#GOALS:
ESTATE AND ASSET PROTECTION PLANNING FOR THE NEXT GENERATIONS

Written and Presented by:
CHRISTINE S. WAKEMAN
Winstead PC
2728 N. Harwood Street, Suite 500
Dallas, Texas 75201
(214) 745-5471
cwakeman@winstead.com
www.winstead.com

Dallas Estate Planning Council
May 2, 2019

© Copyright 2019 by Christine S. Wakeman. All rights reserved.

NOTE: THIS OUTLINE IS FOR EDUCATIONAL PURPOSES ONLY. NOTHING HEREBIN SHALL CONSTITUTE LEGAL ADVICE BY THE AUTHOR OR WINSTEAD PC. ANY TAX ADVICE CONTAINED IN THIS OUTLINE IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (I) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE OR (II) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR OTHER MATTER ADDRESSED HEREIN. EACH CASE VARIES DEPENDING UPON ITS FACTS AND CIRCUMSTANCES. ANYONE SEEKING TAX ADVICE SHOULD CONSULT WITH HIS OR HER TAX ADVISOR.

The author welcomes any corrections and suggestions for improvement to this outline.
Christine S. Wakeman is a Millennial and a shareholder at Winstead PC in Dallas, Texas. She is board certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization. She received her J.D. from Southern Methodist University Dedman School of Law in 2010, *cum laude*, and her B.A. from the University of Oklahoma in 2006, with special distinction for graduating with an undergraduate GPA of 4.0. While in law school Ms. Wakeman completed internships with Estate Tax Attorneys in the Internal Revenue Service's Small Business/Self-Employed Division and the legal department of U.S. Trust/Bank of America. While an undergraduate at the University of Oklahoma, Ms. Wakeman was a Cortez A.M. Ewing Public Service Fellow, who served in the Washington, D.C. office of United States Senator Tom Coburn. She was also a research assistant for a book being written by the Hon. Robert Henry, Judge of the United States Court of Appeals for the Tenth Circuit, during her tenure at the University of Oklahoma. Ms. Wakeman focuses her practice on traditional estate planning with an emphasis on charitable planning and the transfer tax planning aspects of trusts and estates. Her experience includes drafting a variety of estate planning documents, preparing federal estate and gift tax returns and private letter rulings, assisting with Internal Revenue Service examinations, and assisting clients with private foundations, probate matters, fiduciary litigation, the creation and administration of various business entities, transfer tax planning, and pre-marital and post-marital property issues. Ms. Wakeman is admitted to practice law in the State of Texas.

**Professional Activities**

- **American Bar Association**
  - Tax Section Member
  - Real Property, Trust, and Estate Law Section Member
- **State Bar of Texas**
  - Tax Section Member
  - Real Estate, Probate and Trust Law Section Member
- **Texas Bar College Member**
- **State Bar of Texas Intermediate Estate Planning & Probate Course: Practical Applications**
  - Course Director, 2018
  - Planning Committee Member, 2015-2018
- **Dallas Bar Association**
  - Probate, Trusts & Estates Section Member
    - Council Member, 2018
    - Member, 2010-2018
- **Dallas Association of Young Lawyers**
  - Older, Wiser, Lawyers Committee Co-Chair, 2018-2019
- **Dallas Estate Planning Council**
  - Emerging Professionals Initiative
    - Chair, 2015-2016
    - Committee Member, 2015-2017
  - Board of Governors, 2014-2016
• Chartered Advisor in Philanthropy

Awards & Recognition
• Steven G. Condos Award for Outstanding New Member, Texas Bar College, 2017
• Best Lawyers in Dallas, D Magazine, 2016-2017
• Best Lawyers in Dallas Under 40, D Magazine, 2018
• Texas Super Lawyers Rising Star, Thomson Reuters, 2012, 2018
• Outstanding Tax Law Student, Dallas Bar Association Tax Section, 2010

Publications and Speeches


GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Estate Planning & Probate Drafting Course for the State Bar of Texas, Dallas, Texas, October 5, 2018

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, 2018 Advanced Estate Planning Conference, Texas Society of Certified Public Accountants, San Antonio, Texas, August 15, 2018

How To Blow It and Not Know It: Inadvertent Terminations of Subchapter S Elections and How to Fix Them, State Bar of Texas, Advanced Estate Planning and Probate Course, Dallas, Texas, June 14, 2018.

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, American Bar Association Tax Section May Meeting, Washington, DC, May 11, 2018.


GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Tarrant County Probate Bar Association Meeting, Fort Worth, Texas, March 2, 2017.

Performing a Pre-Mortem Autopsy: How to Dissect a Will Someone Else Drafted, Intermediate Estate Planning and Probate Course, San Antonio, Texas, June 21, 2106.

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Houston Bar Association Probate, Trusts, and Estates Section Meeting, Houston, Texas, January 26, 2016.

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Intermediate Estate Planning and Probate Course for the State Bar of Texas, Dallas, Texas, June 9, 2015.

GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger, Dallas Society of CPAs Convergence 2014, Dallas, Texas, May 8, 2014.

Coping with the Threat of a Retroactive Estate Tax, JOURNAL OF TAX PRACTICE & PROCEDURE (CCH), April-May 2010, at 35.
#GOALS: ESTATE PLANNING AND ASSET PROTECTION FOR THE NEXT GENERATIONS

TABLE OF CONTENTS

I. INTRODUCTION ......................................................................................................................... 1
   a. Why Estate Plans Fail ........................................................................................................... 1
   b. Planning for Next Generations Can and Should be Different ........................................... 2

II. FIRST GENERATION ("G1") PLANNING FOR SUBSEQUENT GENERATIONS .......... 3
   a. The Problems .................................................................................................................. 3
      i. The Golden Rule Problem .............................................................................................. 3
      ii. Too Narrowly Defining Wealth Preservation .............................................................. 7
      iii. Treating Wealth Preservation as a Static Process ....................................................... 8
   b. Educating G1 ................................................................................................................ 8
      i. Estate Planning Documents are a Means, Not an End ............................................... 8
      ii. Recognizing There Are Differences Between Natives and Immigrants to Wealth ...... 9
      iii. Recognizing There Are Genuine Differences About How Generations Experience and Perceive the World ................................................................. 11
   c. Identifying Purpose, Values, and Goals for Wealth ......................................................... 13
   d. Encouraging G1 to Educate and Communicate With Next Generations ..................... 14
   e. Strategies ......................................................................................................................... 14
      i. Developing the Ideal Estate Plan .................................................................................. 14
      ii. Drafting Letters of Intent ........................................................................................... 17
      iii. Creating Beneficiary Flexible Trusts ........................................................................... 18
      iv. Creating Family Governance Structures ..................................................................... 18
   f. Charitable Planning ........................................................................................................... 19
   g. Setting Beneficiaries Up to Win; Allowing Beneficiaries to Fail .................................... 21

III. SECOND GENERATION ("G2") PLANNING FOR SUBSEQUENT GENERATIONS .......... 21
   a. Ethical Considerations ...................................................................................................... 22
      i. Texas Disciplinary Rules of Professional Conduct ..................................................... 22
      ii. Pros and Cons of Multigenerational Representation .................................................. 24
   b. Education Planning for G2 and Subsequent Generations .............................................. 25
      i. Connecting to and Preserving the Purpose of the Family's Wealth ............................ 25
ii. Determining Baseline of G2's Technical Knowledge ............................................................. 25

iii. Conducting G2 Bootcamp ....................................................................................................... 26

iv. Goal Setting ........................................................................................................................... 27

c. Communication .......................................................................................................................... 27

i. Client Should Select Mode of Communications ........................................................................ 27

ii. Be an Ambassador from G2 to G1 ............................................................................................ 27

iii. Encouraging G2 to Communicate with and Educate G3 .......................................................... 28

d. Strategies ................................................................................................................................... 28

i. Marital Property Agreements/Cohabitation Agreements .......................................................... 28

ii. Flexible Core Estate Plan .......................................................................................................... 29

iii. Planning With Life Insurance .................................................................................................. 31

iv. Privacy ..................................................................................................................................... 32

v. Philanthropy .............................................................................................................................. 33

IV. CONCLUSION .............................................................................................................................. 34
I. Introduction

Have you ever heard the phrase "shirtsleeves to shirtsleeves in three generations"?1 It is a universal proverb that takes many forms. In Japan, the saying goes "rice paddies to rice paddies in three generations."2 In Scotland, the proverb is more descriptive: "The Father buys, the son builds, the grandchild sells, and his son begs."3 In China, you might hear someone say, "Fu bu guo san dai" or "Wealth never survives three generations."4 Have you ever silently predicted that your client's family will suffer a similar fate?

Seventy percent (70%) of estate plans fail to successfully transition wealth.5 Roy Williams and Vic Pressier define the "failure" of an estate plan as the involuntary loss of control of assets through any combination of taxes, losses, economic downturns, missed market opportunities, litigation expenses, and financial reversals.6

a. Why Estate Plans Fail

Out of all the reasons that an estate plan may fail, what is the largest contributing factor?

- High tax rates?
- Economic conditions?
- Applicable tax regulations?
- Skill level of the professional advisors?
- Size of the estate?
- Level of complexity of the estate?
- Unexpected wealth transition?
- Catastrophe?
- Cultural norms and expectations?
- No formal estate plan?

All of these potential factors would be reasonable guesses. Once upon a time, the author of this paper strongly believed that "no formal estate plan" was a significant contributing factor to the "shirtsleeve to shirtsleeves" problem. It may be surprising to learn that this is not a significant contributing factor to the failure of multigenerational wealth.

Roy Williams and Vic Pressier studied 3,250 high net worth families who transitioned wealth. Their research corroborated the 70% failure rate of family wealth transition. Among the failures, they

---

3 Id.
4 Id.
6 Roy Williams & Vic Preisser at 15.
found that less than 3% were caused by professional errors in accounting, legal, or financial advisory services, while 60% were due to issues with trust and communication, and 25% to lack of preparedness of heirs.7

While the term "lack of preparedness of heirs" may seem somewhat self-explanatory, the definitions of "communication and trust" require further explanation. Williams and Pressier say "communication" is defined by its root words "common" and "action." The objective of communication is to build consensus on common action.8 They say those who effectively communicate with their family speak openly, honestly, and freely concerning information sought by family members. Those who do not engage in open communication, tend to withhold pertinent information from family members. Common action keeps the family focused on the family's mission, reinforces family unity, and helps to minimize disputes that result from disparate family actions or inactions.9

Williams and Pressier explain further that the elements of "trust" include reliability (i.e., do family members actually do what they say they will do?), sincerity (i.e., is the person that a family member projects to the outside world truly reflective of the person's internal self?), and competence (i.e., does the individual have the capacity to accomplish the task at hand?), and they go on to say that communication and trust are often linked. If there is mistrust in the family, there will be no open communication, and without open communication, there can be no trust.

What does this tell us? CPAs, financial advisors, insurance professionals, trust administrators, and non-profit partners are nailing it? Not exactly. It's time to call these sobering facts about wealth preservation (or the lack thereof) to our clients' attention. It's time for the "soft issues" in estate planning to garner equal attention and effort as the technical strategies.

b. Planning for Next Generations Can and Should be Different

"If you always do what you've always done, you always get what you've always gotten." Despite having professional advisors who are at the top of their game, failure to transition wealth persists. Planning for the next generations of wealth can and should be different. This outline will explore the problem of failure to transition wealth, along with the differences between the initial generation of wealth and subsequent generations of wealth. It will also stress the importance of teaching financial literacy and communicating family goals and expectations to subsequent generations of wealth. Finally, this program will equip estate planners across multiple disciplines with tools to facilitate estate planning and asset protection strategies in the second generation of wealth, the third generation of wealth, and beyond. The author of this paper is a Millennial. In an effort to make this paper lit,10 terms from a Millennial's lexicon will appear throughout here in italics. These terms will be defined in context in the footnotes and/or in

---

7 Williams & Preisser at 49. The remaining 15% of wealth transition failures were due to all other causes including insufficient tax, legal accounting advice, or lack of a family mission. Williams and Preisser say that of the components that make up this category, lack of a family mission was the largest component.
8 Id. at 36
9 Id.
the Millennial's Dictionary in Exhibit A. There is clearly room for improvement with multigenerational estate planning. It's time to get some milk.  

II. First Generation ("G1") Planning for Subsequent Generations

a. The Problems

   i. The Golden Rule Problem

   In crafting an estate plan for the first generation, it is tempting to follow the Golden Rule popularized by Brant Parker and Johnny Hart in the 1964 cartoon from The Wizard of Id: Whoever has the gold, makes the rules!

   Few client estate planning preferences are void or voidable at inception, but often a client's initially stated goals or preferences are tempered against countervailing considerations brought up by members of the client's team of professional advisors (e.g., "We can set up those accounts for you but it is going to double your administration fees" or "we could put that in your trust agreement but it will cause inclusion in your estate for estate tax purposes that could otherwise be avoided.")

   Estate planning advisors tend to avoid advising clients about how interpersonal elements can affect the success of their estate planning goals. If a client fails to consider something that will have a direct financial impact, it is easy for an advisor to speak up, but an advisor is much more likely to remain tightlipped when a client's preferences may have an indirect negative impact on their estate plan; they don't want clients to get salty over something that seems like a personal preference.

   Many clients know there is a risk that wealth will be squandered. They have seen firsthand or heard secondhand about ungrateful, entitled, spendthrift children.

   Common client coping mechanisms in the face of the real threat of failing fortunes include: keeping family wealth a secret, attempting to control family wealth from the grave, and giving away the bulk of the family fortune so that money doesn't "ruin" descendants. Let's explore these one by one.

---


12 Definition for Millennials: Golden Rule – Whoever has the gold, makes the rules. Definition from EconomicSociology.org and available at https://economicsociology.org/2015/08/28/remember-the-golden-rule-whoever-has-the-gold-makes-the-rules/. This rule should not be confused with the biblical golden rule derived from Matthew 7:12: "Therefore all things whatsoever ye would that men should do to you: do ye even so to them: for this is the law and the prophets."

13 A client’s estate plan may be void because it violates public policy. See Texas Trust Code § 112.031 ("a trust may be created for any purpose that is not illegal. The terms of the trust may not require the trustee to commit a criminal or tortious act or an act that is contrary to public policy.")


1. "We Don't Want to Ruin Our Kids. Let's Keep This Family Fortune a Secret."

I frequently offer to conduct family meetings with my clients and their children. It never ceases to surprise me when a client responds to my offer with, "Our kids have no idea how much money we have, and we don't want them to know. That would ruin them." This mentality is not limited to my clients. The 2014 U.S. Trust Insights on Wealth and Worth survey of high-net-worth and ultra-high-net-worth individuals found that only 38% of respondents had disclosed their financial status to adult children over age 25. Likewise, only 38% of wealthy parents strongly agreed that their children would be prepared to handle their inheritance.

Many clients believe their children have no idea that they are wealthy. I always think the same thing in response to this mentality, "You really think your children haven't Googled you? You really think they have not looked up the zValue of your home on Zillow or the taxable value of the home on the central appraisal district’s website?" They have.

Clients who buy into silence as a coping mechanism for wealth often avoid difficult lifetime conversations or requests for money from their children, but in exchange, they give up the valuable opportunity to control the conversation about family wealth or even provide their children with insights they have obtained about wealth.

Unless parents surreptitiously give away all of their wealth before they pass away, the next generation is likely to find out the full nature and extent of their parents' wealth when their surviving parent passes away. At that point, kids may be shook. Why didn't their parents mention this significant fact? Why didn't their parents help prepare them for this major life transition? Did their parents not trust them? Did their parents lie to them? "Your last will and testament is your final teaching. What do you want it to say?"

When silence precedes family wealth transfers, children are often haunted by the question of "why?" Why did their parents not want to tell them? Why did their parents not trust them with this information? Why did their parents not help prepare them for the enormous responsibility that comes along with wealth? Williams and Preisser would say that the silent approach is reflective of a lack of communication and trust among the family and would predict such a family would, more likely than not, fail to successfully transition their wealth.

---

17 Id.
2. "We Don't Want to Ruin Our Kids. Let's Make Sure They Can Only Benefit from the Family Fortune in Narrow Circumstances which They Don't Control."

Another coping mechanism G1 employs to deal with the perceived threat of wealth ruining their children is creating highly controlled estate plans. This is sometimes referred to as dead hand control. "Dead hand control is conditioning a bequest or devisement to a beneficiary, such that they will only receive the gift if they abide by the conditions of the gift."20

Incentive trusts are one manifestation of dead hand control. The creators of incentive trusts try to limit distributions to an amount equal to Form W-2, eliminate distributions for alcoholics, or cut out beneficiaries who do not marry (or do not marry the right person). Popular opinion is that rash restrictions are sometimes helpful to prevent "freewheeling heirs from becoming feckless parasites."21 Advocates for dead hand control hope they can control their heirs' behavior long after they are gone through restrictive provisions in their will and/or trusts. Sometimes the intention of testator or settlor is altruistic; he or she may be motivated to protect the future of his or her family, or to preserve his or her good name or his or her vision of what is good about family or the world.22

However, sometimes attempts to control or influence behavior breeds either beneficiary resentment or creative problem-solving to circumvent trust terms. For example, consider the daughter of a real estate magnate who pursues a career as an inner-city teacher in New York City. She is pursuing a noble calling and is far from being a spendthrift, but she struggles to afford housing similar to what she was accustomed to while growing up. Her parents create an incentive trust that limits distributions to her annually to the amount of her prior year income. In such a scenario, could you blame the daughter for thinking her parents loved and valued her brother, the stock broker, more because he earned more money? In other instances, it is not merely a matter of resentment. Beneficiaries will often concoct drastic schemes to circumvent attempts at dead hand control when an incentive trust is involved. Tommy Manville was incentivized to settle down from his playboy ways by a provision in his trust agreement guaranteeing him $250,000 when he married. So he allegedly married 13 times. He would pay a woman $50,000 to marry him and then give him a swift divorce. When he needed additional funds, he would simply remarry and collect from his trust.23 While trendy, some believe incentive trusts simply sidestep a larger problem. In the view of some, incentive trusts say, "more about the moral vacuum of the benefactors than the shortcomings of heirs."24 As John L. Levy, a consultant on inherited wealth says, "What kind of lessons are you teaching by paying people to have certain goals, to live a certain way?"25 Incentive trusts send a message that you don't trust your children to make worthwhile life choices. Mr. Levy believes that the overly controlling air that motivates some people to implement incentive trusts is

24 Id.
25 Id.
the cause of the problems they are meant to cure. Rather than channel time, energy, and resources into incentive trusts, he suggests the more effective strategy would be for parents to work through their children's perceived flaws and shortcomings during their lifetime. However, Levy concedes that working through a child's reckless behavior while the parent is living is the more difficult course, because it causes parents to admit to their own errors, which is often not their first priority.26

3. "We Don't Want to Ruin Our Kids. Let's Give the Vast Majority of our Wealth Away to Charity."

In 2010, Warren Buffet and Bill and Melinda Gates created the Giving Pledge to encourage the super affluent to leave the majority (i.e., 50% or more) of their wealth to charitable causes. Many others followed suit. Notable Texans on the list include Lyda Hill27 and T. Boone Pickens.28 As of 2019, 190 individuals took the Giving Pledge.29 Warren Buffet once said that he wanted to leave his children "enough money so that they would feel they could do anything, but not so much that they could do nothing."30 At that time, he speculated that such amount would be "a few hundred thousand dollars" for a child who was a college graduate.31

But even the Sage of Omaha's attitude about how much is enough to leave to heirs appears to have relaxed over the years. At the annual Berkshire Hathaway meeting in 2013, Fort Worth attorney Marvin Blum asked Warren Buffet how much money is enough that kids can do anything but not so much that they can do nothing? How do parents prevent ruining their kids with inheritance? Mr. Buffet responded by explaining that he thinks more children are ruined by the behavior of their parents than the amount of the inheritance. Furthermore, he implied that the amount he leaves his children has changed over the years by stating that he rewrites his will every five or six years.32

Charitable giving is noble, important, and fulfilling, but a parent's bequest of the majority of their estate to charitable causes is not a fix for family trust and communication issues. In fact, it may be a

26 Id.
27 An excerpt from Hill’s pledge states, "I decided long ago that I'm not looking for Band-Aids or incremental change. I'm looking for solutions. I want to invest in transformational initiatives that have the potential to impact global issues like food safety, ocean conservation, medical research, and related efforts. And that is why I was so pleased to join The Giving Pledge. It gives me the opportunity to "think big" and to share ideas and learn from friends across the globe. In speaking with Warren, he reminded me that I "shouldn't do what others can, and will, do with their giving," but rather, he encouraged me to "do what they can't, and won't, do." He reiterated the importance of taking risks and being bold. The Giving Pledge has fueled and shaped my ambition to achieve even more impact from my giving." The full text of her pledge is available at https://givingpledge.org/Pledger.aspx?id=210.
28 Pickens’s pledge states, "I’ve long stated that I enjoy making money, and I enjoy giving it away. I like making money more, but giving it away is a close second. To date, I’ve given away nearly $800 million to a wide-range of charitable organizations, and I look forward to the day I hit the $1 billion mark. I’m not a big fan of inherited wealth. It generally does more harm than good. I want to thank my friends Bill and Warren for their leadership — I am pleased to join them. Sincerely, Boone Pickens." https://givingpledge.org/Pledger.aspx?id=265
29 https://givingpledge.org/.
31 Id.
catalyst of additional hard feelings, especially if family members did not expect a large portion of the estate to pass outside the family line. Even donors who give away the vast majority of their wealth may still leave substantial sums to descendants. What is being done to ensure the successful wealth transition for the non-charitable portion?

ii. Too Narrowly Defining Wealth Preservation

Another reason estate plans fail at the G1 level is that families too narrowly define wealth preservation. The typical definition of wealth preservation exclusively emphasizes and is measured by financial capital. Very few high net worth families appreciate that their wealth consists of three forms of capital: human capital, intellectual capital, and financial capital.

A family's human capital is its individual members. Qualitative factors such as the physical and emotional well-being of the individual members of the family are measured to determine whether or not a family's human capital is thriving. A family's intellectual capital is defined as everything the family's members know. Both human capital and intellectual capital are measured by qualitative factors. Jay Hughes says that a family's prosperity primarily depends on its human capital and its intellectual capital. Admittedly, the success of a family's human capital and its intellectual capital are more difficult to quantify. However, Jay Hughes poses four fundamental questions, the answers to which may be used as a measuring stick:

- Is each individual member thriving?
- Is the social compact among the members of each family generation providing incentive to the leaders of each generation to stay in the family leadership positions and listen to the individual issues of those they lead so that the members will choose to follow?
- Is there a clear exit strategy for joint wealth management with family members so that members don't spend their time and money trying to figure out how to leave family co-ownership of assets?
- Are the selected representatives of the family meeting their responsibilities to manage the family's human, intellectual, and financial capital in order to achieve the individual pursuits of happiness of each of its members, and does each member perceive they are doing so?

This may seem very academic. Thinking about human capital and intellectual capital in more concrete terms may be helpful. Have you ever advised a client whose child or grandchild was addicted to drugs? Have you ever advised a client who has a close member of their family dying from cancer? If a member of the family is suffering, the family's resources (both time and dollars) are spent managing the crisis involving the family's human capital. Similarly, forgone opportunities with intellectual capital can be costly to families. I worked with a family where trusts for several family members were invested in a family business. The trusts were all managed by individuals who were not members of the family. There were concerns with the way the non-family members were managing the family business and the trusts.

34 Id. at 8.
35 Id. at xv.
36 Id. at 11-12.
Disagreement broke out about how to best manage the family business for the benefit of multiple generations. We spoke with the clients about forming a private trust company. At first blush, this seemed like the perfect solution for the family. But after discussing the logistics with the family they told us, "a private trust company won't work for us because we don't have a leader in our family and it is too late to get leaders." I will never forget that conversation. It dawned on the family that this form of governance could have been the perfect solution to multi-generational wealth preservation for their family. However, the family had failed to encourage and leverage their intellectual capital for many decades. When they reached a tipping point, they didn't have the confidence, knowledge, or tools to manage their family business. It was not only a very somber realization for the family, it also came at a great financial cost.

While human capital and intellectual capital are difficult to harness and quantify, recognizing that they exist is essential. After recognizing their importance, making conscious efforts to measure and track them is a key second step. If little or no value is placed on cultivating human capital and intellectual capital, then a family's financial capital is ill-fated.

iii. Treating Wealth Preservation as a Static Process

Another common problem with wealth preservation is treating the process as static instead of dynamic. The "shirtsleeves to shirtsleeves problem" describes the cycle of wealth in three stages: creation, stasis, and dissipation. As Jay Hughes says, "each generation of the family must be a first generation—a wealth-creating generation." The first generation mentality must be impressed upon and accepted by each generation. If it is not, then the "status quo" of the second generation and the "decay" of the third generation is inevitable. Think about it in terms of a business. It is often said that to be successful in business, 70%-80% of your efforts should be spent on growing the assets of your business and 20%-30% of your efforts should be spent tending to your liabilities. If the reverse is true (i.e., you are spending 20%-30% of your efforts on growing your assets and 70%-80% of your efforts on your liabilities), you will not be in business very long. In the traditional estate planning paradigm, wealthy families tend to spend the vast majority of their efforts on managing their liabilities (e.g., income tax, gift tax, estate tax, and generation-skipping transfer tax), and much less efforts growing their human capital, intellectual capital, and financial capital.

b. Educating G1

The best second generation ("G2") estate plans start with great estate planning by G1. The first step for G1 is to get some milk.

i. Estate Planning Documents are a Means, Not an End

When clients sign a will, trust, or transactional estate planning document which is the culmination of difficult choices and significant time, effort, and money, there is a tendency to let out a sigh of relief. "I am glad that's over," may have been overheard in the office of an estate planning professional or two. Yes, there are trusts to fund, taxpayer identification numbers to obtain, bank accounts to open, and tax

---

37 Id. at 7.
38 Id. at 8.
39 Id. at 7.
40 Id. at 16.
41 Supra at note 11.
returns to file. But there are also bigger picture topics to address. The next time you finish a significant project, try this approach.

"Congratulations. You just completed a significant step towards attaining your estate planning goals. But this is simply step one. Having the documents in place to transfer title to your financial assets at your death is important, but it is merely one spoke in the wheel of your estate plan." In my experience, you will have your client's attention.

"What do you mean?" he or she might ask.

"Your last will and testament is your final teaching. Does this document communicate your love, your core values, your goals, and your expectations for your beneficiaries? Is there anything in this document that your beneficiaries will not understand your motivation for doing? This document is only the first step in a comprehensive estate plan. It is not the end. It is the beginning." The client may very well squirm in his or her chair. "If this document doesn't do it what will?"

ii. Recognizing There Are Differences Between Natives and Immigrants to Wealth

Everyone filters the experience of wealth through the lenses of their own biases and prejudices. Are people of means refined or self-important? Ph.D.s James Grubman and Dennis Jaffe believe that whether clients acquire wealth during their lifetimes or are born into wealth broadly determines an individual's personal identity and how the client spends, shares, invests, and approaches their resources. They use a powerful analogy to describe general approaches to and relationships with wealth: immigrants and natives.

Those who rise from modest means to acquire significant wealth are like "immigrants." Immigrants to wealth have a major change in personal circumstances as a result of lots of effort and good fortune. Immigrants to wealth journey across economic cultures instead of across geographic distance. They have a sense of self before they acquire their wealth. Immigrants have faced adversity, limitations. They have grit. Immigrants may very well have been taught that the rich are evil, greedy, spoiled, self-absorbed, and shallow. They fear "affluenza" and the possibility that money will breed conflict among their descendants.

On the other hand, natives to wealth have never experienced transformation in their economic life. They have never worried whether their basic material needs will be met. The ultimate goal of a native is to preserve stability and safety for themselves and the next generations. Natives' lives are not without stressors. They must figure out self-actualization when work is optional, how to develop self-esteem separate from material things, and how to handle privilege with humility.

First, it is extremely important for professional estate planning advisors to know the difference between natives and immigrants to wealth. When working with immigrants to wealth, advisors should

---

42 See supra note 11 and accompanying text.
44 Id.
45 Id. at 48.
work as guides and interpreters. It is not helpful to casually throw around terms and acronyms that they have never heard before. For example, you would not want to tell them "your 1041 is due April 15th."

There is a good chance that they have never had to file or even heard of a fiduciary income tax return. Instead, your message should be more explanatory, such as, "This trust is an irrevocable trust. The trust is its own taxpayer. It does not have a social security number, but it has a taxpayer identification number, which is sometimes referred to as an EIN, under which it will report its income to the IRS. Like individuals, irrevocable trusts have to pay income taxes. Instead of filing an IRS Form 1040 like individuals, trusts and estates file an IRS Form 1041 each year by April 15th."

When working with natives, professional advisors need to actively try to avoid minimizing their clients' problems and stressors. It is easy for professional advisors to fall into the trap of envy and convince themselves that inheritors of wealth are selfish and without true stress. For example, I once had an extremely wealthy inheritor say to me, "I wish I were independently wealthy." Given the number of zeroes on this particular client's balance sheet, it would be easy to dismiss this client as "crazy" or "out of touch" with real life struggles. However, I knew why she said what she said. She had a large stake in a family business that she did not control; her wealth was largely illiquid. As April 15th approached, she learned she was personally liable for millions of dollars of "phantom" income tax, and at the last minute, the company decided not to make a distribution that would allow her to pay the tax. Her parents' generation had liquidity that she did not have. I did not blow off her comment. I was empathetic to her feelings. It was stressful for her to come up with millions of dollars to pay the IRS at the last minute. It was a stress that her parents did not have to encounter. While she was grateful that her life was a comfortable one, she knew it came at a price. Advisors must be empathetic to the struggles of both natives and immigrants. If they cannot be genuinely empathetic, they are in the wrong business.

Second, it is important to introduce the concepts of natives and immigrants to clients through probing questions that can lead clients to self-discovery. Many immigrants to wealth are concerned about the potential toxicity of wealth. They grapple with whether it is a better parenting play to dispose of their estate in a manner that would cause their descendants to "repeat anew the journey of immigration to wealth for themselves." They recall their formative years with fondness (sometimes in a rosier light in retrospect) and think that leaving their descendants with very little inheritance is a form of altruism: it will provide their descendants with the opportunity to reap the benefits of being self-made. While this viewpoint is understandable, it is myopic. First, it is predicated on a logical fallacy. There is no causal link between lack of affluence and thriving adults. Furthermore, there can be a real emotional cost to this approach. While the clients may be immigrants to wealth, their children may very well be natives to wealth. Children may feel resentful or betrayed from being "deported" from the land they grew up in -- the only land they have ever known -- without the training, personality, skills, or experience needed to successfully complete the journey back to a life of affluence. Natives to wealth also need to be educated and coached. While stability is important, it tends to breed complacency. Natives should be encouraged to teach their descendants financial literacy and life skills. They should practice with wealth management and oversight. They should be allowed to fail (in small ways) so as to build resilience and coping skills.

46 Id. at 52.
47 Id. at 53.
48 Id. at 52.
49 Id.
50 Id.
for life's inevitable challenges. The best way to lead clients to the conclusion that they may have blind spots is by asking questions, not lecturing them. For example, asking the following questions may lead immigrants to wealth to evaluate any impulse they may have to "deport" their descendants from wealth:

- Are you worried about the effects of money on your descendants?
- Do you believe that your children think that money equals love? Do they have life experiences that would lead them to believe that statement is either true or false?
- What positive effects, if any, has your success had on your lives and on the lives of your children?
- If you decided to reduce or eliminate your children's inheritance, do you think they would understand why you chose to do so? Do you think they have the personality and skills to react to the news in the way you would want them to react?
- Do you see any downsides to leaving your descendants out of your estate plan?

Natives can benefit from self-discovery through questions as well. Such questions might include:

- In preparing you for inheritance, what did your parents do well? Is there anything you wish they had done better? How can we make sure we do things better for your children?
- What are your expectations for your children with their inherited wealth? Have these been communicated to them yet? How will they be able to meet expectations that have not been communicated to them?
- Do you have any regrets about the way you have handled your wealth? Have you shared these regrets with your children?
- What core values do you have that are not expressed in your estate planning documents? Do you have any external documents that communicate your core values to your children?

iii. Recognizing There Are Genuine Differences About How Generations Experience and Perceive the World

Just as the distinction between being a native or an immigrant to wealth can influence the way we plan for G1 clients, so too does G1's generational world view. Genuine differences exist in the way generations experience and perceive the world. Generational norms for G1 are not necessarily generational norms for G2 or G3. For purposes of this discussion, we will use the Pew Research Center's generational assignments:

- Silent Generation = born 1928 through 1945
- Baby Boomer Generation = born 1946 through 1964
- Generation X = born 1965 through 1980
- Millennial Generation = born 1981 through 1996
- Generation Z = born 1997 through the present

---

51 Id. at 53.
52 Questions adapted from questions listed in id. at 52.
Less than half of Millennials (48%) ages 25-37 are married, which is a marked drop from each prior living generation: 83% of the Silent Generation, 67% of Baby Boomers, and 57% of Gen Xers were married during the same age range. In 1968, the average American woman married at age 21 and the average American man married at age 23. Today, the average woman marries at age 28 and the average man marries at age 30. In 2016, 48% of Millennial females were mothers. When Generation X women were the same age in 2000, 57% were already mothers, and similarly, when Baby Boomer women were the same age in 1984, 58% were mothers. Millennials are also cohabitating with as opposed to marrying their romantic partners more often. For example, in 2012, 37% of women between 25 and 29 who were living with a romantic partner were cohabitating as opposed to being married to their partner, whereas in 1987 only 10% of Baby Boomers at a comparable age to Millennials were cohabitating with their romantic partners as opposed to being married to them.

Use of technology and social media differs among generations. Nearly all Millennials (97%) use the internet, and 28% of Millennials say they use the internet virtually exclusively through their smartphones. Gen Xers are just as likely to use the internet as Millennials (96%), but only 18% of Gen Xers exclusively use the internet through their phone. 83% of Baby Boomers use the internet, but just 52% of the Silent Generation does so. Only 13% of Baby Boomers and 8% of the Silent Generation use their smartphone as the primary means of internet usage.

Millennials touch their smartphones an average of 45 times per day. One-third of Millennials rely mostly on blogs before making a purchase. More than 4 in 10 Millennials (42%) are keen to help companies develop future products or services, and 64% of Millennials feel that companies should offer more ways to share their opinions online in the future, and if companies do so, the Millennial surveyed will continue to participate in the feedback process.

Millennials are also more focused than prior generations on the total footprint of business as opposed to the financial bottom line than prior generations. In the 2018 U.S. Trust Insights of Wealth and Worth study of high net worth individuals, nearly all Millennials surveyed (87%) thought a company's ESG factors (i.e., its environmental, social, and governance track record) were important to their investment decision-making. Two-thirds of Gen-Xers thought ESG factors were important to investment.

---

53 Pew Research Center Online available at https://www.pewresearch.org/topics/millennials/.
55 Id.
56 Id.
60 Id.
61 Id.
but only 48% of Baby Boomers and 39% of the Silent Generation felt a company's ESG factors were significant considerations in investment decision-making.  

There may be a tendency to think of Millennials as lazy, entitled, or tethered to their electronic devices (okay, admittedly, Millennials are tethered to their electronic devices). However, statistics suggest there may be significant misperceptions about Millennials. Perhaps, members of more senior generations should study the characteristics of Millennials and how they differ from their own generation. If a more senior generation does not feel they are getting through to a younger generation, then perhaps they should pick a smart phone and start communicating with a Millennial in their native language (i.e., text messaging), realize that societal norms about cohabitation and marriage are changing, and discuss more than the financial bottom line when talking about wealth. This concept is discussed in additional detail below.

c. **Identifying Purpose, Values, and Goals for Wealth**

A family needs to understand its purpose. It is essential to put the question of "why" before the question of "how." G1 should help G2 and G3 aim at something specific so that G2 and G3 know that they are shooting in the right direction. A family wealth mission statement focuses on and answers the question, "What is the purpose of this family's wealth?" As Jay Hughes points out, "Every well-managed business in America has a mission statement. Accepting the metaphor that a family is a business, a well-managed family should have a mission statement as well." A well-crafted mission statement guides the professional advisors, helps resolve disputes and impasses, and provides perspective to the family as new opportunities arise. It should be clear, carefully thought out, heavily debated by family members, adopted family-wide, and written.

The mission statement should reflect the family's shared values. Values are the characteristics that the family members deem most important to define the family's unique characteristics. The process of crafting a mission statement should involve family members describing values they each deem to be important, looking for commonalities, and synthesizing common values into a single declaratory statement. Values may include:

- Faith
- Love
- Family Harmony
- Independence/Self-sufficiency
- Stewardship
- Philanthropy

---

63 For an excellent resource on putting the "why" before the "how" in estate planning, see Scott Fithian and Todd Fithian, The Right Side of the Table: Where Do You Sit in the Minds of the Affluent (2007).
66 Roy Williams & Vic Preisser at 58.
67 Id.
G1 should also develop goals for members of subsequent generations. Whereas mission statements should have broad applicability to each and every element of the family's wealth preservation efforts, goals can be geared towards a single task (e.g., to learn about the importance and also the nuances of fiduciary duties, to learn the importance of diversification of assets, to learn basic financial competence skills).

d. Encouraging G1 to Educate and Communicate With Next Generations

If G1 has made it this far, they should be applauded for their efforts. They will have made it further on the wealth preservation journey than most high net worth families. But one critical step may still be missing: communicating the mission, values, and goals developed by G1 to subsequent generations and setting up learning opportunities for family members to help them process, practice, and refine the family's mission and goals.

As discussed above, all too often clients tend to "hope to quarantine wealth's dangers by not speaking of them." G1 must speak of the dangers of wealth to their descendants or they face increased risk of falling victim to those dangers. As I often say to my clients, "Have you communicated your expectations for your children to your children? If not, how will they ever know they have met your expectations?"

Furthermore, the family's mission, values, and goals should be communicated to all generations early and often. Reading a family mission statement to descendants one time will not automatically cause those family members to internalize it. People typically need to hear a message multiple times before it sticks.

e. Strategies

G1 can implement several strategies to vastly improve the odds that G2 will remain engaged and not be part of the "shirtsleeves to shirtsleeves" statistics. They are detailed below.

i. Developing the Ideal Estate Plan

In his book, Timothy Belber discusses seven principles for effective wealth plans.

---

1. The plan promotes important family principles.

There should be specific guidance in the estate plan about what the family deems important and about how it wants to see its financial, human, and intellectual capital deployed to preserve, develop, or enhance family wealth. Developing a family mission statement, identifying values, and setting goals to be achieved by various elements of the estate plan are concrete steps that can be taken to adhere to this principle.

2. The plan is inclusive.

Before a family can ensure that their plan is inclusive, they must undertake to define who is a member of the family. Are spouses "family"? Are cousins, aunts, and uncles family? The family must also determine whether they will be democratic (i.e., one family member one vote) or representative (e.g., a member represents a branch of the family). Is there anyone who is not related by blood that should be included (e.g., those adopted before age 5)? Is there anyone who should excluded from the definition of family (e.g., illegitimate children, people who are incapacitated by addiction, people who are convicted felons, people who have been adopted out of the family).

After the members of a family have been identified, the family should undertake to make sure that the well-being of each family member is being considered in the plan. Both Belber and I caution clients about cutting family members out of the plan or treating members of the same generation unequally. The reasons for unequal treatment are not intuitive to family members. For example, I had wonderful clients Mary and Sam. Mary was a corporate executive, and Sam was retired from business. Sam had a son from a prior marriage who was an adult. Mary and Sam had two joint children who were teenagers. When crafting their estate plan, Mary and Sam were united that they wanted their residuary estate to pass 1/5 to Sam's son, and 2/5 to each of their joint children at the death of the surviving spouse. Their reasoning was that they expected that Sam's son would also inherit from his mother, and they felt that this dispositive scheme was the way to treat their children fairly. I got it. But I wasn't so sure Sam's son would automatically get it. In fact, I thought it was more likely that when Sam's son learned about Mary and Sam's estate plan he would default to "they loved their joint children twice as much as they loved me." If the plan is not inclusive or not equal, then (1) deviations from the norm should be carefully weighed before implemented and (2) if they are implemented, unequal distributions should be explained to affected family members.

3. The plan creates opportunities for personal growth.

Belber believes that planned or scheduled distributions should not be incorporated into an ideal estate plan. Instead, funds should be deployed to meet needs and for personal growth opportunities. If personal growth opportunities are not supported, then the benefits of wealth may seems illusive. Belber suggests incorporating guidelines in trusts that specifically allow for distributions for personal growth if the requesting family member meets certain conditions, including:

- The requesting family member submits to the trustee a written:
  - Description of the growth opportunity and why he or she wants to take advantage of that opportunity;
Description of the cost and how trust funds should be dispersed (i.e., directly to the beneficiary or to a third party);
Commitment to report back on:
  - What surprised the family member about the experience?
  - What disappointed the family member about the experience?
  - What piece of advice the family member would give someone else who is about to do the same thing?
- The family member who completes the experience actually reports back to the trustee within a reasonable period of time.

4. The plan is equal parts preservation and deployment.

The plan must strike a deliberate balance between saving assets for others and deploying assets for family members' personal growth. In upholding this principle, there is a tension between avoiding hoarding on one hand and fostering stewardship on the other hand.

5. The plan is realistic.

Unforeseen obstacles are always a possibility, but some plans fail to consider that the most likely outcome is completely untenable. The question that should be asked about an estate plan (particularly a complicated one) is: Will mere mortals be able to implement the plan without significant obstacles from the outset? The classic example of this is the family vacation home. Often G1 has fond memories of family bonding experiences at a vacation home. But the picture may not be so rosy when the vacation home is owned by multiple family members (some of whom care about the property more than others and most of whom resent being equally responsible for maintenance, upkeep, and taxes even though they do not use the property with regularity). If the family vacation home is important, G1 should bequeath sums for maintenance and incorporate an exit strategy for family members who do not want to co-own the property.

6. The plan has ongoing relevance practices.

A wealth preservation plan is an amalgam of agreements, relationships, legal documents, and property. The success of the overall plan depends on how well each of the elements work together. Social, political, biological, and circumstantial factors may affect the efficacy of the plan. For example, I have a client who had a trust that allowed for distributions to a hospital's foundation for the purpose of treating indigent patients with a certain medical condition. Before signing the irrevocable document incorporating this provision, we called the foundation and asked for input from the foundation about the wording in the trust agreement. The foundation provided feedback, which we gladly incorporated. However, five years after the irrevocable document was signed, we had not received a request for distribution from the foundation. When we connected with foundation staff, they told the family that in reality, they did not have any indigent patients suffering from the condition seeking treatment at their hospital. They did have patients suffering from the condition in question who were slightly above, at, or below the poverty line. If the client's estate plan had not been reviewed we never would have discovered the issue and one of the client's chief philanthropic goals would not have been attained. Because advisors on the team consulted with each other and the client, we were able to determine an aspect of the plan that had become irrelevant and remedy it through the charitable doctrine of cy pres.
7. The plan is flexible.

In order to grasp the importance of flexibility in a wealth preservation plan, read a trust agreement from 50 years ago. Older trust agreements do not provide the mean for a trustee or a beneficiary to adapt the uses of the trust in response to changed circumstances absent the time and financial expense of a judicial modification. I have a client who is a trust beneficiary. A trust for her benefit was settled more than fifty years ago. This client is the primary beneficiary of her trust. In fact, during her lifetime she is the only beneficiary of the trust entitled to receive distributions. The trustee of her trust is concerned that he is distributing the maximum amount that he can reasonably distribute to this beneficiary for her health, education, maintenance, and support. The trustee tells her that he must preserve assets for the remainder beneficiaries of the trust, who are my client's descendants. My client has grandchildren with special needs. Despite being remainder beneficiaries of a trust worth well over $100 million, these descendants are on Medicaid and not receiving therapies that could improve their conditions because their parents lack the financial resources to pay for the therapies. My client has begged and pleaded with the trustee to either (1) distribute additional funds to her so that she can apply those funds on behalf of her special needs descendants or (2) make distributions directly to or for the benefit of those descendants. The trustee told my client his hands are tied. He must preserve assets for the remainder beneficiaries, but he cannot distribute trust funds for the benefit of the remainder beneficiaries currently. The trustee is right. He cannot violate the terms of trust. With the benefit of hindsight, this trust would better serve the settlor's intentions if it allowed for flexibility without judicial approval. This concept is discussed in additional detail below.

ii. Drafting Letters of Intent or Statements of Intent

Many trust agreements may fail to express the settlor's personal intent using words the settlor would have used. Sometimes trust settlors experience settlor's remorse about gifting assets to irrevocable trusts for the benefit of ungrateful beneficiaries but the settlor is unable to alter the terms of their irrevocable trust agreements.

Encouraging a settlor to draft a letter of intent is a great opportunity to allow them to say the things that are left unsaid in a trust agreement. By their very nature, letters of intent are non-binding in nature. They should not attempt to replace or interpret terms in the trust agreement. Instead, they should provide the trustee and beneficiaries of the trust meaningful context for the express terms of the trust.

The good news about letters of intent is that there is no right or wrong way to draft a letter of intent. Appendix C provides some prompts to help you or your clients get started with drafting a letter of intent.

Some have suggested that a statement of intent is preferable to a letter of intent. Unlike a letter of intent, a statement of intent is embedded directly in the trust agreement and clearly sets forth what the settlor's material purposes were in creating the trust.
iii. Creating Beneficiary Flexible Trusts

Experts agree that flexibility is necessary if long-term wealth preservation is desirable. In every trust, a tension exists between flexibility and control. The settlor must decide if his or her principal purpose in establishing a trust is to protect a beneficiary from themselves or to protect a beneficiary from the outside world. If the latter is the driving force, then the "beneficiary flexible trust" might be a helpful estate planning strategy for G1 to implement. The beneficiary flexible trust is designed to give a great degree of flexibility to one or more parties to a trust agreement without sacrificing the tax or creditor protection benefits of trusts for the beneficiary. The beneficiary flexible trust might incorporate the following attributes:

- The beneficiary will serve as trustee to discharge the day to day administrative duties of the trust and make distributions to himself/herself for health, education, maintenance, and support ("HEMS").
- A third party serves as the independent trustee / special trustee / trust protector and is vested with powers to:
  - distribute trust assets to the beneficiary beyond the beneficiary's HEMS needs;
  - terminate the trust if the assets diminish substantially; and
  - deal with insurance on the life of the beneficiary.
- The beneficiary has the right to withdraw a portion of trust assets (subject to 5% or $5,000 limitations under Internal Revenue Code § 2514(e)).
- The beneficiary will have a broad lifetime and a broad testamentary non-general power of appointment over trust assets.
- The administrative and investment provisions of the trust give the beneficiary discretion to minimize administrative and fiduciary obligations.

There are substantial potential benefits of creating a beneficiary flexible trust. On the other hand, the beneficiary flexible trust may go too far in granting a beneficiary license to pursue their own priorities and not incentivize them towards the collective good of the family. Provisions in the beneficiary flexible trust can be modified to strike the balance between flexibility and constraint (e.g., a beneficiary may be granted a lifetime and testamentary power of appointment in favor of descendants of the settlor and charitable organizations only). "The estate planner will need to address the tension between freedom and constraint in each case. The ability to resolve that tension in the best way for the client is part of the value that the capable estate planner brings to the table."

iv. Creating Family Governance Structures

Family governance begins with the joint decision of two or more individual family members to subordinate their individual freedom of choice to a system of representative governance where each

---

72 Id. at 1.
member plays a role. 73 Aristotle taught that families are humans' initial and most fundamental form of
government.74 Families that adopt governance structures believe that collective wisdom generally results
in more thoughtful decision making. After a family has bought into the concept of family governance, the
family must then decide the system. Many family governance systems include by a legislative branch, an
executive branch, and a judicial branch.

The goal of the legislative branch of family governance (sometimes referred to as a "family
assembly") is to make most significant decisions for the family and for family members to accept the
decision-making authority of the family assembly as legitimate. The legislative branch should develop
rules and a course of conduct, vote on family delegates, and debate and reshape the family mission. 75
The executive branch of family governance is sometimes referred to as a "family council." The family
council will execute the decisions made by the legislative branch, select outside advisors, set agendas for
family meetings, and investigate whether other forms of governance would be desirable for the family
such as a family bank or a private trust company.76 Finally, the judicial branch of family governance
(sometimes referred to as "Council of Elders") will adjudicate family disputes, enforce judgments in
disputes, render advisory opinions as the family needs advice, and tell family stories.77 Like the United
States federal government, not all members of the family assembly will like the legislative outcomes of
the family government. However, it is imperative that family members accept the family government's
decisions, whether they agree with them or not. Through family governance, a family can actively create,
practice, and enforce its mission and values.

f. Charitable Planning

Philanthropy takes many forms for affluent families. But perhaps the two most popular options in
the modern era are private foundations and donor advised funds.

Private foundations have distinct differences from donor advised funds. A private foundation is a
separate nonprofit entity created by a donor (for purposes of this discussion, we will use the terms
"donor" and "G1" interchangeably). G1 typically sets up the foundation as a charitable trust or non-profit
corporation, often with multiple trustees or board members. The private foundation has its own separate
taxpayer identification number. On average, the private foundation must distribute to public charities an
amount equal to 5% of its net investment assets each year or face an excise tax imposed by the Internal
Revenue Code.78 Facts about the foundation are made publicly available annually because a private
foundation's tax return (Form 990) is publicly available. The private foundation trustees, directors, and
employees of a private foundation are responsible for making grants, and handling administration,
accounting, investing, and filing of tax returns. If various regulatory rules are not adhered to, then the
private foundation's board of trustees or directors may be personally liable for excise taxes.

73 James E. Hughes, Jr., Family Wealth: Keeping It in the Family: How Family Members and Their Advisers
74 Id. at 20 summarizing Aristotle's The Politics.
75 Id. at 173.
76 Id. at 174.
77 Id. at 174-75.
78 Internal Revenue Code § 4942.
In contrast, donor advised funds operate as subaccounts or funds at a public charity, such as a community foundation. Donor advised funds are not separate entities and they do not have their own taxpayer identification numbers. Under current law, donor advised funds are not required to make annual distributions. Gifts to donor advised funds are considered gifts to public charities. The community foundation maintains ultimate authority and control over the funds and invests, manages, and distributes funds from the account to public charities. In exchange, G1 (or others designated as "advisors" for the fund) maintain the right to recommend to the trustees or board of directors of the community foundation how to distribute assets in the fund to public charities. Because the community foundation is ultimately legally responsible for the funds, the advisors for the fund face no personal liability as a result of their role and are not concerned with filing taxes.

Both private foundations and donor advised funds can be leveraged to teach junior generations the importance of family unity and philanthropy. Opening a donor advised fund is a great step for a family first dipping its toes in the philanthropic pool. The focus of the family's philanthropic efforts is selecting and recommending charities to receive a portion of the funds. The family will not be burdened by rules, regulations, and deadlines. I have clients who allow their young children a "stipend" each year from the family's donor advised fund (the parents are the advisors but they have committed to the children to earmark a certain amount for the children's recommendation). Each child gets to recommend a $1,000 grant to a specific charity if he or she presents the reasons why he or she selected the charity at a family meeting. In addition, the family must reach a consensus on how to distribute $5,000 by majority vote. The family debates how this $5,000 is to be spent before taking a vote. At their next family philanthropy meeting, each child will report on their gift to the charity of their choice and include: whether they received any follow up from the charity, whether they learned what the charity would use the funds for, whether they visited the charity, and whether they would give to that charity again. One family member is designated to follow up and report on the $5,000 family gift. In the beginning, each child selected a different charity. But over time, as the children learned about how various charities responded to or utilized the family's gifts, they changed their strategy. They learned some charities were more responsive to and responsible for their gifts than others. They also learned that larger gifts could make a larger impact. Soon the family was bargaining over their gifts and it became common to make one $10,000 gift instead of five $1,000 gifts and one $5,000 gift. Young family members learned lessons on fiscal responsibility and family unity, and the community foundation took care of the rest.

Some families prefer to deploy similar family philanthropy learning using a private foundation. The major difference with a private foundation is that the family is in ultimate control and has ultimate responsibility for the funds. Whereas my clients with a donor advised fund committed $10,000 per year to family philanthropy, a family with a private foundation would be responsible for making sure they distribute at least 5% of their assets to qualified charitable organizations each year. Some families feel a greater sense of connection to charitable giving through a private foundation.

A metaphor may be helpful to illustrate why some families receive more self-actualization from philanthropy through a private foundation as opposed to a donor advised fund. Around 1960, sales of boxed cake mixes were stagnant. Ernest Dichter posited a theory to his client, General Mills, about why cake mix sales were flat. After conducting interviews with women about their attitude and emotions towards baking, he determined that "just add water" cake mixes were too simple. Women felt self-indulgent for using them, and did not feel like they actually participated in the baking process. Dichter's
solution was to give bakers more to do so that they would have more ownership over their baking. He recommended that General Mills remove dried eggs from their mixes and alter the instructions to provide that the consumer add both water and fresh eggs to the boxed cake mix. Others boxed cake manufacturers followed suit.79

g. Setting Beneficiaries Up to Win; Allowing Beneficiaries to Fail

One of the best strategies that G1 can employ for the benefit of G2 is a "trial balloon trust". For the purposes of this discussion, a "trial balloon trust" is a lifetime irrevocable trust created by G1 which is designed to achieve the family's goals for a beneficiary. Ideally, the beneficiary should serve as trustee of this trust, so that the beneficiary has legal responsibility for the assets of the trust, but the amount of assets gifted to the trust should not be significant to the family. The beneficiary should be made aware that the settlor views administration of this trust as an interview for potentially larger roles and responsibility in family asset management. The settlor should request that the beneficiary meet with the settlor or trust coaches regularly to discuss administration of the trust and how the trust is being used to achieve the family's goals for the beneficiary. If the beneficiary thrives, the settlor should reward the beneficiary by adding additional responsibilities in family wealth management, adding more complex assets to the trust, or giving the beneficiary access to important family information. If the beneficiary does not thrive (i.e., they distribute all the money to themselves, they make imprudent investments, they fail to keep mandatory records or file trust tax returns on time), then the family's efforts have not been wasted. To the contrary, the family has gained valuable information: this heir is not prepared. Naming this beneficiary as trustee of a much larger trust if the settlor were to pass away could have disastrous consequences for the family. The family should not incorporate provisions in their other estate planning documents that automatically make this beneficiary responsible for management of vast sums of wealth upon reaching a certain age. Instead, the beneficiary's ability to serve as trustee should be contingent upon attaining certain concrete milestones as determined by a person or persons that the settlor trusts. The beneficiary should be encouraged to succeed, allowed to fail in small ways, and be provided with concrete steps to gain the family's confidence.

III. Second Generation ("G2") Planning for Subsequent Generations

The best estate plans for G2 are born out of thoughtful estate plans created by G1. However, when you have a new client who is G2 or even G3 of wealth, you never know what kind of wealth preservation platform G1 provided to G2. How should estate planning for a native to wealth be approached in the modern era?

79 It is debatable whether this effort contributed to increased sales of boxed cake mixes or not. Some food historians have claimed that adding a fresh egg made boxed cakes taste better. Others have posited that the decline in domesticity and increase of females in the workforce since 1960 was the true reason boxed cake mixes have become kitchen staples. See David Mikkelson, "Requiring an Egg Made Instant Cake Mixes Sell? Did Instant Cake Mixes Sell Poorly Until One Food Company Decided to Require the Addition of a Fresh Egg to Their Product?" Snopes.com, January 31, 2008, available at https://www.snopes.com/fact-check/something-eggstra/.
a. Ethical Considerations

i. Texas Disciplinary Rules of Professional Conduct

As a preliminary step, ethics should be considered. Do any potential conflicts of interest exist as a result of the potential representation of G2? For lawyers, the Texas Disciplinary Rules of Professional Conduct (the "Rules") set forth the standard for evaluating conflicts of interest.

Rule 1.06(b) states that generally a lawyer may not represent a person if the representation:

(1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or

(2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.\(^{80}\)

However Rule 1.06(c) states that a lawyer may represent a client in the circumstances described in Rule 1.06(b) if:\(^{81}\)

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved if any.

Even if a lawyer complies with Rule 1.06(c) and obtains consent to represent multiple members of the same family, Rule 1.06(e) dictates that if a conflict later develops that puts the lawyer’s interests at odds, the lawyer shall "promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation" of the Rules.

Conflicts may arise when a lawyer represents more than one member of a family. The comments to the Rules specifically mention that conflict questions may arise in the estate planning context when a lawyer is called upon to prepare estate planning documents for several family members.\(^{82}\)

**Example:** You represent Harry and Sally for estate planning. You have drafted several family trusts for the benefit of their children. Harry calls you and says his oldest child Christopher, 25, is having his first child. Christopher is married to Wendy. Harry and Sally have a rocky relationship with Wendy. Harry thinks you are the right person to help Christopher with his estate plan because you have worked with the family for many years. However, at the end of the call Harry says, "But Christopher does not really know how extensive the family’s wealth is, and we would like to keep it that way. We don’t want to ruin his work ethic. Also, those trusts we set up for Christopher years ago contains powers of appointment. Christopher could appoint those assets to Wendy. Sally and I don't want that to happen so

---

\(^{80}\) Tex. Disciplinary R. Prof’l Conduct R. 1.06(b) (2019). This discussion is adapted from Christine S. Wakeman, "A Spoonful of Sugar Helps the Premarital Agreement Go Down: Representing Perturbed Parties to Premarital Agreements" State Bar of Texas Intermediate Estate Planning and Probate Course 2017 (June 6, 2017).

\(^{81}\) Id. at R. 1.06(c).

\(^{82}\) Id. at R. 1.06 cmt. 15.
please steer him away from doing that." In preparing an estate plan for G2, you would always ask about trusts for the benefit of the client, ask to see copies, and discuss whether an exercise of a power of appointment would be appropriate to meet a client's estate planning goals. But now Harry has asked you not to share information with Christopher that you normally would share in this circumstance. The foregoing example highlights how the general conflict of interest rules can come into play when working on an estate plan for a G2 client if the lawyer also represents other family members.

Sometimes you do not get a head's up call from a "Harry." The threat that you could be asked to provide confidential information that you obtained during the course of your representation of another family member looms even if it does not immediately materialize. Therefore, when a lawyer proposes to represent multiple members of the same family, the lawyer should assume an inherent conflict exists or a potential conflict could exist. The lawyer may nonetheless proceed with the representation if the requirements of the exception to the general conflict of interest rule are satisfied.

First, the lawyer must believe that their representation will not be materially affected by the duties to another client.83 In the example above where the current clients did not want their child to know about the value of family trusts or the option of exercising powers of appointment in favor of their daughter-in-law, the lawyer may not have been able to overcome this requirement given that the lawyer routinely suggests that clients review and consider exercising powers of appointment.

Second, the lawyer must obtain consent from each affected client about the existence, nature, implications, and possible adverse consequences of the common representation.84 Once again, written consent to the representation before the representation of the G2 begins is a best practice.

Finally, even after obtaining consent to represent multiple members of a family, a lawyer has a continuing obligation to determine that he or she is not facing a conflict of interest in violation of Rule 1.06(b). If a conflict develops, the lawyer is required to withdraw from one or both representations.85 If the lawyer would like to be able to choose to continue to represent one family member in the event of a conflict, the engagement letter or consent to multiple family representations letter should explicitly state that the lawyer retains the right to continue representing whichever client he or she chooses in the event of a conflict. Otherwise, in the event of conflict, the lawyer would be required to either: (1) withdraw from both representations, or (2) request consent from one client to continue representing the other client (e.g., "A conflict has developed and I may no longer continue to represent both you and your parents, I am withdrawing from representing you, but would you please consent to allowing me to continue representing your parents?"). Obtaining consent to represent one member of a family after a conflict has already developed is potentially awkward.

Under Rule 1.05(a), "confidential information" generally means "all information relating to a client or furnished by the client acquired by the lawyer during the course of or by reason of the representation of the client."86 Rule 1.05(b)(1) prohibits a lawyer from revealing confidential information

83 Id. at R. 1.06(c)(1).
84 Id. at R. 1.06(c)(2).
85 Id. at R. 1.06(e).
86 Under Rule 1.05(a), "confidential information" includes both "privileged information" as described in Rule 503 of the Texas Rules of Evidence, Rule 503 of the Texas Rules of Criminal Evidence, and by the principles of attorney-
of a client or former client to anyone other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm.

However, Rule 1.05(c) permits a lawyer to reveal confidential information about a client or former client:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation; or
(2) When the client consents after consultation.

A close reading of Rule 1.05(b)(1) reveals just how easy it might be to violate the Rule if you represent both G1 and G2 for estate planning matters. A lawyer is prohibited from revealing all information acquired by the lawyer during the course of or by reason of the representation of the client to anyone else, period.87 There is no exception for information that has become generally known as is the case in Rule 1.05(b)(3).88

In order to comply with the Rules, the lawyer must have express authorization or consent after consultation in order to use information of one client in representing another client.89 When a lawyer represents multiple members of the same family, the lawyer may be tempted to pull a trust agreement from one client’s file when the lawyer knows the trust agreement also affects the potential client. Furthermore, when the lawyer asks G2 to list their financial resources to provide appropriate counsel, the lawyer may be able to spot that certain assets are missing from the list because of the lawyer’s representation of other family members.

To avoid ethical missteps, a best practice is to advise the preexisting client that it may be efficient to utilize information obtained in the course of representing that client in the representation of the new client (e.g., trust agreements the lawyer drafted for the parents and asset values used on recent gift tax returns may be helpful to the child in preparing disclosures that are prudent for premarital agreements). Furthermore, the lawyer should obtain the preexisting client’s consent to use that information in the course of the representation of the new estate planning client. If the pre-existing client will not give consent, then a conflict of interest may be likely.

ii. Pros and Cons of Multigenerational Representation

There are some tangible benefits to representing multiple generations of the same family. The family may reap the benefits of planning efficiencies. The lawyer may already have many of the documents that would be relevant to G2, because G1 provided them. The lawyer may have read many of the relevant estate planning documents (or even drafted many of the relevant documents). When a lawyer represents more than one branch of the family, typically he or she will not have to invest as much time getting up to speed. Clients may find this to be beneficial because it leads to an overall lower set of fees.

---

87 Tex. Disciplinary R. Prof’l Conduct R. 1.05 (2019).
88 R.1.05(b)(3) prohibits the use of "confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known."
89 See id.
There is also an automatic level of trust between the lawyer and a member of a family the lawyer already represents that both the family members and the lawyer may find desirable. If G1 endorses the lawyer, then G2 is more likely to trust the lawyer from the outset.

While there may be multiple perks of multigenerational estate planning representation, there are also risks. Can a lawyer zealously represent both G1 and G2 at the same time or will the lawyer's advice be affected by his or her attempt to please multiple masters? Sometimes the most profitable decision a lawyer can make is to decline a representation that is replete with potential problems and conflicts. In evaluating whether to undertake representations of multiple family members, do not be short-sighted.

b. Education Planning for G2 and Subsequent Generations

i. Connecting to and Preserving the Purpose of the Family's Wealth

In prehistoric societies, telling stories was the glue of a community and a family. Still today, one of the most important educational endeavors an estate planner can engage in with a G2 client is connecting the G2 client to his or her family story. Story telling connects clients to the wealth in which they share and can help them buy into the family's mission. Ask a client to tell you the family story. Ask the client if they believe that G1 would tell a different version of the family story, and if so, how the stories would differ. Ask the client to tell you:

- What was the origin of the family's wealth?
- Did the family develop a family mission statement, joint values, or goals that affect the clients planning?
- Was the G2 family member involved in developing family mission or goals?
- Has the family handled wealth in a unified way or a disjointed manner?
- What did G1 get right?
- What does he or she wish that G2 would have done differently?

ii. Determining Baseline of G2's Technical Knowledge

One of the biggest mistakes estate planning advisors can make with a G2 client is to assume that, because they are a native to wealth, they know the terminology, strategies, and best practices of wealthy individuals. A friend and peer of mine in the financial services industry told me about a large G2 client she landed. The first year of her relationship with the client was challenging. Each time she and the client met, they seemed aligned in strategy, budgeting, and cash flows. The client had plenty of money, but she overdrew from her checking account multiple times. At first, my friend dismissed the overdraws. It could happen to anyone. But the overdraws kept happening. Finally, my friend confronted the client. She sheepishly admitted that she had never paid bills in her adult life. The client preferred to consistently pay bank fees instead of admitting that she did not have a skill everyone assumed she had and asking for help.

Before talking strategy with a G2 client, one needs to educate a G2 client. But before one can educate a G2 client, one must establish the client's baseline level of knowledge. In gauging a G2 client's

---

baseline, it is important to avoid shaming for any estate planning knowledge they may lack. Start with basic questions:

- Has anyone ever defined a trust for you?
- Has anyone ever explained to you the trustees' duties, powers, and limitations?
- Has anyone ever explained to you the rights and responsibilities of a beneficiary of a trust?
- Has anyone ever told you the difference between a revocable trust and an irrevocable trust?
- Has anyone ever explained to you what the distribution standard of health, education, maintenance, and support means and why it is used in a trust agreement?

The terminology and strategies used in estate planning are not intuitive. You only learn the parlance of wealth with exposure and translation. If no one has exposed your G2 client to basic estate planning terms, then it is unfair to expect them to know what they mean. On the other hand, some G2 clients have been keen observers of their parents plans and know the language of wealth. By asking questions about what others have taught a G2 client, you neither shame the uneducated G2 client nor offend the educated G2 client.

iii. Conducting G2 Bootcamp

After you have established a G2 client's baseline level of information, the next task is to educate G2 about topics relevant to wealth preservation. There are several tremendous resources available to help you educate clients about wealth preservation.91 Topics to address may include:

1. What is an estate plan?
2. The wealth is not yours, but it is for your benefit
3. Trust basics
5. Marital property legal overview / premarital agreements / cohabitation agreements
6. Asset protection and exposure to creditors
7. Saving
8. Investing
9. Borrowing

Several financial institutions and multi-family offices offer courses on preparing heirs. There are also private trustee coaches and family wealth facilitators for hire, who can assist with educating and preparing heirs for roles in family wealth management.

---

91 The Bessemer Across the Board Financial Education Series addresses topics such as: What is an Estate Plan? 529 Plans, Trusts 101, ETFs Explained, Committed Capital, Four Things Every Investor Should Know about Private Equity, and Prenups: What You Need to Know. They are available to the public at https://www.bessemertrust.com/financial-education. Another excellent resource for individuals serving trustee on trustee risk management by Dave Folz is available at https://files.constantcontact.com/d287cd8b601/6a59000a-e8e8-4336-9214-63017d6f017c.pdf.
iv. Goal Setting

1. Sharing the Family's Mission

As Grubman and Jaffe say, if multi-generational wealth is going to be successful, each generation must act like they are members of G1.\(^\text{92}\) That is, each generation must be engaged in and buy into a family mission. Goal setting for G2 should first look at the mission, goals, and values established by G1, if any. Even if no formal mission statement was drafted by G1, G2 should look to family history and stories to try decipher family values derived from prior generations.

2. Determining Personal Goals

While a G2 client should reflect upon the greater mission of the family, G2 should also work to set personal goals for their descendants taking into consideration their unique preferences, fears, and circumstances. These personal goals may be complimentary to the larger family mission or they may be unique to the individual client. Either way, a G2 client should have the opportunity to openly express their personal family wealth transfer goals.

c. Communication

Communication is key. This concept is not novel to dealing with G2 clients, or Millennials in particular. However, by default, advisors may use a form or communication that is not particularly appealing to a Millennial. Below are a few tips on gaining the trust of a G2 Millennial client through communication.

i. Client Should Select Mode of Communications

Do not assume that all clients will want to communicate in the same way. Add to your initial list of questions for new clients, "How do you prefer for me to communicate with you?" You will have the highest chance of success getting through to a client if you communicate with your clients in the way they want to communicate. Isn't the way advisors like to be communicated with important too? Absolutely. Millennials love to text, but text messaging is not the language of business. How does an advisor bridge the gap between communicating with a Millennial the way he or she wants to be communicated with and maintaining records of important discussions and decisions. See Appendix D: #Goals Life Hack #1: Email to Text for tips on how to send an email that a client will receive as a text. When the client replies to the email to text, his or her reply will come through to you as email. Voila! Each of you and your Millennial client win.

ii. Be an Ambassador from G2 to G1

If G1 is still living, remind G2 clients that G1 often retains significant control over their estate plan. G2's ultimate inheritance may depend (in whole or in part) on G1's perception that G2 is meeting G1's expectations. It may take months or even years to build a home, but it only takes a few minutes to burn one down. Likewise, it may be difficult to build up the good will to control or benefit from vast family wealth, but it may only take one bad decision to cause G1 to disinherit G2.

\(^\text{92}\) See supra note 48.
I counseled a G2 trust beneficiary who was upset about his father's secretness about trusts for G2's benefit. The father had approached the client and asked him to assume a role as a family fiduciary. He had not provided a copy of the trust agreement or any financial records about the trust. The G2 client was hurt and offended. Initially, when he came into my office he wanted me to call his father's attorney and, in haughty indignation, say, "G2 could not possibly sign this document? What are you trying to pull here?" After this client calmed down, I impressed upon him that the assets in the irrevocable trust in question were a pittance in comparison to the remainder of his father's estate. While I validated his feelings, I reminded him that approaching his father in an aggressive way could have far reaching unintended consequences. Instead, I called G1's lawyer and said, "G2 is very interested in learning more about the co-trustee role on the XYZ trust, but prior to accepting this role, he would like to do the responsible thing and read the trust agreement in full and review the most recent financial statements and tax returns for the trust. Can you send those items to me?" The father's lawyer agreed that it would be responsible for G2 to review the relevant documents before accepting a fiduciary role, and he sent them to me. Having a competent professional advisor serve as a liaison between G1 and G2 can increase G2's credibility.

iii. Encouraging G2 to Communicate with and Educate G3

G2 should also make a concerted effort to communicate a family story, mission statement, and values to G3. It may be easier to convince a G2 client to engage in this type of dialogue than it is convince a G1 client. Either a G2 client has seen the importance of shared vision, and thus, is motivated to continue stewardship of family values, or a G2 client wishes his or her parents did more, and thus, may be motivated to take matters in their own hands to improve family dynamics.

d. Strategies

i. Marital Property Agreements/Cohabitation Agreements

A life partner can be a significant asset or a significant liability in terms of both financial capital and human capital. A major difference between G1 and G2 is that, typically, when a member of G1 selects a life partner there is not significant pre-existing wealth. In contrast, when G2 enters into romantic relationships, there are financial assets at stake. Therefore, every G2 client, whether married or unmarried, should be given a crash course on marital property. Sometimes clients claim they do not have a premarital property agreement with their spouses. My standard response is, "You do have a premarital agreement, the State of Texas wrote it for you, and you may or may not like the terms very much. Let's discuss it."

Given the relatively high divorce rates in the United States93 and the uncertainty that trusts will be impenetrable by a former spouse in other jurisdictions,94 a premarital agreement is an important

---

93 Divorce rates are dropping in the United States, due in significant part to the fact that Millennials are divorcing more infrequently than prior generations. From 2008 to 2016 divorce rates dropped 18 percent. Event when controlling for factors such as age, the divorce rate still dropped 8 percent. See Ben Steverman, "Millennials Are Causing the U.S. Divorce Rate to Plummet: They're Waiting Until All is Secure Before Tying the Knot," Bloomberg September 25, 2018 available at https://www.bloomberg.com/news/articles/2018-09-25/millennials-are-causing-the-u-s-divorce-rate-to-plummet. Nevertheless, divorce remains a significant threat to multi-generational wealth transfers.
mechanism to protect family assets in the event of divorce. Spouses can specify the division of assets, and a court will typically uphold the division unless the marital property agreement was involuntarily signed or was unconscionable when signed and a fair disclosure of the nature and extent of the future spouse's assets was not made (or a written waiver in lieu thereof).95

Furthermore, because a growing number of G2 clients are choosing to cohabitate instead of marry, a written cohabitation agreement that sets forth the grounds rules of living arrangements may be advisable to many G2 clients. A cohabitation agreement must be in writing.96 In addition, it might address topics such as:

- The parties are not married and agree not to create a common law marriage;
- Who owns what assets;
- How assets will be divided in the event of a breakup;
- How parties will purchase and finance real property;
- How payments will be split for jointly owned property;
- Who will pay maintenance and taxes for properties;
- Who can stay in the residence in the event of a breakup; and
- How quickly a party must move out a residence in the event of a breakup.97

ii. Flexible Core Estate Plan

Many G2 clients have some working familiarity with the estate plans put in place by their parents. They have witnessed the good and the bad. The bad sticks with them. Developing a core estate plan for a G2 client may require deviation from your normal course of dealing.

1. Deliberate Definitions

G2 clients frequently share stories about how their friends' fortunes were ruined by the question of who is "in" the family and who is "out" of the family. The composition of the modern family is changing.98 Household arrangements that were inconceivable in the 1950s now may very well be included on the United States Census Bureau's list of most common family types in America. Given changes in law and reproductive technology over the past several decades, the definitions used in affluent families' estate planning documents may need a facelift.

97 Carolyn Ostrom, "Drafting for Home Buying with Friends and Significant Others," State Bar of Texas 23rd Annual Estate Planning and Probate Drafting Course (October 18-19, 2012).
98 See R. Hugh Magill, "Estate Planning and Management for a Brave New World: It's All in the Family... What's a Family?" Dallas Estate Planning Council, December 6, 2018.
Look closely at the definition of the terms such as "children," "descendants" (or "issue"), "adopted", "per stirpes", "spouse" (or "husband" or "wife") in family estate planning documents. Are these terms defined in important family estate planning documents? If terms are not defined, then Texas law and litigation will fill in the gaps in defining the terms. Even when estate planning documents contain a definitions section, those definitions should be revisited to see if they address the complex realities of a Millennial's world, including:

- Are only family members born in wedlock considered descendants?
- Are step-children considered "children"?
- Are step-siblings considered "siblings"?
- Should half-siblings receive half as much as whole siblings?
- Should only individuals adopted before a certain age be considered a descendant or is adult adoption permissible?
- Should a non-biological "de facto" parent be considered the parent of a child?
- Should individuals adopted out of the family still be considered children or descendants?
- Should a descendant conceived by artificial reproductive technology be considered a descendant? What if they are born by a surrogate or using no genetic material of a blood relative?
- Should posthumous children or descendants be considered descendants? Do they have to be born within a certain period of time of a family member's death in order to be considered a member of the family?
- Do the definitions account for same-sex marriage?
- Should the term "spouse" be defined to include only someone married to a family member at the time in question or someone who was married to the family member at the time of the family member's death?
- Should the definitions exclude a beneficiary who murders another family member?

2. Thoughtful Consideration to Exercising Powers of Appointment

Often, the most valuable estate planning tool available to a G2 client is a power of appointment. While a well-drafted trust will contain a default dispositive scheme for assets, the holder of a power of appointment may change the default dispositive provisions of the trust and shift assets to permitted appointees in the powerholder's discretion. Typically the holder of power of appointment does not owe fiduciary duties in exercising the power of appointment. However, the class of permissible appointees may limit to whom or to what a G2 client may exercise their powers (e.g., to descendants only; to descendants and charity; to descendants, charity, and spouses; to descendants, a marital trust for a spouse which meets certain criteria, and charity; to any person or entity).

If G1 built the family's wealth, G2 may very well be surprised or disappointed to learn that they don't "own" family assets. But a power of appointment may be a G2 client's opportunity to incorporate their own goals and priorities into the family legacy. If a G2 client possesses powers of appointment, there may be several important considerations. It is extremely important to read the trust agreement thoroughly for rules regarding exercises of powers of appointment. The rules regarding exercises of powers of appointment may not all be in one place in the trust agreement. There may be several restrictions that are not immediately apparent to a client, including:
a prohibition against any exercise of a power of appointment that would violate the rule against perpetuities;
a requirement that an exercise of a power of appointment be achieved by a particular method (e.g., in a valid will admitted to probate, in a notarized writing filed in deed records, in a writing delivered to the trustee, in a writing specifically referring to the section of the trust granting the power of appointment);
a requirement that the client attain a certain age before exercising the power of appointment; and
a restriction limiting the powerholder's ability to appoint assets from a trust with a zero inclusion ratio for generation-skipping transfer ("GST") tax purposes to a trust with an inclusion ratio of greater than zero for GST tax purposes.

iii. Planning With Life Insurance

Traditionally, estate planners have focused on insurance as either a way to provide source of support for surviving family members in the event of an untimely death or to provide the liquidity in the event an estate tax is due at the client's death. Both of these continue to be important uses for life insurance for G2 clients. But there are a plethora of uses of life insurance for G2 clients that break outside of the box, including:

1. Life Insurance for Family Legacy Properties

A client may view a family legacy property, such as a vacation home or ranch, as a family sanctuary. The client often has a strong emotional attachment to a family legacy property and envisions the family harmoniously convening at the family legacy property for generations to come. In reality, after the client is no longer living and paying for the family to enjoy the legacy property, the client's children often view co-ownership of a family legacy property as an unfunded mandate or a liability. One solution is fund an irrevocable life insurance trust ("ILIT") with a life insurance policy insuring the client's life. At the client's death, the family legacy property could be contributed to the ILIT, and the ILIT could contain specific provisions mandating that the proceeds be used for maintenance, taxes, and upkeep of the property. The client's beneficial interest in the trust should be limited to use the property subject to use rules set forth in the trust agreement.

2. Life Insurance for Cohabitation Arrangements

As discussed above, Millennials are cohabitating more and marrying less. Life insurance can be used to ensure that a G2 client's non-married partner can purchase the residence they shared. Consider the following example. Gauge is a 25 year old G2 client. Gauge has lived with his girlfriend Quinoa since they both graduates from college. Quinoa is Gauge's bae,99 but neither of them are even remotely ready for marriage. They are not sure they ever will be. Gauge is the beneficiary of an irrevocable trust set up by his parents. His uncle Steve is the trustee. Steve bought the house in which Gauge and Quinoa reside for $400,000. Gauge would like to leave the house to Quinoa in his will, but he cannot do so because he does not own it. Gauge is concerned that Quinoa would be forced to leave the house if

---

something were to happen to him. In fact, Steve may have a fiduciary duty to ask Quinoa to move out of the house if Gauge died. The solution? Gauge acquires a $500,000 term life insurance policy relatively inexpensively and designates Quinoa as the beneficiary. If Gauge passes away, then Quinoa will have the funds to purchase the house from Gauge's trust. If Gauge and Quinoa breakup, Gauge can remove Quinoa's name from the life insurance policy beneficiary designation form.

3. Life Insurance to Provide Liquidity to pay GST Tax

If there are significant GST non-exempt trusts for the primary benefit of G2, a family may face the reality that a 40% transfer tax may be due when a trust for the benefit of a G2 family member terminates in favor of members of G3. For example, families who have done grantor retained annuity trusts ("GRATs") planning, generally are only successful at shifting wealth one generation at a time due to restrictions preventing allocation of GST tax exemption until the end of a GRAT term.\textsuperscript{100} If G1 created a flexible estate plan, then there may be additional opportunities to minimize GST taxes in a GST non-exempt trust. But often trust provisions are inflexible and G2's hands are tied: they cannot force distributions out of the GST non-exempt trust that would allow for GST tax minimization planning. The solution? Life insurance insuring the life of a G2 family member can be acquired to provide liquidity in the event of a GST taxable termination.

4. Life Insurance to Provide for the Surviving Spouse in Lieu of Making the Surviving Spouse a Business Partner in the Family Business

Affluent families often struggle with the question of whether spouses should be included in multi-generational estate plans. Frightened by the prospect of divorce jeopardizing family harmony or interrupting the operations or ownership of a family business, many clients desire to keep assets exclusively in the family line. However, it is natural for members of a family to want to provide for their spouses or partners. What's the solution? Life insurance ensuring the life of the more affluent spouse can be a win-win. By incorporating life insurance into the estate plan of a G2 client, the family business assets can stay in the family line and the spouse can be provided for in the event the family member passes away.

iv. Privacy

An increasing number of G2 clients are digital natives. They have grown up in the digital age. While the digital age has ushered in increased efficiency and cool gadgets, it has also made privacy increasingly illusive. A G2 client may be concerned about privacy if his or her family has made privacy a priority, or a G2 client may be blissfully unaware of the dangers that lurk on the "dark web." Privacy concerns are real.\textsuperscript{101} To address clients privacy concerns, real estate, firearms, automobiles, and watercraft are often titled in the name of a trustee of a revocable trust for the benefit of a G2 client. To preserve privacy, it is important to select both a trustee and a trust name that cannot be easily traced back to the client. Alternatively, such assets might be held in an LLC in a jurisdiction in which you do not

\textsuperscript{100} See Internal Revenue Code § 2642(f)(1).

\textsuperscript{101} For an excellent discussion on privacy issues, see Jeffrey D. Chadwick, "Planning for Privacy in a Public World: The Ethics and Mechanics of Protecting Your Client's Privacy and Personal Security" Dallas Estate Planning Council April 5, 2018.
have to publicly disclose the owners of the entity, such as Delaware. A G2 client should be made aware of ways to preserve their privacy during the estate planning process.

v. Philanthropic and Civic Engagement

Millennials are being hailed as the civic-minded generation. They do not want their giving to be limited to their parents' and grandparents' ways of thinking or ways of giving. They want to revolutionize philanthropy through experimental and more direct methods that the traditional grants and gifts. When engaging with a G2 client about philanthropy, add the following tools and philosophies to your discussion.

1. Impact Giving

Impact giving is taking the mindset of "making a difference" to an extreme. Mark Zuckerberg and Dr. Priscilla Chan are often classified as impact givers. They created the Chan Zuckerberg Initiative in December 2015, and committed $3 billion over ten years for the purpose of "helping cure, prevent, and manage all diseases in our children's lifetime."102 Their entire charitable vision centers around a bold impact-based mission. Zuckerberg's Facebook co-founder, Dustin Moskovitz and his wife Cari Tuna also have an impact-centric view of philanthropy. They focus on maximum "measurable impact." The causes they choose to focus on are not driven by their personal interests but by what data suggests are the issues or solutions that can save or help the most lives.103 Billionaire Sean Parker describes his philanthropic mission as follows: "We will only target very big specific problems that are 'tip-able' where we see a path to victory and where we can make a catalytic impact."104 Impact giving is all about strategic philanthropy that moves the needle.

2. Service Learning

Service learning is a teaching strategy that combines community service, instruction, and reflection to foster individual development and community enrichment.105 Typically, service learning integrates both a traditional learning component and a component involving hands on action in the community. The discipline-based model of service learning puts a participant in the community and focuses on reflection. The participant uses their experience in the community to develop an understanding of societal issues beyond theoretical issues discussed in books. In the problem-based model of service learning, the participant works as a consultant for a community. They work with members of the community to determine pressing issues and solve problems. Service learning moves philanthropy beyond the hypothetical and allows participants to witness problems with their own eyes and solve problems in partnership with afflicted communities.

103 Id.
104 Id. at 25.
105 Joe Brandy, "What is Service Learning or Community Engagement?" Vanderbilt University Center for Teaching available at https://cft.vanderbilt.edu/guides-sub-pages/teaching-through-community-engagement/.
3. Peer Funding

Millennials have identified "recommending a cause or organization to others" as one of top most important components of philanthropy strategy.106 Peer funding is taking peer influence to the next level to impact philanthropy. If you have given to a cause through Facebook, you have engaged in peer funding. Nonprofit Source gathered statistics on Millennial giving. It reports that 84% of Millennials give to charity, and that Millennials were most likely to contribute to charities when prompted by text message and social media requests.107 Giving circles, such as Natan and Slingshot, that allow peer cohorts to give young donors and opportunity to craft their philanthropic identities and provide checks and balances to giving initiatives are another example of peer funding which is gaining popularity.108

IV. Conclusion

Like it or not, the next generations are gloing up.109 It's time to set aside basic ideas about estate planning and give and get some milk from the next generations, because multigenerational estate planning is goals.110

106 Sharna Goldseker and Michael Moody at 166.
108 Sharna Goldseker and Michael Moody at 167.
111 See supra note 11.
112 Definition for Non-Millennials: goals – Possessing a quality, attribute, or item which you desire to possess (as in "that couple is relationships goals") (https://www.dictionary.com/e/s/slang-watch-2017/#goals).
# Goals: Estate Planning and Asset Protection for the Next Generations

Appendix A

Millennial Dictionary

a) Bae. 1. Affectionate term for a significant other 2. A person who is worthy of dating (https://www.dictionary.com/e/s/slang-watch-2017/#bae)


c) Draking. 1. The feelings of sadness or melancholy experienced while listening to an emotional song, especially from the Canadian rapper Drake 2. Making questionable life decisions while in a sad or melancholy state of mind (https://www.dictionary.com/e/s/slang-watch-2017/#draking)

d) Extra. The level above too much; a hyperbole personified of melodrama, glitz, and extravagance (https://www.dictionary.com/e/s/slang-watch-2017/#extra)

e) Feels. Feelings on another (usually positive) level as in “The movie gives me all the feels” (https://www.dictionary.com/e/s/slang-watch-2017/#feels)

f) Finstagram. Fake or alternative Instagram account where people (typically teens) post more questionable selfies, personal jokes, advice requests, and rants to close friends (https://www.dictionary.com/e/s/slang-watch-2017/#finstagram)

g) Firing shot or Shots fired. When someone says something that will inevitably offend another person (https://www.dictionary.com/e/s/slang-watch-2017/#firing-shot)

h) Glo up. Becoming more attractive and mature as popularized by YouTube star Logan Paul (https://www.dictionary.com/e/s/slang-watch-2017/#glo-up)

i) Goals. Possessing a quality, attribute, or item which you desire to possess (as in “that couple is relationships goals”) (https://www.dictionary.com/e/s/slang-watch-2017/#goals)

j) High Key. Open and unabashed excitement (https://www.dictionary.com/e/s/slang-watch-2017/#low-key-high-key)

k) “It’s just a prank”. Phrase used online as a humorous excuse or justification for behaving disrespectfully (https://www.dictionary.com/e/s/slang-watch-2017/#its-just-a-prank)

l) Lit. Situation or event that is extremely cool, exciting, or crazy (https://www.dictionary.com/e/s/slang-watch-2017/#lit)

m) Low Key. A muted or restrained level of excitement or approval because you do not want to call attention to your level of excitement or approval or because you are trying to play it cool (https://www.dictionary.com/e/s/slang-watch-2017/#low-key-high-key)

On fleek. 1. Any instance of flawless styling or grooming 2. Praise for being on point or good

Roast. The fine art of insulting your friends over the internet (https://www.dictionary.com/e/s/slang-watch-2017/#roast)


Shook. 1. Shaken up 2. Confused, flabbergasted, or surprised 3. Agitated or disturbed mentally or physically (https://www.dictionary.com/e/s/slang-watch-2017/#shook)

Side hustle. Something you do in your spare time to earn money outside of your regular full time job (https://www.dictionary.com/e/s/slang-watch-2017/#side-hustle)

Snap trap. A tactic used to find out what your significant other is up to. Most often a snap trap would be laid if you send a text to your SO to which no reply is received, followed by the sending of a snapchat that they open. Your bae has time to Snap but not text you back? (https://www.dictionary.com/e/s/slang-watch-2017/#snap-trap)


Throwing Shade. A cunning way to disrespect your enemies while minimizing the risk of confronting them through passive aggressive putdowns or criticisms (https://www.dictionary.com/e/s/slang-watch-2017/#throwing-shade)

Turnt. 1. Super excited and enthusiastic about something (as in a party); 2. Under the influence of alcohol or drugs (https://www.dictionary.com/e/s/slang-watch-2017/#turnt)

#Goals: Estate Planning and Asset Protection for the Next Generations
Appendix B

Family Mission Statement Examples

"Our mission is to:

- Develop our family traditions and cultures for the benefit of all future generations
- Be guided by compassion—holding unconditional concern for the health, well-being and happiness of our family members—as we live our core values of openness and honesty
- Facilitate the development of each family member's full potential
- Use our individual and collective talents for the benefit of ourselves, our family, and our community"\(^{113}\)

"To enhance the pursuit of happiness of the family's members, and thereby preserve the family's human, intellectual, and financial capital"\(^{114}\)

"To use our resources to strengthen our family and to support causes in which we believe"\(^{115}\)

"We are committed to family bonding, community outreach, and fun. We grow the family assets and provide for the family's education, growth, and security"\(^{116}\)

"To create environment for making choices that benefits ourselves and the world for generations to come"\(^{117}\)

"To maximize the equitable transfer of assets in a way that will enable and encourage family members to work for the benefit of humanity"\(^{118}\)

"Through God's grace, dream, plan, and grow closer to God and each other using resources entrusted to our care for the benefit of God's work, family, business people, and community"\(^{119}\)

"To strengthen our family and use its assets wisely; to enable our family and others to realize their fullest potential; to value and encourage love, work, and self-sufficiency, and cooperation within the family and in the larger community"\(^{120}\)

---


\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) Id.
Appendix C

Prompts for Letters of Intent

I created the trust because ______.

My non-tax objectives are ____________.

It is my hope that you will use the trust assets to / It would please me if you used the trust assets to ____________.

It is my hope that you will not use the trust assets to / I would be disappointed if you used the trust assets to ____________.

To me, self-sufficiency means ____________.

It would not be in violation of my wishes or intentions if you relied on the trust for support in the following circumstances, without limitation ____________.

When you seek a distribution from the trustee you should do the following ______________.

When you seek a distribution from the trustee, you should not do the following __________.

In interacting with the trustee, the other beneficiaries of the trust, and the trust assets or property it is my hope that you will embody the following values / I want the assets of this trust to be used to reinforce the following values ________________.

I want you to learn ______ from your interactions with the trust and the trustee.

I have built in the following safeguards to allow you to adapt the use of wealth in the event of changed circumstances ________________

It is my desire that the trustee/trust protector/special trustee/independent trustee protect you from yourself when the following occurs, without limitation ____________________.

I encourage you to seek competent counsel regarding the trust from ____________________.

I want you to use the trust assets to teach your own descendants ________________.
#Goals: Estate Planning and Asset Protection for the Next Generations

Appendix D

#Goals Life Hack #1: Email to Text

**Step 1:** Compose your message as normal.

**Step 2:** Enter “find cellphone carrier for phone number” into your favorite internet search engine. Several websites will pop up. Enter the ten digit phone number and the website will reveal to you the cellphone carrier of the recipient.

**Step 3:** In the “To:” field of your email, enter in the 10 digit phone number + @+ the gateway domain for the carrier (see the list below).

<table>
<thead>
<tr>
<th>Carrier</th>
<th>MMS gateway domain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alltel</td>
<td>[insert 10-digit number]@mms.alltelwireless.com</td>
</tr>
<tr>
<td>AT&amp;T</td>
<td>[insert 10-digit number]@mms.att.net</td>
</tr>
<tr>
<td>Boost Mobile</td>
<td>[insert 10-digit number]@myboostmobile.com</td>
</tr>
<tr>
<td>Cricket Wireless</td>
<td>[insert 10-digit number]@mms.cricketwireless.net</td>
</tr>
<tr>
<td>Project Fi</td>
<td>[insert 10-digit number]@msg.fi.google.com</td>
</tr>
<tr>
<td>Sprint</td>
<td>[insert 10-digit number]@pm.sprint.com</td>
</tr>
<tr>
<td>T-Mobile</td>
<td>[insert 10-digit number]@tmomail.net</td>
</tr>
<tr>
<td>U.S. Cellular</td>
<td>[insert 10-digit number]@mms.uscc.net</td>
</tr>
<tr>
<td>Verizon</td>
<td>[insert 10-digit number]@vzwpix.com</td>
</tr>
<tr>
<td>Virgin Mobile</td>
<td>[insert 10-digit number]@vmpix.com</td>
</tr>
</tbody>
</table>

**Step 4:** Voila! Compose the email message as normal and send it. I always like to send a pretty benign initial message to confirm who I am, what I am doing, and that I have the correct recipient. The client’s replies to you will be delivered to your inbox as email, and you can preserve your file. It is a game changing solution for a first world problem!
# Goals Life Hack #2: Conference Call Time Saver

If Millennials love their smartphones above all else, a time-saving life hack is a close second place. Create a calendar invite for a Millennial (or an efficiency loving member of another generation) that allows the conference call attendee to bypass inputting a participant code # sign by following this format: telephone number +,,+,participant code#. See sample calendar invite below:

When the client opens the calendar invite on their smartphone calendar, they can click on the location field and dial call and bypass the headache of entering a participant code.