



Psychology of Death, Money and Gifting

PRESENTED BY:

DR. DAVID W. TRADER
LAURA ZWICKER | GREENBERG GLUSKER LLP



Psychology of Money

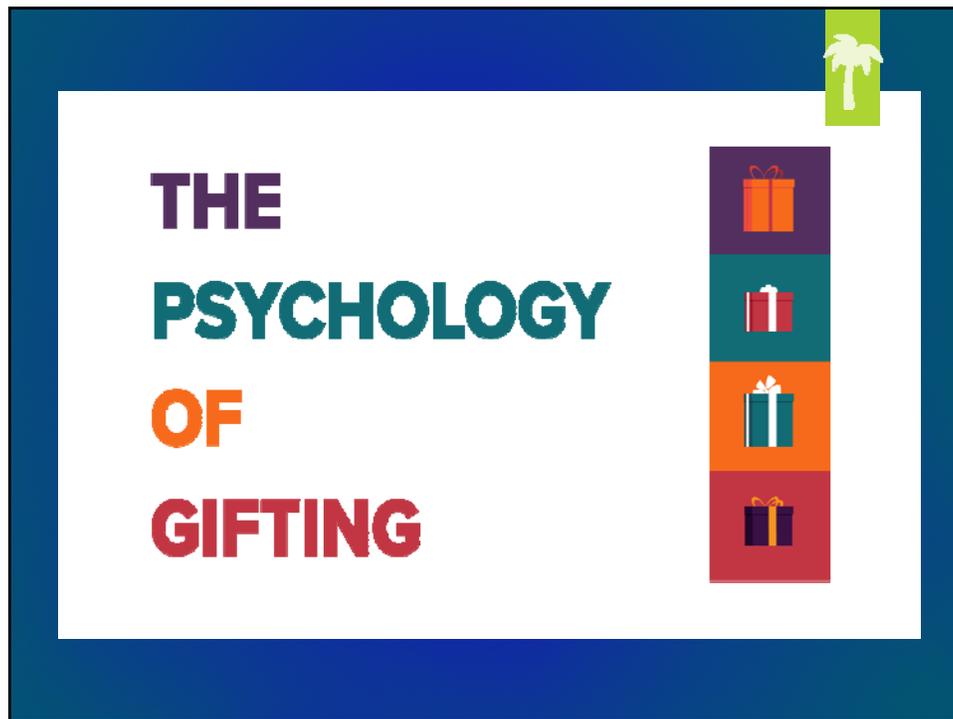


Psychology of Money

- ▶ Success Measured by Wealth
- ▶ Self-Esteem/Identity Equated with Wealth
- ▶ Wealth as Power and Tool of Control
- ▶ Values Surrounding Wealth:
 - ▶ Does wealth provide happiness OR
 - ▶ Does wealth provide resources to find happiness

Psychology of Money-Myths

- ▶ Wealth as the Ultimate Healer and Ultimate Destroyer
- ▶ If I Had More Money, I'd Be Happier
- ▶ Winning the Lottery Will Solve All My Problems
- ▶ Money Corrupts People
- ▶ Being Born Into Money or Acquiring Money Destroys Motivation



Psychology of Gifting

- ▶ Altruistic Gifting
 - ▶ No strings attached
 - ▶ To benefit others in need
- ▶ Narcissistic Spectrum
 - ▶ To be liked/respected
 - ▶ To feel important/powerful
 - ▶ To control a relationship
 - ▶ To control behavior

Cultural Issues Relating to Gifting

- ▶ Generational Roles in Culture
 - ▶ Control retained by senior generation until death
 - ▶ Inappropriate for next generation to raise transition issues
- ▶ Gender Roles in Culture
 - ▶ Spouse may not have role in family wealth
 - ▶ Daughters may not share equally
- ▶ Reluctance to Release Control
 - ▶ "Informal" transfers

Cultural Issues Relating to Gifting

- ▶ Overwhelming Politeness
 - ▶ Reluctance to share sensitive family information
 - ▶ Reluctance to ask advisor to explain plan
 - ▶ Reluctance to tell advisor that plan doesn't meet family needs
- ▶ Relationship Based vs. Transaction Based Cultures
 - ▶ Relationship based culture may need more time to understand and execute gifting transactions
 - ▶ Relationship based culture may require advisor to establish trustworthiness before transaction considered
- ▶ Death Taboo

Legal Issues Relating to Gifting

- ▶ Achieving Tax Planning Objectives
 - ▶ Engaging in tax planning prior to a business liquidity event
 - ▶ Engaging in tax planning by shifting future wealth generation opportunities to younger generation
 - ▶ Engaging in tax planning by positioning ownership of assets to generate valuation discounts
- ▶ Achieving Business Succession Planning Objectives
 - ▶ Allocation of business interests to family members active in business
 - ▶ Provide orderly buy-sell provisions to allow for separation
 - ▶ Plan for payment of estate tax on illiquid business assets

Legal Issues Relating to Gifting

- ▶ Considerations for Effective Gifting
 - ▶ Tax issues
 - ▶ Completed gift/2036(b) controlled corporations
 - ▶ How many generations of tax benefit (outright, trust, jurisdiction)
 - ▶ Grantor vs. complex trust
 - ▶ Compliance Issues
 - ▶ Proper appraisals
 - ▶ Proper gift tax reporting
 - ▶ Proper accounts established and maintained
 - ▶ Proper income tax reporting
 - ▶ Proper information to beneficiaries based on document and jurisdiction



Reasons for Disputes Over Money

- ▶ Equality as Cherished American Value
- ▶ Genetic Predisposition to Competition
- ▶ Need to Feel Loved/Recognized
- ▶ Entitlement
- ▶ Fear of Own Death
- ▶ Personality Disorders

Reasons for Disputes Over Money

- ▶ Sibling Rivalry Is Normal; Life and Death Disputes Are Not
- ▶ Influenced by Parents' Values, Resolution of Conflict, and Manifestations of Love and Approval
- ▶ When Parents Show Love and Approval with Money/Material Gifts, Then Greed and Competitiveness Worsen, and Money Means More Than Relationships
- ▶ Money Becomes The Measure of Love
- ▶ Greater Conflict When Parents are Secretive, Withholding

Reasons for Disputes Over Money

- ▶ Intentional Unequal Distributions
 - ▶ Exclusion because of bad relationship
 - ▶ Exclusion because of tension with spouse
 - ▶ Exclusion because of child's success
- ▶ Less Intentional Unequal Distributions
 - ▶ Lifetime support for child who is not working
 - ▶ Gifts to grandchildren disadvantage childless children
 - ▶ Child receiving compensation from family business
 - ▶ Child caring for aging parent

Reasons for Disputes Over Money

- ▶ Gift Intended to Control Child
 - ▶ Direct behavior through economic incentives
 - ▶ Require gratitude
 - ▶ Require family involvement/care for parent
- ▶ What Happens When Control Is Ineffective
 - ▶ Breakdown of family relationship
 - ▶ Litigation





Conflicts Arising From Influence

► Indicia of Influence

- Initial point of contact is someone other than potential client
- The client's prior estate planning documents are not shared
- Some, but not all, family members/beneficiaries attend meetings
- Someone other than client provides direction regarding drafting



Conflicts Arising From Influence

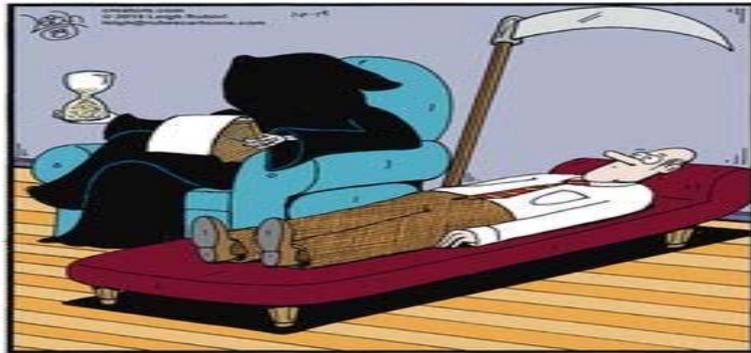
- ▶ Steps that Could be Taken to Counter Indicia of Influence
 - ▶ Exclude family members and potential beneficiaries from all communications (*Witte v. Witte*, 126 So.3d 1076 (Fla. App. 2012)) allowing children to attend meeting with impaired parent may not negate privilege if reasonably necessary to facilitate communication)
 - ▶ Understand from client the purpose of changes to plan
 - ▶ Meet at client's home if client cannot arrive without family assistance
 - ▶ Seek Certificate of Independent Review



Conflicts Arising From Influence



THE PSYCHOLOGY OF DEATH



"Why don't you tell me about your fear of dying, Mr. Feingold? ... And I suggest you make it snappy."

Psychology of Death: Death Anxiety

- ▶ Death Anxiety:
 - ▶ Stems from basic drive to avoid death and mortality salience (intellectual understanding that death is inevitable)
 - ▶ Realization that life is over and will be unable to pursue goals
 - ▶ Uncertainty about life after death
 - ▶ Grief to family and friends
 - ▶ Belief that death will be painful

Psychology of Death: Death Anxiety

- ▶ Consequences of Death Anxiety in Estate Planning:
 - ▶ Avoidance of discussions about mortality and delays in planning
 - ▶ Poor decision making related to denial and sense of immortality
 - ▶ Some research in mortality salience suggests an increased focus on core values and an increase in charitable giving
 - ▶ Decrease in death anxiety when faced with illness, death of a close relative or friend
 - ▶ Death anxiety decreases when estate planning is completed

**LIFE ISN'T FAIR. IT'S
JUST FAIRER THAN
DEATH, THAT'S ALL.**

QUOTEHD.COM

William Goldman
American Novelist

Risks for Advisors

- ▶ Separate Concurrent Representation of Parents and Children
 - ▶ Consider whether representation of child and parent would give rise to an appearance of influence if represented child will be disproportionately benefited under plan (*Haynes v. First Nat'l State Bank*, 432 A.2d 890 (N.J. 1981); *In re Schenck*, 345 Or. 350 (2008); *Hotz v. Minyard*, 304 S.C. 225 (1991))
 - ▶ Consider whether claims could be brought against advisor for participating in a "conspiracy" against unrepresented beneficiaries
 - ▶ Intentional interference with expected inheritance (*Beckwith v. Dahl*, 205 Cal. App. 4th 1039 (2012), also recognized in 25 other states).

Conflicts Arising From Capacity



- ▶ What steps can/should be taken where client wishes to make dramatic changes to long established plan?
- ▶ Moral/ethical issues facing attorney when representing clients with declining capacity.
- ▶ What steps can/should be taken to protect client's documents against later claim of lack of capacity/influence?

Conflicts Arising From Capacity

► Obligation to confirm capacity

- Duty of reasonable inquiry into whether client is able to understand the nature and effect of documents (*Taylor v. Shipley (In re Hughes Revocable Trust)*, 711 N.W.2d 56 (2006)(trust invalidated, attorney on notice of capacity issue and did not sufficiently evaluate capacity and understanding).
- Attorney who is “persuaded” of client’s capacity by “his or her own observations and experience” has fulfilled duty of loyalty to testator and has no duty to consider effect on beneficiaries. (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.*, 109 Cal. App. 4th 1287 (Ct. App. 2003)).

Conflicts Arising From Capacity

► Ethical Issues When Client Has Diminishing Capacity

- Is it ethical and appropriate to continue meeting with a client with advanced dementia who wishes to review his or her estate planning documents when the planner knows that the client lacks testamentary capacity but where the meetings alleviate the client’s anxiety?
- Is it more appropriate to enter the client’s world in order to alleviate anxiety or honestly tell the client that he or she lacks capacity and that no further changes can be made to the client’s estate planning documents?

Larissa MacFarquhar in *The Memory House*, *The New Yorker* (October 8, 2018)

Conflicts Arising From Capacity

- ▶ Documenting Capacity
 - ▶ Contemporaneous Capacity Examination
 - ▶ Regularly attending physician, neurologist, geriatric psychiatrist
 - ▶ Should an examination be recommended:
 - ▶ For all clients over a certain age
 - ▶ For all clients not providing equally for issue
 - ▶ For all clients with certain medical conditions
 - ▶ For all clients with potentially contentious family members
 - ▶ Relevance of notations of dementia in medical record



Conflicts Arising From Capacity

- ▶ Documenting Capacity
 - ▶ Video Recording of Meetings/Execution
 - ▶ Benefits:
 - ▶ Clear record of client's affect and demonstrated understanding/direction
 - ▶ Contemporaneous evidence of intent for fiduciary/beneficiaries
 - ▶ Risks:
 - ▶ Hesitations, apparent confusion, lack of concentration could be used as "proof" of lack of capacity
 - ▶ If video recording is not attorney's regular practice, raises question of why used in particular case



Fiduciary Selection and Succession

- ▶ Fiduciary Selection
 - ▶ Family Members
 - ▶ Spouse (blended marriage)
 - ▶ Children (one child or multiple as co-trustees)
 - ▶ Will arrangement exacerbate existing tensions
 - ▶ Should family member receive compensation
 - ▶ Does advisor have a relationship with a designated fiduciary that needs to be disclosed and documented?



Fiduciary Selection and Succession

- ▶ Fiduciary Succession
 - ▶ Removal for Incapacity
 - ▶ HIPAA/State Law Waiver
 - ▶ Should a HIPAA/State Law Waiver be incorporated into any trustee acceptance
 - ▶ If there is no waiver, a court order may be obtained (Cal. Code Civ. Proc. Sections 2032.020 et seq.)
 - ▶ Standard for trustee capacity should be something different from testamentary capacity or capacity for conservatorship (California Probate Code §§811 and 812)



Fiduciary Selection and Succession

- ▶ Fiduciary Succession
 - ▶ Removal for Incapacity
 - ▶ Should Capacity Determination be Made by:
 - ▶ Regularly attending physician
 - ▶ Neurologist
 - ▶ Geriatric psychiatrist
 - ▶ Family members with no medical expertise
 - ▶ Should refusal to undergo testing or disclose testing results cause removal?



Recommendations For Wealth Advisors

- ▶ Talk, Talk, Talk with your client
- ▶ Understand your client's values
 - ▶ Family history
 - ▶ Culture
 - ▶ History with Money
- ▶ Understand your client's family relationships/dynamics
- ▶ Encourage updated estate planning
- ▶ Encourage communication within the family

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