THE ESTATE PLANNER

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Your original will is missing

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Planning for long-term care

No matter how diligently you prepare, your estate plan can quickly be derailed if you or a loved one (a spouse or parent, for example) requires long-term home health care or an extended stay at a nursing home or assisted living facility.

The annual cost of long-term care (LTC) can reach as high as six figures, and this expense isn't covered by traditional health insurance policies, Social Security or Medicare. According to the Centers for Medicare and Medicaid Services, at least 70% of people over age 65 will need LTC services and support at some point in their lives. So it's important to have a plan to finance these costs, either by setting aside some of your savings or purchasing insurance.

LTC insurance

An LTC insurance policy supplements your traditional health insurance by covering services that assist you or a loved one with one or more activities of daily living (ADLs). Generally, ADLs include eating, bathing, dressing, toileting, transferring (in and out of bed, for example), and maintaining continence.

LTC coverage is relatively expensive, but it may be possible to reduce the cost by purchasing a tax-qualified policy. Generally, benefits paid in accordance with an LTC policy are tax-free. In addition, if a policy is tax-qualified, your premiums are deductible (as medical expenses) up to a specified limit. (See "2017 LTC insurance deduction limits" on page 3.)

Also known as "asset-based" policies, hybrid policies combine LTC benefits with whole life insurance or annuity benefits.

To qualify, a policy must:

- Be guaranteed renewable and noncancelable regardless of health,
- Not delay coverage of pre-existing conditions more than six months,
- Not condition eligibility on prior hospitalization,
- Not exclude coverage based on a diagnosis of Alzheimer's disease, dementia, or similar conditions or illnesses, and
- Require a physician's certification that you're either unable to perform at least two of six ADLs or you have a severe cognitive impairment and that this condition has lasted or is expected to last at least 90 days.

It's important to weigh the pros and cons of tax-qualified policies. The primary advantage is the premium deduction. But keep in mind that medical expenses are deductible only if you itemize and only to the extent they exceed 10% of your adjusted gross income (AGI), so some people may not have enough medical expenses to benefit from this advantage. It's also important to weigh any potential tax benefits against the advantages of nonqualified policies, which may have less stringent eligibility requirements.

Hybrid insurance

Also known as "asset-based" policies, hybrid policies combine LTC benefits with whole life insurance or annuity benefits. These policies have several advantages over standalone LTC policies. For example, their health-based underwriting requirements typically are less stringent and their premiums are usually guaranteed — that is, they won't increase over time. Most important, LTC benefits, which are tax-free, are funded from the death benefit or annuity value. So, if you never need to use the LTC benefits, those amounts are preserved for your beneficiaries.

Bear in mind that the features, terms and conditions of these policies can vary dramatically, so it's important to shop around.

Employer-provided plans

Employer-provided group LTC insurance plans offer significant advantages over individual policies, including discounted premiums and "guaranteed issue" coverage, which covers eligible employees (and, in some cases, their spouse and dependents) regardless of their health status. Group plans aren't subject to nondiscrimination rules, so a business can offer employer-paid coverage to a select group of employees. Alternatively, a business might pay premiums for key executives and require other employees to pay their own premiums if they choose to participate.

Employer plans also offer tax advantages. Generally, C corporations that pay LTC premiums for employees can deduct the entire amount as a business expense, even if it exceeds the deduction limit for individuals. And premium payments are excluded from employees' wages for income and payroll tax purposes.

The rules are slightly different for self-employed individuals, which includes partners, limited liability company (LLC) members and more-than-2% S corporation shareholders. These individuals must include employer-paid LTC premiums in their income, but they may deduct the full amount of these premiums (up to the individual deduction limits) without regard to adjusted gross income limitations. Be aware that, for tax purposes, nonowner employees of sole proprietors, partnerships, LLCs and S corporations are treated like C corporation employees. That is, premiums are deductible by the business and excluded from an employee's income.

Tax-free exchanges

Another option for financing LTC insurance is to use tax-free exchanges under Internal Revenue Code Section 1035. This technique allows you to tap the cash value of a life insurance policy or annuity to purchase LTC coverage. So long as the funds are transferred directly from the old policy to the new one, there's no tax on the distribution. The most common approach is to use partial exchanges to fund annual premiums, but it's also possible to use a complete exchange trade of a life insurance policy or annuity for a standalone or hybrid LTC policy.

Think long term

Given the potential magnitude of long-term care expenses, the earlier you begin planning, the better. Your estate planning advisor can help you review your options and analyze the relative benefits and risks.

2017 LTC insurance deduction limits

For 2017, individuals who purchase tax-qualified long-term care insurance policies may deduct premiums up to the following limits:

Age of insured at end of tax year	Eligible premium deduction
40 or younger	$ 410
41 to 50	$ 770
51 to 60	$1,530
61 to 70	$4,090
71 or older	$5,110

Moving abroad?

Consider the tax implications

If you're planning to move to another country — to retire, to start a new job or for some other reason — it's critical to consider the income and estate tax implications before you relocate. A complete discussion of the tax issues is beyond the scope of this article, but it's important to consult your tax advisor well in advance to discuss tax-planning options. Here are some of the issues to consider.

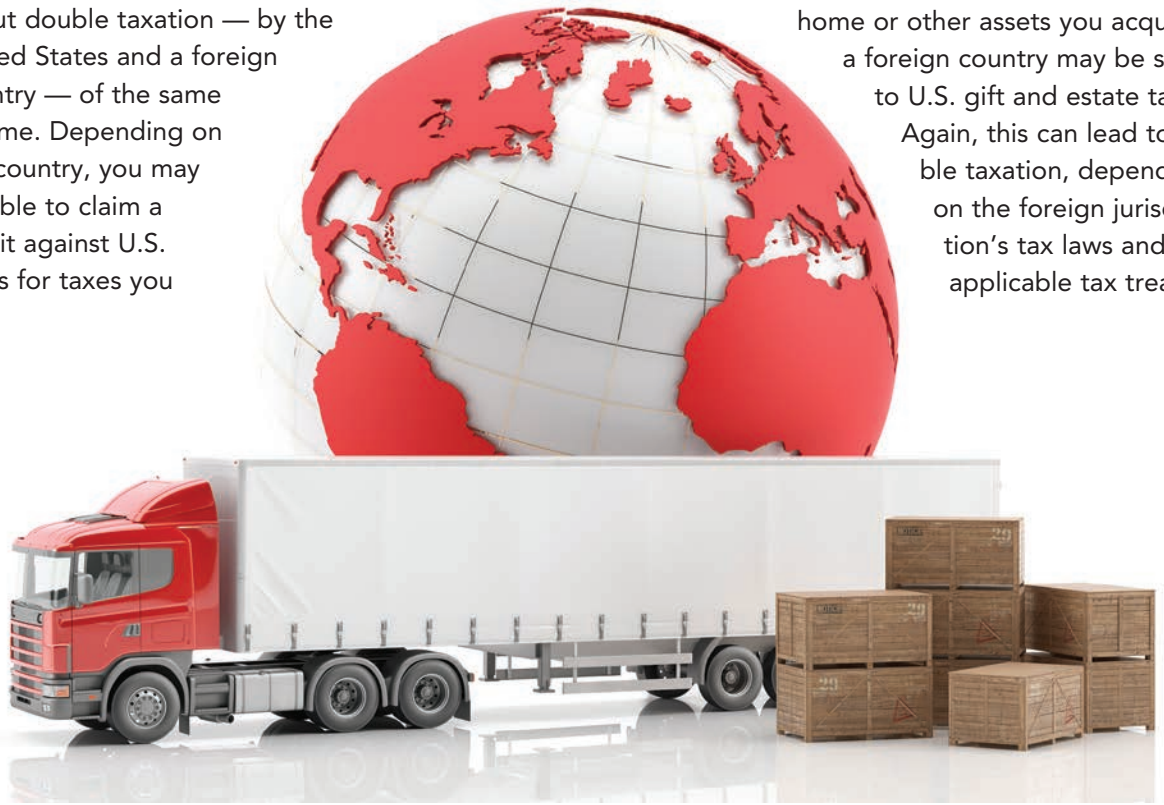
Income taxes

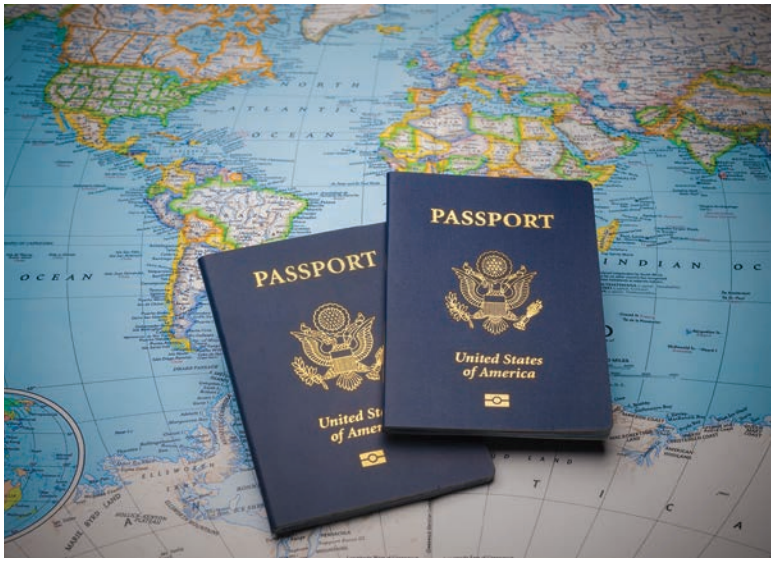
U.S. citizens and permanent residents (green card holders) generally are subject to taxes on their *worldwide* income, even if they're living and working abroad. This raises concerns about double taxation — by the United States and a foreign country — of the same income. Depending on the country, you may be able to claim a credit against U.S. taxes for taxes you pay to a foreign jurisdiction. Also, some countries have tax treaties with the United States that entitle you to a reduced foreign tax rate.

There may be tax planning strategies you can use to minimize your overall tax bite. For example, the United States provides exclusions from income for a certain amount of foreign earned income and foreign housing expenses. But, depending on the foreign country's income tax rate, you may be better off forgoing these exclusions and applying foreign tax credits to your total income.

Estate and gift taxes

As with income taxes, U.S. citizens and permanent residents are subject to gift and estate taxes on their worldwide assets. That means that a home or other assets you acquire in a foreign country may be subject to U.S. gift and estate taxes. Again, this can lead to double taxation, depending on the foreign jurisdiction's tax laws and any applicable tax treaties.





Should you expatriate?

One potential strategy for reducing U.S. taxes is to renounce your U.S. citizenship or permanent resident status. The advantage of doing so is that, rather than being taxed on your worldwide income and assets, you'll be subject to U.S. income, gift and estate taxes on only your U.S.-source income and U.S.-situs assets. But renouncing citizenship raises some significant tax issues of its own that you'll need to consider.

To prevent people from escaping taxes on appreciated assets, the U.S. imposes an "exit tax" on "covered expatriates." A covered expatriate is a U.S. citizen — or a permanent resident who's held that status for at least eight of the previous 15 years — who:

1. Has a net worth of $2 million or more,
2. Has an average annual net income tax liability for the preceding five years that exceeds $162,000 (for 2017), or
3. Fails to certify compliance with all U.S. tax obligations for the preceding five years.

Essentially, covered expatriates are treated as if they'd sold all their worldwide assets at fair market value on the day before they became an expatriate. While there are some exceptions — for instance, there's an exemption of $699,000 (for 2017) of any unrecognized gains — the tax liability is determined by calculating the value of the estate as though the person had died on that day. One consequence, therefore, is that any retirement accounts are deemed to have been distributed on the day before the person became an expatriate.

With some advance planning, however, it's possible to reduce or even eliminate the impact of the exit tax. Techniques include 1) selling your principal residence and taking advantage of the $250,000 capital gains exclusion ($500,000 for married couples), and 2) gradually converting appreciated property into liquid assets to spread out your taxable gains over several years.

Expatriation can lead to some costly gift and estate tax traps.

Expatriation can also lead to some costly gift and estate tax traps. As previously noted, expatriates are subject to U.S. gift and estate taxes on only their U.S.-situs assets. But they're allowed an exemption of only $60,000, compared to the $5.49 million exemption that citizens and permanent residents enjoy in 2017. If you own a significant amount of real estate or other assets in the United States, expatriation could increase, rather than decrease, your gift and estate tax liability.

Look before you leap

If you're thinking about relocating overseas, begin tax planning as soon as possible. If you wait until you've already made your move, it may be too late. In addition, pay attention to possible income and estate tax law changes the Trump administration and Congress have proposed.

Tangible personal property

Assets with sentimental value require extra thought

As a formal estate planning term, "tangible personal property" likely won't elicit much emotion from you or your loved ones. However, the items that make up tangible personal property, such as jewelry, antiques, photographs and collectibles, may be the most difficult to plan for because of their significant sentimental value. Without special planning on your part, squabbling among your family members over these items can lead to emotionally charged disputes and even litigation.

Communicate clearly

There's no reason to guess which personal items mean the most to your children and other family members. Create a dialogue to find out who wants what and to express your feelings about how you'd like to share your prized possessions.

> *Create a dialogue to find out who wants what and to express your feelings about how you'd like to share your prized possessions.*

Having these conversations can help you identify potential conflicts. After learning of any ongoing issues, work out acceptable compromises during your lifetime.

Bequeath assets to specific beneficiaries

Some people have their beneficiaries choose the items they want or authorize their executors to distribute personal property as they see fit. For some

families, this approach may work. But more often than not, it invites conflict.

Generally, the most effective strategy for avoiding costly disputes and litigation over personal property is to make specific bequests — in your will or revocable trust — to specific beneficiaries. For example, your will might leave your art collection to your son and your jewelry to your daughter.

Specific bequests are particularly important if you wish to leave personal property to a nonfamily member, such as a caregiver. The best way to avoid a challenge from family members on grounds of undue influence or lack of testamentary capacity is to express your wishes in a valid will executed when you're "of sound mind."

If you use a revocable trust (sometimes referred to as a "living" trust), you must transfer ownership of personal property to the trust to ensure that the property is distributed according to the trust's terms. The trust controls only the property you put into it. It's also a good idea to have a "pour-over" will, which provides that any property you own at your death is transferred to your trust. Keep in mind, however, that property that passes through your will and pours into your trust generally must go through probate.

Create a personal property memorandum

Spelling out every gift of personal property in your will or trust can be cumbersome. If you wish to make many small gifts to several different relatives, your will or trust can get long in a hurry. Plus, anytime you change your mind or decide to add another gift, you'll have to amend your documents. Often, a more convenient solution is to prepare a personal property memorandum to provide instructions on the distribution of tangible personal property not listed in your will or trust.

In many states, a personal property memorandum is legally binding, provided it's specifically referred to in your will and meets certain other requirements. You can change it or add to it at any time without the need to formally amend your will.

Plan for *all* of your assets

Your major assets, such as real estate and business interests, are top of mind as you prepare your estate plan, but don't forget to also plan for your tangible personal property. These lower monetary valued assets may be more difficult to deal with, and more likely to result in disputes, than big-ticket items.

ESTATE PLANNING RED FLAG

Your original will is missing

In a world that's increasingly paperless, you're likely becoming accustomed to conducting a variety of transactions digitally. But when it comes to your last will and testament, only an original, signed document will do.

Many people mistakenly believe that a photocopy of a signed will is sufficient. In fact, most states require that a deceased's *original* will be filed with the county clerk and, if probate is necessary, presented to the probate court. If your family or executor can't find your original will, there's a *presumption* in most states that you destroyed it with the intent to revoke it. That means the court will generally administer your estate as if you died without a will.

It's possible to overcome this presumption — for example, if all interested parties agree that a signed copy reflects your wishes, they may be able to convince a court to admit it. But to avoid costly, time-consuming legal headaches, it's best to ensure that your family can locate your original will when they need it.

There isn't one right place to keep your will — it depends on your circumstances and your comfort level with the storage arrangements. Wherever you decide to keep your will, it's critical that 1) it be stored safely, and 2) your family know how to find it. Options include:

- Having your accountant, attorney or another trusted advisor hold your will and making sure your family knows how to contact him or her.
- Storing your will at your home or office in a fireproof lockbox or safe and ensuring that someone you trust knows where it is and how to retrieve it.

Storing your original will and other estate planning documents safely — and communicating their location to your loved ones — will help ensure that your wishes are carried out.

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SPECIAL NEEDS TRUSTS: A PRIMER - "LET ME COUNT THE WAYS"

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For those of you who remember, or those who do not remember, back in the '50's and '60's, the late comedian Jackie Gleason hosted a TV show with his favorite character, Reggie Van Gleason III, a bon vivant character with a severe drinking problem. He was the scion of wealthy parents, for whom we, as attorneys, would have advised his parents to establish a *spendthrift* trust, a trust designed to prevent the beneficiary from wasting assets. Otherwise, Reggie would have blown through any inheritance his parents would have left him outright.

A *special needs* trust (SNT) may be thought of as a variant of a spendthrift trust. Simply defined, it is a trust designed for a person with special needs who cannot handle an inheritance, and, more importantly, would lose means-tested public benefits should the individual have too many countable assets. Means-tested public benefits programs, e.g., Medicaid and SSI (but not SSDI), have an asset cap of only $2,000 for eligibility purposes. Because there is usually an income cap as well, there is also a special needs trust for income purposes (d4B, which references the subsection under the United States Code authorizing such trusts) - see below).

A. Third Party SNT's: These are trusts established on an individual's behalf by a 3rd party. If Reggie Van Gleason was disabled and receiving means-tested public benefits, then Reggie's parents would be the 3rd party(s) settlors of the SNT. The funds would be the parents' funds but set aside for the benefit of Reggie. These SNTs should be drafted carefully so that the individual beneficiary does not receive the assets directly, and should include the repetitive directive of only paying for needs which the government does not cover. The SNT may be a beneficiary under a Will or under a Trust; or, it may be designed as a free standing SNT. If clients believe that wealthy grandparents, for example, may want to make bequests to the SNT under their own estate documents, then a free standing SNT is recommended.

B. First Party (Self-Settled) SNT's: These are trusts funded with a disabled individual's own assets in order to keep them eligible for means-tested governmental benefits (SSI and/or Medicaid). There are two SNTs for assets (d4A & d4C) and one for income (d4B). All three SNT's require payback to the government at the time of the individual's death - the payback is for whatever funds the government has expended on the individual's behalf. Disabled individuals may have received assets by way of an inheritance, a transfer of assets by another, or by successfully settling a lawsuit. If a proper spend-down of the assets is not possible, then a 1st party SNT may be necessary.

42 U.S.C. § 1396p(d)(4)(A) "asset" SNT:

- The key elements of a d4A trust are as follows:
- The trust beneficiary is under the age of 65 at time of creation & funding;
- The trust beneficiary is disabled as defined in the Social Security Act;
- The trust is for the sole benefit of the individual;
- The trust is established by a parent, grandparent, legal guardian of the individual, a court, or by the individual* (* "by the individual" added in 2016 in the federal Special Needs Trust Fairness Act under the "21st Century Cures Act");
- The State will receive all amounts remaining in the trust upon the death of the beneficiary up to an amount equal to the total medical assistance paid on behalf of the beneficiary; and,
- The trust must be irrevocable.

NOTE: After the age of 65, additions to or augmentation of the trust will not disqualify the trust if only interest, dividends or other trust earnings. Similarly, the irrevocable assignment of the right to receive payments from an annuity or support payments made when the beneficiary was < age 65 will not be disqualifying [SI 01120.203B1c].

NOTE: When the member has lived in more than one state, the trust must provide that the funds remaining upon the death of the member are distributed to each state in which the member received Medicaid based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on the member's behalf.

42 U.S.C. § 1396p(d)(4)(B) "income" SNT [a/k/a Miller Trust]:

A d4B trust does not protect assets. Its sole purpose is to render excess income exempt when the State uses an income cap as part of its eligibility determination process. The key elements of a d4B trust are as follows:

- The trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust); and,
- The State will receive all amounts remaining in the trust upon the death of the beneficiary up to an amount equal to the total medical assistance paid by the State.

42 U.S.C. § 1396p(d)(4)(C) "pooled asset" SNT:

The essential elements of a d4C trust are as follows:

- It was established and is managed by a non-profit association;
- A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts;
- Accounts in the trust are established solely for the benefit of disabled individuals by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court and,
- To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

NOTE: Policies for payback to the State vary with each pooled trust company.

NOTE: SSA rules (POMS) are such that, for Medicaid eligibility, there is no age limit to join a pooled trust or add to an existing account; however, for SSI eligibility, after age 64, one cannot add to an existing pooled trust account (= a disqualifying transfer of assets/resources) without triggering a penalty period of up to three years.

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This article is intended to educate you about the basics of special needs trusts. There is a huge amount of additional detail. If you or your client(s) are like Reggie Van Gleason III (or his parents), and means-tested public benefits are to be protected, then you need to seek the advice of an attorney who specializes in special needs trusts.