It has always been the case that one size does not fit all when it comes to estate planning. However, recent changes emphasize why we cannot simply use the standard plan from years past and expect that we will achieve optimal and appropriate results for our clients. Here, a bit of history is helpful.

In the early 1980s, there was a sea change in estate taxation with the introduction of the concept of the unified credit, which unified the estate and gift tax systems. The exemption of $600,000 in 1982 dollars put a great many people in a situation where estate taxes were not a concern. Gradually, over the next twenty years, with the growth in our economy and burgeoning wealth at a great many levels, our planning became more and more focused on the fixed $600,000 lifetime unified credit amount, often to the exclusion of other concerns.

By the late 1990s, many of our clients had estates well above the $1.2 million limit, and the transfer of wealth outside of the taxable estate had become very prevalent, with techniques as simple as the Irrevocable Life Insurance Trust (ILIT) and as complex as Grantor Retained Annuity Trusts and Charitable Lead Trusts of various sorts.

Because the avoidance of tax was a significant and primary goal for many clients, at least in the minds of estate planning practitioners, the planning was often driven by tax concerns. Our clients’ other concerns were often dealt with as an adjunct to the goal of saving tax money.

Recent changes have drastically modified the estate planning environment. As a result of the change in estate tax legislation in late 2010, we now have a lifetime credit equivalent that shelters $5 million, adjusted for inflation from the date of enactment. As of 2014, that exemption adjusted
for inflation is $5.34 million and will be indexed for inflation each year going forward. In addition, in the turbulent years between 2001 and 2010, with increasing exemption amounts and the possibility that an estate tax would not be a permanent part of the landscape, estate planners learned the hard way that one size does not fit all, and it was necessary to draw documents with increased flexibility, as well as suggest new approaches.

The focus of trust and estate professionals on taxes, while necessary as a practical matter, was often not the primary issue for clients. In our current federal transfer tax regime, taxes are very often not an issue for our clients. In fact, other issues almost always dominate the discussion. Because those issues are paramount to the client, they should be very carefully considered, and ultimately should be the primary focus of the planning.

Federal estate tax liability is a concern in Virginia for only a fraction of 1 percent of households (e.g., households in which a married couple’s collective estate exceeds $10.68 million). This requires a significant adjustment in the way we think about estate planning. Until a few years ago, it was true that estate tax planning was almost always relevant, certainly for our clients who had acquired $3 million to $4 million. That is no longer the case.

Because the technical ins and outs of planning on a tax sensitive basis were both interesting and presented a significant challenge, whereas other more mundane considerations were less technically exciting, much of our training and continuing education has been focused on a relatively small group of issues. It has always been the case that we should focus on our clients’ intent, however, in the current planning environment, where estate taxes are far less of a concern, a focus on client intent should be redoubled.

The question becomes: What are the proper concerns for us to raise and make sure we discuss with clients when we engage in estate planning? To distill conversations conducted over nearly thirty years, in my experience the client focuses that seem most central are: asset preservation, carrying out the clients’ dispositive and administrative intent, and ensuring that those intentions have the highest possible probability of being implemented after death. Dealing with issues that arise in families where there may be more than one marriage, children from several marriages, second and third spouses with differing amounts of wealth, and other blended family issues are also increasingly a part of this mix as the number of blended families has risen sharply in the last twenty years. Protection of assets from creditors and predators has always been a concern for our clients. Lastly, our clients have been and continue to be concerned with privacy and transmission costs with respect to their estates.

In recent years, we have seen a renewed focus on these issues as the estate tax exemption has risen, but as a result of recent changes we are now in an arena for planning where a new set of concerns have arisen on the tax and non-tax fronts. It is important to understand that estate planning was generally performed in an environment where the estate tax rate was greater than the income tax rate. For the first time in many years, when you combine the highest federal income tax rate and the income tax rate in Virginia or elsewhere, you will arrive at marginal tax rates that make it very important to focus on income taxes.

One of the most pronounced features of our federal estate tax law is the step-up in basis, which occurs to assets that pass through an individual’s estate. Arranging for the step-up in basis is important to all of our clients, and with the exemption equivalents being as high as they currently are, it may be possible in many situations for a married couple to get not only one, but two step-up events (both on the first and second deaths). In addition, for the first time we have portability of the deceased spousal unused exclusion which can be used in certain circumstances.

Federal estate tax liability is a concern in Virginia for only a fraction of 1 percent of households.

How does this translate into changes in the planning process? The answer is that traditional credit shelter planning is almost certainly of less utility and generates more complexity than benefit for most of our clients. Among the alternatives in the current planning environment are to use various techniques that pass property either by
operation of law or under a third party beneficiary theory using everything from transfer-on-death deeds and transfer-on-death accounts to beneficiary designations in retirement plans. It is possible to use titling of assets and an extremely simple estate planning instrument, nothing more than a simple will, to transfer very large amounts of property with great efficiency under current Virginia law.

However, the practical difficulties with this approach should be carefully explained to the client. The client should understand that when beneficiary designations or transfer-on-death designations are made, those techniques need to be carefully monitored so that as facts and circumstances change, adjustments can be made to the specific titling of assets.

Oftentimes, clients wish to benefit their surviving spouse, but want to control the property after the death of that person. This is certainly the case in many blended family situations and is also the case when family concerns about financial responsibility of children and grandchildren, potential threats, or contingent liability threatens the intent of our clients. As a result, we find in many cases, notwithstanding the current environment where a simple will and a combination of these techniques will get the job done with great efficiency, it is nonetheless desirable to use a trust for more modest estates. We do this to provide privacy, to provide an overarching, self-executing strategy, and to accomplish a variety of objectives that are connected to our clients’ assets, but will change based on the fact pattern that evolves over time.

Trusts in Virginia still enjoy significant creditor protection for non-settlor beneficiaries in virtually every instance where the trust is properly designed with spendthrift trust provisions and can provide a significant and ongoing safety net for downstream beneficiaries. The type of trust that can be used has been simplified in many cases, so that a single trust focused first as a marital trust that is “QTIP-able” and is thereafter focused on children and their descendants can be used in a great many cases.

For larger estates, a two trust instrument that uses disclaimer trust structures can also provide for greater flexibility and can serve multiple purposes in conjunction with a “QTIP-able” marital trust. For wealthier clients, traditional credit shelter planning continues to be a viable structure and is one that should be examined carefully. We should also consider more advanced techniques such as ILITs as explored in our feature article. The questions of whether or not to use a trust, its structure, whether or not to use transfer-on-death and other beneficiary designations to transfer significant assets, how assets should be titled, and when access on the part of beneficiaries should be unfettered are all decisions that should be carefully thought through and actively discussed with our clients. Because we have more degrees of freedom than have ever been the case, as we are free from the specter of significant estate tax for those estates less than $10.68 million, more thought and analysis are a necessary part of the planning process. There is no substitute for modeling the results of an estate plan; running the numbers is critical.

This puts us in a position, however, where for the first time in many years, we can sit down with a client, discuss what the client really wishes to do, and add significant value by addressing a multitude of potential concerns and threats with greater freedom from tax constraints than we have enjoyed at any time in the last thirty years. Whenever the choices become difficult or the number of potential courses of action multiplies, a thoughtful and knowledgeable estate planning attorney who wishes to spend the time and energy to tailor a plan to the specifics of a client’s situation and the client’s intent and to address the client’s concerns provides an increasingly value-added service.

Whether you draw one estate plan per year or hundreds, the client focus should be paramount in the planning process. Our current environment presents problems and opportunities for estate planning lawyers as professionals. However, if we rise to the challenge, we can accomplish a great deal more than our clients might suspect and provide a service to them that is virtually irreplaceable. I encourage all practitioners to spend the time and energy to think through these issues for their clients.

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Endnotes:
4 See Id.
6 I.R.C. § 1014.

C. Arthur Robinson II has practiced since 1985, concentrating on taxation, including estate planning, estate and trust administration, and many areas of business and corporate law. He has advised, served on the boards of and in leadership roles in a variety of charitable and non-profit organizations. He is also a certified public accountant, an accredited estate planner, and a fellow of the American College of Trust and Estate Counsel.