

Q&A with Dykema's Michael Cumming

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Michael Cumming

Michael Cumming, a Detroit-based member and leader of the firm's Tax Practice Group, is the subject of Law360's Q&A feature, published on February 4, 2014. This article is reprinted below, with the permission of Law360 and its parent company, Portfolio Media, Inc.

Cumming's practice focuses on estate planning, probate and trust administration and related tax matters, including sophisticated tax planning. He also represents clients in probate and trust contests and premarital agreement negotiations.

Q: What is the most interesting or challenging tax problem you've worked on to date?

A: Oops! Does my trust say that? In the estate and tax planning area, my clients are individuals. Sometimes, they are simply too busy or distracted to focus on planning issues until trust terms smack them in the face. Recently, a client who thought he had settled on how he wanted to treat his children in trusts established for tax planning reasons found out the hard way that the terms he had simply "ordered up" from another tax planning lawyer were nowhere near up to the task.

Moreover, even the trustee he had chosen was hopelessly unprepared and not nearly sophisticated enough to handle the funds. Two events focused his attention. His son withdrew some lesser funds available to him at age 25 and blew them all. Plus, the assets he had funded into his other tax planning trusts for this son had evolved from illiquid and unmarketable closely-held corporate stock with an uncertain, modest value into cash proceeds worth \$40 million. Dad needed to change things—and quick—lest his spendthrift son make a much larger withdrawal!

Fortunately, the problems caused by the trusts written by the prior lawyer could be changed through radical surgery in the local probate court, which had jurisdiction to modify both the trust terms and the trustee. Constructive discussions with the son, which demonstrated the overall tax-reduction advantages of the new trust terms for his family, plus an approach that brought him and his sister, who had an identical problem, as part of the "team to solve the problem," led to a smooth court reformation, accomplished only one day before the agreement causing the "liquidity event" was inked by the purchaser.

Just under the wire!

Q: Currently, what is a pressing tax concern for your clients, and how are you addressing it?

A: I love my children, but their spouses? Not so much. The constant barrage of nasty divorce settlements in the media has frozen clients into inertia. They want to gift downstream to their children, but with marriages having only a 50/50 chance of surviving, they would rather not risk the family jewels (e.g., accumulated wealth or, frequently, a financial empire of closely-held businesses) being forcibly "shared" when sonny's marriage gets rocky.

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What many potential clients don't know is that there is a whole spectrum of planning vehicles—some with simultaneous tax-reduction benefits—that can allow for estate planning without risking loss of value through divorce.

The typical family-law solutions of prenuptial and post-nuptial agreements are always a first line of defense, but other vehicles like irrevocable gifting trusts that include discretionary income and principal terms, third-party trustees, limited powers of appointment and business entities with voting and nonvoting ownership interests all can provide the security to allow the client the freedom to engage in planning that will reduce taxes for the entire family.

Q: What do you anticipate being the biggest regulatory challenge in your practice in the coming year and why?

A: Act when its quiet on the legislative front. In my experience, when we are not hearing anything about new tax reform legislation and we know senators and representatives are talking in the halls of Congress, then you know something is brewing, probably bad. But, good clients plan ahead.

No one on either side of the aisle is happy with the present Internal Revenue Code. Change is going to happen, and that means in all likelihood today's planning opportunities will be history with the stroke of a pen. The Obama administration and others have repeatedly proposed simple rules that will take away the "building blocks" of tax-leveraged structures. The combination of the sequester, "tapering", the budget deadlock, debt-ceiling anxiety and general grumpiness with the present Internal Revenue Code means tax law change is practically inevitable and likely to occur later this year if for no other reason than revenue is drying up. Now is the time the smart clients are building estate and tax planning structures that will undergird their families for the next several decades.

Q: Outside of your own firm, who is an attorney in your practice area whom you admire, and what is the story of how s/he impressed you?

A: Clary Redd and Turney Berry are both sophisticated estate and tax planning lawyers who make complicated tax rules understandable to almost anyone, yet have a sensitivity to clients' family concerns. A little humor also helps! If an estate plan description sounds like a recipe for biscuits and gravy, you must be doing something right!