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The Strategic Objectives of Retirement: How to Set the Stage for Retirement Investing & Legacy Success

by Julie Jason, J.D. LL.M.

In this article, Julie Jason, J.D, LL.M, the author of *The Discerning Investor: Personal Portfolio Management in Retirement for Lawyers (and Their Clients)*[1], shares how her investment counsel[2] firm works with estate legal counsel to help high-net-worth clients navigate financial and estate planning. The goal is to set the stage for clients to think strategically about retirement, while preparing them to achieve their legacy wishes, sidestep unintended consequences, and avoid surprises for heirs and beneficiaries.

No matter your age, you will need to create a strategy that will help guide your investment decisions through each stage of life and prepare you for the decades that define retirement. At stake is your own and your family's security. How you formulate and execute that strategy depends in large part on you. Retirement investing and legacy planning is a very *personal* exercise.

Thinking strategically will lead to an action plan that tackles the more complex investment outcomes desired by retirees—creating *lifelong* financial security for yourself and your family, and potentially creating a legacy for either your heirs or charities, or both. Let's put a name on this exercise and define it.

Defining Personal Portfolio Management

I like the term "personal portfolio management"[3] to capture the idea that a retirement portfolio is unique to the individual, and requires a long-term commitment, much like running a family business.

The term "portfolio" has special meaning. In the words of Nobel Prize–winning economist and father of portfolio management Harry M. Markowitz, a portfolio is "more than a long list of good stocks and bonds . . . [it is a] balanced whole [that provides] protections and opportunities with respect to a wide range of contingencies."[4]

A "personal portfolio" is goal-oriented, meaning it focuses on your personal and unique situation and addresses the goals you want to achieve now and in the future.

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"Management" is the process of planning, executing, and, equally important, monitoring progress against goals, to adjust for changing markets, needs, and circumstances over the decades that comprise the investor's lifetime. This approach may be new to you (if you have never retired before) or old hat (if you have experience running a long-term enterprise).

At this point, I'd like to have you think about your personal situation as you plan your next move. We need to discuss time horizon considerations, your personal role in managing your retirement wealth, and how to assess financial expertise in order to match your particular needs.

Time Horizon

Not too long ago, a retirement timeline assumed you lived into your seventies, supported by a pension and Social Security retirement benefits. Today, pensions are almost nonexistent, life expectancies are greater, and financial success is a function of sound wealth creation and management. Moreover, in the best situations, our timelines extend beyond our lifetimes, to benefit heirs and charities.

It's important to understand that your retirement planning will encompass a much longer period of time than you might first envision.

Your Personal Role

In my experience, lawyers, accountants, business owners, corporate officers, and other successful individuals have a number of brokerage accounts, retirement accounts, and even financial relationships that have served them well. At some point (perhaps now), the strategic objectives of retirement push for the need to think things through with a fresh outlook—with the goal of developing a comprehensive retirement plan—one that runs smoothly and is easy for you to manage. As you look to retire, consider these questions:

- Will my current methods of investing serve me well in my retirement, which will hopefully last decades, and serve my legacy goals thereafter?
- What more do I need to know to be successful when dealing with retirement finances?
- Do I want to be in charge of multiple accounts?
- How do I get reorganized as I move into retirement?
- If I have gaps in my knowledge, how can I identify expertise to fill those gaps?
- How do I measure success with a retirement portfolio?
- How do I avoid mistakes?
- How do I define my job as an investor in retirement?
- Can I, should I, delegate the role to someone else?

Once you have clarity on your goals and capabilities, you can make a well-grounded choice about how to manage your retirement portfolio. You may decide to retain expertise or, if you have the training, interest, and time, you may decide to tackle the job yourself.

Four More Points to Ponder

These four points may help provide additional context:

1. **You have a retirement income gap**. If pensions and Social Security do not cover your living expenses, you have a "retirement income gap."[5] This means you will need to turn your savings into a cash flow stream that will not only last a lifetime but also outpace inflation and taxes and prepare you for the unexpected. You might also want to leave a legacy for children or charity, or both. This is a big-picture activity that needs to be conceptualized, coordinated, and managed over time. Having a retirement income gap increases the need for vigilance and planning and calls for organizing multiple accounts into a consolidated portfolio. (Someone who does not have a retirement income gap has a significantly simpler investment challenge.)

   Your spouse/partner is not interested in investing. If your spouse or partner is not interested in making investment decisions with you, then managing your own portfolio would create risk for him or her in the event you become incapacitated. To mitigate that risk, your spouse/partner would need to understand, among other things:

   - How a retirement portfolio should be structured; whether the economy and other news events should trigger buy, sell, and hold decisions; and the effect of taxes and inflation. The ability to make these assessments takes knowledge, typically gained over time.
   - How living expenses are covered. What are the sources, such as Social Security and pension income, cash produced by investments, and other holdings? And when is it time to redirect or reconsider how you are producing and spending cash flow, after inflation and taxes? The ability to either

prepare or review this information is essential in structuring a proper portfolio.

- How to assess conflicts of interest imbedded in financial relationships. To understand conflicts takes experience and the ability to scrutinize disclosure documents.
- How to interact with financial professionals who may have close long-standing relationships (should all recommendations be accepted; when and how to say "no"). This takes judgment, wisdom, and a dose of healthy skepticism.

2. **You are single**. If you are single, you will need to settle on who you can mobilize (children, siblings, friends, trustees) to make investment decisions for you in the event of incapacity. (The points just made in number 2 apply here as well.)

3. **You have limited time or interest**. If you would rather be pursuing other interests in your retirement, the effort and skills to manage a retirement portfolio can be a burden. Health issues, now or in the future, might limit your ability to make sound investment decisions. This is particularly important to address sooner rather than later, especially if you are finding your ability to handle the management role more taxing than you would like. This is not uncommon as one advances through one's retirement years.

If you are in any of these situations, think long and hard about the benefits of retaining expertise to manage your retirement portfolio. Who might those experts be?

Financial Expertise

Briefly, the U.S. Securities and Exchange Commission (SEC)[6] regulates financial service providers based on their business models under two separate statutes, one governing the giving of investment advice,[7] the other governing investment transactions.[8] You'll have a better feel for the type of expertise to retain as you read through this book; your choice depends entirely on your personal preferences and how much you want to be involved in the personal portfolio management process.

Setting Up for Success

For most people of means, retirement investing is very different from investing before retirement. The horizon is decades long, multiple goals need to be met, and spouses may not be as interested as you are in making financial decisions. Perhaps there are charitable interests that need to be addressed; potential mistakes need to be understood, and avoided; a plan needs to be considered, structured, and implemented—all executed, hopefully, within a framework of calm seas, sunny skies, and smooth sailing. The big message is: This is not the time to learn through trial and error.

Now, let's turn to avoiding miscues.

Accidents Can Happen

Certain legacies result by accident. That is, someone else makes the decisions for you. For example, if you don't have a will, intestate statutes[9] direct who will receive your assets after your death.[10]

As a word of caution, intestate statutes have quirks. For example, in Connecticut, parents of a married individual who has no children ("surviving issue")[11] receive a share of the decedent's assets, which, no doubt, will come as a surprise to the surviving spouse.[12] Another potential surprise is sharing one-half of the spouse's assets (except for the first $100,000) with the children, or even the children of the spouse's earlier marriage(s).[13]

Consequently, if you don't want to retain an estate planning attorney,[14] I strongly advise you to spend some time reading the intestacy statutes of the state you live in.

Legacies can also result by design. "By design," I mean that you direct who gets what and when through your estate planning documents and transfers that occur outside of the probate process.

You *Do* Have a Will

If you have a will, along with powers of attorney, health care proxies, and possibly living trusts and other estate planning documents, you will have better control over how your assets reach your intended heirs. However, it's not a "set it and forget it" exercise. From time to time, you need to have meetings with your estate planning attorney to address changes in your plans and changes in the law.

Between meetings with your attorney, a lot can change, inadvertently, unintentionally undoing the best-laid estate planning.

Events might occur that can change the recipients of your estate without the benefit of advice from your legal counsel. Examples abound. You add a child to your bank account as a joint owner without realizing the impact on your estate (and your potential exposure should there be claims against your child). You change jobs, start contributing to a new retirement plan, and remarry, while your former employer's 401(k) beneficiary designation naming your children from your first marriage remains unchanged.

Surprises can also come about because of the march of time. Plans need to evolve, as documents and tax planning may become stale due to changes in tax laws, inheritances, difficult-to-value assets, such as art collections or privately held businesses, deferred bonuses, larger-than-planned bequests to certain heirs due to capital appreciation after document drafting (or depreciation, in some cases), illiquid holdings that cannot be sold when estate taxes become due, gifts to charity, and changes in family structure and relationships.

Misconceptions about Wills

Does your will determine who gets your assets when you die? If you think of this as a trick question, it is in a way. In my work with clients and my interactions with readers and audiences through my writing and speaking, I can tell you that it is not uncommon to assume that the will directs all transfers at death. That is not the case.

It is important for everyone to understand what a will controls and what assets and dispositions are controlled by other documents that act as "will-substitutes." Will-substitutes are generally not governed by the laws of intestacy, wills, or probate.[15] An example of a will-substitute is a beneficiary designation for an Individual Retirement Account (IRA). This substitute trumps your will, thus avoiding probate, but not taxes.

If your will says you want your IRA to pass to your two sons, but your IRA beneficiary designation names your brother, your brother will inherit the IRA. In order for your sons to inherit your IRA, the beneficiary designation needs to name your two sons.

What if the vehicle is a 401(k) instead of an IRA? If your 401(k) beneficiary designation names your sons, they will inherit the 401(k)—unless you are married at the time of death. In that case, regardless of what your will says and regardless of the beneficiary designation, your surviving spouse becomes the beneficiary under ERISA (the Employee Retirement Income Security Act), which governs 401(k)s. ERISA allows spouses to opt out of this result, however, by signing a "spousal waiver." With a spousal waiver, you can name any beneficiary of your choice. Individuals who are divorced and remarried need to be especially vigilant of unintended consequences if they participate in ERISA plans. Also, if you divorce, and you previously designated your now former spouse as your beneficiary, you should immediately make a new designation unless prohibited by court order, because some courts have ruled that failure to remove a former spouse after divorce is the same as designating your ex-spouse as your beneficiary.

The spousal consent rules do not apply to IRA accounts. That is, your IRA account can have a non-spouse designated as your beneficiary without your current spouse's consent.

As you can see, some determining factors in who receives your inheritance are the nature of the asset and what laws apply. Another determining factor is how the asset is "titled."

Titling of Assets

Joint accounts and jointly owned properties transfer to the surviving joint owner(s) irrespective of what is provided in the will, as do transfer-on-death accounts and, where permitted, transfer-on-death deeds[16] that transfer real estate outside of the will. Assets held by trusts also pass outside of a will. Life insurance death benefits are paid through a beneficiary designation. However, although these properties, assets, and benefits pass outside your will, they will be included as assets in your estate for federal estate tax purposes because you are treated as the owner. Business owners have special issues with how their businesses pass to heirs, including whether heirs can (or want to) continue running the business. What actually happens is determined in part by the structure of the business, ownership interests, and contractual agreements. These are but a few of the complexities that call for understanding and evaluating your particular situation through the different perspectives of your trusts and estates attorney and your investment counsel.

In addition, in today's complicated financial world, assets might come with strings. You likely have a tax-deferred company retirement plan,[17] such as a 401(k), that is subject to taxable required minimum distributions (RMDs) after attaining age 72, or a Roth 401(k) that is subject to non-taxable RMDs after attaining age 72.

It is even more likely that you have a tax-deferred account you set up on your own (a "traditional" or "rollover" IRA), or a Roth IRA that grows tax-free, is not subject to RMDs during your lifetime, and is not taxable when withdrawn, assuming Roth requirements are met.[18]

Unlike Roth IRAs, Roth 401(k)s have RMDs for the account owner during her lifetime. In all cases, however, whether the 401(k) is pre-tax or an after-tax Roth 401(k) and whether the IRA is traditional, rollover, or Roth, someone who inherits from you will be subject to RMDs. Rules for beneficiaries are in flux. In the ideal situation, your legal and investment counsel will work together with you to address how regulations affect your beneficiaries. At the time of this writing, for example, the IRS has proposed regulations related to the SECURE Act[19] that will change how an inherited IRA will need to be withdrawn over time to avoid excise taxes (50% penalty). Other complications arise when considering conversions of tax-deferred retirement accounts into Roth accounts or rolling over Roth 401(k)s into Roth IRAs. Briefly, in the right circumstances, there is a way to isolate the value of the nondeductible contributions made into the IRA over years, thereby allowing the IRA conversion to be tax-free.[20]

Probate Courts

Probate courts handle and confirm the transfer of assets that are controlled by intestate succession or your will. Assets that pass through a will-substitute don't need to be processed by a probate court, since they transfer to heirs or beneficiaries at your death by design and operation of non-probate laws. That is, a joint account with right of survivorship is designed to pass to the surviving joint owner(s) at your death without needing the intervention of a probate court. In either case, confusion can reign, and surprises can occur, if you don't fully communicate with your trusts and estates attorney about your assets, how they are titled, and what your intentions are. Communication is important not only at the time of the creation of the estate plan but also when new property is acquired, assets are retitled, 401(k)s are established or rolled over, or beneficiary designations are updated.

Because your assets are financial, your investment counsel will be an important ally to prepare you to review your assets with your lawyer. In the case of my firm, we use a situation audit and something we call a "survivor analysis" to prepare our clients for a visit with their attorneys. These tools help review assets and open up a dialogue to coordinate, confirm, or change both non-probate and probate assets.

Introducing a Survivor Analysis

The first step before planning takes place is a situation audit. We look at changes in circumstances followed by a review of all documents that show the nature of assets, their ownership, titling, and how they will pass to heirs or beneficiaries. With this information, we provide a preliminary review of holdings and how those holdings would pass to heirs based on titling, the types of assets, and the terms of your current transfer documents (wills, trusts, beneficiary designations, deeds, etc.). The result is the survivor analysis, which shows where and how assets would flow for single individuals or married couples. If married, we alternatively assume one spouse dies before the other (case #1: assume the husband dies first; case #2: assume the wife dies first).

Intentions Come Next

The situation audit leads to questions, most importantly, what are your intentions and are they being met with the estate plan's current design? Often, a situation audit will identify changes that will need to be made; sometimes, because titling of assets may have been changed inadvertently by a non-lawyer who handles setting up bank accounts or brokerage accounts. The results of the situation audit and survivor analysis together with the checklist, and a review of intentions, including charitable interests,[21] sets up an agenda for guidance from the attorney.

Timing of Reviews

With the benefit of your investment counsel's reviews of asset titling and beneficiary designations, your estate planning attorney will be better prepared to perform the legal review and consultation that goes into estate planning.

Working as a team, your investment counsel and legal counsel will be the focal point for any indicated changes to your estate plan or any titling changes needed to implement your plan. In some cases, your accountant or tax adviser may be invited to be part of the team, especially when assets are substantial (high-net-worth[22] or ultra-high-net-worth[23]) and your personal situation has multiple considerations.

Clients with substantial and complicated holdings, such as art collections, real estate located in multiple states or overseas, business interests, and being subject to various tax regimes, require specialized assistance in reviewing the integration, implementation, and operation of financial and estate plans.

The frequency of the review may be tied to the calendar (once every two years, for example), or to asset changes (opening, closing, or transferring of accounts, such as a 401(k) rollover into an IRA, or a brokerage account is moved to another firm), or other events, such as when an insurance policy is purchased or allowed to lapse, a business is sold, art is acquired, or life events occur, such as the birth of a child or grandchild..

Working with Your Investment & Legal Counsel

Let's face it. Thinking about death and taxes is not high on the list of things to do for the average person —unless, of course, that person is facing the inevitable last hurrah.

Inertia is understandable. That's why we put a situation audit and a survivor analysis on the agenda periodically for our clients. By working with estate legal counsel, an actionable project emerges, and a reasonable goal is attained: achieving legacy wishes, while sidestepping unintended consequences. That's the ultimate benefit of having your investment counsel and estate legal counsel join forces; namely, helping you and your intended heirs and beneficiaries avoid surprises and achieve legacy goals.

A Note on Charities

Someone who is charitably inclined may decide to set up a private foundation during her or his lifetime, funding the foundation with a small amount of money, with the intention of having the foundation being fully funded after death through the will. Or, the foundation can be established after death through a testamentary devise in the will. However, the latter situation can be challenged, as the executor (or the trustees, if set up as a testamentary trust) may decide to distribute proceeds immediately after death.[24]

Other options include making lifetime donations to donor advised funds (DAF)[25] or directly to charity, a charitable bequest made in the will, or through a life insurance or IRA beneficiary designation.[26] These are the types of decisions that call for the expertise of both estate legal counsel and investment counsel working together with you to fulfill your wishes.

Also keep in mind that if you don't have a will (and your assets are not titled for non-probate transfers), the intestacy laws of your state of domicile will arrange for your assets to be distributed to your heirs — but never to charities.

A Note on Family Offices

When estates are in excess of $250 million, some families may want to set up a "family office"[27] that manages finances and investments. For example, billionaire Jeff Bezos, the founder of Amazon.com, manages venture capital investments and philanthropy through his own family office, called Bezos Expeditions.

In a family office setting, the position of estate legal counsel would normally be independent counsel; however, the reviews to prepare for estate planning decisions could follow the discussion in this article.

There is no regulatory definition of a family office, and there are few commonalities for good reasons. Every family is unique. Beyond managing assets, liabilities, investments, charitable interests, art collections, real estate, and taxes, some family offices groom younger generations to carry on their family businesses or their family charitable interests.

A resource to consider is the IPI (Institute for Private Investors), which was founded 30 years ago (1992), a membership organization of the ultra-high-net-worth. Membership is open to those with a minimum of $30 million. (Full disclosure: I am a former professional member of the IPI.)

Footnotes

1. Published by the American Bar Association, THE DISCERNING INVESTOR helps lawyers and their clients retire on their own terms. The book guides readers to develop a personal portfolio management strategy and make informed decisions about how to manage their investments. The book also introduces a methodology for discerning between different types of financial services for families who want to understand and lessen or avoid conflicts of interest. The author thanks Daniel J. Wintz, partner, Badura & Wintz Law, of Omaha, NE, for his contributions to this article, which was published as a digital download to the book. Attorney Wintz, a Certified Estate Planning Law Specialist, and a Fellow in the American College of Trust and Estate Counsel (ACTEC), is licensed to practice law in Nebraska and Iowa.
2. "Investment counsel" is a type of investment adviser that, in layman's terms, focuses on creating and managing portfolios tailored to the needs of individual clients. Larger investment advisers are regulated by the U.S. Securities and Exchange Commission (SEC); smaller advisers are regulated by the individual states in which they do business.
3. Professor George W. Trivoli wrote a book titled Personal Portfolio Management: Fundamentals and Strategies; however, that book is about the basics of investing.
4. Harry M. Markowitz, Portfolio Selection: Efficient Diversification of Investments 3 (Yale Univ. Press 1959/1970). Markowitz did not apply his theories to individuals.
5. To calculate your retirement income gap, answer the following questions: How much are you spending on an annual basis? How much Social Security and pension income are you taking in on an annual basis? What's the difference between the two? That's the retirement income gap.
6. Note that state securities authorities also regulate financial firms. For example, investment advisory firms that manage less than $100 million are excluded from SEC registration. Instead, these smaller firms generally register with state securities regulators under the laws of the states in which they do business. At the end of 2019, there were 17,000 state-registered investment advisers. See NASAA's annual report at https://www.nasaa.org/wp-content/uploads/2020/04/2020-IA-Section-Report-FINAL.pdf. NASAA is the North American Securities Administrators Association. See https://www.nasaa.org/industry-resources/investment-advisers/state-investment-adviser- registration-information/.
7. The Investment Advisers Act of 1940 (the "Advisers Act").
8. The Securities Exchange Act of 1934 (the "1934 Act").
9. When a person dies without having a valid will in place, his or her property passes by what is called "intestate succession" to heirs according to the law of the state of domicile.
10. Probate assets are assets held in the decedent's name alone at death.
11. Conn. General Statutes. Sec. 45a-437. "Intestate succession. Distribution to spouse."
12. One-half of the deceased spouse's assets (less $100,000) goes to the surviving spouse's in-laws.
13. Conn. General Statutes. Sec. 45a-437. "Intestate succession. Distribution to spouse."
14. If you do not have a will, you likely do not have an estate planning attorney. You will need to find one. A place to start is the trusts and estates section of the local bar association. Once you have the names of some estate planning attorneys, you will want to interview them to find the best fit for your situation. You may ask the attorneys for references of other clients who have similar circumstances to yours; however, some lawyers may be reluctant to share this information due to client confidentiality rules.
15. Will-substitutes may be governed by property laws such as joint tenancy with right of survivorship; contract laws relating to insurance and beneficiary designations; labor laws relating to retirement account beneficiary designations; contract laws relating to private agreements such as deferred compensation, equity compensation, and buy/sell agreements; business laws relating to organizational documents such as corporate bylaws, LLC operating agreements, partnership agreements, or professional license ownership requirements; statutory rules relating to payable-on-death financial accounts; statutory rules relating to transfer-on-death investment accounts, real estate, and in some states titled personal property such as cars or boats; trust laws for revocable and some irrevocable trusts; future interest laws for gifts where the donor retains beneficial ownership for life but currently designates who will be the owner(s) after her or his death; and domestic relations laws relating to prenuptial agreements and dissolution of marriage property settlements and support decrees.
16. Transfer-on-death deeds are available in 19 states. See Uniform Law Commission Real Property Transfer on Death Act at https:// www.uniformlaws.org/committees/community-home?CommunityKey=a4be2b9b-5129-448a-a761-a5503b37d884 and TRANSFER ON DEATH DEEDS SURVEY (Jan. 14, 2022) at https://www.actec.org/assets/1/6/Transfer_on_Death_Deeds_Survey.pdf?hssc=1
17. Bureau of Labor Statistics, U.S. Department of Labor, The Economics Daily, 68 percent of private industry workers had access to retirement plans in 2021; 51 percent chose to participate. at https://www.bls.gov/opub/ted/2021/68-percent-of-private-industry-workers- had-access-to-retirement-plans-in-2021.htm (visited May 19, 2022).
18. Roth IRA withdrawals are not taxed if they meet "qualified distribution" requirements. See IRS Pub. 590-B and Figure 2-1 from Chapter 2 of the publication.
19. The SECURE Act is the "Setting Every Community Up For Retirement Enhancement Act" (Federal Register Vol. 87, No. 37 Proposed Rules Released on Thursday, February 24, 2022, at https://www.govinfo.gov/content/pkg/FR-2022-02-24/pdf/2022-02522.pdf).
20. Depending on the situation, you may be able to transfer taxable assets from the IRA to a 401(k), thereby leaving only the value of the non-deductible amounts contributed and isolating basis in the IRA.
21. See A Note on Charities
22. High-net-worth is defined in the SEC's Form ADV Instructions as a "qualified client." A qualified client is defined in Advisers Act rule 205-3 as an individual with at least $1.1 million in assets under management with the investment adviser immediately after entering into the advisory contract (or having a net worth in excess of $2.2 million). See also A note on family offices
23. A different definition is used by wealth analysts, such as Wealth-X. Wealth-X divides "high-net-worth" into three levels: (1) "high-net- worth" is defined as net worth of $1 million to $5 million; (2) "very-high-net-worth" is $5 million to $30 million; (3) "ultrahigh-net-worth" is $30 million and up. World Ultra Wealth Report 2021, Wealth-X.
24. One rationale is the dollar amount going to the foundation may not be sufficient. However, I have personally seen this happen at a $5 million level. The cost of setting up a foundation has decreased dramatically over time with organizations such as

Foundation Source. For example, Foundation Source makes it possible to establish a new foundation with less than $1 million in initial funding. Foundation Source is the nation's largest provider of management solutions for private foundations.

25. A DAF is an account that allows grants to public charities.
26. The IRS defines an IRA beneficiary as any person, such as a spouse, child or an entity, such as a trust, that the IRA owner chooses to receive the assets of the IRA after he or she dies.
27. There are about 5,000 families worth more than $250 million in the US, according to the Family Wealth Alliance of Chicago, Ill.

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