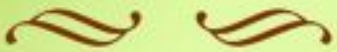
YOUR WILL & ESTATE PLAN



How to Protect Your Estate and Your Loved Ones

Harvey J. Platt

ATTORNEY-AT-LAW

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INTRODUCTION

Why Planning Is Necessary

If you find yourself approaching the topic of this book with reluctance, it is understandable. Perhaps, like many of us, you have little desire to dwell on consideration of the inevitable. In addition, you may think that your assets are so insignificant that no such planning is necessary. However, estate planning is a must for even those with moderate estates. And this planning must be implemented not only to assure that your distribution wishes are observed, but that attempts are made to effectuate tax savings. For example, perhaps you bought your house a number of years ago. As a result of increased values of property in your area, there may be a potential federal estate tax on your house and land of which you are completely unaware. Fortunately, with proper planning and the many devices and techniques that are available you can be sure that your estate will be distributed to your loved ones as you desire, and that the impact of potential taxes is minimized.

Estate Planning: What Is It?

Estate planning is the process that we undertake that prepares us for the transfer of our property to our heirs after we are no longer here. Estate planning is not a simple process. It is a moving target, since changes in circumstances may warrant revisions. Laws that impact estate taxes and distribution may be rewritten, which may also warrant revisions to your plan.

The basic reasons for you to plan your estate may be summarized as follows:

- It is you who will decide who will inherit your estate and which assets they will inherit
- It is you who will decide when your beneficiaries will receive their inheritance
- It is you who will decide who will manage your estate
- You will reduce the impact of transfer costs
- Where applicable, it is you who will choose who will raise your minor children

The Development of the Plan

The essential part of the estate plan is a will, or revocable trust. If you die without such an instrument in place, your property could be distributed under your state's laws of intestacy. Full discussions of dying with and without a will and what the will can and cannot do appear in chapters 3 and 5.

In the development of your plan, there is substantially more to do than create the testamentary instrument. There are three types of property that pass through your will: property that is solely owned, property that you own with someone else (that is not in joint tenancy with the right of survivorship or tenancy by the entirety), and community property. You need to identify your assets, itemize their values, and determine in what forms they are owned (individually or jointly); any business or real estate interests, compensation agreements, retirement plans, patents, and copyrights may require special attention. Life insurance policies, trust agreements, property settlements, or any other document bearing any assets and liabilities need to be examined. A detailed inventory will not only minimize the complications later on in locating your property but avoid the costs related to said proceedings. Chapter 1 provides lists of likely assets to help you create your inventory.

Meeting with Your Planner

This book is the product of more than forty years of experience in this field. If you read it and familiarize yourself with its contents, I honestly believe it will give you the impetus to think about your own circumstances and proceed with the formulation of your own plan. Of course, you should seek the advice of an expert familiar with estate planning.

Since your assets will not be exactly like everyone else's, and the needs of you and your family members will also be unique, the planning of your estate cannot be accomplished through a preprinted form, in an assembly-line manner. It requires a relationship between you and your planner. The overall objective of your estate plan is to fulfill your wishes, but you must be advised what the legalities and estate tax consequences of any particular distribution are.

Since estate planning, especially when the reduction of taxes is involved, is extremely complex, and may offer various possibilities, the planner should provide you with a memorandum of the highlights of your conference to be used as a memory aid.

Creating a plan that gives your heirs maximum wealth protection, that avoids unnecessary capital gains taxation, and that shelters assets from estate taxes to the highest degree possible is probably the greatest material gift any person can bestow.

CHAPTER 1

Developing Your Estate Plan

If you wish to create an appropriate estate plan, you have to consider your following personal information:

- Legal name and domicile
- Family members and other significant relationships
- Assets and liabilities and any other obligations
- Intentions with respect to inter vivos and testamentary dispositions

Generally, the state where you live has the jurisdiction to administer all of the real property (land and whatever is attached to the surface, such as buildings and trees) owned by you in that place as well as all tangible and intangible personal property located anywhere (tangible property is movable property that has a value of its own, as opposed to intangible property, which is usually rights to property or evidence of value, such as copyrights, easements, franchises, and stock certificates). If you are a permanent resident (domiciliary) in a state which is different from the state where you own real property, the state where the real property is located has jurisdiction with respect to its administration. Thus, an administration will be required in the ancillary administration state as well as in your domiciliary state.

Your domicile at the time of your death will generally determine the execution requirements for your will. Domicile is a factor in determining which state's law applies to the construction of your will or other documents, and may affect the rights of various beneficiaries, including rights of election.

Domicile or location of assets at death may determine which state or states has jurisdiction to impose a state death, inheritance, or estate tax. In addition, the laws of the domiciliary state at death may determine which assets must be used to pay the state or federal inheritance, death, or estate taxes.

Where you are domiciled is a question of fact and intent and is usually clear. If you own and use more than one residence, there may be difficulty in determining domicile.

Personal Assets and Liabilities and Other Obligations

In order to plan your estate effectively, you will need a list of your assets, with approximate values and the type of ownership, in addition to a list of significant liabilities and obligations. From this information it can be determined whether your estate will be in a taxable bracket and what estate tax or gift tax planning is necessary, as well as which documents should be created either during your lifetime or by will, in order to implement your estate plan.

Sources of information that you will need as references to make an accurate list of your assets and liabilities include:

- A financial statement prepared by you or your accountant
- A monthly or periodic statement of all or a portion of your investment portfolio, from you or your broker, money manager, or financial advisor
- A summary of your life insurance policies, which your insurance agent may either have or be able to compile
- Appraisals of assets that were prepared for insurance, loan, or other purposes

The types of assets that you own may be organized in the following categories:

- Personal assets
- Investment assets
- Business assets
- Retirement and death benefits

Your personal assets include jewelry, clothing, and other personal effects; automobiles, artwork, collections, household furnishings, and your homes.

Inter Vivos and Testamentary Dispositions

The major goal in estate planning is to make sure your wishes are carried out after your demise. In order to do this, you need to determine whom you desire to benefit, and how and when.

Beneficiaries

After ascertaining the preliminary information about your family, you will need to determine which family members or loved ones you wish to benefit, or which groups, organizations, or charities.

You must consider and provide for what would happen if any or none of the intended beneficiaries survive you, or in the event of a trust, if none of the primary beneficiaries survive until the final date set for distribution. You need to provide for such contingencies by naming an alternate beneficiary, which could be a relative or a charitable organization.

Method and Time of Distributions

In addition to determining who will be the beneficiaries, decisions need to be made as to how and when they will receive their distributions. This determination involves issues of control: control during lifetime and control after death. If you want to maintain the most control, you might contemplate a distribution in trust, either a testamentary trust or a revocable living trust. If you are not concerned with control, you might consider an outright living gift or an outright bequest or devise by will.

Some of the various forms of dispositions include:

(1) Outright distribution at death, by:
- Will
- Totten trust
- Beneficiary designation (such as on life insurance policy, bank account, retirement plan)
- Revocable inter vivos trust

(2) Distribution in trust, payable upon an event or date after your death, whether by:
- Testamentary trust
- Inter vivos trust, whether revocable or irrevocable

(3) Outright, inter vivos gifts

(4) Inter vivos gift in trust, via irrevocable inter vivos trust

(5) Partial gift, by use of tenancy-in-common or joint tenancy with right of survivorship or tenancy by the entirety

Which type of disposition is the most appropriate depends on needs and intent. You need to ascertain how, and in some cases why, you want to benefit certain people and what property should be used for that purpose. You might indicate that a beneficiary has a financial or domestic problem that might mandate the use of a trust with spendthrift provisions. Or you might be of sufficient wealth so that you could afford to make gifts or create an inter vivos trust, yet you might wish to retain control of your own funds during lifetime.

In addition, when considering testamentary dispositions, you need to consider what type of bequest or devise would be appropriate, whether it be specific, general, demonstrative, or residuary. In such case you would need to consider potential changes in assets and liabilities and how that would affect your wishes in addition to whether inter vivos gifts should be given in lieu of testamentary dispositions. Tax consequences also need to be considered, including income, gift, estate, and generation-skipping tax consequences, as well as who should bear the burden of such taxes.

Estate Planning Devices and Accompanying Documents

There are numerous estate planning devices and corresponding documents that are needed for various estate plans. These may be classified as "dispositive documents," those documents used to transfer assets, such as:

- Wills
- Revocable trusts
- Irrevocable trusts
- Beneficiary designations
- Documents transferring title

In addition, certain collateral agreements are used which may affect your right to effectively dispose of various assets, including

- Antenuptial (prenuptial) agreements
- Agreements to make a will or not revoke a will
- Buy-sell agreements

Certain documents executed in contemplation of death or disability may be useful even where they do not necessarily dispose of assets, such as:

- Durable power of attorney
- Anatomical gifts
- Living wills

Dispositive Documents

In addition to deciding who should receive your estate, it is necessary to decide when they should receive it. Thus, one decision that you must make is whether

an inter vivos or testamentary disposition is appropriate. For estate planning purposes, an inter vivos disposition occurs when you make a gift during lifetime or create an irrevocable trust for a beneficiary or beneficiaries. A testamentary disposition occurs when you transfer property upon death by a will or a revocable trust.

The choice between inter vivos and testamentary disposition depends upon your needs during lifetime and the reasons why you would want a beneficiary to receive the property, as well as the tax consequences of such transfer. For example, if you want to give a child a down payment to purchase a home and the child wants to purchase the home during your lifetime, then an inter vivos gift is appropriate. This choice may also be affected by the potential tax consequences. For instance, if you are married, then your spouse may join in the gift for gift tax purposes or each of you may make a separate gift in order to avoid a gift tax or reduce it. Further, if the child is married, you may decide to make part of the gift to the child and part to his or her spouse, or the gift may be made in installments over several years in order to avoid gift taxes. The primary factors to be considered in making the choice between inter vivos and testamentary transfers, however, is your ability to afford the gift during lifetime and the child's need for the gift immediately or in the near future. The tax ramifications are secondary.

In some cases, you may not have a choice between transferring the property during lifetime or at death. You may not have the ability to transfer ownership of an asset during lifetime. Retirement plans generally allow a participant to designate a beneficiary to receive any death benefits but prohibit a participant from assigning his or her interest during lifetime. In other cases, you may not have the choice of testamentary disposition, such as in the case of a tenancy by the entirety or joint tenancy with right of survivorship, unless the other tenant consents to change ownership during lifetime.

Testamentary Dispositions: Revocable Trust or Will

If a testamentary disposition is appropriate, then you must consider if a will or a revocable trust, or both, should be used. A revocable trust provides more privacy than a will, since most non-probate information is not available to public scrutiny. In addition, use of a revocable trust can avoid some of the delays that may occur during probate (although some states do provide for simplified or quicker methods of probate administration). Thus, distributions can usually be made faster under a revocable trust than under a will. In addition, a revocable trust may be used during your lifetime to administer your assets if you become disabled or incapacitated, thus avoiding a court-administered guardianship.

Use of a will can afford you more flexibility in types of ownership of assets during lifetime, because you can change ownership as you wish with a will, whereas assets passing under a revocable trust must be titled in the name of trustee of the revocable trust.

With a will, it is only "you" that needs to make the change.

With a trust, you may need not only "you" as the grantor to approve the change, but the trustee as well. Some of this inconvenience can be eliminated by making you the grantor and the sole trustee or a co-trustee.

There are also some income tax advantages to probate under a will that do not apply in the case of a revocable trust. In addition, sometimes a revocable trust is used in conjunction with a will, where the will pours over any assets owned in your name to the revocable trust when you die. All of these issues must be considered in determining which option is appropriate.

Both types of devices can provide outright distributions after your death. Both can be used to take advantage of favorable estate tax deductions, such as the marital deduction or the charitable deduction. Both can continue after your death if appropriate provisions are contained in the will or revocable trust.

Form of Ownership and Transfer

Assets must be owned in your name alone in order to pass under your will, whereas ownership of an asset must be transferred to and titled in the name of the trustee of a revocable trust in order for the trust to be effective. An exception may be in the case of a beneficiary designation, where you could continue to own the asset in your own name, but the trustee or the estate would be designated as the beneficiary in order for the proceeds to pass under the terms of the respective trust or will.

If an outright gift is desired, then assets need to be transferred and re-titled using the appropriate documents and procedures. In the case of real estate, a deed would be needed, whereas in the case of stock, the stock would need to be transferred by notation on the stock certificate or stock power as well as by complying with the requirements of corporate law and any applicable corporate documents, agreements, or procedures. In the case of a partnership interest, the partnership agreement as well as applicable partnership law would need to be considered to determine how to transfer ownership of the partnership interest. In the case of an insurance policy, the insurance company generally provides the appropriate assignment or transfer of ownership forms and determines the appropriate procedure. For example, it may be necessary to have the forms

signed and witnessed and filed with the insurance company, along with a copy of the policy, in order to effectuate a change of ownership.

If a gift is to be made in trust during your lifetime, then an inter vivos trust must be created and the asset must be transferred to the trustee. It will be necessary to satisfy the formalities, if any, required by law for executing the trust agreement, as well as to assure that all necessary trust elements exist. In addition, one would need to consider any other laws or agreements governing the asset being transferred in trust. For example, if shares of stock were to be transferred in trust, then one would also need to comply with the laws and rules applicable to that corporation.

If the property is to be transferred in trust, effective upon your death, then the way the property is owned would depend upon whether a revocable trust or a testamentary trust were being used to transfer the property. In the case of a testamentary trust, the asset would need to be owned in your name or the trustee would have to be designated as the beneficiary of the proceeds of such asset in order for the asset to reach the trust. In addition, the asset could be placed in trust only to the extent that asset was not consumed by claims, expenses, and taxes. In the case of a revocable trust, the asset would need to be transferred during lifetime to the trustee of the revocable trust, or owned by you and devised to the revocable trust, or the trustee would have to be designated as the beneficiary of the proceeds of such asset in order for the asset or proceeds to pass in accordance with the provisions of the revocable trust.

Collateral Agreements

When you plan your estate, you need to review any collateral agreements as well as plan for the use of such agreements in effectuating the estate plan. Collateral agreements include antenuptial agreements, agreements to make a will or not revoke a will, and buy-sell agreements.

Antenuptial (Prenuptial) Agreements

When you marry, you may consider entering into an agreement with your future spouse regarding what will happen if there is a dissolution of the marriage or if either spouse dies. Generally, the person with more substantial property wants the agreement. Many times, the provisions for dissolution may be more important than the provisions in the event of death. In other cases, where there is a substantial age difference or one party's health is failing, the death aspects of the agreement may be more important. Postnuptial agreements may also be entered into after the marriage.

The agreement may provide what assets, if any, the surviving spouse will be entitled to receive from the other's estate. It may also include a waiver of certain rights or property from the other's estate by the survivor. This type of agreement may create restrictions on a spouse's right to transfer assets during lifetime as well as upon death.

Agreement to Make a Will or Not to Revoke a Will

You may have entered into an agreement to make a will disposing of your property in a certain way, or an agreement not to revoke an existing will; or a court may have imposed such an agreement upon you, in a divorce or separation decree or in a divorce or separation agreement incorporated into such a decree. The impact of these restrictions upon your estate plan must be considered.

Buy-Sell Agreements

Buy-sell agreements are used for many business and investment assets. In the event that an owner dies, a buy-sell agreement may require the estate of the owner to sell his or her interest to the other owners or to the entity itself. Alternatively, the agreement may give the surviving owners or the entity the option to purchase the deceased owner's interest, or the surviving owners or the entity may have the right of first refusal in the event the beneficiaries who receive the interest want to transfer their interests at any time. The agreement may also use a stated amount or a formula to determine the purchase price, or may designate the amount offered by a bona fide third party. These type of provisions may be contained in agreement designated as a "buy-sell agreement" or it may be part of a partnership or corporate agreement or the document by which the corporation or partnership was chartered or created.

These agreements are used for many reasons. One is to assure that the entity can continue to function, without the dissent that may be created by new owners upon the death of an owner. These agreements are often used as a mechanism to establish the value of the interest upon the owner's death, for purposes of state law and federal tax laws.

You must determine how the provisions of any such document affect your estate plan, your flexibility in how the asset is owned, and how it may be transferred during lifetime or upon death.

Documents Executed in Contemplation of Death or Disability

In the creation of your estate plan, you should consider planning for the possibility of your disability or incapacity, as well as deciding what steps should be taken in case a terminal illness leads to a coma or a vegetative state, or whether, at death, you wish to donate organs. Documents that may be drafted to effectuate these wishes include durable family powers of attorney, anatomical gifts, living wills, and health care proxies.

Durable Powers of Attorney

A durable power of attorney is a special power of appointment sanctioned by some legislatures. It operates like other powers of attorney, except that it is not revoked by reason of the incapacity of the grantor of the power, unless the grantor is adjudicated incapacitated by a court and a guardian is appointed. Thus, a durable power of attorney may be a substitute for a guardianship. Such a document can enable the incapacitated person's designated agent to handle his or her financial affairs without having to apply to a court or incur high costs or undergo court scrutiny. This type of power is also an alternative to a revocable trust, or sometimes it is used in conjunction with one.

Since a durable power of attorney is a creature of statute, it is necessary to comply with the statutory provisions of each state in order to have a valid power. In many states, only certain family members may serve and the power must contain some reference to its durability. Some statutes mandate the use of specific language or of substantially similar language. Careful consideration should be given to the type of specific powers to be included in the document, such as the power to make gifts or to purchase flower bonds, and the power to sell real estate without court order.

Anatomical Gifts

Some persons want their organs to be available for transplants or for scientific or medical school use. Many jurisdictions have considered the question of who has the right to dispose of a person's body after his or her death. The Uniform Anatomical Gifts Act is applicable in many situations. Under this act, the testator may make such a gift in his will; the gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated or fails for

any reason, the anatomical gift is still valid. In some cases, the intention to make such a gift may be designated on the donor's driver's license.

Living Wills

In many jurisdictions, a person has the right to determine whether artificial procedures will be used to keep him or her alive when that person is terminally ill. In addition, there may be issues as to whether a person can refuse sustenance, such as food or water, when he is dying or does not wish to live. These issues often arise when the patient is incompetent or comatose and therefore unable to make a decision for himself.

Various jurisdictions authorize a person to express his wishes in some way and provide that medical personnel will not be subject to criminal or other liability for obeying such wishes. Increasingly, people are drafting "living wills" to make their intentions on these issues known. In some jurisdictions, a statutory form is available. In others, the rules have been created or are being created judicially, and a form must be drafted to suit the client's needs.

Health Care Proxies

A health care proxy or durable power of attorney for health care involves appointing another person to make medical decisions when a person is mentally incapacitated.

CHAPTER 2

The Designation of Your Beneficiaries

A beneficiary is a person who is entitled to receive benefits from an estate or a trust. The selection of a beneficiary requires the creation of an order of selection. As a general rule, the primary concerns are of those persons who are the nearest to you. If your estate is not in a position to provide for both your spouse and children, the spouse, under normal circumstances, is favored as the primary beneficiary.

After providing for the spouse, you can select bequests for other primary beneficiaries: parents, children, siblings, and perhaps charities.

The Spouse

In the great majority of states which subscribe to the common-law property ownership system, a surviving spouse will, by statute, have a right to make a claim to a deceased spouse's estate. These statutory rights are elective rights to receive a certain portion of the estate.

As such, our states are split into two different kinds as to the ownership of property by a spouse: community property and common law states.

Alaska (if husband and wife enter into written agreement), Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington, and Wisconsin are community property states. The rule of these states is that during the marriage of the spouses, all property acquired by them, no matter which one acquired the property or the value thereof, is owned by both spouses, in equal shares, as community property. Not included in this rule is property that is received by a spouse during the marriage by gift or by inheritance.

The property of a spouse which is not classified as community property is treated as the separate property of the spouse. Any property a spouse has prior to the marriage will be considered separate property after the parties are

married. Therefore, property owned by each spouse in a community property state will be his or her separate property, in addition to one-half of the community property. There is no legal obligation on the part of a spouse to leave a surviving spouse, in a will or trust, his or her community property or separate property.

All other states, except for Louisiana and the District of Columbia, are common law states. In common law states, there is no law that property acquired by the spouses during the marriage is owned equally. The surviving spouse in the common law states will usually have the right to receive a certain percentage of the deceased spouse's estate, which protects the surviving spouse from being disinherited.

In most of the common law states, a surviving spouse is usually entitled by statute to claim at least one-third of the estate of a deceased spouse, notwithstanding the terms of the deceased spouse's will. The claim can also extend to other property of a deceased spouse that may not pass through a will (non-probate). The amount of a spouse's elective share can depend on whether there are children surviving a deceased spouse and whether the surviving spouse has received any non-probate property through trusts or joint ownership.

Any spouse can sign a waiver wherein the spouse agrees to waive all claims he or she may have to the other spouse's estate. Such a waiver is required to be in writing and is usually provided in a pre- or postnuptial agreement.

In a subsequent marriage, if the spouses have children by a prior marriage, a waiver is normally created to protect the inheritance of the children.

If You Move

What is the impact if spouses move from a non–community property state to a community property state?

The states of California, Idaho, and Washington consider the property acquired by the spouses in the common law state as if it had been acquired in a community property state. This type of property is called "quasi-community property."

The remainder of the community property states do not employ the quasi–community property rule. These states recognize the rule of the state where the property was originally acquired. However, the states of Arizona and Texas recognize quasi-community property for matrimonial purposes, but not for purposes of a will.

As a general rule, when spouses relocate from a community property state to a common law state, the spouses usually retain their respective one-half interest in the property acquired while they were living in the community property state.

Common Law Marriages

Common law marriages are only recognized in certain states: Arizona, Colorado, Georgia (if before 1/1/97), Idaho (if before 11/1/96), Iowa, Kansas, Montana, New Hampshire (under certain conditions), Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah, and in the District of Columbia. In order for a couple to be married under the common law, they have to have held themselves out to the public as husband and wife.

A husband and wife can, through an agreement, set forth the terms of their marriage, notwithstanding the laws of the state of their domicile.

Children

As a general rule, you are not required to leave anything to your children. If you are not leaving anything to your children, you should state so in your will or trust. Some states do have laws that provide for children. Children who are born after the date of a will are given certain rights if they are not mentioned. The state of Florida requires that a homestead (residence) be left to a surviving spouse or, if none, to surviving children. It is always recommended that if you disinherit a child, not only should you state that you have done so, you should set forth the reasons for it. This is also true if you leave your children different amounts or different types of bequests, i.e., one outright and the other in trust. Children need to be told why there are differences or why they are omitted. Such expressions on your part may avoid future conflicts that could result in litigation and estrangements.

Partners Who Are Not Married

The intestacy laws of the states make no provisions for inheritance for partners who are not married. Persons in these circumstances can provide for their respective inheritances by will or trust. Furthermore, such individuals can provide for their respective inheritances by agreement which will be enforceable and affords protection for persons in this situation.

What Happens if the Property of an Estate Is Insufficient

Most states provide for an abatement of a bequest if the estate's assets are not sufficient to pay the cash bequests. Each state has its own rules as to the method

of abatement. A person can protect against the abatement of a legacy by specifically providing for a proportionate reduction of all of the cash bequests, so that they can all be made, even though in a lesser amount.

Chill Clause

A way to discourage challenges to a will is to insert a provision that an unsuccessful challenger will be disinherited. This provision is usually referred to as an *in terrorem* clause. Most states enforce this non-contest provision.

Alternate Beneficiaries

In the event a primary beneficiary should predecease you, an alternate beneficiary should be designated. If a legacy lapses because there is no alternate named, the legacy will usually pass to the residuary beneficiaries of the estate, or, if there is no residuary clause, it will pass under the intestate laws of the state. However, a legacy to a child who predeceases his parent will, in most states, pass to the predeceased child's children (*per stirpes*).

Pets

Often people consider pets a part of their immediate family. Many people therefore are desirous of providing for their pets. A beneficiary is usually defined as a person or a legal entity, and an animal is considered a piece of property. In most jurisdictions, the only way to effectively make a gift is to create a conditional bequest. Under this type of bequest, you leave your pet and a sum of money to a caretaker with the promise that the fund be used to take care of the pet.

In 1996, New York state created the "honorary trust for pets" which is a law that permits a trust to be created for the care of a designated domestic or pet animal. Under the statute, the trust terminates when no living animal is covered by the trust, or at the end of twenty-one years, whichever occurs earlier.

The selection of your beneficiaries is an important process, which must take into consideration their legality, the estate tax consequences, and the effect the selection will have upon your survivors.

Different Kinds of Beneficiaries

- Primary Beneficiary: The first beneficiary to receive a specific gift of property is the first trust beneficiary.
- Alternate Beneficiary: A person or organization that is designated if the primary beneficiary does not receive; for example, if the primary beneficiary predeceases the testator.
- Life Estate: A life estate is a legacy where a beneficiary only has the use of the property which is the subject of the life estate during the beneficiary's lifetime. Upon the termination of the life estate, a remainder beneficiary is usually designated. Life estates can be created covering real property or tangible property, such as objects of art. If a life estate is created for a residence, the life tenant normally has the right to use the residence during his or her lifetime.
- An Organization as a Beneficiary: An organization can be a charitable entity or an unincorporated association, such as a union. Property can be left to any organization, but they usually are federally tax-exempt charities. By being tax free, any gift to a tax-exempt charity will qualify for a charitable estate tax deduction.
- Adopted/Out-of-Wedlock Children: The vast majority of states treat adopted children as children of the blood when referred to in a will. However, the status of out-of-wedlock children is different. For inheritance purposes, most states recognize an out-of-wedlock child as a child of the mother unless the child was formally released by the mother for adoption. An out-of-wedlock child is not recognized as a child of the father for inheritance purposes unless the child has been legally acknowledged by the father or by a judicial decree.
- Residuary Beneficiary: It is important to designate a residuary beneficiary. The residuary estate includes all property of the estate that is not left by the pre-residuary clause and specific gifts. The residuary only passes property that passes through the will as probate property. Other properties, such as non-probate assets which include jointly owned property, property passing by a beneficiary designation (retirement plans and life insurance), pass outside of the will. Failure to provide the residuary beneficiary could result in the residuary assets passing by the intestate laws of your domiciliary state.
- Alternate Residuary Beneficiary: A person or organization designated if the primary residuary beneficiary does not receive it. An alternate residuary beneficiary should be designated in case the primary residuary beneficiary predeceases you.

Survivorship Requirements

A survivorship period means that a beneficiary must survive the testator for a certain time period in order to inherit his or her legacy. The important reasons for providing survivorship periods is the avoidance of duplicate probate costs; possible tax savings; and making sure that your estate passes to the beneficiaries you have selected. For estate tax purposes, you can provide that if your spouse fails to survive you by up to 180 days, then your spouse will be deemed to predecease you.

The major concern is what happens if both spouses die in a common disaster. If no survivorship period is set forth in their will, in most jurisdictions each spouse is deemed to have survived the other, so that each spouse's property will pass to his or her respective alternate beneficiaries. If individuals owning property jointly die in a common disaster, the property will be divided in half and distributed to each owner's estate.

Disinheritance

When you disinherit a person, you totally exclude the individual from your estate. In most states, except for a spouse, you are not legally required to leave anything to a person. However, as has been mentioned, you must leave your residence in the state of Florida to your surviving spouse or minor child.

What Is a Trust?

A trust is a legal entity that can be created in your will. In order for the trust to be effective, you need to designate:

- The beneficiary of, that is the person who benefits from, the trust property
- The trustee who is the legal titleholder to the trust property and who will administer the property of the trust. An alternate trustee should be designated
- The assets that will fund (principal or corpus) the trust
- The terms and conditions of the trust
- The trustee's duties and powers and the beneficiary's rights

In a discretionary trust for the benefit of a class of persons (children), the trustee can sprinkle the benefit of the trust (income/principal) among the beneficiaries in such proportions as the trustee determines, even excluding a beneficiary. Usually in a trust of this kind, when the youngest beneficiary attains a certain age, the trust is divided into separate trusts for each beneficiary subject to trust provisions with distributions of the trust's principal made at certain ages (20/30/35).

The Uniform Transfers to Minors Act

The Uniform Transfers to Minors Act ("UTMA") can be provided for in your will. This can be utilized if you are making a gift to a minor. In your will, you designate a custodian to hold the gift under the UTMA. If you have more than one gift, you can designate a custodian for each gift.

The custodian cannot be a corporation, it must be a person. Only one custodian and one successor custodian can be designated. The authority of the custodian in the administration of the gift is extensive and without court supervision. The custodian normally has the discretion to use the gifted property as he or she determines, so long as the use is in the best interest of the minor.

In most UTMA states, the custodianship must end at the beneficiary attaining either age eighteen or twenty-one. In some states the age can be extended to twenty-five. Some states establish an age at which the beneficiary is to receive the property, but permit a change within a certain age range.

South Carolina and Vermont are the only states that have not adopted the UTMA.

The decision on whether to create a trust for a minor or use the UTMA usually depends upon the terms of the custodianship, and the amount of the gift. If you use the UTMA and die before a child reaches twenty-one or up to twenty-five, a custodian can manage the property without supervision. If a child does not receive the balance of the gift until age twenty-one, the normal age for

States That Let You Change the Age at Which a Minor Receives Property

	Unless it is changed, the minor receives the property at designated age:	**The age can be changed to:**
Alaska	18	19 to 25
Arkansas	21	20 to 18
California	18	19 to 25
Maine	18	19 to 21
Nevada	18	19 to 25
New Jersey	21	20 to 18
North Carolina	21	20 to 18
Virginia	18	21

completing, or nearly completing, his or her higher education, using the UTMA is excellent planning, since the gift will be used for this purpose.

In a state where the gift must be turned over when the child attains eighteen years of age, parents may not elect to use an UTMA, because they would not want their child to have uncontrolled access to such property at that age.

States that have adopted the Uniform transfers to Minors Act

State	Gift Must Be Released When Minor Reaches Age:	State	Gift Must Be Released When Minor Reaches Age:
Alabama	21	Indiana	21
Alaska	18 (can be extended up to 25)	Iowa	21
Arizona	21	Kansas	21
Arkansas	21 (can be reduced to no lower than 18)	Kentucky	18
California	21 (can be extended up to 25)	Louisiana	18
Colorado	21	Maine	18 (can be extended up to 21)
Connecticut	21	Maryland	21
Delaware	21	Massachusetts	21
District of Columbia	18	Michigan	21
Florida	21	Minnesota	21
Georgia	21	Mississippi	21
Hawaii	21	Missouri	21
Idaho	21	Montana	21
Illinois	21	Nebraska	21

State	Gift Must Be Released When Minor Reaches Age:	State	Gift Must Be Released When Minor Reaches Age:
Nevada	18 (can be extended up to 25)	Rhode Island	18
New Hampshire	21	South Dakota	18
New Jersey	21 (can be reduced to no lower than 18)	Tennesse	21
New Mexico	21	Texas	21
New York	21	Utah	21
North Carolina	21 (can be reduced to no lower than 18)	Virginia	18 (can be extended to 21)
North Dakota	21	Washington	21
Ohio	21	West Virginia	21
Oklahoma	18	Wisconsin	21
Oregon	21	Wyoming	21
Pennsylvania	21		

CHAPTER 3

Your Will

The will is probably the most significant part of your estate plan. There is no set format for a will, but the goal of all wills is usually the same. By creating a proper testament, you will establish the orderly distribution of your property, and the conditions upon which it will be given to your beneficiaries. The basic purpose of your will is to clearly and unequivocally set forth your wishes. The location of your permanent residence will dictate the rules that are applicable in the disposition of your belongings through your will and what limitations exist on your ability to bequest what you own. These limitations may revolve around your spouse, children, charitable contributions, and the duration of a trust. A complete and appropriate will contains required basic provisions and selected special provisions.

If you should die without having a valid will, all property other than assets that pass by beneficiary designation or by joint ownership, will pass by intestacy to your closest relatives pursuant to the intestate laws of the state where you are domiciled except for real property situated outside of the state, which will pass to your heirs under the laws of the state where the real property is located.

Creating a Valid Will

In order to create a proper will, you should consider the answers to the following questions:

- Do I want special funeral or burial directions?
- Do I need to provide for the maintenance of my family during the administration of my estate?
- Who should be the beneficiaries of my:
    - tangible personal property?
    - real property?
    - retirement benefits?

  - business interests?
  - miscellaneous liquid assets?
- Should I make cash gifts and, if so, to whom and in what amounts?
- Should I make specific gifts and, if so, what items and to whom?
- Is it necessary for me to create trusts for any of my beneficiaries?
- If my estate is taxable, how will the tax be paid?
- If I leave children who are minors, who should be their legal guardian?
- Who should be my executor and trustee?
- Do I need to make any personal statements?

What a Will Cannot Do

In order for a will to be valid, in most states, certain limitations must be taken into account.

A surviving spouse in most states cannot be disinherited. He or she is normally entitled to inherit a certain amount of a deceased spouse's estate, but in most states his or her share must be distributed outright and not in trust. Some states, in lieu of requiring a spousal share, provide for a surviving spouse to receive a widow's allowance.

Usually, under most state laws, children may be disinherited. However, certain states provide that a child must be given at least an intestate share, unless he or she is disinherited intentionally. Furthermore, there are states that provide that an adopted child or a child born after the date of a will is entitled to an intestate share if the will makes no provision for him or her or if the child has not been given a share of the parents' estate through gifts made during their lifetimes.

Most states have a rule against permitting trusts to last in perpetuity. However, these rules do not apply to charitable trusts.

Some states do not permit more than a certain amount of the estate to pass to charity, if certain persons are living at the death of an estate owner.

Illegal legacies that are strictly in violation of the public policy of a state are not permitted. Bequests to promote illegal activities or those requiring divorce or separation of a beneficiary from a spouse are considered not lawful. In certain circumstances courts have held a conditional bequest valid, where a beneficiary is required to adhere to a particular religion, or renounce a particular religion, or marry or not marry a person of a particular religious persuasion.

The Inventory

Before you can create a detailed and accurate will, an inventory of your property needs to be compiled. The inventory should set forth not only the market value of the assets but how the property is owned. Only assets that are owned by you or those assets that are shared (community property) or owned as a tenant in common will pass on your death under your will. Assets that will not pass under your will are those jointly owned, or in a trust, or those that have beneficiary designations, such as life insurance, pensions, and retirement accounts, or pay on death property, such as certain bank accounts or savings bonds.

Capacity to Make a Will

Every person who signs a will which is valid needs the mental ability or capacity to do so. The most important element of capacity is having a mind that is sound. For a person to be considered of sound mind in the making of a will, it is necessary at the time of its execution that he or she:

- Know the amount and nature of his or her assets
- Know who would inherit his or her estate if he or she died and did not have a will (persons who would inherit under the laws of intestacy)
- Must understand the plan for the distribution of his or her assets

In most states, in order to execute a will, a person usually must be at least eighteen years of age.

Will Challenges

A will can be challenged on a person's lack of capacity, and it can also be challenged on the grounds that a person was unduly influenced in the making of a will or that there was a presence of fraud. A challenge of undue influence is normally based upon the fact that the will expresses the wishes of the person who exercised influence upon the testator and the will is not the testator's will but the influencer's will. Proof of undue influence usually revolves around a showing of a confidential relationship existing between the influencer and the testator. If a challenge of undue influence is successful, in most instances, the tainted portion of the will is thrown out and the remaining portion if left alone. Fraud in the making of a will occurs when a person influences a testator to write

a will, or a provision of a will, based upon false information. Fraud in the execution of a will occurs when a person tricks a testator into signing the wrong document.

Basic Will Provisions

The introductory provisions of the will traditionally provide the name of the testator, domicile, revocation of prior wills and codicils; the payment of all debts (usually not those secured by liens) and personal administration expenses; and any special funeral and burial instructions.

The document will also contain provisions for income to be distributed during the administration of an estate, where the estate may be complex and/or illiquid.

Bequests

Provisions to the will list the bequests/legacies of the testator. The different types of bequests/legacies are (1) specific property bequests; (2) bequests of money; (3) bequests of money to be paid out of a specific source; and (4) bequests distributable out of the residue of the estate. In a will, a person can forgive a debt that is due and owing to him or her. Any kind of debt may be released.

If an estate does not have sufficient assets to pay its debts and expenses, all bequests will be reduced or abated. The residuary bequests will be first reduced; thereafter, the general money bequests will be reduced, followed by the money bequests payable out of specific sources.

Bequests can be conditional upon a pecuniary formula which would provide that they will only take place if the net estate is at least a certain amount.

Tangible personal property, consisting of personal effects such as furniture and furnishings, jewelry, clothing, works of art, is usually enumerated in a separate article.

Gifts of real or personal property that are specific may become moot if the specific item is not owned at death. You may wish to prevent such a happening by setting forth an equivalent amount of cash. Real property located outside of your domiciliary state will necessitate an ancillary probate proceeding in the situs state in order to pass title to the property. The use of a revocable or living trust or joint ownership are ways to own out-of-state property in order not to be subject to this type of additional judicial proceeding.

If a bequest is placed in a trust, you need to indicate when and under what circumstances the income and principal is to be distributed; how long the trust will last; and who will be the remainder beneficiaries when the trust terminates.

If the will creates a trust, you should consider the extent to which trust principal may be withdrawn by a trust beneficiary or withdrawn by the trustees on behalf of the beneficiary. If a trust is a non-marital trust, the power of withdrawal of principal by a beneficiary must be limited to the greater of $5,000 or 5 percent of the trust principal per year, in order for the power not to be considered a general power and result in adverse estate and gift tax consequences.

If a trust includes oil and gas interests, special powers need to be provided in order for the trustee to deal with such interests. The subject of trusts is extensively covered in chapter 10.

A gift to a class may be made to persons not individually named who fit a general description or class, such as children, issue, descendants, grandchildren, brothers, sisters, cousins, or the like. The class may be set up to include unborn persons. If the testator wishes to include adopted children or after-born children within a class, or to exclude them, the will should provide specifically. In certain circumstances, the testator may want to address whether children born out of wedlock are to be included in a class. Generally, membership in the class is determined as of the date the bequest is intended to take effect, which might be the date of the testator's death or some later date, and possibly a date before the testator's death.

The residuary clause of the will disposes of the property that remains (the residuary) after all specific bequests and devises have been set forth. If a testator is married, the residuary usually passes to the surviving spouse. If there is more than one beneficiary of the residuary, the percentages of each needs to be set forth. In addition, if a beneficiary fails to survive, an alternate should be provided.

Minors and Beneficiaries with Special Needs

If a beneficiary is a minor, a guardian of his or her property should be designated. In most instances, a trust is preferred over a guardianship because of broader powers and control. If minor children are left, legal guardians should be designated as well if there is no surviving or qualified parent.

If a beneficiary is receiving government entitlements or is entitled to receive such benefits, the beneficiary's share of an estate needs to be placed in a trust that will protect against the loss or qualification of such benefits.

Trust benefits covering maintenance and residential requirements should be included in a trust for a minor so that all expenses including housing and education are covered. The testator or testatrix should always, in advance of designating a guardian, discuss the same with the person(s). Alternate guardians

should also be designated. It is not the best arrangement for the guardian to be the sole trustee of a trust for his or her ward. If a married couple are designated as guardians, and they get divorced during the course of the guardianship, you may wish to set forth alternates so that your children are always being raised in a family atmosphere.

Lapsed Legacies

A legacy is said to lapse if a beneficiary dies before the testator, or after the testator but before the legacy vests (such as when an interest is contingent on surviving a life tenant), or if the beneficiary is unwilling to accept the legacy. State law governs, absent a will provision dealing with the disposition of lapsed legacies. As a general rule, lapsed legacies fall into the residuary estate. Anti-lapse statutes in some states provide for the legacy to go to the issue of the testator. If there is a lapse of a residuary legacy, the property subject to the legacy may pass as though there were no will, that is, according to the laws of intestacy or inheritance. A will provision can control the disposition of lapsed legacies in the way that the testator desires, rather than as provided under state law.

Estate Payments

In most instances, the payments of debts, taxes, and administration are provided to be paid as an expense of the administration of the estate. In a will, it is usual to use a tax apportionment clause to prohibit the marital share from any tax responsibility. In most states, the marital share cannot be burdened with estate taxes. The testator can allocate the tax burden to be borne either by the estate or by some or all of the beneficiaries.

Order of Death

It is always important to ascertain in what order the testator and a beneficiary died or in what order two or more beneficiaries died. Most state laws provide that if two persons die under such circumstances that it cannot be determined who died first, it is presumed that each is deemed to have survived the other. However, you can provide a different presumption in a will. If a marital deduction bequest is involved and if the bequest is conditioned on survivorship from up to a six-month period, and the survivor does not die within the time limit, the bequest will still qualify for the marital deduction.

Fiduciary Powers

The executor is limited to powers of investments under the law of the jurisdiction of the estate; however, a will may provide greater powers. The basic function of the executor is to gather the assets of the estate and liquidate and distribute them as soon as possible. If the executor retains an asset beyond a reasonable time and the estate suffers a loss, the executor can be held personally liable. The executor can face a risk of personal liability if cash is retained too long without putting it in an interest-bearing account. An exception to the general rule against investment permits the executor to invest in short-term government paper. If the maturity dates are not geared to the estate's cash requirements, the estate may suffer a loss if the executor is forced to sell them before maturity. Investment in money market funds may produce higher yields than short-term government paper. The testator may want to give the executor broader powers.

However, a trustee is in quite a different position. A trustee has implied investment powers if none are given. In certain states, the trustee is limited to legal investments. In other states, the trustee is subject to investment rules. The testator can override all of these restrictions by providing the trustee with broad discretionary powers. The latitude that should be given a trustee should depend on the trustee selected and the capabilities of the trustee.

In the absence of a limiting provision in the will or trust, state law confers a panoply of powers on the executor or trustee. One may add to, eliminate, or limit the powers conferred by state law. Automatically, in a will or trust, statutory powers are incorporated in the instrument and need not be set forth. However, if you relocate, the statutes of your prior state will not be included. It is therefore suggested that the powers desired be specifically set forth in the will or trust. You must decide whether the executor or trustee you select is to be exempt from providing a bond or other security and the extent to which a fiduciary is to be exonerated from liability for losses incurred by the estate or trust.

Business Interests

If the estate includes a business interest, such as a corporation or partnership or sole proprietorship, a number of planning opportunities are available and need to be taken into consideration.

If the testator holds a partnership interest, authority needs to be conferred on the executor or trustee to deal with the partnership interest.

Where the testator is the owner of an interest in a business that is closely held, to be managed by a trustee after his or her death, the will must expressly

authorize such management in order to avoid state law problems with diversification, and conflicts of interest in the case where the trustee is also an officer, director, or employee of the corporation. If the business represents a substantial portion of the estate and if there are "passive" estate beneficiaries who are not involved with the operation of the business, the issues are even more complex. A provision permitting the retention of the estate owner's assets at death should also give the executor/trustee the discretion to liquidate, merge, or sell the business.

Choosing an Executor

In selecting an executor, you should consider whether an individual is able to perform the duties of an executor: marshal your property, pay the debts and costs of final expenses, liquidate assets as required, distribute the property as directed, and settle the estate. Business assets will require additional considerations. The executor should be a person who is trustworthy and responsible and has common sense.

You can choose an individual or appoint a bank or trust company. Selecting an institutional executor offers some advantages over selecting a person. An institution has experience and perpetual existence and will be devoid of conflicts of interests. If there is a business in an estate, a testator should investigate the designation of a corporate executor to serve his or her estate and the fees and charges it receives. In designating a corporate fiduciary, sometimes it is appropriate also to designate a family member as a co-fiduciary.

An executor or trustee named in a will may be unable or unwilling to serve, or, having served, may discontinue service. Therefore, alternates should always be designated. A will or trust can provide for an individual fiduciary in office to designate his or her successor.

If, for some reason, you should designate one of your children and not another, a personal statement should be made setting forth the reason, i.e., due to the child's special abilities or the other children's lack of ability or time to undertake such responsibilities.

The executor, in the administration of an estate, should retain the services of an attorney who concentrates in the field of estates, to assist the executor in carrying out his or her or its responsibilities.

Co-trustees are more frequently used than co-executors. Sometimes an estate owner may feel that the use of co-executors is desirable. The choice may depend in part on how the estate is to be divided, and the differing interest of the beneficiaries of the estate. If there are children of a prior marriage

to be considered along with the interests of the surviving spouse and children of a later marriage, it may be indicated to have either both groups represented, or none at all, by designating totally independent fiduciaries. If conflicts between two children can be anticipated, the estate owner may designate an independent third person to resolve any impasse. If an estate includes a closely held business interests, objects of art, coin or stamp collections, antiques, or other items requiring certain special knowledge in order to achieve the most value, co-executors familiar with these matters may be designated.

In such instance, the executor who is designated should be given the sole authority to deal with those asset(s) that require special knowledge, with the vote of the expert having control.

In Terrorem *Clause*

Some states permit a no-contest or chill clause to be included in a will. This clause warns a person challenging the will that if he or she loses the challenge, he or she will receive nothing at all from the will. To the extent this clause discourages litigation, it does reduce the incident of nuisance litigation.

When a testator wants to leave out some family members or reduce their shares, the testator should explain in the will the reasons for the disparate treatment. If the testator is equalizing treatment among the various takers, as when one child's gift is reduced to take into account a lifetime gift, this information should be set forth. What may have looked like unjustified favoritism (and might have prompted a bitter response) may become understandable.

The Will Execution

State law surrounds the execution of a will with formal requirements, which must be strictly observed and satisfied.

The provisions may vary somewhat from state to state, but they all are intended to establish that the testator executed the instrument in question with full and complete knowledge, that it was his will, that he meant it to be his last will and testament, that he signed it or placed his mark at the end of the instrument on a certain date, and had it duly witnessed and attested. While unwitnessed wills may be given effect in some states, for practical purposes one may ignore this possibility.

General Will Requirements

The following general requirements break down into specifics, subject to some variations in state law that may require special attention.

- Declaration of will. The testator needs to declare to the witnesses who are all present at the same time that it is the will of the testator.
- Signature or mark. The testator should sign the will or, if he cannot do that, place a mark where the signature should be or ask someone else to sign the will on his behalf in his presence. The signing should be immediately at the end of the will.
- Witnesses. Three disinterested witnesses should be on hand to witness the execution of the will. Two may be all that are legally required in some states, but a few require three. Even where only two are needed, an extra witness may facilitate proof if one is later unavailable for any reason.

The witnesses generally should not be: (1) a beneficiary, executor, or trustee under the will, or the spouse or business partner of any such person; or (2) an officer, director, or shareholder of a corporation that is an executor or trustee under the will or is a beneficiary; or (3) a resident of a state or political subdivision that is a beneficiary under the will, if the gift might possibly reduce the resident's taxes.

- Publication and attestation. The witnesses should be told that the instrument that they are called upon to witness is the testator's will, and the testator should specifically ask them to "witness the execution" of the will.

Each witness must either see the testator sign or hear him acknowledge that a signature already on the will is his, and this signature should be pointed out to the witnesses and be actually seen by them. If the testator is unable to sign and someone else signs on the testator's behalf, the witnesses should observe that the person signing does so at the request of the testator and in the presence of the testator.

Each witness, at the request of the testator and in his unobstructed view, should sign his or her name and write his or her address. In some states, this may be done independently of the attestation clause that follows. In others, the witnesses' signatures and addresses appear only once, following the attestation clause.

The witnesses, the testator, and the person, if any, signing for him, should all be present throughout the entire proceedings for execution.

- Date and place. The will should state fully and correctly the place and date of execution.
- Page numbering. As a matter of practice, if not a legal requirement, it is wise to number the pages of the will consecutively, bind them together, and have the testator and witnesses initial each page.
- Attestation. Either as the vehicle for the attesting witnesses' signatures or as an addition provision following their signatures, an attestation clause should be set out, reciting all the formalities of publication and attestation referred to above, the date of execution, and the number of pages of the will.

Self-Proving Will

The Uniform Probate Code and the statutes of many jurisdictions now provide for an affidavit of the witnesses to be executed at, or about the time of, the will's execution (self-proving affidavit), which will be accepted by the probate court in lieu of the witnesses' making an affidavit or appearing personally when the will is probated. This becomes a so-called self-proved will. This affidavit eliminates difficulties of proof that might arise if, at the time of probate, one or more of the attesting witnesses were not available.

Witness Requirements for a Will

The following states require that a will be witnessed by at least two witnesses: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

The following states require that a will be witnessed by at least three witnesses: Maine, Massachusetts, New Hampshire, South Carolina, and Vermont.

Different Kinds of Wills

Besides the traditional formal will, there are other types of wills that can be executed under certain circumstances.

Pour-Over Will

This document is usually a will that names another entity, usually a revocable trust, as a recipient of the property that passes through the will.

Holographic Will

A holographic will is one written entirely in the testator's hand and signed by the testator. Generally, in states that recognize holographic wills attesting witnesses are not required. The rationale is that it is difficult to forge a person's handwriting.

In the states that permit a holographic will, it will supersede a prior formally executed will. Under the Uniform Probate Code, a holographic will is valid, whether or not it has been witnessed, if the signature and the material provisions are in the handwriting of the testator. If the printed material were eliminated, the handwritten portion must evidence the testator's intentions, and the key dispositive provisions must be in the testator's handwriting.

Holographic wills are valid in the following jurisdictions: Alaska, Arizona, California, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nevada, North Dakota, Oklahoma, Pennsylvania, Puerto Rico, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

New York recognizes holographic wills made by members of the armed forces (including merchant marines) during armed conflict.

The Nuncupative Will

A nuncupative will is an oral will, or unwritten will. Although this type of will is usually made before witnesses, it is valid only when the testator is in immediate peril of dying (sometimes called a Last Sickness Will). Generally, you cannot leave property valued at more than $1,000 in a nuncupative will. Nuncupative wills made by soldiers and sailors in active service are recognized by many states.

In New York State, a nuncupative or holographic will is valid only if made by:

(1) A member of the armed forces of the United States while in actual military or naval service during a war, declared or undeclared, or other armed conflict in which members of the armed forces are engaged
(2) A person who serves with or accompanies an armed force engaged in actual military or naval service during such war or other armed conflict
(3) A mariner while at sea

A nuncupative will becomes invalid:

(1) If made by a member of the armed forces, upon the expiration of one year following the discharge from the armed forces
(2) If made by a person who serves with or accompanies an armed force engaged in actual military or naval service, upon the expiration of one year from the time he or she has ceased serving with or accompanying such armed force
(3) If made by a mariner while at sea, upon the expiration of three years from the time such will was made

If any person described in this section lacks testamentary capacity at the expiration of the time limited therein for the validity of his will, such will shall continue to be valid until the expiration of one year from the time such person regains testamentary capacity.

Joint, Mutual, and Reciprocal Wills

A joint will is a single will executed by two or more individuals. A mutual will is one made pursuant to an agreement between two or more individuals to dispose of their property in a special way. The will in each case may be joint or there may be separate wills. Reciprocal wills are those in which each testator names the other as his or her beneficiary, either in a joint will or in separate wills. Generally, it is not recommended for individuals to be tied together in this manner. By doing so, individuals may in the future be unable to deal, on legal or moral grounds, with the circumstances which arise as a result of the death of one of them. For example, financial hardship may occur among some of the beneficiaries and the survivor may want to favor those in need; an estrangement may occur between the survivor and certain of the beneficiaries. These arrangements can cause the risk of extensive litigation between different beneficiaries of different decedents. If parties desire an arrangement of this type, they must expressly spell out its binding effect, if any, both before and after the death of one of the parties.

Living Will

Not a testamentary document, it is simply a document that describes your wishes regarding medical treatment during a terminal illness in case you are unable to communicate them yourself due to mental incapacity.

Divorce

A divorce does not revoke your will but, in the following states, it does revoke any legacy you have made to your former spouse: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

A divorce has no effect on a will in the following states: Iowa, Louisiana, Mississippi, New Hampshire, and Vermont.

Disinheriting a Spouse

In some states, a distinction is made between personal property and real estate (or real property). Under certain circumstances, a husband may disinherit his wife from any share in his real property in Arizona, the District of Columbia, Florida, Georgia, Michigan, North Carolina, North Dakota, South Carolina, South Dakota, Utah, and Wisconsin.

Under some circumstances, a husband may disinherit his wife from any share in his personal property in Alaska, Arizona, Delaware, Florida, Georgia, Michigan, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, and Wisconsin.

Only in North Dakota and South Dakota may a wife disinherit her husband from a share in her real property. A wife may, however, disinherit a husband from personal property in Alaska, Delaware, Georgia, New Jersey, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, and Utah.

When Should You Change Your Will?

- When there is a significant change in your financial situation or if your will contains bequests of items that you no longer own.
- When a minor child reaches adulthood, is emancipated, or is married, and is able to take responsibility for him or herself without a legal guardian.
- When there are family additions, such as the birth or adoption of a child. Here you may decide to appoint a guardian and include the child in your will.

- When there are changes in the federal or state tax laws that have an impact upon your estate.
- You may want to change your beneficiaries when relationships change.
- When a beneficiary and/or the alternate beneficiary dies before you do.
- When you move to another state. A change in your permanent residence affects how your will may be administered. A new will, written in the state where you currently live, is easier to administer. Your will also helps to establish your legal residence.

Revocation of a Will

Writing on a will "this will is null and void" may not be a valid revocation of a will. In one jurisdiction, a person attempted revocation by writing on the pages of the will, but the law was such that a revocation of a will by cancellation was not accomplished unless the words of the document are mutilated or otherwise impaired. Wills may need to be destroyed by a physical act.

It is important to note that there may be no mutilation of a will when the word "Canceled" is written in the margin of the document. There may need to be a writing on the words in the will. But in a state that recognizes holographic wills, writing "I revoke" is enough to revoke a will. However, writing "Destroy" is not enough to revoke the will.

In New York State, there is no partial revocation by a physical act, and total revocation needs two witnesses. However, some states do recognize partial revocation by a physical act. Although the Uniform Probate Code and the statutes of a number of states authorize partial revocation by physical act, in several states a will cannot be revoked in part by an act of revocation; it can be revoked in part only by a subsequent instrument. Remember, the signature is the most vulnerable part of a will.

There is a doctrine, which certain jurisdictions recognize, acknowledging that people sometimes revoke a will by mistake. This doctrine is called the Dependent Relative Revocation and Revival. Under this doctrine, a court may disregard a revocation if the court finds that the act of revocation was premised on a mistake of law or fact, and that it would not have occurred but for the testator's mistaken belief that another disposition of property was valid.

New Will or Codicil

Wills should be revised and executed as circumstances and laws change. There are instances, however, where existing wills are modified by codicils. A codicil

is a supplement to an existing will that is executed with the same formality as a will and when admitted to probate, forms a part of the will.

There are some instances in which the use of a codicil is preferable to a new will.

Where a will was executed when there was no question that the testator was fully competent but at the present time there is some doubt about competency, it may be advantageous to use a codicil. If the codicil is not admitted to probate, at least the old will can stand. If a new will is made but not admitted, then it becomes necessary to locate prior wills, which may be lost or destroyed, otherwise the testator will die intestate.

A codicil should be considered if a provision in an old will has some advantage that may be lost if a new will were executed.

The majority of states permit the incorporation of unattested documents into a will, so long as the writing is in existence when the will is executed and is identifiable with reasonable certainty. Not all states follow this rule, and applicable state law should be referred to before making reference to any extrinsic document in a will.

The state of New York, for example, does not allow incorporation by reference. In a 1965 case, a testator provided in his will that his tangible personal property was to be divided among individuals who were named in a memo located in his safe deposit box. The court refused to allow incorporation of the memo. New York State does provide an exception, however, for a disposition to an inter vivos trust, if the trust was executed before or concurrently with the will and was acknowledged in the manner required by the laws of this state for the recording of a conveyance of real property.

Both the Florida statutes and the Uniform Probate Code allow a will to refer to a written statement or list or to dispose of a person's tangible personal property. The statutes provide that the list must be signed by the decedent and must describe the items of tangible personal property and the designated beneficiaries with reasonable certainty.

Conclusion

If you are harried or hurried and do not currently have time to formulate your entire plan, create a stop-gap testament. At least this will afford your family and heirs a certain degree of protection.

Your will is possibly the most significant document you create. You should therefore assess your various alternatives and obtain the answers to all your inquiries before you finalize it.

CHAPTER 4

Probate and How to Avoid It

A probate proceeding is a judicial process that brings your will before the court to prove it is a valid last will and testament. In other words, did you really sign it; did you act under any undue influence or duress; was there fraud in its execution; did you have testamentary capacity at the time you signed the will? It is up to the court to determine that your signature was genuine, that you were not influenced or pressured or tricked into making your will, and that it was executed under the proper statutory procedures. Once the will is officially approved by the court, your executor or personal representative will be appointed, and he or she will thereafter carry out the terms of your will and administer your estate.

Types of Probate

There are two types of probate: formal and informal. In a formal probate estate proceeding, a petition is filed by the proponent (the person offering the will for probate) who usually is the designated executor or personal representative. At such time, all of the parties interested in the proceeding (those who would inherit the estate by intestacy if there was no will) must appear before the court. If a person was survived by a spouse and adult children, only they must appear before the court since they would inherit the entire estate, if there was no will. If an interested party cannot appear before the court due to a handicap (an infant or a person who is mentally impaired), a guardian will be appointed by the court to represent that person's interest in the proceeding. The guardian is called a guardian *ad litem* and the guardian's main responsibility is to ensure that his or her ward is not adversely affected under the will that is being offered for probate. In the probate proceeding, notices are also sent to all beneficiaries (other than those blood relatives who are required to appear) as well as all designated executors or personal representatives.

Assuming there are no challenges to the will, the will, after appropriate review by the court, is admitted to probate, and letters testamentary or letters of

administration will be issued to the executor or personal representative. Creditors thereafter can present their claims and the business of the estate will commence. Within a period of time after the executor or personal representative has been appointed, an inventory of the estate's assets are usually filed with the court. There are two important reasons for the filing of the inventory, which are: (1) to let the court know what the legal representative will have to account for upon the closing of the estate; and (2) to let creditors and other interested parties know what the assets are. When the estate has concluded its activities, it will normally be closed with some form of report, informal or formal accounting by the fiduciaries to the beneficiaries.

When the assets of the estate are below a certain level, a simple informal probate proceeding is brought by the designated executor or personal representative, usually by affidavit, without the necessity of instituting the procedures required in a formal probate proceeding.

Probate Drawbacks

The probate process often is time consuming. There are extra charges (commissions) for the executor or personal representative as well as legal fees. In some states, the legal fees are statutory and calculated from the gross and not the net estate. It also can be agonizing if the legal representatives engaged are unfamiliar with the process. In some states the fees are not fixed but are calculated on a reasonable basis to be determined by the court.

The cost of probate can be reduced by transferring assets during lifetime or by employing non-probate assets or devices that will pass on death, such as trusts, joint accounts, and assets that have their own beneficiary designation, such as life insurance, retirement accounts, and annuities.

Purpose of Probate

The probate process is a form of protection for the family of the estate owner. It ensures the proper transfer of the estate owner's property without interference. It also ensures that the will that is probated is the last will of the estate owner.

Unusual Circumstances

Not only may a will be contested on the theory that the contestant would be irreparably harmed if the will was permitted to be probated, but other special problems may arise. A spouse who has abandoned the deceased, which abandonment

continued to the date of death, may not inherit from the estate. No person may profit from a will if he or she has caused an illegal death in order to benefit from the will.

Uniform Probate Code

The procedures for probate differ from state to state. In many states, procedures will vary from county to county or from one probate court to another. The Uniform Probate Code, now enacted in various forms by at least thirteen states, has enhanced the movement towards a nationally uniform probate procedure.

In creating the Uniform Probate Code, the creators focused upon: (1) making probate law consistent with current philosophies; (2) creating general rules that provide for efficient estate administration; (3) creating statutory estate plans for those of modest means to permit their estates to pass in accordance with laws governing intestacy; (4) making inter vivos and post mortem estate planning more effective; (5) making the will more popular for the testamentary disposition of wealth; and (6) trying to obtain uniformity of the laws throughout the states.

Reasonable compensation for personal representatives or testamentary trustees is recommended under the Uniform Probate Code. The amount of fees may be determined by the governing instrument which could include rates and schedules. If the instrument is silent, understandings may be reached with the beneficiaries at the time of appointment.

The Avoidance of Probate

The increased desire by the estate owner to avoid probate has augmented the uses of probate-avoidance devices. Assets such as life insurance, retirement benefits, joint accounts, and revocable trusts do not pass through your will and are not subject to probate. During your lifetime, the custodian or institution that holds certain of these assets receives a designation of beneficiary, which is your direction how to distribute such property upon your demise. You can, however, by your will, contradict the beneficiary designation. Thus it is important to coordinate your probate and non-probate property accordingly. You should consider each item of non-probate property as a separate bequest in the planning of your estate.

Revocable Trust

This is probably the most popular device to avoid probate. You are normally the grantor and trustee of a self-settled trust. It permits you to maintain full control

over your property during your lifetime. Upon your demise, the trust becomes irrevocable and usually contains dispositive provisions as to how the assets are to be distributed. In other words, it is a will substitute. When you die, your trust owns your assets and they will pass through it accordingly. See chapter 10 for a more detailed explanation of this trust.

Joint Ownership

Joint ownership means owning property with someone else. The term may be used in a loose sense as to include a tenancy-in-common, where each tenant owns an undivided share of the property, and has the right to dispose of the property as he or she sees fit. "Joint ownership" set forth herein covers a form of ownership in which the jointly owned property will pass to the survivor upon the death of a joint owner. In most states, there is a special form of joint ownership when spouses own the property, called tenancy by the entirety. In this form of ownership, each spouse is deemed to own the entire property. From an estate-planning point of view, a spouse may wish to maintain a joint bank account which, upon survivorship, will provide immediate funds for those debts and costs that become due upon a demise.

Joint ownership, while it avoids probate, is certainly not a panacea with respect to either estate planning or estate and income taxation. A joint tenancy normally allows a division of the income for the property jointly owned, with each owner reporting his or her share. If you establish a joint ownership with a child under the age of fourteen, there probably will be no income tax savings, since the income tax bracket of the child would be his or her parents' rate on the unearned income in excess of the limited amount.

Unless a joint owner makes an equal contribution to the acquisition of property, a taxable gift is created upon the establishment of the joint ownership. This general rule is not applicable to acquisitions of U.S. savings bonds, joint bank accounts, and joint brokerage accounts. As far as estate taxes are concerned, the full value of jointly held property is includible in the gross estate of the first joint tenant to die unless it can be shown that some part of the property originally belonged to the survivor. As to spouses, the requirement showing contribution by the survivor is not applicable.

The joint ownership of properties is not a substitute for having a will. A simultaneous demise of the joint owners requires the need for estate planning in order for the jointly owned property to pass to your selected beneficiaries and not those designated by your state under the laws of intestacy.

CHAPTER 5

If You Die Without a Will

When someone dies without having executed a valid will, he or she is deemed to have died "intestate." The law that provides for property of a decedent not disposed of by will is the law of descent and distribution of an intestate estate.

The laws of the state where you are living at the time of your death will determine to whom your personal property will be distributed if you die without a valid will. Personal property can be either tangible (clothing, jewelry, furniture, and other personal effects or any other property you can put your hands on) or intangible (rights to property or evidence of value, such as copyrights, easements, franchises, stock certificates).

The law of the state where your real property is situated will determine who will inherit the property if you die without a valid will.

All states have statutes of descent and distribution. These laws determine who are the beneficiaries of your estate, as well as its administrator and the guardian of your minor children. At the end of this chapter, the laws of the distribution of an intestate decedent domiciled in New York State are set forth.

Spouses

If you die intestate, your surviving spouse, in the vast majority of states, receives a percentage of your estate, which percentage will differ from state to state. The percentage will usually depend upon what other members of your family survive. If you die leaving no children, your spouse will receive everything. If you die and leave a spouse and children, the spouse and the children will normally share the estate. In New York State, the spouse is given the first $50,000 and then the spouse and children share the balance in equal shares. If you have no spouse but only children, they will receive all of your property. However, when property passes to children under this format, it is divided in equal shares among them, whether they need it or not, and whether or not they are mature and

able to appreciate it. If a person is disabled, an inheritance of an intestate legacy could make him or her ineligible for government benefits.

Classes of Surviving Relatives

The state's intestacy laws will set forth which class of survivors will inherit the estate. If all of the beneficiaries are of the same generation, all of them will inherit an equal share (per capita distribution). Under a *per stirpes* distribution, the person will inherit the property, which his or her ancestor would have inherited had he or she survived the person who has died. So, if you leave your estate to your children, *per stirpes*, and a child of yours predeceases you, the child's issue surviving you will inherit his or her deceased parent's share of your estate.

The vast majority of our states protect adopted children by treating them, for inheritance purposes, as natural children.

Non-Marital Children

In the vast majority of states, a non-marital child is the legitimate child of her mother, so that she and her children can inherit from her mother. However, she can only inherit from her father if one of the following has occurred:

(1) A court of competent jurisdiction has, during the lifetime of the father, issued an order of filiation declaring paternity
(2) The mother and father of the child have executed an acknowledgment of paternity
(3) The father of the child has signed an instrument acknowledging paternity
(4) Paternity has been established by clear and convincing evidence, father openly acknowledging same or a blood genetic marker has been administered to the father

Disqualification of Parent to Inherit

In many states, no share of a deceased child's estate will pass to a parent if the parent refused to provide for the child or has abandoned the child while such child is under twenty-one years of age, unless the parental relationship and responsibilities are subsequently resumed and continue until the death of the child.

Descent and Distribution of a Decedent's Estate

The New York statute, which is typical of the pattern of many states' statutes and reveals the types of issues likely to arise, provides as follows:

(a) *If a decedent is survived by:*
  (1) *A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.*
  (2) *A spouse and no issue, the whole to the spouse.*
  (3) *Issue and no spouse, the whole to the issue, by representation.*
  (4) *One or both parents, and no spouse and no issue, the whole to the surviving parent or parents.*
  (5) *Issue of parents, and no spouse, issue, or parent, the whole to the issue of the parents, by representation.*
  (6) *One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving paternal grandparent or grandparents, or if neither of them survives the decedent, to their issue by representation, and the other one-half to the surviving maternal grandparent or grandparents, or if neither or them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of the subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.*
  (7) *Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the paternal grandparents, per capita, and the other one-half to the great-grandchildren of the maternal grandparents, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.*

(b) *For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.*

(c) *Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime.*

(d) *The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.*

(e) *A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.*

The Benefits of a Will

Your choice to have a will carries with it the following benefits:

- You will decide who will inherit your estate and which assets they will inherit
- You will decide when your beneficiaries will receive their inheritance
- You will decide who will be the manager of your estate
- You will have the opportunity to reduce transfer costs
- You will decide who will take care of your minor children
- You will not disqualify a handicapped beneficiary from receiving government entitlements

CHAPTER 6

The Making of Inter Vivos Gifts

A gift is simply a transfer of property without the transferor receiving full value in money or money's worth. The transfer has to be final so that the transferor retains no power or control over the property gifted. Gifts are usually only given to persons. Sometimes gifts are made unintentionally. If you transfer property to a corporation, or a trust, without receiving any consideration, you will be making gifts to the shareholders of the corporation or the beneficiaries of the trust. If you sell property for less than its fair market value, the difference between the sales price and its actual value will be considered a gift. The same rule applies if you lend funds at a reduced market rate of interest; the difference in between the market rate and the rate actually charged to the borrower will result in a gift. If you create a joint tenancy in real property after you solely contributed to its acquisition, a gift of one-half of the property will have occurred.

Why Make a Gift?

There are a number of reasons for you to consider making gifts while you are alive:

- You wish to share your wealth with members of your family or a charitable organization.
- You may wish to see, first-hand, how a person handles the responsibility of owning property.
- Being aware of outside factors (death taxes, claims, litigation, etc.), you may want to be sure that specific items are received by specific persons.
- There are significant estate tax advantages to creating a lifetime gift-giving program. No estate plan can be successful without one. Gifts that qualify for the annual exclusion (up to $11,000 per person) are outside of the gift tax laws and never included in the calculation of estate tax.

Possibly, the income earned on the gifted property, in the recipient's tax bracket, may be taxed at a lower rate. However, it is possible that in a particular estate owner's situation, the loss of the step-up in basis of the property, which is the fair market value inherited by a beneficiary, will outweigh the gift advantages. In such a case, the property should be retained by the estate owner until his or her demise.

Gifts to a Spouse

Gifts to a spouse can be in the form of an outright gift, in joint ownership, or in trust. Since transfers to a spouse enjoy an unlimited deduction (i.e., no gift tax is payable for gifts between spouses), such gifts can result in substantial estate tax savings, which are discussed in greater detail in chapter 20.

If you are concerned that after you make a gift to your spouse, he or she will not properly manage the property or there is a possibility of divorce, you can consider creating a trust for his or her benefit. In order for the trust to qualify for a gift-tax marital deduction, the trust must be structured so that the spouse receives a qualifying income interest for life in the trust's property. Such income must be payable at least annually, and other persons can have no interest in the trust during the spouse's lifetime. This type of trust is known as a qualified terminal interest property (QTIP) trust. The trust can provide for the utilization of the donee spouse's unified credit, upon his or her demise, since the assets would be included in his or her estate. If the donee spouse dies before the donor spouse, the trust can also provide for the transfer back to the donor spouse any amount in the trust in excess of the donee spouse's unified credit amount.

No gift tax return is required to be filed if the donor's gifts all qualify for the marital deduction.

Joint Interests

As a result of the unlimited marital deduction, no taxable gift occurs upon the creation of a spousal joint tenancy, nor is there estate tax upon the demise of the first joint tenant. For income tax purposes, upon the death of the first joint tenant, since only one-half of the joint asset is includible in his or her estate, the survivor receives a stepped-up basis only in the half of the property that is included for estate tax purposes. (Stepped-up basis means that the value or

basis of the estate's assets are, for income tax purposes, increased to the assets' fair market valuation.) Which means he or she will have two different bases for income tax purposes in the property: his or her one-half original basis and the decedent's stepped-up one-half basis.

A surviving spouse may exclude $250,000 of gain on the sale of a primary residence or up to $500,000 if the residence is sold in the year of the decedent spouse's death and a joint income tax return is filed for that year.

Federal Gift Tax

Gift taxes are applicable to transfers that you make during your lifetime, whereas estate tax is imposed on transfers that take place at the time of your demise. In addition to the annual exclusion, you are permitted unlimited payments of tuition and medical expenses and marital deductions without the imposition of gift tax. A gift tax is only imposed when you make taxable gifts in excess of your unified credit amount (as of 2003, the lifetime unified credit is $1 million), which are not in the permitted unlimited categories. If you make taxable gifts during your lifetime, they will be taken into account in the computation of the estate tax due at the time of your demise.

Gifts are valued at fair market value on the date of the transfer. If the gifts are adequately disclosed on the gift tax return, the Internal Revenue Service must assess any gift tax due within three years after either the due date for the filing of the return or the date the return is actually filed, whichever is later. Otherwise the Service is barred from revaluing the gifts.

Usually, when a gift is completed, the property transferred is not included in a gross estate. However, there are exceptions to this rule. If you transfer real property and create a joint tenancy, a gift of one-half of the real estate is created at such time, if only one joint owner was the contributor towards the purchase of the property. In this case, upon the contributor's death, the full value of the property will be included in his or her estate. If a person transfers property and retains a life estate in it, a gift is created in the remainder interest. The full fair market value of the life estate will be included in the estate of that person who created the life estate. If you make a gift of a life insurance policy and you are the insured and you die within three years, the full value of the death benefit will be included in your estate.

Under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("the Act"), the gift tax remains in effect, but for the year 2010 the highest gift tax rate will be 35 percent (the same as the highest income tax rate).

Exclusions

Taxable gifts are all defined as the total amount of gifts made in a calendar year less the allowable exclusions and deductions. The allowable exclusions are: the annual exclusion (up to $11,000 annually per donee or recipient); amounts paid on behalf of another person for medical care or tuition; and transfers that are made incident to a divorce. In order for the medical and tuition payments to qualify for the exclusion, the following conditions must exist:

- The payment has to be made to the provider of the health care
- The payment cannot be reimbursable by Medicare or a private insurer
- The tuition payments must be made directly to an educational organization (payments made for room, board, books, supplies, etc., do not qualify for this exclusion)

Gifts Made by Check

When you make an annual exclusion gift by check, you should be sure that the check is deposited by the beneficiary before the end of the year. Also, the failure of the clearance of a check before the donor's death will void the gift and require inclusion of the gift proceeds in the donor's estate. Both of these reversions can be avoided by the donor gifting a cashier's or certified check to the donee. Gifts to charity are different. The gift is considered made when the check is delivered to the charitable organization.

Disclaimers

The recipient or donee of a gift can refuse to accept a transfer of property by executing a qualified disclaimer. By doing so, the property gifted will pass to another person without the recipient being treated as having made a gift.

A disclaimer normally results in the transfer of property to others. It does not work that way for Medicaid qualification purposes. For purposes of Medicaid, a disclaimer is treated as a "transfer," resulting in a period of ineligibility which can last up to thirty-six months.

Kiddie Tax

Gifts of property to or for the benefit of a child that produce unearned income will be taxed, for income purposes, if the child is under fourteen years of age, at

the parent's highest marginal tax rate. Unearned income means any income that is not derived form personal services. Possible gifts to children under fourteen years of age might be: equities that pay low dividends, federal savings bonds with maturity dates after the child reaches fourteen years of age, other property that defers taxable income.

Gifts to Minors

When you make a gift to a minor, you should inevitably consider using a trust. However, gifts of relatively modest amounts should be made through a custodianship. A gift to a minor can, by appropriate structure, be shielded from federal gift tax by the annual exclusion. Large gifts to minors or remote descendants could result in the imposition of a generation-skipping tax. Each person has an $1,120,000 generation-skipping tax exemption (2003).

Custodianship

This type of gift is accomplished by giving the asset in the name of an adult "as custodian for the minor under the [insert name of state] Uniform Gifts to Minors Act." The powers of a custodian are similar to those of a trustee. Under this arrangement, when the minor becomes an adult, he or she is entitled to receive the gifted property. In the state of New York, a donor can elect to have the property retained beyond the minor attaining the age of eighteen years, until he or she reaches twenty-one years of age.

A custodian acts in the same manner as a trustee, with the powers of a custodian specifically set forth in the statute of each state. The custodian has broad powers to invest and power to accumulate income or expend income or principal for the support, education, and benefit of the minor without regard to the parent's resources or obligation of support and without regard to the minor's other resources. All income from custodial property is taxed to the minor, but if used to discharge a parent's obligation of support, is taxed to the parent. Accumulated income and principal generally is paid over to the minor at majority or at age twenty-one. Custodianship might not be desirable for certain donors who choose to restrict the beneficiary's access to the funds until a later age. As a result of this concern, California amended its version of the Uniform Transfer to Minors Act to permit retention by the custodian until age twenty-five. Unless the child consents, retaining the funds beyond the age of

termination is not permitted even if the custodian expends the funds on the child's behalf.

All custodial assets are included in a minor's gross estate. The assets will not be included in the donor's estate if the donor predeceases the minor, unless the donor is also the custodian. Therefore, a donor with an estate potentially subject to estate tax should not serve as custodian. A parent of the minor may not be preferable, because of the parent-custodian relationship. The custodian has the power to discharge a parent's legal obligation of support, which, if exercised by a parent, could be considered to give him or her a taxable general power of appointment and be subject to income and/or estate taxation.

Annual Exclusion Trusts

An individual planning to make gifts of more than modest amounts to a minor child should find a trust more suitable than a custodianship. The principal techniques for utilizing the annual exclusion when transferring assets to a trust for the benefit of a minor are Section 2503(c) trusts and Crummey trusts.

Section 2503(c) Trusts

Section 2503(c) of the Internal Revenue Code sets forth a technique for creating a trust for the benefit of a minor which qualifies for the gift tax annual exclusion. Usually a gift of a future interest (that is, something to be received by someone at a future time) will not be available for the gift tax annual exemption of $11,000 (or $22,000, if given by a married couple.) However, this section provides that a gift to a trust for an individual who is not yet age twenty-one is not treated as a gift of a future interest (and thus ineligible for the annual exclusion) if the trust meets the following requirements:

- The trustee must have the power to expend the trust property and the income therefrom to or for the benefit of the minor before the minor reaches age twenty-one
- The minor must have the right to receive the unexpended property and income at age twenty-one
- If the minor dies before age twenty-one, the principal and income of the trust must be paid to the minor's estate or to persons the minor chooses pursuant to a general power of appointment

Crummey Trusts

A donor may find that neither a custodianship nor a Section 2503(c) trust is to his or her liking. The Section 2503(c) trust, as described above, requires termination of the trust or the granting to the minor of an unlimited right to withdraw the trust assets no later than age twenty-one. A custodianship in most states cannot be continued beyond age twenty-one. A third alternative, which permits the trustee to withhold distribution until any age the donor desires, is the Crummey trust, a device that also may be used to make gifts to trusts for the benefit of adult beneficiaries. To obtain an annual exclusion for a contribution to a Crummey trust, the beneficiary must have the power to withdraw the property that is transferred to the trust. Because of the granting of the power to withdraw gifts, the trust will qualify as present-interest gifts eligible for the annual exclusion, if the beneficiary waives the power when a gift is made to the trust. The appointment of a legal guardian to act for the minor in each instance is not required.

The trustee must give notice to the beneficiary of his or her right of withdrawal and must allow the beneficiary a reasonable time to exercise the power. Thirty-days notice is considered reasonable.

The Bargain Sale Gift

When a person considers making a gift, and the property to be gifted may be higher in value than the amount the person wishes to part with, there are a few ways in which he or she can lower the value of the gift. The net gift is one method (see below). Mortgaging of the property before making the gift and the transfer of a partial interest are other methods. The bargain sale is still another method. A bargain sale is a sale to a related person at a sale price substantially below the fair market value of the property at the time of the sale.

In an arm's-length transaction between third parties who are not related, a person who sells property at less than its full fair market value will not be viewed as having made a taxable gift to the purchaser.

However, in a transaction between related persons, including a sale by an individual to a corporation in which family members are shareholders, a bargain sale may be treated as a gift to the extent of the bargain. The Internal Revenue Code provides that, where property is transferred for less than adequate and full consideration in money or money's worth, the amount by which the value of the property exceeds the consideration is to be deemed a gift.

Consideration in money's worth includes any form of consideration that can be reduced to a value in terms of money. Love and affection, a promise of marriage, or anything else that cannot be valued in terms of money, is not regarded as consideration.

Where a transfer is part-gift, to the extent of the consideration received by the transferor it will be treated as part-sale. A tax will be due on any gain realized on the sale portion. Whether a person is entitled to a deduction for a loss on the sale portion will depend on the relationship of the transferee and the transferor. The Internal Revenue Code does not permit a deduction for a loss in a transaction between a donor and his or her siblings, or spouse, or ancestors, or lineal descendants.

In a bargain sale transaction, a donee-purchaser will receive the donor's tax basis for the gift portion, which will be increased by any gift tax paid and by the consideration paid in money or money's worth.

The Net Gift

The net gift device provides for a gift to be made on condition that the donee (person receiving the gift) must pay the gift tax.

Under Rev. Rul. 81-223, the donor's unified credit must first be exhausted before there is any gift tax payable by the donee. Therefore, the application of the unified credit will defer the time when a donor can commence the effective use of the net gift technique. When the unified credit is fully applied, the requirement of the donee to pay the gift tax will reduce the amount of the donor's taxable gift.

Gifts Within Three Years of Death

Generally, gifts made within three years of the death of the donor are not includible in the donor's gross estate, except gifts of life insurance policies. However, all gift taxes paid on gifts made within three years of death are includible and therefore included in the donor's gross estate.

Surviving Spouse

Nontaxable gifts made by the surviving spouse during his or her lifetime can reduce the estate tax on his or her estate. Annual gifts that qualify for the gift tax exclusion are permitted to the extent of $11,000 per year per donee. Therefore, any amount that is removed from the surviving spouse's estate

through annual exclusion gifts can result in eventual estate tax savings. The surviving spouse is also free to give unlimited amounts of nontaxable gifts for education and medical care. Taxable gifts made by the person, which reduce his or her unified credit, will have the effect of removing incomes and future appreciation from a taxable estate. If gift tax is paid, that will likewise be removed from the estate. Charitable giving can reduce estate tax in addition to reducing income tax liabilities.

Assets that are owned by the first spouse to die obtain a stepped-up basis for income tax purposes. Property that is inherited and thereafter gifted will have a higher basis for income tax purposes. A stepped-up basis will be denied if the recipient of the gift fails to survive for at least one year after the gift and gives the property gifted back to the donor spouse.

Estate Tax versus Gift Tax

The method by which the gift tax is actually computed has a direct bearing on the advisability of making large intrafamily gifts, since it may cost less total transfer tax to give away a large amount of property than to leave it to someone at one's demise. The gift tax is computed on the amount of the transfer to the recipient. The estate tax is computed on the amount of the property held by the estate owner on the date of death, including that portion of the estate tax that will be used to pay the tax and, thus, not received by the beneficiaries. One of the differences between subjecting property to estate tax as opposed to gift tax is that the federal estate tax system is inclusive and the gift tax system is exclusive. Therefore it may be better for a family for the surviving spouse, who has inherited property free of taxation and stepped-up in basis, to give such property to descendants, thereby subjecting it to lower transfer taxes.

There are several vehicles, such as a family limited partnership or a limited liability company that can be used for gift giving purposes while the donor (1) retains control of the investment as a general partner and (2) reduces the value of the gift, by way of a discount. The reduction in the value of the gift is permitted because the gift is of a minority interest in an entity, which minority interest has a lack of control and lack of marketability. The use of this discount has been vastly increased by the Internal Revenue Service's abandonment of its prior position. The Internal Revenue Service now acknowledges that transfers of minority interests can be discounted for estate and gift tax purposes despite the fact that the family's combined ownership interest continues to represent control of the entity. Thus it is possible for a person who owns 100 percent of an entity to transfer by gift minority interests at values discounted by up to 50 percent

below market or net asset value. Likewise, if the estate owner owns less than 50 percent of the entity at death, similar discounts can be taken for estate tax purposes. For a more detailed description of these entities, see chapter 14.

One offsetting consideration in making lifetime gifts instead of testamentary transfers is that the donor pays a gift tax now to save estate taxes later. Thus, the lower tax on large lifetime transfers over large testamentary transfers must be weighed against the loss of the use of the money, also taking into account (1) income tax savings from income shifting and (2) estate tax savings from removing the future appreciation and the gift taxes paid from the donor's gross.

CHAPTER 7

Reducing Estate and Gift Taxes

The federal estate tax is determined by the value of the taxable estate and is imposed upon the property that passes to the beneficiaries. Value is determined as of decedent's death, or, optionally, six months after death. The estate tax is payable within nine months of death. The taxable estate is the gross estate less certain permitted deductions.

The Economic Growth and Tax Relief Reconciliation Act ("the Act") enacted into law on June 7, 2001, by President George W. Bush, repealed the federal estate tax for estates of decedents dying after December 31, 2009, and generation-skipping transfers made after December 31, 2009. However, the repeal only lasts for one year (2010). A sunset provision is included in the Act that provides that the rates, exemptions, credits, and deductions repealed will revert in the year 2011 to the levels that existed during the year 2001, unless Congress takes further action. Therefore, until the year 2010, the estate tax continues to be in force and effect with certain modifications such as:

- Reduction of estate and gift tax rates.
- Increases in the amount of the exemption.
- Phase out of state death tax credit to a deduction.
- Repeal of qualified family owned business interest deduction.
- Reduction of the gift tax in a modified format after the estate tax repeal. The apparent concern of Congress was that if the entire transfer tax system were repealed, wealth would be transferred to avoid income taxes, by transferring property to persons in lower income tax brackets. Chapter 21 contains a further discussion of the various changes and effective dates set forth in the Act.

Some Devices for Reducing the Taxable Estate

If the assets that comprise your estate, less all available deductions, are in excess of the applicable exemption, your heirs may be presented with extraordinary costs. There are various devices and techniques available during lifetime that can be used to reduce the amount of a person's taxable estate, such as:

- A lifetime gift-giving program. Every successful estate plan must employ a gift-giving program. Assets with growth potential should be gifted so that the appreciation will never be subject to transfer tax.
- A sale of assets to a family member. A sale of assets on an arm's-length basis will again remove the post-sale appreciation from transfer taxation.
- Life insurance. Life insurance is probably the only real tax shelter that exists in the gift and estate tax world. The proceeds of a life insurance policy can be totally excluded from your gross estate by having a third party own the policy. The owner and beneficiary should be an irrevocable life insurance trust.
- Private annuity. A properly structured private annuity agreement will completely remove the assets transferred to the purchaser from the annuitant's estate, with no transfer tax costs.

Avoiding Assets Subject to Probate

In many jurisdictions, the costs of probate are quite high. Therefore, transfer to non-probate devices, even though the property may be subject to transfer taxation, will help to reduce estate costs.

The federal transfer tax (gift and estate) is the main item on the agenda and, of course, everyone's concern is the federal estate tax. The size of an estate can be significantly reduced through the employment of the various significant techniques that are utilized in value reduction estate planning.

The Gross Estate (for Estate Tax Purposes): What Does It Consist of?

Before we can understand what is in the taxable estate, we have to understand what comprises the gross estate. The gross estate includes the probate and non-probate assets.

Property in the Name of the Decedent

This is property which the decedent owned in his or her name at the time of death, no matter where located. If property is taxed by a foreign country, a credit is available for foreign death taxes. When the first spouse dies in a community property state, only the deceased spouse's one-half interest is included in his or her gross estate, even though, under the Code, the entire community property receives a step-up in basis. Should a married couple leave a community property state and move to a common law state, the community property usually will retain its community property character.

Joint Interests

This refers to all property that is jointly owned and which has some sort of survivorship designation. If the joint owners are married, only one-half of the jointly owned asset is included in the estate of the first spouse to die. Therefore, only one-half of the asset will receive a stepped-up basis. There is an exception which provides that if the asset was jointly acquired prior to 1977 and the decedent was the sole contributor, the entire value of the asset will be stepped-up in basis.

Retirement Benefits

All retirement benefits are included in the gross estate, including individual retirement accounts, the value of an annuity payable to the decedent's designated beneficiary, pension, and profit-sharing plans.

Powers of Appointment

Property that is subject to a general power of appointment at the time of a person's death is includible in that person's gross estate. A general power of appointment is a power that is exercisable by the person, in his or her favor, or his or her estate, or his or her creditors or the creditors of his or her estate. A limited power is a power that can only be exercised in favor of other persons or if its exercise is subject to an ascertainable standard covering the decedent's health, education, support, or maintenance. If you designate a beneficiary as a trustee and if he or she has the right to make discretionary distributions to himself or herself, not limited by an ascertainable standard, the result could cause the entire value of the trust to be included in the estate of the beneficiary. This type of result is normally avoided by giving an "independent trustee" the right to make discretionary

distributions to the beneficiary. Furthermore, for gift and estate tax purposes the taxation of the power can be avoided by limiting the power on an annual basis by only permitting withdrawal of no more than the greater of $5,000 or 5 percent of the then value of the trust assets each year, and that if the power is not exercised in a particular year it is non-cumulative (lapses at the end of the year).

Life Insurance Proceeds

The proceeds of a life insurance policy are included in the gross estate if the insured possessed any incidents of ownership over the policy, or the proceeds of the policy are payable to the insured's estate, or if the proceeds of the policy are directed to be used for the benefit of the insured's estate. Incidents of ownership are defined as the power to change the beneficiary, or to revoke an assignment, or pledge the policy for a loan.

Previous QTIP

If a marital deduction was allowed in a prior estate for qualified terminable interest property, the value of the property at the death of the surviving spouse is includible in the gross estate of the surviving spouse. If during the lifetime of the surviving spouse, she or he gives away any of the QTIP trust property, this would subject the entire trust to gift tax. See chapter 20 for extensive discussion of the use of the QTIP.

Transfers Made Within Three Years of Death

Property given as a gift prior to the death of the transferor is not usually included in the decedent's estate but could be subject to gift tax. There are, however, certain exceptions under the Code to this general rule. These cover life insurance, retained interests, and revocable transfers. In addition, any gift tax paid by a decedent on any gift made by the decedent or his or her spouse, within three years of his or her death, is includible in his or her estate. There is an exception to the three-year rule for transfers to third parties from a decedent's revocable trust.

Retained Interests

The gross estate will also include the value of all property transferred, whether by trust or otherwise, in which the decedent retained an interest. Examples of retained interests that cause the inclusion are:

- An irrevocable trust in which the decedent retained the right to receive the income for life
- An irrevocable trust in which the decedent retained the right to receive the income for a fixed term and he or she failed to outlive the term
- A transfer of real estate in which the decedent retained a life estate (whether by deed or by continued occupancy)
- An irrevocable trust created by the decedent in which he or she is the trustee and the trustee's discretion is not limited to an ascertainable standard
- The retention by the decedent of the right to vote shares of stock in a controlled corporation

Revocable Transfers

The most common form of such transfer is the revocable living trust. Due to the grantor's or settlor's right to revoke it, the full value is includible in the gross estate.

Gifts Made by Power of Attorney Agent

Unless a power of attorney expressly grants the agent the ability to make gifts on behalf of the principal, the gift will be included in the principal's gross estate. The reason for it is that the principal could have revoked the transfer, since the agent acted without authority. A few states have passed laws giving the agent the right to make gift transfers provided there is no provision against making such transfers in the governing instrument.

Donor as a Custodian of a Minor's Gift

If, at the death of a person who is the donor of a gift, he or she is the custodian, the gift will not be effective for estate tax purposes. As a custodian, the donor has the power to control distributions. The donor has the power to alter, amend, or terminate the account, and as such the full value amount of the gift is included in the donor's gross estate under the revocable transfer provisions of the Internal Revenue Code.

Valuation

The assets included in the gross estate are valued at their fair market value on the date of the decedent's death, unless the executor or personal representative

is eligible to and elects to value the assets under the alternate valuation option. Alternate valuation is available only if the election reduces both the value of the decedent's gross estate and the federal estate tax liability. The alternate valuation date is a date six months after the date of death. However, if an asset is sold or distributed in the interim, the alternate value of that asset is its sales price or the value on the date of distribution. Excluded from the alternate value calculation is any income earned between the date of death and the alternate valuation date.

Fair market value is defined as the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of the relevant facts. If the item is one generally sold at retail, the fair market value is the price at which the item or a comparable item would be sold.

The valuation of the estate's property is necessary in order to determine the amount of the gross estate, the amount available for disposition, transfer tax, and administration costs.

Minority-Interest and Lack-of-Marketability Discounts

A discount or a reduction of the fair market value of an asset may be allowed where a minority interest is owned and/or where the property is subject to transfer restrictions contained in a buy-sell or other agreement between or among the owners of undivided interests or where the asset may lack marketability. (An undivided interest is an interest in a property owned by multiple tenants, whereby each tenant has an equal right to make use of the property.)

In the *LeFrak* case, the taxpayer made undivided fractional gifts of real property to various donees. The tax court stated that, in determining the gift tax value of an undivided interest, the effect of the cost and delay of partitioning the property should be considered. A 20-percent minority discount allowed by the court under the willing seller–willing buyer standard is more generous than the Internal Revenue Service position in Internal Revenue Service Technical Advice Memorandum 9336002. The Internal Revenue Service ruled therein that a discount to reflect a decedent's one-half community property interest in real property was limited to the estate's share of the estimated cost of the partition of the property, noting that the courts have recognized that partitioning results in greater economic benefit to the owner of an undivided interest in real property than accepting a reduced price.

One method for determining the fair market value of an undivided interest in real property for estate tax purposes is to multiply the value of the property by the undivided interest, then subtract the share of costs of partition allocable

to the undivided interest. In Internal Revenue Service Technical Advice Memorandum 19943003, the Internal Revenue Service ruled that the determination of the fair market value of an undivided interest in real property based on the hypothetical willing seller–willing buyer analysis with a discount for the costs of partition was appropriate.

In an interesting recent case, other methods of valuation were used. In *Baird v. Commissioner,* which entailed gifts of individual fractional interests in Louisiana timberlands, the Court accepted a 60 percent discount of the fair market value of the property (rejecting a 90 percent claim by the taxpayer).

Blockage Discount

The gift tax regulations permit an exception to the definition of fair market value for certain gifts. Gifts of large blocks of publicly traded shares of stock fall into this category. This exception or special rule is called a "blockage discount." This type of discount is permitted if the block of shares to be valued is so large in relation to the actual sales taking place in the current market that it could not be sold in a reasonable period of time without depressing the market. The amount of the discount depends on many factors, including the amount of the company's outstanding shares. Blockage discounts have been allowed in valuing types of property other than shares of stock. For example, in *E. Brocato, 78 The Chase Manhattan Bank 1243, TC Memo. 1999-424,* the tax court approved an 11 percent discount to reflect the fact that the decedent's eight multiple-unit apartment buildings would all be on the market at the same time in the same geographic area (northern San Francisco) and that seven of the eight properties were similar enough in size and value to be competing against one another for potential buyers.

Capital Gains Discount

The Tax Reform Act of 1986 substantially eliminated the ability to escape capital gains tax upon a liquidation of a C corporation. The revenue rulings of the Internal Revenue Service have set forth the basic guidelines for valuing companies and have acknowledged that the costs associated with liquidation are a part of the process. Accordingly, in the matter of *A. D. Davis Estate Plan Family, 110 TC 530,* the Tax Court of the United States ruled that a discount or adjustment was attributable to the built-in capital gains tax as part of the lack-of-marketability discount in connection with a gift of shares of stock. The discount is permitted even though a liquidation of the corporation is not planned, and is hypothetically assumed in projecting the potential tax liability.

Promissory Notes

The value of a promissory note is its fair market value, which, according to *Rego Park, NY §20.203l-4,* is presumed to be its face value or the amount of unpaid principal, plus interest accrued to the date of death. The regulations explain, however, that the executor may establish that the value of a note is not its face value if the actual fair market value is lower, or if the note is worthless, due to the interest rate, date of maturity, insolvency of debtor, insufficiency of security, or other factors.

Art Objects and Related Property

In the valuation of art objects and related property, such as literary material, coin and stamp collections, etc., expert opinion is usually required and heavily relied upon.

The valuation of paintings is a specialized field, and questions of value and authenticity must usually be resolved by the opinions of qualified experts.

The owner should retain the bill of sale setting forth the price paid, the date of purchase, a description of the painting, and the artist to whom it is attributed. He or she should also retain copies of any appraisals, together with a list of the appraiser's qualifications. Sometimes, on the acquisition of a painting, the purchaser will be given a certificate of authenticity. These certificates are likely to be of little value, especially if, as sometimes happens, the description of the painting is vague. If available, the chain of ownership (provenance) of the painting may be important. If the artist is a living artist or a relative newcomer, a listing of any exhibits or showings of his or her works will be helpful in establishing value.

A large holding of art objects may qualify for a "blockage" discount when it is apparent that liquidation of the holding would depress prices.

The valuation of literary material, including books, manuscripts, letters, autographs, and similar material, is extremely difficult. A major source of difficulty is the absence of a reliable source for quotes of the value of literary items. In this case, qualified expert opinion is also required and heavily relied upon.

Real Estate

An appraiser familiar with the area is usually in a better position to make an appraisal and less open to challenge than is an outsider.

The appraiser should consider the location, frontage, size, condition, and utility of the property and, depending on the character of the property, such other factors as:

- The trends, density, and income levels of the population in the area and in the immediate locality
- The nature, scope, and outlook for industry
- Social, educational, and recreational facilities
- Accessibility to transportation, electricity, gas, and water
- Zoning and private restrictions
- Climate and view
- Public improvements (streets, sidewalks, sewers, parking)
- Federal tax rules
- Local tax policies and trends
- The current mortgage money market

A competent appraiser valuing improved real estate will consider, among other factors, one or more of the following approaches: market, income, and cost.

Market Approach

The best indicator of value is an actual bona fide sale of the real property on the valuation date. The next best indicator is a sale reasonably close to the valuation date, taking into account any intervening factors between the sale date and the valuation date that would affect value, such as a change in zoning, eminent domain, improvements built near the property, or a change in the neighborhood. Absent a sale of the subject property, the next best indicator is recent sales of comparable properties. However, since exact comparisons are not likely, sales of similar properties will be looked to, with adjustments made for such differences as exist between the properties.

Income Approach

This approach in valuing real property is the capitalization of income from property at a rate that represents a fair rate of return on the investment, at that particular time and considering all the risks. This approach is particularly useful in the appraisal of business properties. The determination of the income flow should take into account, among other things, the future demand for space, the vacancy rate, and the cost of labor, maintenance, real estate taxes, and utilities.

The key elements of this valuation approach are income to be capitalized and the capitalization rate. Potential income from the property's highest and best use should be considered in determining income to be capitalized. The usual method is to reduce gross income by certain expenses, such as income and depreciation, unless depreciation can be accounted for in the capitalization rate.

Undervaluation Penalty

The Code provides that where estate (or gift) tax is underpaid because of a "valuation understatement," a penalty of up to 30 percent of the tax attributable to the understatement is to be added to the tax. An understatement is substantial only if the claimed value is 50 percent or less of the correct value and the underpayment attributable to the understatement exceeds $5,000. The penalty is doubled where the claimed value is 25 percent or less of the correct value. However, if reasonable cause and good faith can be shown for the underpayment, the penalty will not be applied.

Deductions from the Gross Estate

A number of deductions are subtracted from the gross estate to determine the taxable estate. The most significant deductions permitted under the Internal Revenue Code are the marital and charitable deductions. These tend to be the largest deductions and, by reducing the taxable estate, can eliminate and/or defer estate transfer taxes.

The Marital Deduction

The estate of a decedent can claim a deduction, called the "marital deduction," for qualifying bequests of property to a surviving spouse.

An appropriate estate plan for a married couple with a combined estate in excess of both spouses' applicable exemption amounts, is to use the marital deduction plus a "credit shelter" or "bypass" or "exemption" trust to both avoid estate tax on the exempt portion and defer the tax on the marital portion until the death of the surviving spouse. The funding formula typically provides for the credit shelter trust to be increased to take into account the credit for state death taxes.

The Economic Recovery Tax Act of 1981 (P.L. 97-34) (ERTA) created an unlimited estate and gift tax marital deduction for estates of decedents dying, and gifts made, after 1981. Qualified disclaimers as well as common disaster and survivorship bequests are important supplements to marital deduction planning.

The marital portion can be either an outright bequest or in the form of a trust. A more detailed explanation of qualifying for the marital deduction is set forth in chapter 20.

Charitable Deduction

Charitable bequests are fully deductible for estate tax purposes. If you wish to split the benefit of a bequest between a charity and a beneficiary, a trust will solve the problem. You can create a charitable remainder trust (CRT), which will pay income to your beneficiary for a certain period and the assets remaining in the trust will pass to a charitable organization when the period ends. In such event, your estate will receive a deduction for the value of the trust that will eventually be received by the charity. The amount of the deduction will be determined by the size of the trust, the trust's terms, and the income to be paid to the beneficiary. You can reverse the scenario by providing, in the first instance, for a charitable organization to receive the income for a certain period, with the remainder passing to your beneficiary after the designated period (charitable lead trust).

Combining the use of a CRT with an irrevocable life insurance trust is a sophisticated technique that can provide for the replacement of assets lost through the charitable gift. Removing an asset from an estate and replacing it with an asset outside the estate, paid with income tax savings, is a very positive strategy. If the CRT continues for the joint life of both spouses, then this plan would favor the use of an insurance policy payable on the death of the second spouse, or what is common called a second-to-die policy. If the CRT terminates on the death of one spouse, then the insurance should be placed on that individual's life.

Miscellaneous Deductions

A number of other items are also deductible from the gross estate.

Funeral expenses, including the costs of a tombstone, monument, or mausoleum; a burial plot for the decedent or his or her family, including the reasonable cost of its future care; and transportation expenses of the person bringing the body to the burial place. These deductions must be reduced by any burial allowance received by the estate.

There is a deduction for administration expenses actually incurred in administering the estate, i.e., the expenses of gathering assets, liquidating debts of the decedent, and the distribution of estate assets to the beneficiaries, including commissions of the legal representatives (executor/personal representatives), court costs, appraisers' fees, and the like.

Claims against the estate are deductible, if they are legally enforceable as obligations of the decedent under state law. Unpaid mortgages and other indebtedness on property, including real estate taxes constituting a lien at death and accrued interest on mortgage debt are also deductible.

The Code allows for the deduction from the gross estate of all or a portion of the value of a family business interest. The maximum value of the business that can be deducted is $1,300,000 less the then applicable exclusion amount (exemption or credit amount). To qualify for the deduction, the fair market value of the business which will pass to qualified heirs (specified relatives of decedent) must exceed one-half of the decedent's estate, as specially defined for this purpose and as computed without regard to the deduction. Also, the business must be owned at least 50 percent by one family; 70 percent by two families; or 90 percent by three families with at least 30 percent owned by the decedent's family. Finally, the decedent or a member of the decedent's family must have owned and materially participated in the operation of the business for at least five out of the eight years preceding the decedent's death.

A recapture tax in an amount up to the estate tax saved plus interest must be paid if, within the earlier of the qualified heir's death or ten years following the decedent's death, the family business is sold, or the qualified heir or member of the qualified heir's family otherwise fails to materially participate in the operation of the business.

How to Compute the Estate Tax

The federal estate tax is calculated in the following manner:

Total Gross Estate
Less: Funeral and Administration
Marital Deduction
= Taxable Estate

Plus: Adjusted Taxable Gifts
= Estate Tax Base

Calculate From the Rate Table
= Tentative Tax
Less: Gift Taxes Paid
= Estate Tax Before Credits
Less: Unified Credit
State Death Tax Credit
= Net Estate Tax Due

In addition to the net estate tax due, another tax that may be due is the generation-skipping transfer tax on generation-skipping transfers made by the estate owner at death. The generation-skipping transfer tax is discussed at length in the next chapter.

Use of the Unified Credit

The unified credit is important in reducing the estate tax liability of the estate owner. The unified credit, now referred to as the "applicable credit amount" in Code Sec. 2010, is a one-time credit in life and at death against taxes payable on certain transfers. The unified credit replaced the pre-1977 $30,000 lifetime gift tax exemption and the $60,000 estate tax exemption. Although the credit must be used to offset gift taxes on lifetime transfers, regardless of the amount so used, the full credit is allowed against the tentative estate tax. The rationale for such full application is that the estate tax payable is calculated using the cumulative transfers at life and at death and is then reduced by the amount of gift tax paid by a decedent.

It should be noted that, because of the nature of the gift tax, the computation of the unified credit for gift tax purposes is different from that for estate tax purposes. Moreover, with the passage of the Economic Growth and Tax Relief Reconciliation Act of 2001, the unified credit has been "de-unified." Different schedules of the estate and gift tax are set forth later in this chapter.

The Act increases the estate tax applicable exclusion amount (unified credit) according to the following schedule:

- For decedents dying in 2002 and 2003: $1 million
- For decedents dying in 2004 and 2005: $1.5 million
- For decedents dying in 2006, 2007, and 2008: $2 million
- For decedents dying in 2009: $3.5 million

The Act also increases the gift tax applicable exclusion amount to $1 million, beginning with gifts made in 2002. However, unlike the gradual increase in the estate tax applicable exclusion amount in the years leading up to repeal of the estate tax, the gift tax applicable exclusion amount remains at $1 million and is not indexed for inflation. For years 2002 through 2009, the amount of the gift tax unified credit is equal to the applicable credit amount in effect under Code Sec. 2010(c) for such calendar year, determined as if the applicable exclusion amount were $1 million, reduced by the sum of the amounts allowable as a credit for all preceding calendar periods (that is, the portion of credit already used through earlier gifts).

The use of the applicable unified credit in your will or trust completely avoids estate tax liability in the amount of the exemption in both your estate and the estate of your spouse. The proceeds held in a unified credit trust will pass totally estate tax free to your beneficiaries. The unified credit is used in tandem with marital deduction planning. If you can, you should make lifetime transfers that use the unified credit. The sooner the transfer, the greater the growth on the gifted property that is free of transfer tax and the less the unified credit is eroded by inflation.

Miscellaneous Tax Credits

In addition to the applicable unified credit, credits are allowed against the estate tax for state death taxes paid, gift taxes paid on pre-1977 gifts, tax paid on prior transfers, and foreign death taxes.

Credit for Gift Tax

A credit is allowed against the estate tax for gift taxes paid on gifts made prior to 1977, for any portion of such gift that is later included in a person's gross estate. The credit is not allowed for gift tax paid on gifts made after 1976. The tax on post-1976 gifts is instead taken into account in the computation of the tentative estate tax.

The amount of the credit is limited to the lesser of the amount of the gift tax actually paid on the gift, or the amount of estate tax attributable to the inclusion of the gift in the gross estate.

Credit for Tax on Prior Transfers

A credit against the estate tax is allowed for federal estate tax paid on the transfer of property to the present decedent from a person who died within ten years before the death of the present decedent. The transferred property need not be identified in the transferee's estate, nor must the property still be in existence. It is sufficient that the transfer of the property was subject to federal estate tax in the transferor's estate and that the transferor died within the prescribed time. The amount of the credit may not exceed the tax attributable to the transferred property in either the transferor's or transferee's estate, whichever is less. The credit is reduced if the transferor predeceased the present decedent by more than two but less than ten years. However, a full credit is allowed, regardless of the time passed since the transferor's death in the case of a decedent who was

denied a marital deduction because his surviving spouse was a non-citizen. If the estate of the surviving spouse is subject to the estate tax, the spouse's estate is entitled to a full credit for tax on prior transfers for property that would have qualified for the marital deduction but for the citizenship requirement.

The actual credit is a percentage of the maximum allowable credit that reflects the difference in the time between the deaths of the transferor and the decedent, as shown in the following table:

Difference in Time between Deaths

Period of Time Exceeding	Not Exceeding	Percent Allowable
2 years		100
2 years	4 years	80
4 years	6 years	60
6 years	8 years	40
8 years	10 years	20
10 years		none

Credit for Foreign Death Taxes

A credit against the federal estate tax is allowed for any estate, inheritance, legacy, or succession taxes actually paid to any foreign country on property located in that country which is included in the decedent's gross estate. The credit cannot exceed the portion of the federal estate tax attributable to the foreign property unless specifically allowed by treaty. The credit must be claimed within four years after the filing of the estate tax return.

Credit for State Death Taxes

Most states impose only a "pickup" or a "sop" tax, which is equal to the federal credit for state death taxes. This portion of the federal estate tax is collected by the state that has jurisdiction over the estate of the decedent (usually the domiciliary state). A minority of states impose their own, often higher, estate or inheritance tax in addition to the credit portion. Because the pickup or sop tax is offset against the federal estate tax otherwise due, this tax is really paid by the federal government and not the taxpayer.

The states of Connecticut, Indiana, Iowa, Kentucky, Louisiana, Maryland, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, and Tennessee impose an inheritance or estate tax. Connecticut began phasing out its inheritance tax in 1997. Effective January 1, 2006, Connecticut will impose only a pickup tax. Louisiana's inheritance tax is repealed, effective July 1, 2004. Other states (e.g., Indiana) levy an inheritance tax, which is computed based on the share received by each beneficiary and the relationship to the decedent.

Several states impose their own gift tax as well (Connecticut, Louisiana, North Carolina, and Tennessee). A majority of states impose a tax on generation-skipping transfers exactly equal to the 5-percent credit for state taxes available under the federal version of that tax. Generation skipping transfer is discussed in detail in chapter 8.

Creditable state death taxes include estate, inheritance, legacy, or succession taxes. The amount of the credit is based on the decedent's adjusted taxable estate, less the sum of $60,000.

Taxes paid to U.S. possession or territories do not qualify for the credit for state death taxes but may qualify for the credit for foreign death taxes.

CHAPTER 8

The Generation-Skipping Transfer Tax

The generation-skipping transfer tax is imposed on transfers to beneficiaries two or more generations younger than transferor. Each person has an exemption of $1,120,000 (in 2003) for federal generation-skipping purposes.

In addition to the estate or gift tax, transfers of property, whether made during life or following death, to beneficiaries who are two or more generations below the transferor may be subject to a generation-skipping transfer tax (GST). This tax enables the government to partially recoup the estate and gift tax that it would have collected from an intervening generation had that generation not been skipped.

The tax is imposed each time a generation-skipping transfer takes place. The tax applies to all generation-skipping transfers made after October 22, 1986, and to lifetime transfers made after September 25, 1985, unless:

- The transfer is from a trust that was irrevocable on September 25, 1985
- The transfer is pursuant to a will or revocable trust executed before October 22, 1986, if the decedent died before January 1, 1987
- The transfer is pursuant to a will or revocable trust in existence on October 22, 1986, and the testator or creator was at all times thereafter under a mental disability to change the will or trust

There are three types of generation-skipping transfers:

(1) Direct Skip. This is a transfer that is also subject to either the estate or gift tax and that is made to a skip person (defined below). However, the gift tax annual exclusion is available to reduce the amount of a lifetime transfer subject to the tax.

Example: Howard gives his grandson $50,000. This transfer is subject to gift tax and $39,000 of it ($50,000 less $11,000 annual exclusion) is a direct skip for generation-skipping tax purposes.

(2) Taxable Termination. This is a transfer in the form of a distribution from a trust to a skip person, resulting from the termination of an interest in the trust property.
Example: The life-income beneficiary of a trust dies and the remainder is distributed to a grandchild of the trust's creator.

(3) Taxable Distribution. This includes any other distribution from a trust to a skip person.
Example: The trustee makes a discretionary distribution of principal or income from a trust to a grandchild of the grantor.

Not all transfers to grandchildren or collateral relatives such as grandnieces and grandnephews are subject to the tax. Transfers to a grandchild or step-grandchild of the transferor are exempt from the tax if the transferor's child or stepchild (who is also the parent of the grandchild or step-grandchild) is deceased on the date of the direct skip. If a transferor is not survived by any descendants, also exempt are transfers to grandnieces and grandnephews of the transferor if their parent (and relative of the transferor) was deceased on the relevant date. Furthermore, a non-relative more than thirty-seven years younger than the transferor is a skip person to the transferor.

An individual may allocate the exemption to any generation-skipping transfer made by that person, whether the transfer is made during the individual's life or follows his or her death. There is a complicated set of rules with regard to the allocation of the exemption if the allocation is not made on a gift or estate tax return.

Generation-skipping transfers not qualifying for the exemption are taxed at the highest estate tax rate.

For generation-skipping transfers made at death, the federal tax may be offset by a state generation-skipping tax of up to 5 percent of the value of the generation-skipping transfer. Most states impose a state generation-skipping tax exactly equal to the maximum federal credit.

Plan for the Generation-Skipping Tax

Planning with regard to generation-skipping transfer tax involves two issues: how the exemption should be utilized, and, to the extent the exemption is not available, the best way to avoid paying GST tax. The following are common planning techniques.

Use GST annual exclusion to fullest possible extent. To qualify a contribution to a trust for the GST annual exclusion, the trust must have a single beneficiary and the trust must be includible in the beneficiary's gross estate if the beneficiary dies prior to trust termination. Section 2503(c) trusts and Uniform Transfers to Minors Act accounts automatically meet this requirement. Careful planning is required to qualify a Crummey trust for the GST annual exclusion. Donors to a Crummey trust unwilling to accept the requisite restrictions may qualify their contributions for the gift tax annual exclusion but will be required to use the generation-skipping tax exemption to the full extent of the contribution.

Use the medical expense and tuition exclusion. Like the gift tax, payments of tuition and medical expenses, if paid directly to the provider, are not subject to GST tax. However, unlike the gift tax, the exclusion extends to payments made by a trustee. The other requirements for obtaining the exclusion are identical to the gift tax.

Decide on allocation of GST exemption. Normally, GST exemption should be allocated first to direct skips, whether made during life or at death. The remaining exemption should be allocated to trusts most likely to have generation-skipping transfers.

Make a reverse QTIP election. Optimal generation-skipping tax planning for a married couple is achieved by first allocating the applicable exclusion amount to a bypass trust (credit shelter trust). The marital deduction then is divided into two portions. The difference between the generation-skipping tax exemption and the bypass amount is allocated to a QTIP trust, and the balance transferred in any form qualifying for the marital deduction (outright, general power of appointment trust, or second QTIP). Under what is known as a "reverse" QTIP election, the surviving spouse need not apply any portion of his or her GST exemption to the QTIP even though the QTIP will be subject to federal estate tax at his or her death. In 2003, the surviving spouse's exemption need be applied only to the balance beyond the decedent's first $1,120,000. Using the reverse QTIP election, the couple can fully utilize both of their generation-skipping tax exemptions while at the same time paying no estate tax until the second death.

Estate owners wishing to minimize estate tax at their children's deaths then will tie up the full amount of both of their GST exemptions ($2,240,000 in 2003) in trust for their children's lives, deferring outright distribution until their grandchildren or even more remote descendants receive the trust remainder.

Planning for single individuals is much easier. The individual simply will tie up $1,120,000 (in year 2003) in trust for as long as possible and allocate the full generation-skipping tax exemption to the trust. Creation of such trusts,

whether for a single individual or a married couple, is facilitated by locating the trust's situs in one of the increasing number of states which have never had or which have repealed the rule against perpetuities.

To the extent transfers fail to qualify for the generation-skipping tax exemption, they should be transferred in a manner that subjects them to estate tax at the children's deaths. If the donors use a trust, estate taxation at the children's deaths can be provided by giving the children a testamentary general power of appointment over their trust shares. Unless the children are in the highest estate tax rate, the estate tax paid at their deaths necessarily could be less than the generation-skipping tax rate.

Analyze carefully before considering a disclaimer (renunciation). While a disclaimer by a child and the consequent reduction of the child's estate reduces the child's estate tax, the disclaimer may actually be more costly if the disclaimed property passes to the grandchildren and triggers generation-skipping transfer tax. Distributions to a grandchild are exempt from GST tax if the grandchild's parent predeceased the transferor.

Annual Exclusion Surprises

Transfers to trusts which qualify for the $11,000 gift tax annual exclusion do not automatically qualify for the GST tax annual exclusion. In order for a trust to qualify for the GST tax annual exclusion, the three following conditions must exist:

(1) The transfer is a direct skip
(2) The trust has only one beneficiary during the beneficiary's lifetime
(3) The trust will be included in the beneficiary's estate upon his or her death

Most typical grandchildren's trusts contain the requirements set forth in (1) and (2) above but do not meet the estate inclusion test as a result of the structure of the trust itself. Usually trusts for grandchildren provide for the grandchild to receive the principal at a certain age and if the grandchild should prematurely die, the trust usually continues for the benefit of the grandchild's issue and the corpus is not paid to the grandchild's estate. If the trust grants or gives the trustee the right to grant the beneficiary a general power of appointment (and if the trustee does so), this will cause the trust to be included in the beneficiary's estate, and the trust will meet the GST tax annual exclusion requirement.

CHAPTER 9

Post-Mortem Strategies for Estate Planning

Estate planning may continue after one's death. Post-mortem planning can include the following:

- The administration and management of the estate
- Estate tax reduction
- Income tax savings for both the beneficiaries and the estate
- Altering a decedent's plan of distribution by having the beneficiaries employ disclaimers and renunciations

The legal representative of an estate may have many selections. Most of them revolve around the final income tax return of the decedent (Form 1040); dealing with income in respect of the decedent (IRD); the income tax return of the estate (Form 1041); and the estate tax return (Form 706).

Steps to Planning

If there is a need or desire to change a person's estate plan after his death, here are some of the steps that should be considered:

- Take inventory of the assets and liabilities of the estate.
- Gather all income and gift tax returns of the decedent that were filed prior to his or her death. Information should be ascertained whether any gifts, other than those reported, were ever made.
- Claims covering all life insurance policies owned by the decedent and Form 712, which is issued by the insurance company, should be filed.
- Identify and review all retirement plans and accounts.
- Search each bank and brokerage company where it is possible the decedent may have maintained an account or a safe deposit box.

- Open safe deposit boxes to ascertain contents.
- Employ appraisers in order to determine the fair market value of decedent's assets for which values are not readily ascertainable.
- Apply for a taxpayer's identification number for the decedent's estate with the Internal Revenue Service.
- As soon as it is feasible, estimate a cash flow requirement covering the anticipated administration costs. Those assets that will be applied towards the various estimated obligations may be identified at this time as well.
- If the estate is subject to estate tax, estimate the cash requirements for same, and schedule time of payment. In addition, if possible, advance estimates of the estate's required settlement costs should be made as well.
- Set all filing deadlines for the various tax returns and fiscal year for the estate's income tax return.

Keeping the Estate Open

If the beneficiaries of an estate are in a higher income tax bracket than the estate, the legal representative may wish to continue the administration of the estate for as long as it is possible, to take advantage of the estate's lower tax bracket. Taxable income that will be taxed at higher rates in the income tax brackets of the beneficiaries may be taxed at the estate's lower rate. However, an estate that has a tax year ending more than two years after the date of the decedent's death must make estimated payments of income tax.

Income Tax Savings on the Decedent's Final Return

The legal representative of a decedent's estate usually must file the federal income tax return that the decedent would have filed if the decedent had lived. The period in question covers the calendar period for the decedent's final tax year.

Should a Joint Return Be Filed?

The legal representative of the decedent's estate has a choice of filing a separate return for the decedent or electing to file a joint return with the surviving spouse if the surviving spouse has not remarried before the end of the tax year.

If a joint return is filed, the return must include the decedent's income for the portion of the year that decedent accrued income and the surviving spouse's income for his or her entire tax year.

The legal representative's decision may be delivered as to whether the estate's liability on a joint return will be lower than if a separate return is filed. If a joint return is filed, the estate becomes jointly and severally liable with the surviving spouse for any income tax liability and any possible penalties. If the surviving spouse has significant taxable income of his or her own, it is possible that the estate's income tax liability will be greater on a joint return than on a separate return.

As a general rule, a joint income tax return should result in tax savings for the estate because of the rate schedule's income-splitting benefits in the community property states. Separate income tax returns may not provide the same income tax results as joint returns. Furthermore, a surviving spouse is eligible to take advantage of joint return income tax rates for the two years following the death of a decedent by filing as a surviving spouse and not as a separate individual.

Medical Expenses of the Decedent

Medical expenses of a person are usually only deductible in the year that they are paid. However, medical expenses incurred before death and paid within one year after death can be claimed as medical deductions on the decedent's final income tax return. Medical expenses unpaid at the time of a person's death can be claimed as an estate tax deduction in the decedent's estate tax return. In order to claim a medical expense as a deduction on the decedent's final income tax return, the legal representative must file a waiver of the right to claim the expense in the estate tax return. (In other words, no double deduction is permitted for any medical expense.)

The decision where to take the deduction usually revolves around the tax brackets of the estate and of the final income tax return, taking into consideration that medical expenses are only deductible for income tax purposes to the extent they exceed seven and one-half percent of adjusted gross income.

U.S. Savings Bonds

Interest income on U.S. Series E and EE bonds is normally reported, upon the redemption of the bond or upon redemption of an H or HH bond received in exchange for an E or EE bond. An election can be made to report as income in

any one year the total increase in the value of an E and EE bond or an H or HH bond received in exchange to date. If the election is not made, the accrued income will be income in respect of a decedent. Any federal estate tax attributable to the inclusion of such income in the estate may be deducted in computing the income tax thereon.

It is usually advantageous to report all of the accrued income on a Series E or EE bond or H or HH bond received in exchange on the decedent's final income tax return, especially if death occurred early in the final tax year before receipt of substantial taxable income. But even if the election results in the imposition of federal income taxes, interest on these bonds is exempt from state and local income taxes, and income taxes are deductible on the estate tax return.

Commissions of Surviving Spouse-Executor or Administrator

Should a surviving spouse who is a legal representative waive commissions, which are income-taxable? The waiver of commissions could be advisable when the spouse will otherwise receive an equivalent amount as a bequest or legacy, income tax free.

In order to answer the question, it is necessary to compare the results of a waiver or receipt, calculating the income tax bracket of the surviving spouse, the estate tax bracket of the estate, and the impact of the waiver on the plan of distribution, including how it affects the marital deduction bequest.

Income in Respect of a Decedent

"Income in respect of a decedent" (IRD) is income that is earned by the decedent or income which he or she has a right to prior to his or her death, but which was not property includible in his or her taxable income for the tax year ending with the date of his or her death or for any prior year under the cash method of accounting employed by the decedent. Most persons use the cash-basis method of accounting, which means they are not taxable on items of income until received. Those using the accrual method of accounting are taxable when the right to income accrues. Unpaid salary owing at death, and deferred compensation are common items of IRD. Other items of IRD include interest on U.S. savings bonds that the decedent elected not to have taxed as it accrued; accrued interest on other bonds, a deceased partner's distributive share of partnership income; discount on a zero coupon bond maturing before death, plus interest

from maturity to the date of death; accrued royalties; payments on installment obligations; alimony arrears; payments on accounts receivable; gain received after death on property sold before death; and qualified plan and IRA distributions to survivor beneficiaries.

IRD also is includible in the gross estate of a decedent for estate tax purposes. Under the Internal Revenue Code, an income tax deduction for estate tax attributable to IRD is permitted. This type of deduction will therefore reduce the income tax due on the IRD item.

The Income Tax Deduction for IRD

The Code provides the entity that is taxable on IRD with an income tax deduction for the federal estate tax attributable to the inclusion of such an income item in the decedent's gross estate. The deduction is the amount of the federal estate tax attributable to the "net value" of the IRD (the IRD less the deductions and credit allowable under the Internal Revenue Code). This is measured by the difference between the estate tax computed with and without the inclusion of such net value in the gross estate.

Disclaimer Planning

A disclaimer or renunciation can be very significant in planning after the death of a person. The disclaimer allows the transfer of assets from the person to whom it is given to other persons without any gift or estate tax consequences to the person who disclaims.

A valid disclaimer for federal estate and gift tax purposes exists if the transfer is timely made, the transferor has no interest in the property or any of its benefits, and it otherwise meets the requirements of a qualified disclaimer.

A qualified transfer is made in writing by the transferor within nine months of the transfer creating that individual's interest (the date of death if created by will or intestacy) or within nine months of the individual's attaining the age of twenty-one.

The Internal Revenue Service has greatly enlarged the use of disclaimers by surviving spouses that permit joint marital property to fund a decedent's applicable exemption. A surviving spouse may disclaim one-half of property held as joint tenants within nine months after the death of the joint tenant. In such an event, the disclaimed property interest would pass as the deceased spouse's individually held probate property.

A person's will should direct that any property disclaimed by the surviving spouse should pass to a unified credit trust, which can benefit the surviving spouse and/or the entire family.

Tenancy by the Entirety

"Tenancy by the entirety" is a special form of joint ownership for married couples. Many states recognize some form of this property interest. In those states that recognize tenancy by the entirety, a spouse enjoys protection from a creditor of the other spouse. If the debtor-spouse dies first, the creditor cannot seize the property held as tenancy by the entirety.

States that recognize some form of creditor protection for current real estate transfers to married owners as tenants by the entirety are Arkansas, Delaware, Florida, Hawaii, Indiana, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming, as well as the District of Columbia.

In tenancy by entirety, the maximum a surviving joint tenant can disclaim is one-half of the real estate joint ownership. The one-half real estate interest is included in the probate estate and gross taxable estate of the first joint owner to die. Any disclaimed real estate interest included in the decedent's gross taxable estate is not considered joint ownership property. It passes as the decedent's separately held probate property to the person under the decedent's will who would inherit the property had the disclaimed joint owner predeceased the beneficiary. If there is no will, the disclaimed interest passes under intestate succession.

If the surviving joint owner disclaims less than one-half of the joint interest, the decedent still will include one-half of real estate jointly held in his/her gross taxable estate. The property disclaimed is treated as real estate held separately by the decedent. This portion of property disclaimed passes to the alternate beneficiary under the will or the intestate heir if there is no will. The original one-half interest of the surviving joint owner plus the balance of the decedent's one-half interest not disclaimed passes to the survivor.

Disclaimer Will

Under this type of will, the testator makes a bequest of the entire residuary estate to the surviving spouse, coupled with a disclaimer provision, which

provides that if the surviving spouse disclaims any portion of the estate, the disclaimed portion will be held in a unified credit trust. This is a useful measure for younger families with children, who have substantial assets. Younger couples are often comfortable with relatively simple wills that leave all to the surviving spouse. Federal estate tax savings on the death of the surviving spouse may not be of great importance to these couples. A disclaimer trust provision, however, could provide savings potential in the event that one spouse dies and the survivor opts for tax savings.

Renounce to Increase the Marital Deduction Amount

In many circumstances, property will pass to or for beneficiaries other than the surviving spouse or otherwise will not qualify for the estate tax marital deduction. If the renunciation of these inheritances has the effect of increasing the amount passing to the surviving spouse in another form, which will qualify the transfer for the estate tax marital deduction, it may be appropriate to effect such renunciation. That may be beneficial because it postpones the imposition of estate tax and provides the surviving spouse with an opportunity to engage in lifetime planning that may reduce overall taxation.

Renounce to Reduce Generation-Skipping Transfer to Amount of Available GST Exemption

Each individual can transfer up to $1,120,000 free of generation-skipping transfer tax, which generally is imposed upon transfers of property to or for the benefit of grandchildren or more remote descendants (or other persons subject to generation-skipping).

On the other hand, the property owner may have made no effective use of the GST exemption because, for example, all property was left to spouse/children outright. Renunciations by the children may have the effect of having the property transferred to their children (the decedent's grandchildren) to allow effective use to be made of the decedent's GST exemption.

CHAPTER 10

The Uses of Trusts in Estate and Gift Planning

Trusts are the most important devices used in estate planning. A trust is a legal relationship created by one person, called the "settlor" or "grantor," in which another individual, the "trustee," owns and manages property for the benefit of a third person, the "beneficiary." Because the trustee owns the trust, he or she has legal title; but because the trustee must use the property only for the benefit of the beneficiary, the beneficiary is said to have "equitable title" to the property. A trust is created by a written instrument called a "trust agreement." If properly worded, a trust instrument can be extremely beneficial to an estate plan, as this chapter will document. If the trust is very large, the trustee can use trust funds to hire financial experts to manage it; the trustee can hire an attorney, if one is needed.

The Uses of Trusts

A trust can be created to do anything the grantor could do and many things that he or she might be prevented from doing because the transaction might not be completed under the transfer tax laws. An estate tax in most instances may not be avoided unless the grantor, absolutely irrevocably, ceases to have any participation over the property gifted. By creating a trust the grantor can give the trustee the right to do many things the grantor cannot do, and not have the assets included in his or her estate. There are, however, certain rights the grantor can reserve, such as the ability to remove a trustee and designate a successor trustee; the grantor can retain administrative powers; as well as a power to substitute assets of equivalent value.

The trustee has great flexibility in managing the trust assets; he or she can use them to buy and sell stocks, bonds, property, or other investments; the trustee can deposit trust funds in a bank account or can withdraw them; the

trustee can tailor the payments he or she makes to or for the beneficiary to suit that individual's needs as they change over time.

There are four basic types of trusts. The first is an irrevocable living trust. When an irrevocable living trust is established, the grantor gives up ownership of the assets that fund the trust, and those assets are not included in the grantor's estate and can avoid estate taxation in the beneficiary's estate. Such a grant may be subject to gift tax upon creation, and must be supervised by a trustee.

A revocable living trust, on the other hand, may be revoked or amended by the grantor. Investments of the trust may be managed by a financial professional. This trust would be part of the grantor's estate, and therefore estate and income taxable to the grantor.

A testamentary trust is created in accordance with instructions contained in the grantor's will. It therefore does not take effect until after the testator's death and is includible in the estate of the testator. The assets are controlled by a trustee.

With a grantor-retained trust, the grantor retains interest in the property of the trust, and the income of the trust is taxable to the grantor. The assets of the trust are not includible in grantor's estate unless the grantor dies prior to its termination or it does not meet the statutory requirements.

More closely defined trusts are used to deal with a plethora of unique issues that affect estates, including generation-skipping trusts; trusts in which the grantor retains an interest, such as grantor-retained annuity, or unitrust; qualified personal residence trust; special-needs trusts; sprinkling trusts; Medicaid trusts.

Often trusts are established to deal with the special circumstances of the beneficiaries, for example, where the beneficiaries are in the category of minors, or persons unable to take care of their own needs, or disabled persons who are entitled to government benefits (which would be lost if they owned the assets outright). Where beneficiaries are persons who have financial or creditor problems, a trust can be made "spendthrift," thus placing the assets of the trust beyond the reach of creditors. This type of trust will also prevent the beneficiary from transferring or assigning his or her interest in the trust.

One of the most outstanding characteristics of a trust is its ability to span the gap between life and death. Irrevocable trusts are normally set up for the benefit of others while revocable trusts are usually created for the benefit of the grantor. In most states, under the rule of perpetuities, a non-charitable irrevocable trust may have a duration of twenty-one years after the last beneficiary named in the trust dies, whereas charitable trusts may last forever.

Some reasons that a person will set up a trust for others are:

- Transfer and/or income tax purposes
- Asset protection
- Inability to manage affairs on the part of the grantor
- Minors are the beneficiaries
- Irresponsibility of the beneficiary
- To remove the burden of management of the asset from the beneficiary (i.e., a business)
- To insure expertise in the administration and management of the property
- Avoidance of probate, which can be cost-effective
- Estate and gift tax savings (these savings are generated as a result of the different types of trusts, such as the creation of irrevocable inter vivos trusts or testamentary trusts, which are created by will or revocable trusts)

Common Trust Provisions

It is beneficial if you have an idea as to what provisions are normally set forth in a typical trust agreement. The following summarizes these provisions:

- Assets transferred. The property transferred to the trust (principal or corpus) detailed.
- Trustee. The named trustee is set forth, and if it is an inter vivos trust, the trustee will also sign the trust agreement.
- Administration. The trustee's powers of administration are set forth.
- Beneficiaries. The primary and alternate beneficiaries are designated and the terms and conditions under which they are to receive the benefits of the trust (income/principal).
- Invasion of principal. The standards and/or conditions under which any invasion of the principal is allowed. A power of appointment, whether general or limited, may be given to a beneficiary with regard to all or part of the trust. A beneficiary can be given a withdrawal power to withdraw the greater of $5,000 or 5 percent of the value of the trust annually. This is a limited power of appointment and is commonly referred to as a five-and-five power. In order to consider a gift to a trust as a gift of a present interest and be available for annual exclusion, the trust may have Crummey power provisions. Crummey power is described more fully later in this chapter.
- Spendthrift provision. This provision prevents a beneficiary from transferring the beneficiary's interest in the trust and protects it from claims of creditors.

- Perpetuities. This provision usually provides that, notwithstanding the terms of the trust, it shall terminate based upon the period permitted under the laws of the state having jurisdiction over the trust.
- Bond. The designated trustee is usually not required to obtain a bond to secure the trustee's performance. However, this may not be the case for alternate or successor trustees.
- Successor trustee. In the event the designated trustee should cease to act, for any reason, a successor trustee should be designated or methods for the designation of a successor should be set forth, i.e., the individual trustee in office may be given the right to designate a successor, or, if he or she shall fail to do so, the beneficiary shall have the right to make such designation.
- Compensation of trustee. The payment of the trustee's commissions for the services provided should be set forth. Such payment can be in a fixed amount or a statutory rate.

The Revocable Trust (Living Trust)

"Put not your trust in money, but put your money in trust," said Oliver Wendell Holmes in 1858. A hundred and forty-five years ago, Oliver Wendell Holmes knew that trusts are a most valuable estate-planning tool.

If you want to avoid probate, reduce estate taxes, and protect your heirs, the living trust is for you. Most individuals understand the significance of a will (a basic estate-planning device) but very few have any knowledge about trusts.

A will is a legal document that transfers assets to heirs at death. A trust does the same thing. A will names an executor or personal representative to do this. A trust names a trustee to do the exact same thing. That's where the similarity ends.

A living trust is a form of revocable inter vivos (among the living) trust. It is an extremely flexible device and therefore offers the greatest amount of benefits for the most number of people.

It usually works as follows: you as the grantor/settlor establish a written revocable trust agreement, naming yourself as the beneficiary while you are alive, and naming family members or others as beneficiaries after your death. You maintain full and absolute control over your assets and can revoke or change the trust at any time. Almost any kind of property can be placed in the trust, such as bank accounts, stocks, bonds, and real estate. You simply place the property in the trust by changing the name or title of the asset. Assets that have their own

beneficiary designations, such as employee benefits, life insurance, IRAs, and the like are not transferred to the trust, but the trust can be named as the beneficiary of such items.

Generally, you are the initial trustee, and you designate a successor trustee to take your place, upon incapacity or death, at which time the trust becomes irrevocable.

The trust is therefore, in effect, a contract, which is self-efficient and requires no approval or blessing from the courts to permit its terms to be carried out upon your death, as opposed to a will.

What a Revocable Living Trust Can Do

- It can avoid the publicity, expense, and delay of probate in most cases. Assets held in the living trust at the time of your death are not subject to probate, because they are not legally owned by you.

In his classic book *How to Avoid Probate*, Norman Dacey offered his view of the probate process: "Probate is essentially a form of private taxation levied by the legal profession upon the rest of the population." A recent AARP study on probate concluded that probate is "costly, slow, and an outmoded state of affairs." The AARP reported that in the estates of the middle class, fees can deplete the assets by as much as 10 percent, even in uncomplicated cases.

- It can avoid the interruption of income for your family members on your death or disability.
- It can allow you to view the trust in operation and make changes as experiences and changed circumstances suggest (seeing your will in action).
- It can serve as a receptacle for estate assets and for death benefits from qualified employee benefit plans and life insurance.
- It can bring together assets scattered in two or more states and thereby avoid additional administration of your estate, particularly real estate. Avoiding probate is likewise significant if you live part of the time on real properties, located in more than one state. In such event, each state might claim you as a domiciliary, and seek not only estate taxes, but possible past due income taxes. The institution of such separate probate proceedings increases the risk of this happening, since usually the state taxing authorities are notified of any ancillary probate proceeding, thereby increasing the chances of review of the decedent's domiciliary status.
- It can enable a going business to continue without interruption.

- It can relieve you of the burdens of investment management.
- It can be less vulnerable to attack than a will would be, on the ground of your lack of capacity, fraud, or duress. Many living trusts are in existence for some period of time before the death of the grantor. This makes the trust more difficult to challenge than a will. It is more burdensome to prove incapacity, fraud, or undue influence in the establishment of a trust, especially if the trust was being managed during the lifetime of the grantor, and if the grantor was a trustee. Common circumstances in which a will contest is likely are:
  - Favoring one child: If a will gives one child a significantly higher legacy than other children, a contest may ensue.
  - Favoring second spouse: If a will gives the second spouse a larger share than his or her elective share, the children of a prior marriage may be disposed to contest.
  - Favoring children of a prior marriage: If a will favors the children of a prior marriage over a second spouse, the latter may be inclined to contest.
  - Substantial charitable bequests: If there are large charitable bequests, heirs may be disposed to challenge.
  - Bequests to a partner: Bequests to a partner may be challenged as the product of undue influence.

If a will contest seems likely, consideration must be given to the use of a revocable living trust as an alternative to a will.

- It requires less accounting, administration, and judicial supervision than a trust created by will.
- It can assist in the management of assets for a young adult or spendthrift.
- The revocable living trust is an excellent method for protecting the grantor's assets in the event of incapacity. The trust can make specific provisions for the continuity of one's affairs in the event of disability, rather than necessitate the court appointment of guardian. Many persons place their assets in a living trust because they want to avoid court intervention if they become unable to manage their affairs. Court proceedings are both expensive and time-consuming. The creation of a living trust and the funding of it completely avoids this. A durable power of attorney may suffice in certain situations, but a properly prepared living trust provides additional flexibility regarding the powers of the fiduciary to make gifts and do other tax planning. The trust can also be a "springing trust." Under such circumstances, the management of the trust will only

shift to the successor trustee when the incapacity of the grantor occurs as such incapacity is defined in the trust. Such incapacity can be determined by the certification of independent physicians (not part of the treating team of the grantor's physicians). The determination of the grantor's incapacity should not be left to the judgment of the successor trustees or beneficiaries.

- It may be used by the grantor/trustee for gifts to selected donees without making the gifted property includible in the grantor's estate for estate tax purposes.
- It can help avoid publicity. Under the probate system, anyone can review the records of the probate court, and the inventory and the estate tax proceedings, thereby knowing the assets of the decedent, the identity of the beneficiaries of the estate, and the dispositions of the assets. No such opportunities are available when a living trust is used.
- It can be used as a beneficiary of an IRA, provided the following takes place: (1) the trust becomes irrevocable upon the IRA owner's death; (2) a copy of the trust must be provided to the plan administrator; (3) the IRA owner must agree to provide the plan administrator with any future trust amendments.

Alternatively, a certified list of all trust beneficiaries must be provided to the plan administrator. The IRA owner must agree to provide any corrected certification when changes occur.

Will (Pour-Over)

In many instances, both a trust and a will are mandated if certain assets cannot be placed in a trust, or if there are special circumstances, such as minors who require guardians or litigation involving the estate owner.

A will can cover those assets that are not transferred to the trust during lifetime and will therefore provide for the orderly administration of all of the estate owner's affairs. Where there is a combined will and trust in the estate plan, the will normally provides for probate assets to pour-over, or be added to the living trust when the administration of the estate has been completed, to be thereafter held and administered in accordance with the provisions of the living trust and thereby create only one stream of testamentary dispositions.

Funding Is Critical

The biggest continuing question in terms of mechanics is how you plan to fund the trust. Because you have selected a living trust rather than a will, it is important to complete the trust by funding it while you are alive, and keeping it funded. Most people lose the benefit of this by failing to transfer their property to the trust in the first place or by forgetting to put new property into the trust when they later acquire it.

Here are some guidelines for using your assets to fund your trust:

- Your residence and other real property owned by you needs to be transferred by deed. The recording of the deed will not trigger a property tax reassessment, because the transfer to your trust, for tax purposes, is not an ownership change.
- All bank accounts should be transferred to your trust.
- All securities including those held in closely held corporations and brokerage accounts should be transferred to your trust.
- Limited and general partnership interests should be transferred to your trust. The partnership agreements should be reviewed in order to ascertain the necessary procedures to effectuate these transfers.
- Notes and mortgage notes and promissory mortgages should be assigned to your trust.
- Your trust should be named as an "additional" insured party on your general insurance (homeowner policy).
- Your IRAs and other retirement plans are not transferred to your trust. They must remain in the name of the account owner with a designation of beneficiary in the event of death.
- Automobiles are not normally transferred to your trust. Life insurance policies are not normally transferred to your trust since they contain a designation of beneficiary in the event of death.

Tax Consequences of a Revocable Living Trust

A revocable living trust is not a device for reducing income, estate, or gift taxes.

The income from the assets of a living trust are taxed to the grantor under the "Grantor Trust" rules of the Internal Revenue Code. If the grantor is a trustee or co-trustee, the trust need not file a separate income tax return. If the grantor is not a trustee or co-trustee, a separate taxpayer identification number must be obtained and a separate tax return is required to be filed, if the trust has

taxable income or gross income of $600 or more. However, all items of income, deduction, and credit are still reported on the grantor's individual tax return.

If the trust is revocable by the grantor, there are no gift taxes upon its creation, because the grantor does not relinquish dominion and control over the assets of the trust.

For the same reason the balance of assets in the trust are included in the gross estate of the grantor for estate tax purposes. The living trust may include, as in a will, provisions providing for the disposition of the grantor's lifetime exemption as well as marital dispositions.

Durable Power of Attorney

A power of attorney is a legal document that gives another person (attorney-in-fact or agent) broad powers over one's financial affairs. A power of attorney can survive the principal's disability or incapacity, and therefore it is called "durable." The power may be revoked at any time by the principal and should be prepared with provisions specifically setting forth the principal's desires.

To ensure the ability of a living trust to carry out an estate plan, a durable power of attorney should be created which authorizes the attorney-in-fact to transfer assets to the trust in case of incapacity. The durable power of attorney may also be a springing one so that you retain all powers and authority until certified as incapacitated. In addition, the power to make gifts, including charitable gifts, can be provided in the durable power of attorney as well. This feature can be very critical in one's financial plan for the purposes of the use of the unified credit and the annual exclusion; to create eligibility for government benefit programs; or simply to continue to carry out the principal's planned program for giving.

The Annual Exclusion

The availability of the use of the annual exclusion is an important element in trust planning. In the case of a transfer of property to an irrevocable trust, it is the trust beneficiaries, rather than the trust or trustee, who are the donees. Thus, the donor has as many annual exclusions for gifts of present interests as there are trust beneficiaries.

The Code provides an exclusion from gift tax of $11,000 per donee per year for gifts of present interests. If the spouse of the donor consents to the gifts, the annual exclusion per donee is $22,000.

The annual exclusion is not available for gifts of future interests. Future interests include remainders and other interests that are limited to commence in use, possession, or enjoyment in the future. It is clear that, when a trust creates a life income interest in favor of a named beneficiary and provides that on the death of the life income beneficiary, the remainder interest is to pass to another named beneficiary, there are two gifts—one of a life income interest, the other of a remainder interest. The annual exclusion is not available for the gift of the remainder interest. Whether it is available for the gift of the life income interest depends upon whether that interest qualifies as a present interest.

The Code makes it clear that an unrestricted right to the immediate use, possession, or enjoyment of the income of trust property qualifies as a present interest and the annual exclusion is available therefore (but not in excess of the value of the interest). It is equally clear that "immediate" in this context does not mean that there must be a payment of income, if any, on the day of the transfer to the trust or the day after. It is sufficient if the trust requires mandatory distribution of income at least annually. The right of a beneficiary to demand that the trustee make an annual distribution of income creates a present interest, but not if the trustee has discretion to distribute corpus to another beneficiary.

If the trust gives the trustee discretion to distribute or accumulate income, there is not a gift of a present interest unless the trust is for the benefit of a minor and meets the conditions of the Code or the beneficiaries are given a special power to demand a distribution of income or corpus.

The Five-and-Five Power

This is an important power that can be set forth in an irrevocable trust. In its pure form, it gives the beneficiary a right to withdraw each year the greater of $5,000 or 5 percent of the principal of the trust. A beneficiary with such power has a present interest in the trust. The primary reason for the five-and-five power relates not to the annual exclusion from gift taxes but to estate taxes. Generally the Code requires inclusion in a decedent's gross estate of property to which the decedent had a general power of appointment at the time of his or her death or had exercised or released the power under circumstances that would render the property includible in his gross estate. The release or lapse of a power may have gift tax consequences over and above the issue of the availability of the annual exclusion.

A five-and-five power will give the beneficiary a present interest. It thus also serves to make the annual exclusion available for gifts to the trust. But the

amount subject to the power, in any given case, may be more or less than the amount of the annual exclusion.

The Crummey Power

The case of D. C. Crummey gave birth to the so-called Crummey trust, or power as a means of assuring the availability of the annual exclusion *(D.C. Crummey, CA-9, 68-2 USTC § 12,541,397 F2d 82)*.

The Internal Revenue Service has cited Crummey in support of the proposition that a beneficiary's present right to demand a distribution of a portion of a trust corpus is a gift of a present interest, so long as the donee-beneficiary is aware of the right to make the demand. The donor must give the beneficiary a reasonable length of time to learn of and to exercise the right to demand distribution before that right lapses. Thirty (30) days' notice has been deemed to be reasonable. Since the annual exclusion is not allowed for gifts of future interests (i.e., a gift to an irrevocable trust to pay a life insurance premium), the gift could be converted to a gift of a present interest by the trust containing a Crummey power.

Trusts Created by Will: Testamentary

As mentioned earlier, a trust created under a person's will is known as a testamentary trust. Such trusts may be created for a number of reasons. A person will not divest himself or herself of assets during lifetime; however, such person may want to control the disposition of his or her assets after his or her death. Estate tax savings (unified credit trust) for the benefit of a spouse requires a trust to be created. In order to protect government entitlements, a discretionary or special-needs trust needs to be created for a beneficiary.

The testamentary trust may not, at the time of the creation of the will, provide present estate or income tax savings; however, it may eventually provide them. A trust may avoid the imposition of multiple estate taxes as property passes through generations.

The credit shelter trust is the most popular form of an estate tax avoidance trust. The credit shelter trust as used together with the marital deduction in an unlimited amount will normally provide the surviving spouse with income for life and principal for health, maintenance, and support. The trust cannot give the surviving spouse control over the trust property, so as not to have the property included in his or her estate.

Grantor-Retained Trusts (GRITs, GRATs, and GRUTs)

These trusts involve the creation of an irrevocable gift of a future interest. In a gift of this kind, you retain the right for the period selected to receive the income from the trust fund. If a GRAT is chosen, the income received will be a fixed dollar amount per year (an "annuity"). The value of the gift or future interest is calculated by subtracting the present value of the annuity from the fair market value of the property transferred. For example, if a GRAT is established with $1 million, with the grantor retaining the right to receive an 8 percent annuity ($80,000) each year for ten years, the gift of the future interest will be approximately $501,000. If the rate of interest is 7 percent, the value of the gift would be higher, or approximately $564,000. The gift can be further leveraged by choosing an asset that will outperform the government's rate or by choosing an asset for which minority/lack of marketability discounts may be available. If a $1 million residence is placed in a ten (10) year house trust (qualified personal residence trust—QPRT), pursuant to current interest rates, the approximate value of the grantor's retained right, for gift tax purposes, is two-thirds of the present value of the house. The value of the gift would be the remainder interest, or approximately one-third thereof, which would be subject to gift tax. What is important is that as grantor, you can select the value of the remainder interest, and hence the value of the gift, by lengthening or shortening the term of the retained interest period. As the term of the income interest is lengthened, the value of the remainder interest (gift) decreases. However, there is a risk in making the term too long since the trust property will be taxable as part of your estate if you should die prior to the end of the term selected.

If the property is sold during the term of the trust, the proceeds are converted into a trust for the benefit of the grantor for the balance of the original term of the trust.

When the original trust's term ends, the property will pass to the remainder beneficiaries. If the grantor dies before the end of the use period, the property is included in the grantor's estate for estate tax purposes. Therefore the QPRT can be viewed as a "no lose" situation. If the grantor does nothing, the property will be included in his or her estate. If the grantor creates a trust and survives the term, there is significant estate tax savings (even if the property does not appreciate in value).

Generation-Skipping Trusts

The Economic Growth and Tax Relief Reconciliation Act of 2001 repeals the generation-skipping transfer (GST) tax for generation-skipping transfers made

after 2009. However, the presence of a "sunset" provision in the Act means that a future Congress will have to revisit the GST tax issue at some point to prevent the expiration of the Act's provisions and the effective return of pre-2001 Act law. In the interim, GST tax planning continues as a part of the estate planning process.

The Dynasty Trust

A dynasty trust can be a unique device in estate planning. By transferring property to a trust and taking advantage of the unified credit and generation-skipping tax exemption, you and your descendants can defer payment of any transfer tax (gift/estate) on the property in the trust for at least ninety years and possibly more.

A dynasty trust creates life income interests in successive generations of your family. Although the initial creation of the trust could be taxable (if the value of the property exceeds the exemptions), no estate or GST will be payable at the death of any of the succeeding beneficiaries during the term of the trust. Assuming no distributions of trust principal are made during the term of the trust, no transfer tax will be payable until the beneficiaries who receive the assets upon the trust's termination transfer those assets by gift or death.

To provide flexibility during the term of the trust, the beneficiaries can be given special powers to permit them to appoint trust principal to family members either during their lives or upon their deaths. The trustee can be given the right to distribute or apply the principal for the beneficiaries to accomplish lifetime goals and for their support, maintenance, and care.

The dynasty trust is created to last in perpetuity. Most states, however, impose a rule against perpetuities that limits the duration of a trust. A few states have abolished this rule to allow trusts to continue forever. Presently Alaska, Arizona, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Maryland, New Jersey, South Dakota, and Wisconsin no longer limit the duration of trusts in certain circumstances. However, in 2002, Alaska reinstated the rule against perpetuities for the limited purpose of property interests subject to limited powers of appointment. Such interests are invalid unless they vest or terminate within a thousand years from the creation of the original limited power of appointment.

The Alaska Trust

Effective January 1, 1997, the state of Alaska established itself as an important situs for the creation and administration of irrevocable trusts, for both protection against creditors and estate planning purposes. The Alaska statute provides that so long as the creator of a trust has not retained the rights to revoke the trust, the trust

will be valid against creditors unless the assets transferred to the trust are intended to delay or defraud the creditors or unless the transfer was made at a time when the creator was in default by thirty days or more in making child support payments.

The Alaska statute also provides that an Alaska trust may continue in perpetuity. Under the new law, four requirements must be met for the laws of Alaska to govern the administration of the trust:

(1) One of the trustees must be a "qualified person," meaning that one of the trustees must be a trust company with its principal place of business in Alaska, a bank with trust powers with its principal place of business in Alaska, or an individual resident of Alaska
(2) At least some part of the trust assets must be deposited in Alaska, either in a checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account located in Alaska
(3) The Alaskan trustee's duties must include both the obligation to maintain trust records and the obligation to prepare or arrange for the preparation of the trust's income tax returns, although neither of these duties must be exclusive to the Alaskan trustee
(4) Part of the trust's administration must occur in Alaska, including physical maintenance of the trust's records in Alaska

Prior to the passage of the Alaska Trust Act, there was no domestic jurisdiction wherein a grantor could "retain" the discretionary right to trust income or principal and yet have the transfer considered a completed gift for federal transfer tax purposes, and therefore not have the property included in the grantor's estate. In most jurisdictions, trust doctrine provides that where a person creates a trust for his or her own benefit, a trust for support or a discretionary trust, his or her creditors may receive the maximum amount that the trustee under the terms of the trust could pay to the grantor or apply for his or her benefit under its terms.

Alaska now provides creditor protection to a qualifying trust notwithstanding the grantor's right to receive discretionary distributions, and thereby avoids the necessity of making substantial inter vivos gifts in order to reduce the amount of one's taxable estate.

Trust Provisions That Are Unusual

In creating an irrevocable trust, which normally does not permit changes to be made, flexibility is required in order for the trustee to deal with situations as

they may arise. Some of the clauses that can be made available to provide such responses are listed below.

Sprinkling Clause

In this situation, the trustee's role is that of a surrogate parent distributing the benefits of the trust (income/principal) among a class of beneficiaries, who usually are the descendants of the estate owner, living during the term of the trust. The sprinkling clause produces not only the protection and the benefits of all members of the class but can provide tax savings where members of the class are in lower income tax brackets.

Distribution of Trust Principal

Under normal circumstances, the vast majority of irrevocable trusts permit the trustee's discretion to pay or apply the principal to or for the benefit of a beneficiary. If a trust beneficiary is the sole trustee or a co-trustee, there is a possibility that the entire trust principal would be included in the beneficiary's estate if the beneficiary held a power to invade the corpus. If the power of the beneficiary is limited to an ascertainable standard, the inclusion would be avoided. Powers for the "support," "maintenance in health," "reasonable comfort," "support in the accustomed standard of living," "education" are acceptable limitations.

Ability of the Beneficiary to Withdraw Principal

In order not to leave a beneficiary at the sole mercy of a trustee, in so far as receiving distributions of trust assets, a power can be given to the beneficiary.

This may be done by limiting the withdrawal in any one year to the greater of $5,000 or 5 percent of the value of the trust property at the time the power is exercisable. The power is made non-cumulative. In this way, there will be includible in the beneficiary's estate only the amount he or she was entitled to withdraw for the year in which death occurs, less any amount that he may actually have withdrawn that year.

The so-called five-and-five powers provide a limited level of protection to a surviving spouse so that he or she does not have to seek trustee approval for minor principal payments. While such powers have been frequently used in testamentary non-marital trusts, they may be more efficiently used in the case of marital deduction trusts.

Spendthrift Provisions

In order for the beneficiary not to be able to assign his or her rights in the trust, a spendthrift provision should be included, preventing such ability. In many states, each irrevocable trust is considered spendthrift unless the trust agreement provided to the contrary.

Provisions Limiting Distributions

Certain circumstances of the beneficiary may mandate that distributions would not be in his or her best interests, such as divorce proceedings, litigation, bankruptcy, incompetence, terminal illness, and substance abuse.

In any of these events or others, the trustee should have the ability to cease making distributions. The ability of the trustee should override a beneficiary's right of withdrawal.

Change of Situs of the Trust

The trust agreement should give the trustee the right to change the situs of the trust without permission of the courts.

Power of Appointment

A person creating an inter vivos or testamentary trust may give a trust beneficiary the power to direct who will enjoy the right to trust property. This power is known as a "power of appointment" and may be either general or limited.

A "general power of appointment" gives the holder of the power the ability to direct that property subject to the power shall be paid to (1) himself or herself; (2) his or her estate; (3) his or her creditors; or (4) the creditors of his or her estate. A limited power is any power that is not a general power. As such, a limited power is one that cannot be exercised in favor of any of those set forth above.

The difference between a general and limited power is significant in estate planning. The gross estate includes the value of all property with respect to which a person has, at the time of his or her death, a general power of appointment created after October 21, 1942. Property subject only to a limited power is not includible in a person's gross estate, notwithstanding when it was created. Limited powers of appointment are very useful devices in the planning of an estate, especially in long-term planning that encompasses multiple generations.

Limited powers of appointment may be made as restrictive or as wide as the grantor of the trust wishes.

- "Narrow" restriction. A person may be given the power, by his or her will, or by some other method, to appoint the principal of the trust created by the grantor among such of his (the power holder's) descendants as shall survive him or her, in such amounts or proportions, and outright or in further trust, as the holder of the power shall appoint.
- "Wide" restriction. A person may be given the right, in his or her will, or by some other method, to appoint the principal of the trust "to such persons or corporations (other than the power holder, his estate, his creditors, or the creditors of the estate) as the holder of the power shall validly appoint."

Limited powers of appointment are important for the following reasons. The grantor of the trust may believe that the beneficiary of a trust (a child) might be in a better position to decide who among his or her children should receive the principal of the trust. So that a husband, in his will or trust, can create a trust for his wife, giving her a limited power at her death to appoint the property of the trust to their children in equal or unequal shares and either outright or in further trust. The limited power can be granted to the holder over all or a part of the trust property.

Trustees

One of the most important decisions to be made in the creation of an estate plan is the choice of the trustee or trustees. In the selection—no matter what the size of the trust—ability, experience, common sense, understanding, and flexibility are important qualifications. There are income and estate tax considerations if the creator designates himself or herself as trustee.

If a sufficient amount of assets are involved, a corporate trustee may be considered. A corporate trustee has no conflict of interest and is usually conservative in its investment strategies. In such a situation, consideration should be given to designating both an individual and a corporation as co-trustees. An individual who is close to the family can be helpful in the discretionary distributions to the trust beneficiary. Corporate trustee's fees should always be considered in the designation process.

Professional persons who are experienced in the investment, legal, or accounting fields may be considered as well. The fees of these persons may be less than those of a corporate fiduciary.

The creator should also designate a successor trustee if the named trustee ceases to serve for any reason. A trustee in office can be given the right to designate his or her successor, with the creator designating an alternate if there is ever a vacancy.

Amendment of a Trust

Can a trust be amended? Most revocable trusts, if properly prepared, provide the authorization for the trust to be altered or amended, in whole or in part, during the grantor's lifetime. In most states, if the grantor is alive and competent and all of the interested parties to the trust are adults and consent to such a procedure, an irrevocable trust can be amended or revoked. If the grantor is not alive, or the grantor's consent or the consents of the other intended parties cannot be obtained, it would be practicably impossible to amend a trust. A testamentary trust is not amendable or revocable except by the courts under certain circumstances (e.g., tax reformation, mistakes in the drafting of the document, or under certain circumstances covering charitable gifts). If an irrevocable trust is amended, the scope of the amendment may cause the trust to be included in the creator's taxable estate.

CHAPTER 11

Charitable Giving

Persons who have adult children who are already provided for may be inclined to make substantial charitable gifts, both during life and at death. Such gifts can reduce substantially or even eliminate estate tax. If made during life, substantial income tax savings are also possible. Lifetime gifts to charity qualify for an unlimited gift tax charitable deduction. An unlimited deduction from the gross estate is available for property passing by will or other transfer at death to a qualified charitable recipient. Unlike the income tax charitable deduction, there is no monetary or percentage limit on the estate or gift tax charitable deduction. For example, if the decedent's entire gross estate passes to a qualifying charity, the entire amount is deductible and the decedent's estate will pay no estate tax.

Issues to Consider when Giving to Charity

The following are some of the issues that need to be considered in developing a strategy for charitable giving:

- Does the organization qualify for a deduction under the tax laws?
- How can income, gift, and estate tax deductions be maximized?
- What kinds of property are most appropriate for charitable gifts from a tax perspective?
- What form should the gift take: outright, in trust, or proceeds from a sale or property?
- What time schedule for transfer of the gift is appropriate?
- What is the official name of the charity?
- If the donor plans to place any restrictions on the gift, will the charity accept the gift subject to these restrictions?

Qualifying for the Charitable Deduction

There are four categories of organizations that qualify as charitable recipients. They are:

(1) The United States government or any state government, or any of their political subdivisions, or the District of Columbia, for exclusively public purposes
(2) A corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art, or fostering of national or international amateur sports competition, or for the prevention of cruelty to children or animals
(3) A trustee or trustees, a fraternal society, order, or association operated under the lodge system, but only if the property is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals
(4) Any veterans' organization incorporated by an Act of Congress, or the organization's departments, local chapters, or posts

In categories (2), (3), and (4), the devise or lifetime gift is not eligible for the charitable deduction if any part of it inures to the benefit of any private individual or shareholder. In addition, the activities of the charitable organization must not include attempting to influence legislation or participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office. The Internal Revenue Service Publication 78, published biannually but also available at Web site *www.irs.ustreas.gov,* lists the official names of all charitable organizations exempt from income tax. If in doubt, you should request a copy of the charity's exemption letter. Furthermore, when making a devise to a charity by will, it is advisable to condition the devise on eligibility for the charitable deduction.

Lifetime gifts to charity are ordinarily made directly to the charity and eligibility for the deduction is clear. An estate tax charitable deduction, however, is available only if the transfer to the charity is required by the terms of the will or other governing instrument. Property passing to the charity as a result of the decedent's possession of a power of appointment (whether exercised or nonexercised) qualifies for the charitable deduction. Property passing as a result of a qualified disclaimer also is eligible for the deduction.

If any estate, succession, legacy, or inheritance taxes are payable out of a charitable devise, the deductible amount is reduced by the amount of the tax.

In addition, if the devise to charity is subject to a condition that may prevent the charity from receiving the devise, a charitable deduction is denied unless the possibility that the charity will not receive the devise is so remote as to be negligible.

Charitable deductions are allowed for the transfer of a remainder interest in a personal residence or farm, a transfer of an undivided portion of the decedent's entire interest in property, and for a qualified conservation contribution. A charitable deduction is allowed for a contribution of a copyrighted work of art to a qualified charity, whether or not the copyright itself is also contributed. Finally, the legal representative may exclude from the gross estate a percentage of the value of land that is subject to a conservation easement.

A married testator who wishes to make a devise to charity instead might consider leaving the amount outright to his spouse with the suggestion that the spouse make the gift. Because the devise to the spouse qualifies for the marital deduction, this alternative does not increase the testator's estate tax and permits the spouse to take an income tax deduction for the gift.

An irrevocable assignment of a life insurance policy can offer substantial tax benefits. If the insured survives the transfer by more than three years, the proceeds are excluded fully from the insured's gross estate, or if the insured survives for a lesser period, they qualify fully for the estate tax charitable deduction. The value of the policy on the date of transfer is eligible for an income tax deduction, regardless of how long the insured survives, as is the insured's continued payment of the premiums. A charitable deduction is also available for trusts that have primary non-charitable income beneficiaries and a charity as a remainder beneficiary.

Split-Interest Trusts

The benefits of the charitable deduction are also available to a testator who wishes to give only a partial interest in his property to charity, while providing for other beneficiaries. The most common split-interest techniques are the charitable lead trust (e.g., income to charity for a period of years, remainder to beneficiary) and charitable remainder trust (e.g., an annuity to spouse for life, remainder to charity).

Charitable Lead Trusts

Charitable lead trusts are primarily an income-shifting device designed to provide an income yield to charity. In a trust of this type, the charity is the primary

beneficiary and there is a non-charitable remainder beneficiary. To qualify for a charitable deduction, the charity must receive a guaranteed annual annuity or a fixed yearly percentage of the property based on the property's fair market value. However, by using these trusts, one can remove substantial amounts of property from the gross estate at reduced transfer tax cost. This type of trust is especially useful for persons with large incomes and definite beneficiaries in mind.

The income stream to charity may be structured as either a charitable lead annuity trust (CLAT), under which the charity will receive a set percentage each year based on the original value of the trust, or as a charitable lead unitrust (CLUT), under which the charity will receive a set percentage each year based on the value of the trust at the time of each annual payment.

Charitable Remainder Trusts

These trusts are useful for persons who cannot or do not wish to give up any income, have charitable inclinations, and want to reduce the size of their gross estates. The donor makes a gift of a charitable remainder and retains an income interest. Alternatively, the donor could transfer the income interest to another beneficiary, but this would constitute a taxable gift, eligible for the annual exclusion. Both charitable gift and income tax deductions are available in the year in which the gift is made. The deduction is based on the value of the remainder, determined as in the lead trust example above. Because of the immediate income tax deduction available from creating a charitable remainder trust, creating such a trust while living is a far better option than providing for the charity by will. Transfers at death only qualify for an estate tax deduction. Because of the large income tax deductions often involved, the transfer to the trust is best made in a year in which you have a large amount of taxable income. However, any deduction in excess of the income tax percentage limitations may be carried forward for up to five years.

A charitable remainder trust may be structured either as a charitable remainder annuity trust (CRAT), under which the non-charitable beneficiary will receive a set percentage each year based on the original value of the trust, or as a charitable remainder unitrust (CRUT), under which the non-charitable beneficiary receives each year a set percentage based on the value of the trust at each annual payment. The amount of the charitable deduction is the same whether the trust is a CRAT or a CRUT.

Planning Notes

In order to qualify, the charitable trusts must take the form of an annuity trust, unitrust, or pooled income fund. The donation of appreciated property to

a charitable remainder trust is a particularly effective strategy. Not only will the donor receive a current income tax deduction for the value of the charitable remainder, exclude the transferred property from his or her gross estate, and receive a current income stream, but capital gain on the appreciation will be avoided. However, to achieve these results, the value of the charitable remainder at the time of the trust's creation must be at least 10 percent of the value of the trust. Trusts with charitable interests below that figure do not constitute qualified split-interest trusts.

When a testator wishes to provide for the surviving spouse for life with the remainder to charity, a QTIP trust with the remainder designated for charity may be a better option than a charitable remainder trust. A QTIP trust, unlike a charitable remainder trust, may allow the trustee to invade the principal of the benefit of the spouse. The QTIP also fully qualifies for the marital deduction at the testator's death. While the trust is fully includible in the spouse's gross estate, this is fully offset by the charitable deduction available to the spouse's estate.

CHAPTER 12

If You Have Disadvantaged Children

Estate planning for a family who has a child with a disability poses an important challenge to those involved. There are significant questions that need to be responded to, which may not be readily answerable, such as: can the child live independently; will the child be able to work or be eligible for government assistance; where will the child live after the parents' death?

The usual wealth-planning techniques are not applicable under these circumstances. The plan must revolve around being sure that qualification for government entitlement programs is preserved. If qualification or forfeiture of existing benefits is not protected, assets will be spent for no reason whatsoever except improper planning.

If, for some reason, the child does not qualify for entitlements, income tax deductions for the child's medical expenses need to be maximized.

Entitlement

For disabled persons, Supplemental Security Income (SSI) and Medicaid are the primary sources of government entitlements and are applicable for living expenses and medical assistance. The disabled person's financial need is the measure of eligibility for these programs. SSI and Medicaid are available only to a handicapped person whose income and resources are limited. If the available income and/or resources of a person increase, these benefits will decrease. They will completely end when income and resources reach a certain level. The standards for Medicaid qualification vary from state to state.

Until a child is eighteen (if not a student) or twenty-one (if a full-time student), the assets (income and resources) of his or her parents are considered to be that of the child. In-kind income, such as room and board, and clothing provided by a parent or other relative will disqualify a child or make him or her

ineligible for SSI benefits. Thus, until a handicapped child attains age eighteen or twenty-one, he or she will usually not be eligible for benefits. Therefore the paramount issue is the support and care of the child after the death of the parents.

Any assets set aside by a family for a handicapped child have to be disposed of or spent before the child can be eligible for a need-based program. The costs of caring for a disabled child will in a vast majority of instances exhaust a family's assets, leaving little or nothing for raising their other children. In view of this, governmental entitlements are an acceptable way to provide for assistance. Through the estate plan, the testator must make sure that the handicapped child is entitled to public assistance and remains so, while handicapped, at the same time keeping the family's assets for the usual benefit of the remaining members. However, there is no guarantee that public funds will always be available or adequate for the needs of a handicapped child, and these contingencies must be considered.

There are other government programs that are not need-based. For example, social security disability benefits are for children of workers covered under social security. A child who was disabled before age twenty-one, is unmarried, and is dependent upon the worker for support, may obtain benefits based upon his or her parents' record of earnings. The parents, not the disabled child, must have contributed to the social security system for benefits to be paid.

The assets of a handicapped person have no bearing on the benefits. Legacies, gifts, or investment earnings have no effect on the entitlement to disability benefits or the amount of benefits; however, the disabled person's earnings or ability to earn may affect the level of, or eligibility for, benefits. A person must be "disabled" in order to obtain benefits. The ability of a person to participate in "substantial gainful activity" means the person is not disabled and, therefore, not entitled to benefits.

Estate Planning

An estate plan is necessary to be sure that the disabled child is taken care of in accordance with the parents' wishes. If no will is provided, the intestacy laws of the state would upset any plan that is intended to shelter a family's assets and preserve a child's eligibility for need-based programs. As such, a will is necessary to prevent an outright distribution to a beneficiary under intestacy laws. Parents of a handicapped child should leave a written memorandum concerning their child and his or her needs and care and their expectations.

The choices for providing for a disabled child include disinheritance, making a gift or bequest to the child, making a gift or bequest to a third person—usually a family member—for the support of the child, and creating a discretionary or supplemental needs trust.

Disinheritance

In considering disinheritance, certain factors need to be considered, such as the level of the child's handicap, the size of the parents' estate, the existence of other children, and the alternatives to inheritance.

If a child's disability is physical and not mental, disinheritance could cause great psychological harm to the child. If the child's disability is severe and the parents' resources are limited, or if, under applicable state law, the state can be reimbursed for its expenditures on the child's behalf from a discretionary or supplemental needs trust, disinheritance is probably appropriate.

Gift or Bequest

A gift or bequest to a disabled child may be "wasted" to the extent that it makes the child ineligible for assistance on a need basis. This would be so whether the gift or bequest is outright or in trust. The gift or bequest would have to be spent down before eligibility is available or reinstated, or the state or local agency may be entitled to reimbursement from the assets. Therefore, there is no benefit to the child in providing for a legacy by way of gift or bequest.

Relatives who wish to make gifts must be informed about the proper way to provide for the disabled family member. Grandparents will usually create custodial accounts for grandchildren or include all grandchildren in a class gift.

Moral Obligation

Using an intended care giver does not make sense except if the size of a special needs or discretionary trust is so small it would be financially inappropriate to create a trust. A gift to a care giver may not be sufficient to care for the child; there is no guarantee that the care giver will use the gift for the child's care; the care giver could predecease the child; the care giver could become unable to care for the child; and the funds may become subject to claims against the care giver by third parties (matrimonial/bankruptcy). You should always keep in mind that the care giver's obligation is moral, not legal.

Discretionary Trust

The purpose of a discretionary trust is to permit the disabled beneficiary to qualify or continue eligibility for governmental programs. The discretionary trust shelters the assets of the trust from governmental claims for reimbursement. Therefore, upon the beneficiary's death, the trust can be distributed to the remainder beneficiaries. In order for a trust to be discretionary, the trustee must have complete and absolute discretion over whether distributions are made to or for the benefit of the beneficiary. If the beneficiary is not entitled to receive distributions and only receives what the trustee determines, the trust is not considered an asset of the beneficiary, and no reimbursement from the trust can be compelled by the government. However, some state courts have held that a trustee's obligation to exercise discretion consistent with the purposes set forth in a trust gives the beneficiary a property interest in the trust.

In certain states, a spendthrift provision should prevent local authorities from obtaining reimbursement from the trust. Any invasion of the trust for reimbursement purposes should be expressly prohibited. The trust may also permit the trustee to "sprinkle" income and/or principal of the trust to other beneficiaries, such as siblings of the beneficiary, which could strengthen the argument that the disabled beneficiary has no property interest in the trust. Using an independent trustee outside of a family member may also provide protection against a challenge. A trust could become a supplemental needs trust, if the beneficiary enters a publicly funded institution or receives home care.

Supplemental Needs Trust

A supplemental needs trust is a discretionary trust. However, the trustee's discretion is limited further by providing for items not covered by need-based programs such as SSI and Medicaid. Such items may include toiletries, non-prescription medicine, entertainment, and family visits. This trust, as well as the discretionary trust, should provide that in the event a government agency asserts a claim against trust assets, the trust should be terminated and distributed to the remainder beneficiaries, as if the primary beneficiary had died. Upon such termination it is usually thought that the remainder beneficiaries will take care of the beneficiary's interests.

Pooled, Master, or Community Trust

Another possibility to leave a bequest for the benefit of a beneficiary is to a pooled, master, or community trust. These types of trusts are discretionary or

supplemental needs trusts administered by trustees for a group of individuals. Since gifts or bequests in minimum amounts are accepted, they permit parents with smaller estates to provide for their disabled children.

Funding a Trust

In placing assets into a discretionary or supplemental needs trust, consideration needs to be given as to the nature and seriousness of the child's disability and the costs both current and potential for the care of the child. A good choice to consider for funding such a trust is life insurance.

Other Family Assets

The entire family's beneficiary designations should also be reviewed to be sure that the handicapped child is not designated as the primary beneficiary or a contingent beneficiary of any asset. Beneficiary designations are necessary for the following:

(1) Life insurance, including employer-provided group-term insurance
(2) All retirement accounts and pension/profit-sharing plans
(3) Pay on death or joint bank accounts
(4) Pay on death or joint savings bonds

The Child's Assets

If the disabled child owns assets, they need to be reduced or eliminated. In order for the child to qualify for public assistance, they can be spent down. Transfer of assets is another possibility. Usually, asset transfers by a Medicaid applicant commence a period of continued ineligibility for Medicaid. However, if the assets transferred are by a disabled person to a certain type of benefits trust for the transferor's benefit, there will be no bar to ineligibility if, at the beneficiary's death, the remaining assets in the trust are available for reimbursement to the state for Medicaid payments made for the beneficiary's benefit. However, a court proceeding is required if a legal representative (a guardian) has been appointed for the person.

CHAPTER 13

Planning for Single People and Unmarried Couples

Although many of the topics discussed in this chapter are discussed in other places in the book, this brief overview will help you to better understand the necessary steps in estate planning for those whose circumstances place them in the single, or not-single-but-not-married categories.

Planning for a Single Person

The unlimited marital deduction is not available to unmarried persons. Therefore, this population is unable to reduce or defer estate taxes through a surviving spouse. In order for single individuals to reduce or avoid estate tax, they have to select other techniques, such as the unified credit, lifetime gifts (outright or in trust), grantor-retained gifts, and charitable gifts.

Single persons (like married persons), who anticipate a taxable estate, should take advantage of the gifts that are free from transfer tax. These include the annual exclusion presently at the rate of $11,000 (2002) per year per donee, and all tuition and medical payments. Over a long period of time, a person could transfer significant amounts.

Through gifting, you not only remove the gift from your estate—and the gift tax if the gift is taxable, you also ensure that the growth and the income earned on the gifted property will never be part of your estate. In order to undertake any kind of gift program, each person must analyze the goal and his or her financial situation.

Charitable gifts serve as excellent vehicles for reducing the gross estate, and can also provide significant income tax savings. Such income tax savings can only be taken during a person's lifetime. There are various ways to make charitable donations. Besides outright gifts, several types of "split-interest" charitable gifts are available. The split-interest charitable remainder trust

permits a person to retain an annual income flow during lifetime and exclude the value of the trust for estate tax purposes at death. Furthermore, at the time the trust is created, an income tax deduction will be available for the value of the charitable remainder. By funding a charitable trust with assets that have appreciated, any sale thereof would escape capital gains tax, which would otherwise be due if the person had sold the assets.

If an unmarried person has no family, he or she must make plans for the possibility of becoming incapacitated. Important tools in this case are the health care surrogate documents, powers of attorney, wills, and revocable or living trusts.

Most single people who have no children feel that none of the lifetime advance directives or testamentary instruments are necessary. For every person, having a will or a living trust is extremely important. By creating such a document, a person will announce to the world who has the rights to his or her estate. Furthermore, an orderly management and distribution of the estate will take place. Certain expenses can be reduced and eliminated if one has a will. A single person without a will cannot take advantage of any form of charitable gift if he or she is charitably inclined.

If You Live Together Outside of Marriage

Today, more and more unmarried couples are living together. People who live in this mode need to know what rights they have at the time of disability, retirement, or death of a partner.

There are basically two kinds of couples that live together: heterosexual and homosexual. Usually people who live together solely for economic and companionship purposes are not concerned about the assertion of rights on each other. However, each case requires its own consideration depending upon the circumstances of the parties.

In contemplating marriage versus cohabitation, the requirements of an older, retired couple are completely different from those of a young couple. The retired couple is concerned about their various benefits, and might be concerned about a prenuptial agreement as either or both may have been married before. Couples of a younger age have much different concerns, like their careers and financial security.

The Laws

Every state in the country has enacted statutes governing the marital relationship. There are really no such laws for couples living together outside of marriage. There are a few exceptions, the most significant being in those states

that recognize common-law marriages (thirteen states and the District of Columbia). Because a couple lives together does not automatically mean they have a common-law marriage. Only heterosexual couples may have the benefit of a common-law marriage, and they must satisfy local law requirements as to their residence and must hold themselves out to the world as husband and wife.

On the other hand, laws prohibiting discrimination on the basis of sexual orientation have been passed in many states. An example of this is the law giving a tenant-partner the right to continue to reside in a dwelling after his or her partner has died.

Income Tax Returns

In the states that authorize common-law marriages, the spouses living together may file a joint federal income tax return. If previously they filed as a single person for a year in which they were considered married, they may file an amended return for that year within three years of the due date of the earlier returns.

Social Security Benefits

Common-law marriages are recognized under the Social Security Act, if they are valid under state law, for the payment of a widow's benefit.

Employee Benefits

The Internal Revenue Service has ruled that amounts paid under a group medical plan for persons other than the employee's spouse or dependents will be included in the gross income of the employee to the extent that coverage was provided by the employer.

Disability

A Minnesota appeals court appointed a disabled person's lesbian companion as her guardian, which is a case of first impression in the fifty states.

Wills and Intestacy

If you die without a will, the intestacy laws of the states make no provision for the non-married partner. The only way a provision can be made is by a bequest or gift in a will or in a trust. Since a will or a trust provision can be revoked at any time prior to death, the partner-beneficiary may find this difficult to accept.

A will provision presents multiple difficulties. Due to the fact that the living arrangement can terminate at any time, the person making the will may wish to place a condition on the bequest that it will only be effective if the couple are

living together at the time of his or her death. This would be applicable as well if the partner is designated as an executor or trustee. In such event, the will or trust should provide for an alternate beneficiary and executor/trustee.

In New York State, a case recently held that since marriages between homosexuals are not authorized, a partner could not be considered a surviving spouse for elective share purposes under the laws, no matter what the nature of the relationship.

Arrangements During Lifetime

A revocable or living trust can be an effective device in estate planning. As beneficiaries of each other's trust during their lifetimes, the couple maintain and control their own benefits, with the ability to amend or revoke the trust at any time. For gift tax purposes, grantor-retained trusts can be employed. Other types of lifetime arrangements can include outright gifts and the creation of co-ownership interests in property. Transfers of these kinds may present gift tax liability against which the grantor can apply the annual exclusion ($11,000) and the unified credit.

Co-ownership can either be jointly or as tenant-in-common. Joint ownership with right of survivorship means that by operation of law the jointly held property passes to the survivor on the date of death. With respect to bank accounts, the joint owner can withdraw the funds at any time or a pay on death account can be created.

Life insurance can be significant in many ways. It can be provided at a reasonable cost without estate and gift tax problems. Another feature is that the partner can also be the owner of the policy. A partner can also be designated as the beneficiary of retirement accounts (IRAs and pension plans).

Children

An unmarried couple with children may face certain dilemmas. A parent usually wishes to make some provision for his or her children. If the children are from another relationship, other problems may exist, all of which need to be addressed so that all parties are satisfied. For those persons with children outside of a marriage, a will or trust must be created, which will specifically include or specifically exclude the children from receiving a portion of the estate. The inheritance rights of non-marital children are handled differently in each state. Furthermore, legal problems of parenting children can be difficult if the relationship between the parents terminates. For example, when a homosexual couple breaks up, is the non-biological parent entitled to visitation or even

custody of the children? The courts and the legislatures of the various states have no choice but to deal with these types of matters. New York State's court of appeals has ruled that a lesbian is not entitled to visitation rights with the child born to her former partner as a result of artificial insemination, even though she participated in the care of the child since his birth. In another case of first impression, a New York surrogates' court approved the adoption of a boy by the lesbian partner of his biological mother. The child, conceived through artificial insemination, had been raised by both women since birth.

Medical technical advances in the fields of in vitro fertilization and artificial insemination pose additional complicating factors if the donors and surrogates assert rights to the children. In a case of apparent first impression, a lower New York State court held that an estranged husband was bound by his agreement to support a child who was born after his wife was artificially inseminated without his consent, although he would not legally be deemed to be the father.

Agreements by the Parties

An unmarried couple living together can enter into an agreement setting forth each of their rights and obligations, including matters relating to household expenses, living expenses, and ownership of automobiles, furniture, and household assets. The agreement can be more extensive and include matters that are usually covered in a marital agreement. The purpose of such an agreement would be to avoid the expensive litigation encountered in a "palimony" suit.

The Georgia supreme court has upheld the validity of a property settlement agreement between a lesbian couple, even though the relationship is considered illegal in the state.

Health Benefits

The idea of health care benefits for live-in partners of unmarried employees has been advancing in the private and public sectors. Apparently those who provide these benefits have ascertained that their health care costs have not increased any more than anyone else's. If there has been a small higher cost, the good will of such a program more than anything is worth it to the employer. The great majority of domestic partner plans are being adopted at the request of homosexual employees. However, most benefits are being claimed by unmarried heterosexuals.

Many employers who choose to offer domestic partner benefits are forced to self-insure because no insurance companies will offer domestic partner benefits.

CHAPTER 14

Unique Planning Strategies: Discount Planning

Estates faced with substantial federal estate taxes require highly aggressive estate planning.

One such current "cutting edge" plan is the use of one or more legal entities to attempt to reduce, for estate taxation purposes, the fair market value of family-owned property, which is intended to pass on to succeeding generations of a family. This type of planning is often referred to as "Value Reduction Strategy" or "Discount Planning."

The Family Limited Partnership (FLP)

For families who have accumulated substantial assets, this entity could be the cornerstone of their plan. The term "family" implies that the partnership is owned by family members. A limited partnership has both general partners (who run the partnership) and limited partners (who are passive investors). General partners have unlimited personal liability for partnership obligations, while limited partners have no liability beyond their capital contributions.

The family limited partnership can be used for gift-giving purposes while the donor (1) retains control of the investment as a general partner and (2) reduces the value of the gift, by way of a discount. The reduction in the value of the gift is permitted because the gift is of a minority interest in an entity, which minority interest has a lack of control and lack of marketability. The use of this discount has been vastly increased by the Internal Revenue Service's abandonment of its prior position. The Internal Revenue Service now acknowledges that transfers of minority interest can be discounted for estate and gift tax purposes despite the fact that the family's combined ownership interest continues to represent control of the entity. Thus it is possible for a person who owns 100 percent of an entity to transfer by gift minority interest at values discounted by

up to 50 percent below market or net asset value. Likewise if the estate owner owns less than 50 percent of the entity at death, similar discounts can be taken for estate tax purposes.

The fact pattern suggests the use of a family limited partnership to transfer property interests all within one family unit, but at significant discounts from what otherwise would be fair market value. The thrust of the FLP is to make lifetime transfers of property at significant reductions in the tax otherwise payable on the transfer of property at death. The use of the FLP requires a substantial inter vivos taxable gifting program. The latter calls for a deep concern about saving taxes for the beneficiaries and a willingness to make significant gifts during the estate owner's lifetime.

Creating an FLP

Here are the steps that would be taken in establishing an FLP:

- Form the FLP together with spouse, closely held corporation, or both.
- Secure independent professional appraisal of limited partnership interests that donor (and spouse) hold. Make the gifts or sale of limited partnership interests subsequent to the valuation.
- All transactions and changes of interests in the FLP should be formalized with amendments.
- Proceed when the donors are in good health. If the health of the donors is suspect, have them examined by a physician and obtain a certificate of health.
- Set forth the non-tax purposes for creating the FLP, i.e., asset protection; the common management of multiple assets; limiting the transfer of assets to third parties; avoiding and/or the reduction of the costs of probate.
- The duration of the partnership should be the maximum period permitted by law.
- The general partner should be a corporation (Sub S). If that is done, no transfer will occur upon the death of a general partner and result in termination of the partnership.
- The partnership agreement should provide that the net income be distributed on a current basis. This provision will protect the annual exclusion.
- Transfers of partnership interests should be limited and only permitted with the consent of the general partners.
- The partnership should receive title to all assets funded by the donors.

- Gift tax returns should be filed for the taxable gifts.
- The partnership should obtain an identification number; open up a bank account; file income tax returns.
- Meetings of all the partners should be held from time to time.
- Financial statements should be rendered to the limited partners.

Traditional Plan

The family member, who is usually the senior generation (father and/or mother), contributes property (real estate, cash, marketable securities) to the FLP in return for an ownership interest in the capital and profits of the partnership.

The partnership interests are broken down into general partnership interests (GP) and limited partnership interests (LP). The GP interests (usually a Sub S corporation) assumes management responsibility and personal liability for partnership obligations not satisfied by the FLP's assets. The personal liability of the LP interests is limited to their investment.

Typically, the family member (probably the parent) or a Sub S corporation owned by the parent receives a one (1%) percent GP interest and a ninety-nine (99%) percent LP interest. Gifts are then made of LP interests to children and grandchildren or in a trust for their benefit.

The transfer (gift) tax value of the LP interests are substantially less than the underlying asset value. The reduction in value or discount is a result of the LP's inability to make decisions regarding the management of the FLP; to demand distributions; to force a liquidation of or withdrawal from the partnership; or lack of ready market.

Sale Plan

Here is another plan, wherein the leverage of valuation discounts can be further enhanced by selling LP interests to a defective grantor trust.

The plan calls for an installment sale of property (LP interests) to an irrevocable trust (grantor) in exchange for a balloon promissory note. Prior thereto, a trust is created which will be treated as owned by the grantor for income tax purposes, but not for transfer (gift and estate) tax purposes.

In order to avoid characterization of the transaction as merely a gift with a retained interest, it is generally suggested that the trust be "seeded" with an initial gift of assets equal to at least ten (10%) percent of the value of the property ultimately to be purchased from the grantor.

The grantor then sells property to the trust in exchange for a promissory note usually calling for payments of interest-only during the term of the note with a "balloon" payment at the end. The purchase price may be significantly discounted, depending on the nature of the property.

Certain types of property will tend to maximize the estate freezing potential of this technique. The sale of an interest in a family limited partnership (FLP) will allow for substantial discounts for minority interests and/or lack of marketability while enabling the grantor to maintain effective control of the business. Potential for post-transfer appreciation will also enhance the estate freeze, as will the ability to funnel income into the trust.

Generally, the note would call for annual interest payments by the trustee to the grantor. However, the interest can be accrued. Payments may be made from the "seed" money (or additional gifts made by the grantor to the trust) or investment earnings thereon, or from income generated by the purchased property or, if necessary, by return of some portion of the property in kind to the grantor.

Upon maturity of the note, the principal is repaid to the grantor (or his or her estate or heirs) in cash or in kind. Repayment in the event of death may be facilitated by life insurance on the grantor's life owned by the trust. Use of life insurance also reduces the need to sell low-basis assets and may provide the trustee with cash to acquire other assets from the estate.

One of the other advantages of the grantor trust is that all trust income would be taxable to the grantor, not the trust, which results in additional tax-free gifts being made to the trust's beneficiaries. The sale of the property to the grantor trust also has other benefits. The growth in the value of the asset sold will benefit the beneficiaries of the trust, without the imposition of transfer taxes and no capital gain occurs at the time of the sale.

A third plan where under no gifts are made may be called the estate discount plan and works in the following manner.

The Estate Discount Plan

An FLP is formed by the estate owner. The general partner would be a Sub S corporation formed by the estate owner. The estate owner would sell to his or her children controlling voting shares of the corporation, and the corporation would thereafter, as the general partner, manage the limited partnership. The estate owner would subscribe for the entire limited partnership interest and would thereafter continue his or her investment in the partnership, which would have investment activities, etc. No gift is made by the estate owner, and the purpose of the transaction would be to obtain a discount in the estate owner's estate of at least forty (40%) percent of the date of death value of her interest in the

partnership. The larger the investment the greater the size of the discount and the more the estate tax savings.

During the estate owner's lifetime, the partnership will need to invest and have activities (purchasing/selling, etc.).

DOs and DON'Ts When Employing an FLP

- Do not use partnership funds for personal disbursements.
- Do not create the partnership when you are on your "deathbed."
- Do not put your residence into the partnership.
- Do not commingle your retirement accounts with partnership assets.
- Do not mix partnership interests with an offshore trust.
- Be extremely careful in mixing partnership interests with a charity.
- Do not commingle partnership and personal funds.
- Do not pay personal expenses from the partnership checking account.
- Do not continue to live in a residence, rent free, if you have transferred it to the partnership.
- The limited partners should not be able to withdraw from the partnership (without the consent of the general partners).
- No voting shares of stock in a corporation that is closely held should be donated to the partnership wherein the officers and directors of the corporation and the general partners are the same persons. The Internal Revenue Service has ruled that a donor who votes these shares as a general partner has retained a life estate in the shares, which will be included in the estate of the donor.
- The books and records of the partnership should be kept and maintained in a professional manner.
- Re-register all of the partnership assets into its name.
- Form the partnership and then gift the interests at a later time.
- Create the transaction when the donor is in a healthy physical condition. Back up an advanced aged person's condition with a physician's certificate as to the state of health.
- Set forth all the purposes for forming the entity (non-tax).
- The FLP should be formed under the laws of the states that have favorable partnership statutes: i.e., Delaware, Georgia, South Dakota, Florida, Texas, and Virginia, which do not automatically permit a limited partner to withdraw from a partnership. Denying the limited partner the right to withdraw will increase the discount for lack of marketability.
- The transfer of partnership interests should be restricted.

The Trust That Does Everything (Almost)

An irrevocable inter vivos trust is created by the grantor for the benefit of his or her children. The grantor's spouse is the trustee. The intention of the grantor is that the trust is to be considered a gift to his or her children and not included in the grantor's estate. The income of the trust will be taxed to the grantor. Therefore, for income tax purposes only, the trust will be considered a "grantor trust." Certain rights and powers are created in the trust.

The grantor has:

- The ability to substitute assets of an equivalent value without any person's permission
- The right to change trustee without designating himself or herself as trustee
- The right to direct the investments of the trust

The trustee has:

- Broad discretionary powers, but not the right to pay a legal obligation of either the trustee or the grantor
- The power to distribute income and principal of the trust to himself or herself based upon an ascertainable standard (health, education, support, and maintenance)
- The right under a limited power of appointment, to appoint trust property to the grantor, but not the trustee, nor the trustee's creditors, nor the trustee's estate, nor the creditors of the trustee's estate

The beneficiaries have:

- The right under a limited power of appointment, to appoint property to the grantor

In order for the foregoing to be effective there must not exist any pre-existing agreement between the spouses and the beneficiaries that provides, in advance, what they will do during the term of the trust. Accordingly, in a harmonious family setting, wealth can be transferred to the next generation while family members retain control over the transferred property.

Under normal circumstances, the gross estate of a person includes all property owned at death and property given away but over which rights were retained. The two most common reasons why property given away with retained interests is included are (1) the property transferred was by gift; and (2) the transferor retained rights prohibited by the Internal Revenue Code.

Under Section 2037 of the Code, such retained right is a reversionary right.

Under Section 2036, property is included in the decedent's estate if the decedent transferred property by gift and kept during his lifetime (1) possession or enjoyment or the income of the transferred property; or (2) the right, either alone or in conjunction with any person, to designate the persons who will possess or enjoy the property or its income.

Section 2038 causes property to be included in the decedent's gross estate if he transferred property by gift and, at the date of his death, the enjoyment of the property was subject to change through the exercise of a power by the decedent alone or in conjunction with others to amend, revoke, or terminate it.

Both Sections 2036 and 2037 require the decedent to possess the prohibited powers and do not cause inclusion if any family member of the decedent has such powers.

Estate tax inclusion under Sections 2036 and 2038 can be avoided if the decedent does not keep (1) any right to enjoy or possess the property; (2) any income from the property; (3) any right to determine who will enjoy or possess the property; (4) any right to determine who will receive the income; and (5) any right to amend, revoke, or terminate the trust.

Asset Protection: U.S. versus Offshore

As a general rule, if the creator of a trust retains substantial control over the trust, the trust could be declared invalid, ab initio, since it is the trustee who is supposed to control the trust. A creditor could therefore reach the trust's assets because the assets would still be deemed to be the creator's property and not the trust's.

Additionally, under general U.S. trust law, a person cannot create a spendthrift trust for his or her own benefit and obtain any asset protection benefits. The creator's creditors can reach the assets of the trust to the extent of the maximum property interest available to the creator/beneficiary under the trust.

In 1997, the states of Alaska and Delaware enacted legislation that permits a creator of a trust to be a discretionary beneficiary of the trust and have the transfer of assets of the trust treated as a completed transfer for federal estate and gift tax purposes. The United States Treasury Department has concluded that for gift tax purposes the transfer has been recognized. Whether the aim of these states will be achieved in all of their sister states in the U.S. is an open question.

The statutes and laws of the states of Alaska and Delaware are subject to the full faith and credit clause of the U.S. Constitution. Therefore, if jurisdiction is

obtained over the trustee or over the assets of the trust in either state, the question is whether another state's judgment will be enforced. In the case of most off-shore sites, foreign judgments are not recognized and not enforceable in their respective jurisdictions.

The states of Alaska and Delaware have not addressed the retained powers nor fraudulent-transfers issues. Most of the off-shore sites permit the creator to be the beneficiary of the trust and have by legislation removed the retained powers and controls issues. The Cook Islands has enacted legislation which provides that if the creator is solvent, after making a transfer of assets into a trust, the creator is deemed not to have the intent of establishing a fraudulent transfer. The standard of proof required to establish a fraudulent transfer, by U.S. standard, is by a "preponderance of the evidence," in contrast to the Cook Islands, where a complaining party must submit proof "beyond a reasonable doubt." In essence, the statute of limitations to establish a fraudulent transfer in the Cook Islands is "nil," as opposed to Alaska where the statute is four years.

In view of the foregoing, off-shore planning is much more advantageous than domestic asset protection.

The Private Annuity

In a private annuity, a person, usually a parent, sells his or her assets to another person, usually a child. The purchase price is then received by the parent as fixed, periodic payments. The private annuity involves three (3) tax transactions, customarily dealt with separately, that give "private annuities" their peculiar tax characteristics.

Tax Consequences

Because a properly structured private annuity is a bona fide sale for full and adequate consideration, it is not a gift and, therefore, it is not within the reach of the federal gift tax rules.

Similarly, because the transaction is a bona fide sale for full and adequate consideration, the seller can remove the property from his or her estate without subjecting the property to federal estate tax, unless the seller's death is imminent at the time of the transfer. Also, because the annuity payments stop when the seller dies, there are no post mortem payments to be included in the seller's gross estate and exposed to federal estate tax.

The income tax consequences of the private annuity transaction are determined by applying the following principles:

(1) The gain realized on the transaction is determined by comparing the transferor's basis in the property with the present value of the annuity. The gain realized will be capital gain if the transferred property constitutes a capital asset.
(2) The gain is reported ratably over the period of years measured by the annuitant's life expectancy and only from that portion of the annual proceeds which is includible in gross income. This will enable the annuitant to realize his or her gain on the same basis that he or she realizes the return of his or her capital investment.
(3) The investment in the contract is normally the transferor's basis in the property transferred. However, if the "adjusted basis" is greater than the present value, the present value of the annuity will be the annuitant's investment in the contract.

Applying the foregoing principles, the transaction in a hypothetical case is taxable as follows:

(1) Age of annuitant: 88
(2) Life expectancy: 5.7 years
(3) Market value of property transferred: $500,000
(4) Internal Revenue Code annuity factor: 4.7373
(5) Basis in property transferred: $500,000
(6) Total value of annuity over 5.7 (6) years: $633,270 (market value $500,000 ÷ 4.7373 ($105,545) × 6 years)
(7) Annual annuity payment: $105,547
(8) Present value of the total value of the annuity is equal to the annual annuity payment ($105,547) times the factor (4.7373) equals $500,000
(9) The capital gain realized is equal to the difference between the present value of the annuity and the transferor's basis in the property: 0
(10) The exclusion ratio is determined by dividing the basis in the property ($500,000) by the expected return ($633,270) which equals 79%
(11) The annual annuity payments are $105,545
    (A) Exclusion amount is 79 percent or $83,380
    (B) Capital gain is 0
    (C) Ordinary annuity income: $22,165

The ordinary annuity payments are included in the seller's income tax return for the year received.

Other Popular Estate Planning Techniques Often Employed

The following estate planning strategies, any one of which can save substantial amounts of dollars, must be considered in every estate plan which has assets at least equivalent to the applicable exemption.

The Grantor Annuity Trust

On April 7, 1993, the sister-in-law of Sam Walton (a founder of Wal-Mart Stores, Inc.) transferred Wal-Mart stock worth slightly more than $200 million to two grantor annuity trusts (GRATs), and retained the right to annuity payments for two years. Each GRAT, which had a fair market value of approximately $100,000,024, provided for a retained annuity to be paid to the grantor; $49,350,012 for the first year and $59,220,014 for the second year. As a result of the market depreciation of the stock, at the end of the two-year period the grantor received back all of the shares of stock she had transferred to the GRATs and approximately $953,067, which were dividends that had been declared on the shares of stock. As a result, nothing remained in the trusts for the beneficiaries. Both GRATs provided that if Mrs. Walton died before the end of the two-year term, any remaining annuity payments were to be made to her estate. Her position was that the annuities were payable in all events for the entire two-year term. The annuities were accordingly created by her as term annuities with no actuarial reduction for the possibility that she might not survive the term. On audit, the Internal Revenue Service asserted that Mrs. Walton had in fact made a gift of more than $7.6 million.

The government contended that Mrs. Walton created three separate interests in her GRATs: (1) an annuity payable during her lifetime; (2) a "contingent" annuity payable to her estate if she died before the end of the term; and (3) the remainder interest. In the Internal Revenue Service's view, only the first interest (above) would be a "qualified interest." Apparently, the justification in the Internal Revenue Service's opinion is the "contingent" nature of the annuity potentially payable to the grantor's estate.

For the technical reasons set forth in the tax court's decision, it refuted the Internal Revenue Service's position and held that the qualified interest retained by the taxpayer in each GRAT is an annuity payable for a specified term of two years and no gift was made.

The important element in this proceeding is the valuation of an annuity as a term interest, and not an interest for the lesser of the lifetime of the grantor or

a selected term, and that the annuity be payable in all events for the full term. In Walton, that requirement was satisfied since the annuity was payable to the grantor's estate if she failed to survive the term. That may be the only way the annuity can safely be said to be payable for the entire term, although the Tax Court seemed to suggest that if a GRAT was "simply silent" concerning the status of annuity payments after the grantor's death, those remaining payments would be made to the grantor's estate as a matter of law.

There are two significant provisions in order for a GRAT to be established with no remainder and, as a result, no gift tax cost: (1) the rate must be set high enough for the present value of the GRAT payments to be at least equal the value of the property transferred; and (2) the annuity must be payable to the grantor's estate for the remainder of the original term if he or she does not survive that term.

Held against the Internal Revenue Service's position, the case presents the unusual opportunity of creating the zeroed-out GRAT. Such an event can have the possibility of passing property to one's heirs without the imposition of transfer taxes, if property placed in the GRAT grows sufficiently.

The Irrevocable Life Insurance Trust

Life insurance, unlike other property, usually develops optimum values when one dies. As a result, the removal of the proceeds of an insurance policy from a taxable estate is an effective estate planning technique. The existence of the unlimited estate tax marital deduction, in addition to the unified credit, may lead many people to believe that the creation of an insurance fund may not be necessary. This can be a harmful misconception, however. Complete reliance on the marital deduction and unified credit may not prove to be in the family's best interests, in the final analysis. This is as a result of the dual impact of the increasing longevity, which may be expected of surviving spouses, as life expectancy increases, and the effect of inflation. The need for adequate protection is even more important where there is a loss of the marital deduction through divorce or death. Since life insurance can be sheltered against death taxation, its consideration is required in every estate plan.

Life insurance proceeds are subject to estate taxation if the proceeds are payable to the estate, or if the insured person possesses or owns any "incidents of ownership" in the insurance policy. "Incidents of ownership" usually include rights to change the beneficiary, borrow against the surrender value of the policy, or surrender or assign the policy.

The entire proceeds of a life insurance policy can be protected from estate taxation, in both the estate of the insured and that of a surviving spouse, by

transferring the insurance policy to an irrevocable life insurance trust. This results in less estate taxes, more income for the survivors, and eventually a larger amount of assets for the insured's heirs. To avoid having the proceeds of an existing insurance policy included in the insured's estate as a "gift in contemplation of death," the insured must survive the transfer of the insurance policy to the trust for a period of more than three years after all "incidents of ownership" in the policy have been transferred. The gift in contemplation of death provision can be avoided by the trust itself initially taking out, and thereafter owning, a new insurance policy.

Working with a Life Insurance Trust

- Do not make your estate the beneficiary of your life insurance (unless your spouse is the beneficiary), otherwise it is subject to estate tax
- Make the beneficiary the owner
- If you transfer your policy, you will have to live three years before it is out of your estate for estate tax purposes
- If you borrow against the cash value in an amount in excess of your cost-basis, the net death benefit will be subject to income tax (face amount less the loan)
- If you donate a policy to charity, do not reserve the right to change the beneficiary, or you will lose the charitable deduction

Family Split-Dollar

The family split-dollar planning possibilities are very varied.

Family split-dollar arrangements are tailored for owners of taxable estates who do not wish to give up control over the cash value in their life insurance policies. As such, many persons with taxable estates will die owning outright the life insurance policies on their lives. For these persons and others, family split-dollar is an excellent solution.

How Does It Work?

The family split-dollar device is an arrangement between two parties who participate in the payment of the life insurance premium. The relationship between the parties is not of employer-employee. The actual owner of the life insurance policy will be an inter vivos irrevocable trust. Under the plan, the grantor of the trust (normally the insured) only gifts to the trust each year the annual P.S.58 table rates for individual insurance, or the P.S.38 rates (which are the insurance

costs issued by the IRS Code) for survivorship insurance costs toward the full amount of the life insurance premium. This is the only annual gift made to the trust each year by the grantor.

The insured's or grantor's designated family member will pay each year all of the policy premium in excess of the economic benefit cost (usually the term insurance rate), in accordance with a split-dollar agreement that has been entered into by the family member and the irrevocable trust. The split-dollar agreement will provide that the insured's family member "owns" all of the cash value of the policy. The policy is collaterally assigned by the trust to the family member as security for his or her interest. The collateral assignment utilized gives the assignee (family member) the right to execute policy loans, surrenders (partial and full), and the right to change the dividend option. The pure death benefit in excess of the policy cash value is owned by and is payable to the irrevocable trust, and therefore escapes taxation in the estate of both the insured and the insured's spouse.

The Internal Revenue Service ruled in PLR 9636033, that as long as the irrevocable trust contributed an amount equal to the economic benefit cost of the insurance coverage, there would be no estate or gift tax (and presumably no income tax) consequences resulting from the split-dollar arrangement (assuming that gifts into the trust are covered by the annual gift tax exclusion).

What If the Family Member Predeceases the Insured?

If the family member predeceases the insured, the cash value of the policy is an asset of the family member's estate and subject to his or her estate plan. A spouse's interest in the cash value of the life insurance policy would be an asset that could be allocated to his or her credit shelter trust. If the insured is the surviving spouse and is not a trustee or co-trustee of the predeceased spouse's credit shelter trust, the insured will not be deemed to have incidents of ownership over the life insurance policy, even if the insured is a beneficiary of the trust. However, the insured could serve as a co-trustee of the trust provided that under the terms of the trust a trustee shall have no access to, or incidents of ownership over, any life insurance policy owned by the trust on the life of a trustee, all such incidents of ownership being vested solely in the non-insured trustee(s).

CHAPTER 15

Corporate Owners' Buy-Sell Agreements

In corporations that are held closely and consist of multiple owners, redemption or buy-sell agreements are important. Such agreements will provide a valuation for the shares of stock of the corporation, a continuity of management, estate liquidity, and, in many instances, establish a fixed manner of resolving otherwise potentially difficult valuation and succession issues.

The development of a successful purchase and sale strategy and a written agreement is often complicated. This is due to the income and estate tax considerations and valuation and funding issues. In certain situations, it is necessary to deal with not only business relationships, but family as well.

Usually a proper agreement will not permit the transfer of shares of stock except under the terms of the agreement. It should also provide that in the event of a death, disability, or retirement of a shareholder, there will be a planned buyout, which will provide the corporation with an orderly continuity and succession. The agreement will usually preclude third-party outsiders from becoming shareholders and rule out the necessity of having negotiations with surviving spouses and/or children. When possible, provisions should be made to create the liquidity required to purchase a shareholder's interest in the corporation. This can be accomplished by installing a program for the shareholders, in the event of a death.

Insofar as a deceased shareholder is concerned, such program would ensure his or her estate liquidity as opposed to a potential unmarketable interest in a closely held corporation. In the event of the retirement or disability of a shareholder, an agreement would provide a market for his or her shares of stock, thereby providing additional funds.

In the event of the death of a shareholder, the agreement should obligate the corporation and/or the other shareholders to purchase the interests of the deceased shareholder. If there is no obligation for the shareholders or the

corporation to buy the deceased shareholder's interest upon his or her death, at a purchase price decided upon within his or her lifetime, the sale price may not be effective for estate tax purposes.

Usually, in the case of a lifetime transfer, an option to purchase is given to the corporation and the other shareholders. If the option is not exercised, they may be given the right of first refusal of an offer from an outside third party, or the offering shareholder may have the right to liquidate the corporation.

An agreement may also be different for certain kinds of lifetime transfers. A transfer as a result of the disability or the retirement of a shareholder may require a mandatory purchase and sale. Any other lifetime situation may create an option or right of first refusal. The difference among the lifetime transfers may depend upon the corporation's ability to fund a particular purchase. Disability and death buyouts may be funded by insurance, whereas retirement buyouts can normally be reserved for by the corporation out of its assets.

Provisions That Trigger Purchase and Sale

The agreement usually provides that any of the following conditions would activate the option, right of first refusal, or mandatory obligation to buy and sell:

- Death.
- Disability. This is significant if the shareholder actively participates in the business. The disability must be clearly defined, i.e., permanent, temporary, or partial. Insurance can be purchased by the business to fund the disability, which should be coordinated with the provisions of the purchase and sale for uniformity purposes.
- Termination of employment. If a shareholder is also employed by the business, and employment is terminated, the buy-sell provision may be triggered. The cause or reason for termination, whether retirement, voluntary or involuntary, or termination for cause will be determinative whether these provisions would be applicable.
- The decision of a stockholder to sell his or her shares of stock.
- Bankruptcy of a stockholder or any other similar proceeding which could permit creditors to succeed to stock ownership.

The Purchase Price

Arriving at a purchase price is one of the most important provisions of a purchase-sale agreement. In many instances, a procedure is chosen that can be totally unfair to the stockholders and does not realistically reflect the appropriate value.

A few of the traditional methods of establishing the purchase price are:

- Book value, or some variation thereof. The type of accounting procedures used by the business will determine whatever modifications are pertinent, especially if the business books are on a cash basis. Adjustments to book value should consider whether accounts receivable are included, how to treat accounts payable, how to value the fixed assets of the business, whether goodwill is included, whether to include or exclude the proceeds or cash values of life insurance, whether accrued income taxes need to be taken into consideration.
- Appraised value. If this method is selected, the method of the selection of one or more appraisers and the guidelines for the appraisers are important provisions.
- A fixed price. If the purchase price is agreed to be in a fixed amount, this means that it is really only appropriate at the date of the agreement. For a fixed amount to be realistic and fair, provisions must be made for revaluations periodically. Furthermore, the agreement must provide for an adjustment on some basis, if there has been no revaluation for a certain period of time.
- An agreed formula. The agreement can specify a certain formula for establishing the purchase price. If a formula is used, it usually will make future adjustments for all of the ingredients set forth in the formula. Usually, the methods employed in creating a formula are: a capitalization of earnings (whether before or after taxes), or a multiple of commission income, and/or some multiple of gross or net income. If the parties decide to include goodwill in the price, it also can be determined on a formula basis. The exact date a valuation is to be made should be carefully selected. Usually the most favorable time is at the end of a period, such as the end of a calendar year or a quarter.

Funding and Payment Security

The way the agreement is to be funded should be chosen to ensure its source and liquidity. If payment in full of the purchase and sale price is not possible,

the balance should be paid in installments, evidenced by a promissory note or notes and secured to the extent possible.

There are different kinds of security arrangements covering deferred payments. They could include personal guarantees from the purchasers or other affiliated corporations, mortgages or other security interests in certain real property or other corporate or individual assets, pledge of both the purchased stock and the shares of stock of the purchasers, a letter of credit, or maintenance of life insurance on the purchasers.

Corporate Redemption

In a corporate redemption, the entity is a party to the agreement, and so is the purchaser. The corporation would own life insurance on the lives of the shareholders and will use the proceeds to purchase ("redeem") a shareholder's shares of stock at his or her death.

In certain states, a corporation is restricted, in that it can only make a redemption out of its surplus or stated capital.

A corporation purchase and sale agreement is usually easier than a cross-purchase agreement. If it is funded with insurance, only policies on the lives of the shareholders need to be issued. The premium costs are paid by the corporation notwithstanding the difference in age of the shareholders. By having the corporation purchase the shares of stock, personal guarantees by the remaining shareholders may be avoided. There are certain other advantages to the use of a corporate agreement, which include the orderly and timely payment by the entity of the annual premiums; where insurance is employed, the cash values of the policies can be added to the corporation's financial statement.

The corporate purchase of a shareholder's shares of stock is usually treated as a sale of redeemed stock, and not as a dividend. If the shareholders are related, income tax regulations may require the employment of a different technique, such as a cross-purchase agreement.

Cross-Purchase Agreement

In the cross-purchase purchase-and-sale agreement, the other shareholders are the purchasers of the shares of stock of the selling shareholder. Each remaining shareholder is therefore personally responsible and liable for his or her obligation to the selling shareholder. In such an agreement, each shareholder owns life insurance on each other, and the insurance proceeds collected by a shareholder on a deceased shareholder are used to buy out the shares of the deceased shareholder.

If there are multiple purchasers, the proportions of the shares of stock that each is required to purchase should be set forth in the agreement. Furthermore, provisions must be made to be sure that all the shares of stock of the shareholder (and not just a portion) are purchased.

The shareholders who purchase will acquire a basis for income tax purposes for the shares of stock they purchased, equal to the purchase price. As such, this type of transaction has an advantage over the corporate type of agreement where the remaining shareholders retain their existing basis. The increase in basis could be significant if a shareholder is desirous of selling or gifting shares of stock at some future time.

The cross-purchase agreement avoids the requirement that the corporation have sufficient surplus to purchase shares of stock, in addition to having enough funds to pay alternative minimum tax, in the event that it receives insurance proceeds.

Furthermore, the agreement should provide for the purchase of the life insurance held by the estate on the lives of the surviving shareholders.

Estate Tax Valuation

In order for a purchase and sale, determined under an agreement, to be effective for estate tax purposes, the estate must be required to sell the shares of stock at a fixed price, and the deceased shareholder cannot have been able to dispose of his shares of stock during his life at any sales price he chooses. The agreement cannot establish an estate tax value if it does not control lifetime sales prices.

In addition, the Internal Revenue Code requires that the agreement be a bona fide business agreement and not a tool to pass the decedent's shares to the natural objects of his or her bounty for less than adequate and full consideration.

CHAPTER 16

Government Entitlements: Medicaid and SSI Planning

The Medicaid program offers substantial benefits, including covering health and long-term care, to eligible persons who are aged, blind, or disabled. Each state determines the criteria for eligibility within federal guidelines based on a person's income and resources (assets).

Income Limitations

State Medicaid programs must cover needy persons who (1) are aged sixty-five or older, blind, or disabled; and (2) are receiving supplemental security income (SSI) payments or meet standards more restrictive than SSI standards.

Coverage by the states can go beyond the minimum federal requirements. Certain states known as "income cap" states determine eligibility according to SSI or more restrictive standards, but increase the amount of income that an individual may have in order to qualify for home care benefits. However, in other states, an individual whose income exceeds the cap is not entitled to Medicaid home care benefits even if the individual's resources are within the eligibility limitations and the cost of care exceeds the individual's income and resources.

Most states also cover "medically needy" individuals whose income exceeds the categorically needy limitations and who are unable to pay their medical bills. However, a person's resources cannot be in an amount exceeding the state's limitations on resources. Persons in this category must "spend down" excess income by paying health care costs for which they receive no reimbursement. Medicaid will then pay all remaining expenses.

If the Medicaid applicant is institutionalized, his or her spouse's income is not calculated if the spouse is living at home (the "community spouse"). If both spouses are living together, either in a nursing home or the community, the income of each spouse is deemed to be available to the other. In such cases, the

eligibility requirements may not be met until the non-applicant spouse would qualify.

Once eligibility is established, the following items will be deducted from an institutionalized individual's income before the excess income is applied toward his or her nursing home costs:

(1) A personal needs allowance (not less than $30 per month)
(2) A monthly maintenance needs allowance for the community spouse of at least 150 percent of the monthly federal poverty line determined each year for a couple—$2,232 in 2002 (this amount may be higher in Alaska and Hawaii and can be increased for shelter and utility needs up to a maximum amount)
(3) A dependent family member allowance
(4) Medical or remedial care costs of the institutionalized spouse
(5) Any court-ordered support for the community spouse
(6) At the state's option, a home allowance (housing costs) deductible for a six-month period

Resource Limitations

In order to be eligible for Medicaid benefits, an individual may have no more than between $2,000 and $4,000 in nonexempt resources. The following resources are "exempt":

(1) A principal residence
(2) Household goods and personal effects up to $2,000
(3) An engagement ring and a wedding ring
(4) A car valued up to $4,500, or any car if needed to commute to work, receive medical care, or for use by a handicapped individual
(5) Equity up to $6,000 in property essential to the individual's support
(6) Cash surrender value of life insurance up to $1,500
(7) Term life insurance with no cash surrender value
(8) Burial plots for the immediate family
(9) Burial costs up to $1,500 per person
(10) Court-ordered support payments for dependents

There is no limit on the value of a car, household goods, or personal effects that may be owned by a married individual whose spouse is applying for Medicaid benefits. However, in the case where one spouse is institutionalized,

the resources of the institutionalized spouse and the community spouse are added together and each spouse is deemed to own one-half of the total in determining Medicaid eligibility. The community spouse is entitled to retain an amount, known as the community spouse resource allowance, equal to the greater of (1) a level established by the state (between $16,824 and $89,280, effective January 1, 2002); or (2) one-half of the couple's nonexempt resources up to $89,280.

Medicaid Planning

Medicaid planning has come about as a result of older individuals, who are faced with the possibility of long-term nursing care, wishing to protect life savings against long-term care costs. These are approaching a minimum of $50,000 a year in many parts of the country and costing as high as $150,000 a year in certain urban areas. Such planning can involve the transfer of a person's assets in a way that is beneficial to the person's family while allowing him or her to meet applicable state income and resource tests to qualify for Medicaid. However, because Medicaid eligibility requirements are complex, long-term health care insurance should be an important element in planning for long-term care.

Transfer of Resources

Medicaid applicants who are in a nursing facility or a medical institution forfeit Medicaid eligibility for such care if they or their spouses transferred resources for less than fair market value within a "look-back" period measured from the date on which the applicant applies for Medicaid or transfers the resources, whichever is later. OBRA '93 extended the look-back period from thirty to thirty-six months and gave states the option of applying the ineligibility provisions to applicants seeking benefits for home care. If the Medicaid applicant's assets are transferred to an irrevocable trust, OBRA '93 extended the look-back period to sixty months.

The ineligibility period extends for the number of months determined by dividing the value of the applicant's transfers by the state's "official rate" representing the average monthly cost of private care in a nursing home. In calculating the ineligibility period, multiple transfers made during the look-back period are aggregated. If the average monthly cost of a nursing home in your community is $5,000 per month and your assets total $100,000 and you

give away your assets all at once, you will qualify for nursing home Medicaid in twenty months (the penalty period) ($5,000 x 20 = $100,000). The maximum penalty period is thirty-six months, no matter the total value of your assets.

Considerations in Transferring Assets

When considering the transfer of resources, the following should be kept in mind:

- A Medicaid application should not be filed during the thirty-six-month look-back period, but only after the look-back period, if the total value of the assets to be transferred exceeds the state's official rate, multiplied by thirty-six.
- In the case of jointly owned property, OBRA '93 treats transfers by joint owners as being made by the applicant if the transfer reduces or eliminates the applicant's ownership or control of the asset.
- Transfers of assets to a spouse or a blind or disabled child do not trigger an ineligibility period. OBRA '93 broadened the exception for transfers to a blind or disabled child to include transfers to a trust "solely for the benefit" of the disabled child.
- A transfer of the applicant's home is also exempt if the home is transferred to (1) a spouse; (2) a minor, blind, or disabled child; (3) a brother or sister who has an equity interest in the home and who resided in the home for at least one year before the applicant was institutionalized; or (4) a child who resided in the home for at least two years before the applicant was institutionalized and who provided care that delayed the applicant's institutionalization.
- The eligibility rules do not apply to trusts funded with assets of disabled persons under age sixty-five or pooled trusts for disabled individuals managed by nonprofit associations. Any funds remaining in the under-sixty-five trust at the beneficiary's death must be used first to reimburse the state for any Medicaid payments on the beneficiary's behalf. Funds remaining in a pooled trust may be either retained by the master trust for the benefit of other beneficiaries or paid out to the beneficiary's family if the state is first reimbursed for any Medicaid expenditures. Miller trusts, which allow persons with fixed incomes to qualify in states imposing income caps, are also allowed.

Recovery Provisions

While prior law made recovery optional, OBRA '93 requires states to recover Medicaid expenditures from the estate of an individual who was aged fifty-five or older (age sixty-five may have been intended) when benefits for nursing-home care and related services were received. States have the option to seek recovery for other services, such as home care. New York City Medicaid and some other counties send notices to all refusing spouses requesting that they reimburse Medicaid for the cost of their sick spouse's medical care. If no response is sent, Medicaid will file a lawsuit for payment of the outstanding debt in the amount paid by Medicaid for the care of the sick spouse. The lawsuits are based upon a 1998 case brought by New York City Medicaid against a community spouse who refused to contribute his resources in excess of the community spouse resource allowance of his sick spouse on nursing home Medicaid *(Commissioner of the DSS of the City of New York v. Benjamin Spellman)*.

Whereas prior law limited the states' right of recovery to probate assets, OBRA '93 gives the states the option of expanding the recoverable estate to include "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy-in-common, survivorship, life estate, living trust or other arrangement."

Planning

At present, in some states, eligibility for Medicaid home care is less restrictive than for nursing-home care. For example, New York State does not impose a waiting period on home care recipients who have transferred their assets. Thus, an individual can transfer all of his or her assets on one day and apply for Medicaid home care on the following day.

When considering the lifetime transfer of assets for Medicaid eligibility purposes, you must take into account the following:

- A gift tax will be payable if the gift exceeds the amount of the donor's available unified credit
- The transferred assets will lose the step-up in basis available to assets held until the donor's death
- Liability for income tax on the transferred assets will shift to the donee
- The donee's creditors may be able to reach the transferred assets

While a Medicaid applicant may retain a principal residence in which a spouse resides, it is a different matter if the applicant is single or the spouse resides elsewhere. In such case, a transfer of the residence to children with the parent reserving a life estate may be indicated. Although the life estate has value, Medicaid does not appear to regard its retention as affecting eligibility. The retained life interest ensures that the full value of the home will be includible in the parent's estate for estate tax purposes. This will ensure a step-up in basis on the parent's death and save the children income tax on the eventual sale of the home. It is assumed that the inclusion of the home in the parent's estate will not result in estate tax or, if it does, the amount taxable will be less than the income tax savings resulting from the step-up in basis.

Testamentary transfer of assets must also be considered from the point of view of protecting property from long-term health care expenses of beneficiaries. Thus, if an individual's will creates one or more trusts for a beneficiary whose age or state of health requires concern over health care costs, provisions should be included in the trust to the effect that any discretion given to the trustee to make payments of income and/or principal to or for the benefit of the trust beneficiary cannot, in any event, be exercised to pay or reimburse any expenses which would otherwise be covered by Medicaid or any other governmental program of assistance. This type of provision is particularly suitable in credit shelter trusts under which the surviving spouse is the beneficiary or one of a class of discretionary beneficiaries. The clause should also be included in QTIP trusts which permit discretionary invasion of principal for the surviving spouse.

Shah v. DeBuono: The Court Rules on Medicaid Planning

New York State's court of appeals approved Medicaid planning in a landmark case. In *Shah v. DeBuono,* decided on June 8, 2000, the New York court of appeals approved Medicaid planning by an applicant's wife who had also been appointed guardian for her husband. As guardian, Mrs. Shah had transferred all of Mr. Shah's resources to herself and then exercised her individual right of spousal refusal to contribute to her husband's hospital costs (in most states, a spouse is legally responsible for the payment of the necessities of his or her spouse, including food, clothing, shelter, medical needs), in order to retain income and resources in excess of the community spouse income and resource allowances. The court's opinion addressed three issues: whether Mr. Shah was a resident of New York State for Medicaid eligibility purposes; whether an Article 81 guardian who was also the

wife of the applicant had authority to transfer all of the applicant's assets to herself so that her husband could become Medicaid-eligible; and whether the wife could then exercise her individual right of spousal refusal.

Although the Shahs resided in New Jersey, Mr. Shah was injured at work in New York, treated in a New York hospital, and discharged to a New York nursing home. He never regained consciousness after the injury. His wife was appointed an Article 81 guardian by a New York court. New York Medicaid argued that Mr. Shah was a resident of New Jersey and that Mrs. Shah should not be allowed to take advantage of New York's spousal refusal law, not available in New Jersey, by simply stating that Mr. Shah was a resident of New York. The court of appeals, however, ruled that Mr. Shah was clearly a resident of New York for Medicaid eligibility purposes, relying on federal regulations which provide that for any institutionalized individual who is incapable of indicating intent, the state of residence is the state in which the individual is physically present. Further, the federal regulations declare that a state may not deny Medicaid eligibility to individuals in institutions who satisfy the residency rules because those individuals did not establish residence in that state before entering the institution.

Under the provisions of Article 81 of the New York State Mental Hygiene Law, courts have the power to authorize guardians to make transfers for Medicaid planning purposes. The court of appeals strongly reaffirmed the provisions of Article 81, which specifically authorize guardians to make gifts, provide support for dependents and, simultaneously, apply for government benefits, stating that these powers of a New York guardian are "unlimited and certainly not contingent on the particular purpose for the transfer. . . ." The court added that the only limitation is that the guardian's actions must take into account what would have been the personal wishes, preferences, and desires of the incapacitated person.

Article 81 requires that transfers by a guardian be approved by the court which appointed the guardian if clear and convincing evidence proves that a reasonable person in the position of the incapacitated person would be likely to make transfers under the same circumstances. The court of appeals agreed with the lower court's "common sense" statement that any person in Mr. Shah's condition would prefer that the costs of his care be paid by the state rather than his family.

Medicaid argued that even though the federal and state Medicaid law allowed Mrs. Shah, as guardian, to transfer resources and income from her husband to herself to bring her resources and income up to the community spouse income ($2,103/month in 2000) and resource ($74,820 in 2000) allowances, she would have to show exceptional circumstances, at a fair hearing or in a court proceeding, to obtain an order of support to receive additional income and

resources from her husband, rather than transferring any excess to herself and then exercising her spousal-refusal right.

The court of appeals ruled that these New York Medicaid provisions allow institutionalized spouses, through guardianship authorization, to transfer all of their assets to their community spouses who may simultaneously refuse to have those assets included in the calculation of income and resources available to their institutionalized spouses for Medicaid assistance. The court also acknowledged, however, that exercise of the spousal-refusal right does not deprive the state of the opportunity to seek reimbursement from financially qualified refusing spouses after Medicaid benefits are paid.

In conclusion, the court of appeals repeated the lower court's statement that "the complexities of the law . . . should never be allowed to blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets, a right which includes the right to give those assets away to someone else for any reason or no reason. . . . We would only amplify this by saying that no agency of the government has any right to complain about the fact that middle-class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential medical treatment."

SSI

Supplemental security income (SSI) is a needs-based program for the aged (sixty-five or older), blind, or disabled. SSI can be a person's only income or it can supplement other income, such as social security retirement, or disability wages or benefits. SSI is administered by the Social Security Administration. As in Medicaid, there are limitations on resources and income. For an individual, the resource limitation in 2002 is $2,000 ($3,000 for a couple) and the income limitation is $632 (+ $20) and $921 (+ $20) for couples.

Persons who qualify for SSI qualify for Medicaid benefits. Under the laws of the state of New York, relatives and friends of an SSI recipient may establish special needs trusts for his or her benefit, without jeopardizing the disabled person's eligibility for SSI, Medicaid, and other public entitlements.

Federal legislation that became effective on December 14, 1999, establishes a penalty period for applicants or recipients of SSI benefits who transfer or give away their resources in order to be eligible for SSI. The law provides for

a thirty-six-month "look-back" period, to be applied starting with the date of the SSI application or the date of the transfer, whichever is later. Eligibility will depend upon how much money is transferred and when it took place.

No-Penalty Transfers

No penalty or waiting period will be imposed on a transfer by an individual or the individual's spouse under the following circumstances:

- The resources are transferred to certain trusts. (Trusts which would repay the state the cost of Medicaid services provided the beneficiary upon his or her death, such as special needs trusts established for disabled persons under age sixty-five and special needs pooled trusts for disabled individuals are not considered available resources for SSI.)
- The home is transferred to any of these individuals:
  - spouse, child under twenty-one, or child of any age who is blind or disabled;
  - sibling who has an "equity interest" in the home and who was residing in the home for at least one year prior to the date the individual became institutionalized; or
  - son or daughter who has resided in the house for at least two years prior to the date the individual became institutionalized and provided care to the individual, which permitted him or her to live at home.
- Resources other than a home are transferred:
  - to the individual's spouse or to another for the sole benefit of the individual's spouse;
  - from the individual's spouse to another for the sole benefit of the spouse;
  - to the individual's child of any age who is blind or disabled;
  - to a trust established for the sole benefit of the individual's blind or disabled child of any age;
  - to a trust solely for the benefit of an adult under sixty-five who is disabled.

In addition, as in the Medicaid program, transfers will not result in a penalty period where:

- An individual intended to dispose of the resources at fair market value or for "other valuable consideration."
- The resources were transferred for a purpose other than to qualify for SSI.
- All resources transferred have been returned.
- The denial of eligibility would cause "undue hardship" as determined under rules to be established by SSA.

CHAPTER 17

Retirement Plans: New Required Minimum Distribution Rules

On January 17, 2001, the Internal Revenue Service issued new proposed regulations interpreting the Required Minimum Distribution Rules. In doing so, the IRS revised the former rules, creating a much simpler method. The new rules apply to individual accounts like 401(k) plans, Keogh plans, IRA plans, and profit-sharing plans. They can also apply to non-annuity defined benefit plans. The new rules generally were effective starting on January 1, 2002.

The new rules provide for a longer period of distributions by expanding or lowering the rate of distribution. Distribution amounts are based on the fact that the plan participant (the owner) will have chosen a death beneficiary who is younger by at least ten years. The one exception is where a participant chooses as his or her designated beneficiary a spouse who is more than ten years younger than the participant. In this case and only in this situation, the spouses will be able to use a withdrawal rate based upon their actual ages.

Whether or not the participant designates a beneficiary and in spite of the actual age of a designated beneficiary (except the spousal exception), the joint life expectancy of the participant and a seventy-year-old beneficiary, as determined by the use of the Uniform Table (the "Table," which is set forth at the end of this chapter) is assumed to be 27.4 years. The Table may be applied by any participant without the necessity of identifying a beneficiary, or if no beneficiary has been designated. This means that a single owner of an IRA account who has designated a non-person as a beneficiary, such as a charity, will have the ability to receive deferral withdrawals, which were previously available only if the participant had designated a beneficiary who was younger in age. The age of the participant is the only required information needed for input into the Table.

In order to permit maximum deferrals and distributions in accordance with an estate plan, an account owner still needs to designate beneficiaries. However, the proposed regulations change the time at which a named beneficiary shall be determined following the death of the account owner. Previously, the determination

of the beneficiary of a retirement plan took place at the death of the account owner. This determination under the new regulations shall be made on the last day of the calendar year following the year of the owner's death.

However, the new proposed regulations do not allow the designation of a beneficiary after the death of an account owner. The new rule does permit a designated beneficiary or multiple to change who would receive the benefits, for the purposes of the Required Minimum Distributions. For example, a disclaimer renunciation, after the death of the account owner, by a beneficiary could make such a change.

A trust may be a designated beneficiary. For a trust to qualify, it must:

(1) Under state law be valid, or would be, except that it has no assets until the death of the IRA owner or plan participant
(2) Be irrevocable upon the death of the IRA owner or plan participant
(3) Provide that the beneficiaries be identifiable and be individuals
(4) Provide the IRA custodian or plan trustee with a copy of the trust or a list of all primary, contingent, and remainder beneficiaries with a description of their benefits
(5) Provide a certified copy of any changes to the beneficiaries to the IRA custodian or plan trustee
(6) Provide the IRA custodian or plan trustee a full copy of the trust if one is demanded (i.e., if the custodian or trustee is not satisfied with option (4) to provide a list of beneficiaries and their benefits)

IRAs and certain other retirement plans can be used in your estate plan to take advantage of your applicable estate tax exemption and that of your spouse. This can be accomplished by using the plan to fund a qualified marital deduction trust and/or a credit shelter trust.

The plan should be employed if you wish to make charitable bequests, to take effect upon your death. In such a case, your estate will have an estate tax deduction and no income taxes will be required to be paid by the charity at the time it receives the bequest.

Death of the Participant Before Required Beginning Date

After the death of the account owner and the identification of the beneficiary, the new rules are very similar to the former rules. If a single person is the designated beneficiary, that person is required to commence receiving distributions under the five-year rule or over his or her life expectancy. Under the five-year rule, the entire IRA must be distributed by the end of the fifth year following the account owner's death.

If there are multiple designated beneficiaries, the distributions will be based on the life expectancy of the oldest beneficiary.

Death of the Participant After the Required Beginning Date

The regulations for calculating distributions if the account owner dies after his or her required beginning date are similar to the regulations where death is before the required beginning date. The only difference is that the account owner's distribution for the year of death must be distributed by the end of the calendar year of his or her death. Furthermore, the five-year rule is not applicable under this situation.

The Spouse as Beneficiary

If the spouse is designated as the sole beneficiary of an IRA, the required minimum distributions are quite different. The best plan in such an event is for the spouse to roll over the IRA into the spouse's own IRA or elect to treat the IRA that the spouse has inherited as the spouse's own IRA. The advantage of a spousal rollover is for the spouse to receive smaller minimum distributions on his or her life, under the table, and with the right to designate the beneficiary of the spouse's new IRA.

If the decedent had not attained his or her required beginning date (70 1/2) at his or her death, a spouse beneficiary has certain options:

- The spouse can elect the five-year rule.
- The spouse can elect to do nothing until either the end of the year in which the account owner would have reached his or her required beginning date, or until December 31st of the year following the year of the account owner's death. At the later of the two dates, the spouse must start to receive distributions on the basis of the spouse's life expectancy. Under the new rules, a spouse is allowed to recalculate the spouse's life expectancy each year as opposed to being required to use a fixed certain term.

Summary of Changes in Required Minimum Distribution Rules

- A postmortem beneficiary need not be designated by the required beginning date
- Recalculation of life expectancy is the standard; it no longer has to be elected

- The participant may change the designated beneficiary after the required beginning date, without altering the required minimum distribution
- The designated beneficiary may change (for example, by disclaimer or renunciation) until the end of the first year after the year of the participant's death
- Life expectancy of the designated beneficiary is irrelevant in establishing the minimum distribution amount during the participant's life except for one exception:

If the only beneficiary is the account owner's spouse and the spouse is more than ten years younger than the account owner, the joint life expectancy of the account owner and the spouse is used to determine the minimum required distribution. If the account owner desires a larger distribution, the minimum distribution rules permit the taking of more than a minimum required amount. If a spouse dies or the spouses are divorced during a year, the account owner must revert to the prior rule. An account owner who marries a younger spouse during a year can accordingly alter the following year's required minimum distribution.

- In all other cases, the minimum distribution table is based upon applying the life expectancy of the account owner and a hypothetical beneficiary deemed to be ten years younger
- If a beneficiary is designated, his or her life expectancy is applied, whether or not the participant dies before or after the required beginning date, subject, however, to the rules when the designated beneficiary is a spouse, an entity, or multiple individuals
- If there is more than one individual beneficiary, the life expectancy used for minimum distributions is the life expectancy of the oldest beneficiary
- If no designated beneficiary exists and the account owner dies after the required beginning date, distributions will then continue over the account owner's remaining life expectancy, determined immediately before his or her death
- If no designated beneficiary exists at the end of the first year after the year of the account owner's death and the account owner died before his or her required beginning date, then the five-year distribution rule applies
- If a beneficiary is an entity, the account will be considered to have no designated beneficiary at the time of the account owner's death and the rules will apply according to whether the participant died before or after the required beginning date

- Trusts that are beneficiaries of a plan will be considered when determining the minimum required distribution, so long as the required documentation is submitted by the end of the first year following the year of the account owner's death; testamentary trusts will qualify the same as trusts created during your lifetime
- A surviving spouse may effect a rollover of a plan by simply designating the plan in the surviving spouse's name as the owner and not as the beneficiary
- If the account owner dies before the required distribution date and if the account owner's surviving spouse is the only beneficiary of the plan, the rule is the same, in that the spouse is allowed to defer distributions until the account owner would have reached age seventy and a half.

Singe Life Expectancy Table

Age	Divisor	Age	Divisor	Age	Divisor	Age	Divisor	Age	Divisor	Age	Divisor
5	76.6	24	58.0	43	39.6	62	22.5	80	9.5	98	3.0
6	75.6	25	57.0	44	38.7	63	21.6	81	8.9	99	2.8
7	74.7	26	56.0	45	37.7	64	20.8	82	8.4	100	2.7
8	73.7	27	55.1	46	36.8	65	20.0	83	7.9	101	2.5
9	72.7	28	54.1	47	35.9	66	19.2	84	7.4	102	2.3
10	71.7	29	53.1	48	34.9	67	18.4	85	6.9	103	2.1
11	70.7	30	52.2	49	34.0	68	17.6	86	6.5	104	1.9
12	69.7	31	51.2	50	33.1	69	16.8	87	6.1	105	1.8
13	68.8	32	50.2	51	32.2	70	16.0	88	5.7	106	1.6
14	67.8	33	49.3	52	31.3	71	15.3	89	5.3	107	1.4
15	66.8	34	48.3	53	30.4	72	14.6	90	5.0	108	1.3
16	65.8	35	47.3	54	29.5	73	13.9	91	4.7	109	1.1
17	64.8	36	46.4	55	28.6	74	13.2	92	4.4	110	1.0
18	63.9	37	45.4	56	27.7	75	12.9	93	4.1	111	.9
19	62.9	38	44.4	57	26.8	76	11.9	94	3.9	112	.8
20	61.9	39	43.5	58	25.9	77	11.2	95	3.7	113	.7
21	60.9	40	42.5	59	25.0	78	10.6	96	3.4	114	.6
22	59.9	41	41.5	60	24.2	79	10.0	97	3.2	115	.5
23	59.0	42	40.6	61	23.3						

Uniform Distribution Table

Age	Divisor
70	27.4
71	26.5
72	25.6
73	24.7
74	23.8
75	22.9
76	22.0
77	21.2
78	20.3
79	19.5
80	18.7
81	17.9
82	17.1
83	16.3
84	15.5
85	14.8
86	14.1
87	13.4
88	12.7
89	12.0
90	11.4
91	10.8
92	10.2

Age	Divisor
93	9.6
94	9.1
95	8.6
96	8.1
97	7.6
98	7.1
99	6.7
100	6.3
101	5.9
102	5.5
103	5.2
104	4.9
105	4.5
106	4.2
107	3.9
108	3.7
109	3.4
110	3.1
111	2.9
112	2.6
113	2.4
114	2.1
115+	1.9

CHAPTER 18

Planning for Elder Persons

More and more in today's world individuals are outliving the mortality tables. This also means that they are substantially outliving their retirement ages. The estate plan that was created at the retirement age may not be applicable when a person reaches "elder" status (eighties and nineties). Therefore, it may be necessary to consider the special needs of an elder person. These needs might include the management of property, health care coverage, living arrangements, and estate planning.

Property Management

Individuals who attain elder status, who have affluence, may not be interested in managing their holdings. Various alternatives exist to relieve individuals of this responsibility:

- Trusts. Trusts can provide a simple and flexible tool to relieve a person of the burden of overseeing his or her affairs. A revocable or living trust will ease the daily requirement of management but the elder person will still retain control over his or her property. A standby revocable trust can be created with the funding being done by the person's agent under a durable power of attorney.
- Durable power of attorney. A person can name anyone to act with respect to his or her affairs. The power of attorney can be made durable so that even if the person becomes incapacitated, the authority of the agent will continue. However, in the event of incapacity, the power could be revoked by a court-appointed legal representative (guardian). The scope of the powers that are given to the agent should be carefully drawn. A possible drawback is that some financial institutions may not wish to deal with an agent.
- Private annuities. An individual can transfer property to a family member in exchange for that person's promise to pay an annuity for life. This

technique is underused and can be very effective in estate tax planning under the appropriate circumstances.

- Moral arrangements. Individuals may give their property to their children or grandchildren or others with an understanding that it will be used for their care and maintenance during their lifetimes. This type of arrangement is not recommended. Even with well-meaning people, there is always the possibility that the funds will not be there when they are needed due to improper management, divorce, or creditor's claims.

Health Care

Part A Medicare is the basic hospital insurance plan available to those sixty-five or older who are eligible for monthly social security benefits or who independently enroll. Part B usually is available for a charge to individuals eligible for premium-free Part A coverage and individuals sixty-five or older who voluntarily enroll.

Entitlement to Medicaid is dependent upon financial need. Attempts to gain entitlement to Medicaid coverage through an "impoverishment" strategy may or may not work.

Living Arrangements

Persons able to take care of themselves both personally and financially may wish to remain in their own homes. Public social services may be available to extend the period of self-care.

Elderly persons whose health has declined to the point where it prevents independent living arrangements, but who are not yet in need of full-time health care, can present unique problems. A family may be asked to take in the elderly family member; or the elderly person may require psychological and financial planning; or housing may need to be found for the elderly person that offers independent living combined with health care support.

Estate Planning

The traditional estate-planning strategies, such as the annual gift tax exclusion, credit shelter trust, and the marital deduction will be as important to an elderly person as they are to the rest of the population. If an estate plan exists, it will need to be reviewed. The elder individual may have created an estate plan many

years before. The plan needs to be reviewed to ascertain if it is current. The designations of named executors and/or trustees may no longer be appropriate. Assets may have changed both in form and in amount.

The older person will also want to consider creating a living will and a health care proxy, both of which are discussed below.

Guardianship

The guardianship of an adult who is under a legal disability is created by the court.

The appointment of a guardian must be made by the court after a hearing, and on a finding that the person is not capable of taking care of his or her person and/or cannot manage his or her financial affairs.

The powers, rights, duties, and liabilities of guardians are set forth in the statutes of the domiciliary state.

Many of the powers mentioned involve financial and estate planning powers. The power to make gifts of a ward's property may also be authorized.

Power of Attorney

A person may appoint another person or entity to act for him or her with regard to any transaction that the individual could undertake. The power that is given is known as a power of attorney. The entity to whom it is given is known as an attorney-in-fact, or agent.

If the person becomes incapacitated, the power will cease unless the power is designated as durable. This means that the power will survive the principal's disability.

All of our states recognize the validity of a durable power of attorney. In many instances, these powers will avoid the necessity and cost of trusts, guardianships, and conservatorships, and their court supervision.

Many states permit a springing power of attorney. By creating a springing power of attorney, you provide that it only becomes effective on the happening of an event, i.e., the disability or incapacity of the principal.

Living Wills and Health Care Proxies

Many persons feel that if, because of sickness or accident, their death is imminent and inevitable, they do not wish to have their lives continue through

the use of life-sustaining techniques. Some persons wish to memorialize their wishes in a document which has become known as a "living will."

A related matter is the "health care proxy" or "durable power of attorney for health care," which involves appointing another person to make treatment decisions when the person is mentally incapacitated.

The Living Will

The *Cruzan* decision and existing state law makes it imperative that any individual who would not wish to have his or her life continued in a vegetative state without hope of recovery should make his wishes clearly known in a "living will."

Forty-two states and the District of Columbia have living will statutes. Other states are considering such statutes. In addition, there is a growing body of case law in those states without "living will" statutes that accords increasing recognition to an individual's right to refuse medical treatment.

Even if the domiciliary state of a person recognizes the validity of "living wills," problems can arise with respect to the effectiveness of such "wills." Some states only recognize their validity if they are executed after the diagnosed onset of a terminal illness. Also, because of the increased geographic mobility of the population (particularly the elderly), a person may be stricken with a disabling illness or injury in a state other than that of his or her domicile, in which case the "living will" direction may be of no effect.

Therefore, it is best to have the broadest possible "living will" to cover any possible situation. For example, certain state statutes narrowly define "terminal condition" to include only those situations in which two physicians would certify that death is imminent. You may want to expand on that to include an irreversible vegetative state or a condition from which there is no reasonable chance of recovery and which will result in a prolonged, yet premature, death. In addition, the living will should specify whether you agree to have artificially provided nutrition and hydration withdrawn, since many state statutes define "life-prolonging procedures" to mean only artificial respiration.

Health Care Proxy

Twenty-four states and the District of Columbia have health care proxy laws that permit agents to make medical decisions, including the right to withdraw life support when the declarant is incapable of making those decisions.

As with the living will, state statutes should be reviewed in order to determine whether the document must be in statutory form. Another issue to

check into is whether more than one agent may be appointed. In general, it is preferable to appoint one agent to avoid disagreements and expedite decision making. The appointment of a successor agent is usually allowed.

A health care proxy should be a separate document from a general power of attorney, even in those states with a durable power of attorney that authorizes health care decisions. Often a person would want to designate different people to handle financial decisions and medical decisions. Health care proxies may provide for termination upon the expiration of a period of time or the occurrence of a specified event. Some states require renewal after a certain period of time. In addition, a declarant may revoke a health care proxy or a living will at any time. Again, state law should be consulted. It may be desirable to provide in the health care proxy that the appointment of a conservator or guardian will not terminate the power of the health care agent, in case state law should provide otherwise.

Many people request a "springing power," which basically means that the power of the agent "springs" into effect upon the incapacity of the individual. However, if an individual is capable of making his or her own decisions, health care providers will not act against the individual's wishes. Therefore, the distinction between a "springing" power and one that is immediately effective, but whose exercise is conditioned upon incapacity, is a distinction without a real difference.

CHAPTER 19

When Death Is Imminent

When an estate owner is terminally ill and death is foreseeable within a brief period, there are estate planning strategies and devices to be considered and implemented as circumstances arise. Many of these techniques have been presented elsewhere in this book and are set forth in this chapter to ease the planning process.

Durable Power of Attorney

In planning for someone who is close to death, it is virtually essential that some trusted and competent person be designated as an agent under a so-called durable power of attorney. The Uniform Probate Code and statutes in a majority of states permit some form of power of attorney that is durable, which permits the attorney-in-fact to act on behalf of his or her principal even though the principal is incapacitated.

Such document enables the attorney-in-fact to engage in the various activities that the dying person is no longer able to do.

The durable power of attorney should contain a provision that permits the attorney-in-fact to make gifts to specific persons or to a specific class of persons. This would allow continued use of gift-giving during a person's illness, in order to reduce his or her estate.

Physician's Certificate

If a person's legal capacity to enter into transactions and sign legal documents may be questioned after his or her death, a certificate from an attending physician or another physician familiar with the person's condition might be obtained. This certificate would certify that the person has the capacity to understand his or her affairs. Even if the certification simply indicates that the

person has capacity in "lucid intervals," a physician's certificate could defeat subsequent claims of incapacity or not understanding what was happening at the specific time.

Living Will

Where the individual intends that no life-sustaining procedures shall be used if he or she is terminally ill, the person should execute a living will setting forth his or her wishes. Many states recognize the validity of a living will. A living will serves to express the person's wishes and, in many instances, relieve the person's relatives from making a difficult decision at a very emotional time.

Health Care Proxy

In the many states that recognize health care proxies, the person should sign such a document. The health care proxy designates an agent to make treatment decisions when the person is not capable of making such decisions. It affords great flexibility since it permits the agent to make decisions for all types of illnesses.

Anatomical Gifts

An individual who wishes to donate body organs after his or her death might wish to make arrangements during his or her lifetime. However, the feelings of surviving family members should always be taken into consideration.

Medical Coverage

Maintaining existing medical coverage is extremely important. Upon the diagnosis of a terminal illness, new medical insurance cannot be obtained.

Trusts

Consideration should be given to the creation of a living trust. A revocable trust will help to avoid the necessity of probate and it will hasten payments of income and principal to a beneficiary. Such a trust does not in and of itself result in any reduction of estate taxes. The trust may serve as a recipient of assets poured

over from a will admitted to probate. If a person is unable, due to incapacity, to make transfers to his or her trust, he or she can do so under a proper durable power of attorney.

Will

If the person does not have a will, he or she should create one. If a will exists, it should be reviewed and revised, if need be, to be sure it reflects the person's present intention. If a will is in a safe deposit box, it should be transferred to another safe place, perhaps an attorney's vault. This will help to avoid the need to obtain a court order, as is sometimes required, to gain access to a safe deposit box after the death of the box owner.

Life Insurance

Investigation should be made to see if the person has any right to purchase additional coverage on any life insurance policy insuring the person's life. In addition, beneficiary designations should be checked to be sure that they comply with the person's current estate plan.

A terminally ill person may own a life insurance policy that provides for obtaining accelerated death benefits upon the occurrence of certain specified life threatening illnesses. The decision to receive any such accelerated death benefits should be considered against possible negative consequences (i.e., Medicaid, financial, or tax).

There are companies in the business of buying life insurance policies owned by terminally ill insureds. Such companies may pay the insured between 50 percent and 75 percent of the death benefit. While such a transaction could improve the quality of life of the ill person, the cost could be high and other considerations must be dealt with. They include the availability of other sources of funds, the effect on relatives in need of funds, the income and estate tax consequences, and even the competency of the insured to effectuate the sale.

Retirement Plans

An analysis should be made of the terminally ill person's rights and benefits under his or her retirement plans. Efforts should be made to expedite payments that will become due. All beneficiary designations should be reviewed to be sure they are current.

Domicile

Steps should be taken to clear any questions about the individual's domicile by appropriate documentation. If there is a chance to change the domicile for better results, this should be considered.

Liquidity

An analysis should be made of pre-death and post-death obligations. Arrangements should be made for the availability of the needed amounts. After the person's demise, access to bank accounts, stocks, or other assets may be difficult, pending the administration of the estate. It may be preferable to have the terminally ill person close the accounts while he or she is still alive. Such a move also would ensure that the surviving beneficiary will have sufficient cash during the period of administration of the estate.

Thought should be given to permitting certain designated parties access to liquid assets (i.e., bank and money-market accounts, securities).

A review should be made as to which persons have access to a safe deposit box. Items in the box that are not owned by the terminally ill person should be removed, or at least identified as to who the real owner is, and tagged.

Incorporation of Sole Proprietorship or Partnership

The incorporation of a sole proprietorship or a partnership interest by a terminally ill person is an important consideration for business reasons such as making sure that the management of the business will be performed by those designated, rather than executor or trustee. The incorporation of a business can make the management, administration, and distribution of a business and its assets through shares of stock, easier. Another benefit from incorporation can be the limiting of liability for the beneficiaries and the legal representatives.

Post-Death Business Transactions

A terminally ill owner of a business may feel that he or she, and not his or her legal representatives or beneficiaries, is the best person to transact a sale of a business.

In order not to lose the stepped-up basis on such a sale, a buyer can be given an option to purchase, with the sale taking place after the death of the estate owner.

Deathbed Gifts

For a terminally ill person who has a taxable estate, using the annual exclusion by making deathbed gifts will save a substantial amount of transfer taxes. If a gift is of property that has appreciated in value, the transfer tax savings will be offset to some extent by the donee's taking the donor's lower basis and not getting the benefit of a step-up in basis upon the death of the donor.

If a terminally ill person does not have an estate subject to tax, deathbed gifts offer no advantage for estate tax purposes. In such a case, gifts of property that have appreciated in value are not appropriate, since the benefits of the stepped-up basis are lost without reduction in estate taxes.

Where a person has a taxable estate, an important consideration in making deathbed gifts is that the person has mental capacity and the gifts considered "complete" from a legal point of view.

If a gift takes the form of money or tangible personal property, and is personally given to the recipient by the donor, there should be no concern. However, this may not be the case where the gift is by check or is one of shares of stock. In this type of situation, the rules of the Internal Revenue Service have to be complied with. The government's position is that since the maker of a check that is not certified may stop payment, there is no completed gift until the check is cashed. If that takes place before the donor's demise, then the gift is complete. If not, the amount of the gift is includible in the donor's gross estate.

For gifts of stock, the government's position is that a gift of shares of stock is not completed until the re-registration of the shares on the books of the corporation has been completed.

When a terminally ill person is incapacitated and unable to make gifts, a durable power of attorney, permitting the agent to make gifts of the principal's property, will permit gifts to be made.

Gifts to Spouse

A terminally ill person may also make gifts in amounts without limitation to a spouse without gift and estate tax implications, provided that the gifts qualify for the unlimited marital deduction.

- Gifts of depreciated property to spouse. Under the rules of the Internal Revenue Code, a person's death will cause the basis of property owned by him or her to be stepped up or reduced to its value on the date of death. Therefore, property that has substantially reduced value during a person's lifetime, at his or her death, will be stepped down in value,

which will eliminate an opportunity for a person who receives the property, by way of gift, to recognize a capital loss on the subsequent sale of the property.

- Gift-splitting by spouses. The gift-splitting consent of a dying spouse should be obtained. This will permit the spouses to make gifts of up to $22,000 per recipient, free of gift tax.
- Gift to a spouse who is dying. If the terminally ill spouse does not own enough assets equivalent in value to the unified credit, a gift should be made to him or her. In order to avoid estate tax on the amount of the unified credit, the recipient spouse must thereafter create a testamentary provision providing for the transfer of this property, to children or others, either upon his or her death or after the death of the surviving spouse. The gift to a dying spouse does not have to be outright, it can be in the form of a trust, which can qualify for the marital deduction.

Charitable Gifts

If a person makes a gift at any time prior to death to a charity that is qualified, an income tax deduction will be available; and there will be no gift tax due. However, gifts of life insurance policies are includible in one's estate, if made within three years prior to death.

If a terminally ill person owns property, which upon death will be treated as income in respect of a decedent (accounts receivable, for example), and wishes to make charitable bequests, he or she should specifically give such an item to a charity. If the bequest goes directly to the charity, it will receive the full amount of the income item free of income tax and the person's estate will receive an estate tax deduction for the full amount. However, if the income-in-respect-of-a-decedent item were bequeathed to an individual, he or she would pay income tax when payment on the legacy was received.

Copyright

A copyright owned by its creator is not considered a capital asset. If a dying person is the creator of a copyright, and owns it at death, it becomes a capital asset of the estate or beneficiary. This allows the estate or beneficiary to take advantage of the long-term capital gain rate on sale of the copyright.

Community Property

If a dying person owns an interest in community property, the basis of which for income tax purposes is higher than the fair market value, its basis for the entire property will be the estate tax value, even though only half of the value will be includible in the estate of the dying person. To keep the loss potential for the survivor, the community property can be split during lifetime and converted into a tenancy-in-common.

Partnership Interest

If a dying person is a partner in a partnership, partnership income that has not been distributed as of the date of death will be treated for income tax purposes as an item of income in respect of a decedent, and will not be includible in the final income tax return of the decedent unless the person is considered to have sold his or her interest at death. A buyout or buy-sell agreement should be considered. If there is such an agreement in existence but it does not provide for a sale at death, it should be amended to so provide.

Private Annuity

If a person is suffering from an incurable disease, and death is not "clearly imminent" (which means that there is no prognosis in existence which anticipates death to take place within one year), a sale by such person of property to a family member, in exchange for a private annuity, could remove the property from his or her estate without transfer (gift/estate) tax cost (assuming that the value of the property transferred is no less than the value of the promised annuity as determined from actuarial tables).

Flower Bonds

Certain long-term U.S. Treasury bonds with low interest rates may be purchased at a discount and used at par to pay estate taxes. Consideration needs to be given to the facts that the bonds are includible in a person's estate at their par value and the bonds bear a low interest rate.

CHAPTER 20

Planning for a Married Couple

Planning for a couple who are married requires a complete disclosure as to the amount of their assets, the value of their assets, and how they are owned. If the estates are not subject to federal gift or estate tax, no tax planning is required. However, planning for larger estates is usually quite complex. If the married persons have little or no affinity for the management of their affairs or they are in ill health, trusts must be contemplated. If there is a prior marriage, a trust can be created so as to provide for the spouse, with the children of the prior marriage being the remainder beneficiaries.

In analyzing the couple's assets, you have to assume that all property owned by them will be included in their estates. Furthermore, certain property may pass by will or trust and other property may pass otherwise, such as jointly owned property or property that has beneficiary designations, e.g., life insurance or retirement benefits. As such, all of the assets need to be identified and valued. If the aggregate value is not expected to exceed the applicable exclusion or unified credit exemption equivalent (1 million in 2002), no tax will be due, regardless of the plan. Consequently, unless use of a trust is otherwise indicated or the person desires to leave property to someone other than the spouse, the simplest course for each spouse is to give the entire estate to the other, whether by devise in the will or by non-probate means.

To minimize the estate tax regardless of which spouse dies first, it may also be advisable for the person to make lifetime gifts to the spouse to ensure that the spouse's estate is at least equal to the applicable exclusion amount.

Use of the Marital Deduction

Careful use of the marital deduction is essential for larger estates. While estate tax can always be eliminated by fully utilizing the unlimited marital deduction

at the first death, maximum use of the marital deduction does not result in the minimum tax when the survivor dies.

The most common planning strategy for a married couple is to fund the combination of unified credit and marital deduction that will eliminate tax at the first death and minimize the tax payable at the second death. To achieve this result, the first spouse to die should transfer to a trust, not eligible for the marital deduction, an amount which, when added to other transfers not qualifying for the marital deduction, will equal the then applicable exclusion amount (unified credit). The trust may be structured in any manner the person desires as long as the spouse is not given a general power of appointment. However, the trust typically pays income to the spouse for life, with the remainder passing to the children or other beneficiaries. Alternately, the trustee may be given discretion as to the distribution of the income and principal among the spouse and children. This so-called bypass trust will escape taxation at both the husband's and the wife's deaths.

After creating the bypass trust, the balance of the estate should be left to the spouse outright or in a trust qualifying for the marital deduction. The unlimited marital deduction and the unified credit will together shelter the decedent's entire estate from tax, with the bypass trust escaping tax at both deaths. It is also good planning for the spouse not to receive any principal distributions from the trust until all other available assets have been exhausted. Depending on the year of the surviving spouse's death, the spouse's own unified credit will shelter the equivalent amount.

This strategy of sheltering only the exemption equivalent amount at the first death, and deferring tax payment until the second death, will not necessarily result in the lowest possible tax. An alternative is to equalize the taxable estates either in the wills or, following the first death, through use of a disclaimer or partial QTIP election.

It should always be anticipated in planning that the poorer spouse might die first. In this circumstance, tax might be saved if the wealthier spouse makes interspousal lifetime gifts.

The impact of state death taxes, if any, has to be considered. To avoid a reduction in the marital deduction, any state death tax liability should be paid first from the non-marital share. Also, while most states charge a death tax exactly equal to the federal credit for state death taxes, some states have an independent death tax, which computes the marital deduction differently from the federal system. Proper planning to minimize or eliminate the federal estate tax therefore may not avoid the possibility of sizeable state death tax liability. State death taxes are frequently an important enough factor to prompt the individual to consider a change in domicile.

Qualifying for the Marital Deduction

Property need not pass by will in order to qualify for the marital deduction. Also qualifying is property included in the gross estate, which passes to the spouse through a variety of non-probate forms, including property the spouse receives as a joint tenant with right of survivorship, a beneficiary of life insurance, an appointee of, or taker in default under, a general power of appointment, and by transfers made within three years of death that are included in the gross estate.

The marital deduction always is allowed for immediate and outright transfers of property to the spouse, whether made during life or at death. More difficulty is encountered if the person wishes to place restrictions on the transfer or desires to provide for the spouse in trust. A marital deduction for restricted gifts or transfers in trust is generally disallowed under what is known as the "nondeductible terminable interest" rule. The significant exceptions to the terminable interest rule, however, form the basis for the best known marital planning devices.

No marital deduction is allowed for property passing to a surviving spouse who is not a United States citizen, unless the property passes in the form of a qualified domestic trust (QDOT).

The portion of the estate qualifying for the marital deduction is not reduced by the payment, from income, of interest on inheritance and estate taxes. The marital deduction also is not reduced by payment of the estate's administrative expenses from income, if permitted under the instrument. The deduction is reduced, however, to the extent that the property passing to the spouse is subject to an encumbrance or is a source of funds for payment of estate and inheritance taxes. No reduction is necessary if payment from the marital share is in the discretion of the executor or trustee and the taxes in fact are paid from another source.

Terminable Interest Rule

Transfers to a spouse of nondeductible terminable interests do not qualify for the marital deduction. A terminable interest is an interest passing to the surviving spouse that terminates or fails on the lapse of time (e.g., a term of years), on the occurrence of some contingency (e.g., if the surviving spouse remarries), or on the failure of some contingency to occur (e.g., if the surviving spouse does not survive for one year).

Certain interests, while terminable, are deductible. A single life annuity payable to a surviving spouse under a retirement plan qualifies for the marital deduction. While the spouse's interest terminates upon the spouse's death, no

interest in the property (i.e., the survivor annuity) will pass upon the spouse's death to another person. Also qualifying for the deduction because it is not a terminable interest is a transfer of property to a trust in which all beneficial interests are held by the surviving spouse. Termed an "estate trust," income may accumulate or be distributed to the spouse during the spouse's lifetime, but at the spouse's death, all of the trust assets must be distributed to the spouse's probate estate.

The nondeductible terminable interest rule is subject to several statutory exceptions, all of which create planning opportunities to varying degrees. Some of these exceptions, including the most important of these, the qualified terminable interest property (QTIP) transfer, are listed below.

Charitable Remainder Trust

A deduction for the full amount of the trust is allowed if the spouse is the only non-charitable beneficiary of a charitable remainder annuity trust or unitrust.

Life Insurance or Annuities

A marital deduction is allowed for all or a specific portion of the proceeds of a life insurance or annuity contract in which the surviving spouse has a sole right to receive interest payments and a power to appoint the funds to herself or to her estate, exercisable by the spouse alone, by will or during life, and in all events.

General Power of Appointment Trust

The entire value of a trust qualifies for the marital deduction if the spouse receives the income of the trust for life, payable at least annually, and if the spouse is given the necessary power of appointment. The power must be a general power of appointment exercisable by the spouse alone, by will or during life, and not subject to condition. The required general power of appointment must be slightly broader than that required to include the property in the spouse's gross estate under the Code. A power to appoint the trust only to the spouse's creditors does not qualify the trust for the marital deduction. The spouse-beneficiary must also have the power to appoint the trust directly to his or her estate. The marital deduction is allowed for a specific portion of the trust if the surviving spouse is given the necessary income right and power over only that portion.

If properly drafted, a general power of appointment trust may be used by the spouse as a device for making annual exclusion gifts. Because the spouse must be given a general power to qualify the trust for the marital deduction, the spouse also may be given any sort of lesser power, including the authority to direct the trustee to make $11,000 annual transfers to designated persons. Through use of such a gift provision, the amount of the trust subject to federal estate tax at the spouse's death can be substantially reduced.

While the spouse may be given authority to direct distributions to other beneficiaries, granting this authority to others disqualifies the trust for the marital deduction. This would include granting the trustee authority to make discretionary distributions of principal to the testator's children.

QTIP Transfers

Transfers of a life estate or life income interest in qualified terminable interest property (QTIP) to a spouse qualifies the entire QTIP property for the marital deduction. For the property to qualify, the spouse must have a "qualifying income interest" for life. Like the general power of appointment trust, this requires that the surviving spouse be entitled to receive all of the income from the property at least annually.

To create a QTIP trust, the spouse would not be given a power of disposition either during life or at death. This is the principal advantage of the QTIP. Otherwise, the QTIP trust is less flexible than the general power of appointment trust. Because of the prohibition against granting any person, including the spouse, a power to appoint the property during the spouse's lifetime to anyone other than the spouse, the spouse may not be granted any inter vivos powers to appoint the trust assets to other beneficiaries, including the power to direct the trustee to make annual exclusion transfers to specified persons. Testamentary powers are permitted, however.

The QTIP is an elective provision, although typically a full election is claimed. The election to take the marital deduction for a QTIP transfer is made by the executor on the estate tax return, and is irrevocable. Property thus qualified is fully subject to the gift tax if any part of it is transferred to other persons during the spouse's lifetime, and to estate tax upon the spouse's death. Property intended to qualify as QTIP almost always is placed in a trust for the spouse, although other types of income interests, such as a legal life estate, also may qualify.

Care must be exercised if it is anticipated that either a QTIP or general power of appointment trust will be funded with non-income-producing property, other

than the family residence. Either type of trust should routinely include a provision granting the spouse the right to convert such property to productive use.

For an IRA or qualified plan to qualify for the marital deduction, the QTIP must distribute all of its income to the surviving spouse at least once a year. The payout options on IRAs and qualified plans are usually based on life expectancy. To qualify the IRA or other retirement plan for the marital deduction, the payout to the QTIP must be structured to distribute each year the larger of the plan's actual income or the required minimum distribution. This income requirement also is met if the trust grants the surviving spouse the power to compel the trustee to withdraw the income earned on the IRA.

Close Deaths

To anticipate the possibility of close deaths and obtain the benefits from equalizing the estates, the planner may wish to consider any one or more of three techniques: a partial QTIP election, a disclaimer, or a six-month survivorship condition.

Partial QTIP Election

The election to qualify eligible QTIP property for the marital deduction may be made in whole or in part. A partial election cannot be made with respect to particular assets, but must constitute a fraction of the entire property interest eligible for the QTIP election. If a partial QTIP election is made, only that portion of the QTIP property is included in the surviving spouse's gross estate. A partial QTIP election is perhaps the most effective method for equalizing estates at death. Because of the ability to control the marital deduction percentage, the personal representative can achieve whatever marital deduction is appropriate based on the facts as they actually exist following the decedent's death. The personal representative, as the person responsible for preparing the decedent's estate tax return, is also in the best position to make this determination.

A partial QTIP election must be made no later than the due date of the decedent's estate tax return, which is normally nine months following the decedent's death, but the making of the election may be delayed for an additional six months if an extension to file the federal estate tax return has been obtained.

Disclaimer

A disclaimer is often a less desirable method for equalizing the estates than is a partial QTIP election. Unlike a partial QTIP election, the personal representative

responsible for preparing the return does not control the decision. The decision to disclaim instead is controlled by the disclaiming beneficiary, which in this case would be the surviving spouse's personal representative or executor. The legal representative may not agree with the decision to disclaim. Furthermore, many states require that a disclaimer obtain court approval, which might not be lightly granted. The disclaimer also must be made in all events within nine months after the first spouse's death. A partial disclaimer cannot be made with respect to particular assets but must be expressed in the form of a fraction or other specific portion of the property interest.

Should the spouse disclaim, state law normally will provide that the disclaimed share passes as if the spouse had predeceased the decedent, unless the will or other governing instrument specifically directs the disposition of a disclaimed share.

Six-Month Survivorship Conditions

A devise may be made to the surviving spouse conditioned upon the spouse's surviving for a period of six months or less. While technically a terminable interest because of the possibility that the interest will fail if the spouse does not survive the prescribed period, such survivorship conditions are specifically excepted from the nondeductible terminable interest rule. A marital deduction is allowed if the spouse survives for the requisite period. A survivorship condition may be attached to any form of marital deduction devise, including a QTIP.

Of the options for equalizing the estates in the event of close deaths, a survivorship condition is usually the least preferred. The time period of six months is shorter than the time limit under the other techniques: nine months for a disclaimer, and up to fifteen months for a partial QTIP election. Furthermore, the decision to include a six-month survivorship condition, and whether it should totally or only partially invalidate the devise, must be made based on the couple's financial arrangements at the time the will is made. The circumstances may change by the time of the couple's deaths. Both a disclaimer and partial QTIP election allow consideration of the couple's actual gross estates following their deaths.

Simultaneous Death Provision

If the testator and the spouse die in a manner in which the order of their deaths cannot be determined, state law generally presumes that each decedent survived as to his or her own property. States which have adopted the 1990 revision of the

Uniform Probate Code follow a different test. A decedent is deemed to have survived as to his or her own property unless the spouse or other beneficiary actually outlived the decedent by at least 120 hours. Rules relating to survivorship make little difference for estate tax purposes in a small estate or in situations where the estates are nearly equal. However, if the testator's estate is substantially larger than the spouse's, the will should contain a clause overriding the statute and creating a presumption that the spouse survived. This permits the estate to take maximum advantage of the marital deduction, and for the presumed survivor's estate to utilize fully its unified credit. All of the states provide that their statutory rules may be reversed or modified in the will or other relevant governing instrument.

Simultaneous death provisions apply literally only by accident. To make certain that both spouses can utilize fully their unified credits, the better option is for the wealthier spouse to make interspousal gifts during life.

Marital Deduction and Generation-Skipping Transfer (GST) Planning

The effective use of both spouses' combined GST exemptions in a testamentary plan is more complicated than the usual marital deduction plan for each. For marital deducting planning, both spouse's estates are allocated into a unified credit shelter portion and a marital deduction portion. In order to obtain the optimum plan for both spouses' GST exemptions, three separate trusts will be necessary. Since we cannot predict who will die first, each spouse should have no less than the amount of the applicable exemptions in his or her name.

Three-Trust Plan

This plan will effectively protect both estate and GST tax exemptions for a married couple. The three-trust plan employs a unified credit shelter trust, a GST tax-exempt QTIP trust, and a non-exempt QTIP trust. The following describes how it works:

- Unified credit trust and GST tax-exempt trust. A unified credit trust is created under the will or trust agreement. The legal representative of the estate of the first spouse to die will allocate the applicable exemption and GST exemption to it (in 2003, $1,120,000 will be allocated) for each exemption.
- GST tax-exempt QTIP trust. This trust is designed to absorb the balance of the GST exemption ($100,000 in 2002) in the estate of the first spouse to die. The legal representative makes a QTIP election to qualify the trust

for the estate tax marital deduction and allocates the balance of the GST exemption to the trust by means of a reverse QTIP election. The reverse election, which is set forth in the deceased spouse's estate tax return, causes the predeceased spouse to be treated as the transferor of the trust for GST tax purposes (otherwise the surviving spouse would be the transferor). This trust and the credit shelter trust will have for GST tax purposes an inclusion ratio of zero, which means that no generation-skipping tax will even be charged to the trusts. To prevent the GST exemption from being dissipated, no distributions or principal from the trusts for the benefit of the surviving spouse should be made unless and until the principal of the non-exempt QTIP trust has been first exhausted.

On the death of the surviving spouse, the principal of the QTIP trusts will be subject to estate tax under the Code. In order to preserve GST tax-exempt property, the estate tax burden should be shifted to the non-exempt QTIP trust. As an alternative, the surviving spouse's will can provide for waiver of the estate's right to recover the tax attributable to inclusion of the trust.

- Non-exempt QTIP trust. The balance of the predeceased spouse's estate is allocated to a trust for which the QTIP election has to be made as well. Distributions of principal for the benefit of the surviving spouse should be made from this trust first, before being made from the exempt QTIP trust. This trust, like the GST exempt trust, will be subject to estate tax in the surviving spouse's estate.

The Qualified Domestic Trust (QDOT)

An estate tax marital deduction is not available for property passing to a non-citizen surviving spouse. There is, however, an exception in the Internal Revenue Code to this rule, which permits a marital deduction for property passing to a non-citizen spouse, if the property is held in a qualified domestic trust (QDOT).

QDOT provisions guarantee that all property that passes to a non-citizen surviving spouse (even a non-resident non-citizen) will some day be subject to federal estate tax. In a QDOT, federal estate tax is imposed on all distributions of principal to the spouse (except for distributions that are made due to a hardship).

Property passing directly to a non-citizen surviving spouse could qualify for the estate tax marital deduction, provided that prior to the filing of the estate tax return the property is irrevocably transferred by the spouse, or his or her legal representative, to a QDOT.

The assets that can only be transferred to the QDOT are those that are in the estate of the deceased spouse, except that benefits payable to a surviving

spouse under qualified retirement plans, annuity contracts, and IRA accounts are eligible assets for the QDOT.

In order to qualify as a QDOT, the trust must meet the following requirements:

- At least one trustee must be a U.S. citizen or domestic corporation.
- A distribution of principal cannot be made without being subject to the right of the U.S. trustee to withhold the amount of the tax due on the distribution.
- The trust must meet Treasury Department requirements to ensue the collectibility of estate tax either on the distribution of trust assets or upon the death of the surviving spouse.
- The executor must make an election on the last estate tax return filed before the due date of the return, or if a timely return is not filed, on the first estate tax return filed by the executor after the due date. The trust must also qualify for the marital deduction. If the trust is a QTIP trust, then both the QDOT and QTIP elections must be made on the estate tax return.

A QDOT trust must qualify as one at the time the federal estate tax return is due or, if the trust is not qualified, the trust must be reformed.

The Internal Revenue Code provides that any estate tax that is due will be treated as if it were taxed in the first spouse's estate and not the surviving spouse's estate. This special tax-payment rule, therefore, does not permit the surviving spouse to apply his or her unified credit to reduce the estate tax.

Planning Note

Married couples who anticipate a substantial tax liability at the second death might consider purchasing a survivorship or second-to-die life insurance policy, which pays proceeds only upon the death of the surviving spouse. These proceeds can be used to pay the estate tax. However, in purchasing such a policy, care should be taken that neither spouse has incidents of ownership in the policy. If the surviving spouse has incidents of ownership in the policy, the proceeds will be included in the surviving spouse's gross estate, thereby increasing the very estate taxes that the policy was intended to pay. Avoidance of incidents of ownership normally is best accomplished through use of an irrevocable life insurance trust. In addition, persons considering the purchase of a second-to-die life insurance policy should be made aware that an exchange of a single life insurance policy for such a policy is not a tax-free exchange.

CHAPTER 21

The Effect of the Economic Growth and Tax Relief Reconciliation Act of 2001 on Estate and Gift Taxes

The repeal of the estate tax occurs by incrementally increasing the amount that is exempt from tax over a period of years; reducing the top rate and eventually repealing the tax for persons dying after the year 2009. Estate tax changes are effective for the estates of decedents dying, and gifts made, after December 31, 2001. What the Act does not do is repeal the gift tax. In the year 2010, the highest gift tax rate will be the highest individual income tax rate (scheduled to be 35 percent).

Under the Act, the Exemption Equivalent, which is the amount of an estate that would be excluded from estate tax, increases in increments. These increases and rates of tax are:

In years subsequent to 2002, the top rate is reduced. In 2003, the top rate is reduced to 49 percent, in 2004 to 48 percent, in 2005 to 47 percent, in 2006 to 46 percent, and in 2007–2009 to 45 percent. In 2010, the estate tax is repealed and the top gift tax rate is reduced to 35 percent.

For decedents dying in 2002, when the increase in the applicable exclusion amount was increased to $1 million, the effective minimum estate tax rate was increased to 41 percent. For estates of decedents dying after December 31, 2001, the top marginal estate tax rate was reduced to 50 percent for amounts transferred in excess of $2.5 million. The maximum marginal estate tax rate will gradually be reduced to 45 percent for estates of decedents dying after 2002 and before 2010, when the estate tax is scheduled to be repealed. The maximum estate tax rate on amounts in excess of $2 million will be 49 percent in 2003; 48 percent in 2004; 47 percent in 2005; and 46 percent in 2006.

Increase in Amount Excluded from Estate Tax (Exemption Equivalent) with Estate and GST

Year	Exemption Equivalents	Maximum Estate And GST Tax Rate
2002	$1,000,000	50%
2003	1,000,000	49%
2004	1,500,000	48%
2005	1,500,000	47%
2006	2,000,000	46%
2007	2,000,000	45%
2008	2,000,000	45%
2009	3,500,000	45%
2010	Taxes Repealed	N/A
2011 (if reinstated)	1,000,000	55% + 5% surcharge

For estates of decedents dying after December 31, 2006, and through December 31, 2009, the maximum marginal estate tax rate will be 45 percent for amounts transferred in excess of $1.5 million.

The following chart shows the impact of the estate and tax credit before and after enactment of the Act.

Estate and Gift Tax Applicable Credit and Exclusion Amounts

Year	Applicable Unified Credit	Applicable Exclusion Amount
1998	$202,050	$625,000
1999	$211,300	$650,000
2000 and 2001	$220,550	$675,000
2002 and 2003	$345,800	$1,000,000
2004 and 2005	$555,800	$1,500,000
2006, 2007 and 2008	$780,800	$2,000,000
2009	$1,455,800	$3,500,000
2010		

The next chart demonstrates that the unified estate and gift tax is based on an escalating tax rate (so a tax of 50 percent on a taxable amount of $2,500,000 does not yield a tax of $1,250,000).

Unified Transfer Tax Rate Schedule for U.S Citizens and Residents (2002)

Rate of tax on excess			
Taxable amount over	**Taxable amount not over**	**Tax on amount in 1st column**	**over amount in 1st column**
$0	$10,000	$0	18%
10,000	20,000	1,800	20%
20,000	40,000	3,800	22%
40,000	60,000	8,200	24%
60,000	80,000	13,000	26%
80,000	100,000	18,200	28%
100,000	150,000	23,800	30%
150,000	250,000	38,800	32%
250,000	500,000	70,800	34%
500,000	750,000	155,800	37%
750,000	1,000,000	248,300	39%
1,000,000	1,250,000	345,800	41%
1,250,000	1,500,000	448,300	43%
1,500,000	2,000,000	555,800	45%
2,000,000	2,500,000	780,800	49%
2,500,000		1,025,800	50%

Gifts

Beginning with gifts made in the year 2002 and continuing through gifts made in 2009, the Applicable Exclusion Amount for gift tax purposes will be increased to $1 million. For gifts made in 2010, the gift tax applicable credit amount will be $330,800, because the maximum gift tax rate will be 35 percent. For gifts made

after the estate tax repeal (2010 and thereafter), the amount of the credit allowed against the gift tax will be equal to (1) the amount of the tentative tax reduced by (2) the sum of the amounts allowable as a credit for all preceding calendar periods.

For gifts made after December 31, 2009, the gift tax will be computed using a rate schedule having a top marginal rate of thirty-five (35) percent. The top rate will apply to amounts over $500,000.

Use of the unified credit is mandatory; it must be used first to offset any gift tax payable on lifetime transfers. To the extent so used, the amount of the credit available against the estate tax is reduced. The gift tax rates as of January 1, 2010, are shown on the following chart.

Gift Tax Rate (As of January 1, 2010)

If the amount with respect to which	
The tentative tax to be computed is:	***The tentative tax is:***
Not over $10,000	18% of such amount
Over $10,000 but not over $20,000	$1,800, plus 20% of the excess over $10,000
Over $20,000 but not over $40,000	$3,800, plus 22% of the excess over $20,000
Over $40,000 but not over $60,000	$8,200, plus 24% of the excess over $40,000
Over $60,000 but not over $80,000	$13,000, plus 26% of the excess over $60,000
Over $80,000 but not over $100,000	$18,200, plus 28% of the excess over $80,000
Over $100,000 but not over $150,000	$23,800, plus 30% of the excess over $100,000
Over $150,000 but not over 250,000	$38,800, plus 32% of the excess over $150,000
Over $250,000 but not over $500,000	$70,800, plus 34% of the excess over $250,000
Over $500,000	$155,800, plus 35% of the excess over $500,000

After 2010

The Act repeals the generation-skipping tax for those persons dying in the year 2010 and modifies other provisions of the generation-skipping transfer tax rules.

Starting in the year 2010, the Act repeals the stepped-up basis rules for death transfers. The rules are replaced with a carry-over basis rule, which provides that the basis of property inherited from a decedent will be the lesser of (1) the decedent's adjusted basis in the property; or (2) the property's fair market value at the date of death; however, each estate will be permitted to step up the basis of property transferred at death up to a total of $1.3 million. In addition, the basis of property received by a surviving spouse may be stepped up by an additional $3 million. Therefore, the total step up for property transferred to a surviving spouse will be $4.3 million. The two thresholds of step up in basis will be indexed for inflation after the year 2010.

The Act provides for the extension to estates and heirs of the income tax exclusion for up to $250,000 of gain on the sale of a principal residence.

The "sunset" rule contained in the Act provides that unless Congress acts otherwise, at a future date, all provisions of the Act will generally not apply beginning after December 31, 2010, which means that all pre-2001 Act rules return after the year 2010. This would mean that the repeal of estate tax would last no longer than one year.

State Death Tax Credit

The state death tax credit is an amount that is taken from the federal estate tax and paid to the state of domicile of the decedent. The amount is computed from the chart set forth at the end of this section. To compute the amount, the decedent's taxable estate is reduced by $60,000. Under the new law, the state death tax credit is phased out faster than the estate tax. The credit went down by 25 percent in 2002, goes down by 50 percent in 2003, 75 percent in 2004, and in 2005 is eliminated and replaced by an estate tax deduction for states that actually impose an estate tax, inheritance tax, or succession tax. Currently there are thirty-eight states that have what is called a "sop" or "sponge" or "pickup" tax, which picks up the state death tax credit from the federal tax. Therefore, the estate pays no extra tax, but a part of the federal tax is paid to the state rather than to the federal government. When the state death tax credit is eventually phased out, all of these states that have the pickup tax will no longer be able to collect revenue. For example, the state of Florida will lose hundreds of millions of dollars, which it currently collects each year through the pickup process. The

state governments will need to replace this lost revenue through either property or sales taxes or otherwise.

Some states, like New York State, do not automatically follow the federal estate tax laws and purposes. New York State's legislature adopted the Internal Revenue Code as it was in effect in 1998 (total exclusion:

State Death Tax Credit

Adjusted Taxable Estate is over	Adjusted Taxable Estate is not over	Credit =	+%	Of Excess over
$0	$40,000	$0	0	0
40,000	90,000	0	.8	40,000
90,000	140,000	400	1.6	90,000
140,000	240,000	1,200	2.4	140,000
240,000	440,000	3,600	3.2	240,000
440,000	640,000	10,000	4.0	440,000
640,000	840,000	18,000	4.8	640,000
840,000	1,040,000	27,600	5.6	840,000
1,040,000	1,540,000	38,800	6.4	1,040,000
1,540,000	2,040,000	70,800	7.2	1,540,000
2,040,000	2,540,000	106,800	8.0	2,040,000
2,540,000	3,040,000	146,800	8.8	2,540,000
3,040,000	3,540,000	190,800	9.6	3,040,000
3,540,000	4,040,000	238,800	10.4	3,540,000
4,040,000	5,040,000	290,800	11.2	4,040,000
5,040,000	6,040,000	402,800	12.0	5,040,000
6,040,000	7,040,000	522,800	12.8	6,040,000
7,040,000	8,040,000	650,800	13.6	7,040,000
8,040,000	9,040,000	786,800	14.4	8,040,000
9,040,000	10,040,000	930,800	15.2	9,040,000
10,040,000		1,082,800	16.0	10,040,000

$675 thousand), for estate, gift, and generation-skipping transfer tax purposes, not the Code that came into effect in 2001 (when the total exclusion amount increased to $1 million). Therefore, in spite of the phase out of the state death tax credit, the state of New York would have continued to realize an estate tax if its legislature did nothing. However, in March of 2002, the state adopted a modification to its law pursuant to an amendment of Section 951(a), providing for the maximum unified credit for the state to match that of the federal Code, for estates of those who die in the years 2002 and 2003 (i.e., $1 million).

Planning Observations Under the Act

- To insure against the potential capital gains tax resulting from the carryover basis provisions, life insurance should continue to play an important role in estate planning. If the amount of life insurance is reduced as estate tax repeal approaches, and if the estate tax is not repealed, it could be more costly or impossible to obtain replacement insurance.
- The increases in the applicable exclusion amount should be utilized. However, any state gift tax which may be imposed (as of now, only Connecticut, Louisiana, North Carolina, Tennessee, and the commonwealth of Puerto Rico impose gift taxes) needs to be taken into account.
- The surviving spouse should be the main beneficiary as repeal approaches, to permit the deferral of the estate tax, where the spouse may survive until after repeal (if in fact repeal ever really occurs).
- By retaining the gift tax, individuals will be deterred from passing their assets to heirs during their lifetime.
- As the exemption amount increases, the amount allocated to the credit shelter trust will increase. This is satisfactory for larger estates but may not work for estates that are close to the exclusion amount. An overfunding of the credit shelter portion may not be in the best interests of the family.
- The higher the exemption, the greater the opportunity to make gifts without incurring a gift tax.
- The use of disclaimers offers great flexibility during the phase-out period. An amount can be left outright to the surviving spouse who can have the power to renounce or disclaim, with any such amounts passing into a credit shelter trust.

- The overall structure of the estate and gift tax, except for the noted changes, remains as it is until repeal. In light of the repeal, the reduction of the estate and gift tax rates and the increase in the estate, gift, and generation-skipping transfer tax exemptions, planning strategies may depend in large part on each person's circumstances. Persons who may not live to see repeal should continue to reduce their estates, for estate tax purposes, by employing the typical leveraged techniques (family limited partnerships, defective grantor trusts, grantor-retained annuity trusts, and qualified personal residence trusts).
- Given the state of the national economy, there always is the chance that the Congress and the President will enact a law calling for the continuation of the federal estate tax in its present form or in some other format.
- Notwithstanding a repeal of the estate tax (if it should ever take place), the creation of wills and trusts will remain a significant aspect of the management and the transferring of wealth. Your wishes in how your property will be transmitted to your heirs will remain the number one priority in estate planning. Trusts are the most important device in estate planning. In addition to providing asset protection, they allow the orderly management of property for your heirs without imposing on them any burden of responsibility.
- As the amount of the applicable exclusion increases, individuals will have to consider using individual retirement accounts to fund the unified credit shelter trust. In addition, a spouse will have to be given a greater amount of assets in order to give the spouse the ability to fully fund a bypass trust in his or her estate. Two methods to fund the bypass trust in this fashion are as follows: provide for the surviving spouse to be the beneficiary of the retirement fund. The spouse can disclaim a portion of the fund in order to create the unified credit shelter trust (the testamentary instrument must have a provision for the creation of the trust). Alternately, the trust can be made the direct beneficiary of the retirement fund and provide for the creation of the credit shelter trust.
- As repeal gets nearer and, in the interim, no changes have been made, provisions can be created to provide different distributive plans, such as:
  the residuary of my estate shall be distributed as follows:
  (1) if the federal estate tax is in existence at the time of my death, my residuary estate shall be distributed in accordance with Article ____ hereof;

(2) if the federal estate tax is not in existence at the time of my death, my residuary estate shall be distributed as follows:

(a) if my wife survives me, ____% shall be distributed to my wife, outright;

(b) ___% to the marital trust credit under Article ___ hereof and

(c) ___% to the credit shelter trust created under Article ___ hereof,

(d) if my wife does not survive me the entire residuary estate shall be funded with the bypass trust.

- Because of the uncertainty as to whether we will or will not have a federal estate tax in the future, flexibility must be considered in every estate plan, such as:
  - Limited powers of appointment should be granted to the surviving spouse over his or her credit shelter and marital trusts, and children over their trusts. Such rights provide the beneficiary with the ability to alter the decedent's estate plan after his or her death.
  - Sprinkling or spray provisions in the credit shelter trust, in which the spouse can be given priority.
- As the credit shelter amount increases, the making of lifetime gifts for certain persons to avoid estate tax will no longer be necessary. The only thing spouses whose estates do not exceed the credit shelter amount must do is create a bypass trust at the time of death in order to avoid estate tax upon the death of the surviving spouse.
- As the credit shelter amount increases, the more financially advantaged spouse will need to make gifts to the less advantaged spouse, in order for him or her to have enough assets in his or her name for bypass trust purposes. These gifts can be made outright or to an inter vivos irrevocable QTIP trust.
- As a result of the increases in the estate tax exemption, persons with children from a prior marriage will be able to provide greater amounts to their children, without the imposition of estate tax. Therefore, in the estate of the first spouse to die, there may not be a need to create a beneficial interest, or larger one, in the surviving spouse.
- If individuals are not in good health and may not live until repeal in 2010, they should think of making gifts over and above the $1 million exemption. They would therefore be required to pay a gift tax, which in effect would be a prepayment of their estate tax. For individuals who have a good chance of living until repeal, it does not make sense to pay a tax that may never be required.

After Repeal

When the repeal is in place, you will focus on carrying out your wishes without considering federal (and perhaps state) transfer taxes.

For wealthier persons, planning for carryover basis will be important. However, a single person with assets having a total value of $1,300,000 or less can safely ignore the carryover basis rules, since in no event will there be more than $1,300,000 of appreciation.

Planning for charitable giving will still be important, not only to carry out your charitable desires, but also to provide income tax benefits. For example, the use of charitable remainder trusts will still be important to avoid income tax on unrealized appreciation when a person desires to diversify his or her investment portfolio. Life insurance will still be important in this situation to replace the assets transferred to the charitable remainder trust that will pass to the charity at the death of the non-charitable beneficiary.

You will still be concerned with asset protection, which may require the use of irrevocable trusts and other devices formerly used principally for transfer tax avoidance.

You may no longer be as interested in lifetime giving, since the gift tax will still be in effect. However, the loss of a step up in basis will no longer be a factor in determining whether to make lifetime transfers except to the extent that you do not retain assets with unrealized appreciation equal to the $1,300,000 general increase in basis and the $3,000,000 spousal increase in basis.

Planning for possible disability or retirement, or for the needs of your surviving spouse and others who depend on you, will continue to be important. Life insurance will still be important for a number of reasons, including:

- Replacement of income needed by individuals dependent upon the insured
- Provision of liquidity, particularly to pay capital gains tax on appreciated assets, especially closely held businesses, after the insured dies
- Funding of buy-sell agreements
- Provisions for the loss of a key employee

Reducing administration expenses and providing for the orderly transfer of assets to younger family members will be as necessary as before the repeal.

Estate Income Taxes

Estates are subject to income taxes, as the following chart clarifies:

Income Tax Rates For Estates And Trusts (2002)	
If Taxable Income Is:	***The Tax Is:***
Not over $1,850	15% of the taxable income
Over $1,850 but not over $4,400	$277.50 plus 27% of the excess over $1,850
Over $4,400 but not over $6,750	$966.00 plus 30% of the excess over $4,400
Over $6,750 but not over $9,200	$1,671.00 plus 35% of the excess over $6,750
Over $9,200	$2,528.50 plus 38.6% of the excess over $9,200

Conclusion

At the time of the writing of this book, there were no exact answers to the many open questions existing in the arena of estate planning. The Sunset Provision of the Act has certainly given us uncertainty. Even before the Act was passed, a vast majority of persons in this country did not engage in the estate planning process, except for perhaps creating cosmetic plans. These individuals do not realize what their families face, and how they could avoid hardships by creating wealth preservation techniques and devices.

However, estate planning cannot be done in a void. It has to be created by skilled advisors and planners. Repeal, if it takes place at all, will not arrive until the year 2010. Meaningful, serious planning needs to be accomplished now. The process, which should be done with the help of professionals who specialize in this field, takes time and cannot be effectuated overnight. The task is complex and complicated, and the best possible plan can only be created during your lifetime with careful consideration and thought.

APPENDIX:

Forms

The following forms are included in this Appendix:

Excluding a Blood Heir from an Intestate Share
Charitable Gift
Charitable Lead Annuity Trust
Charitable Remainder Annuity Trust
Sprinkling Trust Provision
Disclaimer Trust for a Surviving Spouse
Conditional Disposition Clause
Pour-Over Will Provision
Personal Expressions in Your Will

This book is not a "do-it-yourself" book. The forms and clauses contained herein are for your information purposes only. They should be used solely by practitioners who practice in the field of estate planning.

FORM A

Will With Basic Provisions

Articles:	
FIRST:	Revocation of Prior Testamentary Instruments
SECOND:	Identification of Interested Parties (Family)
THIRD:	Funeral Expenses and Just Debts
FOURTH:	Transfer Taxes
FIFTH:	Tangible Personal Property
SIXTH:	Personal Residence
SEVENTH:	Demonstrative Gift
EIGHTH:	General Dispositions (cash bequests)
NINTH:	Residuary Estate with Alternate Disposition
TENTH:	Executors and Trustees
ELEVENTH:	Powers of Executors and Trustees
TWELFTH:	Survivorship and Disclaimer Provisions
THIRTEENTH:	Minors
FOURTEENTH:	Miscellaneous
FIFTEENTH:	In Terrorem Provision
SIXTEENTH:	1. Signature
	2. Attestation Clause

Self-Proving Affidavit

LAST WILL AND TESTAMENT
OF
TESTATOR/TESTATRIX

I, _____, do make, publish and declare this to be my Last Will and Testament. Presently I reside at _____ Street, _____, County of _____, State of _____.

FIRST: I hereby revoke all Wills and Codicils thereto, as well as any and all other instruments of a testamentary nature, at any time, heretofore made by me.

SECOND: At the time of the execution of this my Last Will and Testament, my family consists of my spouse, _____, (sometimes hereinafter referred to as "my spouse"), and my children, _____. All references herein to my children or my descendants or my issue shall include any after-born or after-adopted child or descendant.

THIRD: I direct that my Executors pay all my just debts and funeral and burial expenses, as soon as may be conveniently possible after my death.

FOURTH: I direct that all estate, transfer, or other death taxes imposed upon my estate whether with respect to property passing under this Will or otherwise shall be paid without apportionment as an expense of the administration of my estate.

FIFTH: I give and bequeath my tangible personal property to my spouse, _____, if he/she survives me, or if not, to my children, per stirpes.

SIXTH: I give and devise any right, title and interest in and to any personal residence I own at the time of my death to my spouse, _____, if he/she survives me, or if not, to my children, per stirpes.

SEVENTH: I give and bequeath to _____, if he/she survives me, the sum of _____ dollars ($_____) to be paid from my account at _____ Bank, Account No. _____. If this account is

not in existence at the time of my death or the balance at the time of my death is insufficient to pay such sum, then I direct that any difference be paid from the general assets of my estate.

EIGHTH: I give and bequeath _____ dollars ($_____) to _____, if he/she survives me.
I give and bequeath _____ dollars ($_____) to _____, if he/she survives me.

NINTH: A. All the rest, residue, and remainder of the property which I may own at my death, wheresoever situated and of whatsoever nature, hereinafter referred to as my "Residuary Estate," I give, devise, and bequeath to my spouse, if he/she survives me.

B. If my spouse does not survive me, I give my Residuary Estate to my Trustee, hereinafter named, In Trust Nevertheless, to be administered and distributed in accordance with the following:

(1) Commencing with the date of my death, I direct my Trustee to pay or to apply for the benefit of any or all of my children, all of the net income from the trust principal in at least quarterly installments in such shares and proportions as my Trustee, in (his/her/its) sole discretion shall determine for the support, maintenance, and health of my children, taking into consideration as my Trustee deems appropriate, any other income or resources of my children. Any unpaid income shall be added to the principal at least annually.

(2) My Trustee may pay to or apply for the benefit of any or all of my children trust principal in such proportions as my Trustee, in (his, her or its) sole discretion, deems necessary from time to time at any time, for medical care, education, support and maintenance of my children, taking into consideration, as my Trustee deems appropriate, any other income or resources of my children. Any payment to or application of benefits for any child made hereunder shall be charged against the entire trust principal rather than against the ultimate share of a beneficiary to whom or for whose benefit the payment is made.

(3) When no living child of mine is under the age of twenty-one (21) years, I direct my Trustee to divide this trust as then constituted into equal separate shares so as to provide one share for each then living child of mine and one share for each deceased child of mine who leaves issue then living. Each share shall be retained in trust and subject to the same trust provisions as provided herein.

(4) After division into shares under paragraph (3) hereof and when a child attains the age of twenty-five (25) years, I direct my Trustee to distribute to such child one-third (1/3) of the principal of his or her share as then constituted. When such child attains the age of thirty (30) years, I direct my Trustee to distribute to such child one-half (1/2) of the principal of his or her share as then constituted. When such child attains the age of thirty-five (35) years, I direct my Trustee to pay such child the balance of his or her share, at which time the trust for his or her benefit shall terminate.

(5) Upon the death of a child of mine before his or her share has been completely distributed, the balance shall be distributed, per stirpes to his or her then living issue, or in default of such issue, per stirpes to my then living issue, subject, however, to the trust provisions provided herein; provided, however, that if any part of such share would be distributed to a person for whom a trust is then being administered hereunder, that part shall be added to that trust as an addition to the principal thereof, except that if the part is to be added to a trust which has been partially distributed, the fraction of the last distribution is to be distributed and the balance added to the trust.

(6) If any part of my estate or any trust created hereunder shall not be distributed in accordance with the foregoing provisions, such part shall be distributed as follows: (Alternate Beneficiaries).

TENTH: A. I designate as Executor and Alternate Executor of this Will, the following named persons in the order designated to serve without bond or other security in any jurisdiction:

First Designee: My spouse, _____.
Second Designee: _____.
Third Designee: _____.

B. Trustee: I designate as Trustee and Successor Trustee of any trust under this Will the following named persons in the order designated to serve without bond or other security in any jurisdiction:

First Designee: _____.
Second Designee: _____.

C. Guardian: I appoint as Guardian and Successor Guardian of the person and property of any minor child of mine, the following named persons in the order designated to serve without bond or other security in any jurisdiction:

First Designee: My spouse, _____.
Second Designee: _____.

ELEVENTH: I confer upon my Executor and Trustee, sometimes referred to in this Will as my fiduciary, with respect to the management and administration of any property, real and personal, including that which may be held under a power to manage property vested in an infant, the following discretionary powers, without limitation by reason of specification, and in addition to powers conferred by law:

A. To retain any such property; to acquire by purchase or otherwise any kind of property, real and personal including common stocks and interests in investment trusts, mutual funds and discretionary common trust funds, without being limited to investments authorized for trust funds, and without diversification as to kind or amount.

B. To sell or otherwise dispose of property, real and personal, at public or private sale, for such consideration and upon such terms, including credit, as he shall deem advisable, and to grant options for sale or disposition thereof for such period of time, whether less or more than six months, as my Executor deems advisable.

C. To manage and to lease real property for periods beginning presently or in the future, without regard to statutory restrictions on leasing.

D. To abandon, in any way and for any reason, any property whether or not owned by me without court order, and with exoneration from any liability therefor.

E. To deposit funds in the savings department of any federally insured bank or savings and loan association without limitation as to time or amount and with exoneration from liability for any loss incurred thereby and regardless of whether all or substantially all of the funds of the estate are invested therein.

F. To borrow money and pledge or mortgage any property for any purpose.

G. To renew, assign, extend, compromise, release, with or without consideration, or submit to arbitration, obligations or claims held by or asserted against my fiduciary or which may affect estate assets.

H. To hold property in the name of nominees.

I. To delegate powers to agents or others, to the extent permitted by law and to pay them for services and reimburse them for expenses; to employ and pay compensation of accountants, custodians, attorneys, and investment counsel.

J. To make distribution in money or in kind, real or personal, or partly in each, including undivided interests, even though shares be composed differently.

K. To allocate receipts and expenses between principal and income and to distribute property in kind and set the value thereon as between beneficiaries.

L. To vote, in person or by proxy, or consent for any purpose, in respect of any stocks or other securities constituting assets of my estate; to exercise or sell any rights of subscription or other rights in respect thereof.

TWELFTH: A. If my spouse and I shall die under such circumstances that there is not sufficient evidence to determine the order of our deaths, or if my spouse shall die within a period of six months after the date of my death, then my estate shall be administered and distributed as if I survived my spouse.

B. No person named in this Will, other than my spouse, shall be deemed to have survived me unless living on the 90th day following the date of my death.

C. At any time before receiving an asset under this Will, each beneficiary is authorized to disclaim all or part of that beneficiary's interest under this Will. From time to time after receiving any asset under this Will, each beneficiary is authorized to release all or part of that beneficiary's remaining interest under this Will. In addition to any other method of disclaimer or release recognized by law, a beneficiary may disclaim or release any interest under this Will by delivering to the Executor or Trustee an acknowledged instrument to that effect. The executors or administrators of a deceased beneficiary are authorized to similarly disclaim or release any interest of that deceased beneficiary without authorization or approval by any court. After any disclaimer or release, the interest under this Will which has been disclaimed or released shall be administered and distributed as if the beneficiary did not survive me.

THIRTEENTH: If pursuant to this Will, all or any part of my estate shall vest in absolute ownership in a minor, I authorize and empower my Executor or Trustee, in the Executor's or Trustee's absolute discretion, (1) to elect to pay over such property to a custodian for such minor under the Uniform Gifts to Minors Act and to the extent permitted by law, the Executor or Trustee shall direct such custodian to hold and administer such property until the minor attains the age of twenty-one (21) years, or (2) to hold all or any part of the property so vested in such minor in a separate fund for the benefit of such minor, notwithstanding that such property may consist of investments not authorized by law for trust funds and to manage, invest and reinvest such property, collect the income therefrom and, during the minority of such minor, to pay or apply so much or all of the income and principal thereof as the Executor or Trustee may deem advisable for the best interests and general welfare of such minor, accumulating any net income not so paid or applied adding such accumulated income to principal. When and if such minor attains majority, the Executor and Trustee shall pay over such property to such minor. If the minor dies before attaining majority, the Executor or Trustee shall pay over and deliver such property to the minor's executors or administrators. The authority herein conferred upon the Executor and Trustee shall be construed only as a power during minority to manage property vested in a minor, and shall not operate to suspend the absolute ownership of such property by such minor or to prevent the absolute vesting thereof in such minor. With respect to any such property which shall vest in absolute ownership in a minor but which shall be held by the Executor and Trustee as authorized herein, the Executor and Trustee shall have all immunities and discretions which are herein granted by the provisions of this Will, including, without limitation, the power to retain, invest and reinvest without being limited to investments authorized by law for trust funds.

FOURTEENTH: A. The term "child" shall include a child by adoption or by blood, and shall include any nonmarital child born out of wedlock or considered illegitimate under applicable state law. The term "issue" shall include descendants of any degree by adoption as well as by blood, and the adopted and blood descendants of any degree if any adopted descendant, as well as any nonmarital or illegitimate descendants.

B. A disposition or distribution of property is "per stirpes" when it is made to persons who take as issue, in equal portions, the share which their deceased ancestor would have taken if living. When making a "per stirpes" distribution, the equal division will be made at the first generation who could receive the devise if alive when the distribution is to be made, even if there are no living members of that generation.

C. As used in this Will, the masculine, feminine, or neuter gender and the singular or plural number, shall be deemed to include the others whenever the context so indicates.

FIFTEENTH: In case any person to whom any legacy is given or to whom any beneficial use, interest or income in any trust fund is given in this my Last Will and Testament or either of any codicils thereto shall oppose the probate of my said Last Will and Testament or any of said codicils by the court having proper jurisdiction thereof or shall take any legal proceedings of any kind whatsoever in any court to set aside the said codicils or any of them or any part of them or shall cooperate or aid in any such proceedings or shall refuse to accept the provisions made for his or her benefit therein, then in such case I hereby revoke all or any legacy or legacies in favor of any such person or persons, and the legacy or legacies so bequeathed shall be then added to and become a part of the residue of my estate.

SIXTEENTH: The interests of beneficiaries hereunder in principal or income shall not be subject to the claims of any creditor, any spouse for alimony or support, or others, or to legal process, and may not be voluntarily or involuntarily alienated or encumbered. This provision shall not limit the exercise of any power of appointment.

IN WITNESS WHEREOF, I have hereunto set my hand a seal this _____ day of _____ in the year _____.

_____
Testator/Testatrix

_____
Witness

_____
Witness

_____
Witness

The foregoing instrument was signed, sealed, published and declared by the above-named Testator/Testatrix, as his/her Last Will and Testament, in the presence of each of us who were all present at the same time, and who, in his/her presence at his/her request and in the presence of each other, have hereunto subscribed our names as witnesses the day and year last above written.

_____residing at _____
Witness

_____residing at_____
Witness

_____residing at_____
Witness

STATE OF)
) ss.:
COUNTY OF)

Each of the undersigned, individually and severally, being duly sworn, deposes and says:

The within Will was subscribed in our presence and sight at the end thereof by _____, the within named Testator/Testatrix on the _____ day of _____, ____, at _____.

Said Testator/Testatrix, at the time of making such subscription, declared the instruments so subscribed to be his/her Last Will and Testament and each of the undersigned thereupon signed his or her name as a witness at the end of said Will at the request of said Testator/Testatrix and in his/her presence and signed and in the presence and sight of each other.

Said Testator/Testatrix was, at the time of executing said Will, over the age of 18 years and, in the respective opinions of the undersigned, of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a Will. The Testator/Testatrix, in the respective opinions of the undersigned, was suffering from no physical or mental impairment which would affect his/her capacity to make a valid Will. The Will was executed as a single, original instrument, and was not executed in counterparts.

Each of the undersigned was acquainted with said Testator/Testatrix at such time and makes this affidavit at his/her request.

The within Will was shown to the undersigned at the time this affidavit was made, and was examined by each of them as to the signature of said Testator/Testatrix and of the undersigned.

The foregoing instrument was executed by the Testator and witnessed by each of the undersigned affiants under the supervision of _____, an attorney-at-law.

_____
Witness

_____
Witness

_____
Witness

Severally sworn to before
me this ___ day of _____, ____

_____
Notary Public

FORM B

Will Providing Entire Estate to Spouse with Alternate Gift to Children

Articles: (See Form A)

FIRST:	Revocation of Prior Testamentary Instruments
SECOND:	Identification of Interested Parties (Family)
THIRD:	Funeral Expenses and Just Debts
FOURTH:	Transfer Taxes
TENTH:	Executors and Trustees
ELEVENTH:	Powers of Executors and Trustees
TWELFTH:	Survivorship and Disclaimer Provisions
THIRTEENTH:	Minors
FOURTEENTH:	Miscellaneous
FIFTEENTH:	In Terrorem Provision
SIXTEENTH:	1. Signature
	2. Attestation Clause

Self-Proving Affidavit

Dispositive Article:

I give, devise and bequeath all of my estate of whatsoever kind and description and wheresoever situate (my "Residuary Estate") to my spouse if my spouse shall survive me by six months. If my spouse shall not survive me by six months, I give my Residuary Estate to my children, per stirpes, including children born or adopted after the execution of this Will. If a child of mine shall predecease me, leaving issue, me surviving, such issue shall take the share of such predeceased child, per stirpes. If my estate is not distributed in accordance with the foregoing provisions, it shall be distributed as follows: (ALTERNATE BENFICIARIES).

FORM C

Will with Marital Bequest and Credit Shelter Trust for Spouse

Articles: (See Form A)

FIRST:	Revocation of Prior Testamentary Instruments
SECOND:	Identification of Interested Parties (Family)
THIRD:	Funeral Expenses and Just Debts
FOURTH:	Transfer Taxes
TENTH:	Executors and Trustees
ELEVENTH:	Powers of Executors and Trustees
TWELFTH:	Survivorship and Disclaimer Provisions
THIRTEENTH:	Minors
FOURTEENTH:	Miscellaneous
FIFTEENTH:	In Terrorem Provision
SIXTEENTH:	1. Signature
	2. Attestation Clause

Self-Proving Affidavit

Dispositive Articles:

A. If my spouse survives me, I give to my spouse the minimum amount necessary to be deducted from my estate as a marital deduction in order to eliminate or minimize federal estate tax payable by my estate after taking into account all deductions (other than marital deductions), exclusions, credits, and elections that are claimed and allowed; provided, however, that the amount so determined shall be diminished by the value for federal estate tax purposes of all items of property and interests in property included in my gross estate for federal estate tax purposes which qualify for the marital deduction and which pass or have passed to my spouse under other provisions of this my Last Will and Testament or in any manner other than by this Will.

(i) The values used by my Executor to determine the amount of the marital deduction shall be those values which are finally determined for federal estate tax purposes.

(ii) Property which does not qualify for the federal estate tax marital deduction shall not in any event be distributed in satisfaction of the marital deduction, and assets subject to foreign death taxes or proceeds of such assets shall be used only to the extent that other qualifying assets are not available.

(iii) If my spouse shall predecease me, I direct that this share of my estate shall be added to my Residuary Estate and distributed accordingly.

B. All the rest, residue and remainder of my estate, real and personal, of whatsoever nature and wheresoever situated (my "Residuary Estate"), I give, devise and bequeath to the Trustee hereinafter named, IN TRUST NEVERTHELESS, to be held and disposed of as follows:

(i) The Trustee shall in quarter annual or more frequent installments pay to or apply for the benefit of my spouse all of the net income of the trust. In addition, the Trustee may pay to or apply for the benefit of my spouse (and my children) who are living from time to time such amount or amounts of the principal of the trust as the Trustee in (his/her/its) uncontrolled discretion deems necessary or desirable for the comfortable maintenance, support, health, education and well being of any one or more of them.

(ii) On the death of my spouse, the Trustee shall distribute the then remaining principal and undistributed income to my children, per stirpes.

C. If my estate shall not be distributed in accordance with the foregoing provisions, it shall be distributed as follows: (ALTERNATE BENEFICIARIES).

FORM D
Will with Residuary Trust for Spouse (QTIP)

Articles: (See Form A)	
FIRST:	Revocation of Prior Testamentary Instruments
SECOND:	Identification of Interested Parties (Family)
THIRD:	Funeral Expenses and Just Debts
FOURTH:	Transfer Taxes
TENTH:	Executors and Trustees
ELEVENTH:	Powers of Executors and Trustees
TWELFTH:	Survivorship and Disclaimer Provisions
THIRTEENTH:	Minors
FOURTEENTH:	Miscellaneous
FIFTEENTH:	In Terrorem Provision
SIXTEENTH:	1. Signature
	2. Attestation Clause

Self-Proving Affidavit

Dispositive Article:
I give, devise and bequeath to the Trustee hereinafter named, IN TRUST NEVERTHELESS, all the rest, residue and remainder of my estate, real and personal, of whatsoever nature and wheresoever situated (my "Residuary Estate") for the following purposes: to invest the same and keep the same and the proceeds of the sale of same invested, and to receive income therefrom, and pay over to or apply the same for the benefit of my spouse in quarterly annual or more convenient installments, during the lifetime of my spouse. The Trustee is further authorized to pay to or for the use of my spouse, in (his/her/its) sole discretion, so much of the principal of the trust as it shall deem necessary for the support, comfort, and general welfare of my spouse. Upon the death of my spouse or upon my death if my spouse should predecease me, I give the remainder of the trust and any undistributed income to my children, per stirpes. If no child of mine or issue of a predeceased child shall survive me and my spouse, then I give said property to _____.

FORM E
Joint and Mutual Will of Spouses

Articles: (See Form A)	
SECOND:	Identification of Interested Parties (Family)
THIRD:	Funeral Expenses and Just Debts
FOURTH:	Transfer Taxes
TENTH:	Executors and Trustees
ELEVENTH:	Powers of Executors and Trustees
TWELFTH:	Survivorship and Disclaimer Provisions
THIRTEENTH:	Minors
FOURTEENTH:	Miscellaneous
FIFTEENTH:	In Terrorem Provision
SIXTEENTH:	1. Signature
	2. Attestation Clause

Self-Proving Affidavit

Dispositive Article:
We, (Testator and Testatrix), husband and wife, in consideration of the agreement of each of us to dispose of our property, whether separate or jointly owned, in the manner hereinafter set forth and not to revoke this joint and mutual Last Will without our mutual consent, hereby make and publish this instrument as our joint and mutual Last Will, revoking all other wills previously executed by either of us.

A. We give to the survivor of us, for life, full power to sell or dispose of so much of the principal of the same as reasonably needed for his or her support, comfort and maintenance, in addition to the income, all of the property hereinabove referred to.

B. After the death of the survivor of us, we give and dispose of all of our property remaining, both real and personal, to our children, per stirpes.

C. If our property is not distributed in accordance with the foregoing provisions, it shall be distributed as follows: (ALTERNATE BENEFICIARIES).

FORM F
Community Property Will

Articles: (See Form A)

FIRST:	Revocation of Prior Testamentary Instruments
SECOND:	Identification of Interested Parties (Family)
THIRD:	Funeral Expenses and Just Debts
FOURTH:	Transfer Taxes
TENTH:	Executors and Trustees
ELEVENTH:	Powers of Executors and Trustees
TWELFTH:	Survivorship and Disclaimer Provisions
THIRTEENTH:	Minors
FOURTEENTH:	Miscellaneous
FIFTEENTH:	In Terrorem Provision
SIXTEENTH:	1. Signature
	2. Attestation Clause

Self-Proving Affidavit

Declaration:

A. I declare that all property in which I have an interest, or title presently in my name and the name of my spouse, _____ ("my spouse"), is community property, except for the following described property which is my separate property:

B. I give, devise and bequeath my estate, real and personal, of whatsoever nature or wherever situated (my "Residuary Estate"), to my spouse. If my spouse should predecease me, I give, devise and bequeath my Residuary Estate to my children, per stirpes.

C. If my estate shall not be distributed in accordance with the foregoing provisions, it shall be distributed as follows: (ALTERNATE BENEFICIARIES).

FORM G
Power of Attorney

KNOW EVERYONE BY THESE PRESENTS,

That I, _____, as principal residing at _____, do hereby constitute and appoint _____, residing at _____, my true and lawful attorney for me, and in my name, place and stead,

a. To enter upon and take possession of any lands, tenements and hereditaments that may belong to me, or to the possession of which I may be entitled;

b. To collect and receive any rents, profits, issues or income of any and all of such lands, tenements and hereditaments, or of any part or parts thereof;

c. To pay any and all taxes, charges and assessments that may be levied, assessed or imposed upon any of my lands, buildings, tenements or other structures;

d. To make, execute and deliver any deed, mortgage or lease, whether with or without covenants and warranties, in respect of any such lands, tenements and hereditaments, or of any part or parts thereof, and to manage, repair, rebuild or reconstruct any buildings, houses or other structures or any part or parts thereof, that may now or hereafter be erected upon any such lands;

e. To extend, renew, replace or increase any mortgage or mortgages now or hereafter affecting any of my lands, tenements and hereditaments and/or any personal property belonging to me, and, for any such purposes, to sign, seal, acknowledge and deliver any bond or bonds, or to make, sign and deliver any note or notes, or any extension, renewal, consolidation or apportionment agreement or agreements, or any other instrument, whether sealed or unsealed, that may be useful or necessary to accomplish any of the foregoing purposes;

f. To obtain insurance of any kind, nature or description whatsoever, on any of my lands, tenements and hereditaments and/or in connection with the management, use or occupation thereof and/or on any personal property belonging to me and/or in respect of the rents, issues and profits arising therefrom, and to make, execute and file proof or proofs of all loss or losses sustained or claimable thereunder, and all other instruments in and about the same, and to make, execute and deliver receipts, releases or other discharges therefor, under seal or otherwise.

g. To demand, sue for, collect, recover and receive all goods, claims, debts, monies, interests and demands whatsoever now due, or that may hereafter be due or belong to me (including the right to institute any action, suit or legal proceeding for the recovery of any land, buildings, tenements or other structures, or any part or parts thereof, to the possession whereof I may be entitled) and to make, execute and deliver receipts, releases or other discharges therefor, under seal or otherwise;

h. To make, execute, endorse, accept, collect and deliver any or all bills of exchange, checks, drafts, notes and trade acceptances;

i. To pay all sums of money at any time or times, that may hereafter be owing by me upon any bill of exchange, check, draft, note or trade acceptance, made, executed, endorsed, accepted and delivered by me, or for me, and in my name, by my said attorney;

j. To sell, mortgage or hypothecate any and all shares of stock, bonds or other securities now or hereafter belonging to me, and to make, execute and deliver an assignment or assignments of any such shares of stock, bonds or other securities, either absolutely or as collateral security;

k. To defend, settle, adjust, compound, submit to arbitration and compromise all actions, suits, accounts, reckonings, claims and demands whatsoever that now are, or hereafter shall be, pending between me and any person, firm, association or corporation, in such manner and in all respects as my said attorney shall think fit;

l. To file any proof of debt, or take any other proceedings, under the Bankruptcy Act, or under any law of any state or territory of the United States, in connection with any such claim, debt, money or demand, and, in any such proceeding or proceedings, to vote in the election of any trustee or trustees, or assignee or assignees, and to demand, receive and accept any dividend or dividends, or distribution or distributions that may be or become payable therein or thereunder;

m. To hire accountants, attorneys at law, clerks, workmen and others, and to remove them, and appoint others in their place, and to pay and allow to the persons to be so employed such salaries, wages or other remunerations, as my said attorney shall think fit;

n. To constitute and appoint, in his/her place and stead, and as his/her substitute, one attorney or more, for me, with full power of revocation;

o. Make any gifts on my behalf to my beneficiaries in the pattern I have used in my lifetime, at any time and from time to time, which gifts shall include and not be limited to annual gifts of $1,000, and the amount of my lifetime exemption from gift and estate taxes, which such gifts may be outright or to a trust created for their benefit;

p. The full and unqualified authority to my attorney-in-fact to transfer all property owned by me to the _____REVOCABLE TRUST OF _____ created by Trust Agreement dated even date herewith, between myself as Grantor and myself as Trustee ("Trust"); and

q. The full and unqualified authority to my attorney-in-fact to direct the Trustees of the Trust to transfer all or a portion of the Trust for the purposes of making gifts as set forth in o. above.

If the agent named above is unable or unwilling to serve, I appoint _____, residing at _____, to be my agent for all purposes hereunder.

This power of attorney shall not be affected by the subsequent disability or incompetence of the principal.

Without in any way limiting the foregoing, generally to do, execute and perform any other act, deed, matter or thing whatsoever, that ought to be done, executed and performed, or that, in the opinion of my said attorney ought to be done, executed or performed in and abut the premises, of every nature and kind whatsoever, as fully effectual as I could do if personally present.

And I do hereby ratify and confirm all whatsoever that my said attorney or his/her substitute or substitutes shall do, or cause to be done, in or about the premises, by virtue of this power of attorney.

This instrument may not be changed orally.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the _____ day of _____, ____.

_____

STATE OF)
) ss.:
COUNTY OF)

On the _____ day of _____, in the year 20__, before me, the undersigned personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person on behalf of which the individual acted, executed the instrument.

_____
Notary Public

AFFIDAVIT THAT POWER OF ATTORNEY IS IN FULL FORCE

STATE OF)
) ss.:
COUNTY OF)

_____, being duly sworn, deposes and says:

That _____, who resides at _____ as principal, did, in writing, under the date of _____ appoint me his/her true and lawful attorney, and that annexed hereto, and hereby made a part hereof, is a true copy of said power of attorney.

THAT, as attorney in fact of said principal and under and by virtue of the said power of attorney, I have this day executed the following described instrument:

THAT I hereby represent that the said principal is now alive, that he/she is now of sound mind; that he/she has not, at any time, revoked or repudiated the said power of attorney; and that said power of attorney still is in full force and effect.

That I make this affidavit for the purpose of inducing _____ to accept delivery of the above described instrument, as executed by me in my capacity of attorney in fact of the said principal, with full knowledge that the said _____ in accepting the execution and delivery of the aforesaid instrument and in paying good and valuable consideration therefor, will rely upon this affidavit.

_____

Sworn to before me on
this _____ day of _____, ____.

_____
Notary Public

Special Miscellaneous Powers

Power of Attorney to Become Effective Only Upon Incapacity of Principal

This durable power of attorney shall become effective only upon the incapacity of the undersigned principal. The principal shall be determined to be under an "incapacity" when two (2) licensed, medical physicians deliver to the agent a certification in writing that the principal no longer has the capacity as a result of illness or other cause to have sufficient understanding or ability to make or communicate decisions about the principal's property, finances or personal business or by order of a court having jurisdiction hereof.

Power to Create and Fund Special or Supplemental Needs Trust

My attorney-in-fact has the power to create a Special Needs Trust or Supplemental Needs Trust for the benefit of any of my issue (children or grandchildren) who are disabled and unable to maintain substantial gainful employment. I further authorize my attorney-in-fact to make annual exclusion gifts, as often and annually, to fund this trust. If any of my issue becomes disabled, I further authorize my attorney-in-fact to amend my revocable trust as to any distribution that would have been made to such issue and to instead provide that such distribution shall be placed in such Special Needs Trust or Supplemental Needs Trust. In exercising this power, my attorney-in-fact shall obtain legal counsel to carefully review the tax and public benefits implications of establishing and funding a Special Needs Trust or Supplemental Needs Trust for my estate and for the estate of the disabled beneficiary of such trust.

Power to Borrow

To borrow money by bank draft, or by promissory note of the principal given for such period and at such interest rate as the agent shall select, to give such security out of the assets of the principal as the agent shall think to be desirable or necessary for any such borrowing, to pay, to renew or to extend the time of payment of any note so given or given by or on behalf of the principal, and to procure for the principal a loan from any banker or banking institution, provided that the agent thinks the same is useful for the accomplishment of any of the purposes enumerated hereunder.

Power to Appoint Successor Attorney-in-Fact

The individual serving as my attorney-in-fact shall have the power to appoint a successor attorney-in-fact if I have not done so in this document. Such appointment may include all powers set aside in this document and any powers that my attorney-in-fact may specify. Such successor shall not be given powers that are not specifically included in this document.

Power to Withdraw Funds from and to Transfer Funds to Retirement and IRA Accounts

My attorney-in-fact has the right to withdraw funds on my behalf from my retirement accounts and my Individual Retirement Accounts (IRAs), to transfer such funds from one account to another, either at the same institution or at another, and the power to change the distribution election, to modify investments, to change account custodians, and to accelerate distributions. My IRA accounts are currently held at *[name of institution]*. Should I move an IRA account to another institution, I request and direct that said institution also honor this Durable Power of Attorney.

Powers Not Granted

My attorney-in-fact shall not have the power to use my assets to pay for his/her legal obligations. He/she shall be prohibited (except as specifically authorized in this instrument) from: (a) appointing, assigning or designating any of my assets, interests or rights directly or indirectly to him/herself, his/her estate, his/her creditors or creditors of his/her estate; (b) disclaiming assets to which I would otherwise be entitled if such disclaimer would result in such assets passing in any one calendar year, directly or indirectly to my attorney-in-fact or to his/her estate; and (c) using my assets to discharge or secure any of his/her obligations, including any obligation of support which he/she may owe to others (excluding those whom I am equally with my attorney-in-fact legally obligated to support).

Power to Create a Business/Trust

My attorney-in-fact shall have the power to create a Family Limited Partnership and/or execute an Irrevocable Trust Agreement, with myself as Settlor and such general and limited partners and Trustees and Successor Trustees, including my attorney-in-fact, as my attorney in fact shall select. Such partnership and/or trust may be funded with any part of my assets, including but not limited to, any interest I may have in any business corporation, its affiliates and/or its successors and assigns. In this regard my attorney-in-fact shall have the power to exercise any right, power, privilege or option I may have under any Stockholder's Agreement, i.e., the right to sell or otherwise transfer any or all of my shares of the corporation to my spouse and/or my children. Any such trust shall provide, among other things, the following:

(a). That the trust is irrevocable and unalterable and shall remain irrevocable and that the Settlor may not alter, amend, revoke, or terminate this instrument or in any manner impair or destroy the powers of the Trustee.

(b). That the Trustee shall, at (his/her/its) sole and absolute discretion, pay to or apply for the benefit of a Class of persons consisting of my spouse and/or my children, per stirpes, the income and principal, to such extent and in such amounts and at such times, as the Trustee shall determine during the lifetime of the Settlor.

(c). Upon the death of the Settlor any such trust shall terminate and the trust estate shall be distributed in such proportion and among such one or more of my distributees, including the spouse of the Settlor, and in such manner (outright or continue in further trust), as the spouse of the Settlor by a written instrument executed during his/her lifetime or as set forth in his/her Last Will and Testament, duly admitted to probate, shall determine. Should the spouse of the Settlor fail to execute such power of appointment, in whole or in part, then upon the death of the Settlor, the trust estate shall be distributed, in equal shares, per stirpes, to the children of the Settlor.

FORM H
Revocable Trust

TRUST AGREEMENT made this _____ day of _____, between _____ (hereinafter called the "Grantor") and _____ (hereinafter called the "Trustee").

WITNESSETH:

WHEREAS, the Grantor desires to establish a revocable trust for the benefit of himself/herself, and has, simultaneously with the execution of this Trust Agreement, transferred and assigned to the Trustee hereunder certain property which shall constitute the original corpus of this trust, and which shall, together with such other real or personal property or funds as the Grantor may from time to time hereunder assign to the Trustee, be held by said Trustee and disposed of by him/her upon the trust and for the uses and purposes hereinafter set forth.

I. NAME OF TRUST.

The trust hereby created shall be known as the "_____ REVOCABLE TRUST OF _____."

II. ADDITIONS TO TRUST.

A. The Grantor or any other person shall have and possess the right and power, during his/her life, at any time or from time to time hereafter to make an addition or additions to the trust by transferring and delivering to the Trustee cash, securities or other property, provided, however, that no such property shall become a part of the trust without the written consent of the Trustee.

B. The Grantor or any other person shall have and possess the right and power to provide by her Last Will and Testament that his/her entire testamentary estate or any part thereof shall be distributed to the trust to be held by the Trustee on the terms and conditions specified in this Agreement, and the Trustee hereby agrees to accept any such payment, delivery and/or distribution, and to hold the same upon the terms and conditions specified in this Agreement.

III. RIGHT TO REVOKE, ALTER OR AMEND.

The Grantor, at any time or from time to time during his/her life, shall have the right, by an instrument in writing, signed by him/her, acknowledged and delivered to the Trustee: (i) to revoke, in whole or in part, the trust created by this Agreement; and (ii) to alter, amend or modify this Agreement in any respect whatsoever, provided, however, that the rights, powers, compensation and responsibilities of the Trustee shall not be changed by any alteration, amendment or modification without their written consent.

IV. DISPOSITION OF INCOME AND PRINCIPAL.

A. During the life of the Grantor, the Trustee shall pay the entire net income of the trust to the Grantor, and/or the descendants of the Grantor, in such amounts and at such time as the Trustee in his/her sole and absolute discretion shall determine, in quarter-annual or more frequent installments.

B. During the life of the Grantor, the Trustee is directed to pay to the Grantor, such amounts from the principal of the trust as the Grantor shall request in writing, whether or not any such payment shall result in the termination of the trust.

C. During the life of the Grantor, the Trustee is authorized, in his/her absolute discretion at any time and from time to time, to pay over the whole or any part of the principal of the trust to the Grantor, whether or not any such payment shall result in the termination of the trust.

D. Upon the death of the Grantor the trust shall become irrevocable and the trust estate shall be separated, held, managed and disposed of as follows:

DISPOSITIVE PROVISIONS

V. INCAPACITY OF GRANTOR.

If at any time during the term of the trust the Successor Trustees are in possession of any of the following:

A. A court order, which the Successor Trustees deem to be jurisdictionally proper and still currently applicable, holding Grantor to be legally incapacitated to act in his/her own behalf or appointing a guardian to act for him/her, or

B. Duly executed, witnessed, and acknowledged written certificates, at least one of which is then unrevoked, of two licensed physicians (each of whom represents that he or she is certified by a recognized medical board), each certifying that such physician has examined the Grantor and has concluded that, by reason of accident, physical or mental illness, progressive or intermittent physical or mental deterioration, or other similar cause the Grantor had, at the date thereof, become incapacitated to act rationally and prudently in his/her own financial best interests, the Grantor shall be deemed to be "incapacitated" and any attempt by the Grantor to exercise the above reserved rights of revocation, withdrawal of assets, and/or control over the Successor Trustees shall, unless and until a court of competent jurisdiction determines otherwise, be void and totally without effect, this trust being, during that period of time, irrevocable and unamendable. The Successor Trustees hereunder shall be under no duty to institute any examination to Grantor's possible incapacity, but any such examination reasonably instituted shall be deemed made at Grantor's request, with waiver by the Grantor of all provisions of law relating to disclosure of confidential medical information needed in connection therewith, and the expenses thereof may be paid from trust assets. Any physician's aforesaid certificate may be revoked by a similar certificate to the effect that Grantor is no longer thus incapacitated executed either (i) by the originally certifying physicians or (ii) by two other licensed, board certified physicians. Notwithstanding any other provision hereof, the Grantor shall at all times have the power to appoint to any person and/or institution designated in any way in this instrument (or in any amendment thereto) as vested or contingent beneficiary, any and all assets contained in this trust at the time of Grantor's death, said power of appointment being exercisable, however, only by specific reference to said power in Grantor's Will (or a Codicil thereto) duly admitted to probate.

VI. PROVISIONS AS TO TRUSTEES.

A. Upon the incapacity and/or death of the Grantor, _____, _____ and _____ shall become the Successor Trustees.

B. Each Successor Trustee surviving hereunder shall have the right to designate his or her Successor. Subject to the foregoing, a Successor Trustee serving alone, shall have the right to designate a Co-Trustee. If there shall be no Successor Trustee in office, the competent adult beneficiary, or if none, the guardian of such beneficiary, hereunder shall have the right to designate a Successor Trustee. All designations hereunder shall be by a duly acknowledged written instrument. Any such designation may be changed from time to time by the person making such designation.

C. A Successor Trustee may resign by mailing or delivering a signed instrument of resignation to any other Successor Trustees then acting, or, if no other Successor Trustee shall then be acting, to the Grantor.

D. If there is more than one (1) Successor Trustee in office, the Successor Trustees may designate any one of themselves to execute and deliver on behalf of the trust any and all papers which may be required to effect the sale, transfer or delivery of any asset of the trust, or the purchase or other acquisition of assets by the trust and to sign, alone, checks, drafts or other orders for the payment or withdrawal of funds from any bank account for the trust. Any such designation shall be made in writing, signed by all of the Successor Trustees acting at the time thereof, and may be revoked or changed at any time.

E. No Successor Trustee hereunder shall be required to give any bond or other security, in any jurisdiction, for the faithful performance of his or her duties as Successor Trustee.

F. Any Successor Trustee hereunder shall be liable only for his, or her, or their own willful breach of trust and not for any honest error of judgment.

G. Each Successor Trustee designated as herein provided shall qualify as a Trustee by mailing or delivering a signed instrument of Consent to act as such to the Grantor or to the person who made such designation, or to the beneficiary.

H. 1. No Successor Trustee hereunder shall have any power of discretion, or be deemed to be a Trustee, (i) with respect to any payment or application of principal to or for the use or benefit of himself or herself as a beneficiary hereunder, or (ii) with respect to any payment or application of income or principal to or for the use or benefit of any person whom such Successor Trustee, in his or her individual capacity, is legally obligated to support, if such payment or application would constitute the discharge of any part of such Trustee's legal support obligation.

2. Discretionary powers granted hereunder to the Successor Trustees to pay or apply principal to or for the use or benefit of any trust beneficiary shall be exercisable solely by the Successor Trustees other than the Successor Trustee who has a beneficial interest in the remainder of such trust, or, if at any time there is no Successor Trustee qualified and acting who does not have such an interest, such powers shall be exercisable by all the Successor Trustees (subject to any other provision of this trust restricting the exercise of such powers), in their absolute discretion, but solely for the purpose of enabling the beneficiary to maintain his or her accustomed standard of living and for his or her reasonable support, maintenance and health.

VII. PAYMENT OF ESTATE TAXES AND DEBTS.

Upon the death of the Grantor, if the Grantor's testamentary estate, excluding any real or tangible personal property which may be disposed of by the Grantor's Will, shall be insufficient to pay all estate, transfer, succession, legacy, inheritance or their death taxes or duties, and any interest and penalties thereon (hereinafter collectively called "Death Taxes") and just and provable debts, including but not limited to expenses of the last illness of the Grantor (Debts), which are to be paid by the Grantor's Executors, then the Successor Trustees are authorized and directed to pay to said Executors, from time to time out of the portion of the trust estate defined in Article 4 hereof, such sum or sums as said Executors may request in writing to make up such deficiency. The Successor Trustees shall rely on any written statement delivered to them by said Executors as to the amount of any such deficiency, and the Successor Trustees shall have no duty to take any part in the preparation of any death tax returns or in any negotiations or proceedings to determine the amounts of any Death Taxes and/or Debts. The Successor Trustees may make all such payments either directly to the taxing authorities or to said Executors or to any Creditors, as the Successor Trustees shall determine in their absolute discretion.

VIII. GOVERNING LAW.

This Trust Agreement and the trust hereby created shall be governed by and construed under the laws of the State of _____. Notwithstanding the foregoing, the Successor Trustees shall be permitted to change the situs of the trust to such other jurisdiction as the Successor Trustees shall deem appropriate.

IX. ADMINISTRATIVE POWERS.

A. Wherever used in this Trust Agreement, the word "Trustee" and all references to the Trustee shall mean the Trustee herein named and any additional or Successor Trustees or Successor Trustee named or designated as herein provided or appointed by a court of competent jurisdiction, qualified and acting hereunder from time to time.

B. As used in this Trust Agreement, the words "the trust" shall include the trust hereby created.

C. In the administration of the trust, the Trustees shall have all the authority, powers, privileges, discretion and immunities given by law to trustees, and, in addition thereto and in application thereof, the Trustees are hereby authorized and empowered, in their discretion to do the following:

1. To purchase any property for the trust as an investment and to invest and reinvest the same in property of any character, whether real or personal, foreign or domestic, tangible or intangible, provided that such property is income producing, including, but not by way of limitation, bonds, notes, debentures, mortgages, certificates of deposit, common or preferred stocks, common or preferred shares of interests in investment companies (whether open or closed end or index funds) and participation in any common trust funds (whether or not administered by any corporate Trustee acting hereunder), without regard to the proportion which such property or property of a similar character so held may bear to the entire amount of the trust.

2. To join or become a party to, or to oppose, any reorganization, readjustment, recapitalization, foreclosure, merger, voting trust, dissolution, consolidation or exchange, and to deposit any securities and to pay all fees, expenses and assessments incurred in connection therewith, and to charge the same to principal; to exercise conversion, subscription or other rights, and to make any necessary payments in connection therewith, or to sell any such privileges.

3. To purchase, sell, exchange, possess, manage, insure against loss by fire or other casualty, refrain from insuring, develop, subdivide, control, partition, mortgage, demolish, abandon, construct, reconstruct, build upon, improve, lease or otherwise deal with any and all real property or interest therein; to satisfy and discharge or extend the term of any mortgage thereon; to execute the necessary instruments and covenants to effectuate the foregoing powers, including the giving or granting of options in connection therewith; to use any income of the trust for the amortization of any mortgage on property held in the trust; to make repairs, replacements and improvements, structural or otherwise, or abandon the same if deemed to be worthless or not of sufficient value to warrant keeping or protecting; to abstain from the payment of taxes, water rents, assessments, repairs, maintenance and upkeep of the same; to permit to be lost by tax sale or other proceeding or to convey the same for a nominal consideration or without consideration; to set up appropriate reserves out of income for repairs, modernization and upkeep of buildings including reserves for depreciation and amortization.

4. To lease any such property beyond the period fixed by statute for leases made by fiduciaries and beyond the duration of this trust.

5. To amortize, in their sole discretion, the premium or discount on any securities purchased or otherwise acquired, or to create and maintain any reserve to offset the depletion or depreciation of the trust estate resulting from the investment of funds in one or more wasting asset corporations or in other assets subject to depletion or depreciation, but the Trustees shall not be required to do so.

6. To enter into a business or to continue to carry on any business which may be part of or may hereafter be added to the trust, whether in corporate form, partnership form or otherwise, and whether or not any beneficiary hereof is personally interested in such business; to become and continue as an officer, director, manager, partner or other employee of any such business; to invest original or additional moneys in (even to the extent that the trust may be invested largely or entirely in any such business without liability for any loss resulting from lack of diversification), or make loans (secured or unsecured) to any such business or partnership, or to sell to liquidate the same.

7. To permit any beneficiary of the trust to occupy any real property, or to retain possession of any tangible personal property, forming part of the trust upon such terms as the Trustees shall deem proper.

8. To make distribution in cash or in specific property, real or personal, or an undivided interest therein, or partly in cash and partly in such property without regard to the tax basis of any such property.

9. To extend the time of payment or to consent to the modification or extension of any obligation at any time held in this trust, and to compromise, settle or release with or without consideration any claim in favor of or against the trust.

10. To act through an agent or attorney-in-fact, by and under power of attorney duly executed by the Trustees in carrying out any of the authorized powers and duties.

11. To borrow money for any purposes of the trust, or incident to its administration, upon his bond or promissory note as Trustees, and to secure repayment thereof by mortgaging, creating a security interest in, or pledging or otherwise encumbering any part or all of the property of

the trust, and, with respect to the purchase of any property, as part of the consideration given, to assume a liability of the transferor or to acquire the property subject to a liability.

12. To lend money to any person or persons, including a beneficiary hereunder, upon such terms, and in such manner, and with or without such security, as they may deem advisable for the best interest of the trust and the beneficiaries.

13. To engage in business with the property of the trust as sole proprietor, or as a general or limited partner, with all the powers customarily exercised by an individual so engaged in business and to hold an undivided interest in any property as tenant-in-common or as tenant in partnership.

14. To determine the manner in which the expenses incidental or in connection with the administration of the trust shall be apportioned as between principal and income.

15. To form, or cause to be formed, one or more corporations or partnerships organized under the laws of any state or country, and to transfer to any such corporation or partnership any property held hereunder in exchange for the stocks, bonds, partnership interests or other obligations of any such corporation or partnership, to hold the stocks, partnership interests, bonds or other obligations so acquired, and to do all such acts, take all such proceedings and pay all such expenses as the Trustees may determine to be necessary and proper with respect to the organization and management of any such corporation or partnership.

16. To guarantee collection and/or repayment of any current or future financial obligation or undertaking of any Trust beneficiary, or to guarantee collection and/or repayment of any current or future financial obligation or undertaking of any corporation, partnership or business enterprise in which any trust beneficiary then has any pecuniary interest, whether such interest be direct or indirect, vested or contingent, and in furtherance of such guarantee to enter into indemnity agreements and to pledge, mortgage and/or encumber trust assets as security therefor.

17. To conduct the sale, purchase or any other transaction relating to any such property through any firm or corporation whether or not any Trustee acting hereunder is an officer, director, member or employee of such firm or corporation or has any interest therein and to pay the usual commission or other reasonable compensation to such firm or corporation payable by an independent third party.

18. To vote upon all securities belonging to the trust, and to become a party to any stockholders' agreements deemed advisable by them in connection with the securities.

19. To compromise, settle, arbitrate, or defend any claim or demand in favor of or against the trust; to enforce any bonds, mortgages, security agreements, or other obligations or liens; and to enter upon contracts and agreements and to make compromises or settlement of debts, claims, or controversies as they may deem necessary or advisable.

20. To incur and pay the ordinary and necessary expenses of administration, including (but not by way of limitation) reasonable attorneys' fees, accountants' fees, investment counsel fees, and the like, whether or not the Trustee is an officer, director, member, or employee of such firm or corporation or has any interest therein.

21. To transfer the trust estate to, and to hold and administer it in, any jurisdiction in the United States and to account for the same in any court having jurisdiction over all assets.

22. To do all such acts, take all such proceedings and exercise all such rights and privileges, although not hereinbefore specifically mentioned, with relation to any such property as if the absolute owner thereof and in connection therewith to make, execute and deliver any instruments and to enter into any covenants or agreements binding on any trust hereunder as may be necessary or desirable in the control, management, preservation or distribution of any trust hereunder.

23. Any and all powers and discretion conferred by this Agreement and by law upon the Trustees, including, but not by way of limitation, the right to appoint Successor Trustees and Co-Trustee, shall be exercisable until distribution of the trust created hereunder has been completed. Any and all such powers and discretion may be exercised by the Trustees from time to time qualified and acting hereunder during the continuance in office of such Trustee. Such powers shall be deemed granted as fiduciary powers and not as beneficial powers.

24. The Successor Trustees at any time or times, may pay to or apply for the use or benefit of a beneficiary of a trust created hereunder, such part, or all of the principal of the trust as the Successor Trustees shall determine, without regard to the interest in the trust or any other person. In exercising the discretionary powers granted to the Successor Trustees to pay or apply principal, the Successor Trustees shall have absolute discretion and plenary power to pay or apply principal for any reason or purpose whatever, even to the extent of terminating the trust by paying or applying all of the principal at any one time. In paying or applying principal, the Successor Trustees need not consider the other resources that may be available from any source to the beneficiary and may pay or apply principal regard to the need of the beneficiary therefor. The Grantor suggests to the Successor Trustees, but only by way of illustration and without limiting the Successor Trustee's plenary powers, that principal may be paid or added in the Successor Trustees' discretion not only to enable a beneficiary to meet the expenses of emergencies or illness or medical or dental or nursing care, but also to make up deficiencies in income caused by inflation or changes in the beneficiary's cost of living because of the burdens of income or estate taxation or changes in the tax laws; to enable a beneficiary to take advantage of a business or professional or investment opportunity, to assume and meet family responsibilities, travel, acquire a dwelling (including a seasonal dwelling or a cooperative apartment), to obtain an education (including graduate and professional school) or for any other reason whatever that the Successor Trustees may have at any time. The interest of the remainder beneficiaries of the trust shall be secondary and subordinate to the well-being of the current income beneficiary. The judgment of the Successor Trustees as to whether, when and to what extent to pay principal of any trust shall be absolute and conclusive, and upon making any such payments, the Successor Trustees shall be fully released and discharged from all future liability or accountability thereof.

X. COMPENSATION CLAUSE.

The compensation of any Trustee hereunder shall be the same as would be authorized and allowed to a testamentary trustee, with each Trustee to receive a full commission independent of any other Trustee, provided that the compensation payable to any corporate Trustee shall be one (1) full commission in accordance with their then published rates of compensation for Trustee in effect at the time such compensation is payable.

XI. SPENDTHRIFT CLAUSE.

The interest of the beneficiary under the trust created herein either in income or in principal shall not be subject to pledge, assignment, sale or transfer in any manner, nor shall the beneficiary have the power in any manner to anticipate, charge or encumber his or her interest, either in income or principal, nor shall such interest be liable or subject in any manner to debts, contracts, liabilities, engagements or torts of the beneficiaries.

XII. MISCELLANEOUS.

A. No Trustee hereunder shall be liable for any loss or damage to the trust or any part thereof arising out of or resulting from any act or omission to act on the part of the Trustee taken or based upon the opinion or recommendation of, or arising out of or resulting from the act or omission to act of, any investment counsel, custodian, broker, agent, accountant or attorney employed by the Trustees in good faith.

B. 1. If any beneficiary hereunder is under a disability, legal or otherwise, or, shall in the opinion of the Successor Trustees, become incapacitated, in lieu of paying net income or principal to such beneficiary as

authorized or directed by this Trust Agreement, the Successor Trustees in their discretion, may dispose of any part or all of the same in one or more of the following ways:

a. By making payment to a legally appointed guardian, committee or conservator of such beneficiary.

b. By making payment, on behalf of such beneficiary, to such beneficiary's attorney-in-fact under a durable power of attorney or to any person with whom such beneficiary resides.

c. By application thereof directly for the use or benefit of such beneficiary.

2. The Successor Trustees may make any payment or application described in paragraph 1. hereof without requiring any bond or other security for the payment or application; and the receipt for the amount of such payment or application shall be an absolute protection to the Successor Trustees and a complete release and discharge from all further accountability, responsibility and liability in respect of such payment or application and as to the disposition of such sum or property by the person or corporation to whom such payment is so made.

C. Anyone may rely on an attorney certified copy of this Trust Agreement or of any writings attached thereto as fully as on the original agreement.

D. Wherever used in this Trust Agreement and the context so requires, the masculine shall include the feminine and the singular shall include the plural, and vice versa.

E. The words "Trustee," "Trustees," "Fiduciary," and words of like kind (and the pronouns in place thereof) shall be construed to mean and to refer to the person or persons acting as such fiduciary hereunder at any time, as the context shall require. The terms "his or her" or "person" shall be construed to include and to refer to any individual, corporation, trust, association or similar entity as the context shall require.

F. The captions in this Trust Agreement are for convenience of reference, and they shall not be considered when construing this Trust Agreement.

G. It is understood and agreed that this Trust Agreement shall extend to and be binding and upon the executors, administrators, successors, assigns and heirs of the undersigned Grantor and upon any trustee acting hereunder.

H. The Grantor intends that this trust shall be construed so that the Grantor's interest herein shall cause inclusion of this trust in the estate of the Grantor for estate tax purposes. It is further the intention of the Grantor that the trust created hereunder be deemed a "Grantor Trust" and that all income therefrom be taxable to the Grantor, as provided under Sections 671-678 of the Internal Revenue Code of 1986, as amended from time to time, and the treasury regulations promulgated in connection therewith, and all provisions of this trust shall be interpreted and construed to accomplish this primary objective.

I. If any person named or referred to hereunder, shall institute or prosecute or be in any way interested or instrumental in the institution or prosecution of any action or proceedings for the purpose of setting aside or invalidating this Trust Agreement or any part thereof, such person shall be deemed to have predeceased the Grantor, without issue surviving the Grantor.

XIII. POWERS-IN-TRUST.

If any part of the trust estate shall vest in absolute ownership in a minor (a person under the age of twenty-one (21) years) the Trustees are authorized in their absolute discretion, (1) to elect to pay over such property to a custodian for such minor under the Uniform Gifts to Minors Act and to the extent permitted by law, the Trustees shall direct such custodian to hold and administer such property until the minor attains the age of twenty-one (21) years, or (2) to hold all or any part of the property so vested in such minor in a separate fund for the benefit of such minor, notwithstanding that such property may consist of investments not authorized by law for trust funds and to manage, invest and reinvest such property, collect the income therefrom and, during the minority of such minor, to pay or apply so much or all of the income and principal thereof as the Trustees may deem advisable for the best interests and general welfare of such minor, accumulating any net income not

so paid or applied adding such accumulated income to principal. When and if such minor attains twenty-one (21) years, the Trustees shall pay over such property to such minor. If the minor dies before attaining such age the Trustees shall pay over and deliver such property to the minor's issue, per stirpes. The authority herein conferred upon the Trustees shall be construed only as a power during minority to manage property vested in a minor, and shall not operate to suspend the absolute ownership of such property by such minor or to prevent the absolute vesting thereof in such minor. With respect to any such property which shall vest in absolute ownership in a minor but which shall be held by the Trustees as authorized herein, the Trustees shall have all the immunities and discretions which are hereunder granted, including, without limitation, the power to retain, invest and reinvest without being limited to investments authorized by law for trust funds.

XIV. GIFTS OF PRINCIPAL.

The Grantor has granted the power to his/her attorneys-in-fact, under a Power of Attorney of even date herewith, to direct the Trustees of this Trust to transfer all or a portion of the Trust estate to his/her attorneys-in-fact for the purposes of making gifts to the Grantor's distributees.

XV. SPECIAL POWER RESERVED BY GRANTOR.

If at any time during the term of the trust created hereunder for the benefit of the Grantor, the Grantor shall become incapacitated as hereinabove defined, and the trust shall become irrevocable, and as a result thereof the power of the Grantor to revoke the trust shall no longer exist and that any distributions created hereunder may be subject to gift tax under the applicable regulations of the Internal Revenue Code, then notwithstanding anything to the contrary hereinabove set forth, the following shall be applicable to the trust estate:

A. The Grantor hereby directs that the trust estate shall be transferred and paid over to the estate of the Grantor and shall be distributed in such manner and in such proportions, whether outright, in trust or otherwise, as the Grantor may appoint in the Grantor's Last Will and Testament duly admitted to probate in any jurisdiction. Such power shall be exercisable by the Grantor exclusively and shall be exercisable only by specific reference to said power in the Last Will and Testament of the Grantor.

B. The Trustees may rely upon an instrument admitted to probate in any jurisdiction as the Last Will and Testament of the Grantor, but if the Trustees have no written notice of the existence of such a Will within a period of three (3) months after the death of the Grantor, it may be presumed that the Grantor died without such a Will and the Trustees shall be protected in acting in accordance with such presumption.

C. It is the intention of the Grantor in creating the foregoing provision to avoid a gift tax liability in the event of the trust becoming irrevocable during the lifetime of the Grantor. To this end, and in order to carry out the Grantor's intentions, the Trustees shall have the right at any time and from time to time, during the term of the trust, to make limited amendments to the provisions hereof for the purposes of adjusting the provisions of the trust to conform to the then existing gift tax laws, to prevent such taxation.

XVI. PERPETUITIES.

Notwithstanding anything herein contained to the contrary, no trust created hereunder shall continue for more than 21 years after the death of the last survivor of the Grantor and such descendants of the Grantor as are in being at the date of this instrument and if at the expiration of such period any property is still held in trust, such property shall immediately be distributed among the persons then receiving or entitled to have the benefit of the income in the same proportions in which they are receiving or entitled to have the benefit of the income.

WITNESS the due execution hereof the day and year first above written.

, GRANTOR

, TRUSTEE

STATE OF)
) ss.:
COUNTY OF)

On the _____ day of _____, in the year ____, before me, the undersigned, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

FORM I
Supplemental Needs Trust

The Trustees shall hold the principal of the trust estate, IN TRUST NEVERTHELESS, for the benefit of the child of the Grantor, _____, subject to the following terms and conditions:

a. The Trustees shall pay or apply so much of the income therefrom to or for the care, comfort and support of _____, during his/her lifetime, as they, in their absolute discretion, shall determine. In the event such income shall in any year be insufficient to provide for the support, maintenance and care of _____, or for necessary medical expenses, as determined by the Trustees, in their sole and absolute discretion, the Trustees shall expend out of the principal of said fund such sums as they deem necessary for any such purposes. It is the intention of the Grantor to create a Supplemental Needs Trust which conforms to the provisions of Section 7-1.12 of the New York Estates, Powers and Trusts Law and that the net income and principal of the trust fund shall be used in such manner as will supplement and not supplant, impair or dismiss any benefits or assistance of any federal, state, county, city or other governmental entity for which a beneficiary may otherwise be eligible or which a beneficiary may be receiving. Consistent with that intent, it is the Grantor's desire that before expending any amounts from the net income and/or principal of this trust, the Trustees consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that where appropriate and to the extent possible, the Trustees endeavor to maximize the collection of such benefits for the benefit of _____. None of the income or principal of this trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city or other governmental entity for which the beneficiary may otherwise be eligible or which _____ may be receiving. _____ shall not have the power to assign, encumber, direct, distribute or authorize distributions from the trust. Notwithstanding the provisions of the above, the Trustees may make distributions to meet _____'s need for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the beneficiary's receipt or eligibility for government benefits or assistance but only if the Trustees determine that (i) the beneficiary's needs will be better met if such distribution is made, and (ii) it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance; provided, however, that if the mere existence of the Trustee's authority to make distributions pursuant to this paragraph shall result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the Trustees' authority to make such distributions shall cease and shall be limited as provided above, without exception. The Trustees are further authorized, during the term of the trust, to pay or apply any income not so paid or applied to or for the benefit of _____, to or for a CLASS of persons consisting of _____ and _____, and their descendants, living from time to time. The Trustees, at their sole and absolute discretion are further authorized, during the term of the trust, to pay or apply, any income not so paid or applied to or for the benefit of _____ and/or the CLASS, to any facility, where _____ may be residing and/or to any organization where _____ may be a client or a participant in any program(s) sponsored by them, as the Trustees shall determine, for the general uses of such facility and/or organization, which payments, and/or applications, shall be made at such time or times, as shall be determined by the _____ Trustees, at their sole and absolute discretion. Any income not so paid over or applied as aforesaid shall be accumulated and added to the principal of the trust at least annually and thereafter held as a part thereof.

b. The terms "support, maintenance, care and comfort" shall include necessary and reasonable expenses incurred by the guardian(s) of _____, in the performance of their duties, as determined by the Trustees, in their sole and absolute discretion. Anything to the contrary notwithstanding, the Trustees in their sole and absolute discretion shall also have the right, at any time and from time to time during the term of the trust, to make gifts from principal of the trust, to any member of the CLASS, for the purposes of providing them with travel expenses to permit them to visit _____ at any time and from time to time. Such travel

expenses shall include, but not be limited to, all transportation, vacation and entertainment costs, and room and food costs during the period when any such visits shall take place.

c. The Trustees shall not under any circumstances pay or reimburse any amounts from the principal of the trust to the State of New York, or any other agency of government, federal, state or any other municipality for any purpose, including the care, support, maintenance, education of _____.

d. In making any distribution to or for the benefit of _____, the Trustees should consider what benefits he/she may be entitled to from any government agency, including but not limited to, Social Security Administration benefits, Veterans Administration benefits, Medicaid (medical assistance) and Supplemental Security Income (SSI) benefits.

e. The provisions of Section 7-1.6(a) and (b) of the Estates, Powers and Trusts law of New York regarding invasion of trust principal under certain circumstances shall not apply to the trust held hereunder.

f. In the event this trust may be subject to garnishment, attachment, execution or bankruptcy proceedings by a creditor of _____, the Trustees are authorized to terminate the Trust and to pay and transfer the remaining principal and income as set forth in paragraph g. below.

g. On the death of _____, or upon the death of the Grantor, if _____ shall predecease the Grantor, the Trustees shall terminate the trust and after paying the expenses of his/her last illness and for the cremation of his/her body, to the extent the same are not otherwise provided for, shall pay over and distribute the then remaining principal and accrued income as follows:

See Form H
Add Articles vi, viii, ix, x, xi, xii, xiii, xvi
Signature
Acknowledgment

FORM J
New York Health Care Proxy

I (name of principal) hereby appoint (name, home address and telephone number of agent) as my health-care agent to make any and all health-care decisions for me, except to the extent that I state otherwise.

This health-care proxy shall take effect in the event I become unable to make my own health-care decisions.

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition and hydration. If you chose to state instructions, wishes, or limits, please do so below:

I direct my agent to make health-care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event the person I appoint above is unable, unwilling, or unavailable to act as my health-care agent, I hereby appoint (name, home address and telephone number of alternate agent) as my health-care agent.

I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or occurrence of the condition I have stated below:

(Please complete the following if you do NOT want this health care proxy to be in effect indefinitely): This proxy shall expire: (Specify date or condition):

Signature:_____

Address:_____

Date:_____

I declare that the person who signed or asked another to sign this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence and that person signed in my presence. I am not the person appointed as agent by this document.

Witness:_____

Witness:_____

Witness:_____

Witness:_____

FORM K

New York Durable General Power of Attorney

THE POWERS YOU GRANT BELOW CONTINUE TO BE EFFECTIVE SHOULD YOU BECOME DISABLED OR INCOMPETENT

(CAUTION: THIS IS AN IMPORTANT DOCUMENT. IT GIVES THE PERSON WHOM YOU DESIGNATE [YOUR "AGENT"] BROAD POWERS TO HANDLE YOUR PROPERTY DURING YOUR LIFETIME, WHICH MAY INCLUDE POWERS TO MORTGAGE, SELL, OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THESE POWERS WILL CONTINUE TO EXIST EVEN AFTER YOU BECOME DISABLED OR INCOMPETENT. THESE POWERS ARE EXPLAINED MORE FULLY IN NEW YORK GENERAL OBLIGATIONS LAW, ARTICLE 5, TITLE 15, SECTIONS 5-1502A THROUGH 5-1503, WHICH EXPRESSLY PERMIT THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY.

THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS. YOU MAY EXECUTE A HEALTH CARE PROXY TO DO THIS.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.)

This is intended to constitute a DURABLE POWER OF ATTORNEY pursuant to Article 5, title 15 of the New York General Obligations Law:

I, _____ (insert your name and address), do hereby appoint _____ (If one person is to be appointed agent, insert the name and address of your agent above).

(If 2 or more persons are to be appointed agents by you, insert their names and addresses above.)

My attorney(s)-in-fact TO ACT

(If more than one agent is designated, CHOOSE ONE of the following two choices by putting your initials in ONE of the blank spaces to the left of your choice:)

[ ] Each agent may SEPARATELY act
[ ] All agents must act TOGETHER
(If neither blank space is initialed, the agents will be required to act TOGETHER).

IN MY NAME, PLACE AND STEAD in any way which I myself could do, if I were personally present, with respect to the following matters as each of them is defined in Title 15 of Article 5 of the New York General Obligations Law to the extent that I am permitted by law to act through an agent.

(DIRECTIONS: Initial in the blank space to the left of your choice any one or more of the following lettered subdivisions as to which you WANT to give your agent authority. If the blank space of the left of any particular lettered subdivision is NOT initialed NO AUTHORITY WILL BE GRANTED for matters that are included in that subdivision. Alternatively, the letter corresponding to each power you wish to grant may be written or typed on the blank line in subdivision "(Q)," and you may then put your initials in the blank space to the left of subdivision "(Q)" in order to grant each of the powers so indicated):

[ ] (A) real estate transactions;
[ ] (B) chattel and goods transactions;
[ ] (C) bond, share, and commodity transactions;
[ ] (D) banking transactions;
[ ] (E) business operating transactions;

[ ] (F) insurance transactions;
[ ] (G) estate transactions;
[ ] (H) claims and litigation;
[ ] (I) personal relationships and affairs;
[ ] (J) benefits from military service;
[ ] (K) records, reports, and statements;
[ ] (L) retirement benefit transactions;
[ ] (M) making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate the amount of the then annual exclusion to each of such persons in any year;
[ ] (N) tax matters;
[ ] (O) all other matters;
[ ] (P) full and unqualified authority to my attorney(s)-in-fact to delegate any or all of the foregoing powers to any person or persons whom my attorney(s)-in-fact shall select;
[ ] (Q) each of the above matters identified by the following letters: _____

(Special provisions and limitations may be included in the statutory short form durable power of attorney only if they conform to the requirements of section 5-1503 of the New York General Obligations Law.)

This durable Power of Attorney shall not be affected by my subsequent disability or incompetence.

If every agent named above is unable or unwilling to serve, I appoint _____ (insert name and address of successor) to be my agent for purposes hereunder.

TO INDUCE ANY THIRD PARTY TO ACT HEREUNDER, I HEREBY AGREE THAT ANY THIRD PARTY RECEIVING A DULY EXECUTED COPY OR FACSIMILE OF THIS INSTRUMENT MAY ACT HEREUNDER, AND THAT REVOCATION OR TERMINATION HEREOF SHALL BE INEFFECTIVE AS TO SUCH THIRD PARTY UNLESS AND UNTIL ACTUAL NOTICE OR KNOWLEDGE OF SUCH REVOCATION OR TERMINATION SHALL HAVE BEEN RECEIVED BY SUCH THIRD PARTY, AND I FOR MYSELF AND FOR MY HEIRS, EXECUTORS, LEGAL REPRESENTATIVES AND ASSIGNS, HEREBY AGREE TO INDEMNIFY AND HOLD HARMLESS ANY SUCH THIRD PARTY FROM AND AGAINST ANY AND ALL CLAIMS THAT MAY ARISE AGAINST SUCH THIRD PARTY BY REASON OF SUCH THIRD PARTY HAVING RELIED ON THE PROVISIONS OF THIS INSTRUMENT.

THIS DURABLE GENERAL POWER OF ATTORNEY MAY BE REVOKED BY ME AT ANY TIME.

In Witness Whereof I have hereunto signed my name this _____ day of _____, _____.

[YOU SIGN HERE] _____
[Signature of Principal]
[ACKNOWLEDGMENT]

FORM L
Florida Living Will

Declaration made this ___ day of _____, _____. I, _____ willfully and voluntarily make known my desire that my dying not be artificially prolonged under the circumstances set forth below, and I do hereby declare that, if at any time I am incapacitated

and _____ (initial) I have a terminal condition

and _____ (initial) I have an end-stage condition

and _____ (initial) I am in a persistent vegetative state.

and if my attending or treating physician and another consulting physician have determined that there is no reasonable medical probability of my recovery from such condition, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would only serve to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

It is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and to accept the consequences of such refusal.

In the event that I have been determined to be unable to provide express and informed consent regarding the withholding, withdrawal, or continuation of life prolonging procedures, I wish to designate, as my surrogate to carry out the provisions of this declaration:

Name:_____

Address:_____

Zip Code:_____

Phone: _____

If my surrogate is unwilling or unable to perform his duties, I wish to designate as my alternate surrogate:

Name:_____

Address:_____

Zip Code:_____

Phone: _____

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Additional instructions (optional): _____

_____
Signed

_____
Witness

_____
Address

_____
Phone

_____
Witness

_____
Address

_____
Phone

FORM M

Florida Designation of Health Care Proxy

Name:_____(Last), _____ (First), _____ (Middle Initial).

In the event that I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate as my surrogate for health-care decisions:

Name:_____

Address:_____

Zip Code:_____

Phone: _____

If my surrogate is unwilling or unable to perform his duties, I wish to designate as my alternate surrogate:

Name:_____

Address:_____

Zip Code:_____

Phone: _____

I fully understand that this designation will permit my designee to make health-care decisions, except for anatomical gifts, unless I have executed an anatomical gift declaration pursuant to law, and to provide, withhold, or withdraw consent on my behalf; to apply for public benefits to defray the cost of health-care; and to authorize my admission to or transfer from a health-care facility.

Additional instructions (optional):

I further affirm that this designation is not being made as a condition of treatment or admission to a health-care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.

Name: _____

Name:_____

Signed: _____

Date: _____

Witnesses: _____

Special Will and Trust Provisions

Disinheritance of a Child

I intentionally have made no provision for my children hereunder. (State reason therefor, i.e., estrangement; due to inter vivos gifts made during lifetime; the necessity to provide for a disadvantaged sibling, spouse, primary beneficiary).

Designating a Guardian

I nominate, constitute and appoint _____, as Guardians of the person and property of any minor child of mine, to serve without bond or security in any jurisdiction.

Excluding a Blood Heir from an Intestate Share

It is my direction that _____ or (his or her) issue receive no part of my estate and I expressly declare that he/she is to be excluded from having any right to inherit or succeed to any part of my estate or property by intestate succession.

Charitable Gift

I give the sum of $_____ to _____ presently located at _____, for its general use.

Charitable Lead Annuity Trust

A Charitable Lead Annuity Trust is a trust in which the charitable organization receives the income for a period of time, after which the trust property is distributed to the remainder beneficiary.

Provision:

The Trustee shall pay to _____, during the term of this trust, a guaranteed annuity interest of _____ in each taxable year of the trust. The annuity payment shall be made on (month/day) of each year. The payments shall be made first from ordinary income, then from capital gains. If both of the foregoing shall be insufficient to pay the annuity payment, the difference thereof shall be paid out of the corpus of the trust. If the income exceeds the annuity payment in any year during the trust, the excess may be paid to the charitable organization.

Charitable Remainder Annuity Trust

A Charitable Remainder Trust is a trust under which the beneficiary receives the income for a period of time, after which the trust property is distributed to the charitable organization.

Provision:

I give and bequeath the Trustee, hereinafter named, the sum of $_____, IN TRUST NEVERTHELESS, for the following uses and purposes:

(a) To invest and reinvest the trust property during the lifetime of _____, and in each taxable year of the trust to pay the beneficiary an annuity amount equal to _____ percent (__%) of the initial net fair market value of the assets constituting the trust. In determining such value, assets shall be valued at their values as finally determined for federal tax purposes. If the initial net fair market value of the assets constituting the trust is incorrectly determined by the fiduciary, then within a reasonable period after such determination, the Trustee shall pay to the beneficiary (in the case of an under valuation) or shall receive from the beneficiary (in the case of an overvaluation) an amount equal to the difference between the annuity amount properly payable and the annuity amount actually paid. The annuity amount shall be paid in equal quarterly installments from income and, to the extent that income is not sufficient, from principal.

(b) The obligation to pay the annuity amount shall commence with the date of my death, but payment of the annuity amount may be deferred from the date of my death to the end of the taxable year in which occurs the complete funding of the trust. Payment of the annuity amount so deferred, plus interest computed at _____ percent (__%) a year, compounded annually, shall be made within a reasonable time after the occurrence of such event.

(c) Upon the death of the beneficiary, the Trustee shall distribute all of the then principal and income of the trust, other than any amount due the beneficiary, to _____. If _____ is not an organization described in Section 170(c) of the Internal Revenue Code at the time when any principal or income of the trust is to be distributed to it, the Trustee shall distribute such principal or income to one or more organizations then described in Section 170(c) as the Trustee shall select in (his/her/its) sole discretion. All references herein to the "Internal Revenue Code" or "Code" shall refer to the Internal Revenue Code of 1986, as amended.

(d) In determining the annuity amount, the Trustee shall prorate the same, on a daily basis, for a short taxable year and for the taxable year of the death of the beneficiaries.

Sprinkling Trust Provision

During the term of the trust, the Trustee shall manage, invest and reinvest the trust principal, shall receive the income therefrom and shall pay over or apply the net income and principal thereof, to or for the benefit of such one or members of a class (hereinafter the "Class") of persons consisting of _____, and (his/her) descendants living from time to time, to such extent and at such time or times as the Trustee in (his/her) sole and absolute discretion shall determine to provide for their health, maintenance, support and education, during the term hereof. Any income not so paid or applied shall be added to the principal of the fund, at least annually.

Disclaimer Trust for a Surviving Spouse

I give and devise all the rest, residue and remainder of my estate, real and personal, of whatsoever kind and wheresoever situate, and any property over which I may have a power of appointment (my "Residuary Estate"), as follows:

A. I give, devise and bequeath my Residuary Estate to my spouse, if he/she survives me.

B. If my spouse survives me, but disclaims all or any portion of my Residuary Estate, I give, devise and bequeath such disclaimed portion to my Trustee, hereinafter named, IN TRUST NEVERTHELESS, to be held and administered as follows:

(1) My Trustee shall pay to or apply for the benefit of my spouse during (his/her) lifetime all the net income from the trust in quarter-annual or more frequent installments.

(2) In addition, my Trustee is authorized in my Trustee's sole and absolute discretion at any time and from time to time to pay or apply for the benefit of my spouse from the principal of the trust such amounts as my Trustee may deem advisable to provide adequately for the health, support and maintenance of my spouse in (his/her) accustomed manner of living.

(3) Upon the death of my spouse, my Trustee shall distribute the balance of assets then held hereunder to my children, per stirpes.

(4) If my estate or any trust created hereunder shall not be distributed in accordance with the foregoing provisions, it shall be distributed as follows: (ALTERNATE BENEFICIARIES).

Conditional Disposition Clause

I give, devise and bequeath the sum of $_____ to _____. This bequest, however, is made on the condition that if the value of my net probate estate, after payment of claims and administration expenses, is less than _____, and my spouse survives me, the bequest shall abate. If my net probate estate, after payment of claims and administration expenses, exceeds _____, but the excess is insufficient to satisfy the bequest in full, then the bequest shall abate proportionately so that in no even shall my spouse receive less than the minimum fixed by this Will.

Pour-Over Will Provision

I give my residuary estate to the Trustee then acting of THE _____ REVOCABLE TRUST, dated _____ ("Trust") created by Trust Agreement between myself, as Grantor, and _____ as Trustee to hold and dispose of pursuant to the provisions of said Trust.

Personal Expressions in Your Will

There is nothing wrong with expressing your wishes. Doris Duke did it in her Will. So did Benjamin Franklin.

From Doris Duke's Will:

"I am convinced that I should not have adopted Chandi Heffner," Miss Duke said in her will. "I have come to the realization that her primary motive was financial gain. I believe that, like me, my father would not have wanted her to have benefited under the trusts which he created, and similarly, I do not wish her to benefit from my estate." Miss Heffner did contest the will.

From Benjamin Franklin's Will:

"The King of France's picture, set with 408 diamonds, I give to my daughter Sarah, requesting that she not form any of those diamonds into ornaments. . . . and thereby introduce or countenance the expensive, vain and useless fashion of wearing jewels in this country."

Glossary

Abatement: A priority system of reducing or eliminating bequests that an estate cannot afford to pay.

Actuary: One who calculates various insurance and property costs; particularly, one who computes the cost of life insurance risks and insurance premiums.

Ademption: Property left to a beneficiary in a will that is no longer in the decedent's estate upon death.

Adjusted Gross Estate: During administration, debt administration expenses and losses are deducted. What is left is the adjusted gross estate.

Administration of the Estate: When the court supervises the distribution of the probated estate.

Administrator: A personal representative appointed by the court to administer the estate of an intestate.

Alternate Valuation Date: A date six months after the date of the decedent's death.

Alternative Minimum Tax: A way of computing income tax disallowing certain deductions, credits, and exclusions.

Annual Exclusion: Under gift tax laws, each person may give as much as $11,000 per year to whomever he or she wishes.

Annuity: A right to receive fixed, periodic payments, either for life or for a term of years, payable at specific intervals.

Ascendant or Ancestor: A person related to an intestate or to a claimant to an intestate share in the ascending lineal line.

Attested Will: A will signed by a witness.

Augmented Estate: Property owned at the time of person's death as well as the value of any property transferred during his or her lifetime without consideration (gifts).

Basis: What one has invested or put into property, real or personal. For tax purposes, subtract the basis from the proceeds of a property sale to determine the net gain.

Beneficiary: A person or entity selected by the testator to receive a portion of the estate upon the testator's death.

Bequest: A clause in a will directing the disposition of personal property.

By-pass Trust: Also known as a credit shelter trust. This is an estate tax–skipping trust used in conjunction with the unlimited marital deduction.

Charitable Lead Trust: Trust in which a charitable organization receives income for a certain period, with the remainder passing to the donor's beneficiaries after a set period.

Charitable Remainder Trust: Trust created to pay income to beneficiary for a certain period and assets remaining in the trust pass to a charitable organization. There are three types of charitable remainder trusts.

Charitable Trust: A trust created for the benefit of a charitable organization. There are several different kinds of charitable trusts that can be created.

Closely Held Corporation: A corporation with less than twenty-five shareholders. Usually, all the issued shares are held by only those who work in the corporation.

Codicil: A testamentary instrument, which after it has been properly executed, is added to the will.

Community Property: A property system premised on the belief that everything acquired during marriage belongs equally to each spouse.

Contingency Beneficiary: An alternative beneficiary selected by the testator in case the primary beneficiary dies prior to the testator.

Contingent Remainder: A remainder interest that does not become possessory until a certain specified event takes place.

Corpus: Property the settlor/transferor places in the trust. (Also known as the trust res or trust principal).

Credit Shelter Trust: Also known as the by-pass trust. This is an estate tax–skipping trust used in conjunction with the unlimited marital deduction.

Crummey Power: The right of a beneficiary of a trust to withdraw a portion of a gift made to the trust equal to the lesser of the annual exclusion ($11,000) or the value of the gift made to the trust that year.

Custodian: General term to describe anyone who has charge or custody of property. Also, person named to care for property left to minor under Uniform Gift to Minors Act.

Death Taxes: Taxes on the estate of the decedent. Federal death taxes are called estate taxes and state death taxes can be termed inheritance taxes, among other names.

Devise: A clause directing the disposition of real property in a will. The person named to take the real property is called the devisee.

Discretionary Trust: A trust that allows the trustee to distribute as much trust income to the beneficiary as he or she deems proper.

Disinheriting: When a testator cuts someone out of their will. A spouse cannot legally disinherit another spouse, but a parent can disinherit a child or another by stating so specifically in his will or living trust.

Distributee or Next of Kin: That person or persons who are or who may be entitled to the property of an intestate.

Domicile: The permanent residence of a person or the place to which he intends to return even though he may reside elsewhere.

Elective Share: A portion of the estate that a surviving spouse is entitled to by statute.

Escheat: A reversion of property to the state if no relatives are living to inherit.

Estate Planning: The development of a plan to provide for effective and orderly distribution of an individual's assets at the time of death.

Estate Tax: Tax imposed on the fair market value of the net asset value of a descendent's estate.

Execution: Making a written document complete by meeting the legal requirement of the completion, usually signing, witnessing, and notarizing.

Executor or Personal Representative: The administrator named in a will.

Executory Interest: Interests that will take place in the future.

Exemption: A deduction allowed to a taxpayer because of his status (i.e., over sixty-five, being blind, particular dependents, etc.)

Fair Market Value: The average value that can be placed on an asset as determined by market forces.

Family Limited Partnership: A legal entity that can provide asset protection and allows for management and control of assets.

Fiduciary: An individual having a duty created by his, her, or its undertaking to act primarily for the benefit of others, such as an executor, personal representative, or trustee.

Generation-Skipping Tax: Tax imposed to prevent you from passing property to two or more generations below you without paying a transfer tax.

Gift Tax: A tax imposed on transfers of property by gift during the donor's lifetime.

Grant: Formal transfer of real property.

Grant of Probate: The actual validating of a will.

Grantee: Person to whom grant is made.

Grantor: The person by whom the grant is made.

Grantor-Retained Annuity Trust (GRAT): Irrevocable trust into which the grantor transfers property in return for the right to receive fixed payments on at least an annual basis, based upon the initial fair market value of the property.

Grantor-Retained Income Trust (GRIT): Trust created so that the value of a gift can be lessened by the grantor retaining an income interest, for a certain time, in the property gifted away.

Grantor-Retained Unitrust (GRUT): Same as a GRAT, except that annual payments will fluctuate each year as the value of the property increases or decreases.

Grantor Trust: A trust where income is taxable to grantor because he or she retains substantial control over the trust assets or retains certain prohibited administrative powers.

Gross Estate: The value of all property left by the deceased person required to be included in his or her estate for estate tax purposes.

Guardian: A court appointed person who is legally responsible for the care and well-being of a minor. The only device parents can use to select a guardian for their child or children upon their deaths is a will.

Heir: A person entitled by statute to the assets of the intestate is called an heir at law.

Holographic Will: A will entirely in the hand writing of a testator.

Homestead: That part of a homeowner's real property that is exempt from attachment or sale by a creditor for the homeowner's general debts.

Honorary Trust: Not a legal trust. Some states allow people to leave part of their estate to an animal "in honorary trust."

Individual Retirement Account: A tax-deductible savings account that sets aside money for retirement.

Inheritance Tax: A tax levied on the heir of a decedent for property inherited.

Insurance Trust: A trust created to own and be the beneficiary of an insurance policy.

Inter Vivos Trust: A trust made during one's lifetime.

Intestacy: If one dies owning assets and does not have a distribution instrument, the property will pass to the closest blood heirs of the deceased person.

Intestate: Dying without a will or with a will found not to be legally valid.

Irrevocable Trust: A trust that cannot be revoked or amended by the creator of the trust.

Issue: Offspring, children and their children.

Joint Ownership: Property owned by two or more persons. Upon the death of one joint owner, ownership is transferred to the surviving owners.

Joint Tenancy: Property held by two or more persons with the right of survivorship between them.

Keogh Plan: A retirement plan established by a self-employed individual.

Kiddie Tax: The federal income tax code provision that any unearned income of a child is taxed at the child's parent's rate.

Lapse: An inheritance "lapses" when the intended beneficiary predeceases the testator.

Legacy: A clause in a will directing the disposition of money.

Life Estate: An estate in property held by a person for his or her lifetime or measured by the life of another, the estate ends upon the death of the holder or the measuring life, whoever dies first.

Life Insurance Trust: Trust that collects and holds proceeds of life insurance for distribution to beneficiary and investment so as to exclude these monies from insured's estate for tax purposes.

Living Trust: A trust established by a person during his or her lifetime.

Living Will: A document that states that a person does not want his or her life prolonged by artificial means.

Marital Deduction: A deduction allowed by estate law for all property passed to a surviving spouse. Use of this deduction allows estate tax to be computed only after the death of the second spouse.

Material Provision: A provision that is important and necessary to a will or trust.

Multiple Probate: This occurs when decedent owns real estate or other property in more than one state that becomes subject to probate in each state at time of death.

No-Contest Clause: A clause in a will attempting to disinherit a person who attacks the will's legal validity.

Noncupative Will: An oral will.

Nonprobate Asset: Property that you have transferred during your lifetime, except that you have retained the total right to, at anytime during your lifetime, alter the distribution upon your death.

Personal Property: Holdings such as furniture, jewelry, stocks, cash, and other items of personal possession.

Per Stirpes: In Latin, "through or by the roots." Gives a beneficiary a share in the property to be distributed, not necessarily equal but in proportion to which, the person through whom he claims from the ancestor would have been entitled, i.e., a child claiming through his or her predeceased parent.

Pickup Tax: (Sponge Tax): Permits the state in which one dies to receive a portion of the estate taxes that would have been paid to the federal government.

Pooled Income Fund: A fund among multiple donors, wherein each reserves a pro rata share of its assets. The amount of income paid to each donor is determined by the performance of the fund and the individual's proportionate share.

Pour-Over Trust: A trust into which assets are poured or added from another source.

Pour-Over Will: A will used in conjunction with a revocable living trust to "pour-over" or transfer to the trust any assets which were not transferred to the trust before death.

Pour-Up Trust: Assets of a living trust are poured into a testamentary trust or an estate, reversing the flow found in a pour-over trust.

Power of Attorney: A document by which one person grants to another the legal right to act on his or her behalf with regard to specific situations.

Preliminary Distribution: Assets distributed prior to the close of the estate.

Probate: The procedure by which a transaction alleged to be a will is judicially established as a testamentary disposition, and also applies to the administration process of an estate.

Qualified Disclaimer: Acceptance of bequest and subsequent disapproval. Must be executed in writing and communicated to the executor or administrator within nine months after the transfer, or in the case of a minor by the age of twenty-one.

Qualified Domestic Trust (QDOT): Trust for a non-citizen that defers estate taxes in the estate of a citizen until the death of the non-citizen surviving spouse.

Qualified Terminable Interest Property (QTIP): Trust created for the benefit of a spouse and entitled to a marital deduction.

Remainder: Property left over after all will distribution provisions have been satisfied.

Remainder Beneficiary: A beneficiary named in the will or trust to receive the remainder property.

Res or Principal: The property the settlor/transferor places into a trust.

Residuary Beneficiary: General legacy to persons or organizations that will receive the balance of your property not specifically given or legacies that have lapsed.

Residuary Clause: Provides for a distribution of the remainder of the estate after all of the other specific and cash bequests have been made.

Retained Income Trust: A trust created to give a gift of a future interest whose value is discounted for gift tax purposes.

Reversionary Interest: A right to receive property back at some future date provided that the value of such a right immediately before death is in excess of 5 percent of the value of the entire property.

Revocable Trust: A trust that can be changed or revoked by the creator.

Rule Against Perpetuities: The rule that no contingent interest is good unless it must vest, if at all, no later than twenty-one years after the death of all the beneficiaries who existed (were alive) at the time of the creation of the interest.

Self-Proving Procedure: Adopted by majority of states. Affidavit stating that all the requisites for due execution have been complied with.

Settlor: The person who creates a trust.

Spendthrift Trust: A trust established by a third party, to protect the interests of another party (i.e., spouse) from claims of future creditors.

Sponge Tax: In a state such as Florida, where there is no estate tax per se, the state receives from the estate the credit calculated in a taxable estate as its state death tax.

Springing Trust: When the management of a living trust will only shift to a successor trustee when incapacity or other specified event occurs, as defined in the trust.

Sprinkle Trust: Trustee has the discretion to distribute income to a number of beneficiaries. Also known as a discretionary trust.

Sprinkling or Spray Provision: Provision in discretionary trust that allows trustee to make distributions to a number of beneficiaries without regard to equality as to amounts or times.

Standby Trust: A trust created to manage a person's assets while he or she is abroad or disabled.

Statute of Descent and Distribution: The law that sets forth the order of distribution of the property of a decedent that is not disposed of by will or trust.

Statutory Will: Form will, with fill-in-the-blanks; authorized in a few states.

Stepped-up Value: The value property is increased to (fair market value) at the time of the owner's death that will reduce or eliminate capital gains taxes upon its eventual sale.

Stop-gap: Additional tax designated as the generation skipping transfer tax that prevents property from passing over a generation without estate taxes being imposed on such a transfer.

Succession: Process by which the property of a decedent is inherited by will or through descent.

Support Trust: Trust created to provide beneficiary with only as much principal or income as necessary for support and education.

Tenancy by the Entirety: Ownership of property by a husband and wife together. Neither spouse is allowed to alienate any part of the property so held without consent of the other.

Tenancy-in-Common: When each co-owner owns an undivided fractional interest in the property.

Terrorem Clause: Provides for forfeiture of legacy in the event of a challenge by a beneficiary.

Testamentary Capacity: Criteria established by the laws of our states required to be met by you in order for you to create a legally valid will.

Testamentary Substitute: Transfers usually made during a spouse's lifetime but which usually do not pass to the beneficiary of such an account until the death of the person that created it.

Testamentary Trust: A trust created in accordance with instructions contained in your will. Takes effect only after death.

Testate: One passes "testate" when he or she leaves behind a valid will.

Testator or Testatrix (female): Name for person who has created a legally valid will.

Totten Trust: A bank account created that prevents a joint owner from withdrawing any funds before your death. If the beneficiary of such an account predeceases you, the account will pass under the residuary clause of your will.

Trust: A legal entity created to control the distribution of property.

Trustee: The person holding legal title to a trust for the benefit of a beneficiary.

Unified Credit Against Estate and Gift Tax: Credit up to $345,800 (equivalent to $1,000,000 in property), that can be credited against the federal estate and gift tax.

Uniform Gifts to Minors Act: Law which permits you to give a gift to a minor by giving the gift to a custodian, who holds title to the property for the benefit of the minor.

Uniform Marital Deduction: Unlimited amounts of property that can pass or be gifted to a surviving spouse without estate or gift tax consequences.

Uniform Probate Code: A model statute governing distribution of estate assets. This may be adopted, used as a guide, or wholly ignored by the various states.

Unitrust: A qualified trust in which the grantor retains certain income rights.

Will: An expression, either written or oral, of a person's intentions concerning disposition of property at death.

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