Estate Planning:
The Basics and Beyond
Why There Is No Such Thing as a Simple Will

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By

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To our clients: past, present and future.
Without you we would not be the
success we are!

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Disclaimer

I know this book is written by lawyers. Notwithstanding, you should **not** read it and then rely on it for legal advice. **It is not intended to be legal advice, nor create any type of attorney client relationship and is only a discussion of legal issues by the authors**.

If you have questions about any of the items discussed in the book, please go see an attorney well versed in these issues. Laws and regulations surrounding these issues are constantly changing and you need to consult with an attorney who is current on this area of the law.

We are Colorado lawyers licensed to practice law in the State of Colorado. This book discusses the law on wills, trusts, etc. from the viewpoint of Colorado law. Many of the principles apply to laws in other states, but the laws do vary from state to state. Please keep this in mind.

Introduction

WHAT IS THIS BOOK ALL ABOUT?

There are misconceptions about a will and in this book, we will explore them and hopefully put the will in perspective to other estate planning documents and how you may use not only a will, but other documents, in your own estate plan. Additionally, we will discuss a variety of other estate planning issues we believe you will find of interest.

First and foremost, it is imperative we address the **Tax Cuts and Jobs Act of 2017** (hereinafter sometimes referred to as the "2017 Tax Reform Act". Review Chapter 10 for a detailed discussion of the 2017 Tax Reform Act. The 2017 Tax Reform Act has changed the way we plan for payment of estate taxes. Currently, each individual can pass an amount of 11,700,000 should they die in 2021 (up from $11,580,000 for those who died in 2020) free of any Federal estate tax. This federal exclusion amount will increase, through an inflation adjustment, until December 31, 2025. Colorado has no estate tax.

Consequently, estate **tax** planning has become less of an issue for most folks. To put estate tax planning into perspective, it has been reported in 2000 there were 52,000 taxable estates when the exclusion was $675,000. When the exclusion was $5,000,000 only 4,687 individual estates had to pay a federal estate tax. In 2020, it is estimated there will only be 1,900 estates required to pay an estate tax.

Lest we get too excited keep in mind the Federal estate tax

exclusion, as set out in the 2017 Tax Reform Act is going to "sunset" (revert back to the law in place as of December 31, 2017) for decedents dying after December 31, 2025. Under the prior law (as of December 31, 2017) the exclusion is to adjust for inflation in the ensuing years and would be in the neighborhood of $5,700,000 plus in 2020. So, as we approach the sunset date individuals will again have to assess their need to undertake more sophisticated planning (based on exemption of perhaps $6,000,000 or so, assuming the law sunsets) to avoid paying federal estate taxes, should they choose to do so.

This can change, of course, in the future. There is a bill submitted by Senator Sanders which would dramatically changes the estate, gift and generation skipping tax structure in the United States.

✦ **Really Important Point:** It is important to keep your eyes on this legislation. If it or some variation passes it could change the way YOUR wealth is transferred at death and the portion which must be paid or transferred to the Federal government. It is your money (or capital) and you do have choices you can make to maximize the amount which will pass to your heirs. Being a good steward of your wealth is a choice you can make.

Congress can shrink the exclusion amount, although they really have never done so in modern times. Senator Sander's plan would do just that. They can morph it into a different type of tax, such as an income tax, basis adjustment or whatever. The point here is everyone needs to be vigilant and keep their attention focused on tax reforms of all types. For example, take a look at chapter 10.6 and the discussion regarding retirement accounts.

Many commentators are saying the "income" tax is becoming the new "estate" tax. For those individuals who do not have an estate tax worry they still need to keep their eye on income taxes and how to minimize the impact of those taxes on themselves and their family.

Also, pay attention to Chapter 8 and all the concepts our estate planning clients are focusing on beyond the basics and beyond estate taxes. Protecting the inheritance of your heir from a creditor or perhaps a spousal claim in the event of a divorce may be important to you. In this world of lawsuits and divorces wrapping an inheritance in a protective coating can be very important. Make sure you look at the discussion in Chapter 8 regarding the use of an asset protection trust very carefully.

Clients frequently want something simple when they think of their estate plan. Let's look at the word "simple". It can mean "easy to understand", "simple tools", "plain", "not ornate, not luxurious and unadorned", "not complicated", or a "simple design". Unfortunately, we live in a very complex world. The world today is not plain, simple, or unadorned, but is complex and ever changing.

The "I love you" will alone, as your basic estate plan, where the Testator simply leaves the entirety of the estate to his or her heir or heirs without any strings attached or without providing for unforeseen contingencies, is no longer the "will" or estate plan of choice for many of our clients and probably not for you either.

This book will discuss some of the complexities and the decisions you need to make regarding your own will or estate plan. After reading this book you should have a

working knowledge of not only what a will (and will substitutes) can do for you, but how it accompanies other documents you may want and need, as part of your estate plan. You should be able to ask the right questions of your lawyer when implementing your own estate plan.

A will contains many useful components. In a will, you will appoint someone or an entity to handle your estate. This person or entity is called a personal representative. The powers you give this person, as well as limitations on those powers, can be spelled out in your will. Many other provisions are contained in the will allowing your estate to be administered in accordance with your wishes. You will learn about what a will can do for you and what are some of its limitations in Chapter 1.

We believe a will is a very important document and everyone should have one! The Website Caring.com reports the results of a survey they completed in 2019, which reported only 43 percent of respondents indicated they had an estate plan, such as a will or living trust. Of course, we are biased, but we cannot understand why everyone does not have a will.

What if you die without a will? Well, the law in the state in which you reside at the time of your death will essentially provide one for you. This is called dying "intestate", which we do not recommend!! We touch on this in Chapter 2. Here you can review what we believe to be important components to your will. Make sure you have these matters covered.

We will also discuss a variety of other topics which should be of interest to you, such as, digital assets, pet trusts, asset

protection trusts, and advance directives. If you feel we have missed something, which should have been covered, please let us know. We will be constantly updating this book as we get reader feedback and decide on our own where we want to take the end product to be most helpful to you the reader. Please visit our website (www.brownandbrownpc.com) for the most recent edition or simply call our office.

CHAPTER 1

A WILL—AN OVERVIEW

1.1 WHY THERE IS NO SUCH THING AS A SIMPLE WILL

We often hear from clients they want to keep things simple. We understand this sentiment and strive to keep things simple in our own estate plans (if possible). So, what does "simple" really mean? Merriam-Webster defines simple as "not hard to understand or do; having few parts: not complex or fancy; not special or unusual." Applying this definition to an estate plan is inherently difficult. The law is complex. Families are unique. Life is unpredictable. So how do you accomplish keeping things simple during your life and after your death? Here are five points to think about.

1. Plan ahead: No one likes to think about death or incapacity, but it is important to plan for both. Creating an estate plan which passes your assets in accordance with your wishes is the only way to ensure your family will know and follow your wishes. Similarly, loved ones trying to help you

during a period of incapacity need the legal authority through powers of attorney to make medical and financial decisions for you.

2. Organization is key: Keep your original documents in one place and let your nominated Agent or Personal Representative know where you are keeping your documents. Keep an accurate description of your assets with your original documents so your Agent or Personal Representative knows what you own. Read Chapter 8.5 on digital assets. Don't forget those.
3. Assemble a good team of advisors: Financial advisors such as brokers and insurance agents, accountants, and attorneys all contribute different expertise to your estate plan. It is important each know and understand what your wishes are, so they can advise you accordingly. Your loved ones will also benefit from a well-established team of advisors they can rely on for assistance in the event of your incapacity or death.
4. Coordinate your assets: If you establish a trust, make sure you re-title assets into the name of the trust. Assets outside of a trust in your name individually will potentially trigger the need for a probate, which is one of the main reasons people choose to create trusts. If you have a will estate plan, do not add children or other individuals as joint owners of the account or payable on death beneficiaries. Doing so will cause those assets to pass outside of the probate proceeding and consequently the will does not govern or control those assets. Titling assets correctly is extremely important to ensure your estate plan will dispose of

your assets the way you desire.

5. Protect vulnerable beneficiaries: It is appealing to clients to leave assets outright to beneficiaries without any strings attached. In many circumstances, this is the appropriate distribution method for beneficiaries, however, creating a specialized trust for some beneficiaries is worth considering. Beneficiaries who are minors should have a trust established for them until they reach a certain age. Disabled beneficiaries may benefit from a special needs trust, so they do not lose their public benefits. Beneficiaries with a drug or alcohol problem or who are not good with money matters may benefit from a discretionary trust which is controlled by an independent and money savvy trustee. We are also finding more and more clients interested in asset protection trusts for their beneficiaries. (Look to Chapter 8.3 for a discussion on the Asset Protection Trust). These are specialized trusts designed to cascade through generations while providing tax benefits and insulation from creditors and spouses (who may become ex-spouses) of beneficiaries.

1.2 WHAT DOES A WILL ACTUALLY DO?

Our clients will frequently tell us they have a will and having a will means the "assets in their "probate" estate do not need to pass through a court proceeding, i.e.- probate, when they die." Wrong! What a misconception! A will only directs where your probate assets will pass (or be distributed) upon your death. Generally, it is

necessary to have a court involved in the administration of your estate when you have a will estate plan.

Also, keep in mind a will does not control where non-probate assets are to pass. For instance, a will does not control where a life insurance, a retirement account, property subject to a beneficiary designation or an annuity will be distributed. Upon your death these assets will pass where you designate them to pass in a beneficiary designation form which you must sign during your lifetime, when you have mental capacity. Even if you provide for the distribution of the proceeds from a life insurance policy in your will it has been our experience a life insurance company will not honor this request as a valid beneficiary designation form. They want to see the beneficiary designation of the death benefits of a life insurance policy usually on their own form.

What about property held in joint tenancy, such as a personal residence, other real estate or a bank account? The same result will occur. Property held in joint tenancy will pass to the surviving joint tenant and not subject to control by a will. Any mention in a will, as to where you want your property held in joint tenancy to pass upon your death, will fall on deaf ears and will not be effective.

✦ **Really Important Point:** Make sure you understand the difference between joint tenancy (which automatically passes to the surviving joint tenant or tenants) versus tenants in common. If a property is held as tenants in common, the interest held at death will not automatically pass to the surviving tenant in common.

Example: John and Jane are brother and sister and both live in, and are residents of Colorado. They hold a house as joint tenants and when John dies, with Jane surviving, John's interest in the house will automatically pass to Jane. All Jane needs to do is record a copy of John's death certificate and a separate document called a Supplemental Affidavit and bingo the property is now owned 100% by Jane. On the other hand if John and Jane own the house as tenants in common, when John dies his interest will pass in accordance with the terms of his will or in accordance with the terms of the "intestacy" laws of the state of Colorado. More on this in Chapter 2. The half interest held by John will not automatically pass to his sister Jane. John may provide in his will the property is to pass to Jane, but this will happen only through the probate process (more on this in Chapter 3).

A will is a "testamentary" document (meaning it is used when someone dies and not before), which controls the disposition of an individual's "probate" assets at their death. Probate assets are any assets owned individually by an individual at their death. An asset with a payable on death designation, beneficiary designation or joint tenancy owner is not a probate asset and not controlled by a will. A will also appoints a Personal Representative to administer the will. For parents of minor children, the will can appoint a Guardian and Conservator for those minor children. A will is considered a testamentary document because it only becomes effective at an individual's death. Wills can be amended by executing a "codicil" or if there are significant changes to be made, by executing a new will.

1.3 WHAT TYPES OF TERMS OR PROVISIONS ARE (OR SHOULD BE) INCLUDED IN A WILL?

✦ **Really Important Point:** When preparing a will the will terms will depend upon the situation of the Testator or Testatrix when they die (these are the latin terms for the male or female whose will is being prepared and executed--- we will simply use Testator as the universal term). There are many provisions of a will which are never going to be used, but at the time of preparing the will the lawyer preparing it simply does not know what the Testator may need.

So, we prepare a will and include many "spare tires" in hopes of covering as many contingencies as possible if it is necessary to use the spare tire (or particular clause) we know we have it available. Because we cannot forecast the future very well, it is important to include many spare tires in your will (and other estate planning documents) to insure the will has all the terms it may need! This explains why even a "simple" will can sometimes be so long and appear complex and confusing.

Listed below are some (but most certainly not all) of the will clauses we will usually include in a will (this is the case with a simple tax oriented or otherwise complex will):

Statement of Family. It is important to identify who the Testator's family is for a variety of reasons. We have had cases where there is an estranged child, or a child born out of wedlock. When the Testator leaves his probate assets to his children, we want to know who those children might be

according to the Testator. This may help thwart a claim by one of those pesky claimants.

✦ **Really Important Point:** Remembering your family also goes to the issue of establishing the Testator has mental capacity. If you cannot remember the "objects of your bounty" (a legal term) you may not meet the requirement of having sufficient capacity to execute a will. If you don't have sufficient mental capacity to sign a will, but the Testator signs one anyway, the will can be contested in a "will contest".

As a side note, to set aside a will the contestant must generally show either or both (1) the will was signed at a time when the Testator did not have sufficient mental capacity or (2) the Testator was unduly influenced by someone and it did not really reflect the intent of the Testator, but the intent of the influencing party. You do not want your estate to get caught up in a will contest, so plan early and review often.

For the Testator to have sufficient "testamentary" capacity to execute a will he or she (1) must know the natural objects of his or her bounty; (2) generally know the nature of his or her assets and (3) understand what a will does. One of the tricky aspects of setting aside a will is the fact in many cases the Testator may have capacity on one day or moment, but not on the next. Mental capacity is very transient. It is often very difficult to prove the capacity of the Testator at any given point in time. The law tends to favor finding someone had testamentary capacity at the time the document in question is signed.

Most of the litigation in a will contest centers on someone exerting undue influence on the Testator. This is often easier to prove in a contest based on undue influence because there are more facts which can be dug up or found. For instance, perhaps the perpetrator of the undue influence set up the appointment, transported the Testator to the lawyer's office and paid the lawyer's bill. Perhaps the perpetrator isolated the Testator from his or her family. If the perpetrator was able to access financial accounts so as to change the ownership or transfer on death of the "oldest" to the benefit of the perpetrator and these facts became known to a court setting aside those transactions is a possibility.

This is also the section of the will where we mention the fact the Testator wants to disinherit an heir, if this is the case. If the Testator can identify all his family and the specifically disinherit one or more of his family members, the chances of his decision to disinherit the heir has a high likelihood of being upheld if a court is asked to determine its validity. We also may mention in this section any pre-or post-marital agreements which may be in existence. The idea is to be comprehensive.

Distribution Provisions. It is important to spell out in the will which person or persons (and in what proportions) are to receive the probate estate assets. This should be done with clarity. For example, leaving all or a portion of the estate to "my church" or to my "neighbor who has been so nice to me" only leaves open the question as to who is to receive the distribution, which will likely require further court involvement in the administration of the estate. Be specific in the identification of the intended beneficiaries,

as well as the alternate beneficiaries should an intended beneficiary die before the Testator.

✦ **Really Important Point:** Make sure you dispose of all of your estate subject to the terms of your will (i.e.- the probate assets). We have seen wills drafted by attorneys (yes, attorneys) which dispose of specific assets, but fail to include a "residuary" clause which distributes everything else in the estate (the so-called "residuary" clause). We cannot make this up! So, be careful to insure you don't leave any of the probate assets unaccounted for in your will.

Tangible personal property. Most people have "tangible personal property", which is essentially all your stuff – books, china, jewelry, etc. You can leave your personal property generally to your heirs. You can also use what's called a Tangible Personal Property Memorandum to list specific items you want to go to specific people. For example, you can list your father's Rolex watch should go to your grandson, David.

Your will must specifically reference the use of a Memorandum to be valid. The nice thing is you can update the Memorandum whenever you want. No need to amend your will. You can just execute a new memorandum with your changes. You should always sign and date the latest version, so your personal representative knows which one to follow. Don't write in the margins, cross things out, or include sticky notes with changes! Those types of changes cause confusion! The Memorandum is also helpful in avoiding family fights over who gets what of mom's jewelry or the family clock if you specify it in your Memorandum.

Digital Assets, devices and accounts. In this day and age, everyone has passwords to various devices, websites and accounts. See our discussion in Chapter 8.5 on digital assets.

Designaton and Succession of Fiduciaries. Now there is a big word for you to digest! As part of your estate plan there are many individuals who help in the administration of your estate (the estate may consist of both probate and non-probate assets which may or may not be covered by the assets subject to distribution provisions in your will). These individuals are generally referred to as a fiduciary. A fiduciary is a person or entity (such as an institution like a trust department) which holds a special relationship with you. This fiduciary will help with the administration of your estate, which may include filing of tax returns, selling and distributing assets and dealing with the heirs to name a few tasks. In your will it is important to name these fiduciaries and alternatives if the fiduciary named is unable to act.

Powers of the fiduciaries. After naming your fiduciaries, it is necessary to set forth the powers you want them to have. Colorado has a law which sets out the powers of a fiduciary absent a direction in the will. You will also want to set out whether you want the fiduciary to post a bond or not. Spelling out the compensation for the fiduciary is yet another necessary provision. So don't forget this item, although again the Colorado laws provide a default.

Distributions to individuals who are disabled or perhaps under a certain age (say 25). A distribution to an individual, whether directly or as a contingent beneficiary, with a known disability (or an individual who is a minor or

lacks maturity in handling money) can be addressed head on with the drafting of specific provisions such as holding the money in a trust (this would be a "testamentary" trust) for the benefit of the individual. We routinely include language creating such a "trust" to hold the assets for the disabled, under-aged or under-capacitated heir. The trust will set out the terms of how the principal and income will be invested and how it will be distributed. It is very good idea to have this spare tire!

Taxes. Few estates incur any type of estate, inheritance or death tax due to the high Federal estate tax exclusion (11,700,000 for decedents dying in 2021) and the lack of any such inheritance tax in Colorado. Nonetheless, it is important to determine how any taxes must be paid and by whom (should the decedent be so lucky to have amassed an estate needing to pay taxes). Another spare tire!

Adopted children. There are often adopted children and and step-children a person may wish to include or exclude as an heir (or beneficiary) of their estate. Be clear on whether you want those children included in your estate plan or not included.

Applicable laws. The specific state law used to determine the validity of the will should be set out. Being Colorado lawyers dealing with Colorado residents means we will usually have Colorado law apply. In rare situations it may be more advantagous to apply the law of another state. This needs to be spelled out in the will and flexibility can be allowed to apply the law in the state where the trust is to be administered.

Contest clauses. You no doubt have heard of a "will contest". These do occur and will likely be very unpleasant for all involved. A will can usually be attacked in only one of two ways. If a Testator lacks capacity to understand the will the Testator signed, a court could invalidate the will. The other way (and one usually involving more litigation---fighting amongst the heirs---) is if one of the heirs has "unduly influenced" the Testator. Let's take the case of the child who exerts pressure on the Testator to give the Testator's estate to the influencing child. It could be your brother, sister or one of your children! We also frequently see the caregiver who overreaches by accepting lifetime gifts or taking the client to a lawyer to redirect a will in their favor.

A "contest" clause is intended to discourage unwarranted attacks on the will of the Testator. Generally, the "contest" clause states if anyone tries to contest the will he or she will be disinherited. It is OK to disinherit an heir so long as you have capacity and the other heirs are not influencing the Testator. A "contest" clause will not withstand a challenge if there are a valid reason for setting aside the will, i.e.-lack of capacity or if someone unduly influences the Testator.

Most clients want such a clause to discourage frivolous challenges which are attempts to disrupt the plans of the Testator. Consequently, we include the contest clause in most of our wills, simple or complex.

✦ **Really Important Point:** Wills are not necessarily simple. There are many "complex" terms in a will and any will should be comprehensive and cover these points.

We hear from clients all the time: I want a simple will! Don't give me a will of 10 pages or more. Sounds good, but may not be in the client's best interest. We believe we can all agree driving across the country without a spare tire is ill-advised and rarely does anyone do this. We don't believe in an individual having a will without spare tires (appearing more complex than it really is). It just does not make any sense!

1.4 HOW OFTEN SHOULD I REVIEW MY ESTATE PLAN?

We recommend reviewing your estate plan every 3-5 years to make sure it remains consistent with your wishes. If a life event, birth, death, injury to a beneficiary or Agent occurs, you will want to review your estate plan at that time. Additionally, Federal and State laws change, which may directly affect your estate plan and necessitate reviewing and potentially making adjustments to your estate plan immediately. If the Senator Sander's tax reform legislation becomes law there will be a need to review the estate plan of most anyone nearing the reformed exclusion amount (proposed to be $3,500,000 pe person). Also, just because a will is reviewed does not mean changes need to be made!

✦ **Really Important Point:** As we travel the road of life we have checkups. The dentist and doctors are good examples. Let's not forget about the periodic visit to the mechanic for an oil change or a once over on your car to make sure it

is running like you need. Oh, and then there is the accountant and taxes. You get the point---- you need to take stock of life events, changes in the law to make sure your estate plan is in sync with your goals. Get your estate plan reviewed periodically to insure your legacy is fulfilled the way you want it to be!

Attached as Appendix 1, is a checklist for you to follow to perhaps jog your memory as to what you may wish to review with your estate planning attorney.

CHAPTER 2

DYING WITHOUT A WILL

2.1 WHAT HAPPENS IF YOU DIE WITHOUT A WILL IN THE STATE OF COLORADO?

Dying without a will means you die "intestate". A bit of Latin for you to remember. Dying testate means you die with a will. The good news is if you die without a will and are a Colorado resident (as is the situation in most states), Colorado statutes make a will for you.

As you might expect, if you die without a will and are married then your estate passes to your spouse. This is the case even if you have children provided the children are children of your spouse. The law gets a bit dicey if you have children and the children are not the children of your spouse. In this event the spouse gets a set dollar amount and the balance is then split between the spouse and the decedent's children.

Now, if you have no spouse or children, but living parents, then the parents will take the estate equally. If you only have one parent living, then the entire amount passes to the surviving parent.

Is your head swimming yet? It can get worse. Take the case where there is no surviving spouse, living children or other descendants and no parents. Well then, we start looking for grandparents and if none to siblings and if no siblings, then look for nieces and nephews. On and on we

go until a blood relative is found. If no blood relatives can be found, regardless of how remote they may be, the estate passes to the State of Colorado!

✦ **Really Important Point:** Dying without a will can create substantial complexities. Don't do it! Be proactive and determine how you wish for your estate to be divided.

If you want to get into the weeds and learn about dying intestate, then take a look at CRS 15-11-101 et. sec. There is a lot of night reading in the Colorado statutes for those who have insomnia. The read is guaranteed to put you to sleep!

In a companion book to this book is our new publication, "*Estate Administration Manual. What you need to know when someone dies..*" We suggest you also take a look at this book should you have questions on how to administer an estate. As with this book all the lawyers at Brown & Brown, P.C. had a hand in its creation. The book can be found on our website in digital form, or you can obtain a copy (if available in hard copy book form) by calling our office.

CHAPTER 3

PROBATE

3.1 WHAT IS PROBATE?

As explained later, assets owned by a decedent on the date of his or her death are either probate assets or non-probate assets. Although a bit of an oversimplification, an asset which is in the name of the decedent is usually a probate asset. This could be the decedent's personal property, perhaps a checking account or a house in which the decedent lived. Probate assets are subject to a judicial (court) "probate" proceeding. Other assets under the control of a decedent may not be probate assets. Those might include a life insurance policy, a retirement account or property held in joint tenancy. These assets pass to a beneficiary named in the insurance policy or retirement account or in the case of the joint tenancy property to the surviving joint tenants.

What we are discussing in this chapter are assets which are subject to the probate process. It bears repeating and emphasizing! Non-probate assets are not subject to the probate process. Non-probate assets are governed by a different set of rules.

Whether or not a decedent had a will is not determinative of whether it is necessary to have your probate assets subjected to the probate process. A will simply directs where the probate assets are to pass. If a decedent does not have a will then Colorado will make a will (by statute) for the decedent. In legal terms, this is referred to as dying intestate. (See Chapter 2).

3.2 WHAT TO EXPECT IN A PROBATE PROCEEDING

In administering a probate estate, it is necessary to appoint a personal representative. In this chapter, we will discuss the duties of the personal representative and then review the process of probate.

✦ **Really Important Point:** The probate proceeding in Colorado is not terrible or awful. Yes, it does add an extra layer of complexities in the administration of an estate, but it does have its advantages along with its disadvantages. For instance, it may be important to have a court become involved should the heirs start fighting or perhaps if there is a creditor claim which is contested. A probate proceeding provides the venue to resolve such disagreements and claims. Unless the parties agree, the only way to resolve the disagreements is through the court proceeding. Generally, courts are our friends. Keep this in mind.

Personal Representative

As stated earlier, every estate (other than an estate with no real estate and an estate value of less than $70,000 in 2020) requires the appointment of a personal representative. This is a critical task, which includes following statutes, filing documents, performing valuation of assets and much more. The personal representative can be appointed by two methods, with varying titles:

- The personal representative is also known as the "Executor" when they are named in the decedent's will to carry out their desires as expressed in the Will and to administer his or her estate under the law. An "Executrix" is the feminine form of the word "Executor."
- The personal representative is also known as the "Administrator" when they are appointed by the court to settle the estate in accordance with law when the decedent did not leave a will. An "Administratrix" is the feminine form of the word "Administrator."

As evidence, you have been appointed the personal representative of the estate, the clerk of the court issues a document called the Letters Testamentary, which gives you authority to act on behalf of the estate. It may be important to record in the county in which the decedent owned real estate, to allow the personal representative to transfer the decedent's interest in real property. If anyone should question an individual's authority to act on behalf of the decedent's estate and to act as the personal representative of the estate, the personal representative would present the Letters Testamentary, which evidences the personal representative's authority. In the event the personal representative needs additional copies of the Letters Testamentary, they can be obtained from the court which issued them.

10 Important Reminders for Personal Representatives

1. As a Personal Representative, you are in a professional role. Your duties are specifically dictated and monitored by the court. Your role as Personal Representative is separate from your

role as a beneficiary and/or a family member. Your sole and impartial responsibility is to the estate and to its beneficiaries.

2. Open an estate checking account as soon as possible after your appointment as Personal Representative and use this account for all income and expenses.

3. Keep a detailed accounting of all income and expenses. Utilize an accounting ledger or computer program for ease of transfer to the court's Final Accounting when the estate is in the process of being closed. Please keep in mind an accounting of all estate transactions will be provided to the beneficiaries for review and to the court for review (depending on how you close the estate).

4. The estate account is for estate income and expenses only and cannot be used for personal expenses, even if you are an estate beneficiary.

5. Liquidate and consolidate assets and place proceeds into the estate account in a timely manner (depending on the specifics of the estate).

6. Assets and accounts owned in joint tenancy are not probate assets. A joint tenancy account cannot be used for estate income and expenses except by agreement of the account owners and estate beneficiaries.

7. The Decedent's Estate Inventory required by the court is a listing of the estate assets and their

values specifically on the day the Decedent died, not on the date the form was completed or signed.

8. Do not pay creditor claims before the end of the creditor's period until you know the other liquidity needs of the estate. There are effective ways in dealing with creditors depending on the specifics of the estate. The Decedent's debt is not automatically transferred to the heirs.

9. Do not automatically make distributions of estate assets until after the end of the creditor's period (and possibly after one year from date-of-death depending on the estate), without understanding the consequences of doing so.

10. Most importantly, when in doubt on any issues which may arise, contact the attorney you are working with or the Probate Clerk of the court. There are no "stupid" questions in the probate process. Probate professionals are here to help you.

The Probate Process

Probate, in its narrow meaning, describes the process by which an instrument purporting to be a will is legally determined to be the effective Last Will and Testament of a decedent. In its broadest sense, probate describes the entire process by which a decedent's estate (remember—probate assets only) is collected, administered and distributed.

Note: Assets held in a trust, such as a revocable, life insurance or charitable trust, are not included as a probate asset in the decedent's estate.

The purpose of the personal representative is to administer or settle the estate. This involves the assembly, collection and valuation of the decedent's assets, the payment of debts, expenses of administration and taxes, and the distribution of the remaining assets to the persons entitled thereto.

The first step in the broader probate process is opening the estate and securing the appointment of the personal representative. Once this is set in motion, the administration of the estate begins.

1. The personal representative is responsible for assembling, the collection and valuation of all the probate assets, and preparing an inventory of these assets within three months from the date of the appointment of the personal representative.
    - The assets included in the probate estate include <u>all assets which were titled solely in the decedent's name or payable to his or her probate estate</u>. Any assets which were titled in the decedent's name as a joint owner and any assets which passed pursuant to beneficiary or payable on death designations to individuals other than the probate estate are <u>not</u> included in the probate estate and therefore should not be listed on the inventory.
    - For purposes of the inventory, the NADA or Kelley Blue Book value for any vehicles can be used. Most law firms and lawyers with experience in the probate process can usually assist the personal representative with obtaining this value. For those vehicles which do not have

blue book values (e.g. older vehicles, the trailer and the ATV), it is still necessary to provide an estimate of their fair market values. One way to accomplish this is to have a used car dealer help you arrive at a value. This value should be documented in writing.

- Each of the banks and investment companies where the probate accounts are located must be contacted to request a print-out of the balances as of decedent's date of death. You will need to open an estate checking account and may obtain the date of death values at the time you open this new account.
- The date of death values for each of the probate assets will need to be determined not only for purposes of the inventory, but also to document the basis adjustment (aka the step-up in basis) received by each asset of the probate estate.

An example will help explain this issue. Let's assume the decedent owned 100 shares of ABC Company upon his death, which he paid $10 per share or $1,000 for 20 years ago. At the date of death let's further assume the 100 shares are still owned by the decedent but had increased to $100 per share for a total value of 100 the shares being $10,000.

The tax code provides for an adjustment of the cost basis to those inheriting the 100 shares, which is equal to date of death value. The heirs receive the 100 shares with a value of $10,000 on the date of death and a new cost basis equal to $10,000. When the shares of ABC Company are sold by the heir(s) the heirs have no gain ($10,000 value minus the $10,000 basis). As you can

see, adjusting the cost basis of inherited assets is important to reduce, if not eliminate, the capital gains on the sale of inherited assets of the decedent.

This may all (or in part) change should the Senator Sander's proposed reform bill become law. This will necessitate a re-thinking of whether to hold assets until death just to get the basis adjustment.

It may be necessary in this process to engage the assistance of an accountant to insure you take the greatest advantage available in adjusting the basis in the assets owned by the decedent on the date of his or her death. Once the date of death values for each of the probate assets has been determined the inventory can be finalized.

2. A newspaper notice must be published for claims against the estate. Again, most law firms and lawyers with experience in the probate process, will usually coordinate this process. Claims can be made either by filing with the court or by presentation to the Personal Representative either by mail or hand delivery within four months after the first publication of notice to creditors. Claims need not be on a special legal form. Generally, a regular bill or other statement for services will suffice as a legal claim. Under the Colorado Probate Code, claims are deemed automatically to be allowed if you, as the personal representative, do not take steps to disallow them within 60 days after the end of the claim period.

    - The notice to creditors will indicate a specific date by which the creditor must file their claims to the personal representative or the court for

payment. The personal representative can also mail a notice to the known creditors of the estate.

- It is commonly felt that if a copy of the published notice to creditors is mailed to each creditor and a certificate of mailing prepared, this would be sufficient notice to creditors. If you plan to pay a particular creditor in full at the decedent's death, the notice provisions are not as important. If a claim is to be disputed or intentionally left unpaid the giving of notice becomes extremely important and must be carefully coordinated.
- Note: If the decedent was recurring at home care or was in an assisted living or long-term care facility you will want to find out if the individual was receiving Medicaid. Long-term care Medicaid has an estate recovery program and if the individual who died had a home and was single there may be a claim filed in the estate. Unfortunately, Medicaid can take 8, 9, 10 months to file the claim. Unless Medicaid is specifically notified of the creditors period, Medicaid has a year after the date of death in which to file and it can come as a surprise.

3. Complete records should be kept of all transactions in an estate, including cash transactions for the estate. It is generally recommended the accounts in the decedent's name be closed and funds from the closed accounts be deposited into a new estate checking account. The personal representative will need to ensure the tax identification number for the probate estate is the number used to open the estate account. Do not open

the estate account under the decedent's Social Security number or the Social Security number of the personal representative. Most law firms helping with the administration of an estate will usually apply for the taxpayer identification number for the probate estate.

4. The personal representative should contact an accountant regarding the filing of the final income tax return for the decedent, which will include all the income through the date of death of the decedent. A federal estate income tax return (Form 1041) for income received by the estate subsequent to the decedent's death will be required in all years in which the estate has income of $600 or more.

5. The personal representative may need to file a federal estate tax return for the decedent's estate. Colorado does not have an estate or inheritance tax. A Federal return is required if the decedent's interest in his or her real and personal property, when combined with all other assets included in his gross taxable estate, has a total value of $11,700,00 or more and the decedent dies in the calendar year 2021. The exclusion amount is adjusted annually based on inflation and usually goes up in value. It will be important to value the estate to determine if such a return is necessary. There may be other reasons why a federal estate tax return should be filed. A discussion of these planning options is beyond the scope of this book.

   Although an in-depth discussion of "portability" is beyond the scope of this book, (again, really!) it is important to note the first to die of a married couple may "port" his or her Federal unused estate tax exclusion amount allowing the surviving spouse to

effectively double the amount of estate tax exclusion he or she will have available upon the death of the second spouse. Using the portability provisions of the estate tax exclusion can avoid the need to set up a trust for the benefit of the surviving spouse to shelter assets from being included in the estate of the survivor.

The personal representative is entitled to receive a fee for the services provided to the estate, which fee is considered part of the expenses of administering the estate. If the personal representative wishes to charge a fee, it is necessary to keep detailed time records. Any fee the personal representative receives will be income to the personal representative and will need to be reported on the personal income tax return of the personal representative for the year in which it is received. The personal representative has the option of waiving his or her right to receive this fee for income tax or other personal reasons.

Distributions

Generally, we recommend distributions from a probate estate to the beneficiaries not be made until after the expiration of the creditors' period. Interim distributions can be made, however, and if they are, it is often necessary to have the distributee sign a distribution agreement regarding the distributed assets and any obligations to refund the distributed amount to the estate if the estate does not have sufficient funds to pay all the creditors of the estate.

After the expiration of the six-month period from the date the personal representative was appointed, final distributions can usually be made from the estate and then the estate can be terminated (usually on an informal basis).

Often causing a delay in closing an estate is the filing of the income tax return for the decedent and potentially the decedent's estate. To avoid long delays in an otherwise routine estate careful planning and timing of distributions and earning of income in the estate is necessary.

The administration of each estate is a necessary process. It clears the title to the decedent's property. It settles legitimate debts and wipes out others. It may establish a new tax basis for the property in the estate and protects the personal representative in making distribution of the property to the persons entitled thereto.

The estate administration process does not usually require the personal representative to appear in court. If a dispute arises or the personal representative needs any direction on how to proceed, the court can be asked to intervene to give some direction to the personal representative.

CHAPTER 4

THE TRUST ALTERNATIVE TO A WILL

4.1 WHAT IS A TRUST?

A trust is an entity which holds assets for the benefit of the beneficiaries. A trustee manages the assets and makes distributions pursuant to the terms of the trust. One of the most common type of trust (and often referred to as a "will substitute") is a revocable or living trust. This is a trust established by an individual or couple and funded by an individual's assets and benefits the individual during his or her lifetime. Upon the Settlor's (person creating the trust) death, the trust is administered for the benefit of the named beneficiaries. Assets titled in the name of the trust are not probate assets at the death of the Settlor, which means the disposition of the asset will be controlled by the terms of the trust rather than the terms of the will.

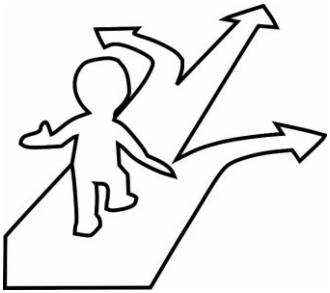
4.2 WHAT DOES MY NET WORTH NEED TO BE TO USE A TRUST?

There is a common misconception that a trust estate plan is only for people with substantial assets. This misconception often precludes individuals from looking at the benefits of a trust, despite the size of their estate. If a trust is properly funded and remains funded with the individual's assets, at the individual's death there may not need to be a probate

proceeding. Additionally, if an individual owns property in another state, using a trust can avoid a probate proceeding in Colorado and an "ancillary" proceeding in the other state. Often clients like the privacy of trusts. These are a few of the advantages of using a revocable trust as your primary estate planning tool.

Unlike wills, which may become public documents at an individual's death, trusts remain private and are only shared with the beneficiaries listed in the trusts. This can be advantageous in situations where beneficiaries are not treated equally or there is a disinherited individual. Finally, trusts can be used for incapacity planning. Along with an Agent under a Financial Power of Attorney, a trustee can manage trust assets on behalf of an incapacitated individual.

4.3 WILL VERSUS A TRUST. HOW SHOULD I DECIDE WHAT TO DO?



We are often asked whether a person should use a will or a trust to pass their estate to their heirs upon their death. It is a question each of us should ask ourselves. The bottom line is, in most cases, the answer is not clear, but is a matter of choice. To understand the difference, we must revisit the difference between a probate and a non-probate asset.

Probate Assets

A probate asset is an asset that passes when a person dies

through a court process commonly referred to as probate. Probate usually takes about six months (or perhaps longer depending upon the need to file income tax returns for the decedent); a personal representative is appointed to handle the proceeding; creditors, if any, file claims in the proceeding; and ultimately, the assets of the probate proceeding are distributed to the individuals named in the will of the decedent. If the decedent did not leave a will the assets pass in accordance with a statute of the state in which the decedent lives on the date of the decedent's death. Dying without a will is commonly referred to as dying intestate.

There are advantages to having your assets pass through the probate process before being distributed to your heirs. The primary advantage is there can be court supervision. A court can help a personal representative sort through many issues that which arise during the administration of the estate including, but certainly not limited to, disputes amongst heirs, the nature and specifics of distributions, the validity of claims of creditors and many other matters in which a personal representative may simply need guidance.

The primary disadvantages of probate are that it can be somewhat more time consuming, usually adds cost to the administration of the estate (although not significant), can require administration in more than one state if an individual owns assets in more than one state, gives a forum or platform in which heirs can fight, requires a direct notice to known creditors (which may be disputed) and may require the disclosure of the decedent's estate plan to the public.

Many clients simply want the privacy of a trust (in contrast

to the will type of an estate plan) as disclosure to the public of the nature and timing of distributions to the decedent's heirs (other than trust beneficiaries) is not required. The fact your heir (often times children) might receive a distribution on their 20th or 30th birthday might be important to keep private.

To drive home the point, just do an internet search for the wills of famous people. When you do you will see a multitude of fascinating wills such as one for Marilyn Monroe, Elvis Presley, Jimi Hendrix, Michael Jackson and many more. These "wills" (and yours) could become a public document (if admitted to probate) so be careful what you say in your will as it may impact your legacy and your heirs.

Non-Probate Assets

Non-probate assets are those which pass to your designated heirs without the need for a court administration or probate. Most clients already own non-probate assets. Non-probate assets include those such as retirement accounts, assets titled in joint tenancy and insurance. A non-probate asset passes directly to the intended beneficiary under a life insurance or annuity policy and a joint tenancy asset passes to the surviving joint tenant. For those individuals with a will estate plan it is important they coordinate how their estate will pass with both the probate and non-probate assets.

For example, let's look at life insurance. Let's assume a parent of three children names the surviving children (those living at the time of the parent's death), as the beneficiary of a life insurance policy on the parent's life. Let's also

assume the parents will leaves all the parent's assets to the children equally and if one of the children predeceases the parent, the deceased child's share would then pass to the children of the deceased child, (the grandchildren).

Under the above scenario, if a child dies prior to the parent, the probate assets are still divided equally among each of the children with an equal share passing to the children of the deceased child. The proceeds of the life insurance policy (absent a very sophisticated beneficiary designation form, which most life insurance companies are unwilling to accept) will pass to the surviving two children and not to the children of the deceased child because the insurance policy likely required the proceeds be paid to the "surviving" children.

Will Estate Plan

With a will estate plan, it cannot be emphasized enough how important it is to coordinate the assets passing pursuant to the will with those that pass outside the will. As we will see below, the same holds true (the need to coordinate the ownership of assets as well as the beneficiaries named in non-probate holdings) for the use of a trust type of estate plan.

Trust Estate Plan

A trust estate plan is a process whereby the probate assets are essentially converted into non-probate assets. The type of trust we are referring to is commonly known as a "revocable," "living", "inter-vivos" or "loving" trust. We simply refer to them as "prepaid probate" as they will often times cost more to create (and fund) than a will. The trust instrument sets forth the distribution plan of the estate.

Upon the death of the person creating the trust (i.e. the Settlor) the successor trustee of the trust administers the trust, much like a personal representative who administers a probate estate, and then distributes the trust assets in accordance with the trust terms.

Under most circumstances, the terms of a trust remain private upon the death of the Settlor and the trustee then in charge of administering the trust distributes the assets of the trust or continues to hold the assets in trust for the purpose established by the Settlor. As with a will, a trust continuing beyond the death of the Settlor can be incorporated into the distribution provisions of the trust.

The advantages of the trust are numerous. All the assets titled in the name of the trust are non-probate assets and are not subject to the jurisdiction of the probate court. The provisions of the trust (which the Settlor may not want known to the public) usually can be kept free from public view and potential intervention by a beneficiary or court. Where assets are in multiple states, the trust can be administered across state lines without the need for multiple court proceedings. If the Settlor becomes incapacitated, it is often easier for the successor trustee to handle the Settlor's financial affairs as a successor trustee rather than as an agent under a power of attorney (a document usually relied on when a "will" estate plan is used). Lastly, there usually is not a need to commence a probate proceeding.

The disadvantage of a trust is it usually takes more work (resulting in a higher cost) to set up your estate plan. It requires monitoring by you as the Settlor and the trustee to insure it is kept up to date (as does a will) and insuring all

your property is constantly within the trust can be burdensome if you are not inclined to pay attention to those types of details. Neither trusts or wills save estate taxes in and of themselves.

Trusts (of the revocable type) are an estate planning tool. They do not shelter your assets from creditors and your assets are still counted for the purposes of qualifying for Medicaid long-term care. One reason to choose a Will plan over a Trust plan is if you may be eligible for long-term care Medicaid in the foreseeable future. Under the Medicaid rules, your home is an exempt asset as long as it is titled in your (or you and your spouse's) name. If it is in a trust, it will be considered an available asset which will most likely cause you to be disqualified for long-term care Medicaid until the home is re-titled into your name. Re-titling a home is not a difficult process, but you are essentially undoing the trust planning, in part. In deciding whether to place your home in a trust or not, remember you never know 100% for sure if you will be needing Medicaid and therefore be subject to the "home in the trust" rule, but you do know 100% you are going to die someday. Take this into consideration when deciding how you should title your home and whether a "will" or "trust" estate plan is best for you. Also, when considering your estate plan, it is essential to review long-term care costs and your plan to pay this cost, if the need arises as it may have an impact on what type of documents are best for you.

How to Decide Which Type of Plan?

So how does one decide the type of plan to use? We advise clients there usually is no right or wrong decision. If a client owns property in multiple states subject to multiple probates or wishes to keep their plan of distribution from

the public eye, then we usually recommend a trust estate plan. If on the other hand, a client would rather not spend as much money now on their estate plan or are not inclined to keep their assets titled into a trust, then we will recommend a will.

Within either a will or trust estate plan, tax savings planning can be incorporated, if needed. At least in our office the cost to create a trust or a will (other than a simple will) is essentially the same. The only difference is with a trust additional time is needed to "fund" the trust. Funding of the trust involves the re-titling of assets which can be anywhere from an hour or two to many hours of our time and a greater cost to the client.

Each client is a bit different, and their specific facts and goals need to be taken into consideration. At our office, we find an estimated 60% of the estate plans we create are trust estate plans. The rest of our clients choose a will estate plan.

CHAPTER 5

ADVANCE DIRECTIVES

5.1 WHAT ABOUT ADVANCE DIRECTIVES? WHAT ARE THEY?

An advance directive refers to a direction given in advance, to a friend, relative or financial institution (in the case of a financial power of attorney), of a person's wishes should they not be able to make either medical or financial decisions on their own. These usually take the form of a medical power of attorney, living will, do-not-resuscitate order, financial power of attorney, or other legal instruments. A person can appoint an individual or entity to make financial or medical decisions for them if they lose capacity. We often advise our clients to appoint successor agents should their initial agent not be able to act so there is some longevity to the documents.

5.2 DO I NEED ADVANCE DIRECTIVES?

Yes! We recommend all our clients execute advance directives. According to the Alzheimer's Association, 1 in 3 seniors will die with (but not necessarily from) some form of Dementia. This means 1/3 of the senior population will need assistance with making financial and medical decisions, at some point in their future. The benefit for signing advance directives is

the ability of appointing the person or entity you would like to make those decisions for you in advance of when you may need them when you have legal capacity to do so and can make a thoughtful decision. Advance directives are your opportunity to ensure you will receive the type of care you desire in your aging years as well as make sure finances are managed by someone you trust.

Additionally, when dealing with long term care planning having an advance directive with gifting and transfer provisions is essential to being able to implement most plans.

5.3 WHAT IF I DO NOT HAVE ADVANCE DIRECTIVES?

If you have not executed advance directives and you lose capacity, it may be necessary to have a court appoint someone to make decisions on your behalf. This process is called a guardianship or conservatorship proceeding. A guardianship is a legal proceeding through which a guardian is appointed to make personal care decisions for an individual. The individual subject to a guardianship is referred to as the "ward." A conservatorship is a legal proceeding where the court appoints a conservator to manage, preserve, and protect an individual's assets. The individual subject to a conservatorship is referred to as the "protected person."

5.4 MEDICAL POWER OF ATTORNEY

The medical power of attorney is one of, if not the most important documents you will sign. This document is usually used at a time when you cannot make your own medical decisions due to a mental or physical impairment.

This directive appoints an agent (and usually one or more alternatives if the primary agent cannot act) to make the medical decision for you. You are asking an agent to literally make life and death decisions for you. You may be asking an agent to "pull the plug" thereby hastening the moment of your death. Do not worry about your assets! Your heirs, in accordance with your estate plan or the plan the state makes for you (if you did not create one yourself) will figure out how to divide up your stuff. With the medical power of attorney, you are talking about your health care and some big medical decisions.

It has been our experience, even with a medical power of attorney appointing a specific individual to make medical decisions for you, the medical provider will not review your document with a microscope to ensure every last directive is followed. Instead, they will try to direct your medical care in such a way they believe is in your best interest, while being sensitive to not implementing care which may be futile. For instance, few doctors will recommend cardiac by-pass surgery for a 95-year-old patient with dementia living in a lock down unit in a nursing home. Make sure the agent you appoint understands your wishes, even though they may be contrary to standard medical care.

It has also been our experience medical providers will attempt to get direction from the patient wherever possible.

They will choose not to rely on an agent, if possible. This is good for you. You want the medical decisions to be made by you and not a third party wherever possible. Right?

But how do you choose your medical agent? One consideration is whether the person is calm in a time of crises. If your agent is highly uncomfortable in a medical setting or unable to make a decision under pressure, that may not be the person for the job. In addition, if someone has opposite views regarding medical procedures than you – again, may not be the best choice for your medical agent. Discussing your decisions with your agent is important so they have a better idea of why you made your decisions.

✦ **Really Important Point:** Something to look for in your medical power of attorney is a HIPAA release. HIPAA is very strict about who can review your medical records. Make sure the person you choose as your agent has the authority to make an informed decision on your behalf.

✦ **Really Important Point:** Regardless of your age, health condition, the frenzy of your pace of life, the cost or any other excuse you can conjure up, understand it is very important to have this document in place.

✦ **Really Important Point:** Beware!!! Some medical facilities (or even your doctors) will place documents in front of you and ask you to sign them. These documents may involve the appointment of an agent under a medical power of attorney (or they may be reffered to as an advance directive). **If you have previously executed a medical power of attorney do not sign this document until you**

have reviewed the consequences of doing so with your estate planning attorney.

This document may "revoke" the prior document or perhaps worse, result in your having two separate, possibly conflicting, documents. If the appointed agents in one or more documents are different, you have likely created problems in what could become a power struggle between family members over who gets to decide your medical decisions.

5.5 FINANCIAL POWER OF ATTORNEY

As is the case with the medical power of attorney an individual may create a financial power of attorney during their lifetime and prior to any disability. The financial power of attorney allows an agent to make financial decisions for you at a time when you are not able to make the decision yourself, perhaps, due to a mental or physical incapacity. A financial power of attorney can also be used to simply enable your agent to make financial decisions for you even though you are not disabled, either mentally or physically.

How should you choose your financial agent? If you are not choosing a professional, then you want someone who is organized and good at finances. For instance, if your son has creditor issues due to non-payment of bills, consider someone else to act on your behalf for financial decisions.

Colorado law (C.R.S. 15-14-701) has adopted the Uniform Power of Attorney Act, which sets out a "form" which may be used. In the form, Colorado has set out certain actions which require the "initials" of the principal in order for the agent to be able to undertake a particular action (C.R.S. 15-14-741). The types of specific authority which must be specifically delegated include the power to make gifts, create or amend a revocable trust previously executed by the principal, changing rights of survivorship, and disclaim an interest a principal may receive in an inheritance to name a few. It is very important to review these powers to make sure you do want to grant them to your agent. They are often times referred to as "hot" powers.

Often, a financial power of attorney becomes out of date. When they are more than 3 to 5 years old, the individual, financial institution, or anyone else relying on document may not want to do so fearing the principal may have changed his or her mind as to who should make financial decisions. Just be aware, this may become an issue. Consider periodically updating your financial power of attorney, as is the case with other advance directives.

✦ **Really Important Point:** We encourage all of our clients to execute a financial power of attorney as part of their estate planning portfolio of documents.

✦ **Really Important Point:** The financial power of attorney, as is the case with all other estate planning documents, must be executed at a time when the principal has mental capacity. We will often see clients call us on behalf of a relative, such as a parent, seeking our assistance in drafting a financial power of attorney. Unfortunately,

many of these calls occur after the point in time when the parent has lost mental capacity. The principal must understand the nature of the document and the consequences of signing it.

5.6 DO NOT RESUSCITATE ORDER

The Do Not Resuscitate Order (DNR) signed by a physician is used in very limited situations (used in our experience primarily in the case of the frail and elderly and terminally ill or a cognitive impaired individual), which tells health care providers not to perform cardiopulmonary resuscitation (CPR). Essentially, it is a statement an individual can make indicating his or her desire not to be resuscitated (through the use of cardiopulmonary resuscitation (CPR)) should the individual's heart stop. The DNR is usually executed in the office of your medical provider, which is commonly your physician. Before executing such a document, you will want to have a conversation with your doctor to ensure the document is what you want.

Under Colorado law, the CPR directive, signed by the individual or patient looks and feels a lot like a DNR without the signature of the physician. Take a look at C.R.S. 15-18.6-101 for the specific statute. It is confusing to say the least, but a directive signed by the physician (as a DNR order in your chart) or a CPR directive signed by you should do the trick. However, if you sign your own CPR it is important you let your health care providers know of the document.

It is important the DNR directive contain identifying information about the individual so an emergency medical service provider can reasonably identify the person.

Identifying information includes name, date of birth, gender, eye and hair color, race or ethnic background, emergency contact information including next of kin, agent under power of attorney and physician.

The Colorado Board of Health has an approved form for a CPR directive which is widely available and includes all the statutory requirements.

✦ **Really Important Point:** Make sure this document meets your goals. Many of our clients are not prepared to execute such a document when they visit with us, as they are still active and prefer to be resuscitated!

5.7 THE LIVING WILL

The use of a "living will" as an advance directive has been approved in Colorado, as part of the Colorado Medical Treatment Decision Act, which can be found at C.R.S. 15-18-101 and thereafter. A bit like the DNR order discussed above in paragraph 5.6 this is a very limited document for a very specific fact pattern. The statute provides an individual may sign "a declaration directing that life-sustaining procedures be withheld or withdrawn if, at some future time, he or she has a terminal condition or is in a persistent vegetative state, and lacks decisional capacity to accept or reject medical or surgical treatment."

This document does not appoint an agent to make this decision for you. In effect, it should be self-executing. This means once you have signed the document and the document is presented to the physician or other healthcare provider and you have a terminal condition and lack decisional capacity then life-sustaining procedures should

be withdrawn. It sounds simple but is often confused. We hear frequently the expression by a client how they have a living will and how they believe that is all they need.

The living will allows you to clarify to your family your wishes regarding life-sustaining procedures and artificial hydration and nutrition. At the time of this decision, you are no longer able to communicate. But this way, the burden of the decision is not on your family – they know what you want.

✦ **Really Important Point:** Most clients execute a living will. This should be executed in conjunction with a medical power of attorney. The medical power of attorney should cover the situation where the principal lacks decisional capacity and may or may not have a terminal condition and thus allows an agent to make the decision as to whether life-sustaining procedures should be withdrawn or withheld. Notwithstanding, we still encourage clients to execute the living will primarily because the healthcare providers are frequently confused, as is the public at large, over the need to have a living will. Rather than trying to convince a healthcare provider a living will is not needed and the agent under the medical power of attorney has the authority to make this decision, it is easier just to prepare both documents.

5.8 THE "MOST" FORM

The Colorado Medical Orders for Scope of Treatment form, commonly referred to as the MOST form is used by providers of medical care (primarily physicians) to document a patient's wishes regarding their end-of-life care. The use of the form is designed to enhance the

patient-centered, and compassionate conversation between patient and his or her physician. In the document, the patient's wishes regarding cardiopulmonary resuscitation (CPR) is noted, along with the level of medical interventions and the use of artificial nutrition desired by the patient.

The MOST form is intended to be easily transferred to and from various healthcare providers enabling them all to be "on the same page" when addressing the patient's wishes. Once signed by the physician, the directives in the MOST form are medical orders and will follow an individual through their continuum of care. It is a summary of the clients wishes and is not intended to replace advance directives such as the medical power of attorney, D-N-R order or living will (discussed elsewhere) but is to be a readily available summary for physicians. The details can be found at C.R.S. 15-18.7-101.

5.9 MISCELLANEOUS OTHER ADVANCE DIRECTIVE FORMS

Dispensing lethal medications. In 2016 Colorado voters approved the Colorado End of Life Options Act (see 25-48-101 et seq). This act establishes a legal framework enabling a competent, terminally ill adult Colorado resident to request and receive a lethal prescription for the purpose of ending his or her life. Taking advantage of this act requires a diagnosis or prognosis of living not more than six months.

The person making the request must have sufficient mental capacity allowing them to make medical decisions. They must, themselves, request this action be taken. The action

cannot be taken by an agent under a medical power of attorney or the guardian of an incapacitated person.

Proxy Decision-making. What if an individual does not have decisional capacity and has no advanced directives? What can be done? The court can intervene through the appointment of a conservatorship and guardianship, or an additional option is found at C.R.S. 15-18.5-101 wherein the Colorado law provides the family can gather themselves up and in effect elect one of them to act as a medical decision-making proxy for the individual who cannot make their own medical decisions. When an individual lacks decisional capacity to provide informed consent for medical care someone needs to do this for them, and this is a good alternative without the necessity of commencing a court proceeding.

5.10 THE ADVANCE DIRECTIVE TRAP --- BEWARE

As mentioned above beware of those wanting to do good, but unintentionally messing up your prior estate plan. If you have already executed a medical power of attorney, you do not need to sign another one unless you want to make changes. **Do not, and we repeat, do not sign a subsequent document which will create a conflict with prior executed documents. Just say no!**

There are major health care providers in Colorado and on the Western Slope, in conjunction with area hospitals and physicians who have “crafted” a “form” which appoints an agent to make medical decisions for you if you cannot

make them for yourself. Although done with good intentions, this document does not, on its face, revoke any prior medical power of attorney you may have executed and potentially could create a situation where you have two different agents making competing decisions for you.

Result: The courts may need to be involved to sort it out. This is not something you want or have time to do if you are unable to make your own decisions.

✦ **Really Important Point:** Do not sign documents placed in front of you without asking what it is you are signing and insuring the document will not revoke or create a conflict with a prior document you may have signed. **Review the document with your Attorney, if time permits, to insure it won't conflict with your existing documents.**

5.11 WHAT IF AN INDIVIDUAL DOESN'T HAVE ANY ADVANCE DIRECTIVES AND HAS LOST THE ABILITY TO MANAGE THEIR FINANCIAL AFFAIRS OR MAKE MEDICAL DECISIONS FOR THEMSELVES?

Although it is not an ideal path an individual's family and loved ones must follow, there is a solution to the dilemma the individual has left them in by not being proactive and getting their affairs in order. The path, as mentioned above and discussed in detail below, is one of the paths which could be followed. It is the commencement of a guardianship or conservatorship court proceeding.

In a guardianship proceeding the court will usually appoint an individual to make healthcare decisions for an individual who cannot make them for themselves. In the case of a conservatorship, the court will appoint an individual or sometimes a professional fiduciary, such as a trust department or bank, to assist the person subject to the proceeding and making financial decisions. Financial decisions can be as simple as bill paying or as complex as investment decisions.

A detailed analysis and description of the guardianship and conservatorship processes are beyond the scope of this book at this time. In short, the process can be emotionally charged and expensive if the competing interests starts fighting. The fighting usually centers around either the person to be protected resisting an appointment, believing they are just fine and need no help or the individuals who squabble over who gets to be the person making the medical and financial decisions for the person to be protected.

Once the court decides who to appoint the work begins for both the guardian and/or the conservator. Annual reports need to be filed with the court in the case of a conservatorship. Both the guardian and conservator are required to act in the best interest of the person to be protected and no self-dealing is allowed.

If the person needing protection has executed advance directives, including a medical and financial power of attorney, then there should not be a need for a court proceeding. However, even if such documents are put in place there is no guarantee individuals with good intentions

won't commence the guardianship and conservatorship proceeding.

✦ **Really Important Point**: Execute advance directives to reduce the likelihood a guardianship and conservatorship proceeding may be started. At a minimum, the courts will likely look at who you have appointed in your advance directives to determine who the court should appoint as your conservator and guardian. They may be the same person acting in both roles or they can be different parties. It is also possible to have multiple persons in the same role acting as co-conservators and co-guardians.

✦ **Really Important Point:** Even if you have done everything you thought you should do in advance unfortunately the "train can still go off the rails." If the agents you have appointed (or those whom you have not appointed) decide to fight over your medical and financial decision making it is still possible you (although you may not be aware it is happening) or they can still ask a court to intervene through the appointment of a guardian or conservator. What is in your best interest can still be contested if family or friends start fighting over you or your money.

5.12 TOP 10 POINTS TO REMEMBER ABOUT ADVANCE DIRECTIVES.

1. A financial power of attorney allows you to choose the person who can pay your bills and manage your assets if you become incapacitated. This person is called your "financial

agent." Without a financial power of attorney, your spouse or heirs may not have any access to your financial assets if you become disabled.

2. A financial power of attorney can avoid the need for a costly and possibly contentious conservatorship court proceeding to protect your assets if you become incapacitated.
3. A financial power of attorney is usually a better choice than naming your adult children or friends as joint signors on your bank accounts.
4. It is very important to choose your agent carefully. A financial power of attorney can be misused by an unscrupulous agent.
5. A medical power of attorney allows you to tell your doctor who will make decisions about your health care, including hospital, hospice, and nursing home care, if you are not able to make those decisions yourself. This person is called your "medical agent."
6. If you have wishes about organ or tissue donation, you can express those wishes in your medical power of attorney.
7. A medical power of attorney can specify religious or other beliefs that guide your medical decision making.
8. A medical power of attorney can avoid the need for an expensive and time-consuming guardianship court proceeding if you become incapacitated.
9. An advance medical directive allows you to express your values and wishes with regard to

life-prolonging medical treatment such as ventilators, artificial nutrition, artificial hydration, and dialysis.

10. A living will is another type of medical directive. Medical directives and living wills can guide and support your medical agent in deciding what kind of care you would want to receive.

5.13 WHAT ABOUT CULTURAL/RELIGIOUS PREFERENCES AND ISSUES?

Individuals have cultural and religious preferences and biases which may need to be taken into account when drafting their advance directives. The blanket (or boilerplate) form of advance directive may not meet their cultural preferences. Some of the comments below are not inclusive of all the beliefs which may be taken into consideration in drafting advance directives.

For example:

Buddhism: For Buddhists, life is a continuing cycle of death and rebirth. There is no concept of life after death or heaven as is the case with the Christian belief. For a Buddhist having the dying individual engaged at the end of life with caregivers is important. In Buddhism, you want to die in a conscious and calm state to enable the dying to become enlightened. A Buddhist may want to ask an agent under a power of attorney to do medically what might enhance the end of life experience.

Jehovah's Witnesses: In the view of members of the Jehovah's witness church blood transfusions are forbidden.

It is believed anyone who ingests blood products, even their own, is eating blood which is forbidden by the Bible. Anyone adhering to this faith will likely want to prohibit an agent under a medical power of attorney from consenting to blood transfusions.

The Church of Jesus Christ of Latter-Day Saints (Mormons): As is the case with many religions, Mormons believe in the sanctity of life. Consequently, they do not believe in physician assisted suicide. It may be necessary to include in their advance directive a prohibition against physician assisted suicide being consented to by an agent acting under a medical power of attorney.

United Methodist: In this church, the idea of suffering pain only to prolong life is not necessary or a precursor to be accepted by God.

✦ **Really Important Point:** The belief system regarding medical care toward the end of life varies amongst the different religions. The reason for discussing this is to point out the need to bring any special provisions or requests regarding the end of life to the attention of the drafting attorney. Remember, this is your life and your end-of-life so make sure it is handled the way you want it handled.

CHAPTER 6

FIDUCIARIES

6.1 WHAT IS A FIDUCIARY?

Simply put, a fiduciary is a person or entity acting in a special relationship to an individual. For instance, if you were to name an individual to handle your estate, commonly referred to as a personal representative, this person is a type of a fiduciary. Another example might be a person you appoint to handle your financial affairs under a power of attorney. Also, a trustee of a trust who is acting on behalf of the trust beneficiaries. It is very important to understand the duties of a fiduciary in the role the fiduciary may play in your estate plan.

Colorado law defines a fiduciary (see C.R.S. 15-1-103) to include, but not be limited to, a trustee under any trust, executor, administrator, personal representative, guardian, conservator, agent, or any other person acting in a fiduciary capacity for any person, trust, or estate. As you complete your estate plan, make sure the individuals you appoint to handle your financial affairs and act as an agent to make medical decisions is the person you want to have help you and are willing to do so. These named persons are your fiduciaries.

6.2 WHAT DUTY DOES A FIDUCIARY OWE AND TO WHOM IS THE DUTY OWED?

According to the Wex Legal Dictionary: "When someone

has a fiduciary duty to someone else, the person with the duty must act in a way that will benefit someone else, usually financially."

Furthermore, "[t]he person who has a fiduciary duty is called the fiduciary, and the person to whom the duty is owed is called the principal or the beneficiary. If the fiduciary breaches the fiduciary duties, he or she would need to account for the ill-gotten profit. The beneficiaries are typically entitled to damages.

In defining specific legal duties, the Colorado statutes set forth requirements on investments by a fiduciary. The statute provides a fiduciary shall "exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of the property of another, not in regard to speculation but in regard to the permanent disposition of funds, considering the probable income as well as the probable safety of capital. Being a fiduciary carry with it significant responsibilities to do the right thing when it comes to the investment of assets of the principal.

The breach of a duty to a principal by a fiduciary is a cause of action brought before a court. Such actions are becoming more frequent in our litigious society.

✦ **Really Important Point:** If you are a fiduciary make sure you act properly and honestly, rely on honest and competent advisers to help you and make sure you properly account for and document your decisions. Keep good books is another hallmark of a successful fiduciary. Last, but not least, never, never self deal or co-mingle your assets with those of the principal without professional advice.

6.3 WHO SHOULD YOU PICK AS A FIDUCIARY TO HELP YOU, IF YOU NEED HELP?

Most clients will choose an individual who is a family member to help them make their medical and financial decisions should they not be able to make those decisions themselves. They will also usually name a family member to handle their estate. Naming a family member is not always the best choice. Many financial institutions are willing to act as a fiduciary in helping those who cannot act themselves. Yes, financial institutions will charge a reasonable fee. Individuals are entitled to charge a reasonable fee as well.

On some occasions, more than one person will be named to act on behalf of a principal. This can create problems if the multiple fiduciaries are not able to agree on issues. It is a common practice to name an initial fiduciary, and a successor fiduciary in the event the initial fiduciary is unable to act. Also, it is not necessary to name the same fiduciary throughout all your documents. You may want to name someone with a financial background to act as your agent under a financial power of attorney or perhaps your successor trustee of your trust but want to name a different person to assist you with medical type decisions.

Naming one child as the co-owner or beneficiary of a particular asset does not make that child a fiduciary over the asset or the balance of your estate. The child you named is not required to share the assets equally with their siblings. Rather than causing possible family strife, name a fiduciary that you trust who is required to carry out your wishes and avoid using non-probate transfers, such as joint

tenancy or payable on death accounts to avoid the estate administrative process.

In considering who should be your personal representative, it does not have to be oldest child. It should be someone responsible and able to handle and resolve conflict. This is also not the time to try to get two siblings to get along by naming them co-personal representatives. If your children did not agree during your lifetime, they are more than likely to disagree when you are not here to tell them to "cut it out." Finally, if you have co-personal representatives who can't agree on an administrative issue it can cause a delay in the administration and substantially increase the cost.

CHAPTER 7

BLENDED FAMILIES

7.1 WHAT IS A BLENDED FAMILY?

Many of our clients are involved in a second or later marriage. Often one or both spouses have children from their first marriage. Sometimes they have additional children together. These complex families are often called "blended families." In many blended families, the distribution of assets upon the death of the second to die of the couple works without a hitch and there is no conflict amongst the family members. However, this is not always the case.

7.2 LIES WE OFTEN TELL OURSELVES IN BLENDED FAMILIES

My spouse, if he or she survives me, will do "the right thing" after I die and share the assets he or she owns with my children.

As time passes after the death of a spouse in a second marriage the survivor and the children of the survivor tend to lose contact with the children of the first to die and naturally begin to think about passing along wealth to the survivor's own blood line. It is not uncommon for a surviving spouse to change his/her estate plan, with negative impacts on the children and grandchildren of the

first to die.

Additionally, there is also the possibility the surviving spouse will remarry again. If this happens the new spouse and his/her children can be added to the complex mix. Now, that is a mess!

My kids won't fight over the money if I leave it all to my spouse. They have told me they don't care what I do with my money.

Although your kids will tell you it is not about the money, we find children often fight with their stepparents over money as well as personal property such as household goods, family heirlooms and jewelry. Sometimes even a good relationship with a stepparent can deteriorate over time. A distribution to a stepparent is often viewed as a disinheritance.

I don't need to redo my estate plan. Everyone knows what I want to happen.

If you have a will or trust drawn up before your marriage, get it updated. If you don't have an estate plan at all—Colorado does not recognize verbal wills, so get it in writing. Dying without an updated will or a trust that outlines exactly how you wish to distribute your estate assets is risky. Put your plan in place to ensure your spouse and your children from a prior relationship receive what you want them to receive.

7.3 HOW TO PLAN FOR SUCCESS:

Pre-nuptial or marital agreements.

Marital agreements are one of the best ways to avoid a family conflict. A well-prepared agreement will prevent a

surviving spouse electing against the will of the first to die as well as waive certain statutory rights the survivor may have against the estate of the first to die. Such agreements can be used to define the rules which everyone must adhere to in the event of death (or in the event of divorce). Even after you are married you can enter into such an agreement (a marital agreement) and they don't have to be done in a confrontational manner. They work best when they protect the interests of both parties.

To enter into such an agreement and make it valid it is important each party is represented by separate legal counsel and there must be full disclosure of the assets owned by each party.

Just because you have such an agreement, it does not mean you cannot leave more to the surviving spouse. The agreement simply sets forth the minimum required distributions.

Leave assets to the surviving spouse in trust and not outright.

You can direct a portion or all of your estate to a trust giving your surviving spouse a right to the income and principal on terms you select ensuring whatever is left in the trust then passes to your children. Trusts are very flexible. This is a great way to protect your spouse and your kids. A trust can create security for your spouse and ensure the eventual disposition of your estate is made in accordance with your wishes.

Avoid certain non-probate accounts.

If you own assets in joint tenancy, upon death of either

spouse the assets (which could be a residence or joint bank account) will pass to the surviving joint tenant (the surviving spouse) and the terms of your will or trust may be defeated. This applies in the case of beneficiary designations for life insurance and retirement accounts as well. Be careful when using non-probate account transfers!

If you are thinking about a second marriage, give consideration to not getting married and instead using a co-habitation or "beneficiary designation" agreement.

These types of arrangements are a good option for many couples. With such agreements, you can set forth the obligations each party has toward the expenses of the "household", delineate the marital status to avoid "common law" marriage allegations, and make provisions regarding distributions upon death. Beneficiary designation agreements allow a couple to sign an agreement setting forth their desires regarding beneficiary designations on retirement accounts, life insurance plans, annuities, etc. and also a variety of rights which non-married couples did not previously have. The new rights which can be designated include the right to visit in hospitals or nursing homes, direct the disposition of last remains and others.

Communicate with your children and heirs as to the expectations you have for them and why the estate plan you have may provide for a new spouse.

This is a good way to ensure your heirs view your plan as being just that----- your plan and not the plan of your spouse or stepchildren. Explaining the plan and your intentions will go a long way to ensure your family will follow your wishes even if they don’t like it.

Include a "no contest" clause.

Such a clause is intended to avoid a contest of your written estate plan by disinheriting anyone who contests the plan you have put in place.

Bottom Line– Put your plan in place now to document and safeguard your wishes, so you can be certain the objectives of your estate plan are fulfilled. Don't rely on your old will to handle these new (and often wonderful!) complications.

CHAPTER 8

SPECIALIZED PLANNING

8.1 PET TRUST

We receive numerous requests regarding the continued care of animals after a client's death. For many, their animals are their family and they wish to provide for them as they would other intended "two legged" or charitable beneficiaries of their estate.

Colorado legislature came to the rescue over a decade ago to provide a solution to the problem. Colorado law currently allows for the creation of a pet trust. At C.R.S. 15-11-901 et.seq., the procedures to create a "pet trust" are set forth. As part of your estate plan you can create a trust that will care for the special animal in your life.

How do they work? An example:

One of our clients established a trust for Romeo, a highly skilled horse in equestrian activities. As part of this particular client's estate plan (which uses a revocable trust) a trust will be established on the client's death holding a sum of money to care for Romeo. The money to be held in the trust will be used for training and boarding the horse as well as for veterinarian expenses and other ordinary expenses of the animal. After a set number of years (during which the horse will be trained), he is to be sold to a loving family who will care for the horse. The client's goal is to

insure, should the client die with Romeo not sufficiently trained, Romeo meets his maximum potential, he continues his training and eventually be cared for by a loving family.

Whether the animal is a highly trained (and expensive) animal such as Romeo, a house pet or group of pets, the owner of those animals may wish to formalize the arrangement within their estate plan for the animal's care. Often clients assure us the administrator of their estate will handle the disposition of their animal just fine having been assured the animal would be cared for by family or friends. Most often this works. To ensure it works, and the pet is cared for, a more formal arrangement such as a pet trust may be called for.

How do I incorporate such a trust into my estate plan?

The Pet Trust can be incorporated into your existing will or trust or can be a separate "standalone" document. It can set forth who is to care for the pet, the amount of funds set aside for the care of the animal, the disposition of the pet's remains upon death, the choice of care providers for the pet, and the compensation of the custodian. Furthermore, an incentive for the care of the pet can be provided by a "longevity" clause. In other words, a payment can be made to the custodian for so long as the pet is alive. Upon death, the payment ceases. This tends to increase the attentiveness of the caregiver toward the pet.

Furthermore, a "watchdog" (no pun intended) can also be appointed to ensure the custodian is properly caring for the pet. The sky is the limit regarding the type of trust and the type of provisions which can be contained therein.

Do you know of any resources to review the use of a Pet Trust?

There are many resources available to review Pet Trusts, how they work and if they would be right for you. Some of the websites have legal forms but be careful in using them as the forms need to be incorporated into or coordinated with your existing estate planning documents.

Professor Gerry W. Beyer a professor at Texas Tech has a wonderful website (www.professorbeyer.com) providing answers to frequently asked questions about the use of pet trusts. Anyone desiring to establish a pet trust may want to visit his site, which also contains links to articles on the subject and state statutes.

If you have a special pet in your life, make sure he or she is properly provided for upon your death by incorporating a pet trust into your estate plan.

8.2 OUTRIGHT DISTRIBUTIONS VERSUS DISTRIBUTIONS IN TRUST

In each estate plan, the decision must be made whether the recipient of the inheritance is to receive their inheritance outright or if it is to be held for the recipient's benefit in some type of trust arrangement. In looking over the last decade, it seems to us leaving assets outright to an heir has become much riskier as divorces, lawsuits and financial hardship have fallen on many Americans. Additionally, taxes are becoming an even greater threat to many as inheritances are reduced by estate taxes over one or more

generations. Here are a few statistics and thoughts worth pondering:

The Divorce rates:

The American Psychological Association claims 40 to 50% of first marriages end in divorce and the percentage is even higher in second marriages. In second marriages it has been reported 67% end up in divorce and in 3rd marriages the number is 74%. Divorce does seem to be prevalent in our society.

Although an inheritance generally is treated as separate property of a married individual and not subject to division in a divorce, the appreciation on the inheritance from the date received to the date of a divorce usually is considered marital property and divisible between the spouses. Furthermore, inherited assets tend to get commingled and lose their status as separate assets.

Marriage trends:

It is also reported there are fewer marriages as a percentage of the population. Perhaps the fear of having to unwind a marriage discourages folks from ever getting married in the first place. Instead, couples are more likely to live together and (if they are wise) will enter into a co-habitation agreement setting forth their understanding of their financial commitments to the relationship and assuring they are not considered married in the event of the death or an attempted divorce of a member of the union.

Bankruptcy statistics:

For the period ending September 30, 2020, the Administrative Office of the U.S. Courts reports there were

612,561 total bankruptcy filings of which 22,391 were business related and 590,170 (96.3% of the total) were for individuals. Leaving an inheritance to an heir with financial woes may help the heir get out of their troubles but may also simply compound the problem by empowering the heir to continue with his or her financial bad habits. The inheritance may end up simply paying for past indiscretions and not really creating a situation where the heir gets a fresh start.

Civil lawsuits:

I believe we can all agree, we live in a litigious society. If an heir is sued, and if the claimant is successful, the results can be devastating in many instances. If there is insurance coverage the insurance may cover the liability and defense cost, but what happens if there is not sufficient coverage?

Americans with disabilities:

Many individuals rely on asset-based assistance, such as Supplemental Security Income (SSI) and Medicaid. The number of individuals relying on government programs is substantial. According to the Social Security Administration, one in four 20-year-olds will become disabled prior to reaching retirement age. CDC (Centers for Disease Control and Prevention) claims one in four U.S. adults have a disability impacting their activities. This number represents approximately 61 million Americans. According to CDC "[t]he most common disability type, mobility, affects 1 in 7 adults. With age, disability becomes more common, affecting about 2 in 5 adults age 65 and older.

Between lawsuits from creditors of all types, as well as divorces, any inheritance you consider leaving to an heir is

subject to the risk of being depleted, either voluntarily or involuntarily by the heir.

In more and more estate plans, we are recommending the assets not be distributed to the heir outright, but instead leaving all or a large portion of any distribution to an heir in trust.

What does a distribution in a trust mean?

A trust is a legal arrangement wherein a trustee (who is an individual or financial institution) manages the assets for the trust beneficiary or beneficiaries and distributes them in accordance with the wishes of the trust creator (sometimes referred to as the Settlor). The creator can place whatever restrictions he or she wishes to make regarding distributions from the trust.

There are a multitude of types of trusts to choose from depending upon your circumstances. Here are a few types:

- Trust with inherited assets that are established to avoid having the inheritance considered as an available resource for public benefit purposes (special needs trust).
- Trust used to help manage assets for those recipients who are not financially savvy and perhaps subject to being easily influenced by “friends” or business associates (asset protection trusts, and are described below in 8.3).
- Trusts established to protect assets from being subject to future estate taxes (Dynasty Trust).
- Life insurance trust (ILIT) used to keep insurance proceeds from being included in the decedent’s estate

as well as the future beneficiary's estate.

The type of trust you may wish to create for your heir or heirs depends upon his or her needs. An estate does not have to meet a threshold size for qualifying to set up a trust. We have established trusts to hold assets valued at under $5,000, with a family member as a trustee to protect assets for the heir and to ensure the assets are being used as the trust creator wishes.

***Bottom line*:** Before you decide to distribute assets outright to any heir, review the types of trusts you could create to hold the inherited assets. It is important to select the most appropriate type of trust to ensure your wishes are fulfilled and the inherited assets are not dissipated against your wishes, either voluntarily or involuntarily by your heir.

8.3 ASSET PROTECTION TRUSTS

According to the Oxford University Press, a *Trust* is "an arrangement whereby a person (a trustee) is made the nominal owner of property to be held or used for the benefit of one or more others." In the practice of law there are numerous types of trusts which are commonly used to meet a variety of the needs of a client. For example, you probably have heard of the revocable trust, irrevocable life insurance trust (ILIT), grantor retained annuity trust (GRAT), special needs trust (SNT), qualified personal residence trust (QPRT), dynasty trust and the charitable remainder trust (CRT) to name a few.

What is an Asset Protection Trust?

An asset protection trust (APT), like the other specialty trusts, is designed to fit a particular need for an individual. An individual who wishes to use an APT as part of their planning does so intending to insulate the assets within the trust from the claims of creditors of their intended heirs. In this day and age, it seems litigation is the answer to so many problems facing individuals and their heirs. As we lawyers know, a lawsuit is easy to start, but difficult to finish or extricate yourself from.

The APT is a technique which can be used to discourage creditors from seeking recovery of a judgment from the assets within the trust. Furthermore, if properly designed, an APT can protect the trust assets from claims of spouses and other dependents.

To understand the structure of an APT an individual must first understand what it is not. Except in very limited circumstances, trusts are not a way for an individual to protect their own assets from their own creditors [2]. Such trusts are commonly referred to as self-settled asset protection trusts. Generally, the law prohibits an individual from transferring assets either outright or in trust to "hinder, delay or defraud a creditor". If an individual believes a creditor might be seeking a recovery from them, it is probably too late to transfer assets in hopes of protecting them. This APT is not about the protection of an individual's assets from their creditors. The APT we are discussing is one established by an individual for the benefit of a third party, such as an heir.

Every rule has its exceptions, or so it seems. It is possible

to transfer assets to a trust and shelter those assets from claims of the transferor's creditors in the situation of public benefit planning. Two types of trusts commonly used in the area of public benefit law are referred to as the d4a trust and the pooled trust. The authority to create these types of trusts are created by Federal law and are designed to protect assets for individuals with special needs and seeking public benefit assistance generally through the Medicaid program. Also, there are offshore trusts and domestic asset protection trusts allowed in certain states (not Colorado) which can be utilized to shelter assets. A discussion of these types of trusts is beyond the scope of this book.

The APT is about protecting inherited assets from the heir's creditors. It is not about protecting an individual's assets from their creditors. Let's assume an individual's heirs are their children. The APT is designed to protect those assets once they are inherited by the children from the parent. The APT can be presently funded with assets a parent generation gifts to their children during the parent or parents' lifetime. It can also be funded at death. Many individuals create the APT as part of their estate plan and then fund it upon their death with their assets. The parent's estate pours over into the trust when the parent or parents are both deceased.

Case Study 1: Let's take John and Jane Doe, who have three children, Able, Ben and Cathy. John and Jane have a modest estate of around $600,000. Their estate plan, through the use of a will or revocable trust, provides for their estate to be divided equally between their children, Able, Ben and Cathy. As a small business owner, Able has creditor problems and probably always will. Ben on the other hand, is disabled, and has trouble keeping a job. He is

not on public benefits but may be in the future. Cathy is married to a highly paid professional and money woes are not on the horizon. The marriage of Cathy is on the rocks and always has been and she may end up being the sole supporter of her two children, your grandchildren. On the other hand, her marriage may stay intact, and if so, she and her husband are likely to have a taxable estate.

How does an APT help John and Jane? First, let's look at the option of leaving their estate out right to Able, Ben and Cathy. If Able receives outright $200,000 as an inheritance, depending upon the way in which the business is organized, his creditors will likely be able to reach the inheritance to satisfy the claims of his business. In the case of Ben, although he has no current creditors, it is likely he will in the future as he turns to the safety net of public benefits to provide for his food and shelter.

In the case of Cathy, an inheritance itself would not be considered marital property (assuming she doesn't comingle her inheritance with marital assets), but the growth in the value of the asset could be considered a marital asset and subject to division in a divorce court. If Cathy and her husband stay married the value of the inherited assets would be subject to estate tax and the marginal rate on estate taxes in 2021 is 40%. Assuming any inheritance would be taxable along with their other assets, the additional $200,000 inheritance would potentially create an $80,000 additional estate tax on the death of Cathy and her husband.

If John and Jane were to transfer the inheritance to be received by each of their children to an APT for their benefit, rather than giving the inheritance outright to their

children, the trust would limit their access to the funds within the trust. In fact, it is important to note their interest in the trust is not intended to be a "property interest" at all. Only if you have a property interest is a creditor, including a spouse, able to reach it to satisfy any claims they may have to marital property.

To accomplish its goals of insulating the assets within the trust from the claims of creditors, including spouses and taxing authorities, the trust must be designed with very special limitations. More specifically, the trust must be designed as a fully discretionary trust. This requires any distributions made from the trust to be approved by a totally independent person who is a co-distribution trustee along with the trust beneficiary or beneficiaries. (The independent person/trustee can be a close friend). Although the trust beneficiary can be the management trustee in charge of all investment decisions it is important the trust beneficiary is not able to control the distributions based on any type of ascertainable or enforceable standard.

How can I provide flexibility with the APT to plan for future changes?

To provide flexibility in the trust it is important to appoint a trust protector to be able to make technical changes to the trust. The trust protector must also be an independent person who is not related or subordinate to the interests of the trust beneficiary. As an additional safeguard, the trust is designed to have a trustee remover and appointer able to provide for continuity of management of the trust assets. The same person can wear many hats!

John and Jane will likely want to have a separate trust for each child which provides for each child to be the

management trustee to manage the trust assets but have an independent party or institution act as the co-distribution trustee along with the trust beneficiary child and as the trust protector. Should any creditor try to reach the assets of the trusts established for the benefit of Able, Ben or Cathy, the distribution trustee would simply say no to any requests for payment or satisfaction of a creditor claim.

Case Study 2: Fred, who is 83 years old, managed to accumulate an estate of over $14 million. Additionally, his only child, Freida, is a specialist physician and has her own estate in excess of $12 million. Freida has two children and intends on leaving her estate to those children.
The problem is both Fred and Freida have taxable estates. If Fred leaves his estate to his daughter Freida, and she dies with a $15 million estate of her own, her estate will be taxed at a 40% tax rate over and above the exclusion amount available at the time of her death. Currently, for decedents dying in 2021 the exclusion amount is 11,700,000.

Through the creation of an APT, to be funded at his death, Fred can place his entire estate into the trust and provide asset protection benefits for Freida and her children. Furthermore, the trust does not have to be funded until the death of Fred. It can simply be standing by and his current estate plan can pour his assets into the trust upon his death. The trust can provide for a portion of the trust assets to be removed from ever being subject to the estate tax in the future by allowing the trustee to allocate a portion of the distribution by Fred to be exempt from the generation-skipping tax and the estate tax for the benefit of Freida and her children.

Who should consider the use of an APT?

Almost anyone, really. If you have an estate and you want to leave it to individual heirs, as opposed to a charitable entity, you have the choice of leaving the inheritance outright to the heir or leaving it in trust. Leaving it in trust can still protect the assets to be used for the benefit of the heir, subject to the restrictions contained within the APT. Almost any value of inherited assets can be considered for placement into an APT. If you choose to leave the inheritance you plan to leave to an heir in trust, a trust other than an APT may be the better choice depending upon your circumstances and requires careful consideration.

8.4 SPECIAL NEEDS TRUSTS

Planning for heirs with special needs takes a great amount of care and detail to ensure the plan does not negatively affect the heir yet works in conjunction with your goals and their needs.

Who are Special Needs heirs?

Special needs heirs, as the term is commonly used, generally include persons with physical and/or mental disabilities.

Why do they Need Protection?

Often heirs with special needs require assistance with managing their assets, deciding when distributions should be made, and in many cases ensuring the heir maintains public benefits, usually through the Medicaid or supplemental security income (SSI) program.

What type of Special Needs Trusts are Available?

A third party (such as a parent, sibling or grandparent) may set up such a trust for the disabled individual. Generally, this type of trust provides for a trustee to make distributions for the benefit of the trust beneficiary on terms established by the creator of the trust. To enable the trust beneficiary to receive public benefits, careful drafting of the trust is required. The trustee is usually given very broad (and discretionary) powers to make distributions to the trust beneficiary for his or her special needs.

Another type of trust which can be used is a "self-settled" special needs trust. This type of trust is usually used in the circumstance where a disabled person receives an inheritance or personal injury settlement and wants to preserve his or her public benefits by transferring the inheritance or settlement to a trust, which is not considered an available asset. These types of self-settled trusts are sometimes referred to as "d4A" trusts.

Both kinds of trusts are often referred to as a SNT. They can from time to time be referred to as a "supplemental needs trust" as well.

What type of assets can be held in a Special Needs Trust?

The options are really unlimited. Real estate, stocks, bonds and life insurance are all possible options. Selecting assets to be placed into the trust does require planning, particularly a residence in which the beneficiary is to reside.

Are there any restrictions on distributions to maintain the beneficiary's public benefits?

Distributions can be made to supplement the needs of the trust beneficiary, other than for their food or shelter (this is where the use of a house in a trust gets tricky!). The types of distributions which won't impact eligibility include, but are not limited to, transportation to see relatives, counseling, certain types of household personal property, tutors, and other "luxury" type items.

8.5 DIGITAL ASSETS

How the times have changed! When you think of the way we used to pay our bills, invest our money, monitor our brokerage accounts, view our news, communicate with others, store photos and writings, you have to wonder how we were able to do all of these things in the past. Remember when we used to pay bills by writing a check. No doubt most people still write an occasional check, but their usage is declining. A bit of an exaggeration, but we can almost transfer all our wealth to a third party, intentionally or not, with a couple of keystrokes. Scary!

We now use online banking and investing, as well as have on-line access to social media, such as Facebook and LinkedIn and others where we are able to communicate with old and new friends. What about writing a letter to a loved one? Who would have thought of texting and e-mail? Of course, photo albums are now almost extinct.

Look how shopping has changed. We seem to be avoiding

the malls and instead are frequenting a variety of electronic shopping websites such as eBay and Amazon. Who needs to physically travel to J.C. Penny's or Target to buy a clothing item anymore? We just go to our online account and order it from there.

We are moving to a world where we are no longer writing checks, receiving bank or investment account statements, or keeping photo and video images. All of this has been "digitized". These items are no more than electronic "digits". The digit itself might be the cash in the bank, the photo image stored on your phone, your investment account statement or a social media account with text you have written.

Are digits really an asset and if so, what are they worth and how do you need to plan for them? Believe it or not you do really need to plan for access to your digital assets. Let's look at digital art, which is defined by Wikipedia as follows:

"Digital art is an artistic work or practice that uses digital technology as part of the creative or presentation process. Since the 1960s, various names have been used to describe the process, including computer art and multimedia art. Digital art is itself placed under the larger umbrella term new media art."

What is digital art worth. Well, it can be worth a lot. Several weeks ago a piece of NFT (a or non-fungible token), meaning it is a unique digital file on the blockchain. It sold for nearly $70 million dollars. Yikes. The point is there is potential value in digital art.

Let's look at a simple online bank account, where bills are paid electronically, deposits (such as social security) are made automatically, and balances can be tracked on the bank or other financial institutions (we will use the term bank) website. With a key stroke, you can transfer the entire account – to a friend or foe!

First, the money in the bank is yours and the bank owes it to you. You can physically walk into the bank and request they pay you the balance in hard cold cash. Cash is not a "digit" and has real value to you and your heirs. It is the real deal.

There is value in online banking and as you know to conduct bank business online you need a username and password. Once you (or a bad guy) access your bank account you can transfer money to almost anyone instantaneous. One can argue the username and password have value as it is the key to your bank balance.

When you become mentally and physically disabled and cannot access the bank account the agent you have appointed under your financial power of attorney should be able to access your bank account. In the old days, the agent would have to get his or her name placed on the bank account and the signature collected by the bank. It can still be done this way, but with online banking all the agent needs is your username and password and "bill pay" will do the rest. There is no need to go to the bank. In fact, the bank does not even know you are disabled like they would in the non-digitized world.

Imagine taking a photo of a check written from you account and depositing the check into an account of a third party

(not an account in your name or one you even own). Instead it is deposited into an account owned by a third party or entity. It happens every day.

When you die, you bank and investment accounts supposed to be frozen until the personal representative of your estate is appointed to act. Once appointed the personal representative contacts the the bank or financial institution to set up an estate checking or investment account. The agent under the power of attorney no longer has the power to act as a power of attorney terminates on the moment of your death. With an online account and the bank not knowing of your death, anyone with access to the digital account can still keep on transacting business whether they are your personal representative or not. In many cases this may be OK, but in others the account could be cleaned out by someone without good intentions.

What about your other digits, such as social media accounts, club memberships, shopping sites, credit card accounts and other digitized assets? Until your disability or death is known whoever has access to your account (knowing your username and password) can access the account assuming your identity.

In 2016 the Colorado legislature passed, and the Colorado Governor signed the Revised Uniform Fiduciary Access to **Digital Assets** Act (the "Act"). In the Act (CRS 15-1-1501) a digital asset is defined as "an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability, unless the asset or liability is itself an electronic record. So, let's go back to our bank account. The money in the bank is not a digital asset, but the electronic record—bank statement, username,

password, access to the account balance using the bank website (all would seemingly be an electronic record) and would be considered to be a digital asset and its use would be governed by the Act.

The Act sets out the rules to be followed by an agent under a power of attorney, conservators, Trustees and for a personal representative at the death of the account holder. It sets out the rules to be followed by the custodian of the account (such as a bank, E-bay, Amazon, etc.). With each of the accounts there is usually a terms-of-service agreement, which the user must sign. Remember, the little box you must check and agree to all of the custodian's terms. As a practical matter, everyone checks the box and are therefore subject to the terms of the agreement. The Act does not impair the custodian's right under this agreement.

The Act does allow an individual to incorporate into their power of attorney, trust and will specific authority of your agent over the content of your electronic communication, as well as access and use of the account.

✦ **Really Important Point:** Any document (such as a power of attorney, trust or will executed prior to Act should probably be updated to give the authority to your appropriate fiduciaries legal access to your digital assets. Make sure you have included in your power of attorney specific authority of the agent you have appointed to access and use your digital information either immediately or after a period of disability. In the power of attorney you may want to give the agent authority to (1) access, use and take control of your digital devices; (2) access, modify, delete, control, transfer and otherwise deal with your digital assets (meaning an electronic record you have a right or interest

in), including but not limited to e-mails, documents, images, audio, video, software licenses, domain registrations, and similar digital files; (3) to access, modify, delete, control, transfer and otherwise deal with your digital accounts, including but not limited to e-mail accounts, social network accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts which currently exist or may exist as technology develops.

What happens under the Act if you die? The Act sets out the authorities granted to a personal representative and successor trustee of any trust established by you for your benefit. You should probably change your will and any trust (such as a revocable trust, which became irrevocable upon your death) to empower your personal representative and successor trustee to access those digital accounts.

In our office, we will try to help pave the way for your fiduciaries to be able to access your accounts should they need to do so by including the necessary provisions in your estate planning documents and furthermore help you organize your usernames and passwords --- **at least for the documents executed after August 10, 2016.**

8.6 WHEN CAN I RETIRE? WHAT ARE COMMON MISTAKES TO AVOID

Q: When can I afford financially to retire? I am tired!

A: That is a question we are often asked and there is not really a good answer. First, you must take control of your expenses. Make a list of what you will need to spend on a

monthly basis. We would recommend dividing the expenses into fixed/mandatory expenses (such as health insurance, home mortgage, taxes, insurance, car payments, utility bills, etc.) and variable/optional expenses (such as entertainment, travel, gifts to grandchildren, eating out, etc.).

Next, you must evaluate your income sources. Most individuals will have Social Security or some other form of pension. If you don't know how much you might receive, go to the Social Security Administration office or the office paying your pension and discuss with them the amount of income you are likely to receive. Once you have a handle on your expenses and potential sources of income, you can then begin to work on your nest egg and calculate how big it must be.

Let's assume your yearly income is $20,000, but that you believe your annual expenses will be $35,000 when you retire. This leaves you a shortfall of $15,000. Let's also assume you are a 60-year-old female in good health and therefore will have a life expectancy of 23.97 years. If you lived out your life expectancy precisely and were able earn 5% after tax for the remainder of your life, you would need to currently have $202,618.06 in your investment account. This calculation will assume at age 83.97 years, you have spent your last investment dollar!

Many individuals don't wish to cut it quite so close and spend their last dollar. So, you must either:

- live on less
- retire later
- work part time to fill in the shortfall (even after "retirement"), or

- build your nest egg larger before retiring.

There are some great retirement calculators which you can access on the internet. One we like in particular is the T. Rowe Price calculator which can be found at www.TRowePrice.com. To access the calculator, click on Planning and Research, then Retirement Planning, then Practice Retirement and finally scroll down until you find the "Retirement Income Calculator." Based on your assets, it will help you determine investment mix, age and life expectancy, and what the likelihood will be that your investments will last long enough.

From our experience, many clients don't really want to retire. They factor into the above equation a part time job to supplement their income. It reduces the amount of income they need and also keeps them socially interactive. Many of our clients are coming out of retirement and wanting to involve themselves in part-time employment or perhaps community service. You can only play so many rounds of golf, bridge or tennis. So, when to retire is a very personal decision and does not hinge on financial resources alone. Prospective retirees beware!

Q: What legal mistakes are most commonly made by retirees?

A: Although not in any particular order, we suggest the following five are the most common mistakes:

1. Not communicating their wishes to heirs regarding the distribution of their estate. If your plan is likely to cause your heirs to fight after you are gone, don't leave it to the cold hard document to tell them of your wishes. Tell them while you are alive, document your desires in

writing (through a will, trust or however), and include a clause in your estate plan that if anyone contests the plan, they will forfeit their inheritance.

2. Waiting too long to get their affairs in order is a very common mistake. If you are incapacitated mentally, you cannot formulate and execute an estate plan. Many retirees are living beyond the time when they have well documented legal capacity and the options available to them to plan are greatly reduced.

3. Non-probate assets will often cause problems with your estate plan. Make sure they are coordinated with your estate plan to insure you don't defeat your estate plan. For instance, don't leave your estate to three children, but place the majority of your estate in joint tenancy with one of the children. The joint tenancy assets don't have to be divided amongst all three children, and that can cause problems if it is your intent that it be shared.

4. Most retirees don't consider (until late in life, when planning is very difficult) the possibility they might end up in a nursing home. Nursing homes in Colorado currently cost about $8,758 per month in 2020. Make sure you have a plan to pay the cost of such care, whether that be private pay, long-term care insurance, Medicaid, or an inheritance from your rich uncle. You and your family don't want any surprises. Our rule of thumb is for males over the age of 65 they have a 1 in 3 chances of spending some time in a nursing home, with the average stay being about 9 months. For females, the odds are 2 in 3 with the average stay of about 30 months. You can project your own situation, do the math and reach your own conclusions on how to proceed.

5. Not working long enough can be a big mistake. We are living longer. That is good and bad. The longer we live, the more money we may need in the later years of our lives. Make sure you have enough resources to retire. 'Enough' depends upon many factors including your lifestyle, the size of your nest egg, and your ability to earn through part time employment. Be careful not to sell yourself short on how much you might need.

8.7 WHAT ABOUT ESTATE AND INHERITANCE TAXES?

There is good news on this front. First of all, Colorado does not have an inheritance tax, regardless of the size of your estate at the time of your death. There is still a federal estate tax for those individuals with an estate of more than about 11,700,000 if they died in the year 2021. For a couple, the exemption amount is a whopping $23,400,000. There is also a concept called "portability" which you need to be aware of for couples with more than an 11,700,000 estate. Take a look at Chapter 10 with a discussion regarding the 2017 Tax Reform Act.

8.8 WHAT IF I NEED TO GO TO A NURSING HOME?

We have help for you in deciding how to plan for long care should the need arise. Check out our publication: *Understanding Long Term Care: Avoid Being Unprepared & Overwhelmed.* This book was written by the same authors of this publication and can be found on our website in digital form, or you can obtain a copy (if available in

hard copy book form) by calling our office.

In this publication, you will be able learn of the five general ways to pay for long term care and how you may qualify for public assistance.

Also, on our website you can access the Senior Living Directory which describes the many care facilities on the Western Slope of Colorado. Another great resource. Take a look!

8.9 DOES A SURVIVING SPOUSE HAVE ANY RIGHTS?

You bet he or she does! You may disinherit anyone, such as children and grandchildren and Aunt Harriet, but you cannot disinherit a spouse. Let's say Uncle Henry dies leaving his surviving spouse, Aunt Margaret. They may have been living together and married for a number of years, say 50 years! Uncle Henry never really liked Aunt Margaret so during their marriage he accumulated all the wealth in his name to the exclusion of Aunt Margaret. Because Aunt Margaret lives in a nursing home and has dementia Uncle Henry has decided to disinherit her and leave all of his estate to their children rather than Aunt Margaret. Let's assume he drafts a will disinheriting Aunt Margaret and then unexpectedly dies with Aunt Margaret surviving him.

Sorry, Henry, but the law does not allow you to do this. According to Colorado law Aunt Margaret has the right to "elect" against the estate plan of Uncle Henry. Because they have been married more than 10 years, she is entitled to 50% of what is referred to as the augmented estate. The

augmented estate consists of basically both of their estates with some exceptions. Aunt Margaret must "elect" against Uncle Henry's estate indicating she wants what she is entitled to---- 50% of essentially the combined estate. Because Aunt Margaret lacks capacity her election against his estate gets a bit sticky, but suffice it to say she has this right and can create an alternative estate plan, whereby she can receive 50% of the augmented estate. If Aunt Margaret cannot make the election it may be necessary to have her agent under a power of attorney, make the election for her or perhaps a court appointed guardian. Again, this all gets a bit sticky.

If the right to elect against Uncle Henry's estate is not enough to get him rolling in his grave, the fact Aunt Margaret also has the right to receive what is called the "exempt property" allowance. For 2020 this amount is $35,000. In other words, she takes the first $35,000 of Uncle Henry's estate in the form of cash, personal or real property. If she needs income (and because she is in a nursing home she may) then she can also get a family maintenance allowance, which is worth $2,917 per month with a maximum of $35,000.

8.10 WHAT IS A COMMON LAW SPOUSE?

As you can see from the early discussions in this book it is very important to determine if you are married or not for purposes of your estate plan. The answer to this question is not as easy as it may seem. For those who have a marriage certificate the question should be pretty simple. Yes, there is a marriage.

But what about those who have not been formally married?

What is a common law marriage? Under Colorado law a common law marriage is not that difficult to establish. First, the parties must have the intent to be married. Second, the parties must hold themselves out as married.

Proving these two points is not too difficult, if the parties truly intend to be married. Evidence of a marriage can be established by the parties filing joint income tax returns or perhaps the parties holding themselves out as married at a cocktail party. Labeling the other party as one's spouse can often occur in a medical setting. It can be as simple as identifying the other person as "my spouse" on a questionnaire or application.

In many situations, it is important to establish the couple, or parties, are not married. Remember our discussion of electing against a will in Chapter 8.9. This is where we see the issue arise—a decedent has a person in his or her life who claims to be a surviving spouse. This can end up being expensive litigation to make a judicial determination of whether the couple were married and there is in fact a "surviving spouse".

✦ **Really Important Point:** If you are living together, and want to insure the other party does not claim to be a surviving spouse in the event of your death, enter into an agreement indicating the two of you don't intend to be married (unless the marriage is consummated through a recognized process complete with a marriage license and certificate). This may save your heirs a lot of heart (and head) ache in the future!

8.11 THE "CABIN" TRUST?

On occasion, clients will have amongst their list of assets a family vacation home, such as a cabin, condominium or other resort type property. In many cases, the property has become a location for family gatherings, such as reunions. Many families wish to continue holding the cabin for generations to come. They can create many memories.

One effective way of holding the cabin for a family is through the use of a trust. The cabin trust can set forth the rules as to when and how the cabin can be used amongst the heirs and future generations, as well as, how the maintenance and expenses are to be handled.

There is not a one-size-fits-all cabin trust. Each one seems to be unique and is very dependent upon the likes and dislikes of each family. Of course, not all members of the family have the same fondness of holding the cabin for generations to come. In such an event, the cabin trust can provide for this by limiting the beneficiaries to those members of the family who would like to retain it.

The trust can be funded either during the lifetime of or at death of the senior generation. An alternative to the cabin trust can be an entity such as a limited liability company or partnership. Using these types of entities will require the drafting of either an operating agreement in the case of a limited liability company or a partnership agreement in the case of a partnership.

If you have a special cabin or family retreat you may want to discuss how to pass this along to future generations with

your estate planning attorney. Providing certainty for your heirs, and how the family cabin will be treated in the future, can be a valid estate planning objective.

8.12 ARE YOU REALLY MY SPOUSE?

This question comes up quite often in the estate planning context. We see it when clients ask if someone is a "common law" spouse resulting from a common law marriage. What about same sex couples? Of course, there are the situation where being a spouse has significant consequences when taxes, long term planning, pension rights, etc. come into play. Whether someone is in fact a spouse presents its own unique analysis.

Let's look at **common law marriage** for starters. Colorado law recognizes a common law marriage. It is easier to be in a common law marriage than you might expect. If you have the intent to be married and hold yourself out to the public as being married you are, in all likelihood, in a common law marriage relationship. We see the situation most frequently when we are consulting a surviving spouse or an alleged surviving spouse. In many cases proofing the common law marriage is not as easy as you might expect, as the evidence is not always perfectly clear one way or another. When the fact is contested it is important to have supporting documentation. What evidence can be shown of the common law marriage? How have income taxes been reported? What does the death certificate indicate? What about obituaries in the newspaper? How do the parties to the relationship introduce themselves at social gatherings? How are they known in the community?

It can be very easy and can happen in just a moment. What about the other side of the marriage---- a divorce. There is

no such thing as common law divorce. You guessed it a court proceeding is required to unwind or dissolve a marriage. So, in summary keep in mind a marriage (a common law marriage) is easy to get into, but not so easy to dissolve. (Also see our discussion in paragraph 8.10).

How about same-sex marriages. A lot has changed over the years in this regard. In short, Colorado recognizes same-sex marriages and affords the rights under the Colorado laws regarding estate planning to same-sex couples. Same-sex couples can enter into civil union agreements setting forth their agreement regarding separate and collective assets, payment of obligations etc. The same-sex couple can also enter into a marriage and for purposes of their rights can marry similar to a heterosexual couple.

The rights of **same-sex couples** to marry in Colorado and all the other states was confirmed in the U.S. Supreme Court case of Obergefell v. Hodges in 2015. In Obergefell, the Court stated the fundamental right to marry is guaranteed to same-sex couples by the U.S. Constitution which created a mandate to all fifty states stating the states must then recognize marriages of same-sex couples. This means same-sex couples could enjoy the rights and responsibilities of opposite-sex couples. The Court also ruled the various states are required to recognize marriages of same-sex couples validly married in other states.

Of course, it is important to understand the rights and responsibilities of a community spouse. The concept of a community spouse is important in the world of long-term care planning and specifically eligibility for Medicaid. Medicaid is a federal and state funded program assisting

eligible individuals in payment of assisted and long-term care in Medicaid approved facilities. For a discussion of the rights and responsibilities of a community spouse you can read a companion book, Understanding Long-Term Care, also published by Brown & Brown, P.C. (which is available in a hard copy and on our website www.brownandbrownpc.com).

No discussion would be complete with a mention of a surviving spouse. If a decedent is married at death the surviving spouse has many rights regarding the estate of the decedent. (Also see our discussion in paragraph 8.9). the rights of the surviving spouse can reach to survivor benefits to retirement accounts, the Colorado elective share statute and benefits such as are found in the Federal Social Security laws.

So, the answer to the question of whether you are a surviving spouse or not can be very important. If you find yourself in the situation of a surviving spouse or it is anticipated you are going to be a surviving spouse, make sure you understand the law as it relates to you.

CHAPTER 9

THESE CASES ARE SO WEIRD THEY MUST BE TRUE!!!

Over the years we have had many sad, but interesting, cases which are the result of poor planning. Please don't make any of the mistakes we have had to clean up. For the most part, they make administering an estate more troubling, as well as costly. The names, of course, and a few of the facts have been changed in the discussion below to protect the attorney client privilege. There are lessons to be learned from these real life (believe it or not) cases. After you read them you will get the point of how important it is to get it right when it comes to planning your estate.

Case #1- Abel the charitable guy!

Facts: Abel was one generous guy. He was single and had no children. He must have been frugal, having no "lawyer prepared" will. Instead he wrote his will all by himself. Abel had no spouse or children and over the years he accumulated a reasonable sum of investments, in addition to his house.

In his handwritten will (known as a "holographic will" in Colorado) he left various percentages of his estate (of a $1,000,000 or so) to about a half dozen charites. This sounds fine so far. His will was deposited with the court and Abel's brother was appointed to be the personal representative in his estate.

So far, so good! Here is the problem. When Abel listed a

charity he simply put down the common name of the charity. For example, he would indicate he wanted 10% to be paid to the "Salvation Army" and another 10% to the "Goodwill". What he failed to indicate is which Salvation Army and Goodwill. There are many local chapters in most every reasonably sized town across America. In Colorado, there are many of these organizations across the State. Perhaps he intended it to be paid to the national organization to support administrative costs. He did not any hint of who and how he wanted the distribution to be made.

The solution was to ask the court in the Colorado county in which he resided at his death to give instruction to the personal representative as to whom to make the payments. It was necessary to publish in the local paper a notice of the hearing and the needed instruction from the court. The personal representative proposed what he thought his brother would have wanted (not knowing for sure). Yes, the court did approve the plan and the charities were paid, but only after an expense which far exceeded the cost of having the estate plan professionally prepared.

The Lesson: Don't be penny wise and pound foolish when it comes to preparing your estate plan. Get it done correctly to insure your estate is distributed in accordance with your wishes and be precise in identifying any potential beneficiaries to avoid confusion.

Case #2-Ben the lucky duck—sort of!

Facts: Being a farmer in western Colorado is not an easy life. Most farms and ranches have a difficult time making ends meet. For most of Ben's life, he and his wife lived frugally off of their farm. As Ben and his wife aged, the health of Ben's wife deteriorated until she finally died. Ben

was left a widower with adult children.

Ben became very close to his wife's caregiver, Cindy. He was very appreciative of all she did for his wife during her last months and became fond of her. Ben and Cindy married after the death of Ben's first wife, admittedly late in life for Ben, and the children of Ben were quite concerned. Upon the death of Ben's wife, a substantial inheritance was received by the children of Ben. Ben still had a sizable landholdings of his own although they were shared in ownership with his adult children.

Ben wanted to provide for Cindy in his estate plan. He made changes to his estate plan leaving some of his property in the mineral interests to Cindy. At the time, the mineral interests were not paying substantial royalties, but were enough to help Cindy live comfortably thereafter.

After the estate planning changes were made, the oil and gas industry heated up which became very lucrative for landowners, such as Ben holding mineral interests. During Ben's lifetime royalties increased substantially on Ben's oil and gas holdings. The monthly checks were large enough to fight over.

As you might expect a battle ensued between Cindy and the children of Ben. The children claimed Ben did not know he was leaving such a substantial amount to Cindy for her lifetime and instead it should have been paid to them. As noted elsewhere in this book, it is common for contestants in a will contest to argue the decedent lacked mental capacity to execute a will or in the alternative was unduly influenced.

After much legal wrangling, the parties reached an agreement regarding the payment of royalties to Cindy for the balance of her lifetime.

The Lesson: As we travel the road of life, changes occur. People die. Value of assets increase or decrease, sometimes by large amounts. In the case of Ben he probably did not review (or for sure document) his estate plan to ensure it reflected accurately what he wanted to leave to Cindy. You can argue he did not want to make the change or he would have done so.

His estate plan resulted in Cindy receiving very large sums of money on a monthly basis. You could also argue, as did Ben's children, he did not understand the nature of the windfall, which benefited Cindy, or he would've made changes to his estate plan. We will never know what Ben really intended, but we do know he should've taken the initiative to review his estate plan. It is important to periodically review your estate plan and particularly when you have a change in your life which would alter, perhaps, the goals of your estate plan.

Case #3- Dr. Dave and the "holographic" will!

Facts: This is a sad case, so be prepared. Dr. Dave was estranged from his wife. He had several children. In a moment of depression, he sent an email to his parents indicating he wanted his estate to be distributed to his children, to the exclusion of his wife, and he anticipated taking his own life. Shortly after the sending of the email, he did in fact commit suicide.

One can imagine the problems Dr. Dave created. First of all, is an email a will? This is a good question. Next,

usually, a spouse is entitled to the entirety of the estate even to the exclusion of her children, if the surviving spouse's children are the children of the decedent. The grandparents of the children wanted the estate to pass to the grandchildren to the exclusion of their mother. The mother of course wanted the entirety of the estate. What a mess! Eventually, it got sorted out through an agreement between the mother and the children.

The Lesson: It should be obvious by now, make sure you have your estate plan in place and you understand the law surrounding the rights of a spouse, if you are married. Seek professional help before walking out onto thin ice.

Case #4- Ellen and the internet will.

Facts: Ellen took a page out of Abel's playbook. She decided to use one of the online/internet will kits for the preparation of her estate plan rather than seeking the advice of a professional. She downloaded the form, put in all the information she thought was relevant, printed the document and signed it.

There was a slight problem. Ellen provided for dispositions to go to a few close friends and charities and set dollar amounts. After making these provisions in her will she did nothing further. She did not indicate, through a residuary clause, who was to receive the balance of her estate. Hello! What was she thinking?

The administration of her estate became complex. Who was to receive the residuary? Would it be those individuals who would have inherited her estate had she had no will at all? This is what the court ultimately decided.

The Lesson: The do-it-yourself kits you can buy online might be expedient and inexpensive and seemingly perfect for the frugal person. Be careful using them as you may not end up with what it is you want. Unintended consequences in using such documents can be both costly and devastating to your estate plan.

Case #5- Fred's missing (or out of place) signature. Ouch!

Facts: Fred was a pretty smart guy, or so he thought. During his career he was a professional and usually paid a lot of attention to detail. He decided to create his own will. Apparently, he had heard about the holographic will and decided to write his thoughts down on a piece of paper.

He was quite specific in how he wanted his estate to be distributed and made both specific bequests to individuals and charities with the balance to pass to members of his family. Fred did not sign his handwritten will.

Instead, he took the "will" and placed it into an envelope and then signed the envelope. Was the envelope part of the will? Was the document laying out all the dispositions in his handwriting intended to be his will? Why didn't he sign the actual will? Why did he sign the envelope?

Fred left more questions unanswered and confused the administration of his estate. Fortunately, everyone (in particular the residuary beneficiaries who were to receive the balance and majority of Fred's estate) agreed the specific bequests to various individuals should be honored, whether it was a valid will or not. Fortunately, the residuary beneficiaries would be the same individuals who would take the estate had he died without a will. By a written

agreement amongst all the beneficiaries the estate was settled and the court approved of the distribution plan signed off by all of the potential beneficiaries.

The Lesson: Again, be careful preparing your own estate planning documents as they may create more problems than they solve. Do you remember the Fram oil filter ads of long ago. The ad would say "You can pay me now or pay me more later." The same applies with estate planning. You can pay a fee to get it right now or pay a lot more to fix the problem later.

Case #6- Greg's great idea!

Facts: Greg was on the right road, but he took a wrong turn. He had his will in place which divided his estate between his two daughters. His estate consisted of approximately $800,000 of liquid resources plus a residence.

As Greg aged he became more dependent upon his daughter Hazel to care for him, which included paying his bills. To make life easier, he and Hazel decided to put Hazel's name along with his on all of his investment accounts. This allowed Hazel to be able to write checks to pay for his expenses and make investment decisions with his broker. Not knowing the proper way to set up the accounts, Greg and Hazel indicated they should be held in joint tenancy.

When Greg died the joint tenancy accounts all passed to Hazel. Irene, the other daughter, was shocked when she learned she was to receive half of the residence as the only asset in the probate estate and subject to the terms of the will. The 800,000 of liquid resources is paid directly to Hazel.

There are good people in the world who aren't driven by greed. Hazel was one of them. Without even a bit of a fuss, she told Irene half of the joint tenancy holdings would be distributed to her. The estate ended up being split equally between the two sisters because they were on good terms. Irene was lucky her sister turned out to be an honorable person. The law was not on her side.

The Lesson: Be careful in how you title your assets. It is easy to confuse probate versus non-probate assets. All families are not as cooperative and generous as was the case with Greg. We have seen it time and time again where the Hazel's of the world take the position they are entitled to the assets held in joint tenancy, because that's the way parent want to the assets paid. It becomes ugly.

Conclusion

No client has ever said to us:

> "You know who I would like to give my estate too? Well let me tell you. I want it to go to the estate litigation attorneys. I want to help them along, so I'll jot a few notes on a piece of paper as my Will and tell everyone in my family contradicting information from my handwritten will.
> And oh yes, because this is my second marriage with children from both marriages, I will insure everyone is happy. Even my first wife."

Taking those actions will just about guarantee a fight at a substantial cost and benefit a host of attorneys to straighten out your intent.

In our experience, with the rise of blended families, online estate planning templates, dispersed families who are not in

tune with the plan, and an increase in dementia/Alzheimer's diagnoses due to the aging population, the door may be open to litigation without careful planning.

You do not want to leave questions unanswered when you are no longer there to provide the answers. Taking the time to address family dynamics and leave clear instructions is not simple and takes some time to consider. But if taking the time means your loved ones will avoid litigation and are able to enjoy the holidays together because they did not have to argue over your intent, isn't it worth it?"

Hopefully this book has helped you get your thoughts together and encourages you to get your estate in order. Perhaps you already have an estate plan in place, which may need to be reviewed or you haven't even started the process. Whatever, we hope this book helps you understand the process a bit better.

Remember, this book is not to be relied on for legal advice! Go see your lawyer instead!

CHAPTER 10

ESTATE TAX REFORM----AGAIN

10.1 THE GOOD, BAD AND UGLY OF ESTATE TAX REFORM

2021 seems to be developing into another year of upheaval in regards to the Federal estate tax. With the Democratic control of executive and legislative branches of government and the plans for large amounts of Federal spending the need to raise revenue has put a target on the estate tax once again.

The Federal estate tax raises less than 1% of the total revenue raised by the Federal government annually. After the 2017 Tax Reform Act it seemed to be on the way to extinction. Currently, there is an exclusion of $11,700,000 per person from Federal estate taxes. For a couple they can shelter twice this amount or $23,400,000. This is a large number by most anyone's standards. This may be about to change.

What we know, as of April 29,2021, when we "go to press" is change is on the horizon, but we just don't know many of the details. We hear one proposal and then a recanting of the proposal. For our purposes about all we can do is speculate and hope you all stay tuned.
One proposal we continue to hear is the elimination of the "basis adjustment" at death for assets owned by a decedent. This is commonly referred to as "step-up-in-basis. Under the current law, the decedent's assets receive a new cost basis adjustment at death. This means the "old" basis is

adjusted to the date of death value. Usually, this means the heir can liquidate the decedent's assets and avoid paying any capital gains tax on the inherited assets. Gain would be reported only to the extent the property increases in value from the date of death to the date of sale.

Under the new "carry-over basis" proposal the heirs (subject to a possible exemption of $1,000,000 for an individual and $2,500,000 for a couple) would not receive a basis adjustment and would have to pay tax on the gain, as though it were held by the decedent. Some would speculate this would become the tax at death (rather than the current estate tax) and could be due whether or not the inherited asset is sold by the heir.

Do you remember what you paid for all of the assets you own? What about improvements to the assets, which improve your basis? What if you depreciate an asset, during life, thereby lowering its basis? So many details, which are extremely murky, to say the least.

Under current law, when a donor gives away an appreciated asset, during their lifetime, the donee who receives the asset also must accept the basis of the donor. We use carryover basis in the tax realm of gift of assets, so this concept is not new.

However, applying the carryover basis at death is very complex and difficult to monitor from the taxpayer's and the IRS' point of view. During life, a donor can plan with the carryover basis, but planning at death, particularly when it is not contemplated, is much more difficult. It has been tried in the past and then repealed due to the complexities.

The Tax Reform Act of 1976 would have imposed carryover basis, but it was repealed before it got started. In 2001 the estate tax was repealed for a year and the carryover basis was substituted, as a way to generate, tax revenue. This was confusing and eventually dropped. During the years of President Obama it was discussed as a way to generate revenue, but it never made it into law.

So, here we go again. Time will tell what comes out of Congress, but here are other items which may be included in the name of "reform".

Some of the current estate tax reforms being discussed are as follows:

1. A reduction in the estate tax exemption amount to $3,500,000 per person or $7,000,000 for a couple. There is a discussion of decoupling the estate tax from the gift tax (which is also currently $11,700,000) and reduce the lifetime gift tax exclusion to $1,000,000. By making this change, the ability of clients to remove large amounts from their estates during their lifetime and allowing the appreciation in the gifted assets to escape the estate tax is eliminated. This is huge for clients with taxable estates. Currently, the thinking is this change in the estate and gift tax will not become effective until January 1, 2022 leaving a window of opportunity for those willing to act between now and the end of the year.

   It is notable, President Biden did not talk about the reduction of the estate tax exemption in presentation to Congress on April 28, 2021. Because the estate

tax exemption is set to be reduced for decedents dying after January 1, 2026, he may have decided to leave this alone and let it reduce on its own.

2. It is possible the estate tax rate will increase from the present day 40% to a 45% rate on estates over $3,500,00, but under $10,000,000. Once an estate exceeds $10,000,000 the marginal estate tax rate for estates in excess of $10,000,000, but under $50,000,000 the marginal rate is 50%. For estates with valuations between $50,000,000 and a billion, the marginal rate is 55% and finally for those estates over 1 billion the marginal rate is 65%.

3. The proposal also includes changes to the annual gift tax exclusion for gifts to irrevocable trusts, such as grandchildren education trusts. The changes will limit the amount gifted to $30,000 per donor. Non-trust gifts (or gifts to individuals) may not be impacted.

4. Some good news for surviving spouses who may have elected portability in their deceased spouse's estate, there is no discussion of eliminating the use of portability.

5. The elimination of "discounts" to reduce valuation of assets in family entities may be in jeopardy under the new act. Such techniques, popular in the past, may be reduced in their effectiveness, if not entirely. This is something to watch. After the legislation, a decedent who may own a small percentage, say 5-15% of the entity, may not be entitled to a valuation discount even if the interest is

not marketable or liquid, as in the case of an interest in a limited partnership holding real estate.

6. Another highly popular technique is the use of a gift to a trust for the benefit of a spouse using a portion of the donor spouse's exclusion and eliminating the gifted amount from both spouse's estates. Such trusts are commonly referred to as a "spousal lifetime access trust" or "SLAT". After January 1, 2022 these highly effective types of trusts may not be available. The proposed regulation would require the assets in the SLAT to be included in the estate of the grantor of the trust. If a SLAT is in the tool box of estate planning techniques which might fit your needs it should be created and funded before the end of 2021, assuming the legislation passes, as proposed.

7. For those wanting to utilize a trust to hold assets for generations into the future and avoiding the impact of estate taxes on successive generations this technique may also be limited. There is talk of requiring trusts longer than 50 years in existence to disgorge the assets in the trust to the beneficiaries thereby making them subject to an estate tax in the beneficiaries estate.

Review Chapter 10.3 and the planning techniques discussed and used by those individuals with possible estate tax concerns. Many of those techniques will be reduced or eliminated. It is important to continue to monitor the developments.

Individuals may want to act sooner rather than later to safeguard some of the planning they may have already done. It may be important to extend the terms of notes to heirs to longer periods of time to avoid sooner than later payments. To avoid inflation (which all the pundits say is on the horizon) the sale of certain assets to cap the value in the estate of a senior family member may be appropriate. There will be a rush at the end of the year to do this type of planning once the terms of any proposed legislation are enacted and signed into law.

✦ **Really Important Point:** If you are single and have an estate in excess of $3,500,000 (or a couple with an estate in excess of $7,000,000) you may wish to undertake some estate planning during calendar year 2021. It is natural to want to wait and see what, if any, legislation is enacted. This may sound like a great tactic, but the problem is getting any meaningful planning done at the end of year is practically impossible. In our case we will not be able to handle all of the work which comes in at the last minute. The moral of the story is start planning soon, if not now.

For many putting a plan in place and having the documentation held in abeyance until the legislation and its implications are clear is the right choice. If the law does change the documents and the plan can be implemented. If the law does not come into being then the plan does not have to executed. This may be a small price to pay for safeguarding against the likely changes. It is a bit like buying insurance on your house. If the house does not burn down then this is good news. The insurance was for naught, but having the insurace allows you to sleep at night.

✦ **Really Important Point:** Congress may not make any changes and provisions of the 2017 Tax Reform Act may continue on. Although we believe it is unlikely, based on our view of the Washington environment, 2012 told us different as explained below. The unlikely may be likely, and only time will tell.

The 2017 Tax Reform Act is still the law we apply for those dying in 2021. The current exclusion of $11,700,00 per person and twice this for a couple is something to celebrate for high net-worth individuals and couples. The higher exclusion amount seems to be a win for simplification with fewer individuals needing to worry about estate tax planning. Estate tax planning will be only for the truly wealthy by almost anybody's definition. This could be labeled as the "good" news.

However, there is a dark cloud on the horizon regarding estate "tax" planning. The "bad" news is absent any changes to the law, at the stroke of midnight on December 31, 2025 the exclusion amount will return to the 2018 level of $5,490,000 for an individual and just short of $11,000,000 for married couples, adjusted for inflation from 2016 As mentioned above, we have seen this "cliff" before on December 31, 2012, when the estate tax exclusion amount was to fall back to $1,000,000 for decedents dying after January 1, 2013. Dying in 2012 had its benefits with the higher exclusion. The exclusion of $5,120,000 was available for decedents who died on December 31, 2012, but for those individuals dying on January 1, 2013 the exclusion was only planned to be $1,000,000.

Individuals and their advisors were obsessing over the "January 1, 2013" cliff when estate taxes and gift tax exemptions were to drop back to $1,000,000. Clients and their advisors were asking whether large gifts should be made using the larger gift tax exemption? Many clients used gifting techniques to use the larger gift tax exclusion rather than risk losing it starting January 1, 2013.

Low and behold! At the stroke of midnight on December 31, 2012 Congress acted to save the estate and gift tax exclusion from dropping back to $1,000,000. Instead, the estate, gift and generation skipping tax exemption was increased to $5,250,000 with the provision they would adjust upwards for inflation in future years. For decedents dying in 2017 the exclusion, based on the inflation adjustment, had been increased to $5,490,000.

With this historical perspective, here comes the "ugly" reality of the 2017 estate tax reform provisions. For many, planning for the impact of estate taxes on their estates appears to be non-existent. It is off their radar for planning purposes.

The prospects of the permanent repeal of estate tax was lost in the Senate and House compromise committee. Instead, another "cliff" was created starting on January 1, 2026. For decedents dying on or after this date the exclusion will return to the 2017 level of $5,490,000 adjusted upwards by inflation. Why? There is something referred to as the "Byrd" rule meaning a 60-vote approval would be required to make the change permanent. The Byrd rule was adopted in 1974 and provides budgetary items such as tax reform cannot increase significantly the federal deficit beyond a ten-year term. Republicans were barely able to get a

majority of 50 votes in 2017, so they passed the estate tax changes through a process called "reconciliation, which limited their rights to make the estate tax changes permanent (and beyond the 10-year limitation called for by the Byrd rule).

Will Congress extend the higher exclusion amounts at the stroke of midnight on December 31, 2025 as they did at the closing of 2012? Take a look at how divided the US House and Senate are at this point in time. Will it get any better between now and 2026? We are skeptical.

It has been reported to fully repeal the estate tax the cost to do so would be roughly $1 trillion over the two years following the permanent repeal. To keep the increased exemption at or near the current $11,700,000 exclusion would be costly as well, but not nearly as costly as full repeal. With the explosive national debt, it is hard to see a way forward to full repeal or even keeping the higher exclusion in place after December 31, 2025.

Getting out of the debt situation could be handled by "inflating" away the debt by paying it back with dollars having less value or perhaps raising tax or perhaps both.

Because the cost to make the estate tax repeal permanent will likely be costly, we are not recommending to our clients they ever count on permanent repeal. An extension of the current 2021 exclusion of $11,700,00 has a greater chance of being extended as it was at the end of 2012, but it will depend upon the political landscape in 2025.

Because the gift exclusion is also currently $11,700,000 should clients be considering making larger gifts in the event the exclusion is reduced? The answer is likely yes if

an individual has a large estate. It becomes a really big "YES" if legislation to reduce the exemption amount becomes reality. If larger gifts are made, relying on the large current gift tax exclusion, is it possible those gifts will be subject to estate tax when the donor dies if the estate tax exclusion falls back to $5,250,00 plus inflation? The IRS has pronounced such gifts will not be brought back into a decedent's estate. This is another "good", which we can rely on until we can't. No one knows for sure! Based on what we know today, there is good news: gifts made relying on the larger exclusion on or before December 31, 2025, should not be an inclusion in the donor's estate (i.e. there will not be a claw back into the decedent's estate of the gifted amount!). Regardless, uncertainty is "ugly".

10.2 AREN'T THERE REALLY TWO ESTATE TAX SCHEDULES BASED ON ONE'S AGE?

Take a step back and look at who really benefits by the increased exemption of $11,700,000. As mentioned, assuming the Senator Sanders proposal is not adopted, the new and higher exclusion will only be available to individuals who die or make gifts prior December 31, 2025. An 89-year-old (or older) male today is expected to die prior to December 31, 2025. This 89-year-old (or older) male will not be living (based on the actuarial tables) beyond 2025, according to the life expectancy calendar of the Social Security Administration (SSA). The 89-year-old male (or older) will likely be able to use the exemption of $11,700,000, if he dies during 2021. If you are male and younger than age 89 you are expected to live beyond December 31, 2025, when the estate tax exclusion will drop back to the $5,490,000 amount, also adjusted to inflation.

An 89-year-old (or younger) male (approximately), as a practical matter, has a lower estate and gift tax exclusion.

For females, who are currently 91 years of age or younger they are expected to live beyond December 31, 2025 when the estate, gift and generation skipping tax exemption returns to the $5,490,000 amount (adjusted upward for inflation). Females under the age of approximately 91, as well as males under the age of approximately 89, should not be lured into believing they are going to be able to rely on the currently higher exemption amounts.

✦ **Really Important Point:** Check your birthdate and age and realistically look at the estate, gift and generation skipping tax rates which will apply to your estate. If the lower exemption amount is likely to be the one you will be using (because you are not old enough) you may want to be proactive and consider use of the gift tax exclusion before it is reduced (or decoupled) to shift assets to your heirs. There is more on this below.

Also, keep in mind life expectancy tables and their projected dates of death or life longevity are by their very nature inaccurate when applied on an individual basis. Occupational risk, accidental deaths, health conditions and other factors certainly impact the accuracy of any projection.

10.3 WHAT NOTABLE ESTATE TAX PROVISIONS DID NOT GET CHANGED BY THE 2017 TAX REFORM ACT?

Taking a look at what did not get changed is equally as important as what did get changed. Subject to our

discussion above, here are a few examples of what has worked in the past, but my not be viable in the foreseeable future:

Basis adjustment at death could be modified under the Biden proposal.

The ability to use discounts for purposes of valuing assets in an estate.

✦ **Really Important Point:** The value of assets at death depends upon the character of the asset. For instance, an investment asset of $1,000,000 in cash is worth $1,000,000 and is listed as such on an estate tax return, if one needs to be filed. When the decedent holds cash the decedent in the decedent's name, he or she has the control of its use and the cash is easily transferred (referred to as being marketable)

The same $1,000,000 invested in an entity, such as a family partnership, may not be worth $1,000,000. If the investment is in an entity the decedent owns an interest in the entity and not the cash. The decedent no longer has control of the $1,000,000 (in that it is subject to the controls set forth in the entity documents) and the interest in the entity is not as easily transferred in that it is subject to the terms and conditions of the entity governing documents. The interest in the entity is potentially not worth as much, as the cash for valuation purposes, as the decedent's interest will be valued by his or her interest in the entity. This value is of the decedent's interest in a "going concern" is valued differently.

When you value the interest in the entity as a going concern it is not worth as much as the $1,000,000 of cash. Instead,

the valuation is eligible for a "discount". The discount can be substantial depending upon the governing terms of the entity.

The use of valuation discounts could be modified under the proposal being discussed.

Portability.

✦ **Really Important Point:** For married couples it is important to remember they still can rely on "Portability" of the first spouses unused exemption. This allows the estate of the first to die to elect portability on a Federal estate tax return to transfer (or port) the decedent's unused exemption to the surviving spouse. Let's assume the decedent had an estate of $1,000,000 when he died. He did not use $10,700,000 of his exemption. He can effectively transfer this to his surviving spouse under portability giving the surviving spouse his unused $10,700,000 of exemption to add to her own. If her exemption was $11,700,000 at the date of her death, she would have $22,400,000 of exemption to use.

There are many nuances to the use of portability which a married couple should consider when planning their estate, if estate taxes are an issue. Second marriages, surviving spouses with health or financial judgment issues, or alternative disposition other than to the surviving spouse all need to be taken into account.

The good news is the use of portability is still a great planning opportunity to be considered by a surviving spouse.

The use of Portability could be modified, although we have not seen any indications this will change.

10.4 FIVE DIFFERENT APPROACHES TO REDUCING ESTATE TAXES

When thinking about estate taxes, think broadly about ways to reduce estate taxes. There are really five generalized approaches, which can be considered in most estate plans.

✦ **Really Important Point:** The viability of these approaches may be eliminated or altered based on any estate and gift tax reform this year based on what we are hearing. It is important to stay aware of any changes and be prepared to act quickly if you desire to make any changes to your estate plan.

Approach #1: Make the assets worth less on paper than they would be if they were held solely by the decedent.

We talked above about making assets worth less on paper through the use of "discounts". Consider placing assets into an entity, such as a partnership or limited liability company, where the asset would be valued at less than its liquidation value. $1,000,000 of cash is worth more than a $1,000,000 cash invested in a family limited partnership or other type of entity.

Approach #2 Give the asset away to remove the appreciation from your estate.

Giving assets away will remove the value of the asset from your estate. If the gift is in an amount in excess of the annual exclusion amount of $15,000 (for gifts in 2021) then

a gift "tax" is potentially due, unless you elect to use a portion of your gift tax exclusion amount, which is currently 11,700,000 per person. Using the gift tax exclusion reduces the available estate tax exclusion you have available when you die. The advantage of making the gift during your lifetime is the future appreciation in the value of the gifted asset is not in the transferor's estate and no tax is due on the appreciation.

Consider coupling the lifetime gift with the reduction in value of the gifted assets through the use of "discounts" and you can take advantage of leverage. Also, think about other planning techniques such as qualified personal residence trusts to further leverage the gift of a residence or a second home.

If you believe you have or are close to having (based on your own view of what the estate tax exclusion is likely to be on your death) a taxable estate making lifetime gifts might be the right choice for you. There are many different ways of making gifts to further protect the gifted assets for your intended recipient of the gift. You should visit with an advisor to make sure the gift is structured to ensure the gift is established to meet your objective.

Approach #3: Consider paying the tax using life insurance.

If properly structured, life insurance can be owned by a trust ensuring the life of the individual whose estate will need to pay an estate tax. When the insured dies, the insurance proceeds pay into the trust, which can use the proceeds to buy assets from the estate or loan money to the

estate to pay the estate tax which is owed. The insurance proceeds are not taxable when received by the trust, as income, and are not subject to estate tax.

Approach #4: Take advantage of special valuation rules.

For farmers and ranchers there are special rules allowing an estate of a decedent to be able to use a "different" value for their properties, other than its highest and best use. In many cases the farm or ranch could make a nice subdivision or be purchased as a trophy home by the rich and famous. To help keep the estate tax cost down it is possible under some circumstances to value the property as a farm and ranch based on its usage, as such.

There is also the possibility under some circumstances to pay the estate tax in installments to help with the liquidity needs in an estate. Liquidity is a common problem within the estate of farmers and ranchers. The loans, essentially by the IRS, are at favorable rates. This option can certainly help keep a business, farm or ranch intact until the estate tax can be paid.

Approach #5: Give your estate or some of it to one or more charities.

Giving your estate to a charity, instead of individuals, can reduce the value of the estate by the value of the gift, thereby reducing the taxable value of the estate. Some clients give away the estate tax exempt portion of their estate, say the first $11,700,000, to their non-charitable heirs, with the balance (above the available exclusion amount) all to one or more charities. This reduces the estate tax liability to zero.

Lifetime gifts to charity work the same way with the added value of generating an income tax deduction. Leveraging the income tax and estate tax planning can be accomplished through charitable trusts. These can be very beneficial to both the donor and the charity.

10.5 WHAT SHOULD YOU BE THINKING ABOUT IF YOU ARE NOT THINKING ABOUT ESTATE TAXES?

Whoa! Not so fast!

There is always the possibility the estate tax will go off the cliff with the possibility the estate and gift tax exclusions will be rolled back to the 2017 rates and those individuals with estates in excess of $5,490,000 (and couples with nearly $10,980,000) still need to pay attention to this possibility. Clients may want to consider gifting of the additional gift tax exclusion amount before December 31, 2025. Consider the old adage, “use it or lose it”.

For those couples **not** wanting to gift large gifts to their heirs during their lifetime or for a multitude of other reasons, they may want to consider making gifts into trusts for each other. These trusts are fairly sophisticated but can be extremely useful in locking away assets through current gifts into trusts for the benefit of each spouse. These trusts are often referred to a “Spousal Lifetime Access Trusts or SLATs and were discussed above. For using these types of trusts for couples it is important to avoid what is referred to as the “reciprocal trust doctrine”. You can visit with your estate planning attorney about this doctrine, which could impact the viability of any plan using a SLAT for each spouse benefiting the other spouse.

Married couples still need to think about Portability- a concept where the unused exclusion of the first spouse to die can be transferred to the surviving spouse to be used when the surviving spouse then dies. An estate tax return needs to be filed when the first spouse dies, but it is only a slight hassle and should be used in many situations.

Trusts v. Outright distributions.

✦ **Really Important Point:** It is worth repeating. There are many advantages of leaving an inheritance into a trust for the benefit of the heir rather than leaving it outright to the heir. Sounds a bit like a broken record, but it is true.

An inheritance can be placed into a trust for an heir giving the heir protection should the heir become divorced and also should the heir encounter problems with a creditor. Such trusts can be designed to last for generations. Under Colorado law, such trusts can be designed to last for up to 1,000 years. These trusts are often referred to as "Dynasty Trusts". Tax reform may eliminate the use of the long-term Dynasty Trust, so be on the alert.

Lots of things to think about in a "thoughtful" estate plan.

✦ **Really Important Point:** There is much to think about in planning your estate in an efficient manner, creating a lasting legacy for your heirs. It does take time and does cost money to get it done how you want it. After all, what doesn't cost money these days? It is important to make sure your estate plan, whether it be in a will, a trust, or through beneficiary designations, reflects your wishes. Look at Appendix 1 to this book for additional thoughts.

10.6 THE SECURE ACT – HOW ARE YOUR RETIRMENT ASSETS AFFECTED?

In the midst of the holidays and major global news stories, Congress quickly and quietly passed the SECURE Act which was signed into law by President Trump on December 20, 2019 as part of the Further Consolidated Appropriations Act. While the SECURE ("Setting Every Community Up for Retirement Enhancement") Act may seem innocuous, the effects of the Act will impact every person with a defined contribution retirement plan or individual retirement account (referred to as the "account holder" herein). This article will summarize some of the changes created by the SECURE Act and it is recommended you review the impact on your accounts with your attorney, financial advisor and accountant as changes may be necessary.

There are a couple of changes to SECURE which primarily impact the account holder or "plan participant" prior to his or her death. First, SECURE changed the beginning date for required minimum distributions to age 72. Under prior law, the beginning date was age 70 ½. The Act also eliminated the age cap to contribute to an IRA. Under prior law, the plan participant could not contribute to a traditional IRA in or after the year in which the plan participant turned 70 ½. After SECURE, a plan participant can contribute to a traditional IRA at any age.
Slight changes were made to the qualified charitable deduction income tax exclusion. Normally, a transfer from an IRA to a qualified charity results in an exclusion of the income tax associated with the IRA withdrawal. Contributions to a traditional IRA may be tax deductible depending on the plan participant's gross income. Because

the age cap limitation to contribute to IRAs was eliminated, SECURE changes the calculation of income tax exclusion for a qualified charitable deduction to preclude the potential of double dipping on tax benefits. For example, if a $5,000 deductible contribution was made to a traditional IRA, and subsequently a $50,000 distribution (which created a qualified charitable deduction) was made from the IRA, the plan participant would report $5,000 of income from the IRA withdrawal ($45,000 would be excluded due to the charitable contribution).

Then there are the dramatic changes (and perhaps most noteworthy) to the beneficiaries of a retirement accounts, after the death of the plan participant. The retirement account, after the death of the plan participant, is generally referred to as an "inherited" IRA or retirement account.

Under prior law, beneficiaries of a retirement account could take their required minimum distributions over the beneficiary's life expectancy. This allowed a beneficiary to "STRETCH" the tax liability over the beneficiary's lifetime. SECURE made dramatic changes to the way in beneficiaries of an inherited retirement account are able to withdraw the retirement account assets. (See Section 401 of SECURE) Now, SECURE requires the beneficiary to withdraw the account over 10 years rather than over the beneficiary's life expectancy, which was the law prior to December 31, 2019.

An inherited retirement account does not have to be withdrawn in any set amount over the 10-year period. A beneficiary could plan to wait until the end of the 10-year period before taking their distribution, if they chose to do

so. This would allow the retirement account to continue to grow tax free over the nearly10 year period. One of the downsides to this plan is all of the income would be reported in the 10th year, and this bunching of income could push the beneficiary into a higher income tax bracket.

However, there may be a way around the 10-year limitation, by using a charitable remainder trust and purchasing life insurance. This is a bit more complex, but it is being suggested by many planners. This strategy provides for the retirement account to be payable to a trust for the benefit of the intended heir, which has a charity as a beneficiary, once the intended heir dies. This trust is commonly referred to as a charitable remainder trust (CRT). The charity should have an actuarial likelihood of receiving at least 10% of the amount initially passing into the CRT. For instance, let's assume the CRT receives $100,000. In this case, the charity, which is referred to as the residual beneficiary of the CRT, should have a reasonable chance of receiving at least $10,000 once the beneficiary (or beneficiaries) dies. Don't worry, there are IRS tables which can be used to calculate the amount which the charity is to receive. The distributions to the intended heir (heirs) are based on his, her or their life expectancy(ies) and are not limited to 10 years.

The life insurance comes in to play as a wealth replacement tool. When a policy is purchased (presumably) on the life of the initial beneficiary of the CRT (perhaps a child), the life insurance proceeds would be payable at the death of the child to the heirs of the child (perhaps grandchildren) and thereby replace the wealth which passed to the charity, pursuant to the CRT. This will allow the heirs of the initial beneficiary to receive the life insurance, which is tax free,

and be able to stretch the distributions from the charitable trust over the life expectancy of the intended heir. For many clients, this could be a way to get around the new 10-year distribution limit and STRETCH the IRA.

There are five categories of eligible designated beneficiaries (EDB) who are exempt from the 10-year payout requirement and in some cases can still use the life expectancy payout (the STRETCH). Only the EDB is able to STRETCH the distributions over the life of the beneficiary. These Eligible beneficiaries are the following:

- The plan participant's surviving spouse.
- A minor child of the plan participant.
- A disabled beneficiary as defined by 26 U.S.C. §72(m)(7).
- A chronically ill beneficiary as defined by 26 U.S.C. §7702B(c)(2).
- A beneficiary who is not more than 10 years younger than the plan participant.

It is a fairly common practice, when planning with a retirement account, to name either a "conduit" or "accumulation" trust as the beneficiary of the retirement account upon the death of the plan participant. By doing so, the plan proceeds can potentially be protected from creditors and divorcing spouses of the beneficiary of the trust. Although the above mentioned use of a CRT planning technique certainly seems viable going forward a thorough cost benefit analysis needs to be undertaken because of the fact the distributions from the CRT to a beneficiary will be taxable to the beneficiary and the use of the CRT may defer the income taxes, but not necessarily avoid them. Also, there is no guarantee the final

regulations, which will be created by the IRS, will allow a CRT to be treated as a designated beneficiary. It would seem a designated beneficiary of a CRT would at least be allowed the 10-year withdrawal period. If the CRT is not considered a designated beneficiary, the withdrawal would need to be made over a 5-year period.

The complexity of such an estate plan with a retirement account being paid into a CRT is particularly true when the plan participants wants to have assets pass into a trust designed to provide asset protection for the beneficiary of the inherited retirement account, while at the same time trying to create a STRETCH retirement account using the CRT referenced above. Such a planning technique, which may achieve the plan participant's goal, does require significant technical drafting. They say: Nothing comes easy without hard work.

Also, keep this in mind: If an existing beneficiary of a retirement account is a trust, which potentially could distribute the retirement account amongst both EDB and non-EDB beneficiaries, careful drafting of the trust document is required. All of the estate plans which name a trust as a beneficiary of a retirement account should be reviewed to make sure the estate plan meets the needs of the plan participant. The payout terms of such trusts, in this era of uncertainty on how to define the payout term to the beneficiary of a trust may be stated as the "longest allowed by law".

SECURE dramatically changed the planning landscape for people with retirement plans. Eliminating the life expectancy payout for most beneficiaries changes the tax implications of retirement plans and necessitates a review

of the structure of an individual's estate plan to determine whether it is still effective. The best plan now is to be proactive. Talk to you advisors about how these changes impact you. '

Appendix 1

Is it time for your estate planning check-up?

Ensuring you have your affairs in order is a lifetime task as every day you face changes which perhaps should be reflected in your estate plan --- your legacy. With an estate tax exclusion for those dying in 2021 of 11,700,000 and no Colorado inheritance tax clients have turned their concern to a variety of other issues. This may change in the near future with the Senator Sanders' proposal. Clients are now focusing on family goals and how they can make a positive impact on their families. Clients are focusing on one or more of the following matters:

- Protecting their legacy for their children and grandchildren against claims by the heir's spouse (in the event of a divorce) or creditors of the heir.
- Not outliving their assets during a time when our economic future is uncertain.
- Preserving their independence and not being an emotional or financial burden on their children.
- Helping their grandchildren in a variety of ways, including educational opportunities, and assisting heirs with disabilities.
- Blended families of their own and of their heirs; ensuring everyone gets their fair share of the inheritance, as well as equal opportunities (although not necessarily equal outcomes).
- Public benefits and entitlements such as Social Security, Medicare and Medicaid; ensuring they will be available for themselves and their heirs.

- Providing for their own transition from a life of fun and frivolity to one characterized by fragility and lack of cognitive ability.

The checklist below is designed to get you thinking about what is important to you and what if any changes you may need to make (or discuss with your estate planning attorney) regarding your estate plan.

If you generally agree with the statement on the list, mark it with an X. If you mark any of the items with an X, it is time to meet and visit with your estate planning attorney about your existing estate plan to determine if it meets your goals and what, if any, changes you may need to make with your documents.

Thoughts about My ("Your") Estate Plan:

___ I am fearful of outliving my assets and believe I need guidance on structuring my estate to avoid this unpleasant situation.

___ With the higher estate tax exclusion of 11,700,000 per person (for those dying in 2021), I need to know if the structure of my plan makes sense, particularly if I now don't anticipate having a taxable estate. Will my documents need to be updated?

___ I would like my estate plan, and the manner in which I leave my estate, to focus on leaving a positive impact on my heirs and I am willing to tackle the "tough" issues such as wayward heirs (and the possibility of unequal distributions

amongst them), second marriages, son and daughter in laws, treating heirs differently (and perhaps unequally) due to their circumstances, or a myriad of other tough issues which concern me.

___ My children, and my future grandchildren, are of concern to me as they have not become independent and self-sustaining on their own for a variety of reasons, and should I die I want to make sure I have wisely provided for them.

___ Although I am empty nested, I have concerns for my children should they be sued or get divorced in the future, and the impact this would have on any inheritance I may want to leave to them. I would like to know how to protect their inheritance against claims by my children's creditors or spouses.

___ My children (and my future grandchildren) are of a concern to me as they have not become independent and self-sustaining on their own for a variety of reasons and should I die I want to make sure I have wisely provided for them.

___ I currently use a revocable trust as part of my estate plan, I need assistance to ensure my assets are properly titled and my beneficiary designations are set forth as they should be.

___ My marital status has changed.

Second Marriage or Blended Family:

___ A second marriage is on the horizon, or I am currently married to a spouse who is not the parent of my children, and I am in need of ensuring my new or current spouse and my intended heirs are cared for in the future and there is no fighting amongst them!

Special Bequests:

___ I would like to make specific bequests to individuals not presently included in my plans – or delete the names of one or more persons or charities currently named.

___ I would like to change the amounts of some of the bequests I have made, because my estate has increased or decreased in size.

___ My pet is very important to me and I want to ensure if it survives me it is taken care of in the manner of my choosing.

Asset Protection for my heirs:

___ One or more of my heirs has a creditor problem or is not good with money and I am concerned any inheritance will be lost to creditors.

___ Divorce could be on the horizon for one of my heirs and I want to do what I can protect any inheritance I might give to my heir, likely a child, to ensure it will ultimately end up in the hands of my grandchildren.

Special Provisions for Children/Grandchildren:

___ I have a child who has become handicapped or seriously injured since our last review.

___ One or more of my children receives SSI or Medicaid.

___ I wish to ensure assets are held for the benefit of a child or grandchild to use for educational or other specific purposes.

___ My desires regarding the ages at which I originally provided for the disposition to my children has changed.

Assisted and Long-Term Care Costs for me or my parents:

___ I am concerned about assisted and long-term care costs and have considered purchasing long term care insurance and may need to visit with someone about this for myself.

___ I believe I or a member of my family may need to be admitted to either an assisted care or a skilled nursing facility, and I am concerned my or their assets will be depleted in paying for his or her care.

___ Medicaid and Medicare are confusing to me and I am unsure how they might be useful to me in my estate planning.

Guardian, Agents, Executors, and Trustees:

___ I would like to change the person or order of persons I have named as my personal representatives, successive trustee or agent acting under my medical or financial power of attorney.

___ I would like to name a particular person as advisor to my personal representative and trustees.

___ I would like to reconsider the designation of the guardians, agent under a power of attorney or health care proxy, personal representative, and/or trustees I have named.

Powers of Attorney:

___ My financial or medical power of attorney is over 5 years old.

Other:

___ I would like to know how the latest tax laws affect my estate plan.

Disclaimer (Again)

I know this book is written by lawyers. Notwithstanding, you should not read it and then rely on it for legal advice. It is not intended to be legal advice, nor create any type of attorney client relationship and is only a discussion of legal issues by the authors.

Furthermore, the law changes frequently and projecting what those new laws may say or the impact they may have on your estate plan is simply unknown. You should stay on top of the changes and be prepared to act quickly and timely.

If you have questions about any of the items discussed in the book, please go see an attorney well versed in these issues. Laws and regulations surrounding these issues are constantly changing and you need to consult with an attorney who is current on the law in this area.

About the Authors

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Baird has over 45 years of experience in family wealth preservation, focusing his practice on tax, estate planning and administration, long term care and special needs planning. He graduated from the University of Colorado with a Bachelor of Arts degree in Economics in 1972 and received his law degree from Willamette University in 1975. He founded the law firm of Brown & Brown, P.C. and has practiced in the Western Slope since 1975.

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Baird also has been a guest speaker at various legal continuing education events periodically throughout the United States.

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