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ESTATE PLANNING SUMMIT

2025 Estate Planner's Playbook

Battle-Tested Materials **That Work**

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Contributing Authors

PARTNER
Chase Beguin
Cauble, Furr & Beguin, LLP

ATTORNEY
Evan Bermudez
Sperry & Hatley, P.C.

ATTORNEY
Michael Bezoian
DeWitt LLP

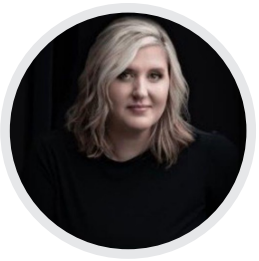
MANAGING PARTNER
Christopher Cauble
Cauble, Furr & Beguin, LLP

ATTORNEY
Gretchen Burgess
Murphy Desmond Lawyers S.C.

FOUNDER/MANAGING PARTNER
Jehan Crump-Gibson
Great Lakes Legal Group PLLC

David DuPlain
DuPlainLaw, LLC

FOUNDER
Gregory DuPont, Esq., CFP
Dupont Law Group



OWNER AND MANAGING PARTNER
Julie Eisenhower, J.D., MCEP®
Patel & Eisenhower, PLLC

MANAGING PARTNER
Don D. Ford III
Ford + Bergner LLP

SHAREHOLDER
Michael S. Goode, Esq., L.L.M., Taxation
Lewis Thomason

MANAGING MEMBER
Aviva Gordon, Esq.
Gordon Law LLC

ATTORNEY & CEO
Okyeame Haley, Esq., LLM
Haley Law Practice L.L.C.

LEAD TAX COUNSEL
Andrés J. Hernández Lossada
Saltiel Law Group

OF COUNSEL ATTORNEY
Julian LaCasse
Radiant Probate & Estate Law, Inc

PARTNER
Leslie Levin
Hinman, Howard & Kattell, LLP

ATTORNEY-AT-LAW
Christina Lewis
Parker, Milliken, Clark, O'Hara & Samuelian, a Prof. Corp.

MANAGING PARTNER
Shayla Maatuka
Maatuka Al-Heeti Emkes LLC

CEO AND MANAGING ATTORNEY
Samantha McCarthy Jarvis
McCarthy Law, LLC

PARTNER
Sandra Mertens
Gensburg Calandriello & Kanter, P.C.

ATTORNEY AT LAW, OWNER
Sharon Michaels
Sharon L. Michaels

ATTORNEY
Paul Miller
The Law Office of Paul Miller

PRINCIPAL AND FOUNDER
Gregory Nussbickel, J.D., LLM
Nussbickel Law Firm, P.A.

ATTORNEY
Ann O'Hara
Dale & Eke, P.C.

PARTNER
George Reilly
Dunlap Bennett & Ludwig

ATTORNEY
Carla Sigler
Sigler Law, Inc.

ATTORNEY, SOLE PRACTITIONER
James Snow
James M. Snow Law Firm

FOUNDER
Philip Tortorich
Torch Law, P.C.

MANAGING PARTNER
Mary Vandenack, ACTEC, COLPM®, CAP®, Accredited Estate Planner® (Distinguished)
Duggan Bertsch

ATTORNEY
C. Blake West
Vertical Estate Planning, LLC

Preface

At National Business Institute, our mission is to deliver practical learning experiences that empower attorneys to better serve their clients. *The 2025 Estate Planner's Playbook* is an extension of that mission—a collaborative resource designed to share real-world insights and professional wisdom from across the estate planning community.

The materials in this collection were curated from submissions by attorneys and estate planning professionals within our network. Each contributor offers a perspective shaped by hands-on experience—from drafting techniques and client communication strategies to reflections on evolving laws and best practices. Together, these contributions form a collective knowledge base that bridges theory and practice, helping practitioners refine their craft and stay grounded in the realities of modern estate planning.

All submissions have undergone non-substantive editorial adjustments for clarity and consistency, but the ideas, approaches, and professional judgments remain those of the individual authors. Our role is to facilitate the exchange of these insights—not to prescribe any single approach—and to provide a platform where the expertise of the legal community can continue to grow through shared learning.

We hope this Playbook serves as both a reference and an inspiration: a reminder that estate planning is not only about documents and doctrines, but about thoughtful guidance, professional integrity, and the collective pursuit of excellence in service to clients and families.

Top Trust Provisions You Need to Have in Your Arsenal

Floating Spouse

By Michael Bezoian

Provision: Notwithstanding any provision herein to the contrary, Settlor's Spouse means that person whom the Settlor is married to at such time a provision referencing the Settlor's Spouse applies. An individual ceases to be the Settlor's Spouse for purposes of this Agreement if that person divorces or legally separates from the Settlor. In addition, an individual ceases to be the Settlor's Spouse for purposes of this Agreement if either the Settlor or that individual who would otherwise be the Settlors' Spouse commences a divorce or legal separation proceeding during the Settlor's and that individual's marriage. If such proceeding is dismissed and the result of which is the Settlor's continued marriage to that individual, that individual shall continue to be the Settlor's Spouse for purposes of this Agreement.

Use: A provision like this (sometimes referred to as a "floating spouse" provision) is common in Spousal Lifetime Access Trusts (SLATs). The rationale for a provision like this is to define "spouse" broadly to: (1) terminate a divorced spouse's interest in the SLAT and (2) to permit the settlor to continue to have indirect benefits from the SLAT if the settlor remarries. Naming a spouse by name may result in continued distributions to that individual even after a divorce. A provision like this may also have utility in planning with revocable documents (such as trusts) too. With that said, some jurisdictions (such as Wisconsin) have statutes that presume beneficial interests and fiduciary nominations in favor of a former spouse are revoked upon divorce, legal separation, or annulment of a marriage, absent a showing of contrary intent.

Swap Power

By Michael Bezoian

Provision: Notwithstanding anything in this Trust Agreement to the contrary, either or both Settlors, during their respective lifetimes, shall have the power, exercisable in a non-fiduciary capacity without approval or consent of any person acting in a fiduciary or non-fiduciary capacity, to acquire all or any part of the principal of the trust initially created hereunder by substituting other property having a fair market value, at the time of such substitution, equivalent to the trust principal so acquired, which power shall be exercisable by written notice to the

Trustee. The Trustee shall ensure that the properties acquired and substituted are of equivalent value. The power granted in this Paragraph shall not be exercised in a manner that shifts benefits among the trust Beneficiaries. This power shall not be assignable, and any attempted assignment thereof shall be void. It is the purpose and intention of this Paragraph to cause the trust initially created under this Trust Agreement to be treated as a grantor trust as to the Settlors with regard to all of the income and principal thereof throughout each taxable year of such trust; however, no income or principal of the trust initially created under this Trust Agreement shall be distributed or paid to the Settlors or any representative of the Settlors as reimbursement for or in discharge of any income taxes incurred as a result of the power granted in this Paragraph. The power granted in this Paragraph may be released at any time by the holder thereof, by written, acknowledged instrument delivered to the Trustee, and such release shall be irrevocable. The power granted in this Paragraph shall terminate upon the death of the Settlors.

Use: This provision—sometimes referred to as a "swap" power or "substitution" power—is a common power in irrevocable grantor trusts. A person is treated as a grantor (for income tax purposes) if that person retains a power of administration that "is exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity." IRC § 675(4). IRC § 675(4)(C) defines a "power of administration" to include "a power to reacquire the trust corpus by substituting other property of an equivalent value."

Unless a settlor is intentionally establishing an irrevocable non-grantor trust, the settlor will likely include this provision to trigger grantor trust status for an irrevocable grantor trust (including, most commonly, a standard intentionally defective grantor trust (IDGT)).

A concern when triggering grantor trust status with an irrevocable trust is avoiding estate tax inclusion (but retaining sufficient powers for a settlor (under trust law) to remain as grantor (under tax law)). Estate of Jordahl, 65 T.C. 92 (1975), acq. 1977-1 C.B. 1, addressed this question. The Tax Court in Jordahl held that a swap power wasn't a power to alter beneficial enjoyment under the estate tax "string provisions" (IRC §§ 2036–2038) and that that there was no incident of ownership (under IRC § 2042) of a life insurance policy because of that swap power. Notably, in Jordahl, the swap power was arguably held in a fiduciary capacity. Rev. Rul. 2008-22 provides additional guidelines for drafters to mitigate the risk of a swap power causing estate tax inclusion.

"The Tax Court in Jordahl held that a swap power wasn't a power to alter beneficial enjoyment under the estate tax "string provisions" (IRC §§ 2036–2038) and that that there was no incident of ownership (under IRC § 2042) of a life insurance policy because of that swap power."

Exercising a swap power would be especially useful to receive a step-up in basis on low-basis assets originally held by irrevocable trust. A swap power can also provide the settlor (or the trust) liquidity. Finally, a swap power may be helpful to shift appreciation if a settlor anticipates that a given asset (currently in the settlor's estate) will appreciate in value in the future.

Optional Disclaimer Trust

By Julian LaCasse

Sample Provisions

Funding:

Allocation to Bypass Trust. If the surviving Settlor, hereinafter referred to as the "surviving spouse," makes an effective disclaimer of the surviving spouse's interest in the Survivor's Trust or any specific portion thereof, the interest so disclaimed shall be allocated to a trust designated the "Bypass Trust," to be held, administered and distributed as provided herein. The term "effective disclaimer" shall mean a disclaimer satisfying the requirements of Internal Revenue Code Section 2518, as amended from time to time.

Revocability:

Powers Over Trusts After Death of Predeceased Spouse. The Bypass Trust, if created, shall become irrevocable at the death of the predeceased spouse and may not be altered or amended. With reference to the Survivor's Trust, the surviving spouse shall retain, in addition to the rights and powers hereinafter granted, the right to alter and amend it or to revoke it, in whole or in part.

Distributions during life of surviving spouse:

Distributions of Income and Principal to Surviving Spouse. The Trustee shall pay to or apply for the benefit of the surviving spouse the entire net income of the Survivor's Trust and the Bypass Trust, quarter-annually or at more frequent intervals. The Trustee shall also pay to or apply for the benefit of the surviving spouse from time to time such sums from the principal of either trust as the Trustee, in the Trustee's discretion, deems necessary for the surviving spouse's health, maintenance and support in accordance with the surviving spouse's accustomed manner of living after taking into consideration, to the extent the Trustee deems advisable, any income or other resources of the surviving spouse outside these trusts, known to the Trustee and reasonably available for such purposes. The Trustee shall, to the extent practical, make all such principal payments first from the Survivor's Trust until it is exhausted, and thereafter out of the Bypass Trust; provided, however, that the Trustee may in its discretion elect not to exhaust the Survivor's Trust if to do so might constitute an undue hardship on the surviving spouse (e.g., where the Survivor's Trust contains an interest in the residence occupied by the surviving spouse), or might result in an undesirable forced liquidation of assets in which the Survivor's Trust has an interest.

Purpose

These provisions upgrade a trust from the simplest structure, "All to A," to the next level of complexity, referred to colloquially as an "A optional B." The "optional B" part, of course, is the Disclaimer Trust, which these sample provisions specifically define so it is thereafter referred to as the "Bypass Trust."

When using these provisions, the only assets allocated to the Bypass Trust are those that the surviving spouse disclaims, which she or he will need to do following the death of her or his spouse, ideally with the assistance and advice of legal counsel, in a way that meets the formal requirements dictated by IRC section 2518.

To make a "qualified disclaimer" that meets the requirements of IRC 2518, the surviving spouse must make an "irrevocable and unqualified refusal" to accept the interest in the property that meets the following requirements:

a) the refusal is in writing

b) the writing is delivered to the transferor, her legal representative, or the "holder of legal title," to the property no later than 9 months after either:

   i) the day on which the transfer creating the interest in such person is made, or

   ii) the day on which the person attains age 21, [and]

c) the person has not accepted the interest or any of its benefits

d) as a result of the refusal, the interest passes without any direction from the person making the disclaimer, and passes either:

   i) to the decedent's spouse,

   ii) to a person other than the person making the disclaimer.

See IRC section 2518(c) for additional rules; 26 U.S. Code § 2518, and 26 CFR § 25.2518-2 for additional details regarding the requirements of § 2518.

Many clients have questions about the optional nature of funding the Bypass Trust, as well as the timing aspects related to making such a disclaimer. It is important to stress to those clients that the option is exercised, if at all, following the death of the deceased spouse. This generally eases their concerns, but additional explanation may be needed in some cases.

Function

At the most basic level, these provisions are a tool for estate tax planning. The surviving spouse would disclaim (an interest in) assets she or he would otherwise receive from the deceased spouse's half of their community property—or the deceased spouse's separate property, if passing to the surviving spouse—if she or he anticipates that the aggregate value of the couple's property will exceed their total applicable exemption amount at the surviving spouse's death. Keep in mind that (1) estate tax liability is derived from the total value of a person's or a married couple's global assets, regardless of whether such assets are titled to the trust, even though (2) the trustee only has authority over assets titled to the trust.

Strategy

At this point, you may be wondering which assets are best to disclaim (and thus allocate to the Bypass Trust). As may or may not be obvious, the answer will be dictated, at least in part, by your clients' assets. In a perfect world, the disclaimed asset will fit nicely within the contours of the Bypass Trust provisions, i.e., produce income, since the trustee is required to distribute all income to the surviving spouse anyway. Additionally, when valuing assets for estate tax purposes, the value of each asset allocated to the Bypass Trust is 'frozen' as of the deceased spouse's death, meaning any increase in value after that date will not be included in the total value of the Bypass Trust assets. By contrast, had that still-appreciating asset been included among the Survivor's Trust assets, the calculation of the surviving spouse's estate would have included the increase in value since the deceased spouse's death.

With that in mind, the best assets for a surviving spouse in these circumstances to disclaim are those that produce income (as mentioned above) and are likely to appreciate significantly in the future.

Pet Trust

By Julian LaCasse

Sample Provisions

Funding of Companion Animal Trust. Provided there are pets of any kind (hereinafter "Companion Animals") that survive the surviving spouse, [dollar amount, portion of trust assets or description of other property] shall be allocated to the Companion Animal Trust and administered according to the provisions in Section [#] below.

[#]. Companion Animal Trust. Assets allocated to the Companion Animal Trust will be held in trust for the benefit of the surviving spouse's surviving Companion Animals. The Companion Animal Trust will be administered as set forth in this Section [#].

The primary purpose of this trust is to ensure that any Companion Animal of the surviving settlor that survives the surviving settlor will receive proper care for as long as that Companion Animal lives.

The trustee of the Companion Animal Trust shall be [Trustee 1], but if [s/he] is or becomes unwilling or unable to serve, then [Trustee 2] shall serve as trustee. The trustee under this section shall act with full power of trust administration.

The term of this trust shall begin on the death of the surviving spouse and shall end upon this trust's termination in accordance with the other provisions of this Section [#].

At any time or times during the trust term, the trustee shall pay to or apply for the benefit of each of the settlor's Companion Animals so much of the net income and principal of the trust as the trustee deems proper for the care and maintenance of each of them. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed.

In administering this trust during the trust term, the trustee shall comply with the following directives:

- The trustee shall be responsible for ensuring that each of Settlors' then living Companion Animals has a Caretaker (as that term is further defined below) and a suitable home.

- The trustee shall arrange for one or more independent Caretakers to provide a home for the settlor's Companion Animals.

- Upon placement of the Companion Animals with an independent Caretaker, the trustee shall visit each of those Companion Animals, or arrange for an independent person to do so, at least once every three (3) months, to ensure that the Companion Animal is being properly cared for.

- The trustee may pay trust funds, in the trustee's discretion, to the Caretaker of each Companion Animal as needed to ensure that the needs of each Companion Animal's health, maintenance and support are properly met. The trustee may make distributions as monthly allotments to the Caretaker, to reimburse the Caretaker for out-of- pocket expenses related to the care of the Companion Animal(s), as compensation for taking care of the Companion Animal, and/or directly to third parties who provide products or services for the Companion Animal. It is Settlors' primary intent to provide for each Companion Animal. Therefore, the entire Companion Animal Trust estate may be expended for this purpose.

- The term "Caretaker" as used herein shall refer to the person(s) responsible for providing a proper home and loving care for the Companion Animals, and for working with the trustee to ensure that the financial needs of the Companion Animals are met. The trustee shall select a Caretaker or Caretakers, as the case may be, including the trustee if she or he so chooses, for each Companion Animal. No provision herein is intended to prevent a Caretaker from acting as such with respect to more than one (1) Companion Animal if, in the trustee's sole discretion, such Caretaker is capable of providing the level of care desired by Settlors and otherwise required hereunder.

- Each individual who is a Caretaker under this instrument shall be entitled to compensation for services rendered, payable without court order. The trustee, in the trustee's sole discretion, shall determine the amount of compensation for each Caretaker.

- The Caretaker or trustee shall select a suitable veterinarian.

- On the death of each of the settlor's Companion Animals, the trustee will pay any outstanding veterinarian bills and pay for the proper disposition of the Companion Animal's remains.

- On the death of the last to die of the Settlors' Companion Animals, and after the satisfaction of those expenses pursuant to Subsection [#]* above, the Companion Animal Trust shall terminate and any remaining trust estate shall be distributed, free of trust, to [beneficiary/ies].

- Settlors acknowledge that the interest in this trust given to the settlor's Companion Animals and any remainder gift to a charitable organization will not qualify as a charitable remainder trust under current law and will therefore preclude a charitable for estate tax purposes. However, as Settlors' primary intent is to ensure the proper care of the Companion Animals, they have chosen to forego the benefit of the charitable deduction.

*The subsection referred to is the one immediately preceding this one, regarding disposition of remains and outstanding vet bills.

Purpose

Despite the name of this publication, the above provisions are admittedly not among those you "need to have in your arsenal." However, for the right client(s), access to these provisions turns out to be essential. Over the years, I have had a handful of clients who were very happy I was able to draft this kind of trust for them.

Those clients, generally speaking, are ones whose lives revolve around their pets. They usually do not have children, or if they do, their relationship with those children tends to leave something to be desired.

Even in cases where the clients (or potential clients) fit that description, I usually start by recommending a specific gift of the clients' pets, along with a cash gift to provide for the pets' care after the clients pass away. I have seen cash gifts accompanying specific gifts of pets in amounts ranging from $2,000 to $100,000. In many ways, this method (specific distribution/cash gift) accomplishes the same goals as the pet trust, without attaching such stringent requirements. If the clients seem attracted to a more significant cash gift, that could be your opportunity to propose setting up a pet trust.

Function

As you can see, these provisions impose specific duties on at least two individuals: the trustee of the pet trust and the Caretaker of each animal. These duties may be too onerous for whomever your client is thinking will take care of her or his animals. I recommend pointing out each requirement to your client to make sure that the designated trustee or proposed caretaker is up for the job.

"These duties may be too onerous for whomever your client is thinking will take care of her or his animals. I recommend pointing out each requirement to your client to make sure that the designated trustee or proposed caretaker is up for the job."

The provisions require the trustee to place each animal with a caretaker (or more than one) and to ensure its ongoing care at a very high level by, among other things, visiting the animal(s) or arranging for someone else to do so. Also included are arrangements for each animal's end-of-life care and disposition of its remains, as well as distribution of remaining trust assets on the death of the last animal to die.

The last point worth mentioning is the acknowledgment of taxation. By including this provision, the clients and the trustee (and her or his CPA) have all received notice that the settlors have prioritized care of the animal(s) over tax efficiency, which can be a good wake-up call for your clients, not to mention a convenient way to CYA.

Co-Trustee Delegation/ Singular Authority

By Julian LaCasse

Sample Provisions

Singular Nature Of Authority. At any time when two or more Co-Trustees are acting, a majority of the then-acting Co-Trustees shall agree on any action to be taken, but after that decision has been made, any such acting Co-Trustee, alone, may sign and act for the trust, including specifically but not limited to, negotiating securities and making deposits to and withdrawals from bank and savings accounts, and all third parties may rely upon such singular nature of that Co-Trustee's authority.

Purpose

This clause is included in all of our trusts as a 'backstop provision.' It is meant to undo the default treatment of co-trustees in California law, which requires unanimous agreement both in deciding to pursue a given course of action and in actually carrying out whatever is necessary to make it happen. Accordingly, the law would—in the absence of a provision like this—mandate that each trustee: sign documents requiring a trustee's signature, attend a meeting between a trustee and, for example, a bank employee, or any other action taken in a person's capacity as trustee.

I recommend including a provision like this even in trusts where sole trustees are designated sequentially, since those trusts most often (if not always) empower a settlor or an acting trustee to designate a co-trustee to act with her or him, or authorize a settlor or an acting trustee to designate a successor trustee

or co-trustees, or both. Here is why: one consequence of this added flexibility is the possibility that a trustee would in fact designate a co-trustee to help her or him with the duties imposed by the trust, without realizing that she or he cannot actually delegate tasks to such a person without also participating in them.

Function

Giving each acting trustee the authority to act alone with respect to administration of the trust can ease the burden on each of them, increasing collaboration, and in turn, efficiency. Since the co-trustees must still agree on the actions to be taken, this provision attempts to guard against a scenario where any of them can act in contravention of the other(s).

However, you and your client should be aware that giving an individual co-trustee authority to act on behalf of all acting trustees opens the door for mistakes to be made, which will be attributable to all co-trustees, or even willful misconduct, which would also be attributable to all co-trustees. Additionally, it would be difficult to prove that some bad behavior was not taken with the innocent trustee's involvement, since there is no requirement that any acting co-trustee consent in writing.

Despite the risks, in my experience, this provision has done much more good than harm. This is especially poignant in a situation where co-trustees are selling a piece of real property—since any of them can sign the sale agreement (and related precedent documents, like affidavits for retitling), only the one (or more) who is willing to participate in the sale negotiations and meetings need do so.

As a final note, explaining each of the points I make above to your client is also a good opportunity to remind the client how important it is to designate a person they deeply trust as their successor trustee (or their successor co-trustees).

Customized Right of Occupancy Provisions for Marital Home in an Ongoing House Trust or Continuing Trust

By George F. Reilly

An increasingly common issue for a number of clients in second or later marriages or in unmarried relationships is how best to address use of the marital home (or other property) after the owner spouse/partner dies. If the home is jointly owned or if the intention is that the house shall be distributed to the surviving spouse or partner it is a straightforward solution. But in many cases the owner spouse/partner would like to have the property pass to his or her beneficiaries at some point but not force the surviving spouse/partner out of the home shortly after their death.

Traditionally this might have been addressed by use of a Deed with a Life Estate or creation of a Life Estate by Will or Trust. That can still be an effective method, but my preference is to create or update an individual Revocable Living Trust plan for the owner client and include a provision that clearly sets out his or her intentions for the ongoing use of the property and its ultimate disposition.

The property remains in the now-irrevocable Trust and is managed by the Successor Trustee for the benefit of the surviving spouse/partner. In some cases it may make sense to "spin off" the Right of Occupancy in a separate House Trust that is established in the Revocable Living Trust. As for who should be in charge of this Trust, in some cases the surviving spouse/partner is also designated as the Successor Trustee, but that may be problematic in some family situations. It is often a best practice to have a non-interested party or a professional

fiduciary in charge of this property to reduce potential friction points.

Among the myriad of issues to consider in creating this right of occupancy provision are whether the occupant is responsible for any type of payment along the lines of rent for use of the property, whether they are responsible for different types of maintenance such as lawn and garden care, HVAC servicing, minor repairs up to a dollar amount, appliance replacement, among other things. The personal property and fixtures in the real property are also sometimes an issue and clarity on what the decedent wanted to do with those things can be very helpful in reducing potential disputes.

As a general rule capital improvements and major repairs are the responsibility of the Trustee, as well as property taxes, insurance payments, mortgage liability, and other things that can be specified in the Trust provision. I have prepared some relatively straightforward Right of Occupancy provisions and some very detailed ones. A colleague of mine had a particularly complicated one that went on for several pages due to the particular issues with the vacation property involved and family use and responsibilities.

Then there are the issues of the surviving spouse/partner's rights as to cohabitation with another person while residing in the property, his or her rights to sub-let the property or use it as a vacation rental/Airbnb, and what is considered abandonment or termination of their rights to remain in the property?

My advice to attorneys discussing this issue with clients is to follow the Stephen Covey approach and begin with the end in mind. What does the client envision for this property in the long term, and are there any particular concerns he or she has about its use? Do they anticipate any family dynamics interfering with the use of this property by the surviving spouse/partner? Do they have a Trusted Agent they can appoint to supervise this occupancy period who is not an interested party?

While perhaps seemingly a simple solution to draft for in a Trust, there are many traps for the unwary, and the client may have to consider some uncomfortable things relating to their family situation in getting this Right of Occupancy properly drafted for a successful outcome!

While perhaps seemingly a simple solution to draft for in a Trust, there are many traps for the unwary, and the client may have to consider some uncomfortable things relating to their family situation in getting this Right of Occupancy properly drafted for a successful outcome!

Here are some provisions for a Right of Occupancy either in an ongoing Irrevocable Trust or a separate House Trust established after the owner's death by specific bequest in the Revocable Living Trust:

Upon my death, and upon request from my [SPOUSE/PARTNER], my Trustee is authorized and directed to retain in a separate Trust share established by my Trustee specifically for this purpose, any interest owned by me in property which constitutes my personal residence at the time of my death, currently [HOUSE INFORMATION] ("My Residence"). If my [SPOUSE/PARTNER] desires to remain in my residence he/she may do so as long as he/she shall actually use and occupy it as a home subject to the conditions set forth herein. This Trust share shall be called the "[NAME] House Trust" and all property held in this share shall be titled accordingly.

[Name] House Trust

If my [SPOUSE/PARTNER] chooses to remain in my residence after my death, he/she has the exclusive right of occupancy of this property so long as he/she is unmarried or not cohabiting with someone not related to her [OPTIONAL]. His/her right of occupancy shall be personal to [BENEFICIARY] and is not subject to assignment. There is no right of rental or subletting other than by my Trustee. [OPTIONAL but recommended]. For purposes of this Article, the period of my [SPOUSE/PARTNER's] occupancy in my residence shall be referred to as the "Use Period."

(a) Payment of Expenses for My Residence

During the use period, [SPOUSE/PARTNER] shall be permitted to use and occupy my residence free of any rent [OPTIONAL]; provided, however, that all taxes, insurance, assessments, minor repairs (i.e., those costing less than $2,500.00) [CLIENT SETS THESE PROVISIONS], and other charges necessary to maintain said property shall be paid by him/her. Other repairs (i.e., those costing $2,500.00 or more), or work viewed as improvements to the property shall be paid for by my Trustee. My Trustee may, but is not required to, use the IRS guidance on repairs vs. improvements in making a determination under this section. If at any time my [SPOUSE/PARTNER] should fail or refuse to pay any charges or expenses which he/she is obligated to pay when due, or if he/she shall fail to keep the property in good repair, my Trustee may pay such charges and look to [SPOUSE/PARTNER] for reimbursement therefor, or my Trustee may deem him/her to be not abiding by the conditions set forth and may terminate her right to occupy the property.

(b) Trustee Authority to Substitute Properties

My Trustee is authorized in Section _____ of my Trust to "acquire, maintain, and invest in any residence for the beneficiaries' use and benefit, whether or not the residence is income producing and without regard to the proportion that the residence's value may bear to the Trust property's total value, even if retaining the residence involves financial risks that Trustees would not ordinarily incur." It is my specific intent that the authority in Section _____ shall be used in coordination with this Article to permit my [SPOUSE/PARTNER] to "downsize" from my current residence to something more appropriate for his/her use and enjoyment at that time subject to the same conditions of use and occupancy herein. My Trustee may purchase an appropriate property at no more than the anticipated or actual sales price of my residence in the name of the Trust. The replacement property shall then be considered as "my residence" for the purposes of this Article and shall continue to be administered as the [Name] House Trust.

(c) Disposition of My Residence

Upon the first to occur of: (i) notification by [SPOUSE/PARTNER] to my Trustee that he/she no longer desires to occupy my residence; (ii) end of the use period by the remarriage or attempted cohabitation of [SPOUSE/PARTNER] as set forth above [IF OPTION CHOSEN]; or (iii) the death of [SPOUSE/PARTNER], then the right to live in my residence shall terminate. My Trustee shall sell my residence [OR OTHER ACTION PER CLIENT'S WISHES], at such time and price and upon such terms and conditions, including credit, as my Trustee may determine in his or her sole discretion and distribute the net proceeds as set forth in the Articles that follow.

If [SPOUSE/PARTNER] is deceased at the time of my death, then this provision will lapse, and this property instead will be distributed under the other provisions of this Trust.

Incentive Provisions for Matching Income or Retirement Account Contributions, Etc.

By George F. Reilly

Clients often would like to include provisions for their children or other beneficiaries that would impose restrictions or conditions on their inheritances to encourage them to be good citizens and good financial stewards. In some cases, the beneficiaries have a track record of poor decision-making or have issues with substance abuse, gambling, or other problematic behavior. Of course, an initial conversation to have with the client is to advise them that no one except a currently serving spouse (by state law rights) has an entitlement to an inheritance. And because there is no right or entitlement, the client does not have to provide anything to any particular beneficiary, has no obligation to provide equally to all beneficiaries and, if they still want to provide for a beneficiary for whom they have concerns, they can set some conditions on inheritance distributions.

It is this last part where things can get complicated. Many times clients have notions of things they want to, in effect, control from the grave. Whether these goals can be effectively drafted into a Trust and, perhaps more importantly, be able to be administered by a Successor Trustee, is where the drafting attorney has a key role in advising the client. While it can be easy to provide a list of desired behaviors for a Trustee to consider in providing discretionary distributions to a beneficiary, in my experience a professional fiduciary may be hesitant to be required to make these assessments on a beneficiary's conduct before making a distribution. A family member or Trusted friend may be more inclined to follow the client's guidance, but there are still risks involved if the Trust contains, for example, the following type of guidance:

In making discretionary distributions to the Beneficiaries of the Trust, I request—but do not require—that my Trustee do so in a manner that assists, encourages, or rewards the Beneficiaries in exhibiting or accomplishing a behavior I want to assist, encourage, or reward (desired behaviors). These desired behaviors are to:

- pursue an education at least through college or vocational school;
- be gainfully employed with a view toward being financially self-sufficient;
- be a law-abiding member of society;
- be a productive member of society by making meaningful and positive contributions to family, community, and society;
- engage in entrepreneurial activities;
- engage in creative activities;
- handle money responsibly and avoid wasteful spending;
- act with empathy, thoughtfulness, kindness, and compassion toward others;
- develop healthy and meaningful relationships;
- make contributions of time, money, or both to charity; and
- maintain a physically and mentally healthy lifestyle.

My recommendation to clients is to consider a more definitive standard that any Trustee can follow, and one that I use regularly is the use of income and retirement account contribution matching provisions for distributions. One measurable standard for "being a productive member of society" is gainful

employment or entrepreneurship, while a measure of good financial stewardship is making contributions to an individual or employer retirement account. Any Trustee can make a determination on discretionary distributions using these criteria.

While certainly not a precise way to attest to a beneficiary's compliance with the grantor's intent of demonstrating the desired good behaviors, it does at least give the beneficiary a standard to achieve a definable benefit from their inheritance. The two provisions I adapt for these matching programs are set out here:

(a) Income Matching Incentive Distributions

My Trustee may distribute to my [BENEFICIARY] on a quarterly, annual, or other basis, as much as the net income of his/her Trust, and, to the extent the net income is insufficient, the principal of the Trust for each dollar of income earned by my [BENEFICIARY]. My Trustee's determination of the amount of income and principal distributable to my [BENEFICIARY] under this paragraph, if any, shall be absolute and binding upon all persons interested in the Trust estate.

My Trustee may, for example, base the distribution for my [BENEFICIARY] after determining his/her income earned by considering his/her adjusted gross income for federal income tax purposes, reduced by investment or passive income (such as rents, dividends, and interest), income from relief of indebtedness, capital gains, and government benefits, if any, and such other adjustments as my Trustee deems appropriate under the circumstances.

My Trustee may make interim distributions to my [BENEFICIARY] prior to the Trustee's final determination of his/her earned income based upon such documentation of earnings as my Trustee deems appropriate, including, without limitation, my [BENEFICIARY]'s W-2 forms, pay stubs, business profit or loss statements, 1099's for independent contractor work, or draft tax returns.

The distributions authorized under this paragraph shall be made to my [BENEFICIARY] as soon as practicable after the amount of such distribution, if any, has been determined by the Trustees.

In no event shall the distributions to my [BENEFICIARY] under this paragraph exceed TWENTY-FIVE THOUSAND DOLLARS ($25,000) [OPTIONAL CAP], collectively, in any calendar year.

(b) Retirement Savings Matching Distributions

In order to encourage my [BENEFICIARY] to invest in his/her own retirement planning, my Trustee may make annual distributions equal to any contribution my [BENEFICIARY] makes to an Individual Retirement Account, employer retirement account, or other retirement savings program in a dollar-for-dollar match. The intended effect of this distribution is to reward my [BENEFICIARY] for his/her efforts in funding their retirement plan, while effectively having no net loss of resources for making those contributions due to the reimbursement from the Trust. My Trustee may require my [BENEFICIARY] to provide such information as is necessary to verify the nature and amount of annual contributions prior to making any distributions under this provision. Further, if my Trustee becomes aware that my [BENEFICIARY] has been withdrawing funds from their retirement account prior to reaching age 60, my Trustee has the discretion to not make additional distributions under this provision.

Directing the Trustee to Purchase a Restricted Single Premium Immediate Annuity (R-SPIA) for a Beneficiary's Inheritance Share Rather Than Have an Ongoing Trust Established

By George F. Reilly

Another way to address the issue of providing for a beneficiary but imposing limitations on the amount and timing of their inheritance distributions is to consider using a special kind of annuity to provide the beneficiary with guaranteed income for a term of years or for life.

In some smaller value estates it may not be practical to establish an ongoing Trust for the administration of an inheritance with conditional payments to a beneficiary. And in other cases, a client would like to use a family member, such as the sibling of the beneficiary for whom a Trust is being established, to be the Trustee for those funds. This is rarely a good idea, no matter how well intentioned it may be, as the relationship between the siblings is likely to be adversely affected by the view of the beneficiary that their sibling is "standing between me and my money." This is particularly problematic if the other beneficiaries received outright distributions with no conditions applied.

A low-cost solution that addresses both the economic aspects of a continuing Trust and the family dynamics issues is to use a special purpose annuity known as a Restricted Single Premium Immediate Annuity (R-SPIA) instead of an ongoing Trust for one or more beneficiaries. The Will or Trust can specify that, after determining the amount of the inheritance distribution to which the beneficiary is entitled, the Executor/Personal Representative/ Trustee shall use those funds to purchase one or more R-SPIAs to provide that beneficiary with guaranteed lifetime income or for some period of time, typically paid out on a monthly basis. The R-SPIA can also include possible additional features such as a minimum payment period (10 or 20 years typically), reimbursement of unused benefits in the event of an untimely death of the beneficiary payable to his/her heirs, or even a survivor benefit option. Note that all of these features reduce the monthly annuity payout to pay for their cost.

Restricted SPIAs are more typically used for Medicaid planning and other purposes but they can be used for providing an inheritance stream of income with the additional benefit of the restriction itself. That restriction is that the beneficiary does not have the authority to change the terms of the annuity contract, cannot sell the annuity for a lump sum to one of those TV ad companies, and is "stuck" with just the magic money that comes into their bank account each month. A creditor cannot attach the annuity in any way and may only access the

"A low-cost solution that addresses both the economic aspects of a continuing Trust and the family dynamics issues is to use a special purpose annuity known as a Restricted Single Premium Immediate Annuity (R-SPIA) instead of an ongoing Trust for one or more beneficiaries."

funds that are distributed to the beneficiary from the annuity. These annuities have no ongoing costs as the fee for the annuity paid when it is purchased includes all of the costs of the future payments and administration of the annuity.

What are the downsides of using an R-SPIA in place of a continuing discretionary Trust? The main one that my clients have expressed is that the beneficiary will get the income with no strings attached and they can use it for whatever purposes they want, even self-destructive ones. There is no discretion with the annuity payments. Some have expressed concern about the use of annuities since they may have had a bad experience with annuities in the past. I explain to them that this is the simplest form of annuity, a lump sum payment to an insurance company for a series of guaranteed payments per the contract terms, with the added benefit of the restrictions on sale, transfer, or redemption. I do advise that the Trustee should make sure that the R-SPIA is purchased from a company that is financially sound and will not likely default on the payments, but that is usually not an issue since only a few insurance companies currently offer the R-SPIA option.

The bottom line to me is that this is an option that some clients may want to consider, particularly in those circumstances where the Trust assets may not warrant the use of a professional fiduciary and they want to avoid family disharmony but still provide for the wayward beneficiary, presumably with the hope that the inheritance will help them steer a better course for the rest of their life.

A simple way to incorporate this R-SPIA into a Trust is to use language like this in the beneficiary guidance section:

Our Trustee shall, if practicable, use the funds to be distributed to the share for my [BENEFICIARY] to purchase a Restricted Single Premium Immediate Annuity for the maximum term of years permissible or for his/her lifetime. [OPTIONAL] with [CONTINGENT] as the contingent beneficiary for the remaining annuity funds which shall be distributed to them outright unless the annuity contract permits an ongoing series of payments. This Annuity shall provide my [BENEFICIARY] with a guaranteed stream of income for the term of the Annuity and not be subject to early termination, sale, or transfer by the beneficiary. If my [BENEFICIARY] has predeceased, this share shall lapse… .

Qualified Subchapter S Trust (QSST) Provision and Explanation

By Michael Goode

Provision

Article [X]: Qualified Subchapter S Trust (QSST)

Section 1. Purpose; Separate QSST.

If any trust created under this instrument would otherwise hold stock of a corporation that has made (or may make) an election to be treated as an S corporation, and such stock will not be held in a trust that is treated as owned by the Grantor for federal income tax purposes or in a trust for which a valid Electing Small Business Trust (ESBT) election is then in effect, the Trustee shall segregate such stock in a separate trust intended to qualify as a Qualified Subchapter S Trust (QSST). It is the Grantor's intent that any such separate trust satisfy all requirements for QSST treatment.

Section 2. Required QSST Terms.

Each separate QSST shall mirror the dispositive

terms of the originating trust except as necessary to maintain QSST status:

(a) There shall be only one current income beneficiary during that beneficiary's lifetime.

(b) All of the trust's income (within the meaning of Section 643(b) of the Internal Revenue Code) shall be distributed to the current income beneficiary at least annually.

(c) During the lifetime of the current income beneficiary, no distribution of principal may be made to any person other than such beneficiary.

(d) During the lifetime of the current income beneficiary, no person shall hold a power of appointment, whether inter vivos or testamentary, other than in favor of such beneficiary.

(e) If a single trust would otherwise have more than one current income beneficiary, the Trustee shall divide it into separate trusts or shares so that each QSST has only one current income beneficiary.

(f) If additional requirements are imposed by applicable federal income tax law to maintain QSST eligibility, the Trustee shall administer each QSST in conformity with those requirements.

Section 3. Elections; Protective Actions.

(a) The current income beneficiary (or such beneficiary's legal representative) is authorized and requested to make any required QSST election and to execute and deliver all documents necessary to maintain S corporation eligibility. The Trustee shall timely furnish information and notices to facilitate such election.

(b) If a QSST election is not timely and effectively made or maintained, the Trustee may, to the extent permitted under this instrument and prudent administration: (i) make an ESBT election; (ii) distribute the S corporation stock outright to the current income beneficiary if consistent with the dispositive plan and fiduciary duties; or (iii) sell or otherwise dispose of the stock or take other lawful steps to preserve S corporation status and the interests of all beneficiaries.

(c) The Trustee is authorized to execute consents and take shareholder actions reasonably necessary to maintain the corporation's S status, provided doing so does not contravene these QSST terms.

Section 4. Termination During Life of Current Income Beneficiary.

If a QSST terminates during the lifetime of its current income beneficiary, the remaining principal shall be distributed to such beneficiary.

Section 5. Construction.

References to "income" in this Article mean trust accounting income as defined in Section 643(b) of the Internal Revenue Code. This Article shall be construed to effectuate QSST eligibility while preserving the Grantor's overall dispositive scheme.

Explanation

This clause is included to allow the trust to hold S corporation stock without jeopardizing the corporation's S election. It automatically creates a separate trust when necessary to satisfy federal QSST requirements.

Several important features stand out. The provision ensures there is only one current income beneficiary and that all income must be distributed annually, which satisfies the IRS conduit requirement. It bars principal distributions to anyone else and eliminates powers of appointment, thereby preserving single-

beneficiary status. It also directs the Trustee to split the trust if multiple current income beneficiaries might otherwise exist.

The election itself must be made by the current income beneficiary, but the Trustee is directed to provide the information necessary to support it. Protective authority is given to the Trustee to make an ESBT election, distribute stock, or sell it if a QSST election is not secured. This prevents loss of S status.

This provision provides flexibility and tax compliance while preserving the settlor's dispositive scheme. Because QSST rules are federal in scope, this language will generally work across jurisdictions, but drafters should confirm consistency with state trust statutes and fiduciary powers before use.

No-Contest Provision

By Michael Goode

Provision

Article [Y]: No-Contest (In Terrorem) Provision

Section 1. Intent.

The Grantor has carefully considered this dispositive plan. This Article is intended to discourage litigation, minimize cost and delay, and promote faithful execution of the Grantor's objectives, consistent with applicable law.

Section 2. Forfeiture Upon Contest.

Except as otherwise provided in this Article, if any beneficiary, directly or indirectly, (a) contests the validity of this instrument (or any amendment) or any dispositive provision, or (b) seeks to prevent any provision from being carried out according to its terms, or (c) assists or finances any such contest, then all gifts, fiduciary appointments, and other benefits for that beneficiary shall be revoked. The beneficiary shall be treated as having predeceased the Grantor without issue for purposes of all dispositions hereunder, including powers of appointment, and any affected share shall be distributed as if such beneficiary had so predeceased.

Section 3. What Constitutes a "Contest."

A "contest" includes a pleading or proceeding that alleges lack of due execution, lack of capacity, undue influence, duress, fraud, forgery, revocation, or other ground that, if sustained, would result in invalidating or modifying this instrument or any dispositive provision.

Section 4. Actions That Are Not Contests.

The following shall not constitute a contest for purposes of this Article:

(a) A good-faith proceeding seeking construction, interpretation, reformation to correct a scrivener's error, or instructions to carry out the Grantor's intent.

(b) A good-faith petition or claim by or against a fiduciary concerning administration (including accountings, removal for cause, surcharge, investment or distribution instructions, or enforcement of fiduciary duties).

(c) A good-faith assertion or resolution of creditor claims evidenced by a written obligation of the Grantor, or tax apportionment or allocation matters.

(d) A good-faith assertion of statutory rights of a surviving spouse or minor child, or of exempt property, allowances, or similar protections.

(e) Requests or limited discovery expressly authorized by court rule or statute for preliminary inquiry.

(f) Efforts to enforce the dispute-resolution provisions of this instrument.

(g) Participation in a nonjudicial settlement agreement that does not seek to invalidate this instrument.

Section 5. Probable-Cause and Good-Faith Savings.

If a court of competent jurisdiction determines that a beneficiary brought a contest with probable cause and in good faith at the time of filing, the beneficiary's interest shall not be forfeited under this Article.

Section 6. Interim Measures; Fees and Costs.

(a) Pending resolution of any asserted contest, the Trustee may withhold distributions to any beneficiary the Trustee reasonably believes to be a contestant, limited to the portion reasonably at risk.

(b) To the extent permitted by law, if a beneficiary's contest (or assistance in a contest) is finally denied or dismissed, such beneficiary's share (including any separate trust for such beneficiary) shall bear the Trust's reasonable attorneys' fees and costs attributable to defending the contest. This cost-shifting is in addition to the forfeiture in Section 2.

Section 7. Savings; Alternative Remedies.

If any portion of this Article is unenforceable in the governing jurisdiction, it shall be enforced to the maximum extent permitted, and, in lieu of forfeiture, a court may equitably charge the contestant's share with the Trust's reasonable attorneys' fees and costs, suspend or condition further benefits, or fashion comparable relief to deter litigation inconsistent with the Grantor's intent.

Section 8. Severability and Reformation.

Each clause of this Article is severable. A court may reform this Article to the minimum extent necessary to effectuate the Grantor's intent consistently with applicable law.

Explanation

This clause is included to discourage costly litigation and to preserve the settlor's dispositive plan. The heart of the provision is the forfeiture rule, which causes a beneficiary who contests the trust to be treated as having predeceased the settlor without issue.

The clause carefully defines what counts as a "contest," capturing the usual challenges such as claims of lack of capacity, undue influence, fraud, or improper execution. At the same time, it lists safe harbors so that routine or necessary actions do not trigger forfeiture. Beneficiaries can still seek construction or interpretation of terms, pursue accountings, bring fiduciary claims, or assert creditor or tax rights without fear of losing their share.

"A probable-cause exception ensures that beneficiaries who bring contests with genuine justification are not penalized. This improves enforceability in states where such exceptions are required."

A probable-cause exception ensures that beneficiaries who bring contests with genuine justification are not penalized. This improves enforceability in states where such exceptions are required. The clause also

builds in alternative enforcement tools. The Trustee may withhold distributions to a suspected contestant during a dispute, and a losing contestant's share may be charged with the trust's attorney's fees and costs. These cost-shifting measures provide a deterrent even in jurisdictions where outright forfeiture is restricted.

Finally, severability and reformation language allows courts to enforce as much of the clause as possible, or to substitute fee-shifting and other equitable remedies where forfeiture is unavailable. This helps preserve the settlor's intent across diverse jurisdictions.

Because states vary widely in how they treat no-contest provisions, attorneys should always check this clause against local law. In some states no-contest clauses are enforced only with a probable-cause savings clause, while in others they are curtailed or even unenforceable. Careful adjustment to local law is essential.

Trustee Succession Plan Provisions

By Christina WH Lewis, Esq.

Trusts often last many years and even several generations. If a trustee resigns, becomes incapacitated, or passes away without a clear plan for a replacement in the office of the trustee, the trust can be left in limbo. A trustee succession plan provision is different than the provision that simply names backup trustees (successor trustees). Additionally, the trustee succession plan provision is not meant to replace the provision which names successor trustees.

Without a built-in succession plan, beneficiaries or family members may have to go to court to have a new trustee appointed. That process can be slow, expensive, and stressful. The trustee succession plan provision addresses what are the next steps in event that there is no further successor trustee named willing or able to act. A well-written trustee succession planning clause avoids the need for court involvement altogether.

Succession provisions can outline a process to choose future trustees (for example, allowing beneficiaries to vote or permitting the current trustee to name a replacement). This flexibility helps the trust adapt if future needs or circumstances change. Below are some sample provisions.

SAMPLE PROVISION 1: This paragraph provides the mechanism allowing a majority of the adult beneficiaries to appoint a successor trustee in the event of a vacancy, or in the event the majority of the adult beneficiaries fail to do so, the resigning trustee or any such beneficiary under the trust can petition the court as a final resort.

Manner of Appointment if No Successor Designated. If there is a vacancy in the office of Trustee, and if (i) no successor Trustee is herein designated to act or (ii) no named successor Trustee accepts the office, a majority of the adult beneficiaries of this Trust shall have the right to appoint a successor Trustee, pursuant to the provisions of Paragraph [_____]. In the event a successor Trustee shall not be so designated, the resigning Trustee or any such beneficiary of this trust or any trust established pursuant hereto may secure the appointment of a successor Trustee by petitioning a court of competent jurisdiction, at the expense of the trust estate.

SAMPLE PROVISION 2: This paragraph provides for the designation of successor Trustees and/or Co-Trustees by an individual Trustee. This provision is typically used when you want built-in flexibility for trustee succession without having to amend the trust or involve a court. This is especially important

in long-term trusts, where the originally named successor trustees might no longer be available, willing, or appropriate.

1.1. Power of an Individual Trustee to Designate a Successor Trustee or Co-Trustees.

(a) An individual acting as Trustee or named as a successor Trustee in this Trust Agreement (the "Designating Trustee") shall have the power to designate one or more successor Trustees or Co-Trustees (referred to collectively as "Designated Successors" or individually as a "Designated Successor"). Such Designated Successors shall be entitled to serve as Co-Trustees or successor Trustees subject to the limitations or conditions set forth in the remainder of this Paragraph 1.1.

(b) Designated Successors shall commence to serve and shall serve as Trustee or Co-Trustees hereunder as follows:

(1) A Designated Successor may be appointed to serve concurrently with the Designating Trustee, with the Designated Successor's term ending when the Designating Trustee ceases to act as Trustee hereunder for any reason, unless revoked or modified by such Designating Trustee in which case an earlier date may apply.

(2) A Designated Successor may be appointed to serve concurrently with the Designating Trustee, subject to revocation or modification by such Designating Trustee, with the Designated Successor's term as Trustee hereunder continuing after the Designating Trustee ceases to act as Trustee hereunder for any reason, provided that there is no successor Trustee named in this Trust Agreement who commences to act as successor Trustee, in which case the Designated Successor shall cease to act as Co-Trustee hereunder, but may be named to resume acting as successor Trustee hereunder at such time as there is no successor Trustee named in this Trust Agreement who is then qualified or able to serve as Trustee hereunder for any reason.

(3) Designated Successors may be named to act as successor Trustees hereunder, one or more at a time, in the order indicated by the Designating Trustee at such time as there are no successor Trustees named in this Trust Agreement who are available to act as successor Trustee.

(4) Designated Co-Trustees may be named, one or more at a time, in the order indicated by the Designating Trustee.

(c) Each acting individual Trustee and each named successor individual Trustee may exercise the power to name Designated Successors, subject to the following limitations:

(1) Any designation of Trustees and successor Trustees and Co-Trustees by the Grantors, as set forth in this Trust Agreement, shall take precedence over the exercise of the power to name Designated Successors by any Designating Trustee. Notwithstanding the foregoing, upon the death or incapacity of both Grantors, and subject to the remaining provisions of this Paragraph 1.1, the designation of a Designated Successor by a Designating Trustee may take precedence over the designation of Trustees and successor Trustees by both Grantors; provided such Designating Trustee specifically states such intent in the written notice required pursuant to Paragraph 1.1(e) herein.

(2) If the individual named as or serving as Trustee as well as any one or more individuals named as successor Trustees hereunder act as Designating Trustees and exercise the power to name Designated Successors, the exercise by the first-named successor Trustee shall take precedence over an exercise by the second-named successor Trustee,

which shall take precedence over an exercise by the third-named successor Trustee. Successive exercises shall be handled in the same manner.

(3) While Co-Trustees are serving, they shall exercise this power jointly; provided, however, that if one (1) Co-Trustee does not join in the designation and does not attempt to make an alternative designation, then the designation by the one Co-Trustee shall be effective.

(4) A Designated Successor shall have the authority to name additional Designated Successors; provided, however, that any Designated Successor named by a Designated Successor may serve as Trustee hereunder only if no successor Trustees named in this Trust Agreement and no Designated Successors named by an individual named as a successor Trustee in this Trust Agreement are available to serve as Trustee hereunder.

(d) The purpose of this Paragraph 1.1 is to provide a mechanism whereby one or more individuals may be named to serve as successor Trustee or Co-Trustee hereunder without a court proceeding. However, no provision of this Paragraph 1.1 shall be interpreted to prevent a Designating Trustee from also naming a Qualified Corporate Trustee as a Designated Successor.

(e) The foregoing power to name Designated Successors shall be exercised by a Designating Trustee by giving written notice of the designation of such Designated Successors to the then-living adult beneficiaries, the guardians of any minor beneficiaries and the conservators of any incapacitated beneficiaries, and as otherwise required by law.

(f) Any designation pursuant to this Paragraph 1.1 may be revoked or amended by the Designating Trustee with respect to a Co-Trustee prior to a Designated Successor commencing to act as a successor Trustee, by giving written notice in the same manner as the designation was made as provided above.

(g) Any Designated Successor who serves as a successor Trustee (or Co-Trustee) hereunder shall have all of the powers conferred upon a named Trustee under this Trust Agreement, shall serve without bond and shall for all other purposes be treated as a named Trustee under this Trust Agreement.

Environmental Matter Provisions

By Christina WH Lewis, Esq.

Provisions addressing environmental matters and issues must be included to address any significant risks that may accompany property with actual or potential environmental law violations. If a trust owns real property, businesses, or land with potential contamination risks, the trustee could face liability under both federal and state environmental laws. Environmental laws are strict liability in many jurisdictions which means a trustee may be responsible even if the trustee wasn't negligent. Clear environmental provisions can limit the trustee's personal liability, authorize them to investigate and remediate environmental hazards, and ensure trust funds can be used appropriately for compliance and cleanup.

If a trust document doesn't specifically authorize the trustee to take particular environmental actions, a prudent trustee may be reluctant to proceed and may seek beneficiary consent or court approval instead, due to potential liability, not only from actual or possible environmental law violations, but also from the risk of beneficiaries later second-guessing

the trustee's decisions. The sample provision below allows the trustee, or even someone who may become trustee, to investigate in order to potentially avoid or limit liability from actual or potential environmental law violation. This provision also provides for indemnification and reimbursement to the trustee for any liability and damages that the trustee incurs from any actual or potential environmental law violation.

SAMPLE PROVISION:

1.1 Environmental Hazards and Compliance with Environmental Laws.

1.1.1 Authorization To Inspect Property Prior To Accepting Property or Consenting To Serve as Trustee. Prior to accepting assets as part of the trust estate and prior to consenting to serve as a Trustee or Co-Trustee of any trust established hereunder, any person named or designated herein to so serve may take the following actions at the expense of the trust estate:

(a) To enter and inspect any existing or proposed asset of such trust (or of any partnership or corporation in which the trust holds an interest) for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance; and

(b) To review records of the currently serving Trustee or of a Settlor (or of any partnership or corporation in which the trust or a Settlor holds an interest) for the purpose of determining compliance with any federal, state or local environmental laws or regulations, including those records relating to permits, licenses, notices, reporting requirements, and governmental monitoring of hazardous waste.

1.1.1.1 Inspection Rights. The right of the person named or designated to serve as Trustee to enter and inspect assets and records of a partnership or corporation under Paragraph 1.1.1 shall be treated as equivalent to the right under state law of a partner or shareholder to inspect assets and records under similar circumstances.

1.1.1.2 No Consent To Act. Acts performed under Paragraph 1.1 by a person named or designated as Trustee shall not constitute consent to serve as a Trustee or Co-Trustee.

1.1.1.3 Transfer of Assets. If, upon any review of a trust's assets under Paragraph 1.1, the person named or designated to serve as Trustee discovers that an asset of the trust is contaminated with hazardous waste or otherwise not in compliance with any environmental law or regulation, he, she or it may decline to so serve solely as to such asset while consenting to so serve as to all other assets of the trust. Similarly, any currently serving Trustee or Co-Trustee may refuse to accept the transfer of any asset proposed to be transferred to the Trustee. If there is no person willing to serve as Trustee or Co-Trustee with respect to any asset in or proposed to be transferred to any trust, the court having jurisdiction over such trust shall appoint a receiver or special Trustee to hold and manage the rejected asset, pending its final disposition.

1.1.2 Termination, Bifurcation or Modification of Trust Due to Environmental Liability. If any trust established hereunder holds one or more assets, either directly or through any corporation or partnership, the nature, condition, or operation of which is likely to give rise to liability under, or is an actual or threatened violation of, any environmental law or regulation, the Trustee may take one or more of the following actions:

(a) Modify the trust provisions by granting the Trustee such additional powers as are required

to protect the trust and its beneficiaries from liability or damage relating to the actual or threatened violation of any such environmental law or regulation;

(b) Bifurcate the trust;

(c) Appoint a special Trustee to administer any such assets or business interests that fail to comply with or may give rise to liability under any environmental law and regulation; or

(d) Abandon such assets or business interests.

1.1.2.1 Termination and Distribution. With court approval, the Trustee may terminate the trust or partially or totally distribute its assets to its beneficiaries.

1.1.2.2 Addressing Administration Problems. It is the Settlors' intent that the Trustee have the widest possible discretion in identifying and responding to administration problems associated with the potential environmental liability of any trust or the Trustee, in order to protect the interests of such trust, the Trustee and the beneficiaries of the trust.

1.1.3 Trustee's Powers Relating to Environmental Laws. The Trustee may, on behalf of any trust established hereunder, take any action necessary or appropriate to prevent, abate, avoid or otherwise remedy any actual or threatened violation of any environmental law or regulation or any condition that may reasonably give rise to liability under any environmental law or regulation, including but not limited to performing investigations and audits and taking action considered a "response" under 42 U.S.C. §9601(25), relating to any asset that is or has been held as part of such trust.

1.1.4 Indemnification of Trustee for Environmental Expenses. The Trustee shall be entitled to be indemnified and reimbursed from any trust for any liabilities, losses, damages, penalties, costs or expenses incurred arising out of or relating to the actual or threatened violation of any environmental laws or regulations (hereinafter "environmental expenses"). Environmental expenses shall include, but not be limited to:

(a) Costs of investigation, removal, remediation, response, or other cleanup costs of contamination by hazardous substances, as defined under any environmental law or regulation;

(b) Legal fees and costs arising from any judicial, investigative or administrative proceeding relating to any environmental law or regulation;

(c) Civil or criminal fees, fines or penalties levied with respect to the violation of any environmental law or regulation; and

(d) Fees and costs payable to environmental consultants, engineers, or other experts, including legal counsel, relating to the identification, avoidance or prevention of, or in any other manner related to, the violation of any environmental law or regulation.

1.1.4.1 Right of Reimbursement. This right to indemnification or reimbursement shall extend to environmental expenses relating to:

(a) Any real property or business enterprise that is or has at any time been owned or operated by the Trustee as part of any trust; and

(b) Any real property or business enterprise that is or has at any time been owned or operated by a corporation or partnership in which the Trustee holds or has held at any time an ownership or management interest as part of any trust.

1.1.4.2 Lien against Assets. The Trustee need not expend his, her or its own funds in payment of

environmental expenses; instead, environmental expenses may be paid directly from trust assets. Any environmental expenses paid directly by the Trustee shall be reimbursed from the trusts holding the assets giving rise to the environmental expenses. Pending reimbursement from such trusts, the Trustee shall have a primary lien against the assets of such trusts.

1.1.4.3 Breach of Fiduciary Obligation Limitation. Notwithstanding anything in Paragraph 11.30 to the contrary, this right of indemnification or reimbursement shall not apply to any environmental expenses resulting from the Trustee's negligence, intentional wrongdoing, bad faith or reckless disregard of fiduciary obligation.

1.1.5 Indemnification of Trustee for Environmental Expenses in Excess of Trust Value. If the assets of any trust are insufficient, or there is insufficient liquidity in any trust to satisfy the obligation of indemnification or reimbursement for environmental expenses provided in Paragraph 1.1, the Trustee shall notify the Settlors and the beneficiaries thereof. If the assets giving rise to the environmental expenses were directly or indirectly transferred to the trust by the Settlors or either of them, then the transferring Settlor(s) shall within thirty (30) days thereafter indemnify or reimburse the Trustee for such environmental expenses. Each of the beneficiaries of such trust shall within thirty (30) days thereafter indemnify or reimburse the Trustee for such environmental expenses to the extent not otherwise indemnified or reimbursed by the Settlors or either of them. Any indemnification under this Paragraph 1.1.5 shall be in a form acceptable to the Trustee. Upon the death of a Settlor or of a beneficiary prior to the indemnification or reimbursement of the Trustee as required under this Paragraph 1.1.5, the obligation of indemnification or reimbursement shall constitute a lien upon the property of such Settlor or beneficiary and such Settlor's or beneficiary's estate, as the case may be, and a legally enforceable debt of such Settlor or beneficiary.

1.1.6 Exoneration of Trustee for Acts Relating to Environmental Law. The Trustee shall not be liable to any beneficiary or to any third party for any action or inaction relating to any environmental law or regulation, or for the payment of any environmental expenses; provided, however, that the Trustee shall be liable for any such action, inaction or payment that is a breach of trust or is committed negligently, in bad faith or with reckless or intentional disregard of the Trustee's fiduciary obligations hereunder.

1.1.7 Allocation of Environmental Expenses and Receipts between Income and Principal. The Trustee may allocate all environmental expenses paid and all reimbursements or other funds received relating to environmental expenses between income and principal of the trust estate. In making such allocation, the Trustee shall consider the effect of such allocation upon income available for distribution, the value of trust principal, and the income tax treatment of such expenses and receipts. The Trustee may create a reserve for payment of anticipated environmental expenses.

Digital Assets Provisions

By Christina WH Lewis, Esq.

It's important for a trust to include a provision giving the trustee power to manage digital assets because these assets are now a significant part of most people's property. Digital assets, like online bank accounts, cryptocurrency, domain names, emails, and social media, are legally considered property in many jurisdictions. However, unless the trust document specifically mentions digital assets, a trustee's general

power over "property" may not clearly extend to them. A digital asset clause ensures that the trustee has explicit authority to access, control, and transfer these assets as part of the trust.

"It's important for a trust to include a provision giving the trustee power to manage digital assets because these assets are now a significant part of most people's property."

Without explicit authorization, trustees could face serious legal obstacles. Laws like the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) restrict access to online accounts and communications unless the user (the settlor) gives express consent. If the trust doesn't include this consent, digital service providers (Apple, Google, etc.) can legally refuse to give access to the trustee.

Often the provisions relating to digital assets help the trustee efficiently administer the estate in managing subscription or cloud storage accounts, preserving valuable digital records or intellectual property and closing or memorializing social media profiles. It ensures that the trustee can act without waiting for court orders or navigating unclear access policies.

NOTE: These provisions do not apply to cryptocurrencies or cryptoassets.

SAMPLE PROVISION 1: This section includes the definition of "Digital Assets" rather than putting the definition of "Digital Assets" into the definitions section of the trust.

1.1 Powers with Respect to Digital Assets. With respect to the Settlor's "Digital Assets" (as defined herein), the Trustee is authorized (a) to access, use, and control any digital devices, including without limitation desktops, laptops, peripherals, storage devices, mobile telephones, smart phones, and any similar device which currently exists or exists in the future as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring any of the Settlor's Digital Assets; (b) to access, modify, delete, control, and transfer any digital assets, including without limitation of the Settlor's Digital Assets; and (c) to obtain, access, modify, delete, and control any usernames, passwords, and other electronic credentials associated with any digital devices and digital assets.

"Digital Assets" shall include, but shall not be limited to, domain names, websites, licenses for use of games, music, books, photo archiving sites, software and/or data storage, blogs, emails, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, domain registrations, Domain Name System (DNS) service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, including frequent flyer and other bonus program accounts, and similar digital items which currently exist or exist in the future as technology develops. It further includes all items purchased by Settlor (whether in Settlor's name, by pseudonym, or anonymously) and maintained digitally, social media and electronic accounts such as Facebook, Twitter, X, Instagram, Snapchat, iTunes, and LinkedIn, or any successor(s) thereto, email accounts, including the contents of electronic communications, cloud storage accounts, any and all computers, tablets, smartphones, watches, and any other electronic devices Settlor owns as of the date

of this trust instrument.

This authorization shall be construed to be a lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state law governing digital assets. The Settlor has written or may hereafter write a letter of instructions concerning any digital assets and the Settlor's wishes concerning their access, handling, distribution, and disposition, and the Settlor's requests, but does not require, that the Trustee honor such instructions and wishes.

SAMPLE PROVISION 2: The below sample language places the first paragraph under "Trustee Powers" and the second paragraph under the "Definitions" section of the trust.

1.1 Digital Assets. Unless a Grantor has separately specifically granted such authority to a person or persons other than the Trustee (e.g., in a separate document such as a stand alone digital assets authorization), the Trustee is specifically authorized to access all of that Grantor's Digital Assets; to review all information, records and communications contained in any such Digital Asset; to transmit, copy and/or print any or all information, records and communications contained in any such Digital Asset; and to close, terminate or unsubscribe from any such Digital Asset. The Trustee shall have the foregoing powers over all Digital Assets regardless of whether any such Digital Asset is protected by a password that is unknown to the Trustee. To the greatest extent legally permissible, the provisions of this Paragraph shall apply notwithstanding any contrary provisions of any applicable terms of service of any internet service provider or provider of online services, the Computer Fraud and Abuse Act (18 USC 1030), the Stored Communications Act or any other federal or state laws. Moreover, it is the Grantors' intent that the provisions of this Paragraph supersede the provisions of the California Revised Uniform Fiduciary Access to Digital Assets Act (AB 691).

[INSERT INTO "Definitions" Section of Trust]

2.1 Digital Assets. The term "Digital Assets" shall include, but shall not be limited to, electronic files stored on any digital devices, including desktop computers, laptops, tablets, peripherals, storage devices, mobile telephones, smart phones and any similar digital device that serves to access, modify, delete, control or transfer digital accounts or assets. The term "Digital Assets" shall also include e-mail, blog posts, documents, images, audio, video and similar digital files stored in a digital account, all social media, e-mail accounts, online banking and brokerage accounts, blog rights and other internet and electronic media rights that are independent of the ownership of any other asset. Notwithstanding the foregoing, the term "Digital Assets" shall not include any digital or cryptocurrencies, or assets that are, in the Trustee's sole and absolute discretion, assets used by the Grantors or either of them in connection with a trade or business.

QTIP

By Ann O'Hara

The Internal Revenue Code provides for an unlimited gift tax deduction for gifts of present or future interests made to the donor's spouse (I.R.C. §2523) and an unlimited estate tax deduction for transfers of present or future interests to decedent's surviving spouse (I.R.C. §2056). To qualify for the unlimited marital deduction, the following conditions must be met at the time the gift is made:

- Spouses must be married to each other.

- Spouse making the gift must be a United States citizen or resident.
- Donee spouse must be a citizen of the United States.

With the exceptions listed below, a terminable interest given to the surviving spouse will not qualify for the unlimited marital deduction. Terminable interests are interests that will terminate or fail after the passage of time or upon the occurrence or nonoccurrence of some event or contingency.

Examples of terminable interests are:

- Life estates, annuities, and estates for a term of years.
- A devise in a decedent's Last Will and Testament, which provides that the decedent's surviving spouse is devised the decedent's "tangible personal property providing that the decedent's surviving spouse survives the decedent by 30 days."

A terminable interest will qualify for the unlimited marital deduction if the interest meets the requirements of a "qualified terminable interest property (QTIP)" found at I.R.C. §2056(b)(7) and applicable regulations. In order to qualify, the terminable interest property must be transferred from the decedent to the surviving spouse. The surviving spouse must be the sole beneficiary of the terminable interest property during the spouse's lifetime. No part of the terminable interest property can be treated as passing to any person other than the surviving spouse during the surviving spouse's lifetime.

- The surviving spouse has a qualifying income interest for life for purposes of the QTIP requirements if:
    - Surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals;
    - Surviving spouse can be given the power to access principal subject to an ascertainable standard such as for the surviving spouse's health, education, maintenance or support; and
    - No person has a power to appoint any part of the property to any person other than the surviving spouse during spouse's lifetime.

The limitation on a power to appoint does not apply to a power exercisable only at or after the death of the surviving spouse.

A QTIP election is required to be made on the decedent's federal estate tax return (Form 706) and it is irrevocable. A QTIP election can be made on a Form 706. The deadline for the election is tied to the due date of Form 706, including any extensions granted.

QTIP Trusts frequently used where the spouses have been married previously and have blended families. Where there is a concern of re-marriage upon the death of the first spouse, QTIP Trust have also been used even in a first marriage if the spouses are concerned about re-marriage upon the death of the first spouse and their family being disinherited by a second subsequent spouse.

Sample QTIP Trust Language

A. Upon the death of the Settlor, if the Settlor's Spouse survives the Settlor, the Trustee shall divide the trust property into two parts, hereinafter referred to as "Marital Trust" and "Residuary Trust," as hereinafter provided. If the Settlor's Spouse does not survive the Settlor, then the Trustee shall

distribute all the assets according to the terms of Residuary Trust.

1. Marital Trust. The Trustee shall allocate that amount, if any, which is necessary to increase the Settlor's taxable estate to the largest amount that, after taking into account any family business benefit and the applicable credit exclusion amount, or similar credit or deduction, available to the Settlor's estate, after taking into consideration the credit exclusions utilized by the Settlor during the Settlor's lifetime, will result in no federal estate tax payable by the Settlor's estate. If no federal estate tax, or its equivalent, is in effect at the time of the Settlor's death, then all of the trust assets shall be allocated to the Marital Trust. Any asset distributed in kind in partial or complete satisfaction of the foregoing allocation may be distributed on a non-pro rata basis without regard to its income tax basis, shall be distributed at its estate tax value in partial or complete satisfaction of this bequest and shall be fairly representative of appreciation or depreciation in the value of all property available for distribution in satisfaction of the foregoing allocation. The assets of this trust shall be held, administered and distributed by the Trustee pursuant to the terms of Marital Trust, hereinafter, set forth:

a. The Trustee shall invest and reinvest the Marital Trust and shall collect the income therefrom and shall pay the entire net income therefrom to the Settlor's Spouse during the Settlor's Spouse's lifetime. Payment shall be made annually or in more frequent installments as the Settlor's Spouse may from time to time in writing request. It is the Settlor's intention that the Settlor's Spouse shall have no power which would cause the principal of the trust for the Marital Trust to be included as part of the Settlor's Spouse's gross estate for Federal Estate Tax purposes.

b. In addition, whenever the Trustee determines that the income of the Settlor's Spouse from all sources known to the Trustee is not sufficient for the Settlor's Spouse's health, education, maintenance or support, then the Trustee, in the Trustee's discretion, may pay to or use for the benefit of the Settlor's Spouse, so much of the principal of Marital Trust as the Trustee determines to be required for those purposes.

c. Upon the death of the Settlor's Spouse or upon the death of the Settlor if the Settlor's Spouse does not survive the Settlor, then the Marital Trust, as then constituted, shall be paid over and distributed the Residuary Trust and distributed in accordance with its terms and conditions.

QDOT

By Ann O'Hara

In order to qualify for the unlimited marital deduction for federal gift and estate tax, the donee spouse must be a U.S. citizen. I.R.C. §2523(i)(2) does provide for an exclusion of gifts of present interests to donor's alien spouse up to $100,000 per year. Due to these limitations, a transfer to joint ownership with an alien spouse with rights of survivorship may be taxable gifts.

Transfer to an alien spouse can qualify for the unlimited marital deduction if the transfer is in the form of a qualified domestic trust (QDOT). The QDOT must meet the requirements a marital trust to qualify for the unlimited marital deduction such as power of appointment trust or a QTIP. Additionally, the QDOT must meet with specific requirements under IRC §2056A and applicable regulations.

For purposes of I.R.C. §2056A and I.R.C. §2056(d),

the term "qualified domestic trust" means, with respect to any decedent, any trust if:

- The trust instrument requires at least one (1) trustee of the trust be a U.S. citizen or a U.S. corporation; and
- Provides that no distribution (other than a distribution of income) may be made from the trust unless a trustee who is an individual U.S, citizen or US corporation has the right to withhold from such distribution the tax imposed under I.R.C. §2056A.

Similar to a QTIP, a QDOT election must filed on the decedent's federal estate tax return (Form 706).

The federal estate tax is imposed on the QDOT on any distribution from the trust made (other than income) to the surviving alien spouse during the spouse's lifetime and upon the death of the surviving alien spouse. The trust instrument must also require that no principal distribution may be made unless the U.S. trustee has the right to withhold the federal estate tax on the principal distribution.

Sample QDOT Language

ARTICLE VI

QDOT Marital Trust

Property that is to be held as or disposed under the terms of the Marital Trust shall be held under this Article, and all references to the "Marital Trust" shall be to the trust held under this Article.

A. During the Grantor's Spouse's Lifetime. The following provisions shall apply during the Grantor's Spouse's life:

1. The Trustee shall distribute to the Grantor's Spouse the net income of the trust at least annually.

2. The Trustee may, but shall not be required to, distribute to the Grantor's Spouse as much of the principal of the trust as the Trustee may from time to time select for the Grantor's Spouse's health, education, maintenance or support in the Grantor's Spouse's accustomed manner of living.

3. The Trustee may, but shall not be required to, distribute to the Grantor's Spouse as much of the principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, for any purpose.

4. The Grantor's Spouse may direct the Trustee to make any unproductive assets productive of income or to convert any unproductive assets to property that produces income, within a reasonable time, notwithstanding any provision of this Trust Agreement or any applicable law otherwise authorizing the Trustee to retain unproductive property. The application of any specific provision of this Trust Agreement shall in all events be construed so as to give the Grantor's Spouse that degree of beneficial enjoyment of the trust property during the Grantor's Spouse's life which the principles of the law of trusts accord to a person who is the sole income beneficiary of a trust and shall ensure that the Marital Trust qualifies for the Federal estate tax marital deduction to the extent so elected.

B. Upon the Grantor's Spouse's Death. The following provisions shall apply after the Grantor's Spouse's death:

1. Unless the Grantor's Spouse provides otherwise by specific reference to this paragraph in a Will or other writing, the Trustee shall pay any increase in death taxes payable upon the death of the Grantor's Spouse caused by the inclusion of a Marital Trust hereunder or a portion of a Marital Trust hereunder in the Grantor's Spouse's gross estate from the principal of the trust or portion so included. The

Trustee may rely upon the written statement by the Grantor's Spouse's Personal Representative of the amounts thus payable.

2. The balance of the property then held in the Marital Trust shall be distributed to the Grantor's descendants then living, *per stirpes*.

C. Spouse's Disclaimer. If the Grantor's Spouse disclaims any of the Grantor's Spouse's interest in the income and principal of a Marital Trust hereunder, the disclaimed property shall be added to the Family Trust under this Trust Agreement to be disposed of under the terms of that trust; provided, however, that the Grantor's Spouse shall have no power to direct the beneficial enjoyment of the fractional share of the Family Trust originally consisting of disclaimed property, including any accumulated income of that share, unless such power to direct the beneficial enjoyment is limited by an ascertainable standard. If the Grantor's Spouse disclaims all of the Grantor's Spouse's interest in the income of a Marital Trust hereunder or a portion of the income of a Marital Trust hereunder, the Grantor's Spouse shall be deemed to have disclaimed the Grantor's Spouse's interest in all or a corresponding portion of the principal of that Marital Trust.

D. QDOT. If the Grantor's Spouse is not a citizen of the United States at the Grantor's death, the Grantor intends that any marital trust hereunder qualify as a "Qualified Domestic Trust" ("QDOT") within the meaning of Code Sec. 2056A and the Regulations thereunder. The Trustee shall comply with all statutory and regulatory requirements necessary to qualify the trust as a QDOT, including (but not limited to) Reg. §20.2056A-2(d)(1)(i)(A), (B), (C), or (d)(1)(ii). The Trustee shall amend the terms of the trust in any way necessary to qualify the trust and seek any judicial relief necessary to qualify the trust. There shall always be at least one Trustee of the trust who is an individual citizen of the United States with a tax home in the United States or a domestic corporation (a "U.S. Trustee"). The U.S. Trustee shall have the right to withhold the tax imposed by Code Sec. 2056A on any distribution (other than a distribution of income). The allocation of receipts and disbursements to income or principal as provided by law shall be made solely by the U.S. Trustee or Trustees. The Trustee may seek approval of an alternate plan or arrangement to secure collection of the deferred estate tax. The Trustee may elect to qualify the trust as a QDOT and the Trustee may divide any trust in the manner permitted by the Regulations in order to permit an election over a portion of it. The Trustee may designate a U.S. Trustee to act as "designated filer" for this and other QDOTs and such U.S. Trustee shall perform the responsibilities of the designated filer if the Trustee makes such designation. In the event that a trustee of some other QDOT is the designated filer, the Trustee shall cooperate with such designated filer in the preparation of returns and payment of tax.

E. Allocation of Management Expenses. To the extent the following authorization does not cause any interest hereunder to fail to qualify, in whole or in part, for the Federal estate tax marital deduction which otherwise would so qualify, the Trustee is authorized to allocate management expenses within the meaning of Reg. §20.2056(b)-4(d)(1)(i) to any interest hereunder that qualifies for the Federal estate tax marital deduction.

Charitable Gifts

By Ann O'Hara

Charitable gifts should be considered in an individual's estate plan whether as a bequest in a Last Will or Revocable Trust or naming a charity as the designated beneficiary of a retirement account or life insurance policy. Additionally, an individual can make a split-interest gift which is a gift which is split between a charity and individual beneficiaries. For example, charitable remainder trusts are designed to pay income to a noncharitable beneficiary for a specified term. At the end of that period, the charity receives the remainder interests.

Charitable gifts provide tax deductions for federal and state incomes tax as well as a deduction for federal gift and estate taxes. I.R.C. §2055 allows an estate tax charitable deduction for transfers to qualified charitable organizations. "Qualified" means a nonprofit organization or public entity, such to or for the use of the United States, any State, or any political subdivision, for exclusively public purposes. No net earnings of the qualified organization or entity may inures to the benefit of any private stockholder or individual. The qualified organization or entity must also not be disqualified for tax exemption under I.R.C. §501(c)(3). For this reason, drafting a bequest or gift to a qualified charitable organization should be conditioned on the organization being recognized a tax-exempt organization by the IRS in good standing.

"Charitable gifts provide tax deductions for federal and state incomes tax as well as a deduction for federal gift and estate taxes."

The One Big Beautiful Bill Act ("OBBBA") did make changes to taxpayer's ability to deduct charitable gifts on their federal income tax returns. OBBBA made the standard deduction increases under the Tax Cuts and Jobs Act of 2017 (TCJA) permanent, increasing the standard deduction for 2025 to $15,750 for single filers and $31,500 to taxpayers who are married and filing jointly. Individuals who itemize may take charitable deductions only to the extent that the charitable deductions exceed 0.5% of adjusted gross income. Additionally, taxpayers in the top bracket can only claim 35% for charitable gifts instead of the full 37% that would otherwise apply to their income tax rate. OBBBA also permanently extended the 60% of adjusted gross income contribution limitation for cash gifts made to certain qualifying charities.

In reviewing charitable planning with individuals, it should be analyzed on which type of gift will be the most effective to the individual on a tax basis. Depending on the individual's tax status, it may be more beneficial to make a lifetime outright charitable gift for federal income tax purposes or alternatively, implement a split-interest remainder trust which can be funded with the assets which have a low basis for federal income taxes. The individual would then receive a federal gift tax deduction, reduce his or her taxable estate for federal estate taxes by the gift and avoid recognizing capital gains taxes on the future sale of the low basis asset.

Sample Charitable Bequest Language

I devise the sum of Five Thousand and 00/100 Dollars ($5,000.00) to Hamilton County Community

Foundation, Inc., an Indiana nonprofit corporation, to be used in any manner its Board of Directors determines is appropriate. In order to receive this bequest, the Hamilton County Community Foundation, Inc. must be recognized as a tax-exempt organization by the Internal Revenue Service. If the Hamilton County Community Foundation, Inc. is not then in existence or is no longer recognized as a tax-exempt organization, this devise shall lapse.

Recent Landmark Cases: Summaries And Impact Analysis

Taylor v. Holt

By Julie D. Eisenhower, Esq.

Citation: 134 S.W.3d 830 (Tenn. Ct. App. 2003)

In *Taylor v. Holt*, the testator created a nuncupative will using a computer and included a computer-generated signature to sign the instrument. Family members contested the validity of the will, arguing that the will was invalid because it lacked a handwritten signature and therefore did not meet Tennessee's statutory requirements for execution. The Court examined the testator's intent, the circumstances surrounding the creation of the will, and compliance with witnessing requirements. The will had been properly witnessed by two individuals in accordance with Tennessee law. The court concluded that the testator intended the computer-generated signature to serve as his signature and that the formal witnessing requirements had been satisfied. Consequently, the court upheld the validity of the will. This case is notable as one of the earliest Tennessee decisions addressing the validity of wills executed with digital or nontraditional signatures.

During the COVID-19 pandemic, Governor Bill Lee issued Executive Order No. 26, temporarily allowing remote execution and notarization of wills and other estate planning documents via audio-visual platforms. *Taylor v. Holt* provided a legal foundation for these measures, showing that nontraditional execution methods like electronic or digital signatures could satisfy Tennessee's statutory requirements if the testator's intent was clear. Today, *Taylor v. Holt* continues to influence estate planning in Tennessee. While the case has not been directly cited in many recent decisions outside Tennessee, its principles have been recognized in other jurisdictions, particularly regarding electronic wills and remote execution.

Some practical concerns for practitioners include: proving the testator's intent, verifying that witnesses actually observed the signing in real time, mitigating the risk of forgery or fraud with digital signatures, ensuring interstate recognition of the will for ancillary probate, and determining whether additional documentation is necessary to demonstrate intent and compliance with Tennessee law. I emphasize documenting the testator's intent clearly and confirm proper witnessing for all wills.

In re Estate of Toni Harris

By Julie D. Eisenhower, Esq.

Citation: No. M2023-01824-COA-R3-CV, 2024 WL 1075321 (Tenn. Ct. App. Feb. 29, 2024)

In *In re Estate of Toni Harris*, the decedent's will left real property to a beneficiary who predeceased her. The will did not provide a contingent beneficiary or alternative distribution plan for this scenario. The central question before the Tennessee Court of Appeals was how to distribute the property when the named beneficiary dies before the testator and the will is silent on contingencies. The court applied Tennessee's anti-lapse statute and held that the property passes to the deceased beneficiary's descendants *per stirpes*. The court emphasized that when a will does not address contingencies, the statutory default rules control. This decision clarified the application of the anti-lapse provisions specifically for real property in Tennessee, ensuring that estates are distributed in accordance with legislative intent when a named beneficiary predeceases the testator.

"The biggest takeaway and impact from this case is that practitioners should always include contingent beneficiaries language to ensure property passes according to the testator's intent if a beneficiary dies before the testator."

The biggest takeaway and impact from this case is that practitioners should always include contingent beneficiaries language to ensure property passes according to the testator's intent if a beneficiary dies before the testator. This also shows the importance of addressing real property in wills and for reviewing wills periodically for updates to account for changes in the beneficiaries' circumstances, such as death.

Anti-lapse rules exist in most states but vary significantly, so estate planning language and contingencies must be tailored to the law governing each property interest. Practitioners with multistate clients should explicitly address what happens if a beneficiary predeceases the testator to prevent unintended transfers under default statutory rules.

Foreseeable practitioner concerns include: the failure to include contingencies, which may result in property passing contrary to the testator's intent; potential conflicts in ancillary probates when other states do not recognize Tennessee's anti-lapse statutes; inadequate coordination updates to ensure consistency and clarity; and insufficient client education on the difference between statutory defaults and specific testamentary instructions, which could lead to disputes among descendants. I always include detailed contingent beneficiary language for all personal and real property, and I explicitly address what happens if a beneficiary predeceases the testator, particularly for client with property in multiple states. I would urge colleagues to review and revise standard boilerplate residuary language in their own will drafts to ensure contingencies are properly addressed.

In re Estate of Harold W. Williams

By Julie D. Eisenhower, Esq.

Citation: No. E2022-01621-COA-R3-CV (Tenn. Ct. App. Aug. 16, 2023)

The key legal issue in *In re Estate of Harold W. Williams* was whether cash and similar intangible property must be specifically referenced in a will to pass to the designated beneficiaries. In this case, the decedent's will did not mention all intended cash assets and only included a provision distributing cash to certain beneficiaries. The Tennessee Court of Appeals held that cash is considered intangible property under Tennessee law and must be explicitly mentioned in the will to pass to the intended beneficiaries.

"Estate planners must specifically identify cash and other intangible assets in a will to ensure they are distributed according to the testator's intentions as ambiguous language or general references to "assets" may be insufficient to transfer ownership of intangible property."

Estate planners must specifically identify cash and other intangible assets in a will to ensure they are distributed according to the testator's intentions as ambiguous language or general references to "assets" may be insufficient to transfer ownership of intangible property. Most states distinguish between tangible and intangible property and clear identification of intangible property is essential to prevent unintended default distributions under state intestacy rules or anti-lapse statutes in other states.

Failure to explicitly reference cash or intangible assets may lead to disputes or unintended distributions. Practitioners must coordinate updates to reflect the full scope of the estate including intangible property and must educate the client on the importance of specificity in drafting for intangible property to avoid probate litigation. I now explicitly list cash, cash assets, bank accounts, securities, and other intangible property in all wills and residuary clauses, and I educate clients on why intangible property requires specificity to prevent unintended intestacy distributions.

In re Estate of Jerry A. Dunn

By Julie D. Eisenhower, Esq.

Citation: No. W2023-00686-COA-R3-CV (Tenn. Ct. App. June 6, 2024)

The Tennessee Court of Appeals confirmed the probate court's determination that the decedent devised a parcel of real estate to this widow in fee simple absolute instead of placing the property in a trust for the benefit of the decedent's children. The decedent's will contained ambiguous language regarding the disposition of real estate. The court emphasized the importance of the testator's intent, as expressed in the will, and found that the language used did not support the creation of a trust.

In re Estate of Jerry A. Dunn stresses the importance of clear drafting in testamentary documents. Ambiguous terms can lead to disputes and litigation. Estate planners must avoid such language and instead specify the exact nature of the gift wile also anticipating possible disagreements among beneficiaries so that the will document properly addresses these conflicts proactively.

Clarity in language is even more important when addressing real estate in other states and courts in different states may scrutinize the language of the will differently. Explicit language regarding ownership and rights (e.g., fee simple, life estate, trust, etc.) when clients hold property in more than one state is a best practice with a multistate client. Ambiguous language is very risky in an interstate context and practitioners must draft with precision to ensure uniform interpretation across jurisdictions and to prevent disputes or unintended distributions. I use unambiguous language for all real estate gifts, clearly defining ownership type and rights. I carefully review draft wills for potential ambiguities that could cause litigation.

Estate of Galli v. Commissioner

By Philip Tortorich

Citation: No. 7003-20 (Tax Ct. Mar. 5, 2025)

The *Estate of Galli v. Commissioner* involves the estate of Barbara Galli, the decedent and mother of Stephen R. Galli, the petitioner (both individually and for the estate).

During her life, Barbara transferred approximately $2.3 million to Stephen formalized with a written promissory note showing an intent to be repaid by year 9 with periodic interest accruing at the Applicable Federal Rate. Interest was paid and reported annually, and the Estate included the note at Barbara's death. The Commissioner of Internal Revenue asserted gift and estate tax deficiencies for the loan note listed as part of Barbara Galli's Estate and alleged that the transfer was a gift (either in whole or in part) and that Barbara had failed to file the appropriate gift-tax return.

The primary issue is whether an intra-family loan lent at the AFR can be characterized as a gift, either wholly or in part. Specifically, there is a question as to whether I.R.C. § 7872, detailing the treatment of loans with below-market interest rates, controls characterization when the note is sufficient in both form and performance.

The Court explained that I.R.C. § 7872 explicitly applies to loans with below-market interest rates and governs interest and gift consequences for those loans. In addition, the Court relied upon *Frazee v. Commissioner*, which held that "[t]he coverage of section 7872 … provide[s] comprehensive treatment of below-market loans" and applied § 7872 to reject "partial gift" theories when AFR is charged. 98 T.C. at 588-589.

Ultimately, the court found the Commissioner's argument "wholly inadequate", citing Tax Court Rule 121(d), declaring that the Commissioner should have submitted more evidence as the argument was based entirely on a declaration that Barbara Galli had not filed a gift-tax return. Furthermore, court found that the executed note, funding trail, timely interest payments, and consistent tax reporting on the part of the Gallis overshadowed the lack of gift-tax return. Summary judgment was granted on the gift-tax issue and partial summary judgment was granted on the estate-tax issue, since "under § 7872, this transaction was not a gift at all."

The key takeaways from this case involve keeping proper record of AFR-rate terms, papered credit, paying actual interest, and having consistent returns protect family loans against being rendered "partial gifts." It's always best practice to document as much as possible and to be consistent with gift and estate treatments. However, filing a gift tax return and disclosing the loan transaction (asserting it was a loan, not a gift) will start a three-year statute of limitations clock that could have prevented this case from being brought at all, especially as Intrafamily loans receive special scrutiny from the IRS, and are often presumed to be gifts unless it can be shown otherwise. This is why a properly executed promissory note, use of the AFR, and proof of timely payments are crucial in these sorts of transactions. Finally, the use of the AFR is sufficient even if a commercial lender would have required a higher rate and security (due to repayment risk).

Loper Bright Enterprises v. Raimondo

By Philip Tortorich

Citation: 603 U.S. 369 (2024)

This case involves a group of fishing companies, Loper Bright Enterprises, H&L Axelsson, Lund Marr Trawlers, Scombrus One, Relentless, Huntress, and Seafreeze Fleet, challenging a rule promulgated by the National Marine Fisheries Service. The respondent to the challenge was Gina Raimondo as Secretary of Commerce for the U.S. Department of Commerce.

The fishing companies challenged a rule which was created under the authority of the Magnuson-Stevens Act and required the fishing industry to pay for federal observers to be carried on board their vessels. The petitioners represented a group from D.C. which were consolidated together in the First Circuit to address *Chevron* Deference's role in the judiciary. The concept of *Chevron* deference involves a two-step test to determine whether a court should defer to an agency's interpretation of a statute. The first step is for the Court to determine whether Congress had directly addressed the precise issue at hand in the statute. If the statute was clear and unambiguous, then the court and the agency had to follow Congress's stated intent. If Congress's intent was unclear or silent, the Court would then assess if the agency's interpretation was a "permissible" or "reasonable" construction of the statute. If the interpretation was reasonable, the court was required to defer to it. The ultimate issue in this case was whether the doctrine of *Chevron* Deference should be retained or overruled, and what standard of review the Administrative Procedure Act requires for agency statutory interpretation.

In a landmark decision, the Court held that courts may not defer merely because a statute is ambiguous, as the interpretation of statutes is the purview of the Court. While Agency interpretation receives persuasive weight, it is not binding. Furthermore, the Court also addressed *stare decisis* but found that the factors supporting stare decisis—namely the quality of reasoning, workability, and reliance – all weighed against the preservation of *Chevron*. Lastly, the Court also found that the deference was unworkable because "ambiguity" as a test was ambiguous in itself due to the arbitrary nature of determining what was, in fact, ambiguous. Therefore, *Chevron* is overturned, as it cannot coexist with APA guidelines. The Supreme Court opted not to follow the 40-year-old "Chevron doctrine" of automatic judicial deference to federal agency interpretations of ambiguous statutes. The judgments of the lower courts are vacated for the petitioners and remanded for further proceedings consistent with the APA *de novo* standard rather than reliance on Chevron Deference.

As a result of this case, when arguing in regulatory areas, arguments should be based on the text of statutes, their structure, and the legislative history, rather than relying on agencies to fill in any blanks around the statute. Regulatory guidance should serve as persuasive input but will not necessarily be deferred to if an issue gets to court. According to the Court, statutes have a "best meaning" and it is up to the Courts, not agencies, to determine this meaning. Agencies are no longer entitled to deference beyond whatever industry-specific respect would be given to any other type of expert witness. As a result of this ruling, will likely be some transitional turbulence as courts adjust to APA standards rather than Chevron Deference. In overturning Chevron, there is now a more favorable legal environment for plaintiffs to challenge what they consider to be possible regulatory overreach.

Carlson v. Colangelo

By Philip Tortorich

Citation: No. 38, 2025 WL 1127765 (N.Y. Apr. 17, 2025)

The case of *Carlson v. Colangelo* involves Kristine M. Carlson, who was the longtime partner and caregiver to Donald P. Dempsey, the decedent. Crissy Colangelo was the trustee of Donald's trust, the executor of his estate, and also a beneficiary of the estate.

At issue was a piece of real estate and an interest in an LLC, Dempsaco, LLC. In the decedent's revocable trust, Carlson was specifically bequeathed his residence, but after the decedent's death, Colangelo refused to distribute the residence to Carlson. The trust contained trust contained an *in terrorem* (or "no-contest") clause, stating that "in the event that any [beneficiary] shall contest any aspect of this Trust [...] the Grantor directs that such rights of such challenger shall be ascertained as they would have been determined had that challenger predeceased the execution of the instrument and the Grantor, without living issue." When Carlson filed suit seeking to enforce the distribution of the real estate, Colangelo argued that the suit triggered the in *terrorem clause* and therefore nullified Carlson's rights as beneficiary. In addition, Carlson also made a $100,000 transfer to the decedent prior to his death, which she claimed was in exchange for a 50% ownership stake in Dempsaco, LLC.

The primary issue was whether or not the suit violated the *in terrorem* clause, or whether suits brought to enforce or construe a trust as written fall outside of these sorts of clauses. The court determined that *in terrorem* clauses are enforceable but are generally disfavored and must be strictly construed, with a focus on the grantor's intent. In this case, Carlson's action sought to enforce the instrument, not undermine its validity and therefore does not trigger the *in terrorem* clause. The Court emphasized that such clauses deter contests, not suits compelling performance. While the Trust unambiguously gives the premises to Carlson, and she was granted summary judgment in her favor on this issue, there was a separate question as to whether Carlson had an interest in the LLC, which was remitted back to the lower court. Ultimately, the Court ruled this was an action to enforce the provisions of the trust, not to nullify any provisions of the trust.

The primary takeaway of this case involved the nature of litigation around trusts with *in terrorem* or "no-contest" clauses. Beneficiaries should be careful when seeking relief to err on the side of enforcement rather than contestation. Actions that seek to enforce are not in violation of *in terrorem*/no-contest clauses, but those that challenge the validity or terms of a trust do violate such clauses. When meeting with clients about potential trust litigation, always be aware of no-contest clauses and look for mechanisms to compel proper enforcement first before arguments against validity, to the extent possible. Finally, a beneficiary can compel enforcement of trust provisions without challenging the overall validity of the trust itself, particularly when compelling trustee performance. It is important to note that these types of clauses are governed by state law and each state takes its own approach to the enforceability of *in terrorem* clauses. This case was specifically addressing New York law.

Estate of Czoka v. Life Care Center of Gray

By Samantha McCarthy

Citation: *Court of Appeals of Tennessee at Knoxville, No. E2020-00995-COA-R9-CV (May 6, 2021)*

Estate planning and elder law attorneys regularly serve communities vulnerable to manipulation and abuse due to changes in mental capacity. Effective capacity evaluation is, therefore, a vital skill made more difficult when clients experience fluctuating cognition. Pagiel Hall Czoka, who suffered from dementia, moved from Boston to Tennessee in 2012 to live with family. Soon after, her sister, Kirsten, brought her to an attorney to execute financial and health care powers of attorney. In 2015, Kirsten used that authority to admit Czoka to a long-term care facility and signed an arbitration agreement. After Czoka was allegedly assaulted by a facility employee (an incident unrelated to her death the following year), the estate sued. The facility sought to enforce the arbitration agreement, while the estate argued Czoka lacked capacity to execute the POAs. The key issue was whether Czoka had contractual capacity despite documented decline and a neurological assessment shortly after signing. Tennessee law presumes adults competent unless proven otherwise. The appellate court affirmed that Czoka had sufficient capacity to execute the documents.

This case illustrates that capacity is contextual. A client who struggles with daily living activities may still understand the purpose and effect of estate planning documents. Attorney observations can be decisive: here, the drafting attorney testified that Czoka appeared lucid and committed to her choice, which the court found persuasive.

While our firm has always been dedicated to conducting comprehensive capacity assessments, we have included additional documentation and observation notes surrounding responsiveness, and decisiveness. When dementia or cognitive decline is at play, attorneys may want to consider capacity affidavits or even short video recordings (with appropriate client consent) for the client and their family to preserve evidence that the client understood the documents. In this case, the client (Czoka) was not documented to have read (or had read aloud) the power of attorney text itself. This is something that may be worth considering to cement proof of a client's understanding, although it does not necessarily prove capacity or understanding in and of itself.

Lubov Stempniewicz Power of Attorney and Trust Litigation

By Samantha McCarthy

Citation: Massachusetts Appeals Court (2021) SJC-13149

This case addressed whether a power of attorney authorized Edward, acting as attorney-in-fact for his mother Lubov Stempniewicz, to create a trust on her behalf. The POA granted powers over "estate, trust, and other beneficiary transactions" and "living trust transactions." Edward argued this language gave him broad authority to establish the "Lubov Trust."

The court disagreed. The provisions allowed Edward to manage trust transactions where Lubov was a beneficiary and to transfer property into revocable trusts Lubov herself had already created. They did not authorize him to create a new trust. Any trust Edward purported to create was therefore *void ab initio*.

The court emphasized that a trust requires the settlor's contemporaneous intent and capacity. Delegating this power to an attorney-in-fact, if it is to be allowed, would therefore need to be expressly stated in a power of attorney document.

How This Has Changed My Practice: While it has always been clear within my own practice that powers of attorney must be detailed and clear, this case brought a new level of scrutiny to power of attorney language. In my firm, we spend time with clients discussing what their true intentions for the power of attorney documents are. This often includes questions about whether the attorney-in-fact should be allowed to create a trust, whether revocable or irrevocable, in that individual's name. These powers can then be expressly permitted or disallowed in the documents based on the client's wishes. By clarifying these issues, we are able to help clients proactively anticipate any challenges with trust creation and have their wishes clearly stated to help avoid confusion should any disputes arise in the future.

Estate of Fields v. Commissioner

By Samantha McCarthy

Citation: United States Tax Court, T.C. Memo. 2024-90 (Sept. 26, 2024)

Estate planning and elder law attorneys frequently encounter cases where last-minute asset transfers raise questions about control, retained interests, and tax inclusion. This case highlights the risks of family limited partnerships formed shortly prior to death.

Case Facts

Anne Milner Fields, a Texas oil business owner and widow, relied heavily on her great-nephew, Bryan Milner, who was her agent under her durable power of attorney. In May 2016, just weeks before her death, Mr. Milner created AM Fields Management, LLC, and AM Fields, LP. Acting as her agent, he transferred about $17 million of Ms. Fields's assets, including cash, stock, real estate, and LLC interests, into the partnership. In return, Ms. Fields received a 99.9941% limited partner interest, while the management company (controlled by Mr. Milner) received a nominal general partner interest.

The estate valued Ms. Fields's limited partnership interest at $10.8 million after applying significant discounts. The IRS argued the full value of the underlying assets should be included in her gross estate. The Tax Court agreed, finding that Ms. Fields, through her agent, retained too much control and enjoyment of the assets, and that the transfer lacked bona fide nontax purposes.

Practice Implications

This case underscores the danger of relying on aggressive discounting when transactions occur late in life. In our firm, we place greater emphasis on ensuring that transfers are completely compliant, especially for Medicaid purposes when relevant, and serve clear, documented nontax purposes beyond estate reduction as needed. Timing can be a huge factor in transfer scrutinization, especially with structures created close to death. We also advise clients to maintain sufficient liquidity outside of entity structures to cover expenses, bequests, and taxes, so that distributions do not signal continued enjoyment of the transferred assets.

Rhode Island Protects Attorney–Client Privilege in Fiduciary Matters

By Samantha McCarthy

Citation: R.I.G.L. § 18-1-5 "Confidential Communications" (June 13, 2025)

Estate planning attorneys often represent trustees and other fiduciaries whose decisions can invite scrutiny from beneficiaries. Until recently, Rhode Island left open the possibility of a "fiduciary exception" to attorney-client privilege, risking compelled disclosure of communications between fiduciaries and their counsel.

Case Facts

In *Metcalfe v. Dempze*, the Superior Court held that when trustees sought legal advice for trust administration, beneficiaries were entitled to see those communications. This ruling followed the minority approach nationwide. The Rhode Island Bar Association responded quickly: Attorney Eric D. Correira, with support from President Christopher S. Gontarz and lobbyist William Farrell, advanced legislation modeled on New Hampshire's statute. The bill moved smoothly through both Judiciary Committees and passed unanimously. On June 13, 2025, Governor Dan McKee signed it into law, effectively overturning the decision and aligning Rhode Island Law with laws active in many other states, thereby reinforcing the protection of confidentiality and attorney-client privilege.

"Rhode Island now follows the majority rule, assuring that attorney–client privilege fully applies in trust and fiduciary contexts."

Legal Issues Addressed, Impact on Practice

The law reverses *Metcalfe* and establishes that communications between attorneys and fiduciary clients are privileged to the same extent as communications with clients in their individual capacity. Rhode Island now follows the majority rule, assuring that attorney-client privilege fully applies in trust and fiduciary contexts.

How the Case Has Changed the Way I Work

In practice, this statute reinforces attorney-client trust within communications, promotes candid advice, and provides certainty in litigation that beneficiaries cannot demand disclosure under a fiduciary exception theory. This may also allow attorneys to document advice more thoroughly, knowing privilege will be respected, which can reduce malpractice risk. Practitioners may be empowered to approach fiduciary counseling with greater confidence. This law signals that Rhode Island views privilege as essential to effective fiduciary administration, aligning practice in the state with the majority of U.S. jurisdictions.

In re Estate of Coffman

By Sandra D. Mertens, Esq.

Citation: 2023 IL 128867 (Nov. 30, 2023)

Key Issues: Powers of Attorney, Agency, Undue Influence

Facts: The Decedent Mark executed an estate plan in 2001 naming his wife Dorothy as agent, effective immediately, under Powers of Attorney for Property and Health Care. Mark also executed a 2001 Will leaving his family business interests to his sisters after Dorothy's death. Dorothy did not exercise her authority under the 2001 POAs. On his deathbed in 2018, Mark executed a new Will granting Dorothy immediate control and potential future benefits from the family businesses, removing Mark's sisters as the residuary beneficiaries of the businesses. After Mark died, his sisters contested the Will, alleging Dorothy obtained the 2018 Will through undue influence. Although the sisters alleged Dorothy brought Mark's attorney to his hospital room to coerce him to execute a new Will, the evidence and testimony from the attorney and others showed different facts and circumstances. The Court found that: (i) Mark was cognizant and competent when the 2018 Will was signed; (ii) he made independent choices including choosing to reject clauses favoring his sisters; (iii) the attorney brought three different Wills to the hospital and Mark selected one; and (iv) Dorothy was not coercive and actually attempted to leave the room while Mark met with his attorney. The Court also considered the lengthy of the marriage (24 years) and the relationship between Mark and Dorothy.

Holdings: The 2001 Power of Attorney created a fiduciary relationship between Dorothy and Mark *as a matter of law*, regardless of whether or when Dorothy ever exercised her authority. The fiduciary relationship begins at the time the power of attorney document is signed, and creates a rebuttable presumption of undue influence when a will "is prepared by or its preparation procured by such beneficiary." Here, Dorothy was inferred a fiduciary relationship because she was named as Mark's agent in 2001, even though she never exercised her authority. However, Dorothy rebutted the presumption of undue influence through the facts and evidence. The court rejected the "debilitated-testator doctrine" which would lower the standard for undue influence when the testator was seriously ill or in hospice care, such as Mark dying from cancer in the hospital, holding the doctrine is not recognized in Illinois.

Takeaways: Although the Court's opinion did not put emphasis on whether the 2001 Power of Attorney was "springing" (i.e., effective upon incapacity) or "plenary" (i.e., effective immediately), the 2001 POA became effective upon signature, rather than incapacitation. The Court did not explicitly state if a fiduciary duty would be created later in such a case. However, the Court's holding should change the way estate planning attorneys approach Powers of Attorney and advice to clients and their loved ones. When discussing the type of Power of Attorney, an attorney should advise a client that their first-named agent may have fiduciary duties upon execution of the POA, especially if it is effective immediately. Clients may be instructed to notify their agents of the need to seek counsel when needed to protect

the agents from claims of undue influence. Estate planning attorneys should also consider using the Agent's Certification and Acceptance of Agency Form (see 755 ILCS §45/2-8(b)) to formalize when the agent has accepted authority. Finally, attorneys preparing estate plan documents for deathbed clients should take extra precautions and gather evidence of the testator's competency and independent choices in the event of a later Will or Trust dispute. For example, the attorney should make sure to speak face-to-face with the client to ensure the attorney is documenting the client's wishes rather than another family member's influence. The attorney may wish to record the meeting by sound recording, video, or a memorandum or email kept in the file documenting the discussion and attorney's mental impressions during the meeting. The attorney may want to speak to the deathbed client's doctors and nurses to confirm competency and mental state. The more evidence the attorney can gather at the time of signing, the stronger the case that the signed estate plan documents the testator's wishes.

Estate of Hirschfeld

By Sandra D. Mertens, Esq.

Citation: 2023 IL App (5th) 220630 (Aug. 1, 2023)

Key Issues: Powers of Attorney, Agency, Fraudulent Transfer/Self-Dealing, Probate Procedure

Facts: John Hirschfeld executed an estate plan naming his second wife as his agent, effective immediately, and his children from his first marriage as legatees. When John married the second wife, they executed a prenuptial agreement which limited the second wife's share in John's assets and estate. When John died, his children discovered that his assets available for distribution were only $200,000, when they had been $3 million some years prior. A special investigator appointed in the probate case considered all the facts and circumstances to determine whether there was the possibility of undue influence or other wrongdoing. John had been married to the second wife for 15 years, and although John was the primary breadwinner during the first portion of their marriage, his declining health left him wholly dependent on the wife for his care, transportation to doctors and hospitals, and financial management. The second wife repeatedly refused to produce records relating to John's assets or an accounting, and the Court found the second wife made transfers to herself from John's assets exercising her agency under John's Power of Attorney.

Holdings: It is well settled in Illinois that the mere existence of a fiduciary relationship prohibits the agent from seeking or obtaining any selfish benefit for herself, and if the agent does so, the transaction is presumed to be fraudulent. Therefore, the second wife's transfers to herself which materially benefited her and was for her own use were presumed to be fraudulent transfers caused by her undue influence. The burden then shifts to the fiduciary to show by clear and convincing evidence that the transaction was fair and equitable and did not result from undue influence, but the second wife did not rebut the presumption. The marital relationship is considered using the following factors: (i) the existence of a fiduciary relationship between the parties, (ii) the nature of the spouses' relationship, (iii) who initiated the conveyance that is at issue, (iv) which, if either, holds a dominant position, and (v) whether self-dealing occurred. When the power dynamic shifted causing John to be dependent on his second wife, the wife thereafter was in the dominant position and held a fiduciary duty. The Court reversed the lower court's presumption that the transfers were a spousal gift simply because of the existence of a marital relationship, and remanded for application of the appropriate factors.

Takeaways: Clearly a fiduciary should not abuse his or her position by transferring assets of the agent to the fiduciary. In the event both the principal and agent agree to transfers which could otherwise be presumed fraudulent, an estate planning attorney can document the principal's intent to make a transfer to demonstrate it was not procured from undue influence, and to confirm the transfer is a gift, such as through a Declaration of Gift. Estate planning attorneys might also consider instructing couples executing mutual estate plans that selecting "durable" (i.e., effective immediately) rather than "springing" (i.e., effective upon incapacitation) Powers of Attorney has the potential to raise fiduciary issues, especially in unique family situations such as multiple marriages.

In re Estate of Piton

By Sandra D. Mertens, Esq.

Citation: 2024 IL App (3d) 240051 (Nov. 12, 2024)

Key Issues: Pre-death asset titling, post-death standing to challenge a Will or alleged breach of fiduciary duty.

Facts: Patrick executed an estate plan naming his sister Dorothy as his agent under a Power of Attorney for property. Before he died, Patrick allegedly instructed Dorothy to change his beneficiaries on his Vanguard investment accounts, which at the time named Dorothy and their brother V. Lawrence as joint "pay on death" beneficiaries. V. Lawrence died, and then Patrick died, and Dorothy had never changed the Vanguard beneficiaries. After Patrick died, V. Lawrence's children (Patrick's nieces and nephews) sued Dorothy, alleging breach of her fiduciary duty as agent and demanding an accounting of the Vanguard accounts.

Holdings: The nieces and nephews lacked standing to bring their claims, because they had no interest in the Vanguard accounts since V. Lawrence pre-deceased Patrick, and they were not named as successor beneficiaries on the Vanguard accounts. They were not "successors in interest" under 755 ILCS §45/2-7 because they had no interest in the accounts, and even if they were "interested persons" under 755 ILCS §45/2-10(f) through their interest as beneficiaries in Patrick's Will, it did not give them standing to challenge the Vanguard accounts, which passed outside of Patrick's estate by operation of law.

Takeaways: Often in disputed estate administrations, the familial relationships have broken down over time and the prospect of an inheritance. This case highlights the importance of proper estate planning well in advance of death or illness. Clients should be reminded to revisit their estate plans whenever a close family member, heir, or beneficiary dies. When V. Lawrence died in 2018, Patrick could have re-evaluated his end-of-life planning to change the beneficiaries on the account himself rather than relying on his sister, who was faced with a difficult situation. Alternatively, Patrick could have named his trust as the beneficiary of the Vanguard accounts to ensure they would pass to his intended beneficiaries. Ultimately, there were no facts in this case to indicate what Patrick truly intended, such as a written letter of direction from Patrick to Dorothy directing a change in his wishes, an email to Patrick's Vanguard agent documenting his request, or a personal property memorandum delineating Patrick's wishes for his investment funds. Had there been evidence to demonstrate Patrick's intent, the nieces and nephews may have presented a good faith basis that they were intended to be successors in interest in order to bring a claim of breach of fiduciary duty. Moreover, written evidence would have provided clarity and insight into Patrick's intentions, which is the court's foremost concern when reviewing such disputes.

Connelly v. U.S.

By Sandra D. Mertens, Esq.

Citation: 602 U.S., 144 S.Ct. 1406 (decided June 6, 2024)

Key Issues: Estate taxes and tax planning for family-owned businesses

Facts: Two brothers, Michael and Thomas, held 50/50 shares in a family corporation. To keep the business in the family, they executed a Buy-Sell Agreement providing that, upon the first to die, the surviving brother would have an option to purchase the deceased brother's shares, and if the surviving brother chose not to, the corporation must redeem the deceased brother's shares, with the redemption payment paid to the decedent's estate. To ensure the corporation would have sufficient funds to redeem the shares, the corporation took out life insurance policies on both brothers. Michael died, and Thomas declined to purchase the shares, requiring the corporation to redeem them using the life insurance proceeds on Michael's life. No appraisal was obtained for Michael's 50% ownership interest; instead, Thomas determined Michael's 50% interest was worth $3 million as the fair market value, which was reported on Michael's Form 706 estate tax return. The IRS audited the estate tax return, and determined that Michael's shares were worth $6 million (including the $3 million paid for the shares plus the $3 million insurance proceeds). The Estate argued the $3 million insurance proceeds should be offset by the corporation's contractual obligation to redeem the shares (i.e., a liability).

Holdings: A decedent's taxable estate includes his shares in a closely-held corporation (26 U.S.C. §2031(b)), and to determine the value of the shares, the court must consider the company's net worth, prospective earning power and dividend-paying capacity, and other relevant factors including proceeds of life insurance policies paid to the corporation (26 C.F.R. §20.2031-2(f)(2)). Here, the corporation's contractual redemption obligation was not necessarily a liability that reduced the corporation's value. Rather, the corporation was worth its value plus the life insurance value, because the redemption obligation did not change the company's value for the remaining shareholder. After the corporation redeemed Michael's share, the value of Thomas' interest in the corporation remained the same.

Takeaways: Small family businesses can suffer a hefty cost if the *Connelly* holding applies to increase the estate taxes of a family member who passes away. This holding may also apply to any small business with similar protections in place to keep the business within the partners rather than allowing a decedent's shares to pass to his or her estate. At a minimum, small businesses owners should be aware of the potential costs of using a life insurance policy with a Buy-Sell Agreement: potentially increased estate taxes. Estate planning attorneys should consider whether alternatives may be available, such as structuring a buy-out or redemption through other payment methods (such as the sale of assets or payment plan), revising the value computation to reduce the buy-out cost, including the cost of estate taxes in the buy-out computation, or including an option to dissolve the entity and distribute the value upon the first partner to die. Additionally, attorneys representing an estate should always consider obtaining an objective appraisal of a decedent's business interest whenever estate taxes could be involved, to document the value and the estate's reasonable reliance on a professional, as well as avoid potential accuracy-related or substantial understatement penalties on top of the estate taxes.

IRS Letter Ruling 2023-002

By C. Blake West

IRS Letter Ruling 2023-002 has caused much confusion on stepped-up basis from an irrevocable trust. In this matter individual A, created Trust in year 1. A held power(s) over the Trust that would result in the income being attributed to him. See 26 USC 671 – 678.

Brief description of those provisions:

673 retained reversionary rights

674 retained right of occupancy

675 retained right to substitute assets, purchase for less than FMV, right to borrow from trust without security

676 retained right to revoke

677 retained right to income

678 retained right to vest principal in self.

A died in year 7 and the assets had greatly appreciated. A's heirs sold the assets and paid taxes based on a stepped-up basis as of the date of A's death. The IRS disagreed.

A did not hold a power over the Trust that would allow (require) inclusion of Trust in A's taxable estate. See USC 2035 – 2042.

Brief description of those provisions:

2035 transfer within 3 years of death

2036 retained right of income, occupancy, and/or power of appointment 2037 retained reversionary interest

2038 retained right to amend, revoke 2039 applies to annuities

2040 applies to jointly held properties

2041 retained general power of appointment

2042 retained incidents of ownership of life ins policy.

Thus, the Trust was a completed gift trust. That eliminates the step-up in basis allowed by 26 USC 1014. (This is bad).

The basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent, if not sold, exchanged, or otherwise disposed of before the decedent's death by that person, is the Fair Market Value (FMV) of the property at the date of the decedent's death.

The step-up in basis allows the heir/beneficiary to take the property at the value as of the date of death of the deceased/grantor. An example of the step-up is Parent purchased $5,000 of Tesla, Inc. stock in September of 2010. Parent gifts the stock to Child in 2020. Child assumes parent's basis. Parent dies in 2025. Child sells stock for FMV of $2 million with a tax bill of $400,000. If Parent retains the stock until death, Child takes at the value on that day, sells the next day and pays $0.00 in taxes.

What many on social media took from this Letter Ruling was that irrevocable trusts no longer provide a step-up in basis, a.k.a. click-bait. I had several calls from clients who told me the IRS changed the rules and an irrevocable trust no longer allows a step-up in basis. We all know the IRS cannot change laws, only Congress. I have heard the same thing from other attorneys and financial advisors. That is incorrect. The revocability or irrevocability is of no consequence. What matters is including one

or more of the above listed powers, preferably at least one from each list. The irrevocable asset-protection trusts I draft, unless for some specific reason, include powers from both lists. I do not want the Trust to have a TIN and pay its own taxes. I want the beneficiaries to receive a stepped-up basis at the death of the grantor and for income taxes to be assessed and paid by the Grantor. Trust taxation rates accelerated much faster than individual tax rates. Trust tax rates:

Tax Rate	Trust Income
10%	$0–$3,150
24%	$3,150–$11,450
35%	$11,450–$15,650
37%	$15,650 or more

Individual tax rates:

Tax Rate	Single Filers	Married Filing Joint
10%	$0 to $11,925	$0 to $23,850
12%	$11,925 to $48,475	$23,850 to $96,950
22%	$48,475 to $103,350	$96,950 to $206,700
24%	103,350 to $197,300	$206,700 to $394,600
32%	$197,300 to $250,525	$394,600 to $501,050
35%	$250,525 to $626,350	$501,050 to $751,600
37%	$626,350 or more	$751,600 or more

Failure to properly draft the trust could have expensive results to the heirs and maybe the grantors as well.

Sample Trust Provisions to Allow/Require the Grantor to be Taxed on Trust Income and not the Trust

Section 1.03

We retain the lifetime power to: (1) appoint the entire principal and any accrued and undistributed net income of the Lifetime Trust, (2) change the Residuary Beneficiaries, amount, bequests and/or the timing, manner or method of distribution as we shall exclusively select, subject to the following restrictions: (1) we exercise this power of appointment by a valid Trust Agreement, or other written notarized instrument signed by us and (1) we cannot exercise this power in favor of either of us, our creditors, our estate or creditors of our estates. The exercise of the appointment shall occur upon delivery of my notarized written instrument to the Trustee.

This paragraph includes provisions related to 26 USC §§674, 2036 and 2041.

Section 3.01 Contributions Held in a Single Trust

(a) Residence Provisions

In the event that our trust holds residential real property (including condominiums or the shares of a cooperative apartment) used by either of us, then we have the exclusive right to possess, occupy, and use the real property (including a cooperative apartment) for residential purposes.

Includes powers mentioned in 26 USC §674 and §2036.

Section 9.09 Exercise of Testamentary Power of Appointment

Except as otherwise prohibited, a testamentary power of appointment granted under this agreement may be exercised by a valid will or living trust that specifically refers to the power of appointment.

The holder of a testamentary power of appointment may exercise the power to appoint property among the permissible appointees in equal or unequal proportions, and on such terms and conditions, whether outright or in trust, as the holder of the power designates. The holder of a testamentary power of appointment may grant further powers of appointment to any person to whom principal may be appointed, including a presently exercisable limited or general power of appointment.

Includes powers mentioned in 26 USC §2041.

Section 9.23 Grantor Trust Provisions

We intend that our trust be a grantor trust for federal income tax purposes for those periods of time during which we or any other person holds one or more of the powers described in Sections 671 through 679 of the Internal Revenue Code, the effect of which is that we will be taxed on the income of our trust. To carry out this intent, the following provisions apply to the administration of our trust.

(a) Power of Substitution

While either of us is living, either of us may direct our Trustee to transfer any property of our trust to either of us in exchange for property of equivalent value. Our Trustee must follow any such directive.

Includes powers mentioned in 26 USC §§ 675

Rev. Rul. 2023-2

By C. Blake West

Issue

Is there a basis adjustment under § 1014 of the Internal Revenue Code (Code) to the assets of a trust on the death of the individual who is the owner of the trust under chapter 1 of the Code (chapter 1) if the trust assets are not includible in the owner's gross estate pursuant to chapter 11 of the Code (chapter 11)[1]

Facts

In Year 1, A, an individual, established irrevocable trust, T, and funded T with Asset in a transfer that was a completed gift for gift tax purposes. A retained a power over T that causes A to be treated as the owner of T for income tax purposes under subpart E of part I of subchapter J of chapter 1 (subpart E). A did not hold a power over T that would result in the inclusion of T's assets in A's gross estate under the provisions of chapter 11. By the time of A's death in Year 7, the fair market value (FMV) of Asset had appreciated. At A's death, the liabilities of T did not exceed the basis of the assets in T, and neither T nor A held a note on which the other was the obligor.

Law

Section 671 provides that, where subpart E treats the grantor or another person as the owner of any portion of a trust, the taxable income and credits of the grantor or the other person include those items of income, deductions, and credits against tax of the trust that are attributable to that portion of the trust to the extent that these items would be taken into account under chapter 1 in computing taxable income or credits against the tax of an individual. Any remaining portion of the trust is subject to subparts A through D of part I of subchapter J.

Section 1012(a) provides that the basis of property is its cost, except as otherwise provided in subchapter O of chapter 1 (subchapter O) (relating to gain or loss on disposition of property) and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses) of chapter 1. One of the provisions set forth in subchapter O is § 1014.

Section 1014(a)(1) generally provides that, except as otherwise provided in § 1014 (including § 1014(f) requiring the use of consistent basis), the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent, if not sold, exchanged, or otherwise disposed of before the decedent's death by that person, is the FMV of the property at the date of the decedent's death.

Section 1014(b) lists the seven types of property that are considered to have been acquired from or to have passed from the decedent for purposes of § 1014(a). The types of property are:[2]

- Section 1014(b)(1) – Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;
- Section 1014(b)(2) – Property transferred by the decedent during life in trust to pay the income for life to or on the order or direction

[1] Unless otherwise specified, all "section" or "§" references are to sections of the Code or the Income Tax Regulations (26 CFR part 1).

[2] Section 1014(b)(5) applies only to decedents dying before January 1, 2005. Section 1014(b)(7) and (8) were repealed by section 221(a)(74)(B) of the Tax Increase Prevention Act of 2014, Public Law 113-295, 128 Stat. 4010, 4049 (December 19, 2014).

of the decedent, with the right reserved to the decedent at all times before death to revoke the trust;

- Section 1014(b)(3) – In the case of decedents dying after December 31, 1951, property transferred by the decedent during life in trust to pay the income for life or on the order or direction of the decedent with the right reserved to the decedent at all times before death to make any change in its enjoyment through the exercise of a power to alter, amend, or terminate the trust;
- Section 1014(b)(4) – Property passing without full and adequate consideration under a general power of appointment exercised by the decedent by will;
- Section 1014(b)(6) – Property which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State, or United States territory or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate under chapter 11 or § 811 of the Internal Revenue Code of 1939 (1939 Code);
- Section 1014(b)(9) – Property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property must be included in determining the value of the decedent's gross estate under chapter 11 or under the 1939 Code. In this case, if the property is acquired before the death of the decedent, the basis commencing on the death of the decedent is the amount determined under § 1014(a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under subtitle A of the Code or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on the property before the death of the decedent. However, § 1014(b)(9) does not apply to:

  (A) annuities described in § 72;

  (B) stock or securities of a foreign corporation that would have been a foreign personal holding company prior to the repeal of § 552 of its next preceding taxable year prior to the decedent's death to which § 1014(b)(5) would apply if the stock or securities had been acquired by bequest; and

  (C) property described in any other paragraph of § 1014(b); and Section 1014(b)(10) – Property includible in the gross estate of the decedent under § 2044 (relating to certain property for which the marital deduction was previously allowed). In any such case, the basis is determined under § 1014(b)(9) as if such property were described in the first sentence of § 1014(b)(9).

Section 1.1014-1(a) generally provides that the basis of property acquired from a decedent is equal to the value placed upon such property for purposes of chapter 11. Accordingly, generally the basis of property acquired from a decedent is the FMV of such property at the date of the decedent's death, or, if the decedent's executor so elects, at the alternate valuation date prescribed in § 2032. Property acquired from a decedent includes, principally, property acquired by bequest, devise,

or inheritance, and, in the case of decedents dying after December 31, 1953, property required to be included in determining the value of the decedent's gross estate under any provision of the Internal Revenue Code of 1954 or the 1939 Code.

Section 1.1014-2(a)(1) provides that property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, whether the property was acquired under the decedent's will or under the law governing the descent and distribution of the property of decedents, is considered to have been acquired from a decedent and the property's basis is determined under the general rule in § 1.1014-1.

Section 1.1014-2(b)(2) generally provides that property is considered to have been acquired from a decedent to the extent such property is includible in the decedent's gross estate if the decedent died after December 31, 1953.

In Rev. Rul. 84-139, 1984-2 C.B. 168, D, a citizen and resident of foreign country Z, died owning real property located in Z. B, a United States citizen, inherited the real property in accordance with the laws of Z. At the time of D's death, the property had a basis of $100x and a FMV of $1,000x. Because the property was located outside the United States and D was a nonresident alien, the value of the property was not includible in D's gross estate under § 2103 for purposes of chapter 11. B sold the property the following year for $1050x, claiming a basis of $1,000x and gain of $50x. The ruling concludes that, because B inherited the property from D, and the property is within the definition of property acquired from a decedent under § 1014(b)(1), it received a basis adjustment to FMV at D's death and B had correctly calculated B's basis and gain. In Rev. Rul. 84-139, which did not involve a grantor trust, the property at issue was acquired by a bequest.

Analysis

For property to receive a basis adjustment under § 1014(a), the property must be acquired or passed from a decedent. For property to be acquired or passed from a decedent for purposes of § 1014(a), it must fall within one of the seven types of property listed in § 1014(b). Asset does not fall within any of the seven types of property listed in § 1014(b).

First, upon A's death, Asset was not "bequeathed," "devised," or "inherited" within the meaning of § 1014(b)(1). A "bequest" is the act of giving property (usually personal property or money) by will. Black's Law Dictionary (11th ed. 2019). The Supreme Court defined "bequest" as a "gift of personal property by will" for purposes of the predecessor provision of § 102 that, as today, excluded gifts, bequests, devises, or inheritance from gross income for income tax purposes. United States v. Merriam, 263 U.S. 179, 184 (1923).

A "devise" is the act of giving property, especially real property, by will. Black's Law Dictionary (11th ed. 2019). Volume 97 of the Corpus Juris Secundum notes that although "bequest" and "bequeath" strictly refer to a gift by will of personal property, the words may be given a broader meaning to include real property which, under the narrower definition, would be a devise. See 97 C.J.S. Wills § 1861 (2022).

An "inheritance" is property received from an ancestor under the laws of intestacy or property that a person receives by bequest or devise. Black's Law Dictionary (11th ed. 2019).

In *Bacciocco v. United States*, 286 F.2d 551, 554-55 (6th Cir. 1961), the court found that property transferred in trust prior to the decedent's death is not bequeathed or inherited because it did not pass either by will or intestacy. The court stated, "[w]e construe those terms [bequest and inheritance] according to their usual and normal meaning" and noted that the decedent's death

did not transfer the assets to the trust.

Id. at 554-56. This does not imply that property in a trust could never fall within the meaning of § 1014 (such as property included in the decedent's gross estate or property specifically described by §§ 1014(b)(2), (3), or (4); however, in the facts outlined above, the trust property does not fall within the meaning of those terms.

The Congressional committee report explaining the basis of property acquired from a decedent for purposes of § 1014(b) (then designated § 113(a)(5) of the 1939 Code) stated that the provision "applies basically to property in the decedent's probate estate and includible in his gross estate under § 811(a) [the predecessor provision of § 2031(a)]. In addition, it applies to property acquired by certain specifically described methods of disposition which are treated as though the acquisition was by bequest, devise, or inheritance." H.R. Rep. No 83-1337 at 4407-08 (March 9, 1954). Citing that report, the court in Collins v. United States, 318 F. Supp. 382, 386 (C.D. Cal. 1970) stated, "[i]t seems clear that property cannot be said to come from a decedent by 'bequest, devise, or inheritance' unless it is part of the decedent's probate estate under the laws of the state of his domicile."[3] The court determined that payments made to a widow by her deceased husband's employers, under contracts negotiated by her husband, did not pass from the decedent under § 1014 and so would not acquire a basis determined by the contract's FMV at the decedent's death but instead were income with respect to a decedent that would not receive a basis adjusted to date of death value.

Second, Asset does not fall within any of the remaining types of property listed in § 1014(b). Asset is not described in §§ 1014(b)(2), (3), or (4) because A did not retain a power to revoke or amend T or hold a power to appoint Asset. Asset also is not described by § 1014(b)(6) because it is not community property. Finally, Asset is not described by §§ 1014(b)(9) or (10) because it is not included in A's gross estate under the provisions of chapter 11. Because at A's death Asset does not fall within any of the seven types of property listed in § 1014(b), Asset does not receive a basis adjustment under § 1014(a) at A's death.

Holding

A creates T, an irrevocable trust, retaining a power which causes A to be the owner of the entire trust for income tax purposes under chapter 1 but does not cause the trust assets to be included in A's gross estate for purposes of chapter 11. If A funds T with Asset in a transaction that is a completed gift for gift tax purposes, the basis of Asset is not adjusted to its fair market value on the date of A's death under § 1014 because Asset was not acquired or passed from a decedent as defined in § 1014(b).

Accordingly, under this revenue ruling's facts, the basis of Asset immediately after A's death is the same as the basis of Asset immediately prior to A's death.[4]

Drafting Information

The principal authors of this revenue ruling are Cynthia D. Morton and Daniel J. Gespass of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue ruling, please contact Ms. Morton at (202) 317-5279 or Mr. Gespass at (202) 317-6859 (not a toll-free call).

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[3] The court in Collins also determined that the wording of § 1014(b) indicated that the list was exclusive, marking the limits of property acquired from a decedent or passing from a decedent, and that a transfer must therefore be within that list before it could be considered as eligible for a basis adjustment under § 1014(a). Id. at 385-86.

[4] This revenue ruling does not alter the result in Rev. Rul. 84-139. Property acquired from a non-resident non-citizen decedent that is not included in his or her gross estate may receive a basis adjustment under § 1014 if the property is acquired by bequest, devise, or inheritance within the meaning of § 1014(b)(1) or is otherwise specifically described in § 1014(b).

In re Interdiction of Lessie Eugene Jones

By Okyeame G. Haley, Esq. LLM

Citation: 371 So.3d 1164 (La. App. 2 Cir. 2023)

ACTS. Eighty-seven-year-old Dr. Lessie Eugene Jones, a retired business-school professor with mild to moderate dementia, lived with his companion and caregiver of twenty years. His niece, Marilyn Skirvin of Indiana, used $5,000 of his own funds to hire counsel to seek his interdiction after he revoked her 2003 power of attorney and granted a new one to his companion. Three doctors testified he could not make reasoned decisions. The trial court ordered a full interdiction and named the niece curator of property and the companion curator of the person.

ISSUE. Dr. Jones, age 87, revoked his niece's power of attorney and chose his live-in companion instead. The niece, now an adversary, petitioned for interdiction, alleging undue influence and dementia. With conflicting medical opinions and family hostility, did the court properly order full interdiction and appoint the niece rather than the companion as curator?

HOLDING. The appellate court affirmed full interdiction but amended the judgment to name the companion curator of both person and property and the niece undercuratrix.

REASONING. All medical experts agreed Jones could not make reasoned decisions under Civil Code article 389. Rival powers of attorney and family conflict made lesser protection unworkable. Appointing the out-of-state niece who had used his funds to sue him was error. The companion's long caregiving record supported his appointment as curator.

HOW THIS HELPS MY PRACTICE. This case shows that interdiction litigation depends on careful fact development and preparation. Competing powers of attorney and family conflict often obscure the capacity question. It's important to conduct a detailed factual investigation at the start, including records, care history, and financial review, to present a complete and credible case.

In re Interdiction of Bruce Carlton Anderson

By Okyeame G Haley, Esq. LLM

Citation: 389 So.3d 129 (La. App. 3 Cir. 2024)

FACTS. Bruce Anderson, a 54-year-old man with cerebral palsy, epilepsy, and profound intellectual disability, lived under 24-hour supervision. After severe burns when left unattended following his mother's death, his uncle petitioned for full interdiction. Disability Rights Louisiana argued for supported decision-making. Medical experts, including the parish coroner, found Anderson unable to manage care or property.

ISSUE. Bruce Anderson suffered burns after being left unsupervised despite cerebral palsy and intellectual disability. When his uncle sought full interdiction and advocates proposed supported decision-making, did clear and convincing evidence show that Anderson could not make or communicate reasoned decisions, leaving no less restrictive option under article 389?

HOLDING. Affirmed. Full interdiction was warranted.

REASONING. Medical and lay testimony proved Anderson lacked capacity to handle personal or financial matters. The burn event showed that partial autonomy endangered his safety. Because constant oversight was needed, limited interdiction or supported decision-making would not protect him. The finding met the clear and convincing standard.

HOW THIS HELPS MY PRACTICE. This case reinforces the role of medical evidence in interdiction. Expert testimony aligned with objective facts can decide the case. It's important to base each interdiction petition on complete medical documentation and supporting witness statements that demonstrate incapacity with clarity.

In re Interdiction of Carroll LeBlanc Constance

By Okyeame G Haley, Esq. LLM

Citation: 384 So.3d 1111 (La. App. 5 Cir. 2024)

FACTS. Carroll Constance's son petitioned for full interdiction, alleging cognitive decline and undue influence by her daughter. A court-appointed psychologist found dementia but noted she could still cook, shop, and care for herself though she struggled with finances and health decisions. The judge met privately with Louisiana Guardianship Services, Inc. before naming it curator.

ISSUE. Carroll Constance's son sought full interdiction and her daughter opposed, citing their mother's ability to live independently. After the judge met with a guardianship agency before appointment, did the court err by imposing full instead of limited interdiction and by holding private discussions with the proposed curator?

HOLDING. Reversed in part and remanded. Only a limited interdiction was justified. The private communication was improper but did not affect the result.

REASONING. Under Civil Code article 389, full interdiction applies only when a person cannot make reasoned decisions about both person and property. Evidence showed partial incapacity involving finances and health decisions but independence in daily life. She qualified for limited interdiction under article 390. The court's contact with the agency was improper but harmless.

HOW THIS HELPS MY PRACTICE. This case clarifies the line between capacity for personal and financial decisions. It's important to organize each record to show which functions are intact and which are impaired. Clear evidence on each point helps the court decide between full and limited interdiction.

In re Interdiction of Gloria Lanasa Raspanti

By Okyeame G Haley, Esq. LLM

Citation: 410 So.3d 282 (La. App. 5 Cir. 2024)
No. 24-CA-166 (La. App. 5 Cir. Dec. 4, 2024)

FACTS. Adult children disputed their mother's capacity. They agreed in court to a limited interdiction covering finances and health decisions to be managed by an independent curator. The written consent judgment omitted the word "limited," appearing to make it full. The mother died during the appeal.

ISSUE. After Gloria Raspanti's children agreed to a limited interdiction over her finances and health care, the trial judge's written order omitted the word "limited." After her death, could her heirs still appeal, and did the omission convert the judgment into a full interdiction?

HOLDING. Appeal not moot. Judgment confirmed as limited. The omission was a clerical error.

REASONING. An interdiction ends at death but can have later effects. The transcript and oral ruling confirmed that the parties and court agreed to a limited interdiction. The omission in the written form was a clerical error correctable under Code of Civil Procedure article 1951. Consent judgments derive authority from the parties' agreement, not judicial revision.

HOW THIS HELPS MY PRACTICE. This case shows that an interdiction's effect can extend beyond the life of the person interdicted. It's important to review every judgment and transcript to ensure the written order matches the oral ruling and the parties' agreement to prevent later disputes or collateral consequences.

C.S. v. R.H.

By Mary Vandenack

Citation: Sup. Ct., N.Y. County, Sept. 8, 2025

SUMMARY

This case addresses whether assets held in irrevocable trusts created during marriage with marital funds can be considered part of the marital estate for equitable distribution. The court held yes — where the settlor-spouse retains control and both spouses benefited from the trust assets, the value of those assets must be included in equitable distribution, even if the trusts themselves remain intact.

FACTS

- R.H. ("Husband") is a successful wealth professional. C.S. ("Wife") started out as a financial reporter. At the time of their marriage in 1994, Husband was making $2 million a year and Wife was making $52,000 per year.

- Husband and Wife had four daughters together. All of the daughters are healthy and successful in their own right.

- The firm that Husband was employed by at the time of the marriage was bought out by Goldman Sachs. This buy-out resulted in Husband and Wife joining the ranks of those of extraordinary wealth.

- In 2001, Husband created two irrevocable trusts — a Family Trust and a GST Trust. The trusts were funded with marital assets for estate-tax minimization. Husband was not a beneficiary of either trust. Husband worked with the family attorney to develop the trusts. Although Wife participated in various meetings, she was not actively involved in the planning and did not have separate counsel.

- Husband was the trust settlor and retained the power to change the trustee. Husband also held the role of Investment Advisor for each of the LLC's owned by the trusts.

- Husband and Wife, and family, resided in homes owned by the trusts and family expenses were paid from the trusts.

- Wife filed for divorce in 2018. Husband removed the Wife from all her trust roles, evicted her from trust homes, and decanted the trusts into new Delaware trusts mid-trial without notice or approval.

ISSUES

1. Can irrevocable trusts funded with marital assets be treated as part of the marital estate in the event of a divorce? New York, state of divorce, is an equitable distribution state.

2. Did Husband's post-commencement conduct constitute economic fault affecting distribution?

Holdings

- The court concluded that the assets were included as marital assets for purposes of division of the marital estate. The court cited the following factors:

    - Husband never relinquished control.

  - The trusts funded the family's lifestyle and were integral to the marital economy.
  - Wife reasonably relied on Husband's assurances and expected ongoing benefit.
- Equitable Distribution: Entire marital estate valued at $181,469,321.
  - Trust assets = $111,225,848; non-trust assets = $70,243,473.
  - Wife awarded 50% (≈ $90.7 million), including all non-trust assets and a $35.8 million distributive payment over ten years.
- Maintenance: None (Wife's award sufficient for support).
- Child Support: $8,333/month retroactive to commencement.
- Attorney's Fees: $1.68 million plus $162k expert fees to Wife.
- Economic Fault: Husband's unilateral transfers, decantings, and evictions were egregious economic misconduct under DRL § 236(B)(5)(d)(16).

NOTES

- In this case, the Husband is ordered to pay an amount that exceeds the non-trust marital assets. Husband is not a beneficiary of the trusts so the ruling effectively leaves him with a negative net worth.
- This case follows a recent trend that seeks to include irrevocable trusts as part of a marital estate but it is problematic in this instance given that the Husband is not a beneficiary of the trusts.
- This case illustrates the intersection of family law and estate planning.
- Consider whether you should ever engage in joint representation in this type of matter.
- Consider whether you can have spouses enter into an agreement that assets contributed to trusts will no longer be marital property.
- Consider whether a Trust Protector or other Advisor/Director should have the ability to add a settlor spouse as a beneficiary.

APPEAL

This is a leading New York decision extending equitable-distribution principles into complex estate-planning structures. It signals heightened judicial scrutiny of "irrevocable" trusts in high-net-worth divorces and underscores the need for independent counsel, genuine fiduciary independence, and clear documentation of donative intent.

The decision is being appealed.

Metcalf v. Dempze

By Mary Vandenack

Citation: Case No. PC-2021-05737

FACTS

- The plaintiffs are beneficiaries of a series of family trusts formed by Michael P. Metcalf and his father George P. Metcalf. There has been fairly extensive trust and estate litigation related to the family.
- The trustees include the mother/beneficiary Charlotte Metcalf, as well as law-firm partners (including Nancy E. Dempze and Stephen Kidder) affiliated with the same counsel for the trusts.
- Disputes arose when the beneficiaries objected to the trustees' proposed sale of trust property (a tract in Dublin, New Hampshire) and alleged that the trustees breached their fiduciary duties—including by appointing trustees without proper process and diminishing the beneficiaries' role under a Memorandum of Intent.
- Plaintiffs sought to compel production of certain communications between trustees and their counsel. The trustees resisted, invoking attorney-client privilege. The plaintiffs invoked the "fiduciary exception" to that privilege, arguing that when a trustee obtains legal advice in the capacity of trustee (for beneficiaries' benefit), the privilege may not shield those communications from beneficiaries.

ISSUE

Is the attorney-client privilege applicable so as to block beneficiaries of a trust from obtaining communications between the trustees and their attorneys, or does the "fiduciary exception" apply under Rhode Island law, such that the trustees' communications can be discovered by beneficiaries?

HOLDING & REASONING

- The court adopted the fiduciary exception, holding that trustees' communications with their attorneys may be subject to disclosure to beneficiaries where those communications relate to trust administration for the benefit of the beneficiaries.
- The court further recognized a "conflict rule" exception to the fiduciary exception: once the interests of trustee and beneficiary diverge (for example, when trustee acts in self-interest or the trust is under attack), then some communications may again be protected by privilege.
- In this case, the court held that communications up to the date of the letter dated October 22, 2019 (in which Dempze memorialized her decision to appoint Kidder as trustee) were subject to the fiduciary exception and thus discoverable. After that date, the court found the conflict of interests had arisen and privilege could apply.

SIGNIFICANCE

- This is a notable decision in Rhode Island because until this ruling, the Rhode Island Supreme Court had not clearly adopted the fiduciary exception for trust-administration contexts.
- In response to this ruling, Rhode Island legislation was passed to reaffirm and protect the attorney-client privilege for trustees/fiduciaries acting in

their capacity as such. Under the new statute (effective June 13, 2025) — R.I. Gen. Laws § 18-1-5 — communications between an attorney and a client who is a trustee or fiduciary are privileged to the same extent as if the client were acting individually.

- For trust and estate practitioners: the case underscores the risk that, in some jurisdictions, trustee-counsel communications might be disclosed to beneficiaries when (i) the advice is sought to administer the trust, (ii) the fees are paid out of trust assets, and (iii) the trustee is acting for the beneficiaries—not solely for personal defense. Practitioners should be alert to how their state treats the fiduciary exception.

Leveraging AI in Estate Planning Practice

Harnessing AI in Estate Planning Law: Practical Applications and Prompting Strategies

By Aviva Gordon

Artificial Intelligence (AI) is rapidly transforming the legal landscape, offering estate planning attorneys new ways to streamline their workflows, enhance client service, and improve accuracy. Yet, as powerful as these tools are, it is essential to remember that AI is not a replacement for legal expertise. Rather, it should be viewed as a collaborative assistant—one that supports attorneys in their work but never substitutes the judgment, ethical responsibility, and nuanced understanding that only a licensed professional can provide.

"However, it is critical to emphasize that AI should only be used to augment the attorney's review—not replace it."

This article explores how estate planning attorneys can responsibly and effectively integrate AI into their practice. It focuses on three core areas: analyzing client-provided documents, generating marketing materials, and drafting specific clauses for legal documents. It also offers guidance on crafting effective prompts to get the most out of AI tools.

Analyzing Client-Provided Documents with AI

One of the most practical applications of AI in estate planning is document analysis. Attorneys frequently receive wills, trusts, powers of attorney, and other legal instruments from clients, often in varying formats and levels of completeness. AI tools can assist by quickly scanning these documents to identify missing clauses, inconsistencies, or potential compliance issues based on jurisdictional requirements.

For example, an AI assistant can compare multiple versions of a trust document to highlight changes or flag outdated provisions. It can also cross-reference the document against state-specific laws to ensure it meets current legal standards. This kind of support

can dramatically reduce the time attorneys spend on initial reviews, allowing them to focus on higher-level analysis and client counseling.

However, it is critical to emphasize that AI should only be used to augment the attorney's review—not replace it. While AI can identify potential issues, only a qualified attorney can interpret their legal significance and determine the appropriate course of action. Attorneys must remain the final authority on all legal decisions and ensure that any AI-assisted analysis is thoroughly vetted.

To guide AI effectively in this context, attorneys should craft prompts that clearly define the task, jurisdiction, and expectations. For instance, a well-structured prompt might read: "You are a legal assistant specializing in estate planning. Review this trust document for missing clauses and compliance with Nevada law. Highlight any risks or inconsistencies and suggest improvements." This kind of prompt sets the stage for a focused and relevant output.

Creating Marketing Materials with AI

Marketing is another area where AI can provide substantial value to estate planning attorneys. Whether drafting blog posts, newsletters, social media content, or client guides, AI can help generate engaging and informative materials that resonate with target audiences.

Attorneys can use AI to brainstorm topics, draft outlines, and even produce full-length articles tailored to specific demographics, such as young families, retirees, or business owners. AI tools can also optimize content for search engines by identifying relevant keywords and formatting suggestions that improve visibility online.

Despite these advantages, attorneys must exercise caution. All marketing content generated by AI should be carefully reviewed to ensure it aligns with the firm's voice, complies with advertising regulations, and maintains professional integrity. AI can assist with the heavy lifting, but the attorney remains responsible for the final message.

To get the best results, prompts should be specific and goal-oriented. For example: "Generate a blog post titled 'Estate Planning for New Parents' with SEO keywords. Use a professional yet approachable tone suitable for young families. Include a checklist and call-to-action for scheduling consultations." This kind of prompt helps AI produce content that is both relevant and actionable.

Drafting Specific Clauses for Legal Documents

AI can also be a valuable tool for drafting customized clauses in estate planning documents. Whether creating provisions for wills, trusts, healthcare directives, or powers of attorney, AI can generate language tailored to the client's unique circumstances and the applicable legal framework.

For instance, an attorney might need to draft a clause for a revocable living trust that addresses guardianship for minor children, includes tax considerations for assets held in multiple states, and complies with Nevada law. AI can assist by generating a draft clause that incorporates these elements, saving time and providing a solid starting point for further refinement.

Nevertheless, attorneys must remain vigilant. AI-generated clauses should never be inserted into legal documents without thorough review. The attorney must ensure that the language is enforceable, appropriate, and aligned with the client's goals. AI can offer suggestions, but it cannot replace the legal judgment required to finalize a document.

Effective prompting is key to success in this area. A strong prompt might read: "Draft a revocable living trust clause for a Nevada resident with minor children and real estate in California. Include guardianship provisions and state-specific tax language." This level of detail helps AI produce content that is both relevant and legally informed.

> *"AI should be seen as a collaborative partner—one that supports the attorney's work but never replaces it."*

Mastering Prompt Engineering

Prompt engineering—the practice of crafting clear, specific instructions for AI tools—is essential for attorneys who want to use AI effectively. A well-designed prompt can mean the difference between a vague, unusable output and a precise, actionable result.

To create effective prompts, attorneys should be specific about the task, provide relevant context, and clearly state their expectations. It's also helpful to break complex tasks into smaller steps and to 'prime' the AI by establishing its role and tone. For example, starting with a prompt like "You are an estate planning expert drafting clauses for Nevada law" helps set the stage for more accurate responses.

Attorneys should also be prepared to test and refine their prompts. AI tools are iterative by nature, and small adjustments can lead to significantly better results. By approaching prompt engineering as a skill to be developed, attorneys can maximize the value of AI in their practice.

Conclusion

AI offers estate planning attorneys a powerful set of tools to enhance their practice, from document analysis and marketing to drafting legal language. However, its use must be guided by professional judgment, ethical standards, and a clear understanding of its limitations. AI should be seen as a collaborative partner—one that supports the attorney's work but never replaces it.

By integrating AI thoughtfully and mastering the art of prompt engineering, estate planning attorneys can improve efficiency, deliver more personalized service, and stay ahead in a rapidly evolving legal landscape.

Staying Ahead: Why Estate Planning Attorneys Must Embrace AI

By David DuPlain

Right now, according to the ABA, ChatGPT can pass the Uniform Bar Exam, not far away from having a perfect score. Though it seems unlikely that attorneys will be replaced by it, success in the burgeoning practice of law will be guided by which practitioners make better use of AI. What is important right now, and in the foreseeable future, is to remember that anything produced from AI must be vetted for accuracy and validity.

When it comes to estate planning, AI presently offers many advantages that an up-to-date attorney can make use of with little training other than diving into its direct use.

Leveraging AI in Estate Planning

New Drafting

AI is not a good tool for complete drafting. For example, it is not advisable to prompt "draft me a trust," even if all necessary information is provided. The result will not only lack the intricacy and nuance that should exist within good estate planning, but it will also be readily apparent as a product of AI. As of yet, such cold drafting lacks any humanity (appropriately so) and therefore can lack what is necessary to convey the full intent of the client.

" . . . anything produced from AI must be vetted for accuracy and validity."

However, AI can be very helpful for adding additional provisions to your existing documents. For example, if you have an existing irrevocable trust that meets your needs except that you wish for it to be a grantor trust as to the beneficiary. You can upload the trust document and prompt AI to provide suggested modifications to make the trust a grantor trust as to a specific individual.

An AI prompt is best completed with each sentence or clause conveying one complete idea, but only one idea. As an example, after uploading the Poe Family Trust, a prompt could be: *"How can I make the Poe Family Trust to be a grantor Trust as to Edgar. Allan is the trust creator and is the father of Edgar. The trust will be funded with $5,000,000 from Allan. Include specific federal tax law references to support the modifications that create grantor trust status."*

There is no minimum amount of information that must be added, but including more information will help a reader understand the result provided by AI. Understanding the result provided will help ensure that you can properly verify that the result is accurate.

- The paragraph above could have been written: "Adding more information will make the result easier for you to vet." When drafting a prompt, use the paragraph above as a model. Just as with drafting in estate planning, if your writing is clear to anyone logically reading it, your results will be better.

There may be follow-up questions from your specific AI model. Answer those to the best of your ability, but do not get hung up on having to know the answers. If you are really in the dark about the follow up questions asked, simply prompt with *"explain why {contents of question} is significant"* and greater detail will be provided.

To provide a more complete example, continuing on the prompt about the Poe Family Trust, AI will provide various options about making it a grantor trust as to Edgar. One likely option will be a reference to IRC 678 and creating a beneficiary defective grantor trust. So, a follow up prompt could be *"Explain how Internal Revenue Code section 678 is utilized when drafting a BDGT."* One likely suggestion would be to add an income withdrawal right to a trust for the benefit of Edgar.

From there, a proper prompt could be *"Redraft the Poe Family Trust to be a grantor Trust as to Edgar by adding an income withdrawal right for Edgar. Retain as much of the trust as possible while still achieving this goal."* If you are utilizing one continuous chat or project, the AI should retain the other pertinent information regarding the family that pertains to this trust.

As a follow up, verify that the document makes sense. If the provision added is still generally new to you,

upload the document into a new chat (or project) and prompt for an explanatory review, requesting what specific statutes were utilized in creating the added provision. Thereafter, request case law that has used the relevant provision. From here, it is best to directly review the provided code sections and cases to make sure that you have a proper understanding. Ultimately, this method should be a process for the practitioner to expand their knowledge utilizing AI without allowing AI to be a replacement.

General Document Review

Whether drafted by AI or by a person, AI can also be very helpful for reviewing a document for errors. This can be even more helpful for a set of documents. Begin by uploading the existing estate plan. Following is a real example, utilizing Claude (by Anthropic):

Prompt: *"Analyze the attached trust, including the federal estate/gift tax and gst tax ramifications. Also check for any internal errors or general mistakes."*

I was met with these follow-up questions:

1. Are you looking for me to check for internal inconsistencies within the trust provisions themselves, or verify the tax and legal analysis against current law?

2. Is there a particular area of concern (e.g., GST tax treatment, grantor trust status, distribution provisions) you'd like me to focus on?

3. Should I also look for potential drafting issues or administrative challenges that could arise in implementing this trust structure?

Upon answering, stating *"Search for inconsistencies compliance with the law. No particular area of concern. Look for drafting issues."* The result was that there was a naming inconsistency. The review illustrated that the documents achieved the desired result, however I had misspelled a client's child's name in one of the five places it was written (due to an uncommon name spelling and a self-righteous autocorrect in Word).

This process does not take much time, but it helped in providing a better product. A name correction is easy to fix and likely would have been immaterial, but it will reflect poorly if such errors end up in the final document (especially if found later on, after the documents have been put into place).

In-Depth Estate Plan Review

Beyond general review, AI can assist in verifying that the ultimate purpose of an estate plan is met. You can ask general questions as to what to include (or avoid) to achieve a specified purpose. Once again, however, it is best to upload the actual estate plan.

Some example prompts in this scenario:

"Make an argument that would allow a disinherited child to legally contest this estate plan. Provide suggestions on how to include protections against these potential future contests. Focus on how the assets can be protected for Bert after Ernie's death."

"How will the estate plan for the De Sade family affect the income taxes for the Marquis. Include an explanation of how the taxes are treated at the trust level and at the beneficiary level. Provide a separate breakdown for capital gains taxes."

"What are some methods for adding creditor protections to an estate plan. Include methods for creditor protection for the parents and methods for the children. Include detailed explanations with proper citations as to what code sections or case law allow for the provided creditor protections."

Summaries and Explanations

Clients most often enter the estate planning world with little real knowledge about the various aspects. I have had to explain that there is no "reading of the will" too many times. This is not by any real fault of the client as it is the practitioner's job to explain all such aspects. AI can help with this task. After uploading a document (or documents), request an explanation with the client's knowledge level in mind.

An example prompt: *"Explain the provisions of the Thoreau Family Trust. Provide an explanation that can be understood by a person with a grade school education, but in a way that does not make the reader feel talked down to in any way."* This is not meant as condescending, remembering that "a grade school level" effectively means an explanation to someone that is entirely new to the concepts, so it all needs to be explained in easily digestible sections. It may be helpful to have a non-attorney other than the client review the explanation without reviewing the actual documents to verify that the explanation is helpful.

In addition to explanations, AI can provide illustrations, charts, etc. Explanations or illustrations can be created for specific clients and their specific estate plans. In addition, this can be very useful for general estate planning concepts, such as explaining the concept of "per stirpes" to your clients. One (lengthy, but effective) example: *"Provide three different illustrations for how residuary bequests from a trust will function. Make the illustration for the distribution of $180,000 from a parent to three children, assuming no surviving spouse for the parent. Assume that child 1 has two children, which would be grandchildren to the "parent." Assume that child 2 has three children, which would be grandchildren to the "parent." Assume that child 3 has two children, which would be grandchildren to the "parent." This illustration should assume that child 1 and child 2 predecease the parent. Of the three illustrations, make one for each of per stirpes, per capita, and lapsing distributions."*

Creating a bank or binder of such illustrations for various legal concepts, which can be at the ready, may often prove to be a very useful tool in your estate planning client meetings.

Questionnaires

Attorneys most often have a standard set of estate planning documents that are likely a part of most of their estate plans. It can be useful to create a list of all the topics that need to be addressed in the initial client discussion. AI can be very helpful with pre-meeting planning, then utilized during such initial meetings. Example prompt (a fuller example is provided to illustrate how various aspects can be addressed): *"Draft a list of questions for an estate planning attorney to ask clients during an initial estate planning meeting. This meeting is for an attorney and clients in the state of Ohio. The documents to be discussed are a financial power of attorney, a last will and testament, and a revocable trust. The clients are a married couple. The clients have two children with each other and no other children. Include questions to help determine: which documents should be included, which trust provisions need to be included if a trust is needed, and who will be appointed in all positions within the documents to be drafted."*

Litigation

AI can be very helpful to find cases using searches similar to how any search engine can be used in searching for cases, whether a general search engine or a legal-specific engine. Where AI can be helpful is that it can process more detailed search requests and even pull out the specific quotes. The prompt here should first provide a description of your legal

scenario and request cases in support of the plaintiff, defendant, etc. Be specific as to the applicable state(s) and if federal should be included. Request specific quotes from applicable case law and/or statutes by adding *"including specific citations" to your prompt. A specific number of cases or quotes can even be requested; i.e. "What are the 20 most often cited cases from California or federal courts that address..."*

"IMPORTANT NOTE:
AI has been known to fabricate cases
or make use of otherwise fabricated cases.
In other words, it may reference cases that DO NOT EXIST.
Such cases have become known as "hallucinations,"
which have even shown up in judicial opinions
(likely the result of an overworked judicial clerk)."

It can be just as helpful to prompt for AI to draft your specific brief, complaint, response, etc. It is not recommended that you make direct use of the AI provided document, but the result from AI can often provide useful cases within a helpful context.

IMPORTANT NOTE: AI has been known to fabricate cases or make use of otherwise fabricated cases. In other words, it may reference cases that DO NOT EXIST. Such cases have become known as "hallucinations," which have even shown up in judicial opinions (likely the result of an overworked judicial clerk). All cases should be checked directly!

One way around this potential, devastating pitfall —other than always checking directly—is to create your own database of cases. Some AI interfaces allow you to connect your cloud database and limit the provided response only to cases in your integrated Google Drive (for example). This option will vary depending on the specific AI being utilized.

Whichever model an attorney chooses, it is advisable to start with the lowest cost level of the professional version on a monthly subscription basis. Most often, the difference between the levels is how much processing power you will need. The more in-depth a search or analysis that is requested, the more processing power is needed. (AI subscription services will allow a choice of how in-depth a response should be delivered.) In addition, a greater number of requests require the use of more processing power. After using a model for a relatively short time period, it will become clear if a higher level is necessary and most pricing structures more easily allow an increase in the level within a monthly subscription. Once you have made that determination, choose the annual subscription if doing so meets your particular needs.

Whatever your thoughts on AI, it is now a tool available to many people. As such, it is important that attorneys embrace it. Doing so will ensure that attorneys remain relevant by creating a difference between this tool being used by professionals versus it being used by a less trained hand. AI is here and is now a part of the legal landscape. AI is changing the legal world; the only question left is precisely how it will do so. Be a part of the answer to that question.

"We always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten. Don't let yourself be lulled into inaction." – Bill Gates

Five Ways AI Can Simplify Your Daily Practice

By Gregory Nussbickel

Generating or Revising Blogs and Newsletters

AI can be a valuable tool for generating or revising content for blogs and newsletters in an estate planning practice. It can help identify new case law, statutes, or best practices which affect your clients or target audience. Use AI when you need to produce content quickly or when you want to ensure your writing is clear and engaging. AI can help brainstorm topics, generate outlines, or even draft entire articles based on prompts you provide. To prompt AI effectively, start with a clear topic or question, such as "What are the latest trends in estate planning?" or "How can families prepare for generational wealth transfer?" This approach allows AI to generate relevant and informative content that can be refined and personalized to match your firm's voice and style.

Updating Clients on Case Progress and Next Steps

AI can assist in drafting updates for clients regarding their case progress and next steps. This is particularly useful for routine updates or when you need to communicate complex information in a clear and concise manner. Use AI to draft initial versions of these updates, which you can then review and personalize. For instance you can ask AI to analyze a court docket and create a timeline of events for your client. To prompt AI, provide specific details about the case and what needs to be communicated, such as "Summarize the recent developments in the Smith estate case and outline the next steps for the client."

Drafting Inventories and Accountings from Asset and Income Statements

AI can streamline the process of drafting inventories and accountings by extracting and organizing data from asset and income statements. Use AI when you have large volumes of data (e.g. bank records and account statements) to process or when you want to reduce the time spent on manual data entry. To prompt AI, provide clear instructions and relevant data, such as "Create an inventory list from the following asset statement. Confirm consistency with the bank ledger entries nearest date of death." Once those documents are generated, AI can be used to create or proof other pleadings like the final accounting.

Transcribing Client Calls and Meetings

AI-powered transcription services can be invaluable for capturing the details of client calls and meetings. Use AI transcription when you need accurate records of conversations for future reference or when you want to focus on the discussion without taking notes. Many phone and online meeting systems (e.g. Dialpad or Zoom) have native transcription or recording capabilities. To prompt AI, ensure you have a clear audio recording and specify the format you need, such as "Transcribe this client meeting into a detailed summary" or "Provide a verbatim transcript of this call." Later on, AI can be used to compare the transcription summaries to other documents. For example: "compare the client summary and intake form to my draft estate plan to ensure that client's wishes are properly reflected."

Calendaring/Scheduling

AI can assist with calendaring and scheduling by automating the process of setting appointments and managing deadlines. Use AI when you have a busy schedule or need to coordinate multiple parties for

meetings. AI can help by suggesting optimal meeting times, sending reminders, and even rescheduling appointments as needed. Some online calendaring tools incorporate AI as an integrated feature, helping to streamline the process. To prompt AI, provide details about your availability and any constraints, such as "Schedule a meeting with the Johnson family next week, but not within an hour of any other appointment" or "Find a time for a team meeting that accommodates everyone's schedule, but preferable in late mornings or early afternoon"

Ways I Utilize AI Tools

By Sharon Michaels

1. To search for any new case law or statutory changes (whether State or Federal). This impacts how I advise clients regarding wills, trusts, probate, and estate planning.
2. To look for model language that I can integrate into my documents. No matter how long one has practiced, there are always novel situations. It is helpful to see approaches taken by other lawyers.
3. To stay abreast of current events. This aids if a client brings up some news event and asks how it may impact their situation.
4. To research specific matters to see how Courts have interpreted statutes, codes, and ordinances. What appears to be clear may be interpreted differently by your jurisdiction.
5. To see what effect state of federal agencies have issued guidelines that impact what type of documents you will use, or choices you will make in drafting documents.
6. To see what current trends in my jurisdiction exist that will affect what I will suggest to my client.

I am currently evaluating three different applications or programs that would be most useful in my estate planning practice, which applications appear strongest for certain uses; and which applications are most responsive to inquiries and supply relevant answers. There are also factors of cost, speed of responses made, how comprehensive the answers are to the questions posed, and which application is best for certain users.

I asked the same two questions of each of these three websites – ChatGPT, GROK, and Microsoft's Co-Pilot:

1. What are the top five legal topics searched by United States Attorneys?
2. What are the top five questions the public asks about probate and wills?

I first posed these questions to **ChatGPT** which gave a two-page response. It included the ABA statistics as to the growing use of general legal research, and that smaller firms use Generative AI and such research tools more often than larger ones. It mentioned use in Commercial litigation, for case strategy and judge analysis. However, it gave no specifics or examples, just percentages or usages.

As far as public usage is concerned, it mentioned the question of what it means to go through probate; when probate is necessary, what are the costs, and how a probate case gets started.

Finally, it mentioned lawyers are avoiding probate because of trusts, tax exemptions and multistate holdings. Again, there were no links to get more information.

GROK was my second application. GROK generated a full three page answer to the same question I had posed of legal topics searched by attorneys and

submitted to ChatGPT. It confirmed that personal injury cases have the highest traffic words being used. The reasons given were the competitiveness of personal injury law firms, and that these lawyers wanted case law updates, litigation strategies, and marketing techniques. GROK noted personal injury cases can produce enormous financial recoveries for personal injury lawyers and their clients.

GROK stated that the second topic was intellectual property because of patent and trademark disputes. GROK noted that lawyers searched on how to patent an idea or trademark a name.

The third area researched was cybersecurity. Compliance requirements, ethical obligations to clients and data protection from cybercriminals were all discussed.

Fourth was employment law. Current topics are discrimination claims, workers' rights, privacy concerns, and cybersecurity.

Last was business and corporate law. Historical uses as far as hiring, business contracts and enforcement of rights were discussed. It also included areas of mergers and acquisitions, corporate governance, and tax strategies as far as the topics researched.

GROK also gave specific responses as to the top five questions asked by the public. It discussed the general matters that arise with probate, the payment of debts and the admittance of wills and distributing assets, all concerns of lay people.

Probate costs were summarized, and strategies to avoid probate were specifically listed. Finally, the mechanics of creating a valid will were explained.

Thirdly, I tried **Microsoft's Co-Pilot**. This is available as a free use application as well as fee-based usage. It did not really demonstrate or suggest how topics could be researched. It seemed to be more oriented to performance of tasks – such as sending out meeting agendas, producing calendars or drafting notices. The fee based subscription product seemed to have more features useful for larger enterprises.

How and when I would use each of these apps:

ChatGPT is good for a quick overview of a topic, particularly for statistical data on trends. I would not use it for legal research at this point.

Microsoft Co-Pilot appears to be more oriented to tasks, scheduling and preparing agendas. The enterprise version may offer more in the way of research and analysis.

I think my most used application will be GROK. I will use it for research, generation of concepts and drafting of documents. It can conduct a discussion, similar to a lawyer discussing ideas with a senior legal partner or other legal expert.

Verification Through Traditional Legal Research

To verify that the concepts expressed are both sound and timely, traditional legal research is highly recommended. It should certainly confirm the legal concepts or representations of the statutes and case law represented by the AI sources.

Legal research sites should include Lexisnexis https://lexisnexis.com (which is fee based after a free trial); Google Scholar which is free; Fastcase; or Vincent AI which is now https://www.mycase.com and offers a free 10 day trial before subscription.

AI Tools, Workflows, and Practical Applications for Estate Planning Attorneys

By Shayla Maatuka, Esq.

Artificial intelligence is no longer a distant concept—it's a practical set of tools lawyers can integrate into their daily practice. From automating routine work to enhancing research and client communication, AI can help firms deliver higher-quality service more efficiently. This article combines an overview of the most useful AI platforms in the legal field with estate planning–specific examples and prompts to show how attorneys can put these tools to work. The key to receiving output from a chat box that is usable in the practice of law is to create a good prompt.

Understanding the Basics of Prompt Structure

Every effective prompt involves four main components: Persona, Task, Context, Tone, Example and Format. Let's take a closer look:

- Persona: Defines the role or characteristics of the AI to match the response style.
- Task: Specifies the action or objective the AI needs to accomplish.
- Context: Provides background information or details relevant to the task.
- Tone: Tell the AI the tone you want to convey, whether is it professional, funny, persuasive, or friendly.
- Example: Give AI an example of a past letter or document that you have used.
- Format: Describes the desired structure or presentation of the AI's output.

While the Task is the only required part of a prompt, including Persona, Context, Tone, Example and Format leads to more accurate and refined results. The more detailed and clearer your instructions, the more effective and reliable the AI's output will be. Here is a sample prompt that includes all of these: Act as a world-renowned estate planning attorney. Draft a last will and testament for a female client based on the following sample will. Maintain the same structure, formatting, and legal tone, but change all male pronouns (he/him/his) to female pronouns (she/her/hers). Ensure the document reflects a professional and legally sound style suitable for presentation in probate court.

Once you learn how to write a good prompt, those prompts can be used in all or most AI programs. Some of the programs that I use in my estate planning practice are:

OtterAI & Zoom

Beginning with the initial consultation, using the transcription and summaries from these two programs is a huge time saver. The programs create summaries and to do lists for you and your paralegals, saving time and money.

- Automates transcription, identifies speakers, and enables easy sharing of meeting notes.

Estate Planning Use Case: Capture family dynamics, asset lists, and client concerns during long meetings.

Prompt Example:

"Act as a world-renowned estate planning attorney. Summarize this client meeting in clear, concise bullet points. Include: (1) a detailed list of all assets discussed, (2) names and relationships of specific beneficiaries, (3) any concerns raised about guardianship or estate management, and (4)

actionable next steps for drafting estate planning documents. Ensure the summary is professional and comprehensive."

Right after the client meeting, I can enter the information into our practice management system, CLIO and use its AI features to start drafting documents.

Clio with AI Features

- Tracks clients, automates billing, and integrates with other platforms.
- Clio Draft AI can quickly generate routine documents using stored client data.

Estate Planning Use Case: Draft state-specific powers of attorney and living wills.

Prompt Example:

"Act as a world-renowned estate planning attorney. Using the statutory form as a template, draft a durable power of attorney for property and a healthcare power of attorney for Jane Smith (DOB: 4/12/1970). Name her daughter, Emily Smith, as the primary agent and her son, Michael Smith, as the successor agent. Ensure the document complies with state-specific requirements, includes all necessary legal provisions, and is written in a professional tone suitable for legal presentation."

One of the most used AI tools in my Estate Planning practice is Copilot. It adds AI features to the entire Microsoft Office Suite.

Microsoft Office Suite with Copilot

- Drafts documents, generates summaries, and creates presentations.
- Allows you to upload documents as samples or to edit or summarize.
- Automates repetitive tasks, suggests edits, and generates content from prompts—all within a secure environment.

Estate Planning Use Case: Update master will or trust forms with targeted changes.

Prompt Example:

"Act as a world-renowned estate planning attorney. Open the attached master will template and make the following updates: (1) Replace John Smith with Mary Johnson as the primary executor, (2) Update the guardian provision to name Robert Lee, (3) Add a specific bequest of $50,000 to the University of Illinois Foundation, and (4) Distribute the remainder of the estate equally among her three children. Use the contact information provided in the attached client intake sheet to ensure accuracy. Maintain a professional tone and ensure the document adheres to legal standards."

Westlaw AI

- Enhance legal research with natural language queries.
- Offers predictive analytics, legal trend insights, and a secure, verified database.
- The Co-Counsel portion of the program drafts, reviews, summarizes, and performs additional research in the Westlaw database.

Estate Planning Use Case: Research complex clauses like in terrorem provisions or charitable trusts.

Prompt Example:

"Act as a world-renowned estate planning attorney. Search Illinois case law for precedents addressing the enforceability of in terrorem clauses in wills that disinherit beneficiaries who contest the will. Summarize key rulings and legal principles, and draft a legally enforceable in terrorem clause that minimizes the risk of successful challenges. Ensure the clause aligns with current Illinois law and includes citations to relevant cases. Present the findings and drafted clause in a professional and legally precise tone."

Another program that I use to review and summarize large estate plans is Adobe Acrobat.

Adobe Acrobat AI (and Photoshop AI)

- Manages and reviews large documents.
- Offers smart organization, automated redaction, and advanced editing features.

Estate Planning Use Case: Review old wills, trusts, or powers of attorney efficiently by "chatting" with the document.

Prompt Example:

- "Act as a world-renowned estate planning attorney. Search this document for all provisions related to successor trustees and provide a professional summary of their content and location."
- "Act as a world-renowned estate planning attorney. Rewrite the tax apportionment clause in clear, plain English while preserving its legal accuracy and intent. Ensure the revised clause maintains a professional tone suitable for legal documentation."
- "Act as a world-renowned estate planning attorney. Identify and list all references to lapsed beneficiaries, including the context in which they are mentioned. Present the findings in a professional and organized format."

Co-Counsel Draft

- Integrates legal research and generates plain-language client communications.

Estate Planning Use Cases:

1. Draft enforceable provisions based on case law.
2. Prepare client letters summarizing complex legal decisions in accessible language.

Prompt Example:

"Act as a world-renowned estate planning attorney. Based on the provided research on in terrorem clauses under Illinois law, draft a will provision designed to deter contests while ensuring enforceability. Include specific language that aligns with case law and statutory requirements. Additionally, prepare a memorandum summarizing the legal basis for enforceability, citing relevant cases and statutes to support the provision. Ensure the provision and memorandum are written in a professional tone suitable for legal practice."

Risks and Considerations

While AI tools streamline workflows, they are not foolproof. Attorneys must carefully verify AI outputs to avoid errors, plagiarism, or inclusion of watermarked content. AI should never replace legal judgment—it should enhance it.

Final Thoughts

AI is not replacing lawyers, it's replacing inefficiency. By combining platforms like Microsoft Copilot, Westlaw AI, Adobe Pro AI, Clio, OtterAI, and Co-Counsel Draft, attorneys can eliminate tedious tasks and focus on strategy, client counseling, and high-level analysis. Estate planning, in particular, benefits from the precision and time-saving capacity of AI tools, allowing lawyers to serve more clients effectively while devoting more energy to the human side of the practice.

The key is not just having the tools, but mastering the art of instructing AI with precise, strategic prompts. Attorneys who embrace this shift will position themselves at the forefront of the next generation of legal practice.

Estate Planning Forms and Resources You'll Use Every Day

My Tools and Tips for Working With International Clients

By Andrés J. Hernández Lossada

When dealing with international clients, estate and tax planning can be highly complex, layered structures, multiple jurisdictions, regulatory compliance, and sensitive family dynamics.

One example is the consistent use of intake forms and confidential data sheets tailored to cross-border families. Civil law clients often arrive with private foundations, fideicomisos, or offshore companies, and their information can be scattered across jurisdictions. By adapting standardized intake forms, we can capture critical data, e.g., family members, citizenships, tax residencies, entity charts. This not only saves drafting time later, but also helps with a quick to-go source of information, and even helps clients recognize the gaps in their own information.

Another often overlooked step is asking clients to confirm when their digitized corporate records were last verified against the originals. Registries of shareholders, share certificates, and resolutions are frequently scanned once and circulated for years. In practice, I am often surprised at how many "official" digital files are outdated, and how many important decisions have been made based on incomplete or stale documents. Building a habit of reconciling digital copies with originals is one of the simplest ways to prevent costly errors.

Digital Tools as Hidden Gems

Technology has also reshaped the way we interact with clients and manage projects. Two stand out as "hidden gems" in my practice.

World Clock Meeting Planner has been a simple but powerful. Coordinating calls with clients across Miami, Bogotá, Madrid, and Panama used to make sure time zones align across different time zones and avoids scheduling mistakes.

Monday.com has become equally valuable for internal task follow-up. Estate planning projects involve multiple moving parts, drafting trust deeds, coordinating notarizations, requesting tax ID numbers, liaising with foreign counsel. Monday.com allows us to track each task, assign responsibility, and visualize progress. For a practice where

delays can cascade across borders, having a clear dashboard improves both accountability and peace of mind.

Even with the best tools, estate planning evolves quickly. Continuing education is critical. Of course I need to mention NBI (National Business Institute) for seminars and training. Their programs, especially on trusts, tax updates, and probate practice, provide practical insights that can be applied immediately. For attorneys navigating both domestic and cross-border complexities, NBI has become an invaluable resource to stay current and sharpen skills.

Three Tools and One Habit to Boost Your Productivity

By Evan Bermudez

Digital Document Management Apps

Managing the volume of documents in estate planning requires a precise system to maintain accuracy and accessibility. Digital document management apps like Clio offer cloud-based systems tailored to legal professionals, particularly estate planning attorneys. Clio allows me to securely maintain, organize and access client's past and present documents while ensuring compliance with North Carolina's Data Protection standards. The features on this platform that stand out for estate attorneys include e-signatures, document templates, and task logs. Not only does this save time, but also reduces the risk of error, enabling me to focus on client consultations rather than mundane administrative tasks.

Time-Tracking Tools

Efficient and effective time management is vital for balancing consultations, document preparation, and client communication. Clio's built-in time-tracking features allow me to monitor billable hours and optimize my caseload. The time tracking feature provides me with the ability to identify my own inefficiencies while drafting estate documents or reviewing trust amendments. This tool also integrates with the firm billing system, ensuring accurate invoices for each client. This is particularly useful for estate attorneys operating on a flat-fee basis, which is common in North Carolina.

Client Communication Portals

Consistent and secure communication establishes trust with your clients. In my experience, delivering exceptional service paired with consistent communication is the most effective way to transform a client into a reliable source of ongoing referrals. Client communication portals, such as Lawmatics or MyCase, provide a centralized system for sharing and receiving documents, sending automated messages, and maintaining client information used to draft estate documents. In my practice, I use these portals to streamline client intake, which allows me to efficiently receive client questionnaires without the need for constant follow-up. I find these platforms especially useful for annual or bi-annual trust review reminders, ultimately enhancing client satisfaction and retention.

Daily Review Habit

A daily review habit seems simple; however, it is an incredibly powerful way to stay organized and effective with each client. Each evening, I spend 10-15 minutes reviewing my calendar, Clio task list, and recent client communication. This allows me to prioritize tasks and ensure compliance with North

Carolina's estate planning deadlines. By reflecting on the daily or weekly progress I catch potential oversights early and maintain a client-focused practice. This habit fosters discipline and keeps my workflow aligned with client needs.

By incorporating these simple habits, estate planning attorneys can enhance their practice, efficiency, ensure compliance and deliver unmatched client service. Whether your practice manages complex trust structures or guides clients through simple wills, these habits make you indispensable as an effective, client-centered estate attorney.

Useful Forms and Resources for Estate Planners

By Paul Miller, Esq.

Useful Form For Estate Planners: Confidential Data Sheet

Many estate planners use their Confidential Data Sheet to gain information about the assets and liabilities of a client. This helps to inform the estate planner about any potential estate tax issues (if the client's estate is significant enough), and also informs the estate planner of what assets should be properly transferred to the client's Trust. (i.e., Trust funding.)

Years ago, I decided to make my Confidential Data Sheet more expansive, to include how my clients rate their relationships with those people who could be, or likely are, beneficiaries in their estate plan: their children, stepchildren, or other family members (such as siblings, if they have no children).

All estate planning attorneys are wary of potential litigation or contests by disgruntled beneficiaries or heirs. Ideally, an estate planning attorney would learn about these potential red flags or landmines before they finalize an estate plan (or even take a client on).

Apart from financial information I collect from clients on my Confidential Data Sheet, I modified my Data Sheet to include the following, which has been very useful. If I see that a client has a difficult relationship with a child, sibling, or potential heir, I will want to spend some time learning more about that during our meeting. Also, if a disgruntled heir did come back to create issues after your client died, and claimed they had a perfect relationship with the creator of the Trust, this Data Sheet—and the ranking of the client's emotional relationship with the disgruntled heir – could be used to show that, in fact, they didn't have a great relationship.

On a scale of 1 – 10 (with one being poor and ten being excellent), score your relationship with the following individuals (as applicable):

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Adult child (Name: _____) 1 2 3 4 5 6 7 8 9 10

Your sister/brother (Name: _____) 1 2 3 4 5 6 7 8 9 10

Your sister/brother (Name: _____) 1 2 3 4 5 6 7 8 9 10

Your sister/brother (Name: _____) 1 2 3 4 5 6 7 8 9 10

Your sister/brother (Name: _____) 1 2 3 4 5 6 7 8 9 10

If any score from the question above is seven or below, please briefly describe your relationship with that individual.

On a scale of 1 – 10 (with one being poor and ten being excellent), score and briefly describe the relationship(s) between your adult children, if any. *Please describe using an attachment as necessary.*

If you have adult children, briefly describe how often you communicate with each.

If you have adult children, do any of them suffer from alcohol or drug addiction, or been diagnosed with a mental illness? (i.e., bipolar disorder, schizophrenia, etc.) Y/N *Please describe.*

If you have no adult children but have siblings, describe how often you communicate with each. N/A, *or please describe.*

If you have no adult children but do have siblings, do any of your siblings suffer from alcohol or drug addiction, or been diagnosed with a mental illness? (i.e., bipolar disorder, schizophrenia, etc.) N/A, *or please describe.*

Useful App For Estate Planners: Calendly.com

One of the potentially most frustrating tasks for an estate planner (and particularly for an estate planner who runs a lean operation, with limited secretarial or paralegal help) is setting up appointments with clients. In the past, a client would send me an e-mail with a potential meeting time (or times), I would respond that I was busy at those times, but would these alternate times work, and the client would respond that they are busy at those times, and they would suggest alternate times. This led to a lot of wasted time; not only for me, but for the client as well.

With **calendly.com**, this back and forth has been nearly eliminated altogether. Using Calendly, a client (or potential client) can view my calendar, and see my availability (which I set.) I can set up different meetings: initial consultations, meetings to discuss estate planning wishes, meetings to review drafts, and even meetings of to finalize the documents. I can also set the meeting length, and the client can select if the meeting will be by telephone, by Zoom, or in person. Calendly synchs with my Google calendar, so if I am blocking off time to be on vacation or out of the office on my Google calendar, those times and dates will not be available for booking for a client. Calendly costs roughly $10 per month, and it is worth every penny.

One App and One Productive Habit I Would Recommend Above All Others

By James Snow

Technology

The one software application that I would recommend above all others is Dragon Naturally Speaking Professional. I discovered this software several years ago and have upgraded over the years. Most recently, you must use version 16 if you have upgraded to Windows 11.

Basically, this is voice-activated software that allows you to dictate directly modifications to documents that you keep as templates for your various estate planning clientele. By setting up certain key commands, you can quickly go through the documents that you are preparing for your clients and make sure that you have replaced the template directions with the modifications tailored to the clients.

Above all, I love being able to respond to emails using this voice-activated software. I did not learn typing in high school or college. I have approximately 40-50 emails each day to which I need to respond. By trying to type responses, I found myself spending 1-2 hours each day in my endeavor to keep up with my incoming emails. Further, I had to hunt for attachments to attach to my responses.

With Dragon, I now find that I can respond to all of my emails in as little as 15 to 20 minutes and I've even set up commands that cover the attachments. I am able to personalize the responses because I do not feel the same time drain that I felt trying to type responses. Plus, I have saved my arthritic hands from even further deterioration.

The final bonus that totally justified the expenditure was the fact that I could reduce the personnel at my office down to a single paralegal that I now basically used for doing the estate settlement work and I may concentrate more fully on the estate planning work. Occasionally, when I do find it necessary to prepare the estate settlement pleadings on court generated forms, Dragon also works just fine on such forms and cuts the time in half.

Productive Habits

By nature, I have always been a hard worker, but I often questioned my time management. I tried various tips from others but invariably suffered from feeling as though I was not getting everything done in a day that I should. Whether I left the office at 6:00 PM or 11:00 PM, I still had anxiety about whether I had truly accomplished what I needed to accomplish during that particular day. I found that this anxiety often contributed to poor sleep and I tried to make up for my feelings of misgivings by working on weekends and during holidays.

The worst manifestation of this anxiety was that I would go through periods of burnout. It was as though I was a manic-depressive in which I overdid and overachieved for a number of days, followed by a day or two in which I cared to do little, found ways to avoid my work and ended up doing little, which just further contributed to my anxiety.

How did I solve it? I began to look at work the way I felt that I should organize the balance between my work, and the rest of my life. I fashioned upon dividing the work into 3 piles. The first pile involved complex matters that would require unique thinking and meticulous preparation. The next pile involved matters that required manipulation of existing templates and other standardized documentation but did not necessarily require complex thinking or planning. The last pile involved relatively simple matters such as correspondence, minor changes, emails, directions to personnel and the like.

I started the day by being determined to finish at least 1 matter in the first pile. Along the way, I would take periodic breaks and work on some aspects of a matter in the second pile. At other times during the day, I would knock out three or four items from the third pile. By doing this, I did not get burned out and I felt a sense of achievement at the end of the day. I was allowing myself a form of mental refreshment. Within a matter of weeks, I slept. I hope that some part of this solution that I found may be utilized by you with your own unique modification.

Checklists to Send to Clients for Updating Documents

By Leslie Levin, Esq.

1. Information Gathering Forms and Checklists

A checklist is a useful tool when first meeting with an estate planning client. While the form can be completed at the initial meeting, attorneys may find it more effective to give the checklist or questionnaire to the client in advance of the first meeting. By doing so, the client can gather necessary information regarding assets, liabilities and contact information. Additionally, the checklist causes the client to begin thinking about the estate plan before the meeting. Many of the items contained in a Will are emotionally difficult for the client. By giving the client more time to focus on end of life issues, the client will be better able to make decisions at the first meeting. Through the estate planning process, clients are looking to provide for their immediate family, provide

for other relatives and/or friends, pass property to beneficiaries quickly, ease the strain on the family following death, minimize expenses, reduce estate taxes, plan for retirement, plan for incapacity, achieve philanthropic goals and plan for business succession.

Checklists come in many formats (see sample checklist found at Exhibit A) and should seek to address the above items and gather essential information. Common provisions found in the various forms are:

- Personal information (name, contact information, birthday and social security number for client and family members and list any disabilities or other special needs they may have).
- Asset information (types of accounts, account balances and how accounts are titled).
- Debt information, including mortgages, installment loans, leases, and business debts.
- Retirement account information and names of beneficiaries.
- Life insurance information and names of beneficiaries.
- Real estate.
- Income sources.
- Long term care insurance information.
- Copy of recent income tax return.
- Copy of any gift tax returns.
- Important documents (prenuptial agreement, divorce agreements, deeds, tax returns, death certificates for predeceased spouse or children, etc.).
- The name, trustees, and assets of any trust held for benefit of client or family members or created by client.
- Beneficiary information (names, percentages, outright vs. in trust).
    - Identify family and friends that client wishes to name as beneficiary.
    - Identify property to be distributed to such beneficiaries.
- Names and contact information of the fiduciaries (executor, trustee, guardian).

In general, using the checklist ensures that the client thinks through how to protect his or her family and assets, communicates his or her wishes to the attorney and engages in tax planning by allowing the attorney to develop tax saving strategies based on the information provided. The checklist also speeds up the estate planning process by making it more efficient. A more efficient process results in reduced time spent on the matter, translating into reduced fees.

A sample letter, which can also be used as an e-mail, that can be sent to the client with the memo is attached as Exhibit B.

2. Dealing With Family Dynamics: Past, Present, and Future

Knowing your client is as important as knowing your client's financial information. Often family politics governs the plan and is more important than saving taxes. Attorneys must ask personal questions even when doing so feels uncomfortable. Without knowledge of disabled family members, estranged family members or unemployed family members, a carefully crafted plan can disintegrate. Ensuring that Supplemental Needs Trusts are included for

disabled family members, in terrorem provisions are included for estranged family members and special gifting provisions for unemployed family members, can make all of the difference when crafting the plan.

Attorneys must know whether family members live in close proximity, whether they have high powered jobs, are they spendthrifts and are there medical issues. This knowledge is crucial to designing a plan that names the proper relative in fiduciary capacities. Attorneys also need to be aware of family dynamics between the children in order to anticipate possible problems after the client passes away. If the children are likely to fight about possessions, special tangible personal property clauses should be included. If children do not get along then the attorney should ensure that they are not named as co-fiduciaries or as fiduciaries for the other.

The answers on the checklist plus the meeting itself, should be sufficient to obtain this information. If not, the attorney should ask additional questions related to these topics.

Finding opportunities to meet the extended family can ensure proper planning and also open up the possibility of representation of multiple generations or related parties.

3. What To Look For In Reviewing Existing Estate Plans

The existing plan should be reviewed in conjunction with reviewing the asset information and finding out current family dynamics. At a minimum, the attorney should review the existing Will, health care forms, power of attorney, beneficiary designations and trusts to make sure that no changes are needed. As part of this process, the client should be asked:

1) Have your assets increased/decreased since documents were last prepared? Have you acquired or disposed of a significant asset?

2) Have there been any illnesses, deaths, births, adoptions, marriages or divorces in your extended family?

3) Has getting older affected any named beneficiary's behavior or lifestyle?

4) Does anyone in your extended family have special needs?

5) Has anyone in your extended family moved?

6) Are you still happy with whom you've named as Executors, Trustees and as Guardians?

7) Has there been a change in employment for either of you?

If the client answers yes to any of the above questions, the client may need to revise the existing documents. Additionally, the attorney should ascertain if any tax laws have changed since the plan was last implemented.

A sample letter that can be sent to the client is attached as Exhibit C. This letter can also be sent as an email.

4. Determining Overall Estate Plan Strategy

Important considerations in determining whether an estate is subject to estate tax and how the plan might change because of it are:

- When estates are subject to federal estate tax. The taxable estate is determined by subtracting allowable deductions and applying credits and exemptions to the gross estate. Currently, the applicable federal exclusion amount, or unified credit, is $10,000,000, indexed for inflation, resulting in an amount equal to $13,990,000

in 2025 under Section 11061 of the Tax Cut and Jobs Act, Pub. L. No. 115-97, which expires on December 31, 2025. At that time, due to the passage of the One Big Beautiful Bill Act, Pub. L. No. 119-21, 129 Stat. 1000 (2025), the unified credit will become $15,000,000. The available applicable exclusion upon death will be reduced by the amount used to shelter lifetime gifts from federal gift tax.

- When estates are subject to New York estate tax. The New York estate tax applies to both residents of New York and nonresidents with real or tangible property located in New York (see New York Tax Law §954 and §960). Presently, there is a disconnect between the Federal and the New York applicable exclusion amounts. As of January 1, 2019, and after, the exemption amount will be linked to the former federal amount ($5,490,000), indexed for inflation. For 2025, that amount is $7,160,000.
- Whether estate tax laws in other states affect planning.
- How lifetime gifts fit into the federal estate tax and federal generation-skipping tax.
- Complex tax matters, such as estate tax consequences for transfers of business assets.
- State and federal laws governing cancelling or issuing shares or membership interests, including required accounting, record keeping and filings.
- Asset and income levels for Medicaid planning.
- Presence of disabled beneficiaries (or the client) and medical needs.
- Special planning for pets.
- Presence of minor beneficiaries.
- Philanthropic goals.
- Requirements of prenuptial agreement or divorce agreement.

The attorney should be using the answers from the checklist plus the meeting to ascertain if any of these issues are present for the client. Additional, probing questions can be asked to dive deeper into these areas once the attorney has obtained some information from the client.

5. Executor/Trustee Duties and Responsibilities and Considerations for Client to Consider When Picking Fiduciaries

a. Helping Clients Pick the Fiduciaries

In New York, a personal representative "is a person who has received letters to administer the estate of a decedent" (New York Estates, Powers and Trust Law ("EPTL") §1-2.13). If there is no Will, the personal representative is the Administrator and if there is a Will then this person is called the Executor. Typically, the decedent's Will contains an article which names the Executor. The Executor (or Executrix in the case of a woman, although the term Executor is often used for both genders) is the person who carries out Testator's wishes upon death of Testator upon receipt of Letters Testamentary from Surrogate's Court (New York Surrogate's Court Procedure Act ("SCPA") §103(20)). The Trustee is the legal owner of the trust property (or trust corpus) who holds the property for the benefit of the beneficiary. The Trustees owes a fiduciary duty to manage and preserve assets for the beneficiaries. The Executor and Trustee can be referred to as the Fiduciary.

All persons are able to qualify as a Fiduciary, except for infants, incompetents, non-domiciliary alien (other than a foreign guardian under SCPA §1716(4) or one who serves with multiple fiduciaries at least

one of whom is a New York resident), and someone who has a history of substance abuse, dishonesty, improvidence, want of understanding or is otherwise unfit for office (SCPA §707). In 2021, the statute was amended to remove the prohibition of a felon or someone who cannot read and write English from serving. Instead, the Court now has the discretion to declare such a person as ineligible to serve. Since SCPA §707 does not define dishonesty, the Court uses the following standard established in *Matter of Latham*, 145 App. Div. 849, 854 (N.Y. App. Div. 1911), "The dishonesty contemplated by the statute must be taken to mean dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor." This dishonesty must be proved by the party alleging the claim and must show that the dishonesty is part of that person's character (see *In the Matter of Walsh*, 2007 NY Slip Op 51353(U) (N.Y. Sup. Ct. 7/10/2007) and Matter of Riede, 138 App Div 83).

"In 2021, the statute was amended to remove the prohibition of a felon or someone who cannot read and write English from serving."

A Trustee serves once appointed by a lifetime trust or by the Court upon issuance of Letters of Trusteeship (*see* SCPA §103(34)).

A client may believe that he or she must name the surviving spouse or the eldest child as the Fiduciary. Therefore, the attorney must convey that the person designated must be the person most capable of handling the responsibilities to which he/she will be assigned and must have the time and ability to carry out the estate administration.

The attorney should also review possible conflicts. Fiduciaries may have personal interests in the estate or trust which conflict with their fiduciary role. Therefore, the client must determine if the named individual will be able to handle the conflict and whether the other beneficiaries will be comfortable with the arrangement. For example, the Executor who also is a beneficiary (such as the oldest child), has a potential conflict when the Executor has the authority to divide tangible personal property in the event of a disagreement among the testator's children. A plan should be formulated for dealing with such conflicts before they arise. To mitigate possible conflicts or fighting between children as to who was named as fiduciary and who was not, the client may consider naming multiple fiduciaries. Also, a Trustee who is a beneficiary cannot make discretionary distributions to himself or herself (EPTL §10-10.1). Therefore, the client must name a Co-Trustee to serve with such a beneficiary.

Naming multiple fiduciaries can provide great flexibility so that the administration can be divided between them, resulting in sharing the burden of administration. When there are disputes between fiduciaries, the majority makes the decision unless otherwise provided in the Will (EPTL §10-10.7). The attorney should also convey that sometimes having "more than one cook in the kitchen" can complicate administration. If there are only two fiduciaries, there could potentially always be a stalemate. As an alternative, naming an impartial non-family member or other relative may be wise.

The client should consider the merits of naming the attorney as fiduciary. It is generally unethical for an attorney to suggest that the client should

nominate the attorney as Executor. However, if the client truly believes that the attorney is the best person for the job, then the client can name the attorney to such role, such as when the attorney has unique knowledge of the client's personal affairs or there is a lack of family members appropriate for the position.

A client may also consider naming a corporate fiduciary if no relative or friend would be appropriate. The client may believe that the corporate fiduciary has certain expertise that would then make it the logical choice for acting as fiduciary. Another consideration is that the corporate fiduciary will be impartial and not be aligned with either of the opposing sides of a family. However, in general, a corporate fiduciary will be more conservative and less flexible than a family member. Such behavior may be a positive to the client, but none-the-less, should be considered. Additionally, a corporate fiduciary may not have a relationship with family members other than the client. The corporate fiduciary may not be in the best position to make distribution decisions since the corporate fiduciary lacks important personal knowledge about the beneficiaries. Also, since financial advisors frequently change institutions, if a client names a particular corporate fiduciary because of such client's relationship with the financial advisor, the client must remember to change the corporate fiduciary in his or her Will when such advisor switches firms. Potentially, the advisor could switch firms during the administration of the estate or the testamentary trust. If that is the case, the estate or beneficiaries will not be able to follow the advisor to the advisor's new institution unless the corporate fiduciary is willing to resign and designate the advisor's new firm as the successor or unless the Will contains provisions that contemplate this scenario. If the client owns a business, the corporate fiduciary may have certain policies in place with regard to continuing such business. The attorney should encourage evaluating such policies before naming such institution as a fiduciary. Because of these inherent problems, careful drafting of fiduciary appointment provisions is of utmost importance.

The attorney should also ensure that successors are named to each fiduciary position and that there are provisions in place for the successors to designate successors. The attorney may also find it prudent to allow the fiduciary to name additional persons to serve. Providing for the resignation of a fiduciary can be very important especially in the corporate fiduciary context as discussed earlier. When a Trustee resigns, such Trustee must submit a verified petition and decree to Court under SCPA §715. Successor Trustees are appointed with a verified petition (can be done at the same time and in the same petition) under SCPA §706. When no successor is named under the Will, SCPA §1502 provides a mechanism for the Court to do so. A new Executor can be appointed as an Administrator C.T.A. under SCPA §1418.

"It is generally unethical for an attorney to suggest that the client should nominate the attorney as Executor."

When deciding on the appointment of the Guardian, the client should be guided as to who the best person is to raise the minor child at that point in time and perhaps for up to the next five years. The client can be easily overwhelmed when choosing a Guardian for an infant when the client begins to focus on what that child will be like as a teen. Therefore, the attorney must redirect the discussion

as to whom the best person is if something happens to the client today. Reassurance should be given that the person can easily be changed by signing a new Will naming a new person as the child ages. The client may find it useful to name one person as Guardian and a different person as Trustee to manage the assets for the minor child. The benefit to such scenario is that multiple sides of the family can be involved in the care of the minor child and the realization that the best person to act as parent may not be the best person to invest money. However, other clients may prefer to name the same person as Trustee and as Guardian under the theory that the Guardian will best know the child's financial needs. For ease of caring for the child, many clients believe the same person should serve in both roles. Both theories hold merit and the attorney should help the client navigate between the two options.

b. Clarifying Fiduciary Compensation

Many clients ask for information about commissions. Under SCPA §2307, unless drafted differently, the Executor is entitled to receiving and paying out commissions as follows:

5% on the first $100,000

4% on the next $200,000

3% on the next $700,000

2.5% on the next $4,000,000

2% on the remaining sums over $5,000,000

The Will can override these provisions by providing that no commissions are allowed, by changing the tiered structure or by stating a flat fee.

Multiple commissions are payable if more than one fiduciary is named (SCPA §§2307, 2309 and 2313). In the case where there are more than three Executors serving and the gross estate is greater than $300,000, three commissions are allowed and divided between them unless the Will provides otherwise. In the case where there are more than two Executors serving and the gross estate is between $100,000 and $300,000, two commissions are allowed and divided between them unless the Will provides otherwise. Therefore, the attorney should focus on this issue when drafting the governing document.

Under SCPA §2309, unless drafted differently, the Trustee is entitled to annual commissions as follows which are payable one-third from the income of the Trust and two-thirds from the principal of the Trust:

1.05% on the first $400,000

0.45% on the next $600,000

0.30% on the remaining sums over $1,000,000

When the Trust terminates, the Trustee is entitled to a paying out commission of 1%. Multiple commissions are payable if more than one Trustee is named (SCPA §§2307, 2309 and 2313). In the case where if there are more than three Trustees serving and the Trust assets are $400,000 or greater, only two commissions are allowed unless the Will or Trust provides otherwise. Therefore, the attorney should focus on this issue when drafting the governing document.

A commission "cheat sheet" is attached at Exhibit D and can be used during the client meeting and/or provided to the client.

Developing Forms That Can Be Used For Drafting

By Leslie Levin, Esq.

Key Provisions for Either a Will or a Revocable Trust, Including Use of a Disclaimer Trust, Credit Shelter Trust, Marital Trust, Descendant's Trust and Supplemental Needs Trust

Once the information is gathered from the client, the attorney can then apply a plan to eliminate, reduce or defer a client's potential estate tax liability. The plan can include some or all of the following techniques:

- Making nontaxable lifetime gifts to reduce the value of the gross estate and reduce estate tax. These gifts can include Annual Exclusion (IRC §2503(b) provides $10,000 (indexed for inflation currently $19,000 in 2025) can be gifted annually during a client's lifetime to as many individuals as the donor desires), Education ((IRC §2503(e)(2)(A)) allows for an unlimited amount paid to an educational institution on behalf of any person regardless of age or type of school (primary, secondary, vocational, graduate, parochial, etc.), Medical ((IRC §2503(e)(2)(B)) allows for unlimited gifts for Medical Expenses by paying the service provider (i.e., hospital or doctor) on behalf of any person), Applicable Exclusion Amount, Charitable and determining outright vs. in trust.
- Creating trusts such as life insurance trusts to remove life insurance proceeds from the taxable estate.
- Using qualified terminal interest trusts (QTIP) or outright dispositions to take advantage of the marital deduction to defer estate tax on transfers to a surviving spouse.
- Bequests to charitable entities, creation of charitable trusts (CLT or CRT), foundations or Donor Advised Fund (DAF) to use the charitable deduction to reduce the value of the gross estate.
- Using a Disclaimer Trust, Credit Shelter Trust and/or Portability to shelter the applicable exclusion amount and future appreciation from estate tax.
- Retitle assets to balance estates between each spouse to take full advantage of the applicable exclusion amounts.
- Benefits of trusts for single beneficiary vs. multiple beneficiaries.(i.e., sprinkling trust).
- Using a trust to hold assets for children and/or grandchildren either for lifetime or until certain age reached (i.e., Descendant's Trust) vs. outright bequest.
- Focusing on Generation Skipping Transfer ("GST") Tax Exemption when considering gifts/bequests to grandchildren.
- Creating and using Supplemental Needs Trust (SNT) for disabled beneficiary to receive inheritance and ensuring an SNT provision is included in the Will or Revocable Trust to cover the possibility of a later disabled beneficiary.
- Using in terrorem provisions for estranged family members to prevent Will contest.

Types of Bequests

When drafting Wills, consideration must be given to the types of bequests which are appropriate to include in a Will. There are four different types of bequests: specific bequest, demonstrative bequest, general bequest and residuary bequest.

A specific disposition of property gives a specifically identifiable item to a specific person or entity (EPTL §1-2.17). For this bequest to succeed, the attorney must clearly identify the item and clearly identify the recipient: "I give my ruby ring to my daughter, AUDREY LEVIN, if she survives me." If the property no longer exists at the time of the testator's death, the bequest fails. However, if there is any question as to what happened to such property, litigation may ensue. The attorney should remind the client that specific property bequeathed must be included on the decedent's estate tax return and valued for estate tax purposes. Also, the Will is a public record once it is submitted for probate. A client may not feel comfortable with an itemized list of his assets available for all to see upon his death.

Most Wills contain a specific disposition of the testator's tangible personal property (i.e., jewelry, cars, furniture, clothing, etc.). By including such a provision, the testator is able to avoid passing estate income out to the residuary beneficiaries under Internal Revenue Code of 1986, as amended (the "IRC") §§661(a)(2), 662(a)(2) and 663(a)(1). Additionally, the provision avoids subjecting the assets to an executor's commission. If the residuary estate passes in trust, then without a specific bequest of tangible personal property, such items will be held in trust for the beneficiary which may prove impractical and cause the inclusion of non-income producing assets in the trust. The attorney must be careful to use clear descriptions to avoid litigation, confusion and inadvertently including assets not meant to be distributed (see *Matter of Winburn*, 139 Misc. 5, 247 NYS 584 (1931) holding motor boat and horse are "household effects").

A demonstrative bequest has the characteristics of both a specific and a general bequest and is a bequest of property to be taken out of specific property (EPTL §1-2.3). For example, "I give the sum of TEN THOUSAND DOLLARS ($10,000) from my Citibank account #12345, or any successor account thereto, to my son, NATHANIEL LEVIN, if he survives me." If the property or account no longer exists at the time of the testator's death, the bequest is then paid out of the residuary estate (see Matter of Young, 137 Misc. 2d 744, 522 NYS2d 795 (1987). If there is any question as to why such property is no longer owned by the decedent, litigation may ensue. The attorney should avoid using overly broad terms when drafting this bequest to avoid confusion. Another problem with a demonstrative bequest is that when language is included requiring that the bequest is paid from sale proceeds of a specific item, the executor is forced to sell such item shortly after the testator's death and may not get the best price for the item if the market for such item is depressed.

A general bequest is a bequest which is not specific, demonstrative or residuary in nature (EPTL §1-2.8). For example, I give the sum of TEN THOUSAND DOLLARS ($10,000), to my son, JOSHUA LEVIN, if he survives me." The bequest is payable within seven months of date of death (EPTL §11-1.5) and is paid from the estate.

A residuary bequest is a bequest of the remaining assets in the probate estate after all administration expenses have been paid and all other bequest have been satisfied. The attorney should be mindful to include provisions which take into consideration what happens to a residuary share in the event a residuary beneficiary predeceases the testator.

The attorney should advise the testator as to the option of leaving assets in trust for a beneficiary as opposed to an outright bequest. Trust provisions in a Will direct the Trustees to manage and control the trust assets (money, real estate, business, etc.) for the benefit of one or more persons who

are called beneficiaries. A trust benefiting more than one beneficiary is often called a "sprinkle trust" or a "spray trust" because the Trustees have discretion to "sprinkle" income and/or principal to one or more people from a class of beneficiaries. Reasons to use a trust include removing the burden of complex financial decision making from family members, reducing estate taxes in the surviving spouse's estate, growth of assets outside of beneficiary's taxable estate in certain circumstances, provide security for family members, protect family members, deal with disabilities and to keep assets in the family.

"In general, a trust for the testator's children should include income and principal provisions focusing on whether distributions are i) discretionary amounts decided by Trustee, ii) governed by the ascertainable standard (HEMS – health, education, maintenance and support), iii) at certain ages or iv) a combination of those choices."

Careful consideration should be given to bequests to children. The attorney should discuss with the testator the merits of an outright bequest or a bequest in trust for children. The discussion should include the age of the children, the client's education plans for the children and whether the children are responsible, including whether the children are spendthrifts. The client should consider how the marital status of the child affects the bequest. Keeping assets in the family and out of the hands of future spouses or current spouses of children could be an important objective for the client. Using a trust can ease the burden of administration and ensure that financial decisions are not made by the children alone. The testator should gage the child's ability to manage assets. Additionally, the testator must disclose whether the child has special needs because an outright bequest to such a child could cause federal and state benefits to cease with regard to such child. The attorney should also inform the client that if the assets are left to a minor child outright, then the guardian will have to petition the court each time a withdrawal of funds is needed to care for the child. Drafting to include a trust for the benefit of the minor child avoids this cumbersome and potentially expensive process.

If the testator concludes that a trust is the proper vehicle for a bequest to children, then the attorney should advise the client as to the two types of trust available: a separate trust for issue (i.e., Descendant's Trust) and a "pot trust" for issue. The benefit to a separate trust is that each child's expenses are handled separately and individual management can be decided based on the need of such child. A pot trust mimics the way the testator manages property for his children during his lifetime. One trust is administered for the benefit of all of the testator's children and income and/or principal is distributed to the children when needed. However, such a trust can result in disproportional treatment of the children. In general, a trust for the testator's children should include income and principal provisions focusing on whether distributions are i) discretionary amounts decided by Trustee, ii) governed by the ascertainable standard (HEMS - health, education, maintenance and support), iii) at certain ages or iv) a combination of those choices. The trust should ensure that assets do not pass to children until they have reached a certain age when

they would be fiscally responsible, which could mean that assets are held in trust for the lifetime of the beneficiary. Careful drafting includes adding a rule against perpetuities clause (EPTL §9-1.1).

The testator must focus on the unpleasant possibility that the child will not survive the trust term. In such a rare instance, the testator should decide who receives the trust assets upon the death of a child before the age at which the trust terminates. The attorney can also give an exclusive special power of appointment to the child to allow for flexibility in distributing assets to surviving issue upon the death of the child before the trust term ends (EPTL §10-3.2) or the attorney can give a general power of appointment to the child to allow for flexibility in the child's estate plan (EPTL §10-3.2). By giving this power, trust assets will be includable in the child's estate upon such child's death before termination of the trust and will avoid the application of GST Tax to the portion passing to issue of a deceased child.

Provisions to Include in the Will and Trust

General provisions which should be considered for all Wills and Trusts (to a degree) include:

- Preamble containing testator's name (including all names used on various accounts) and county and state of residence.
- Statement that the document is the testator's Will and that all prior Wills and Codicils are revoked by this document (EPTL §3-4.1).
- Disposition of tangible personal property.
- New York does not allow incorporation by reference of a separate list or separate instructions.
    - If there is a chance that family members will fight over the property, consider including provisions on how to avoid or resolve disputes (i.e., have beneficiaries pick in a specific order, direct that disputed property be sold, direct that all property be sold in case of dispute, etc.).
    - Divide property into shares, provide for specific bequests of certain property or allow someone to choose an item from either all tangible personal property or a subset.
    - Include provision for estate to pay packing and shipping expenses as administrative expense so that beneficiary does not bear this expense.
- Devise of real property (and cooperative apartments).
    - If mortgage on real property is to be paid out of estate and not by beneficiary, then a specific provision must be included in the Will (EPTL §3-3.6).
    - If real property is not specifically devised, consider a provision providing how such property shall be managed until it is disposed (EPTL §11-1.1).
    - A specific provision authorizing the executor to sell the real estate allows the executor to deduct expenses related to the real property on the estate tax return, otherwise such expenses are only deductible if the sale is necessary to pay the testator's debts, expenses of administration or taxes, to preserve the real property as part of the estate or to effect distribution (Treas. Reg. §20.2053-3(d)(2) and IRC §2053).
    - Real property is only subject to an

executor's commission if it is sold by the executor (SCPA §2302).

- If real property is needed to utilize the testator's applicable exclusion amount, then consider including provisions giving the surviving spouse a life estate in such property which includes provisions regarding payment of expenses, maintenance, repairs and taxes.
- Consider adding a provision to allow the surviving spouse to disclaim inherited real property (whether by operation of law or through the Will) so that it can be added to a Credit Shelter Trust or to a Disclaimer Trust and utilize the testator's applicable exclusion amount.
- If the testator owns a cooperative apartment (which is not considered real property), then specifically dispose of shares of the corporation and the proprietary lease.

- Provisions governing care of pets, including pet trust (EPTL §7-8.1).
- Disposition of Applicable Exclusion Amount (unified credit) tied to Federal amount ($13,990,000 for 2025, less any amount used by the testator to shelter lifetime gifts from federal gift tax) or the State amount. As of January 1, 2019, and after, the New York exemption amount became linked to the former federal amount ($5,490,000), indexed for inflation. For this calendar year the amount is $7,160,000.
- Credit Shelter Trust or Disclaimer Trust.
- Disposition of remainder of assets ("Residuary Estate") outright or in trust.
  - Testamentary dispositions to issue or to a sibling who predeceases the testator but after the execution of the Will vests in surviving issue of the decedent by representation unless Will provides otherwise (EPTL §3-3.3).
- Disposition of assets in the event no spouse or issue survives. Without this provision, EPTL §4-1.1 governs the disposition of these assets.
- Estate tax provision.
  - In most cases, taxes should be paid out of residuary estate.
  - If not specified, EPTL §2-.18 apportionment statute will apply.
- Designation of fiduciaries (executor, trustees and guardians) and successor fiduciaries.
  - Last acting fiduciary can name successor.
  - Acting fiduciaries can name additional fiduciaries.
  - Resignation of fiduciaries.
  - Delegation of authority to another fiduciary.
  - Serve without bond.
  - Removal for disability.
- Management of property vesting in a minor or disabled person.
- Supplemental Needs Trust provision in case a beneficiary becomes disabled at a future time.
- Simultaneous death provision to determine order of deaths. Otherwise, the provisions of EPTL §2-1.6 control.
- Administrative powers of Fiduciaries (EPTL §11-1.1(b)).
- Representation of persons under disability to avoid the appointment of a guardian to represent person under a disability when there is another person with the same interest not

under a disability (SCPA §315(5)).

- Spendthrift provision.
- Accounting clause.
- Testimonium and attestation clause.
- Self proving affidavit for subscribing witnesses to be used as a separate sheet at the end of the Will to avoid searching for witnesses at time of testator's death (SCPA §1406).

Building Flexibility Into the Plan - Checklist of Special Provisions

- Specific bequest of cash legacies or stock.
- Forgiveness of loans.
- Exercise or non-exercise of a power of appointment.
- Sprinkling Credit Shelter Trust or Disclaimer Trust for benefit of surviving spouse and issue.
- Credit Shelter Trust for benefit of issue to be used when spouse has sufficient other assets.
- Credit Shelter Trust or Disclaimer Trust as beneficiary of retirement accounts.
- Limited Power to withdraw principal (5/5 power) in Credit Shelter Trust, Disclaimer Trust or QTIP Trust.
- Qualified domestic trust ("QDOT") to secure marital deduction for assets passing to non-citizen spouse (IRC §2056A and Treas. Reg. §20.2056A).
- Pour over to Revocable Trust (EPTL §3-3.7).
- Charitable bequests.
    - Specific bequest to a named charity or family foundation (EPTL §8-1.1).
    - Give executor discretion to choose charity.
    - Charitable remainder trust ("CRAT" or "CRUT") (IRC §§664(d)(1) and (2) or (3) and EPTL §8-1.8).
- Trust pays the beneficiary an annuity for life or for a period of time not to exceed 20 years (or a percentage of the value of the assets re-calculated each year).
- Annual payments cannot be less than 5% of the initial fair market value of the trust.
- Upon the end of the trust term, the assets pass to the charity.
- Estate receives an immediate tax deduction at the time of the testator's death based on the remainder interest of the trust (what will pass to the charity when the trust ends). This remainder interest is calculated using the beneficiary's age (or trust term), the selected payout percentage and the applicable federal (interest) rate. The value of the estate tax charitable deduction increases with lower payout amounts, higher interest rates and shorter trust terms.
    - Charitable lead trust ("CLAT" or "CLUT") (IRC §§664(d)(1) and (2) and EPTL §8-1.8).
    - Trust pays the charity an annuity for a period of time not to exceed 20 years (or the charity can receive a percentage of the value of the assets re-calculated each year).
    - There is no minimum annual payment.
    - Upon end of the trust term, the assets pass to named beneficiaries.
    - Estate receives an immediate tax deduction at the time of the testator's death based on 7520 rate.

- GST Tax planning using GST Tax exemption amount which is the same as the available unified credit ($13,990,000 in 2025) (IRC §2631).
    - GST Tax exemption placed in Trust for spouse and issue or spouse then issue.
    - Outright bequest of GST Tax exemption to issue.
    - Can be applied against Credit Shelter Trust or Disclaimer Trust.
    - Issue can be given general power of appointment in Descendant's Trust in case of death before trust terminates to avoid application of GST tax.
- Powers of appointment (EPTL §10 in its entirety).
- Provision appointing corporate entity as investment advisor, appointing attorney and/or appointing accountant.
- Provision providing how to break deadlock between acting fiduciaries and majority control when three or more fiduciaries are acting.
- Closely held business provision including continuation of business.
- Real estate investment provision.
- Additional fiduciary administrative powers when assets are more complex (list is not exhaustive).
    - Investment in proprietary funds.
    - Improve real property.
    - Power to sell, exchange, lease, mortgage or otherwise dispose of real property and execute deeds, leases, mortgages and related instruments.
    - Power to settle and adjust partnership or LLC interests.
    - Amortization of bond premiums (EPTL §11-A-4.6(a) prohibits unless Will provides otherwise).
    - Sell property.
    - Change nature of assets.
    - Use custodian, investment counsel or other agents (EPTL §11-1.1(b)(9) prohibits use of investment counsel unless will provides otherwise under 11-2.3).
    - Creation of qualified conservation easement to allow for deduction under IRC §2055(f) and §2031(c) exclusion otherwise executor cannot create easement without consent from all beneficiaries of affected real property.
    - Mineral rights.
    - Electing small business trust authorization.
    - Subchapter S savings provision (IRC §1361).
    - Allocation between principal and income.
- Compensation of corporate fiduciary where it differs from statute.
- Guardianship trust to provide additional money to guardian of minor children until youngest child attains specific age.
- Provision governing ancillary probate when there are assets in other jurisdictions.
- Interrorem provision to be used when will contest is expected (EPTL §3-3.5(b)).
- Separate form of acknowledgment of disclosure to be used when naming attorney as executor which can be annexed to Will (SCPA §2307-a).

Attorney as Fiduciary

Under SCPA §2307-a, when a client nominates the attorney as Executor, the client must sign an acknowledgment of disclosure in the presence of a witness (Exhibit E) stating that the client was informed that:

- Any person can serve as an Executor;
- Any person serving as an Executor is entitled to statutory commissions;
- Any attorney, including the Attorney-Executor, is entitled to legal fees for legal work performed on behalf of the estate; and
- Absent execution of the acknowledgment of disclosure, an attorney who serves as Executor will be entitled to only one-half of the statutory commissions such attorney would otherwise be entitled to receive.

The statute does not provide any guidance as to whom the attorney should use as a witness for this acknowledgement. While SCPA §2307-a does not prohibit someone affiliated with or employed by the law firm for which the attorney works from witnessing the disclosure form, good practice would be to ensure that the person witnessing does not have a personal financial interest in the commissions that the attorney-Executor would earn like a partner. See *Matter of Moss*, 2008 NY Slip Op 28338 [21 Misc 3d 507] September 12, 2008 Roth, J. Sur Ct, New York County (stating "It is thus concluded that the partner, because he was not independent, could not witness the Hess disclosure statement" and *Matter of Beybom*, 2011 NY Slip Op 51886(U) Decided on August 26, 2011 Sur Ct, Suffolk County Czygier, J. (stating that "a better course of action may have dictated using someone other than an attorney affiliated with the nominated executor.").

This disclosure must also be filed at the time of probate. If this disclosure was not signed at the time the Will was signed, then the attorney acting as Executor will only be entitled to receive one-half (1/2) of the commissions. Additionally, the Executor must file a statement that the Executor is an attorney, whether such person (or such person's law firm) will act as counsel and whether such Executor was the draftsman of the Will (22 NYCRR §207.16(e) see Exhibit F). In addition, if the attorney is designated as the fiduciary, a Weinstock Affidavit may be needed to explain why the decedent appointed the attorney in such capacity (see *Matter of Weinstock*, 40 NY2d 1, 351 NE2d 647, 386 NYS2d 1 (1976)). In *Weinstock*, the attorneys did not act in a manner best suited to aid their client. In fact, in this case, the attorneys actively deceived their client, betraying their client's trust. The two attorneys, father and son, drafted a Will for an 82-year-old man and appointed themselves as Co-Executors, which the court found as attorney misconduct, tainting the drafting process and breaching the attorneys' duty to their elderly client. 40 NY 2d 1 (1976). The legacy from that case, is to ensure that attorneys are not acting against the best interest of their clients and that is why the affidavit is needed to explain the relationship and the facts surrounding the appointment. See Exhibit G attached for sample form of Weinstock Affidavit.

A Putnam Affidavit is needed whenever there is a bequest to a person in a confidential relationship to the decedent such as an attorney, doctor, accountant or clergy. In such a case, the attorney should also submit a Putnam Affidavit to explain the circumstances surrounding the gift (see Matter of Putnam's Will – Smith v. Mitchell, 257 NY 140 (1931)). In this seminal case, the attorney who drafted the client's Will also designated himself as residuary legatee without explaining the circumstances. The Court concluded that there was an inference of

undue influence. See Exhibit H for sample form of Putnam Affidavit.

Reminder Letters

Clients sometimes have a fear that by completing their estate planning documents, they will suddenly become mortal and die. Therefore, much time can pass between sending out drafts and hearing back from clients. A reminder letter can be sent to the clients to both remind them to complete the estate planning process as well as to protect the attorney from claims that the attorney delayed in completing the drafts which caused some type of problem. A sample set of reminder letters for drafts is attached at Exhibit I.

Other times, once the clients have signed their estate planning documents, certain documents need to be executed by other parties. Powers of Attorney ("POA") are a perfect example of this type of document. In order to ensure that the POA gets fully executed, the attorney often shepherds the execution process by sending the form to the Agent and/or Successor Agent. Unfortunately, the parties often delay in returned the signed pages. A sample set of execution and reminder letters are attached as Exhibit J.

These letters can be altered for other types of documents that are sent either for review or for execution.

EXHIBIT A

Client Intake Questionnaire

MEMORANDUM

To

From

Subject Estate Plan

Date

WILLS

1. Full name for both of you (and the name you use on your accounts) and for your children.

2. Country of citizenship. If not a citizen of the United States, please provide copy of Green Card or other relevant information. If became a naturalized citizen, please provide a copy of naturalization papers, etc.

3. Address, phone number, e-mail address, social security number, birthday for each of you and for your children.

4. List of assets (including house/apt., life insurance, IRAs, etc.) including approximate values, name of financial institution, account number, current beneficiaries and how they are owned (i.e., your name, spouse's name, joint, in trust, etc.). Please also provide salary information and any other source of income. Please provide information about trademarks, copyrights and patents. To assist you, I have provided a spreadsheet on the next page.

Please provide copies of insurance policies (life, disability, long term care, etc.), current insurance beneficiary forms together with change of beneficiary forms and current retirement account beneficiary forms together with change of beneficiary forms.

If you have a mortgage or a loan, please provide a copy of all documentation pertaining to it.

If you own real property, please provide a copy of the deed.

Please provide me with a copy of your most recent income tax returns.

If you own an interest in a corporation or partnership, please provide me with copies of all documents relating to such entity, including, but not limited to, operating agreements, shareholder agreements, partnership agreements, certificates of incorporation, by-laws and most recent income tax returns.

Asset	Husband	Wife	Joint	Primary Beneficiary	Secondary Beneficiary
Residence					
Life Insurance					
Life Insurance					
Disability Insurance					
IRA					
Roth IRA					
Rollover IRA					
401(k) Plan					
Profit Sharing Plan					
Employee Stock Purchase Plan					
Checking Account					
Checking Account					
Checking Account					
Savings Account					
Savings Account					
Savings Account					
Brokerage Account					
Brokerage Account					
Brokerage Account					
LLP					
LLC					
S Corporation					
C Corporation					
Trademark					
Patent					
Copyright					
Car					
Other					
Total					

Asset	Husband	Wife	Joint	Primary Beneficiary	Secondary Beneficiary
Liabilities					
Mortgage					
Loan					
Lease					
Other					
Total					
Monthly Income					
Salary					
Social Security					
Pension					
Other					
Total					

5. Do either or both of you have any trusts which you created or which were created for your benefit or for the benefit of your children? If so, please provide details and please bring a copy.

6. Who inherits your personal property? Car, furniture, art, etc.? And if that person predeceases you, then who inherits it?

7. Any bequests to charity? If so, please provide name, address, telephone number and contact person for each charity to be named.

8. Any bequests to family or friends? If so, please provide name, address and telephone number of each person to be named.

9. Who inherits your remaining assets? And if that person predeceases you, then who inherits? Do these people get it outright, in trust, or both? (we will discuss in greater detail the different provisions you can include in a trust - for right now focus on whether you want it in someone's pocket or whether you want someone else to handle the money for that someone). Also, focus on the unlikely situation that both of you and your children all die in a common disaster - then who inherits your assets?

10. Who is Executor (handles your estate after you die)? Successor Executor? Are they USA citizens?

11. Who is Trustee (administers the Trust - if any)? Successor Trustee? Are they USA citizens?

12. Who is Guardian (takes care of minor children when both of you are gone)? Successor Guardian? Are they USA citizens? Do you want a trust set up to provide the Guardian with money as a "thank you" until your youngest child turns 18 (or 21 or some other age)?

13. Do you have any prenuptial agreements? If so, please provide a copy.

14. Do you have any divorce agreements from prior marriages? If so, please provide a copy.

15. Do you have a predeceased spouse? If so, please provide name, date of death, copy of death certificate and an original death certificate.

16. Address, phone number and e-mail address for any person you think will be named in your Wills.

17. Address, phone number, date of birth and e-mail address for your parents, siblings, nieces and nephews.

18. Do you have any pets? If so, do you need special provisions for their care?

19. Does anyone named in your Will have special needs or is disabled? If so, do you need special provisions for their care?

20. Do you have any prior Wills? If so, please provide a copy.

Living Will/Proxy/Organ Donation Forms

1. Who makes your medical decisions if you are not able to do so? Name, address, and phone number of person.

2. And if that person can't then who? Name, address, phone number and e-mail address of person.

3. Do you have any prior health care forms? If so, please provide a copy.

Powers of Attorney

1. Who can make financial decisions on your behalf (effective while you are alive and competent)? Name, address, and phone number of person.

2. And if that person can't then who? Name, address, phone number and e-mail address of person.

3. Do you have any prior Powers of Attorney? If so, please provide a copy.

Lifetime Gifts

1. Any gifts to children? If so, outright or in trust? For what purpose? How large?

2. Any gifts to charity? If so, outright or in trust? For what purpose? How large?

3. Any gifts to family or friends? If so, outright or in trust? For what purpose? How large?

4. Any federal gift tax returns (Form 709) filed? If so, please bring a copy.

EXHIBIT B

Initial Client Meeting Follow-up Letter

DATE

NAME

ADDRESS

Re: Estate Planning

Dear _____:

Thank you for thinking of me with regard to your estate planning needs. I am glad I had a chance to speak to _____ on _____. Enclosed is the estate planning "homework assignment" which I mentioned to you on the phone and return to me together with the requested documents. Please also provide any other information which you feel is important and may not have been requested on the memo. As we discussed, please complete the memo to the best of your abilities. Naturally we will discuss all of your concerns and any relevant items from the enclosed memo in greater depth and detail as we move forward with your estate planning. Please do not be "married to the memo." It is a tool to help you with this process. Please feel free to share information, preferably before we meet, in any format that is easy for you (for example, providing statements instead of filling out the spreadsheet or using memos completed for other attorneys, accountants or financial institutions). It is ok to not have the answers to all of the questions at this stage in the process but you should certainly be thinking about all of the issues that I raise in the memo.

Please feel free to contact me with any questions. I look forward to meeting you at our _____ office on _____ at _____ am/pm to begin your estate planning process.

With best wishes!

Very truly yours,

ATTORNEY

Enclosure

EXHIBIT C

Client Letter Regarding Periodic Estate Plan Update

DATE

NAME

ADDRESS

Re: Updating Estate Plan

Dear _____:

I hope all is well with you both and your family.

As your current estate planning documents were drafted in _____, I recommend that you review them and all of your beneficiary designations to make sure that no changes are needed. As part of this process, please consider the following:

1. Have your assets increased/decreased since we last met? Have you acquired or disposed of a significant asset?

2. Have there been any illnesses, deaths, births, adoptions, marriages or divorces in your extended family?

3. Has getting older affected any named beneficiary's behavior or lifestyle?

4. Does anyone in your extended family have special needs?

5. Has anyone in your extended family moved?

6. Are you still happy with whom you've named as Executors, Trustees and as Guardians?

7. Has there been a change in employment for either of you?

If you have answered yes to any of the above questions, you may need to revise your current documents. Please contact me to schedule a time to discuss your estate plan and any changes you may need to make.

As always, please call me with any questions. With best wishes!

Very truly yours,

ATTORNEY

EXHIBIT D

NY Fiduciary Compensation Rates

Under SCPA §2307 the executor is entitled to a commission as follows:

5% on the first $100,000

4% on the next $200,000

3% on the next $700,000

2.5% on the next $4,000,000

2% on the remaining sums over $5,000,000

Under SCPA §2309 the Trustee is entitled to a commission as follows:

1.05% on the first $400,000

0.45% on the next $600,000

0.30% on the remaining sums over $1,000,000

EXHIBIT E

Client Attorney Designation and Informed Consent

I, JOHN DOE, have designated an attorney, _____, as my Executor in my Will dated _____, 20___.

Prior to signing my Will I was informed that:

(i) subject to limited statutory exceptions, any person, including an attorney, is eligible to serve as my executor.

(ii) absent an agreement to the contrary, any person, including an attorney, who serves as an executor for me is entitled to receive statutory commissions for executorial services rendered to my estate.

(iii) if such attorney serves as my executor and she or another attorney affiliated with such attorney renders legal services in connection with the executor's official duties, she is entitled to receive just and reasonable compensation for those legal services, in addition to the commissions to which an executor is entitled.

(iv) absent execution of this disclosure acknowledgment, an attorney who serves as an executor shall be entitled to one-half (1/2) commissions she would otherwise be entitled to receive.

_____ _____

(Witness) JOHN DOE

Dated: _____, 20___

EXHIBIT F

Affirmation of Attorney

STATE OF NEW YORK

SURROGATE'S COURT: WESTCHESTER COUNTY

_____ X

Probate Proceeding, Will of

JANE DOE

Deceased.

File No.: _____

AFFIRMATION OF ATTORNEY

22 NYCRR §207.16

_____X

STATE OF NEW YORK)

) ss.:

COUNTY OF WESTCHESTER)

Mary Doe, hereby affirms under penalty of perjury, that:

A. I am an attorney-at-law duly admitted to practice in the courts in the State of New York. I am a partner at Law Firms R Us, with offices at 123 Main Street, White Plains, New York 10601. I make this Affirmation for the benefit of the Surrogate, Westchester County, pursuant to SCPA 2307-a and 22 NYCRR 207.16(e).

B. Your affirmant is appointed as the Co-Executor of the Last Will and Testament of Jane Doe dated April 15, 1997 (the "Will) and First Codicil to the Last Will and Testament dated December 27, 2002 (the "Codicil").

C. Jane Doe died on _____, 20___, a resident of 456 Main Street, city of White Plains, County of Westchester, and State of New York.

D. Your affirmant is offering said Will and Codicil for probate.

E. The law firm of Lawyer & Attorney LLP prepared and supervised the execution of said Will and Codicil.

F. Jane Doe nominated your affirmant as the Executor. Your affirmant was not the attorney draftsperson, a then-affiliated attorney or employee thereof of Lawyer & Attorney LLP.

G. Your affirmant and her law firm, Lawyers R Us, will not be rendering any legal services with respect to the Estate of Jane Doe.

H. The decedent at the time of executing her Last Will and Testament was competent in all respects, possessed testamentary capacity and was not under any restraint; her Last Will and Testament was made at her direction and in accordance with her express wishes; and she was explicit and insistent that she wanted your affirmant to act as the Executor.

Dated: White Plains, NY

_____, 20___

_____

Mary Smith

Affirmation of Attorney

STATE OF NEW YORK

SURROGATE'S COURT: WESTCHESTER COUNTY

_____ X

Probate Proceeding, Estate of

EVA DOE,

Deceased.

_____X

AFFIRMATION OF ATTORNEY

PURSUANT TO 22 NYCRR §207.16(e)

File No.: _____

STATE OF NEW YORK)

ss.:

COUNTY OF WESTCHESTER)

MARY SMITH, duly sworn, deposes and says:

A. I am an attorney-at-law duly admitted to practice in the courts in the State of New York. I make this Affidavit for the benefit of the Surrogate, New York County, pursuant to 22 NYCRR §207.16(e).

B. EVA DOE died on _____, 20___, a resident of 456 Main Street, city of White Plains, County of Westchester, and State of New York.

C. Your deponent is affiliated with or an employee of Lawyers R Us who represents the Estate of EVA DOE, and as such, your deponent will be rendering legal services with respect to the Estate.

D. Your deponent is the draftsperson of the decedent's Last Will and Testament dated October 4, 2012 being offered for probate.

Dated: _____, 20_____

_____
MARY SMITH

Sworn to before me this _____ day of _____, 20____

_____
Notary Public

EXHIBIT G

Affirmation of Attorney

STATE OF NEW YORK

SURROGATE'S COURT: WESTCHESTER COUNTY

_____ X

Probate Proceeding, Will of

EVA DOE,

Deceased.

_____X

ATTORNEY AFFIDAVIT

PURSUANT TO 22 NYCRR §207.16(e)

File No.: _____

STATE OF NEW YORK)

ss.:

COUNTY OF WESTCHESTER)

Mary Smith, being duly sworn, deposes and says, that:

A. I am an attorney-at-law duly admitted to practice in the highest courts in the State of New York. I am a Partner at the firm of Lawyers R Us with offices at 123 Main Street, White Plains, New York 10601. I make this Affidavit because I am the attorney-draftsman of the Last Will and Testament of Eva Doe and the Executor therein.

B. Eva Doe died on _____, 20___, a resident of 456 Main Street, city of White Plains, County of Westchester, and State of New York. (hereinafter, the "Decedent").

C. On the 4th day of October, 2012, the Decedent executed her Last Will and Testament, which Will is being offered for probate by your Petitioner. I drafted said Last Will and Testament of Eva Doe at her direction and in accordance with her express instructions. By the terms of said Last Will and Testament, the Decedent bequeathed her residuary estate to one (1) or more qualifying charitable organizations which preferably support Jewish causes, preferably in Israel, or the arts, preferably in Israel, as her Executor shall select.

D. The Decedent nominated me as Executor. At the time of such nomination, I advised the Decedent that by acting as such Executor, I would be entitled to commissions and also attorney's fees in connection with

the administration of her estate. The Decedent understood this and still wanted me to act as Executor. The Decedent signed an Attorney Disclosure Form conforming with the requirements of New York Surrogate's Court Procedure Act §2307-a.

E. I have been the Decedent's attorney for over fourteen (14) years and she asked me to act as Executor in order to assist in the administration of her estate. I agreed to act as Executor in order to provide her estate with legal, business and financial expertise.

F. The Decedent at the time of executing her Last Will and Testament was competent in all respects, possessed testamentary capacity and was not under any restraint; her Last Will and Testament was made at her discretion and in accordance with her express wishes; and she was explicit and insistent that she wanted me to act as Executor.

_____

MARY SMITH

Sworn to before me this
_____ day of _____, 20____

_____

Notary Public

EXHIBIT H

SURROGATES COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

_____ X

PROBATE PROCEEDING OF

Putnam Affidavit

File No.: _____

JOHN DOE, DECEASED.

_____X

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

George Doe being duly sworn deposes and says:

1. I am over the age of eighteen and reside in New York County and am fully familiar with the facts set forth herein.

2. I am an attorney admitted to the bar of the State of New York where I have practiced law since 1981, first in the area of transactional real estate and co-operative conversions and then as a commercial litigator. I submit this affidavit in support of my Petition for the issuance of Letters Testamentary to me (the "Petition") as proponent of my father, John Doe's Will dated July 30, 2014 (the "Will"). The Will is being filed with this Court simultaneously herewith. My father died on August 3, 2017.

3. I am his youngest son, the draftsman of his Will and the beneficiary of one-third (1/3) of his residuary estate and the sole devisee of the Stock and Proprietary Lease appurtenant to Apt 1A at 123 Main Street, New York, N.Y. 10024 (the "Apartment). Accordingly, I submit this affidavit in specific response to the issues raised in The Matter of Putnam, 257 N.Y. 140. 177 N.E. 399 (1931) and its progeny, and to describe the circumstances surrounding the bequest to me of his Apartment and one-third (1/3) of his residuary estate.

4. My mother, Jane Doe, died on January 8, 1992. Accordingly, as my father's only distributees and beneficiaries under his Will, my two (2) brothers, James Doe and Bob Doe, are the only persons who are adversely affected by such bequest since the balance of my father's estate is divided into equal thirds for his three (3) children. My brothers, however, were fully aware of, and are in full accord with the bequest of the Apartment to me and to my serving as Executor, and have signed Waivers and Consents on September 28, 2017.

5. My father was born in Tarnow, Poland in 1912, to Tom and Sara Doe and arrived in this country in July of 1939. He re-established his father's men's apparel business in New York, which continued successfully for seventy years. He had a rigid unwillingness to ever rely on "strangers," including for legal and tax advice born out of his war experiences. Inevitably, as the transactional attorney in the family, I had always been drawn into the legal issues arising out of my father's business. For the last ten (10) years of his life, my father made a point of leaving his home for lunch with me at the same local restaurant, every day until the day before his death.

6. My father remained in amazingly robust health until the date of his death at age 103. He insisted - even at the age of 90 - on traveling to Europe by himself, revisiting the places he had come to love with my mother and living in the Apartment entirely alone following my mother's death, refusing any help except for a weekly housekeeper. He shopped for himself, prepared his own meals and paid his bills. In 2010, at the age of 98, my father finally agreed to accept the assistance of three (3) home companions.

7. Although he had been diagnosed with heart failure, my father was largely asymptomatic. His medication consisted of beta blockers, statins and diuretics. He never took any sleep medication or psychotropic medications. My father's appetite remained remarkably robust until the day of his death. I examined my father's emailed medical report and accompanying labs of July 26, 2014 – four days before the execution of his will. The physician notes "[E]verything looks fine with respect to the labs.

8. My father maintained continuing mental acuity and read the New York Times daily and followed the stock market on television. At no point was his long-term memory impaired or his ability to recognize, acknowledge and identify his immediate and extended family members as well as neighbors, doormen and waiters who became part of his daily routine. He was fully ambulatory until the last four months of his life when he finally consented to use a wheelchair for his daily luncheon outings with me.

9. My father purchased the Apartment in 1985. In 2011 my Father wanted to transfer title of the Apartment to me as part of his estate plan. He was frustrated in this effort by the Apartment Corporation which refused to register title of the shares in the Apartment Corporation's books or issue a proprietary lease in my name since I was not going to take occupancy immediately. Similarly, a proposed transfer by my father to an inter vivos trust with a gift over of the Apartment at my Father's death to me was also rejected by the co-op board on the grounds that a trust could not take occupancy.

10. After discussing the intransigence of the co-op board in its refusal to permit transfers to trusts or inter vivos gifts to me, as a non-occupant, my father asked me to "make a will" for him so that I could live in the Apartment after he died. It was unthinkable for him that the home which he shared with my mother for 64 years would be sold to a third party. I strenuously urged my father to have another attorney prepare his Will, particularly since I was to be a beneficiary. However, he insisted on using me because I was his son.

11. The conversations with my father, me and my brothers, explosive with humor and provocation, were always focused on the matters which had always been of consistent concern to him throughout his life: finances and the health and welfare of his family and extended family. At all times my father was fully aware of the nature and extent of his assets and that I and my brothers were his natural beneficiaries. He was acutely aware that the Apartment was a valuable asset and that both my brothers owned homes which he had assisted them in

purchasing them over thirty years ago. He was aware that I, his youngest son, owned no home or apartment and that my father's own assets had diminished at the time of his retirement and even more dramatically after the 2008 collapse of the stock market. Accordingly, he had never been able to help me purchase a home or provide tuition assistance to my daughter as he had provided assistance to my brothers and their children. He frequently reminded my brothers of these facts at family gatherings.

12. Based on these discussions over a course of months, I prepared the Will and presented it to him for review several days before it was signed. When I arrived at my father's apartment on July 30, 2014, all of the witnesses were present and I noticed that my father was scrutinizing one provision on the first page of the Will repeatedly. He asked me what the term "contents" meant with reference to the gift of the Apartment to me and whether it included "the paintings" on the wall. What he was referring to was my brother, James's valuable collection of German Expressionist prints and drawings which had been on the walls of the Apartment since he had started collecting. I advised my father that the "paintings" were purchased and owned by James as reflected on his bills of sale and accordingly were not my father's property.

13. I once again summarized the Will for my father, explained the gift of the Apartment solely to me and the division of his residuary estate in equal thirds to his sons. After following my direction that he declare to the three (3) witnesses that this document was, in fact, his Will, my father signed the Will and initialed each page, asking why I had searched frantically for a pen with blue ink. I explained that it was important for me to be able to distinguish an original from copies.

14. My father, the decedent, at the time of executing his Last Will and Testament was competent in all respects, possessed testamentary capacity and was not under any restraint; his Last Will and Testament was made at his discretion and in accordance with his express wishes; and he was explicit and insistent that he wanted me to inherit the Apartment and to act as Executor.

15. For the foregoing reasons, I respectfully request that the Petition be admitted to probate and that Letters Testamentary be issued to me, George Doe, together with such other and further relief as this court should deem just and proper.

_____

MARY SMITH

Sworn to before me this
_____ day of _____, 20____

_____

Notary Public

EXHIBIT I

Client Reminder Letters

Reminder Letter #1

DATE

NAME

ADDRESS

Re: Estate Planning

Dear _____:

I hope that this letter finds you well.

On _____, I sent you drafts of your estate planning documents for your review. To date, I have not heard from you with any comments, questions or revisions. I would like to work with you to complete your documents and schedule a time to execute them. Please contact me to either schedule a meeting, by phone, virtually or in person, or provide me with your comments, questions and any requested information relating to the last drafts at your earliest convenience.

Should you decide not to proceed, please advise me as well.

With best wishes!

Very truly yours,

ATTORNEY

Reminder Letter #2

DATE

NAME

ADDRESS

Re: Estate Planning

Dear NAME:

I hope that this letter finds you both well.

As I reminded you on DATE 2, on DATE 1 I sent you drafts of your estate planning documents for your review. To date, I have not heard from you. In our email correspondence on DATE you indicated you were interested in continuing this process. Please contact me to either schedule a virtual, in person or telephone meeting, or to provide me with your comments, questions and any requested information relating to the last drafts at your earliest convenience, so we can complete your documents and schedule a time to execute them. We are happy to resend you the letter and documents.

If you are not interested in completing this process, please e-mail me at _____, or call me or my assistant, _____, at the above number.

With best wishes!.

Very truly yours,

ATTORNEY

Reminder Letter #3

DATE

NAME

ADDRESS

Re: Estate Planning

Dear NAME:

I hope that this letter finds you both well.

On Date 1, I sent you drafts of your estate planning documents for your review. To date, I have not heard from you, despite several reminders on Date 2 and Date 3. Please contact me to either schedule a meeting, or to provide me with your comments, questions and any requested information relating to the last drafts at your earliest convenience, so we can complete your documents and schedule a time to execute them.

If we have not heard from you by Date (2 weeks), we will consider this matter closed. In that instance, should you wish to reopen this matter at a future date, please contact me, or my assistant, _____, at the above number.

With best wishes!

Very truly yours,

ATTORNEY

EXHIBIT J

Letters to Power(s) of Attorney

Initial Letter

DATE

NAME

ADDRESS

Re: Name and Name – Estate Planning Documents

Dear Mr. Doe:

This firm represents Name and Name in connection with their estate planning. They each name you as successor attorney-in-fact, along with Name, to act separately under their Powers of Attorney in the event that they are unable to serve for each other and in the event that Name is unable to serve. I have enclosed a copy of their Powers of Attorney for your review. This is the instrument to manage assets and contains a broad range of powers.

The New York Statutory form provides a section entitled "Important Information for the Agent" followed by a place for the agent to sign before a notary. The Power of Attorney is not effective without the agent's signature and cannot be used by you without your notarized signature. We recognize that your signature has legal consequences for you. As we represent Name and Name, we do not represent you in this matter and cannot offer advice. You may wish to retain independent counsel before signing.

Please sign each of their five (5) separately enclosed Power of Attorney signature pages (total of 10 pages) in the presence of a notary and return them to us in the enclosed pre-paid envelope. If you choose not to sign, we would appreciate you notifying us and returning the unsigned pages to us.

Thank you for your assistance in this matter. With best wishes!

Very truly yours,

ATTORNEY

Enclosures
cc: Name and Name (w/o enclosures)

Reminder Letter #1

DATE

NAME

ADDRESS

Re: Name and Name's Estate Planning Documents

Dear _____:

I hope this letter finds you well.

As you know this firm represents your [mother and father etc.], [Jane Doe and Jack Doe], in connection with his/her/their estate planning. He/She/They each name you as successor attorney-in-fact, along with Name, to act separately under his/her/their Powers of Attorney in the event that he is/she is/they are unable to serve for each other and in the event that NAME is unable to serve. On Date, our office sent you a copy of _____ Powers of Attorney with separately enclosed pages for your signature before a notary. To date we have not yet received them. Please sign them before a notary and return them to us in the previously enclosed postage-paid envelope. If you need us to resend them to you, please let us know.

If you choose not to sign, we would appreciate you notifying us and returning the unsigned pages to us.

Thank you for your assistance in this matter.

Very truly yours,

ATTORNEY

cc: Clients

Reminder Letter #2

DATE

NAME

ADDRESS

Re: Name and Name's Estate Planning Documents

Dear _____:

I hope this letter finds you well.

As you know, this firm represents your sister and brother-in-law, Name and Name, in connection with their estate planning. They each named you, along with Steven's sister, Name, as successor attorney(s)-in-fact, acting separately, under each of their Powers of Attorney in the event that they are unable to serve for each other. On Date, our office sent you a copy of their Powers of Attorney, with separately enclosed pages for your signature before a notary and a reminder on Date. To date we have not yet received them.

For your convenience, I have enclosed another copy of each of their Powers of Attorney and a set of five (5) signature pages for each of them. Please sign each of their five (5) signature pages in the presence of a Notary and forward them to our office in the enclosed prepaid envelope.

If you choose not to sign, we would appreciate you notifying us and returning the unsigned pages.

Thank you for your assistance in this matter.

Very truly yours,

ATTORNEY

Enclosures

cc: Client

Reminder Letter #3

DATE

NAME

ADDRESS

Re: Name and Name's Estate Planning Documents

Dear _____:

As you know, this firm represents your _____ and _____, Name and Name, in connection with their estate planning. They each name you as successor attorney-in-fact, along with your _____, Name and Name, to act separately under their Powers of Attorney in the event that they are unable to serve for each other. On Date and again on Date 2 our office sent you a copy of their Powers of Attorney with separately enclosed pages for your signature before a notary. We also sent you a reminder on Date 1. To date we have not yet received them. Please sign them before a notary and return them to us in the previously enclosed postage-paid envelope. If you need us to resend them to you, please let us know.

If we have not heard from you by Date (2 weeks), we will consider this matter closed and will inform Name that you do not wish to sign.

Thank you for your assistance in this matter.

Very truly yours,

ATTORNEY

cc: Client (w/o encls.)

Small Ways to Improve Your Life

By Jehan Crump-Gibson

Digitize The Intake Process

- Adopt online form tools (e.g., Clio Grow, MyCase, Lawmatics Jotform,) that are encrypted and compliant with privacy laws (HIPAA, etc.). Some of these or comprehensive case management systems, others are online tools that can be used for intake purposes only. In any case, ensure all client data is stored on secure, U.S.-based servers with access control. Make sure there are confidentiality statements on the intake forms that you use.
    - Use these tools to create questionnaires/ intake forms designed to extract the information you need to create a plan that fits your client's needs. A comprehensive case management system is recommended, as it can serve as the one-stop-shop for housing the client's information securely, creating engagement letters, billing, etc.
- Digitizing and streamlining this process can make your life much easier. You are able to gather the necessary information to make an informed recommendation on appropriate plan documents and retrieve that information in a succinct manner for drafting. You don't have to worry about scant pieces of paper and arranging for filing and storage of hard copies.
- For older clients or those that are not tech savvy, a completely digital process for intake may not be feasible. A succinct PDF or guided interviews may be more appropriate. The latter may be useful in supplementing the intake process. The reality is that some clients are simply better at verbal communication than "written homework". Offer brief onboarding calls to walk clients through digital intake if needed.
- Even if you do allow intake forms to be completed in hard copy form, they can still be uploaded to a comprehensive case management system for efficiency purposes.

Pre-Populate Engagement Letters

- You can use structured data from your intake forms to auto-fill key fields in your engagement letter. For example: client name and contact info. A field in your form labeled "**Client First Name**" automatically populates all instances of {Client_First_Name} in your letter template. There are features in Microsoft Word (Mail Merge), Clio Grow and Mycase that allow for this type of integration/automation.
- You can automate Fee and Scope Sections as well. Example: If "Trust-based plan" —> insert trust fee paragraph; If "Will-only plan" —>insert will-based scope language.
- Make use of your case management system for client execution of engagement letters. You can also use Docusign or Adobe sign if you do not maintain a system with this feature.
- Make sure to add human touches to your engagement letter! It only takes one sentence. This maintains efficiency but doesn't make the process seem too impersonal to the client. You don't want them to feel like they are just another file!

Pro Tip: Automate engagement letters for your most common client, e.g. single individuals with adult children; married couple with no business interests, etc.

Prepare Standard Templates to Work From

First, always ensure you are preparing state-specific documents. For each category of documents, prepare for your most typical client(s) e.g. high-net worth individuals, blended families, single individuals; individuals with closely-held business interests. Here are standard templates you should have prepared:

- Powers of Attorney (Effective on Execution v. Effective on Incapacity)
- Patient Advocate Designation (With or/without living will provisions and HIPAA authorizations- the latter can be stand-alone documents)
- Joint Revocable Trust
- Revocable Trust for Individuals
- Wills or Pourover Will
- Funeral Advocate Designation (as applicable by State)

Maintain an optional clause bank for documents governing asset distribution: (Pets, Firearms, Charitable Bequests, Age Withdrawal Provisions, Alternate Distribution provisions, etc.)

Checklists from intake to Signing

Checklists allow for efficiency and make sure the attorney (and staff) don't miss any steps:

Engagement Checklist

- ☐ Send/collect client intake questionnaire
- ☐ Complete conflict check, note to file
- ☐ Schedule initial consultation
- ☐ Confirm fee quote and send engagement letter
- ☐ Verify retainer received
- ☐ Create client folder and data entry in case management system
- ☐ Create plan summary

Client Review Checklist

- ☐ Send (reviewed) drafts to client via secure portal
- ☐ Provide cover letter or summary of major provisions
- ☐ Schedule review meeting or call
- ☐ Record client changes and confirm in writing
- ☐ Update internal plan summary for signature package

Signing/ Execution Checklist

- ☐ Confirm signing date and participants (clients, witnesses, notary)
- ☐ Proofread and prepare final versions for execution (no "draft" watermark)
- ☐ Review signature and notarization requirements for each document
- ☐ Verify all pages are initialed or numbered properly
- ☐ Ensure witnesses sign in proper places and all pages are complete
- ☐ Scan and save executed documents immediately after signing

Post Signing & Closing Checklist

- ☐ Provide client copies (bound originals and/ or digital)
- ☐ Provide funding letter/ instructions as applicable
- ☐ Send thank-you email and request feedback/rating
- ☐ Update matter status to "Closed" in your system
- ☐ Set reminder for client follow-up (e.g., annually, or upon life changes)
- ☐ Update estate plan log for future reference

My Go-to Resources

By Christopher Cauble

1. Other attorneys/colleagues
2. Forms and form banks
3. The expertise of staff
4. Artificial intelligence
5. Bar "Listserves"" where lawyers can discuss questions and get answers
6. Seminars
7. CPAs and other tax professionals
8. Wealth planners
9. Internet resources
10. My own experience with different scenarios

My Top 10 Research and Practice Resources

By Chase Beguin

- CLIO Business Articles
- LexisNexus Business
- Specialist Law Firm Articles
- Legislative History Notes on Intent
- Uniform Estate Planning Tools
- Uniform Probate Administration
- Business Wealth Management Services
- Public Meetings on Relevant Legal Topics
- American Bar Association's Articles on Ethics
- WestLaw Articles

Deliberate Wellness—The Resilient Lawyer

By Mary Vandenack

Private Wealth Attorney Offering AI Enhanced Legal Experience, Advisor, Investor, Professional Speaker and Writer. I help good people do great things and help them find their superpowers.

In late February 2020, I enjoyed a fantastic latte at Goddess and the Baker in Chicago, Illinois. I was in Chicago to speak at ABA Women of Legal Tech and teach yoga at ABA Techshow. After my Women of Legal Tech presentation, I met my law clerk for the latte. Ten days later, I was home in Omaha canceling trips because of the outbreak of the COVID pandemic. Days after that, I took my law office mostly remote and worked endless hours to help people navigate the COVID-19 crisis. During the first week of the pandemic, almost every call brought me near to tears. The first week was lay-offs, and almost every client I had ever worked with asked immediately for updated health care powers of attorney and wills. The second week was business after business shutting down or figuring out how to function as an essential business amid a pandemic.

The practice of law is challenging in times that don't include a pandemic. Lawyers often arrive at the office to an inbox full of e-mail, a voicemail full of messages, and an inbox full of urgent items to address. A lawyer's day is filled with meetings, deadlines, demands, and urgency. Amidst all that, a lawyer must function at a very high level in terms of work product and communication skills. When an already-challenging professional lifestyle collides with a pandemic that results in a sudden and unplanned transition to remote work, zoom meetings, drive-by document signings, and clients in a state of panic, you have a recipe for testing the resilience of even the most resilient lawyer.

I have dedicated a lifetime to fitness, meditation, mindfulness, yoga, coaching, and healthy living. My long-time mantra has been "never compromise a workout or healthy activity for work." I found my resilience tested at an all-new level during the pandemic and since. In the first few weeks of the pandemic, despite my long-time mantra, I found myself struggling to find the time to engage in my long-time practices. My phone started to ring in the wee hours and continued all day, every day. I wanted to be able to take care of everyone who called. There was so much suffering and so much concern. I asked all that I could of myself and those who worked with me to support clients trying to find their way through the pandemic. On top of the legal demands, my home life faced challenges. I focused my energy on the pandemic, and I was susceptible to personal attacks.

By the end of week four of the pandemic, I was tired, cranky, and irritable. My shoulders hurt. My neck hurt. And I was becoming short with those who were trying to support me. I recall being on the phone one day with someone I value and catching myself noticeably impatient. I recognized that the pandemic stress was getting to me.

For me, years of work on resilience paid off. I was able to see what was going on. I made a conscious decision to stop, breathe, and find a way to engage in the practices that had created resilience in my life.

While the pandemic brought the need for resilience front and center, the fact is that being a lawyer, a partner, a parent, a friend, a family member, and a member of the community requires resilience even in times that don't involve a pandemic. This article intends to provide a working definition of resilience and some practices that you can engage in to improve resilience.

What is Resilience?

Resilience involves the ability to overcome negative emotional experiences and difficult life experiences by adapting to the changing demands of stressful experiences. A resilient person can meet life's challenges regardless of significant demands made. A resilient person bounces back from adversity. A resilient person also grows from challenges.

The good news is that anyone can develop resilience.

Resilient People Have Strong Relationships

Nurture relationships. Supportive and positive relationships matter, especially when you are going through a difficult time. Those who have resilience have invested in building relationships with those capable of supporting them through life challenges. When life is challenging, it is imperative to surround yourself with those who love you as you are at that moment. It is really easy to let the legal profession's demands get in the way of building relationships. Make time for building relationships with people who love you exactly as you are. There is little in life as valuable as someone who sees you in your darkest hour and says, "I love you. You will find your way."

Gratitude Practice

Engage in a regular gratitude practice. One of my favorite approaches is from positive psychology. The approach involves identifying, each day, three things that went well and expressing gratitude for that which went well. In addition to identifying what went well, it is essential to recognize why something went well. The reason something went well may be simple. For example, perhaps you had a client that called you in immediate need of a health care power of attorney. You were able to get one executed by the end of the day because you showed up at work, took the phone call, and coordinated with a

paralegal. Another example of something that went well can be as simple as a positive interaction with someone at work. You may have had a positive interaction because you recognized that a colleague was having work-related challenges, and you took the time to encourage them.

Self-Awareness

Self-awareness is about taking a breath and noticing what is going on internally. Stop, breathe, notice your thoughts. Are your thoughts helping you with the situation, or are you giving in to thought traps such as catastrophizing? Can you identify how you are feeling? Can you identify your behaviors and reactions, what is helping you, and what is harming you? Are we attuned to the connection between emotions and physiology? Self-awareness also involves being aware of one's strengths and achieving better outcomes using those strengths.

One strategy to develop awareness is meditation. Meditation doesn't require that you sit on a mat and say OM for hours but requires taking a deep breath, noticing the breath, and staying in the present moment. I try to practice mindfulness throughout the day. If I am in a long line to check out at the grocery store, I use that time to take some deep breaths and notice what is going on in my mind and body.

Engage in self-evaluation. Work with a coach or professional who is a good fit for you and who will provide you honest and direct feedback. Seek mentors who have focused on health and well-being despite choosing a challenging profession.

Self-Regulation

Self-regulation is different from controlling emotions. When people overly control emotions, they essentially pile them up in a closet. The closet gets too full one day, and everything comes tumbling out. Self-regulation is about realizing that your fight-or-flight response is engaged but that there isn't really a battle. Resilience is about recognizing that you need to down-regulate all that fight or flight and calm the waves.

By way of example, you might have a conflict with your life partner. Perhaps she has a different view than you do about the actions of someone you consider a friend. The self-regulated person will see that the difference of opinion is simply a matter of differing perspectives. He will find calm, keep lines of communication open, and act following his values. A person who is not self-regulated may instead get himself worked up, attack his partner with unrelated issues, and let anger take control. The absence of self-regulation looks like a childish tantrum, but the person engaged in it may fail to see it.

Effective self-regulation strategies include mindfulness, cognitive reappraisal, and ensuring one's actions align with one's values. To practice self-regulation, you must become aware of issues that trigger you and develop strategies to avoid triggers or manage reactions effectively. In every situation, you have the choice to approach, avoid, or attack. Approach is the skill of the resilient self-regulated individual.

Mental Agility

Mental agility is the ability to look at things from multiple perspectives. As lawyers, seeing differing views is part of what we do. While we may find it easy to do when we are thinking about a client's problem, we may not always find it as easy when dealing with a situation involving our own emotions. At work, we are trying to manage multiple challenges and stay calm. It can be challenging to take the time to listen to an associate about a process the associate sees differently. Still, it is essential to engage in problem-solving in work and personal relationships as well as in client issues.

Optimism

Optimism is a critical aspect of resilience. If you are optimistic, you are more likely to persist in finding solutions to challenges. Part of optimism involves identifying what you can control in a situation and what you cannot. A resilient person thinks about stressors as challenges rather than threats.

Optimism can be developed by becoming aware of mind traps and finding ways to counter them. Perhaps you catastrophize things. You receive a call from a client who has decided to use a different lawyer. In your mind, this becomes a catastrophe: "I will never be able to satisfy any client, and my career and ability to originate is over...." You can challenge this by becoming aware of the thought process and consciously shifting the thoughts. "This client was not a good fit for my practice area or me, and the fact that the client chose to move on provides me the ability to focus more on clients who are a good fit for me. I have several other clients who have stayed with me and value my work."

Find Purpose

Sometimes we get lost in figuring out the meaning of life and our purpose in the process. We may look for some dramatic purpose. Resilient people find purpose in small ways every day. Perhaps an essential purpose in your day is simply taking the time to have coffee with your paralegal and provide him with some supportive comments about how he is making a difference for clients. Making a difference in a small way for one person a day can change many lives.

Practice

I once attended a driver training course at a racetrack. The instructor suggested practicing what you would do in an emergency. He suggested that when you are driving daily, you should think about how you would respond if the car in the left lane suddenly swerved in front of you. His thought was that you could imagine how you would respond and build the skills. The same is true for difficult life experiences. You can practice making positive comments on a day when you are in a bad mood. What will you say to a client who just lost her spouse to COVID? What will you say to your life partner when he or she tells you how upset he or she is about something that happened that day?

Take Amazing Care of Yourself

A healthy person is likely to be more resilient. It is easy to get caught up in the stress of a legal career, busy lives, taking care of a parent, or challenging relationships. When a lot is going on, it can be challenging to take care of yourself as you should. When you are dealing with many life stressors, it is more important, not less, to take care of yourself no matter what. Schedule time in your calendar to work out, make time for food preparation, connect. I was taught to schedule my wellness time early in my career. I have done that for my entire career. Doing so matters. As much as I value my work, I value my health, wellness, and resilience first. Work is the rubber ball of life. If a rubber ball is dropped, it bounces back. Health and relationships are crystal balls that break when dropped.

Practice Insights and Outlook

A Shift From Traditional Drafting to Strategic, International, Multi-Disciplinary Problem-Solving

By Andrés J. Hernández Lossada

How My Trusts and Estate Practice Has Changed in the Last 2–3 Years

The last five years have brought a dramatic evolution in international estate and tax planning. When I look back at my client work, the shift is clear, conversations that once focused on straightforward trust formation or probate administration now invariably involve multi-jurisdictional considerations, compliance with complex reporting regimes, and family governance.

I have seen an increase when working with families in multiple jurisdictions, parents in Latin America or Europe, children studying or residing in the U.S., assets spread across offshore entities, Delaware or Florida LLCs, and investments in real estate, funds, and private companies. This global puzzle requires strategies that go beyond domestic estate planning: pre-immigration trusts, cross-border holding structures, and careful consideration of U.S. estate tax exposure for non-U.S. persons.

Additionally, regulatory and compliance pressures have reshaped the practice. FIRPTA, FATCA, CRS, and the growing scrutiny of offshore arrangements mean that planning today must anticipate transparency. Structuring is no longer about hiding assets but about achieving efficiency, flexibility, and compliance. A typical project now involves aligning trust deeds, corporate reorganizations, and U.S. tax elections (such as check-the-box or IRC §351 non-recognition) with foreign tax regimes and reporting obligations. This adds a layer of coordination with foreign counsel, CPAs, trustees, and banks that was far less pronounced three years ago.

The role of the estate planner has expanded. Clients expect not only advice on relevant structures and to draft documents but also to interact and coordinate multi-disciplinary teams, with local counsel, investment advisors, private bankers, accountants, notaries abroad (when dealing with civil law jurisdictions), and even family governance consultants. Estate planning has become family

office advisory, where succession, control, and wealth preservation are just as important as tax minimization.

Finally, one of the most striking trends has been the growing comfort of Latin American families with using U.S. trusts. In the past, many clients from civil law jurisdictions favored structures such as private interest foundations in Panama or Liechtenstein, or local fideicomisos. While familiar, those vehicles often proved bureaucratic, rigid, and subject to legal systems exposed to political risk. In contrast, U.S. trusts offer families greater predictability, stronger creditor protection, and a well-developed body of jurisprudence. They also align naturally with the needs of next-generation beneficiaries who are frequently U.S. residents or citizens. Increasingly, families view the U.S. trust as a modern, reliable, and globally recognized tool for long-term stability.

What Are Three Short-Term Predictions for the Practice?

Increased Demand for Cross-Border Structures
As more non-U.S. families seek to invest in the U.S., and more U.S. future heirs will inherit foreign structures, cross-border estate planning will become the norm rather than the exception. We will see continued reliance on Florida revocable trusts, foreign blockers, and hybrid structures (e.g., U.S. trusts classified as foreign for tax purposes) to balance estate tax exposure and income tax efficiency.

Rise of Institutional Trustees and Professional Administration
Families are increasingly wary of leaving large, complex structures in the hands of a single individual trustee. Institutional trustees will be paramount, not only to make sure structures are compliant in a world with increased transparency and reporting requirements, but also for credibility and for succession continuity. Alongside this, expect to see more customized trust provisions, protector committees, delegation of financial advisor roles, more in tone with family dynamics.

Growing Integration of Technology and Transparency
Digital onboarding, KYC/AML procedures, and global reporting standards will accelerate. Clients are already asking about secure digital vaults for estate documents, blockchain-based asset registers, and AI-assisted compliance checks. Within the next few years, international estate planning will be less about paper documents and more about transparent, trackable systems that integrate legal, financial, and tax data in real time.

Overall, the practice of trusts and estates is shifting from traditional drafting toward strategic, international, and multidisciplinary problem-solving. Families no longer come with a single question about a will; they come with an ecosystem of entities, jurisdictions, and family members to reconcile. The next few years will reward practitioners who can combine technical expertise in U.S. tax and estate law with the ability to anticipate global trends, coordinate across borders, and provide clients with not just documents, but durable solutions for generations.

With this final comment it is also important to align clients regarding banking solutions. Families need structures that banks will accept for account opening and ongoing compliance. Many offshore entities, once standard, now trigger delays or outright rejections from financial institutions. By contrast, U.S. trusts, particularly when combined with transparent LLC or corporate structures, are widely recognized by private banks and investment platforms. International estate planning is therefore not only designing the legal structure but ensuring that it is acceptable or in-line with banking standards.

Growing Practice Amid Boomer "Avalanche"

By Don D. Ford III

I am the Managing Partner of Ford + Bergner LLP, which is a boutique trusts and estates law firm in Texas with offices in Houston, Dallas, and Austin. Founded in 1999, our firm has nearly 15 lawyers, who handle every aspect of the trusts and estates practice, from planning to administration to complex litigation involving large estates. Among our offices, we now have 6 attorneys who each handle a substantial amount of estate planning work for our clients.

Since the pandemic started in 2020, our firm's Estate Planning practice has grown significantly. In talking with many of my colleagues at other firms in Texas, everyone seems to be overloaded with a significant amount of work. During this time in Texas, we have seen many lawyers leave the practice (by death and retirement), but we have not seen a corresponding number of new lawyers joining the practice. I am repeatedly stunned at the number of lawyers handling significant amounts of trusts and estates work who are over the age of 70. There are not nearly as many attorneys under the age of 40 who also do this work.

All of my colleagues, both within my own firm and at competing firms, complain repeatedly about the difficulty in hiring attorneys who know anything about trusts and estates (or who want to work hard enough to be good at it!). At the same time, the baby boomer "avalanche" is starting to hit. By this, I mean that a massive amount of wealth is set to change hands over the next 15-20 years as baby boomers die, creating an avalanche of work in the trusts and estate market. The market feels as though this process has already started.

Over the next few years, I predict that we will feel the shortage in good, quality lawyers more and more. This will create a tougher pinch on those who are doing this work because they do not have enough hours in the day to accommodate all of the work that they are being asked to complete. This tension will likely be resolved, at least in part, by lawyers starting to employ Artificial Intelligence into their practices. Many lawyers are fearful that AI technologies will put them out of business because AI will do all of the work, making them obsolete. Instead, I predict that the smartest, most entrepreneurial attorneys will find ways to smartly adapt AI technologies to assist them in getting the work done more efficiently so that they can achieve more results in a shorter period of time.

"Over the next few years, I predict that we will feel the shortage in good, quality lawyers more and more. This will create a tougher pinch on those who are doing this work because they do not have enough hours in the day to accommodate all of the work that they are being asked to complete. This tension will likely be resolved, at least in part, by lawyers starting to employ Artificial Intelligence into their practices."

While I am excited at the ability to use technology to better meet client needs and also ease the stress on our lawyers, I am very concerned about the growing trend of lawyers who disseminate sloppy work product. Greater technology affords us the ability to do a higher quality of work, but it also affords the opportunity for work to be sloppier. Quality estate planners should remain vigilant to maintain high standards of work, rather than accepting sloppy, AI-driven work product.

The old adage, "the only two things you can count on in life are death and taxes" has always sustained the estate planning industry, and it will continue to do so for many decades to come. We must continually adapt to meet the challenges of the changing market!

Changing Assets and Family Structures, Greater Consistency Across State Lines

By Gretchen Burgess

I have been practicing in the area of estate planning for the better part of 20 years and have noticed some distinct changes of recent, namely in the areas of digital assets, adoption of uniform acts, changes in family structures, and more purposeful reviews by clients. It is these changes that have prompted predictions for estate planning in the coming years.

Modern estate planning is being reshaped by **generational and lifestyle changes** that bring new complexities. Younger clients, particularly Millennials and Gen Z, are more likely to own digital assets like cryptocurrency and utilize online tools. In recent years, digital assets have become a critical component of estate planning, driven by the rise of cryptocurrencies, NFTs, online businesses, and valuable digital assets. In addition to financial holdings, digital assets include sentimental and reputational content like cloud storage, social media, and email accounts. Legal structures like the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) have arisen to guide access for fiduciaries, though there are still challenges, including those of consent and terms of service. Estate plans now increasingly include explicit instructions for digital asset management, such as naming digital executors and securing access credentials (i.e. private keys, seed phrases, and passwords). However, difficulties remain, especially around data privacy. As digital wealth continues to grow, estate planning practitioners should prepare for evolution in this area.

Additionally, many states have now adopted **Uniform Law Commission (ULC) acts**, replacing inconsistent (and outdated) state-specific statutes. Notable examples include the Uniform Fiduciary Income and Principal Act (UFIPA), which modernizes how trusts distinguish between income and principal; the Uniform Electronic Wills Act (UEWA), allowing for, in some cases, both electronic wills and remote execution of wills; and the Uniform Real Property Transfer on Death Act (URPTODA), enabling real estate to pass outside of probate using TOD deeds. These laws promote greater consistency across state lines, making estate and trust administration more uniform, especially for clients with ties to multiple jurisdictions. These also support planning tools, like digital documents and remote signings. However, adoption of these acts is often not identical, as states frequently add their own modifications.

Further, **family structures have become increasingly nontraditional**, with more blended families,

cohabitation, and same-sex marriages, and with this becomes more common relocation across borders. These changes demand more thoughtfulness when preparing legal documents, especially regarding guardianship, stepchildren, and inheritance rights. Geographic mobility and remote work also means clients are more likely to hold assets in multiple jurisdictions, requiring estate planners to navigate state law specifics. As people live longer, often with extended periods of incapacity, estate plans must also adapt. Overall, estate planning attorneys must provide more flexible and personalized solutions to meet the needs of our changing client base.

The last noticeable change in recent years of my estate planning practice is **how often and intentionally estate plans are being reviewed**. This is due to increasingly rapid changes in tax laws, an increase in commonality of digital assets, and changed personal circumstances. Shifting estate tax thresholds, asset growth, and evolving rules around digital property (like cryptocurrency and online accounts) all require more attention now. In addition, life events such as relocation, birth, death, marriage, or divorce can make existing documents ineffective. Estate planners recommend reviews every 5-10 years, or after major "trigger events," but these changes have required reviews to occur in shorter periods.

The above shifts have yielded **my three predictions** for the evolution of estate planning in the next 2-3 years, and these are in the areas of digital assets, remote execution, and family structure changes.

Digital Assets: As digital assets like cryptocurrency, social media accounts, cloud storage, and online financial tools continue to become a central part of clients' lives, estate planning will rapidly evolve in an effort to address them. Many states have adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which allows fiduciaries to access digital assets with proper authorization. In the next few years, we can expect digital assets to become an integral part of estate planning. This means that estate planning documents will increasingly include provisions for digital access and that client questionnaires will ask about digital assets.

Remote Execution: Remote execution of estate planning documents has become gradually more common since the Covid pandemic, with many states enacting or expanding remote notarization laws like the Uniform Electronic Wills Act (UEWA). Within the next few years, we expect remote execution to become a standard option, particularly for clients in different jurisdictions. Firms are embracing hybrid signing models, digital communication, and platforms that promote remote witnessing and electronic signatures. As a result, clients can expect greater convenience and flexibility.

Changes in Family Structure: As family structures become more diverse, including remarriages, stepchildren, unmarried partners, LGBTQ+ relationships, adoption, surrogacy, and geographically distanced households, estate planning must evolve to reflect these changes. Generic terms like "spouse" or "children" are no longer sufficient; modern plans require specific naming of individuals and thoughtful language to reflect the unique dynamics. Over the next few years, estate planners will begin to treat blended and non-traditional families as the norm, not the exception. This shift will drive more tailored documents, deeper client conversations about family roles and values, and strategic use of tools like QTIP trusts, lifetime gifting, and marital property agreements. For LGBTQ+ clients, careful attention to legal parentage and guardianship is critical. Estate planning must now account not only for who inherits, but how relationships, roles, and expectations are defined.

Changing Client Views, Growing Need for Medicaid

By James Snow

How has your trusts and estate practice changed in the last 2-3 years?

By far, the biggest changes that I have noticed come from certain things about our society over which we, as lawyers, have little control but for which we need to be prepared and adapt. What am I talking about?

First, **the public now has greater access to information than ever before**. In addition, there are numerous resources competing against the services that we offer such as online legal documentation preparation. Finally, a number of blogs, pamphlets and social media platforms crow about "smart" tactics, tricks and tips the presenters of these information sources attest they have learned in dealing with issues such as estate planning, long-term care planning, estate settlement and attorneys. The client tries to digest all of this information and ends up being more confused rather than better informed.

Second, **the public is more skeptical and distrustful than ever**. You can witness this through the politics and news of our country. You will also find people coming to your office who want to vent their frustrations and see you as part of the problem, not the solution. Therefore, how do you sort out getting control of the situation of trying to advise people of the things that you think are in their best interest while other voices in their head, including their own, are undermining your efforts?

I have found that the most effective techniques involve being a good and patient listener and learning to intersperse during the exchange some tales of caution and some tales of humor. Many estate planning attorneys manifest a somber and sometimes condescending manner. Instead, I have noticed that in the last 2 to 3 years people respond better when you are talking with them rather than at them, and when you are building rapport with them by parables or illustrations.

Example: I sometimes start off after getting some basic factual information from the clients with a little story about why people don't do their estate planning. It may be, I say, like in the case of my own father, who thought he was never going to die- "that's something that happens to other people, not to me." It may be that they are like many of the people that I run into around town who tell me that they're going to come and see me, but never do, and the next thing that I hear about them is when I read their obituary. I call them the mañana (Spanish for "tomorrow") people, and the clients get the gentle message. Or, they may have unfinished business in their life such as a child who is in a bad marriage or has never matured or grandchild in a special-needs situation. By opening up the conversation in this fashion, I can get these individuals to open up about themselves, and I can build a trust relationship in which they see me as a counselor and not merely as a scrivener. Thus, the biggest change that I have noticed is that the clients take a lot more handholding and the lawyer has to be a lot more affable and empathetic than ever before in the nearly 50 years that I have practiced law.

What are three short-term predictions for the practice?

First, we are going to see a lot fewer "meat and 3" clients and a lot **more clients wanting trusts including revocable living trusts, irrevocable trusts, pet trusts and special needs trusts.** What do I mean by "meat and 3"? In the restaurant business the type of family-style restaurant where my parents liked to go (and even I liked to go at one time) involved a protein entrée with 3 vegetables. In the estate planning business, this typically means that the clients want a basic will, durable financial power of attorney, health care power of attorney and either living will or advanced directive.

A number of clients will tell you that they can get the basic documents off of the internet and feel these documents are just fine. In fact, many of them come into the office having already downloaded and perhaps even executed these documents. I typically ask that I may review those documents for the purpose of seeing whether they truly conform to the law of the domicile state or not. If they do not, I have to be gentle in my approach to overcome their perception that I'm just a greedy lawyer.

The second phenomenon we will see is **the increase in the number of people who seek Medicaid planning.** The costs associated with long-term care in an institutional setting are astronomical. It is often the son or daughter of the elderly parent who is motivated to find an attorney who does this type of work because the parent may believe they are simply going to die at home one day or their children or going to take them into their homes and look after them to the end. Both of these beliefs are often simply wishful thinking, but you have to remember as an attorney that it is the elderly parent who is the client in this situation, not the son or daughter, and you have to be mindful of their fear that their kids just want to "stick them some place to die." If you are going to do this work you need to know how to handle the client and thoroughly know the Medicaid regulations including being prepared to defend your plan when the county attorney advises the Department of Social Services against approving Medicaid for that elderly client.

The third phenomenon will be **the entry of AI into the preparation and delivery of our work product.** I sometimes request an AI application to weigh in on an answer to a question that a client has put forth such as, "May you transfer an LLC into an irrevocable trust and what are the advantages and disadvantages of doing so?" While many of us may have learned the answer to this question at some point in our education or career, we nevertheless will always want update our learning and research by checking the latest updates through the generally accepted legal research engines. Thus, the good and prudent lawyer will spend perhaps an hour or two making sure he or she has the latest knowledge to advise the client. But what if an AI resource could accomplish this research and draft a perfectly worded response to the client in less than 1 minute? Further, do we trust the AI resource or are we still going to the research for ourselves? Some of the answers to these questions will lie in what will become acceptable standards of practice in the future and what our ethical duties may be to our client.

A Few Practice Tips for a Wonderfully Unpredictable Practice

By Carla S. Sigler

Like most lawyers, I cannot claim to have a crystal ball into which I can see the future of the legal practice, including with regard to the area of estate planning and succession work. One of the main reasons the legal practice is so interesting for me, even after over twenty years, is its very unpredictability. There is always the promise of the unexpected showing up on your desk or walking through your office door.

Like any true profession that combines the requirement of essential "book" knowledge with the hard-won know-how that only actual experience brings, the law will remain a constant challenge for most of us. Practiced, yet never perfected, regardless of how many years we do it.

However, this is what I know for certain: as larger sections of our population age (as we all will continue to do absent some miraculous discovery), one certainty is that estate planning attorneys are needed today more and more. After all, everyone faces death, and nearly all of us will have the post-mortem need for someone else to settle their affairs.

Moreover, as we age, due to loss of legal and mental competency and/or physical infirmity, many of us will face the prospect of needing someone to help us make our decisions. Some of us will even need someone to outright make decisions on our behalf or to physically care for us.

With our increased life expectancy, we may be living longer, but we are not necessarily living better. The longer we live, the more likely we are to need to have and use something as seemingly simple[5] as a Power of Attorney. Powers of Attorney have long been an acknowledged need by individuals "of an certain age."

However, in my last few years of practice I have seen even young people recognize that Power of Attorney documents are unquestionably a good idea. This could be because they are parents to young children, or because they are college students who want to help ensure that their parents can get needed school class schedule or academic information about them from whatever university they attend, or even to learn about a medical emergency that occurs when they are enrolled.

Practice tip: Without the clear ability to obtain information about a student enrolled in university, both parents and students can discover that enactment of federal and state laws do not permit campuses to give parents even urgently needed medical information. (**Practice tip**: when doing a Power of Attorney for a university or college student, ensure that you are also completing whatever special forms the school requires, and that the document is filed wherever it is needed at the school).

In the last two to three years, not only have I seen (especially post-COVID 19) more people of every age realize how important legal documents like Powers of Attorney are, but I have also seen that Powers of Attorney need to cover more information and topics than ever, like digital asset matters, burial directives and desires, and specialized business-operation matters.

Practice tip: It is critical that whether we draft

[5] A "simple" document can be anything but, as a comprehensive, well-drafted Power of Attorney might encompass many potential issues and needs of the individual, and cover business, financial, legal, and even burial directive matters.

multiple Powers of Attorney documents addressing different powers or choose to place comprehensive powers in one document, we ensure that we thoroughly interview our clients to ensure that any specialized items they need addressed are covered.

An unusual issue I have dealt with in my own practice with greater frequency over the last few years involves contentious burial and funeral disputes. I do not believe that this issue is going anywhere.

As someone who also practices family law, I believe that the number of "second" families and re-marriages is something that contributes to conflicting desires and a failure to communicate about a loved one's own funeral and burial desires. Simply put, I believe the better practice is to put it into clearly worded legal documents.

Practice tip: I now draft burial directives in the forms of Powers of Attorney for my clients, and I also include burial plots, funeral plans, and similar matters in my Last Wills and Testaments.

In the last few years, I also have seen an increasing number of cases where persons genuinely have difficulty finding people to name to place it charge of their affairs, either in their Power of Attorney documents or their Last Will and Testaments. This may be because they do not have children, because their children have pre-deceased them, or even because they just do not have many family members or friends whom they can trust to put in those positions.

Practice tip: make sure that you try to put multiple alternates for every position of authority in your legal documents, and encourage clients to carefully consider those choices. Advise them to never put someone in charge of their affairs unless they can be trusted to actually carry out the client's desires rather than their own.

Finally, one of the changes in my recent practice experience is the sheer increase in the number of cases involving elderly abuse, including financial fraud. There is no one easy answer to this plague.

While advanced age certainly does not on its own render one incompetent to understand and execute legal documents, if you do not ensure competency to execute legal documents for your elderly clients who arrive at your law firm, especially those there with the "assistance" of another, then you may be part of the problem.

Practice tip: Every lawyer should ensure that he or she is not only well-versed in the prerequisites for legal competency, but also that he or she assesses it for every client that walks through the door—especially if the client is of an advanced age and a well-meaning relative insists that the client "needs" legal paperwork done right away. If something seems suspicious, there is likely reason to be wary.

I do estate planning and succession work because of my own personal, family experiences of what can happen when someone dies without estate planning, when no one knows what their last wishes would have been. Without specific directives via advance directives and Last Wills and Testaments, none of us can say that we really know what another truly wants or wanted.

We should never take for granted the importance of what we do, which offers protection and peace of mind for our clients and their families. That means we should constantly strive to ensure we are the best lawyers we can be.

Final practice tip: Legal CLE resources like those of NBI are invaluable—never stop learning as much as you can in your practice areas.

Remote Practice Spurring Growth, DIY Planning Driving Litigation

By Christopher Cauble

How has my practice changed in the last 2-5 years?

1. **Far more remote work**
   In the past 5 years, my firm has expanded to the point that I do work statewide. I can meet with clients in different geographical parts of the state and appear in court all over the state. 96% of my hearings are conducted remotely. Also, I have increased my staff and opened 2 additional offices in Oregon. This has allowed me to hire more attorneys.

2. **Far higher client demands**
   Since the COVID outbreak, it seems that client demands are far higher. That may be because of the stress of it or because of the increase in mobile communications. The fact that clients have more access to their attorney directly has increased demands on staff and lawyer time. However, it has also made things more profitable to attorneys who have been able to adjust.

3. **Increased estate litigation**
   This is most likely been a result of demographics. As more people retire and start to die, far more poorly constructed or amended estate plans are becoming litigated. This may be because of culture but I find that they are more a cause of poor estate planning or, worse, no estate planning at all. I have seen estate litigation increase by 150-200% in my practice.

Short-term predictions:

1. **Increases in Litigation**
   Because of artificial intelligence and increased internet resources, people are going to try to "save money" by doing their own planning. This will trigger more litigation or estate disputes that will require courts to resolve.

2. **Massive Wealth Transfers**
   Given the demographics of the nation, we are going to see increasingly large transfers of wealth. This will require more work in the estate and wealth arena as not only do we have to plan for people's estate plans, we have to help the generations who will be receiving this wealth It will also have a massive impact on the nation's wealth in general as younger people may have different values than their parents and, therefore, invest differently.

3. **Reliance on Artificial Intelligence**
   Artificial intelligence will bring about the same type of change that online legal research and the internet had in the 80's and 90's. This could bring about more consolidation in the legal market as lawyers will be able to accomplish more with fewer labor costs. I personally think these are challenges but they are also opportunities to serve clients better. Clients will come in more educated which will require our profession to stay on its toes. I also see more and more lawyers getting into estates and many of those lawyers will need higher training. We will all need to strengthen the "3 legs of the stool" by incorporating legal analysis, tax analysis through tax professionals, and professional wealth planning even though many will try to rely mostly on AI, which will case more estate plans to fail to incorporate the other legs of the stool.

Technology is Driving Innovation and the Need for More Sophisticated Planning

By Chase Beguin

How has my practice changed in the last 2-5 years?

Even during my law school experience, it was an underlying factor of all course work that the practice of law is anticipated to evolve drastically in the next few decades. Technological advances, both in the legal field and in the various specialty markets which attorneys practice in, have been occurring exponentially in the past few years. Whether it be AI generative applications, or firmware advances in tangible technology's computing capacity, the continual introduction of innovative technology creates a need, and a duty, to adapt to the times; and proactively plan for future implementation.

This means that the larger firms with more "old-school" practice structures will struggle to deal with the constant change and influx of new resources available to them; as well as the proposed ethical liabilities which arise if certain technologies are utilized and mishandles or misused. The prime example of this is with newfound generative AI drafting legal memorandum. In its current state, it is still being fleshed out in regard to its ethical pitfalls and tenable uses, but there is not total clarity on under what circumstances an attorney can rely on the AI's product without falling into ethical issues; and to what extent can an attorney rely on AI product.

While our firm has not relied on AI generative products in its litigation or transactional practice yet, we are currently investigating AI's applications on estate planning and transactional contract drafting to create a more affordable and expedited work product for our clients.

On the semi-down-side of evolving technology, the expansion of legal technology has created different expectations of clients; particularly in litigation or estate planning. No longer are clients left to unquestioningly rely on the attorney's expertise when there are resources and products available to them. This means that the client is typically more informed on their respective matter's legal implications than those in the past. However, that also means that clients can develop unrealistic expectations, or misunderstand the relevant processes.. This misunderstanding is compounding in rural areas where local supplemental rules alter what is generally expected.

Essentially, it is difficult to identify and explain how our firm's practice has changed over the years, because our practice looks very different now than it did even a year ago. The main takeaway is that our practice is growing exponentially due to our willingness to explore novel technologies, but only doing so with the understanding that ethical guidelines require careful and total understanding for application of these new tools to be effective from a business sense.

What are your three short-term predictions for the trusts and estates legal practice and wealth industry?

1. Generative AI will Alter Trust and Estate Practice

Legal drafting will likely become taken over by generative AI as a general practice; with attorneys reviewing the generated document. As opposed to typical practice of having associates and staff making the initial drafts. This will likely lead to

cheaper and faster services, but with more risk as the technology's interplay with the practice of law is ironed out.

This new tool in drafting will allow smaller firms to accomplish more, with less time, leading to a cost reduction for clients. However, this will also lead to more instances of misuse by practitioners, leading to a different landscape for malpractice claims when generative AI is implicated.

2. Wealth Management is going to require a vaster knowledge base

Wealth management is going to continually become more complex as cryptocurrency, and other forms of novel investments, become a integral part of wealth managers meeting their fiduciary obligations. Just as in the law field, wealth managers and fiduciaries are going to be responsible for knowing the in's-and-out's of cryptocurrency investment and other burgeoning financial tools to ensure that their client is receiving the best possible investment advice for their situation.

This will expand the requirements for fiduciaries to meet their duties; especially for larger wealth reserves which must be diversified to the best of the tools available. Likewise, as 401K's and other retirement accounts allow for more "risky" investments, the tool boxes for fiduciaries has expanded; meaning that so has the requisite knowledge base for fiduciaries to do their job effectively.

3. The combination of new technology, and the aging baby boomer population, will allow for massive innovation and changes in practice methodology in Estate Planning.

Wealth advisors and trust and estate attorneys are going to experience a massive influx of client matters due to the baby boomer population reaching an average age of seventy years old in 2025. This will force the legal industry, particularly in estate administration and drafting, to rely on new technology to accommodate the amount of matters; particularly in rural and traditionally underserved areas.

This may also lead to more attorneys being drawn to rural agricultural communities to serve the dying population who may not have engaged attorneys through their life. Likewise, this also may lead to larger firms expanding their sphere of influence if the technology is only fiscally available to larger firms. Regardless, the massive transfer of wealth from the baby boomers to the next generation will force practitioners to look to technological advances to accommodate the wealthiest generation's transfer of the estimated $82 trillion in total net worth for baby boomers as of this year.

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NBI, Inc.
PO Box 3067
Eau Claire, WI, 54702