NBI NATIONAL BUSINESS INSTITUTE™

Estate Planning: New Laws, Old Tools, and the Changes You Need to Make

February 22, 2022 | Product: 91622

For information on how to become a faculty member for one of our seminars, contact the Planning Department at the address below, by calling (800) 777-8707, or emailing us at speakerinfo@nbi-sems.com.

NBI, Inc.
PO Box 3067
Eau Claire, WI 54702

Product: 91622

Presenters

JUSTIN M. GILBERT has successfully represented hundreds of clients in all matters relating to living trusts, estate planning, probate, business formation and planning, and real estate and elder law. Mr. Gilbert is a member of the State Bar of California, the Tennessee Bar Association, the Nashville Bar Association, the Williamson County Bar Association, the ARAG, Attorney Advisory Committee and a member of WealthCounsel, LLC, a cooperative alliance of nationally recognized estate-planning attorneys dedicated to bringing their clients the finest estate planning advice and documentation possible. He received his B.S. degree from George Mason University and his J.D. degree from Santa Clara University School of Law.

FRANK GUSTINE is an attorney with The Lynch Law Group, LLC. He is a member of the firm's Estates & Trusts and Municipal Services Practice Groups. He advises individuals, families, and business owners in matters relating to estate planning and administration, with experience advising in wills, living wills, healthcare and financial powers of attorney, trusts, strategies to preserve wealth, and gifting and estate taxes. Mr. Gustine earned his BMus degree, magna cum laude, from West Liberty University and his J.D. degree from Duquesne University School of Law.

CHARLES B. HADAD is a partner in The Lynch Law Group, LLC. He is chair of the firm's estates and trusts practice group and a member of the firm's corporate and business succession group. Mr. Hadad concentrates his practice in the areas of estate planning, estate administration, probate, trust administration, real estate transactions and corporate and business planning. He advises clients in all facets of estate planning and estate administration. Mr. Hadad is an experienced litigator for Orphans' Court and has successfully represented fiduciaries in surcharge actions, defended will contests, and asserted claims on behalf of beneficiaries and other interested parties for breach of fiduciary duty in the course of estate and trust administration. He is a member of the Pennsylvania and Allegheny County (Probate & Trust Section Council) bar associations, and the Pittsburgh Estate Planning Council. Mr. Hadad earned his B.A. degree from the University of Pittsburgh and his J.D. degree, with honors, from the Thomas M. Cooley Law School.

DIANNA D. MURPHY is the associate dean of the School of Humanities & Social Sciences at Morehead State University, and professor in the nationally ranked Legal Studies program. Her research is in legal ethics relevant to estate practice, remote access, and access to justice. She is a licensed attorney who received her J.D. degree and B.A. degree in philosophy from the University of Kentucky.

Presenters

RICHARD P SCHULZE is the owner of Schulze Law Group and principal shareholder in Patriot Legal Services. Mr. Schulze's law practice emphasizes wills, trusts, asset preservation planning as well as elder law. He is highly skilled in assisting clients in qualifying for and receiving Medicaid and the Veterans' Aid & Attendance benefit. Mr. Schulze is a frequent lecturer to the public and professionals on estate, Medicaid, asset protection and tax planning matters. Mr. Schulze is a member of the National Academy of Elder Law Attorneys and WealthCounsel, LLC. He is also a member of the American Bar Association and the State Bar of Nevada. Mr. Schulze earned his B.A. degree from Reed College and his J.D. degree from Willamette University College of Law.

Authors

Justin M Gilbert
Music City Estate Law
Nashville, TN

Charles B Hadad
The Lynch Law Group, LLC
Cranberry Township, PA

Dianna D Murphy
Dianna D. Murphy Attorney
Lexington, KY

Richard P Schulze
Schulze Law Group
Reno, NV

NBI NATIONAL BUSINESS INSTITUTE ™

Table of Contents

Tax Updates, White House Administration's Priorities and Tax Goals

Submitted by Justin M. Gilbert

ESTATE PLANNING: NEW LAWS, OLD TOOLS, AND THE CHANGES YOU NEED TO MAKE

Justin M. Gilbert

ABOUT ME

Tax Updates, White House Administration's Priorities and Tax Goals

NATIONAL BUSINESS INSTITUTE

TCJA Effects and Potential Dismantling

Signed in 2017, the Tax Cuts and Jobs Act (TCJA):

- Reduced tax rates for businesses/individuals
- Increased standard deduction and family tax credits
- Eliminated personal exemptions and itemized deductions for most taxpayers
- Limited deductions for SALT (state/local income and property taxes)
- Reduced alternative minimum tax for individuals and eliminated for corps
- Cancelled penalty enforcing the individual mandate of ACA

Major impact of TCJA for estate planners was reducing the number of estates subject to the federal gift and estate tax.

Build Back Better Act

- The BBB currently contains no income tax rate changes for individuals and corporations
- If enacted, it appears the $24 million exemption for married couples will remain intact
- No changes to:
  - 199A
  - Taxation of derivatives
  - 1031 exchanges
  - Carried interest
  - Taxation of partnerships
- There is no mark to market taxation

IRS Funding and Compliance

- If BBB is enacted, the IRS will receive a large appropriation to improve tax compliance and enforcement
- There will be additional funds to the Treasury to supervise the IRS and the Tax Court, which is estimated to increase revenue by $200B over 10-years
- There will be additional reporting requirements for third-party network transactions

Social Safety Net – Redistribution Plan

- The goal of BBB is to provide a social safety net by ensuring the wealthy pay their fair share
- The benefits to the non-wealthy include extending changes to the Child Tax Credit and increasing refundability
- The Earned Income Tax Credit changes under the American Recovery Act (ARP) will be made permanent and BBB will extend the Premium Tax Credit for Obamacare through 2025

Corporate Tax

- BBB will make some changes to corporate tax law, including:
  - 15% domestic minimum tax
  - 15% global minimum tax
  - 1% surcharge on stock buybacks
- The 1% surcharge on stock buybacks is not likely to have its intended effect of changing the behavior of corporate officers and boards
  - Corporations frequently decide they can make more money on a stock buyback than with investments. A 1% surcharge is not enough of a penalty to change their behavior.

State and Local Tax Deduction

- BBB will increase the cap on the SALT deduction from $10,000 to $80,000, effective from 2022 through 2030, and revert to $10,000 in 2031

Charitable Contributions

- Under BBB for tax years 2022-2025, your clients will only be able to deduct 60% of their charitable contributions
- For tax years 2026 and beyond, only 50% of their charitable contributions will be tax deductible
- At death, there is a deduction from gift and estate tax, but no equivalent income tax deduction
- However, if the charitable gifts are made during one’s lifetime, there is a reduction in the taxable estate and income tax deduction

Change to 3.8% Net Investment Income Tax

- BBB expands NIIT to cover income derived in the ordinary course of trade or business for high income earners, meaning the owner's draw will be subject to NIIT
- This will not apply to income on which FICA is already imposed
- This closes the so-called S-Corp Loophole
- The threshold will be:
  - $500,000 for Married Filing Jointly (MFJ)
  - $400,000 for Head of Household (HoH), single taxpayers, and estates and trusts
  - $250,000 for Married Filing Separately (MFS)

Change to 3.8% Net Investment Income Tax (Cont'd)

- NIIT will also apply to passive and portfolio income above:
  - $250,000 for MFJ
  - $125,000 for MFS
  - $200,00 for single or HoH
  - $13,450 for trusts and estates

High Income Taxpayer Surcharge

- Under BBB, there will be a surcharge equal to 5% of excessive Modified AGI over $10 million for MFJ ($5 million MFS)
- The threshold for trusts and estates will be $200,000
- There will be an additional surcharge of 3% (8% total) of excessive Modified AGI over $25 million MFJ ($12.5 million MFS)
- There will also be a reduction for investment interest
- There is no sunset date for these surcharges of high-income taxpayers

High Income Taxpayer Surcharge (Cont'd)

- For the sale of closely held business consider an installment sale or a charitable remainder trust
- For a trust with more than $200,000 in income, tax mitigation strategies include:
  - Gain harvesting in low-income years
  - Loss harvesting
  - Charitable remainder trusts
  - Charitable lead trusts
  - Donating capital gain property
  - Installment sales
  - Utilizing opportunity zones
  - 1031 exchanges

Section 1202 Modification

- Section 1202 allows individuals to exclude up to 100% of the taxable gains on the sale of qualified small business stock
- The BBB will limit the gain exclusion to 50% for taxpayers with income of more than $400,000
  - This provision of the BBB is retroactive to September 13, 2021
- The tax rate on the 50% of taxable gain will be the old capital gains rate of 28% for an effective rate of 14%
- The maximum exclusion per taxpayer is $10 million

Digital Assets

- BBB will modify the constructive sale rules and wash sale rules for cryptocurrency
- You can no longer sell Bitcoin today for a loss, then repurchase tomorrow
- There will be a 30-day window between transactions

For the 99.5% Act

- First step in dismantling TCJA
- Most changes seen over last 30+ years if enacted
- Exemptions – Use it or Lose it
- Same pig, new lipstick
  - Obama 2016 Budget
  - For the 99.8% Act
- Discuss potential impacts with clients and look for possible enactment before October 1st.

Budget Reconciliation

- 50 Senators plus Vice President Harris
- 10-year duration
- More than one reconciliation bill in 2021 may be permissible
- Joe Manchin and Krysten Sinema hold the keys

Retroactivity

- Supreme Court conferred on Congress the authority to make tax changes retroactive if only to raise revenue, but if only it can be tied to a legitimate legislative purpose.
  - *Pension Benefit Guaranty Corp v. R.A. Gray and Co.*, 467 U.S. 717 (1984)
  - Must be rationally related to a legitimate legislative purpose

Look for retroactive SALT deduction

Disclaimers

- Given uncertainty of which tax proposals will pass, all wealth transfers, structured gift and estate tax planning must include flexibility
- For any planning in 2021, consider including disclaimer language
- 9 months to disclaim under I.R.C. § 2518
- In writing
- No prior distributions from trust

Be Proactive

- Clients need to plan in anticipation of tax changes
- Ensure client comfort and utilize a collaborative team approach
- Valuation and Discount Projections
- Forecast client need and access to cash to maintain lifestyle
- Do not over-gift

For the 99.5% Act

- Conservation Easements
  - Under For the 95.5% Act, the Conservation Easement Exclusion will increase for land subject to conservation easement from $500K to $2 million and will increase the maximum percentage of land value which may be excluded from 40% to 60%.
  - Effective date – December 31, 2021
  - Income tax deduction – decreased valuation
  - Discounted valuation for limits on commercial use
  - Public benefit rule

For the 99.5% Act

- Valuation Rules – Non-Business Assets
  - Appraisals consider adjustments for marketability, minority interests, blockage and taxes on built in gain.
  - Under the 99.5% Act, non-busines assets will be treated as if they were owned by the shareholders and not the entity, *taking away marketability and minority interest discounts*.
  - No minority discount if transferee and family members have majority ownership in the business entity.
  - I.R.C. 2032A(e)(2)

For the 99.5% Act

- Valuation Rules – Non-Business Assets
  - Exceptions
    - Inventory
    - Accounts receivable
    - Real Property – Material Participation Rule
    - Reasonably required working capital

For the 99.5% Act

- GRATS – Grantor Retained Annuity Trusts
  - The Act would require all GRATs to have minimum 10- year term
  - Max term – life expectancy of annuitant plus 10 years
  - Remainder interest no less than 25% FMV or $500,000
  - Failure to comply – estate inclusion of full value
  - Estate tax inclusion for grantor trust
  - Effective as of date of enactment

For the 99.5% Act

- Grantor Trusts
  - Assets will be included in estate except grandfathered IDGT (Intentionally Defective Grantor Trusts).
  - Estate tax inclusion for completed gifts
  - Exceptions include trusts created and funded prior to enactment and I.R.C. §678 Trusts – BDIT
  - No exception for GRATs, QPRTs and ILITS
  - New I.R.C. §2901

For the 99.5% Act

- Generation Skipping Tax Changes
  - Under new rules, inclusion ration of zero is lost
  - Must have inclusion ration of 1, unless qualifying trust
  - Qualifying Trust - 50-year limitation
  - New I.R.C. §2642(h)

SALT Deduction

- In addition to the 99.5% Act, the dismantling of TCJA will also be manifest in SALT Deduction restoration
- TCJA – SALT deduction capped at $10,000
- SALT Deductibility Act
  - Full restoration of SALT deduction
- Defer tax payments until 2022
- Reduce need for non-grantor income trust sitused in jurisdictions with no state income tax

Tax Rates and Exemptions

- Massive Federal Bailouts, Covid relief bills, infrastructure bill, Green New Deal, student loan forgiveness, etc., will necessitate the federal government to find additional revenue streams.
- Lead to increase taxes on “wealthy” and not so wealthy
- Tax rates are going up
- Exemptions are going down.

Lifetime Gift and Estate Tax Exemption

- TCJA doubled the Estate and Gift Tax Exclusion Act for tax years 2018-2025, which is $11.7M. In 2026, the exemptions for back to the old law as if TCJA never existed.
- Use it or lose it
- Pay tax now at lower rate
- Notes sales to grantor trusts
- Lifetime gifts

Tax Rates

- Under TCJA, estates over $11.7M subject to 40% tax rate.
- New Tax rates under the For the 95.5% Act:
  - 45% for estates over $3.5M
  - 50% for amounts over $10M
  - 55% for amount over $50M
  - 65% for estates in excess if $1Billion

Exemptions

- Estate Tax Exemption
  - $3.5 Million
  - Portability
  - Indexed for inflation
- Lifetime Gift Tax Exemption
  - $1 Million
  - No inflation adjustment
- Effective to all death, GST Transfers, and gifts made after December 31, 2021

Annual Gift Tax Exclusion

- Obama proposed $14,000 annual exclusion with $50,000 annual cap
- For the he 99.5% Act - restrictive annual exclusion amount of $10,000 per donee with an aggregate $20,000 annual exemption per donor
- No de minimus exception for birthday gifts, weddings, etc.

Wealth Tax - Ultra Millionaire Tax

- Democratic control of White House, House, Senate, a wealth tax on estates exceeding $50M is a real possibility
- 30% minimum audit rate for taxpayers subject to Ultra-Millionaire Tax
- 40% “exit tax” on the net worth above $50 Million of any US Citizen who renounces citizenship to escape paying their “fair share”
- $100 Billion to rebuild and strengthen IRS to hire and train additional personnel, modernize IT systems and implement new asset valuation, reporting and enforcement of Ultra Millionaire Tax

The Step-Up in Basis at Death

- Biden administration has proposed eliminating the step-up in cost basis at death
- Goodbye I.R.C. §1014
- Capital gain realization at death
- More lethal than death tax
- No step up for completed gifts to grantor trusts
  - Request refund for prior years

No Step-up for completed gift to Grantor Trust?

- No step up for completed gifts to grantor trusts
  - Request refund for prior years
- Contrarian View
  - I.R.C. § 1014(b)(1) does not requires estate tax inclusion
  - Change of ownership at death = receipt of property from decedent
  - No gain recognition until termination of grantor trust status at death
  - PLR 201245006
  - IRS refusal to resolve issue
  - Priority Guidance Plan – identify "basis of grantor trust assets at death under section 1014"

Trust Tax Deductions – Changes?

First Category (non-deductibile under TCJA for individuals and trusts):

- Costs where existence and nature of cost if individual were holding the same property
- Ownership costs (condominium fees, insurance premiums, maintenance and lawn services, auto registration, and insurance costs.)
- Fees for investment advice

Second Category (fully deductible for trusts):

- Tax preparation fees
- "certain incremental costs of investment advice…"
- Appraisal fees
- Certain fiduciary expenses

I.R.C. 199A Changes

- TCJA introduced I.R.C. § 199A
- Deduction for the lesser of 20% of qualified business income plus 20% of combined real estate investment trust dividends and qualified publicly traded partnership income, or 20% of the taxpayer's taxable income minus net capital gains
- New Proposal – phase out completely 199A deduction for incomes in excess of $400,000
- Cap itemized deduction tax benefit to 28%
- Retore 3% PEASE limitation

Business Tax Changes Affecting Estate Planning

§2032A Special Use Valuation

New law as proposed will increase the Special Use Valuation aggregate decrease in value limit from $1,180,000 to $3,000,00. This will be effective for deaths after 12/31/21

Eliminate Preferential Treatment of Long-Term Capital Gains

Expand social security tax

Expanded social security tax from 12.4% to earned income over $400,000.

Tax free gap on income between $142,800 and $400,000

1031 Exchanges

- Among the new tax proposals, there is a plan to limit the use of 1031 exchanges for real estate investors with incomes over $400,000 or to end them altogether.

Tax Updates, New White House Administration's Priorities and Tax Goals

A. TCJA Effects and Potential Dismantling

On December 22, 2017, President Donald Trump signed the Tax Cuts and Jobs Act of 2017 (hereinafter "TCJA"), a congressional revenue act which amended the Internal Revenue Code of 1986. TCJA was considered a major change to tax policy, but not when compared to more recent proposals. The TCJA reduced tax rates for businesses and individuals, increased the standard deduction and family tax credits, eliminated personal exemptions, and made it unnecessary to itemize deductions for most taxpayers, limited deductions for state and local income taxes and property taxes, commonly referred to as the SALT deduction ($10,000). TCJA also further limited the mortgage interest deduction (first $750,000 of indebtedness for an individual and $375,000 if married filing separately), reduced the alternative minimum tax for individuals and eliminated it for corporations and cancelled the penalty enforcing the individual mandate of the Affordable Care Act (ACA). It had a major impact for estate planning practitioners by reducing the number of estates subject to the federal gift and estate tax. Several bills have been proposed which would substantially dismantle the TCJA, which would have an immediate impact.

<u>Build Back Better Act</u>

The effort to undo the Trump Tax Bill have been a central theme of the Build Back Better Act (BBB), which was released in September of 2021. The text and contents have been widely debated. It has been a moving target as BBB has been subject to intense negotiations between the White House, Senate Majority Leader Schumer and the Sens. Sinema from Arizona and Manchin from West Virginia. I am not going to review the components of BBB that are outside the realm of estate, gift and income tax planning. For now, it appears BBB has died a slow excruciating death.

Sen. Lindsey Graham has stated that the Build Back Better is dead. However, Sen. Schumer and Senate Democrats insist there is life left in the bill, which is why it is necessary to review its latest iteration lest BBB in case it is resurrected later this year. If it does pass, you need to be ready to react and advise your clients accordingly

Many of us have been concerned about major changes to the unified estate and gift tax regime. I will discuss many of the changes in the context of the For the 99.5% Act, which was a predecessor to BBB as it related to estate tax, gift tax and IRS treatment of various types of trusts. If BBB is enacted, it appears the $24 million exemption for married couples will remain intact, precluding the need for much of the planning you would otherwise be undertaking.

There has been much confusion over what is and what is not in the bill. Let's start with what is not in the bill. At present BBB contains no income tax rate changes for individuals and corporations, meaning there will be no general corporate tax of 21%, no changes to the rate structure for individual ordinary income and no changes to the capital gains rate tax structure.

There are no changes to changes to 199A, taxation of derivatives, 1031 exchanges, carried interest, and taxation of partnerships. BBB will not impose taxation of unrealized gains at gift and death (the STEP Act), no modifications to estate tax, gift tax or GST tax. There is no mark to market taxation (billionaire's tax for the 700 billionaires in the US that the Senate is so concerned about) or wealth tax – however, the Senate may reconsider the inclusion of the wealth tax in the BBB. When the language was released, the cut-off was $10B, not $1B.

If control of the US House and US Senate swing to the Republicans in November of next year, as is projected, there will be substantial pressure on Sen. Majority Leader Schumer and House Speaker Pelosi to pass legislation to raise taxes before the Republicans take over in January 2023.

IRS Funding and Compliance

If BBB is enacted, the IRS will receive a large appropriation to improve tax compliance and enforcement. Republicans are opposed to giving the IRS additional funds, especially given the politically motivated conduct of the Service during the Obama administration.

There will be additional funds to Treasury to supervise the IRS and the Tax Court, which CBO estimates would increase revenue by $200B over 10-years. The Biden administration argues the figure is closer to $400B. An article in the NY Times from November 15, 2021, indicated the latest CBO figure was actually $120B. If additional enforcement is not sufficient to generate the necessary revenues, other sources of revenue will likely be added to the legislation.

There will be additional reporting requirement for third party network transactions. With the increased budget, we should expect increased 1041 audits, which are almost non-existent, and 706 and 703 audits of high-net worth individuals.

Social Safety Net – Redistribution Plan

The goal of BBB is to provide a social safety net by ensuring the wealthy pay their fair share. The benefits to the non-wealthy include extending changes to the Child Tax Credit enacted under the American Recovery Act (ARP) and increasing refundability. The Earned Income Tax Credit changes under ARP will be made permanent and BBB will extend the Premium Tax Credit for Obamacare through 2025.

Corporate Tax

BBB will make some changes to corporate tax law. There will be a 15% domestic minimum tax, 15% global minimum tax, and 1% Surcharge on stock buybacks. The 1% surcharge on stock buybacks is not likely to have its intended effect of changing the behavior of corporate officers and boards. Frequently, corporations decide they can make more money on a stock buyback than with investments such as new equipment and infrastructure. A mere 1% surcharge is not enough of a penalty to change the behavior of corporate boards throughout the United States.

State and Local Tax Deduction

I will have a more-thorough discussion of the State and Local Tax Deduction known as SALT later in the presentation. In the meantime, please note BBB will increase the cap on the SALT deduction from $10,000 to $80,000, effective from 2022 through 2030, and revert to $10,000 in 2031.

Charitable Contributions

In 2021 your clients were able to deduct 100% of their charitable cash contributions. Under BBB, for tax years 2022 through 2025, your clients will only be able to deduct 60% of their charitable contributions, and for tax years 2026 and beyond, only 50% of their charitable contributions will be tax deductible. For clients who plan to leave their entire estate to charity, it would have been more tax efficient to make their charitable gifts in 2021 to reduce or eliminate their taxable income. At death, there is a deduction from gift and estate tax, but no equivalent income tax deduction. However, if the charitable gifts are made during one's lifetime, there is a reduction in the taxable estate and an income tax deduction.

<u>Change to 3.8% Net Investment Income Tax (NIIT)</u>

For a law firm organized as an S-Corp , under the current rules you are not subject to NIIT for net earnings above your salary. Unfortunately, the BBB expands NIIT to cover income derived in the ordinary course of a trade or business for high income earners. That means, the owner's draw will be subject to NIIT. However, the this will not apply to income on which FICA is already imposed. This closes the so-called S-Corp Loophole. The treatment for real estate professionals is unclear. The threshold will be $500,000 for Married Filing Jointly (MFJ), $400,000 for Head of Household (HoH), single taxpayers and estates and trusts, and $250,000 for Married Filing Separately (MFS). However, NIIT will also apply to passive and portfolio income above $250,000 for MFJ tax filers, $125,000 for MFS, $200,000 for single or HoH filers, and $13,450 for trusts and estates.

<u>High Income Taxpayer Surcharge</u>

Under BBB, there will be a surcharge equal to 5% of excessive Modified AGI over $10 Million for MFJ ($5 Million MFS). The threshold for trusts and estate will be $200,000. There will be an additional surcharge of 3% (8% total) of excessive Modified AGI over $25 Million MFJ ($12.5 Million MFS). The threshold for trusts and estate will be $500,000. There will also be a reduction for investment interest. There is no sunset date for these surcharges of high-income taxpayers. For the sale of a closely held business consider an installment sale or charitable remainder trust. If the taxpayer is in the 37% tax bracket, the surcharges will result in a tax rate of 45.8% or 48.8%. For a trust with more than $200,000 in income, tax mitigation strategies include gain harvesting in low-income years, loss harvesting, charitable remainder trusts, charitable lead trusts, donating capital gain property, installment sales, utilizing opportunity zones and 1031 exchanges.

Section 1202 Modification

Section 1202 allows individuals to exclude up 100% of the taxable gain on the sale of qualified small business stock. The BBB will limit the gain exclusion to 50% for taxpayers with income of more than $400,000. This provision of the BBB is retroactive to September 13, 2021. The tax rate on the 50% of taxable gain will be the old capital gains rate of 28% for an effective rate of 14%. The maximum exclusion per taxpayer if $10 Million.

Digital Assets

BBB will modify the constructive sale rules and wash sale rules for cryptocurrency. You can no longer sell Bitcoin today for a loss, then repurchase tomorrow. There will be a 30-day window between transactions.

Planning Considerations

With the demise of BBB, the first major step in dismantling the TCJA will be the passage of the "For the 99.5% Act," which Senator Bernie Sanders introduced on March 25, 2021. If enacted, the For the 99.5% Act will include the most extraordinary changes we have ever seen to the estate and gift tax regime, even for estate planning practitioners who have been around 30 or 40 years. Many of the proposal contained in the For the 99.5% Act are not new. We saw the same proposals in the "For the 99.8% Act" introduced in 2019 and in the Obama budget published in 2016. These are now mainstream democratic proposals. If the spending proposals of BBB are really dead, there is a substantial likelihood that the White House will continue their quest to undo TCJA and seek to enact the tax proposals contained in the For the 99.5% Act which could pass both houses of Congress and be signed into law by President Biden. If true, we would be in a use it lost it scenario. We have no way of knowing which of these proposals will be enacted, if any, but as a proactive advisor you do not want to sit on sidelines.

If you have a client who died within the last 9 months, or 15 months on extension, you should counsel the family on whether to pay estate tax now, on the death of first spouse, rather than wait until the death of the second spouse. This will lock in a lower tax rate and a larger estate tax exemption. If the White House gets its way, large estate and gift tax exemptions are going down, tax rates are going up, and marketability and minority discounts are going away. Your clients need to be prepared. We do not know the effective date of future legislation, but for some it mat already be too late.

It may appear that we are out of the danger zone, but we need to continue to discuss the impacts of possible legislation with clients, engage the clients' team of advisors to prepare projections of estate value with valuation discount changes, potentially accelerate funding of GRATS, and other grantor trusts, consider the need to accelerate IDGT sales, make taxable gifts to use the lifetime gift tax exclusion amount prior to enactment to pay the lower effective rate, consider paying estate tax for 2020 and 2021 deaths, and capture valuation discounts. Estate planners should continue to caution every client about the new rules so they are on notice of these proposed changes and the potential for retroactivity added to the final bill. Several Republican Senators voted for the infrastructure bill to ensure pet projects for their respective jurisdictions, like airports, new schools, repair roads and bridges, clean energy projects, etc. These same Republicans may also vote for a revenue generation bill, especially if they are not up for re-election.

Budget Reconciliation. Historically, the filibuster rules in the US Senate have prevented radical changes to tax policy. As a result, unless 60 senators agree, tax related measures must be passed via the budget reconciliation process. However, such changes are limited to a duration of ten years, which is why the tax rates and other tax related changes in the TCJA will sunset in 2026. Due to the 10-year duration, the $12.06M exemption will disappear at the end of 2025. With Joe Biden as president, 50 democratic senators and Vice President Kamala Harris as the tie breaker, the Democrats will be able to pass their tax proposals if they can alleviate the inflation concerns of Sens. Manchin and Sinema. The passage of new tax policy will be a reality if Republican Senators like Susan Collins, Lisa Murkowski, or others vote with the Democrats to adopt the new proposals. There have been deals between Democrats and Republicans, and among Democrats, with the Bernie Sanders/Elizabeth Warren faction on the one side, and the more moderate faction of Joe Manchin and Krysten Sinema on the other. There has been immense pressure on Sens. Manchin and Sinema to change the Senate rules to eliminate the filibuster, forego the budget reconciliation process and make the administration tax policy proposals "permanent." Publicly, however, Sinema and Manchin have opposed eliminating the filibuster, but Manchin indicated a willingness to modify the filibuster rules, lowering the threshold to 55 votes.

Retroactivity. Historically, major changes to tax policy, and amendments to Internal Revenue Code of 1986, are not made retroactive. However, a retroactive effective date to pending legislation is still possible given Democrats equal representation in the Senate. The retroactive effective date could also be the date of enactment.

There is cause for concern. The Supreme Court of the United States has confirmed the United States Congress has the authority to make tax changes retroactive, even if the only justification is to raise revenue. However, to be retroactive the law must be rationally related to a legitimate legislative purpose. See *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.,* 467 U. S. 717 (1984); United States v. Carlton, 512 U.S. 26 (1994). The 2017 TCJA was prospective in all respects, however, there is no certainty that the next tax law will not be retroactive. One area of particular concern is the federal deduction for state and local taxes (SALT deduction). Sens. Pelosi and Schumer desperately want to restore the unlimited SALT deduction. This would be beneficial to many Americans in California, Illinois, New York, New Jersey and other states with high state income tax. There should be few complaints, except for the fact that it will increase the national deficit. The proposal appears the contradict and go against the notion that the Rich are not paying their fair share.

Disclaimers. Given the uncertainty of which tax proposals will pass, and their respective effective date, all wealth transfers, and structured gift and estate tax planning done in 2022 must include the flexibility to be undone if necessary. The taxpayer should not make transfers outright - make them in trust. For any planning undertaken in 2022, consider including disclaimer language. For example, the grantor of a gifting trust could allow a child to disclaim the gift, causing it to revert to the parent. For an irrevocable trust, consider including a provision permitting a principal beneficiary to disclaim on behalf of all trust beneficiaries. That should give the trust beneficiary 9 months to disclaim, which under I.R.C. § 2518 would result in the exemption not being used and the assets restored and reverted back to the Grantor. Take caution – the disclaimer must be in writing and the beneficiary must not have received any benefits from the trust. Unfortunately, many clients have already made transfers to irrevocable trusts that do not have disclaimer language, however, in the transfer instrument, the taxpayer can build in additional flexibility with disclaimer language.

Be Proactive. Clients need to plan in anticipation of tax changes, despite the uncertainty of such changes, and the many unknowns. Now is the time to plan for those who did not take any action last year. For those who did plan last year, this is the opportunity to take one last bite at the apple if there is no retroactivity. For any clients still in the initial stages, you must ensure the client is comfortable with the planning you have proposed. A collaborative team can help alleviate client concerns. Work with the client's CPA and financial advisor to present illustrations related income needs and valuation projections. Further, the client should only gift asset they can live without. If the client is not comfortable with the plan, tell the client not to make the transfer.

Tax Proposals

Conservation Easements. The Conservation Easement Exclusion under I.R.C. §2031(C) will increase the exclusion for land subject to a conservation easement from $500,000 to $2,000,000 and increase the maximum percent value of the land which may be excluded from 40% to 60%. This may be one of the good things to come from the White House tax proposals. If the taxpayer utilizes a conservation easement during the taxpayer's lifetime, the taxpayer will get an income tax deduction for the value of the land before the easement was put on versus the value of the land after the easement was put on. The taxpayer has at least temporarily locked in the present value of the land for inheritance purposes. If the taxpayer has additional restrictions limiting the commercial use of the property, the taxpayer will reduce the value of the property for estate tax purposes. However, the burden will be on the taxpayer to prove the land has a significant public benefit. Therefore, the taxpayer will want an IRS ruling in her favor ahead of time

Valuation Rules. Appraisers commonly consider valuation adjustments for marketability, minority interests, blockage (the discounted price or value the market gives stocks when a block of shares is sold), and taxes on built in gain. Under the 99.5% Act, non-business assets will be treated as if they were owned by the shareholders and not the entity, taking away marketability and minority interest discounts. Non-business assets include those that are not used in the active conduct of a trade or business, such as passive assets. There will also be no minority discount if the transferee and family members have control or majority ownership in the business entity. A member of the family is defined in IRC § 2032A(e)(2) – parents, grandparents, spouse, and any spouse or lineal descendant of such individual or parent of such individual. As a result, the non-business asset will be valued as if the transferor transferred the non-business assets directly to the transferee.

Exceptions. As drafted, the Act includes a carve out for inventory, accounts receivable and real property where there has been material participation, which has a 750-hour requirement. If the taxpayer meets the material participation requirement, the taxpayer will then be considered a real estate professional. This could be a problem for older taxpayers that have stepped back from the business. There will also be an exception for "reasonably required" working capital.

GRATS. The Act as proposed would require all GRATs (Grantor Retained Annuity Trusts) to have a minimum 10-year term. The maximum term for a GRAT will be the life expectancy of the annuitant plus 10-years, and the remainder interest must not be less than an amount equal to the greater of a) 25% of the FMV, or b) $500,000. Failure to comply with the "not minimum value " rule will create estate tax inclusion for the full value of the GRAT. This has the potential to eliminate usefulness of nearly all GRATs. The effective date would be the date of enactment.

Grantor Trusts. Assets in grantor trusts will be included in the grantor's estate, except grandfathered Intentionally Defective Grantor Trusts (IDGT). Distributions from a grantor trust during the life of the deemed owner (trustee gives grandchildren a gift) will be treated as gifts. Assets of a grantor trust are deemed to have been gifted when the grantor trust status is "turned off." These rules will apply to trusts created after enactment, transfers made to pre-existing trusts after enactment and sales to pre-existing trusts of Sec. 678 trusts (BDIT). These rules will be section §2901 of the IRC.

There was an exemption under the Obama proposal for GRATS, QPRTs and ILITs, but not under the For the 99.5% Act. Taxpayers with an ILIT, should consider making gifts now to ensure the transfers are grandfathered in. Going forward, it may be advisable to use a non-grantor trust, partnership, or LLC to own the life insurance policy.

GST Changes. Under the new rules, an inclusion ration of zero is lost. The inclusion ration of any trust other than the qualifying trust must be 1, such that there would be a full GST tax on a generation skipping transfer. A qualifying trust must terminate no greater than 50-years after the trust is created. This will appear as I.R.C. §2642(h).

SALT Deduction. In addition to the 99.5% Act, the dismantling of the TCJA will also be manifest in the restoration the SALT deduction. Starting with the 2018 tax year, the SALT deduction has been capped at $10,000. The value of the SALT deduction as a percentage of AGI tends to increase with a taxpayer's income. Since the enactment of the TCJA, high earners have seen a sharp reduction in the deduction as a percent of AGI, from 7.7 percent in 2016 for those earning over $500,000 to 0.71 percent in 2018. The value dropped because the deduction remains at a maximum value of $10,000 even if AGI and state and local taxes are increased.

In early 2021, the SALT Deductibility Act was introduced. The proposal would allow taxpayers to fully deduct their state and local taxes on their federal income returns.

This policy change may warrant a reconsideration of state income tax minimization strategies. Since at least 2018, there has been a push for non-grantor trusts sitused in jurisdictions with no state income tax, such as Nevada, Florida, Texas and Tennessee. This may no longer be necessary. Since the SALT deduction is likely to be restored in full, now may be the time to consider deferring state and local tax payments until next year when SALT could be fully deductible from federal income tax, or at least raise the cap to $80,000 as proposed in BBB.

B. Tax Rates and Exemptions

With historically high rates of inflation caused by the massive federal bailouts, countless COVID relief bills, the infrastructure bill, Green New Deal, student loan forgiveness, and many other spending proposals, the federal government needs additional sources of revenue. We saw this to a much smaller degree in the previous administration with the Secure Act and its accelerated taxation of inherited IRAs. The need for additional revenues requires higher taxes on the wealthy (and the not-so-wealthy). The Biden administration has already shown us how these tax law changes will occur. Tax rates are going up and exemptions are going down. Everything needs to be rethought. Therefore, shifting assets out of an estate at a much lower cost, before the current tax regime changes, by using note sales to grantor trusts, or making lifetime gifts, may prove very advantageous.

<u>Lifetime Gift and Estate Tax Exemption</u>. The TCJA doubled the Estate and Gift Tax Exclusion Amount and GST exemption for tax years 2018-2025, which is currently $12.04 Million. In 2026 the exemptions go back to the old law as if TCJA never existed, which was $5 Million adjusted for inflation. The proposed changes to the estate and gift regime could reduce the federal estate tax exemption amount to $3.5 Million (for the 99.5% Act) or accelerate expiration of TCJA, which will be indexed for inflation, with portability in-tact, and reduce the lifetime gift tax exemption amount to $1 Million, with no inflation adjustment. The exemption

& rate structure under the For the 99.5% Act will apply to all deaths, GST transfers, and gifts made after the effective date.

Tax Rates. Under TCJA, estates over $12.04 Million are subject to a 40% tax rate. The new tax rates, if enacted, will be as follows: 45% for estates over $3.5 Million but less than $10 Million, 50% for amounts over $10 Million but less than $50 Million, 55% for amounts over $50 Million but less than $1Billon and a tax rate of 65% for every dollar over $1Billon. In contrast, President Obama, in his final budget proposed returning the tax rate to the 2009 level of 45%.

Annual Gift Tax Exclusion. Under President Obama's final budget, he proposed an annual gift tax exclusion amount of $14,000 per donee (annual exclusion at the time) and $50,000 aggregate limit per donor. The 99.5% Act is much more restrictive with a $10,000 annual exclusion limit per donee and aggregate $20,000 annual exemption per donor. The annual gift tax exemption, as proposed will not include a de minimis exception, not even for birthdays gifts or a child's wedding. The current annual exemption is $16,000 per gift.

Wealth Tax. The debate over a wealth tax has reached a fevered pitch. Until recently, a wealth tax was unthinkable. But now that the Democrats control the White House, the House of Representatives and the US Senate, a wealth tax on estate exceeding $50 Million is a real possibly. The White House proposed an annual tax of the increase of the wealth, even without no event of realization. Historically, in most circumstances, there must have been realization to trigger capital gains. However, the move to a mark to market taxation of wealth is gaining steam. The new Ultra Millionaire Tax will require a 30% minimum audit rate for tax payers subject to the Ultra-Millionaire Tax, 40% "exit tax" on the net worth above $50 Million of any US Citizen who renounces citizenship to escape paying their “fair share” and $100 Billion investment to rebuild and strengthen IRS to hire and train additional personnel, modernize IT systems and implement new asset valuation, reporting and enforcement of Ultra Millionaire Tax.

C. The Step Up in Basis at Death

Although not a new proposal, the Biden administration has proposed eliminating the step-up in cost basis at death. This was proposed by President Obama, but not seriously considered by the Republican Congress in charge during all but the first two years of his presidency. If enacted, there could be possible realization at death similar to the Canadian tax policy. If Biden eliminates the step-up in cost basis at death, but left the estate tax exemption amount intact, this could be a new, more lethal death tax.

No Step-Up in Basis for Grantor Trusts. There will be no step-up on basis for assets owned by a grantor trust that were not included in the grantor’s estate at death. For an in-depth discussion of whether there would have been a step-up in basis under I.R.C. §1014, see Jonathan G. Blattmachr, Mitchell M. Gans and Hugh H. Jacobson, “Income Tax Effects of Termination of Grantor Trust Status by Reason of the Grantor’s Death,” 96 *J. Tax’n* 149 (September 2002).

Grantor trusts created before the enactment of the For the 95.5% Act, will be exempt, except for a IRC § 678 trust, which is a Beneficiary Defective Inheritor's Trust, also known as a “BDIT.” This part of the bill would create a new subsection to IRC § 1014. This change appears to be inconsistent with Sen. Van Hollen’s bill, which would create gain realization at death, similar to the Canadian regime. As a result, if enacted, these new tax proposals will likely be modified to some degree.

The inclusion of this section may lend support to the view that the taxpayer would have been entitled to the step-up in basis regardless of a completed gift to the IDGT before the death of the transferor. If you have a client who died with assets in a grantor trust when they died that was not includible in the estate, the taxpayer should consider requesting an IRS for a refund based the notion there had been a stepped-up basis at death despite there being no estate tax inclusion, assuming the property had been sold. If the property had not been sold, the taxpayer can argue the basis is equal to the fair market value on the date the grantor died.

Some have argued I.R.C. §1014(b)(1) does not depend on actual estate tax inclusion. Instead, the trust assets receive a date-of-death value basis adjustment under 1014(b)(1). Under this interpretation there is a supposed change of ownership for income tax purposes at the grantor's death (from the grantor to the trust) which constitutes the receipt of property from a decedent for purposes of § 1014 giving the transferee a basis step-up even though the assets are not included in the gross estate based on the idea that the gain isn't recognized during the decedent's lifetime because the grantor trust ends at death, not before. In PLR 201245006 (July 19, 2012), the IRS ruled that the basis of property held in the grantor trust will be stepped up under Section 1014(a) on the taxpayer's death, despite the fact that the assets in the trust aren't subject to estate tax. This appears to be in conflict with CCA 200937028, Rev. Rul. 78-32 and the regulations under Section 684. On June 15, 2015, the IRS released Rev. Proc. 2015-37, which advised that, until the IRS resolves the issue, it will no longer issue individual private letter rulings on whether the basis of assets in a grantor trust must be adjusted to reflect their fair market value (FMV) on the grantor's death if those assets are not includible in the grantor's estate. Soon thereafter, on July 31, 2015, the IRS and Treasury released the 2015-16 edition of their Priority Guidance Plan (PGP), which identifies the "basis of grantor trust assets at death under section 1014" as a project that will be a priority for resource allocation. While there has been no official pronouncement from the IRS, if enacted, the clarification under the For the 95.5% Act on this issue suggests there would have been stepped-up basis prior to enactment. Otherwise, it would be unnecessary to declare there will no longer be a stepped-up basis for assets owned by a grantor trust that were not included in the grantor's estate at death.

D. Trust Tax Deductions Changes

Taxes went up under TCJA for trusts and estates with large investment advisory fees or certain other expenses. The problem for these trusts is that the TCJA cut out miscellaneous itemized deductions for everyone, but trusts have no standard deduction to fall back on like individual taxpayers do. Lower deductions result in higher taxable income, and the tax brackets and rates applicable to trusts. The IRS regulations confirmed estates and trusts are allowed the following deductions under I.R.C. § 67(e): Most advisory, tax preparation, and similar fees are categorized as miscellaneous itemized deductions. Pre-TCJA, for an individual, these fees were deductible to the extent they exceeded 2% of adjusted gross income. Trusts have this same rule, but get a special break in the case of costs which are paid or incurred in connection with the administration of the trust that would not have been incurred if the trust property was instead held by an individual. Even better, these costs do not have a 2% floor and are completely deductible. So, when is a cost in the first category (non-deductible for individuals under TCJA, and for trusts as well), and when is a cost in the second category (still fully deductible for trusts)? Under the final regulations, the following are considered costs in the first category: costs where the existence and nature of the cost would still be incurred if an individual were holding the same property. The regulations give as an example the cost incurred in defense of a claim against an estate or decedent, where such claim is unrelated to the existence validity, or administration of the decedent's trust. Ownership costs such as condominium fees, insurance premiums, maintenance and lawn services, and automobile registration and insurance costs. The regulations also give as an example any costs that are passed through to the trust (such as were the trust is a partner in a partnership), where such costs would be defined as miscellaneous itemized deductions if passed through to an individual. Fees for investment advice, including fees for any related services that would be provided to an individual investor, where those fees are those that would be commonly or customarily incurred by an individual investor.

The following are costs that are considered to fall in to the second category: Tax preparation fees: costs relating to all estate and generation-skipping transfer tax returns, fiduciary income tax returns, and the decedent's final individual income tax return (probably because individuals can never prepare their own final individual income tax returns). The costs of preparing all other tax returns (for example, gift tax returns) are excepted out and placed back into the first category. There is a special exception for "certain incremental costs of investment advice beyond the amount that would normally be charged to individual investor." An incremental cost is defined as "a special, additional charge that is added solely because the investment advice is rendered to a trust or estate rather than to an individual or attributable to an unusual investment objective or the need for a specialized balancing of the interests of various parties (beyond the usual balancing of the varying interests of current beneficiaries and remaindermen) such that a reasonable comparison with individual investors would be improper." Appraisal fees to determine the fair market value of assets as of the decedent's date of death, to determine value for the purposes of making distributions, or as otherwise required to properly prepare the trust's tax returns. Appraisals for insurance purposes are excepted out and placed back in the first category. Certain fiduciary expenses not commonly incurred by individuals, such as probate court fees and costs, fiduciary bond premiums, legal publication costs of notices to creditors or heirs, the cost of certified copies of the decedent's death certificate, and costs related to fiduciary accounts. It is not clear whether the new tax changes will modify the most recent regulations.

E. I.R.C. 199A Changes

When the TCJA was passed in 2017, it introduced the section 199A deduction, which is a below-the-line deduction available to owners of sole proprietorships, partnerships, S corporations, and some trusts and estates involved in qualified trades or businesses. Currently, the deduction is limited to the lesser of 20% of qualified business income plus 20% of the combined real estate investment trust dividends and qualified publicly traded partnership income, or 20% of the taxpayer's taxable income minus net capital gains. While the section 199A deduction is set to end beginning in 2026, the Biden proposal would maintain the current deduction for those making under $400,000 per year and phase out the deduction completely for taxpayers making more than

$400,000. That is in addition to Biden's plan to restore the top marginal tax rate for non-corporate taxpayers to the pre-TCJA rate of 39.6%. There would also be a cap in the itemized deduction tax benefit to 28% and restoration of the 3% PEASE limitation.

F. Business Tax Changes Affecting Estate Planning

§2032A Special Use Valuation. Generally, assets included in a decedent's gross estate are valued at their "highest and best use" for estate tax purposes. However, if specific requirements are met, §2032A permits an alternative method for valuing certain real property used either as a farm for a farming purpose or in a trade or business other than farming. This alternative method is intended to reflect the (lower) value of the property in its current use. The new law, as proposed, will increase the Special Use Valuation aggregate decrease in value limitation from $1,180,000 (indexed figure for 2021) under §2032A of the IRS Code to $3,000,000. This will be effective for deaths after December 31, 2021.

Eliminate Preferential Treatment of Long-Term Capital Gains. Senator Wyden, Chairman of the Senate Finance Committee and President Biden has unequivocally stated the capital gains rate must go up. Proposals to dismantle the TCJA include a 39.6% marginal tax rate and elimination of preferential rate for long-term capital gains and qualified dividends on income over $1Million. With an increased long-term capital gains rate form from 20% to 39.6%, plus the net income investment tax of 3.8%, many taxpayers are taking steps to sell assets before the new rates take effect.

Expand Social Security Tax. A new proposal will expand the 12.4% Social Security tax to earned income over $400,000. The established 12.4% rate and the employee/employer split would be retained. This proposal would create a tax-free gap between the Social Security base, which is $142,800 for 2021, and the $400,000 threshold.

<u>1031 Exchanges</u>. Among the new tax proposals, there is a plan to limit the use of 1031 exchanges for real estate investors with incomes over $400,000, or to limit them altogether.

Old Small-to-Medium Sized Estate Tools and How to Update Them

Submitted by Justin M. Gilbert

Part II: Old Small-to-Medium Sized Estate Tools and How to Update Them

Life Insurance

- In the 99.5% Act, there is a proposed $1M lifetime gift tax exclusion amount. Many taxpayers and advisors will feel the urgency to redirect assets out of the estate and *towards split-dollar life insurance*.
- IRA relocation –taking money out of the IRA and shifting funds into a life insurance trust, providing estate tax exclusion for those funds at the death of account owner.
- Life insurance can be used to deal with premature death of spousal beneficiary to a Spousal Lifetime Access Trust (SLAT) and mortality risk of long term GRATs.

Decanting Irrevocable Trusts

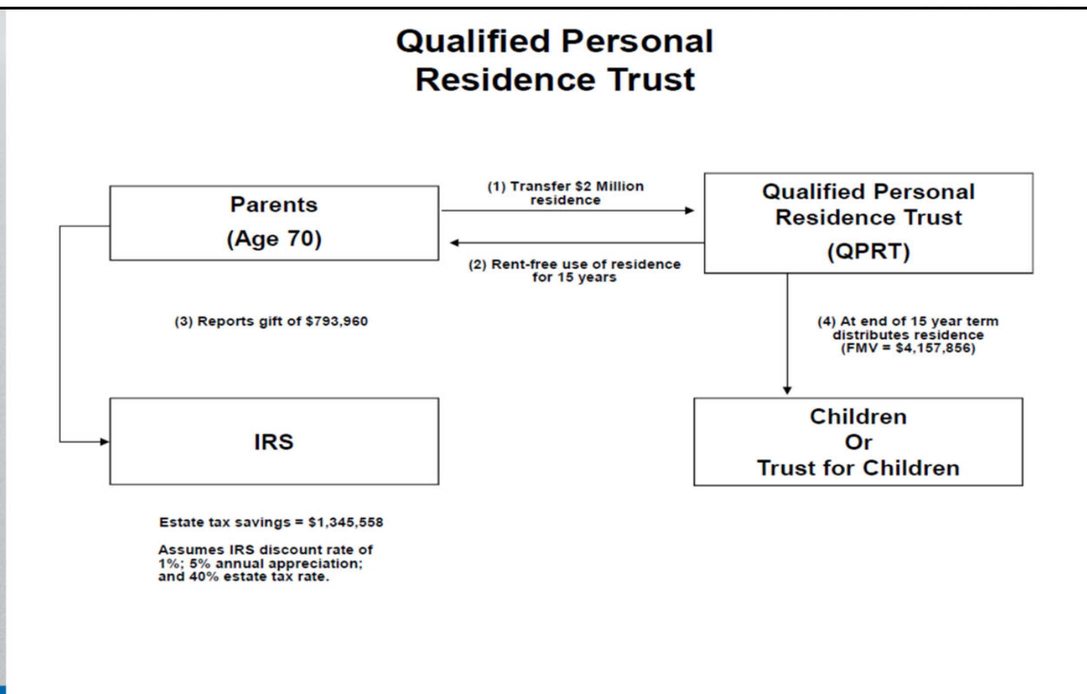
- IT is becoming ever more important to have flexibility in updating irrevocable trusts to reflect marginal changes.
- Decanting has become a popular option for updating unhelpful or outdated trust provisions.
- Spendthrift provisions, correct scrivener errors, resolve ambiguities, add a general power of appointment for estate tax inclusion.
- Written exercise of decanting power
- Caution: be wary of estate tax inclusion for grantor

Durable Powers of Attorney Caps of Gifting

- Making lifetime gifts is a valuable estate planning tool, resulting if significant tax savings at death. It is advantageous for an agent under a durable power of attorney (DPOA) to be authorized to make gifts and limit gifting power to prevent abuse
- Without specific authorization limited to annual exclusion amount
- Carefully state gifting authorization
- Draft to precent abuse
- Use neutral third party to authorize excess gifting
- Prohibit disrupting principal's estate plan

Old QPRTs: What to Do with the Family Home

- A Qualified Personal Residence Trust (QPRT) is a gift to family members with retained right to live in a residence for a term of years.
- According to tax changes currently under consideration, the value of assets, including trusts, will be included in the grantor's estate at death.
- The 99.5% Act does not include an exception for QPRTs



Reassessing FLPs and LLCs

- Family Limited Partnerships (FLPs) and Limited Liability Companies (LLCs) continue to be important estate planning tools.
- Under the 95.5% Act, non-business assets will be treated as if they were owned by the shareholders and not the entity, taking away marketability, minority interest discounts.
- Parents = General Partner with 1% interest
- Children and grandchildren = limited partners
- Gift Limited Partnership Units (LPUs) as needed or desired
- If LPU value does not exceed annual exclusion, no reported gifting and no use of lifetime exclusion

Joint Tenancies, Income Tax Basis and Estate Tax Treatment

- Married Couples – one-half interest regardless of how much each spouse has contributed.
  - One-half of income and deductible expenses on each spouse's separate return
  - One-half step-up in basis
  - One-half in each spouse's estate

Gift Tax

- Unlimited gift tax marital deduction between U.S. citizen spouses.
- Non-US Spouse
  - If a spouse gifts half of an interest in real property to a non-citizen spouse, a gift tax return must be filed if the value of the property and all other gifts to the spouse exceeds annual gift exclusion of $159,000 (2021)

Income Tax

- Each spouse includes an equal share of income and deductions from the property on their individual tax returns.

Estate Tax

- When a non-spouse joint owner passes away, the amount of the fair market value of the property that gets included in the decedents' estate is determined by how much each tenant contributed.

Gift Tax

- When a person gifts an equal share of real property to a non-spouse, the basis of the property will be one-half of the original donor's basis in the property for income tax purposes. Each owner is responsible for paying an equal portion of the expenses, including mortgage payments.
- If payments are not equally made between joint owners, then ½ of payment is a gift to the other.

Second Marriage Planning

Some clients are concerned about remarriage of their surviving spouse and wants to ensure their assets end up in the hands of their children, and not anyone else.

These concerns are addressed by creating separate trusts or drafting a marital trust such that access to principal or income terminates at remarriage unless parties execute a pre-marital agreement.

Pre-Marital Agreement

- Pre-marital agreements are not guaranteed to survive a legal challenge. The clients must comply with statutes and laws that impose stringent requirements upon prenuptial agreements, both technically and procedurally.

Domestic Asset Protection Trust

- Due to issues surrounding premarital agreements, many couples are seeking other options to protect separate property assets acquired prior to marriage.
- A domestic asset protection trust (DAPT) are powerful trusts that protect assets from potential unknown creditors, which by definition includes a future divorcing spouse.

Spousal Limited Access Trust

- Spousal Limited Access Trust (SLAT) is an irrevocable trust set up by one spouse for the benefit of the other spouse, descendants to provide for health maintenance and support.
- Beneficiary is unable to modify or revoke the trust.

Thank You

II. **Old Small-to-Medium Sized Estate Tools and How to Update Them**

A. Life Insurance

Life insurance is an extremely valuable tool in the estate planner tool bag. This will continue to be the case if we go back to $1M lifetime gift tax exclusion amount, as has been proposed in the For the 99.5% Act. Many taxpayers and their advisors will feel a sense of urgency and great stress to get assets out of the estate. Many will seek to re-direct those assets towards split-dollar life insurance. With the large gift and estate tax exemption amounts, most estate planning practitioners have not had to focus on this technique since 2010. If the current proposals are enacted, and we are limited to a $1M gift tax exemption, it will be critical to preserve it and maximize every dollar, as it will become very precious, which will lead many to focus on split-dollar techniques.

Many of us have clients with large IRAs, that in or themselves exceed $1M. Thus far, the tendency has been to recommend Roth conversions. However, it is important to consider other options as well. If the estate tax exemption is reduced to $3.5M as proposed by President Biden, the Roth conversions that have performed well, and which will continue to grow, will push many estates beyond the joint exemption amount of $7M for a husband and wife. Practitioners will need to look at IRA relocation – taking money out of the IRA and shift those funds into a life insurance trust, providing estate tax exclusion of those funds at the death of the account owner. Life insurance can also be used to deal with the premature death of a spousal beneficiary of a Spousal Lifetime Access Trust (SLAT) and the mortality risk of longer term GRATs. Consider drafting SLATS with insurance provisions, including an insurance director to exclude all incidences of ownership, especially if it is a directed trust.

Unfortunately, we do not have time to wait. As noted above, the new grantor trust rules under consideration, if enacted, will create estate tax inclusion for grantor trusts. Unless the planning and implementation is done immediately, grantor trusts created after enactment of the For the 99.5% Act, and transfers made to pre-existing trusts after enactment will be included in the grantor's estate. Taxpayers with an existing ILITs, should consider making gifts now to ensure the transfers are grandfathered. Going forward, it may be advisable to use a non-grantor trust, partnership or LLC to own the life insurance policy. Until the rules changes, the biggest issue will be getting sufficient liquid assets to fund the insurance trust.

Now is the time to forecast the client's available resources. Work with the client's advisors to identify the amount available for gifting. You need to ensure the client can support their accustomed lifestyle without access to trust assets, even if it's a trust to which the client will have direct or indirect access. The forecast will make the client comfortable with a plan that is strong enough to overcome a challenge by the IRS asserting an implied agreement with the trustee to make distributions of income and principal.

Before implementation, undertake a comprehensive review to determine whether the client has adequate liability insurance, long term care coverage and life insurance, to show client had adequate resources after the transfer, to counter allegations of a fraudulent conveyance. You must also review life insurance to insure the mortality risks of the plan.

B. Decanting Irrevocable Trusts

It is becoming increasing important to retain the flexibility to update irrevocable trusts to reflect changes in family relationships, disability of trust beneficiaries, changing trust law and ever-changing tax policy. Clients are very leery about irrevocable trusts. They recognize there are very few constants in life. They want the flexibility to make marginal changes that may be necessary to accomplish the material purpose of the trust, even if they intend for their irrevocable trust to span multiple generations. Clients tend to disfavor court approved modifications, which is why decanting has become a popular option for updating unhelpful or outdated trust provisions. Many states have enacted decanting statutes to empower trustees to change the terms of an irrevocable trust by permitting the transfer of assets from an outdated irrevocable trust to a new trust with more favorable terms. If the trust provides for discretionary power to distribute property to the beneficiaries, then the trustee arguably has a limited power to distribute the property in further trust for the beneficiaries.

Decanting an irrevocable trust may be necessary to modify trustee powers, improve spendthrift provisions, correct scrivener errors, resolve ambiguities, or provide a general power of appointment to create estate tax inclusion. However, the trustee must comply with decanting provisions contained in the old irrevocable trust, follow state law, and not cause the trustee to breach its fiduciary duties. Trust assets must be re-titled to the name of the new trust unless state law allows for decanting via trust restatement.

The trustee will exercise the decanting power in writing which must identify the authority under which the trustee is exercising the decanting power, provide background information to support the decision to decant, including specific requirement of the state decanting statute, identify the current trustee, the grantor, the date of the original trust and any amendments, include an excerpt of relevant terms, and identify the decanted trust if different from the existing trust. It is advisable to obtain consents and releases from the trust beneficiaries if the beneficial interests are modified in the new trust, all of which must be done in a manner that does not create unintended estate tax inclusion for the grantor and trust beneficiaries and does not undermine the intent and technical requirements of the trust.

C. Durable Powers of Attorney Caps of Gifting

The ability to make lifetime gifts is a valuable estate planning tool, which can lead to significant tax savings at death. Therefore, it is advantageous for an agent under a durable power of attorney (DPOA) to be authorized to make gifts for estate planning purposes. In most cases the DPOA should limit gifting power to prevent abuse. If the durable power of attorney authorizes gifting in general language, without any express limitations, in many states, the agent is authorized to make a gift up to the amount of the annual federal gift tax exclusion amount ($15,000), or twice that amount if the principal's spouse consents to a split gift. The agent may also gift the principal's property if doing so is consistent with the principal's objectives, if known, or if unknown, with the principal's best interest, based on all applicable factors, including: (i) the value and nature of the principal's property; (ii) the foreseeable obligations and need for maintenance of the principal; (iii) the minimization of all taxes; (iv) the principal's eligibility for any benefit, program or assistance; and (v) the principal's personal history of making such gifts.

The power to make gifts on behalf of the principal should be carefully stated. In general, the courts will not infer a gifting power from general authorizations to transfer property. To prevent abuse, the drafting attorney should limit gifting that may cause income generated by the principal's property to be attributed to the agent for federal income tax purposes; cause the value of the property to be included in the agent's gross estate; cause distributions to be treated as a gift from the agent; or discharge the agent's legal obligations.

The language of the DPOA should require a neutral third party, unrelated by blood or marriage, to review and approve the proposed transaction. If it becomes necessary for the agent to liquidate or reinvest any of the principal's assets to provide for support, prohibit the agent from disrupting the dispositive provisions of the principal's pre-existing estate plan.

Expanded gifting powers should include the power to a) withdraw assets from trusts created by the principal, b) forgive any debts owed to the principal, c) gift or otherwise spend down the principal's estate for Medicaid eligibility d) honor pledges and continue to make gifts to charitable organizations, e) continue gifting programs initiated prior to incapacitation; and f) make special occasion gifts but otherwise limit gifts to the agent, the agent's estate, the agent's creditors, or the creditors of the agent's estate, unless approved by a neutral third party.

Require the neutral third party to approve gifts in excess of the annual federal gift tax exclusion, but only if the gifts are in the principal's best interest and the best interests of the beneficiaries of the principal's estate plan, following a diligent review of the facts and circumstances. The neutral third party could be an independent certified public accountant, attorney at law, or corporate fiduciary, who would authorize gift splitting under

The DPOA should specifically authorize gifting by creating tenancy in common and joint tenancy interests or establishing irrevocable trusts including charitable or non-charitable split-interest trusts, establishing and contributing property to corporations, family limited partnerships, limited liability partnerships, limited liability companies, or other similar entities and by making gifts of interests in any of those entities. The DPOA should also specifically ratify any gifts made by the agent under the DPOA.

D. Old QPRTs: What to Do with the Family Home

A Qualified Personal Residence Trust (QPRT) is essentially a gift to family members with a retained right to live in the residence for term of years. The QPRT will generally overvalue use and assume no appreciation. The QPRT is a grantor trust during the term of years, and therefore the grantor pays the income tax payable during the term. The grantor will continue to deduct the mortgage interest deduction. Since the QPRT is a grantor trust it is disregarded for income tax purposes and the grantor is treated as the owner of the property, entitling the grantor to the I.R.C. §121 homeowners' deduction from capital gains. The residence may be sold but the net proceeds must be reinvested within two years. The QPRT may own the grantors personal residence, plus one other residence. If the property no longer qualifies as a personal residence, it may be distributed outright to the grantor or converted to a GRAT, with the payments based on original 7520 rate. If the transferred property has a non-recourse mortgage, the amount of the gift is equal to fair market value and monthly mortgage payments are considered recurring gifts. However, if the mortgage is recourse, the monthly payments are not considered additional gifts. At the end of the term, the property is no longer part of the grantor's estate and may grow estate tax free. However, the grantor must start paying rent to the trust for the continued use of the property.

The tax changes currently under consideration, the assets in a grantor trust, even a QPRT, and even if a completed gift for estate tax purposes, the value of the trusts will be included in the grantor's estate at death. As drafted, the For the 99.5% Act does not include an exception for QPRTs, unlike previous proposals – see the proposed budget submitted by President Obama in 2016. As such, the QPRT must be created and funded now to take advantage of what had been an extremely important estate planning technique.

E. Reassessing FLPs and LLCs

Family Limited Partnerships (FLPs) and Limited Liability Companies (LLCs) continue to be useful estate planning tools. In a typical scenario, one or both parents create the FLP/LLC. The incorporator will also serve as the general partner(s), while the children and/or grandchildren serve as the limited partners. Initially, the parents hold both the general partner interests and the limited partner interests. The general partner interest can be as little as 1% of the total equity in the FLP. The limited partner interest will be the remainder of the equity in the FLP so it can be divided up among the children and/or grandchildren by the parents. The parents, as general partners, maintain full and complete control over the FLP while gifting as many of the limited partner units to their children as they desire; thus, reducing their taxable estates. Furthermore, gift tax and use of the applicable exclusion amount can be avoided if the value of the units transferred to each child does not exceed the annual exclusion amount. If the Parents wish to transfer assets at a quicker pace, they can still avoid gift tax by using their lifetime gift tax exclusion amount. If minority interest and marketability discounts are still available, even more value can be transferred to the next generation.

Unfortunately, under the For the 95.5% Act, non-business assets will be treated as if they were owned by the shareholders and not the entity, taking away marketability and minority interest discounts. There will also be no minority discount if the transferee and family members have control or majority ownership in the business entity.

F. Joint Tenancies, Income Tax Basis and Estate Tax Treatment

For clients who forego a living trust, joint tenancy with right of survivorship is the preferred method for a married couple to take title to real property. For those living in community property states, community property with right of survivorship is preferred.

Married Joint Tenants. For married couples who own property as joint tenants, and who file separate returns, one-half of the income and deductible expenses will be included on each of the spouse's separate returns, even if one spouse contributed all the proceeds to purchase the property.

Estate Tax. Each spouse has a 50/50 ownership interest in the property, regardless of how much each spouse contributed. After the first spouse dies, the fair market value of the decedent's half is included in their gross estate. The fair market value will either be the appraised value as of the date of death or the alternative valuation date, which is six months after the date of death. The decedent's half of the property, which now has a new basis, will automatically transfer to the surviving spouse. The surviving spouse's new basis will be the original cost-basis of their one-half interest, plus the one-half step-up in basis, less depreciation.

Gift Tax. Generally, there is an unlimited gift tax marital deduction between U.S. citizen spouses. Therefore, if both spouses are U.S. citizens at the time the real property is gifted, no gift tax will be assessed. An exception to the unlimited marital deduction is when there is terminable interest property. This is when the donor (one of the spouses) maintains control of how the asset will be distributed after both spouses are deceased. A good example of this is property that is funded into a Qualified Terminable Interest Property (QTIP) Trust. If each spouse gifts an equal share of their property interest to another person, such as their child, then each spouse file a separate gift tax return.

Non-US Spouse. If a spouse gifts half of an interest in real property to a non-citizen spouse, a gift tax return must be filed if the value of the property and all other gifts to the spouse exceeds the annual gift exclusion amount for non-U.S. citizens. For 2021, the gift exclusion amount for non-U.S. citizens is $159,000.

Income Tax. Each spouse includes an equal share of the income and deductions from the property on their individual income tax returns. It does not matter how much each contributed to the purchase. When sold, each owner will report an equal share of the gain on their individual returns. Depreciation is calculated based on an equal share.

Estate Tax. Generally, when a joint owner passes away, the amount of the fair market value of the property that gets included in the decedent's estate is determined by how much each tenant actually contributed. However, if the survivor cannot document her personal contribution to the purchase, the entire fair market value will be included in the estate of the first to die. When this happens, the surviving tenants will determine their own basis in the property by equally dividing the total interest in the property. If a property owner gifts an equal share by adding another person to the deed, the entire fair market value of the property will be included in the donor's gross estate. This is true even if the donor filed a gift tax return for the half that was gifted. For estate tax purposes the gift is set aside. If the donor paid gift tax that amount can be used as a credit towards the payment of estate tax. The survivors will automatically inherit the property, and the fair market value of the property will be divided equally between the survivors.

Gift Tax. When a person gifts an equal share of real property to a non-spouse, the basis of the property will be one-half of the original donor's basis in the property for income tax purposes. Each owner is responsible for paying an equal portion of the expenses, including mortgage payments. If the mortgage payments are not equally paid between the joint owners, then one-half of the mortgage payment is a gift to the other. The payor of the mortgage is required to file a gift tax return if the total payments and any other gifts to the other owner exceeds the gift exclusion amount for the year. For 2021, the gift tax annual exclusion amount is $15,000.

G. Second Marriage Planning

Some, but not all, clients are concerned about remarriage of their surviving spouse. The client wants to ensure their assets end up in the hands of their children, and not anyone else. These concerns can be addressed by creating separate trusts or drafting a marital trust such that access to principal or income terminates at remarriage unless the parties execute a legally binding pre-marital agreement.

Pre-Marital Agreement. Pre-marital agreements are not guaranteed to survive a legal challenge. The clients must comply with state statutes and case law that imposes stringent requirements upon prenuptial agreements, both technically and procedurally, such as representation by independent counsel to prevents accusations of conflicts of interest, duress or coercion, number of days to review and sign the agreement before the wedding, full disclosure of assets and liabilities, and possibly a continuing obligation of disclosure. Most problematic tends to be the distasteful nature of a pre-marital agreement for new couples, especially younger couples.

Domestic Asset Protection Trust. Due to the issues and complications surrounding premarital agreements, many couples are seeking other options to protect separate property assets acquired prior to marriage, and to protect forthcoming inheritances. Asset protection trusts give couples a great alternative to the traditional pre-marital agreement. A much better alternative may be a domestic asset protection trust (DAPT) sitused in one of the fifteen states that permit the use of self-settled asset protection trusts in some form. DAPTs are powerful trusts that protect assets from potential unknown creditors, which by definition includes a future divorcing spouse.

Spousal Limited Access Trust. Another option for second marriage protection is a Spousal Limited Access Trust (SLAT). SLAT is an irrevocable trust set up by one spouse for the benefit of the other spouse, and descendants, to provide for health maintenance and support. The beneficiary spouse is unable to modify or revoke the trust, which will prevent the surviving spouse from changing the contingent future beneficiaries. The grantor spouse can name a floating spouse as the beneficiary, such that the beneficial interest of the trust would change if the grantor divorced, then remarried to a new spouse. This will ensure the grantor continues to have indirect access to the trust. The grantor can serve as trustee, or at least retain the ability to remove and replace trustees.

Reassessing Gifting Strategies

Submitted by Charles B. Hadad

Reassessing Gifting Strategies

Presented by: The Lynch Law Group
Charles B. Hadad, Esquire
375 Southpointe Boulevard
Suite 100
Canonsburg, PA 15317
chadad@lynchlaw-group.com

I. Federal Gift Tax

a) Applies to transfers, by gift, of any property. Making an interest-free or reduced-interest loan may be considered making a gift. Political donations are also considered gifts.

b) Gift Tax Exclusions

- As long as spouse is US citizen, you do not have to pay taxes on any amount given;
- Payments made directly to educational or medical institutions for purposes of paying someone else's tuition or medical expenses are not taxable;
- Verified charities receiving contributions may allow deduction from amount of Gift Taxes owed;
- Business gifts may offer deductions. Many caveats apply.

c) Annual Gift Exclusion

- As of 2022, you can give $16,000.00 in gifts before paying gift tax.

II. Current Unified Credit

a) If the gift exceeds annual gift tax exclusion, you can pay tax on excess or take advantage of unified credit to avoid paying tax;

b) Currently, unified credit enables lifetime giveaway value of $12.06 million without having to pay gift tax;

c) By using unified credit, amount available to offset estate tax upon death is reduced;

d) If gift tax paid, such taxed gifts added back to estate and estate tax is recalculated when preparing and filing the Form 706 for the Donor's estate upon his/her date of death.

(Information gathered from https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax)

III. <u>Taxable Estate</u>

a) The federal estate tax is imposed "on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." The starting point in the calculation is the "gross estate." Certain deductions (subtractions) from the "gross estate" amount are allowed in arriving at a smaller amount called the "taxable estate."

b) The "gross estate" for federal estate tax purposes often includes more property than that included in the "probate estate" under the property laws of the state in which the decedent lived at the time of death. The gross estate (before the modifications) may be considered to be the value of all the property interests of the decedent at the time of death.

c) <u>Deductions and the taxable estate</u>. Once the value of the "gross estate" is determined, the law provides for various "deductions" in arriving at the value of the "taxable estate." Of these deductions, the most important is the deduction for property passing to (or in certain kinds of trust, for) the surviving spouse, because it can eliminate any federal estate tax for a married decedent. However, this unlimited deduction does not apply if the surviving spouse (not the decedent) is not a U.S. citizen. A special trust called a Qualified Domestic Trust or QDOT must be used to obtain an unlimited marital deduction for otherwise disqualified spouses.

d) <u>Tentative tax</u>. The tentative tax is based on the tentative tax base, which is the sum of the taxable estate and the "adjusted taxable gifts" (i.e., taxable gifts made after 1976). The tentative tax is reduced by gift tax that would have been paid on the adjusted taxable gifts, based on the rates in effect on the date of death (which means that the reduction is not necessarily equal to the gift tax actually paid on those gifts).

e) <u>Credits against tax</u>. There are several credits against the tentative tax, the most important of which is a "unified credit" which can be thought of as providing for an "exemption equivalent" or exempted value with respect to the sum of the taxable estate and the taxable gifts during lifetime.

f) Requirements for filing return and paying tax. For estates larger than the current federally exempted amount, any estate tax due is paid by the executor, other person responsible for administering the estate, or the person in possession of the decedent's property. That person is also responsible for filing a Form 706 return with the IRS. In

(Information gathered from https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax)

addition, the form must be filed if the decedent's spouse wishes to claim any of the decedent's remaining estate/gift tax exemption. Filing of 706. The deadline for filing the Form 706 is 9 months from the date of the decedent's death. May place filing requirement on extension for 6 months upon filing request for automatic filing extension (see IRS Form 4768).

IV. <u>Portability</u>

Federal Tax Exemption

Year	Estate Tax Exemption	Top Tax Rate
2011	$5,000,000	35%
2012	$5,120,000	35%
2013	$5,250,000	40%
2014	$5,340,000	40%
2015	$5,430,000	40%
2016	$5,450,000	40%
2017	$5,490,000	40%
2018	$11,180,000	40%
2019	$11,400,000	40%
2020	$11,580,000	40%
2021	$11,700,000	40%
2022	$12,060,000	40%

(Information gathered from https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax)

a) The 2017 American Taxpayer Relief Act set the "Portability" provisions which allow the estate of a deceased spouse who does not use all of his exemption to pass his excess exemption on to his surviving spouse. However, in order to utilize the "Portability" benefit, a Form 706 Federal Estate Tax Return has to be filed in the first spouse's estate regardless of whether the first spouse owes any federal estate tax. Many "survivor's" estates are going to miss this opportunity by not filing the return of the estate of the first spouse. The portability provisions of the Act require an understanding of two new definitions:

b) Basic Exclusion Amount (BEA) – The Basic Exclusion Amount is $5,490,000 for 2017.

c) Deceased Spousal Exclusion Amount (DSUEA) – This is the lesser of the Basic Exclusion Amount of the "last deceased spouse" or the excess of the Basic Exclusion Amount over the amount on which the tentative tax was calculated on the estate of such "last deceased spouse."

d) For the estates of decedents dying after December 31, 2010, the "Applicable Exclusion Amount" is the sum of the BEA and the DSUEA, if any.

V. Requirements of Portability

a) Only available for decedents dying on or after January 1, 2011, or for gifts made after January 1, 2011.

b) Only applicable for predeceased spouses who died after January 1, 2011.

c) The executor of the predeceased spouse must file a federal estate tax on a timely basis; compute the DSUEA on said return; and irrevocably elect to allow the DSUEA to be taken into account in the surviving spouse's estate.

d) Last Deceased Spouse. If the surviving spouse has more than one predeceased spouse, the surviving spouse's estate may use only the DSUEA of the predeceased spouse whose death occurred last.

e) Portability Applied to Gifts. Surviving spouses may use the DSUEA in making lifetime gifts.

(Information gathered from https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax)

f) Use of Credit Shelter/Exemption Trusts. The birth of portability did not result in the extinction of the Credit Shelter/Exemption Trust. There are still instances in which the use of a Credit Shelter/Exemption Trust may be appropriate and/or preferred. For example, if the estate of the first spouse to die includes assets that are likely to appreciate significantly over the course of the surviving spouse's lifetime, the use of a credit shelter trust can maximize the use of the exemption because the exemption of the first spouse to die will be applied using values determined at the time of death of the first spouse to die. Non-tax reasons (such as a second marriage or spendthrift concerns) are other reasons why a trust might be preferred over portability. A Credit Shelter/Exemption Trust can also be utilized for this purpose and accomplishes the dual objective of utilizing the unified credit or federal estate tax exemption of the first spouse to die.

g) Interpretation: If the first spouse dies and the value of the first spouse's federal gross estate does not require the use all of the deceased first spouse's federal exemption from estate taxes (i.e. $5,490,000), then the amount of the exemption that was not used for the deceased spouse's estate, which is commonly referred to as the DSUE (Deceased Spouse's Unused Exemption) may be transferred to the surviving spouse's exemption so that he or she can use the deceased spouse's unused exemption (DSUE) PLUS his/her own exemption when surviving spouse later dies, at the surviving spouse's date of death. *Ex. First spouse dies with 3 mm federal gross estate and exemption is $12.06 mm, the First spouse's DSUE is $9.06 mm.*

h) Step-Up in Basis. Avoid capital gain taxes (either short-term or long-term) by allowing heirs to inherit the asset. The cost basis of the asset is "stepped up to value" on the date of death. Many exceptions and tricky language in tax code (i.e., does not apply to assets held jointly with children. Also, does not apply to IRAs or 401(k)s).

VI. Sunset of the Federal Exemption

a) On December 16, 2010, Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, which was signed into law by President Barack Obama on December 17, 2010. The 2010 Act changed, among other things, the rate structure for estates of decedents dying after December 31, 2009, subject to certain exceptions. It also served to reunify the estate tax credit (aka exemption equivalent) with the federal gift tax credit (aka exemption equivalent). The gift tax exemption is equal to $5,490,000 for estates of decedents dying in 2017.

b) Credits against tax. There are several credits against the tentative tax, the most important of which is a "unified credit" which can be thought of as providing for an

(Information gathered from https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax)

"exemption equivalent" or exempted value with respect to the sum of the taxable estate and the taxable gifts during lifetime.

c) On December 22, 2018, Congress passed the Tax Cuts and Jobs Act, which was signed into law by President Trump. The Act increased the unified credit amount and double the exemption from approximately $5,600,000 to the lifetime exemption of $11,180,000 per individual and maintained married couples use of portability rules. (i.e. 22.4 mm per married couple). If the estate includes property that was inherited from someone else within the preceding 10 years, and there was estate tax paid on that property, there may also be a credit for property previously taxed. **However, this exemption amount is scheduled to sunset on January 1, 2026 at which time the Unified Credit will return to $5,000,000 per person (with adjustments for inflation).**

VII. Ways to Gift before the 2026 Sunset

a) Irrevocable Trust. Put assets into a long-term trust for the benefit of the children and grandchildren or more remote beneficiaries. These trusts can run for the period governed by the rule against perpetuities in a particular state. Some states still have the common law against perpetuities, which permits a trust to last for about 100 to 120 years. Others have eliminated the rule against perpetuities and the trust can last forever, and others have set number of years for a trust to last.

b) SLAT – Spousal Lifetime Access Trust. A SLAT is an irrevocable trust where one spouse makes a gift into a trust to benefit the other spouse (and potentially other family members) while removing the assets from their combined estates.

- One spouse may choose to fund a SLAT for the benefit of the other spouse or each spouse may choose to fund SLATs. Because a SLAT is funded with a gift made during the spouse's lifetime, any post-gift appreciation will take place in the trust and be excluded from the estate of both spouses for federal estate taxation purposes. They may also elect to include other family members (typically children and grandchildren) as beneficiaries. The donor spouse uses their federal exclusion when transferring assets to the SLAT.

- Married couples may be interested in making large, permanent gifts to reduce the size of their estate. However, concerns can arise because many gifting strategies involve the loss of control of the assets during their lifetime and they may be unsure whether the assets will be needed in the future. Although the trust is irrevocable, the donor spouse may indirectly benefit from the property gifted to the trust, as long as the non-donor spouse is living and remains married to the donor.

(Information gathered from https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax)

- This indirect benefit is achieved because the non-donor spouse is the primary beneficiary of the trust and can request distributions from the trustee of the trust, if needed, during their lifetime.

c) Charitable Remainder Annuity Trust (CRAT). This is a type of gift transaction in which a donor contributes assets to a charitable trust which subsequently pays a fixed income to a designated beneficiary, in the form of an annuity. The value of the annuity is calculated as a fixed percentage of the initial value of trust's assets. A CRAT lasts until the donor passes away, at which time any funds remaining in the trust are then donated to a charity pre-chosen by the donor. The minimum annuity distribution value is 5%.

d) Make Charitable Gifts before January 2026

e) Gift to Family/Beneficiaries before January 2026

(Information gathered from https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax)

The End of the IRA Stretch: Planning for IRAs in Light of the SECURE Act

Submitted by Charles B. Hadad

Charles B. Hadad, Esq.
The Lynch Law Group, LLC
375 Southpointe Blvd., Suite 100
Canonsburg, PA 15317
chadad@lynchlaw-group.com
724-776-8000

The End of the IRA Stretch! Planning for IRAs in Light of SECURE Act

I. What is it, where can I find it & what clients are impacted:

A. Setting Every Community Up for Retirement Enhancement (SECURE) Act
P.L. 116-94
House Bill 1865 (Division O) (starts at page 604)

B. Impacts defined contribution plans, defined benefit plans, individual retirement accounts (including Roth) and 529 Plans.

C. Automatic stretch over life expectancy is no longer available

(i) For some clients – there is no impact.

(ii) For some clients – there is a major impact.

(iii) For most clients – some tweaking will be necessary.

D. Required minimum distribution age is increased from 70 ½ to 72. For an individual born after June 30, 1949, the required beginning date is April 1 of the year after the year in which they reach age 72 (some exceptions apply). Prior to SECURE Act the age was 70 ½. No IRA owner will have a required beginning date in 2021. If born before June 30, 1949, the prior rule requiring the distribution to start by April 1 of the year after the year in which they reach age 70 ½ remains applicable. (SECURE Act §114)

E. Maximum age for making contributions to traditional IRA is repealed (as long as person is working and has earned income, they can contributeto a traditional IRA) (SECURE Act §107)

F. Greater access to annuity options within retirement plans,including 401(k) accounts

G. Up to $5,000 withdrawal is permitted upon the birth or qualified adoption of a child which is not subject to the 10% penalty. (SECUREACT §113)

H. 529 savings account can be used to make a repayment of up to$10,000 in qualified student loans and expenses for home-schooling expenses and certain apprenticeship programs. This change is retroactive to 12/31/2018. (SECURE ACT §302)

I. <u>Employer</u> plan provisions which will not be discussed as partof this program.

A. <u>Changes to RMD Rules (SECURE Act §401) – "10-Year Rule"</u>

i. Maximum 10-years to withdrawal account for 401(k), traditional IRA and Roth IRA Accounts

ii. What does this look like? Assume $100,000 IRA with 3% estimated rate of return in the account is inherited by 50-year-old in 2020 who elects to take distributions using 10-year payout rather than waiting and taking all in year 10.

	Before SECURE Act RMD	Remaining Balance		After SECURE Act	Remaining Balance
Year 1	$2,923.98	$99,988.30		$10,000.00	$92,700.00
Year 2	$3,011.70	$99,885.90		$10,300.00	$84,872.00
Year 3	$3,102.05	$99,687.37		$10,609.00	$76,490.89
Year 4	$3,195.11	$99,387.03		$10,927.27	$67,530.53
Year 5	$3,290.96	$98,978.95		$11,255.09	$57,963.70
Year 6	$3,389.69	$98,456.94		$11,592.74	$47,762.09
Year 7	$3,491.38	$97,814.53		$11,940.52	$36,896.22
Year 8	$3,596.12	$97,044.96		$12,298.74	$25,335.40
Year 9	$3,704.01	$96,141.18		$12,667.70	$13,047.73
Year 10	$3,815.13	$95,095.83		$13,047.73	$0.00
Total RMD	**$33,520.13**			**$114,638.79**	
The SECURE Act increases the RMD by **$81,118.66** over the 10-year period.[1,2]					

B. Annual distributions are not required – just have to make sure all funds are withdrawn by 10th anniversary of year of death

i.e. January 10, 2020 DOD

Last withdrawal must occur by 12/31/2030

C. Age of deceased participant is not relevant

[1] Chart prepared using www.securermd.com calculator.
[2] All values determined at year end.

II. Beneficiary Designations - New Rules Per Secure Act

A. Definition has not changed and is defined as an individual named as a beneficiary by the participant or by the plan or a trust so named as beneficiary if the trust meets the IRS requirements to be considered a see-through trust

B. If no Designated Beneficiary (e.g. estate, charity or trust that does not qualify as a see-through trust) – current rule remains unchanged:

If participant died before RBD – 5 years

If participant died after RBD – single life payout

III. Definition of Eligible Designated Beneficiary (EDB) (SECURE Act Section 401(a)(2))– life expectancy payout with modifications

A. Surviving Spouse (SECURE Act §401(a)(9)(E)(ii)(I)) – note that on spouse's death, the 10-year rule applies to successor beneficiaries'

B. Minor child of the participant (but only during minority) (SECURE Act §401(a)(9)(E)(ii)(II))

(i) Upon attainment of "age of majority" – flips to the 10-year payout rules

(ii) "Age of majority" not defined in SECURE Act – it is controlled by state law

a. Under 21 - See, 1 P.S. §1991

b. Under 18 - See, 23 P.S. §5101

c. 21 or under - See, PA inheritance tax instructions referring to this group as "minors"

(iii) It is unclear if the exception found in the regulations under IRC §401(a)(9)(F) which provides that "a child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26."

(iv) Does not apply to step-children

C. Disabled individual within definition of definition of §72(m)(7)

(i) An individual is considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. Entitlement to Social Security benefits is evidence of disability but other evidence can be presented to the IRS.

(ii) This could protect supplemental and special needs trusts from the 10-year distribution rule.

1. Be careful that no distributions are permitted during the disabled persons lifetime to others such as siblings.

2. It may be necessary to use the provisions of the PA Uniform Trust Act to amend existing irrevocable trusts. Many trusts contain language which permits a trustee to amend a trust to remain in compliance with changes in tax law. Evaluate if this language is broad enough to allow the amendment. If not, petition the Court of Common Pleas to amend the trust. Consider holding a meeting with all settlors (if living) and all current and future beneficiaries to discuss the impact of the SECURE Act. A consented to Petition may get expedited treatment.

(iii) Consider defining the beneficiary as "disabled person as defined on IRC §72(m)(7) so the trust document ties back directly to the SECURE Act provisions.

(iv) Status as disabled is determined as of the participants date of death. A beneficiary who becomes disable at a later date is not eligible to be an EDB.

D. Chronically Ill Individual

(i) Within the meaning of §7702B(c)(2) except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to such individual is an indefinite one which is reasonably expected to be lengthy in nature

(ii) Consider defining the beneficiary as "disabled person as defined on IRC §7702B(c)(2) so the trust document ties back directly to the SECURE Act provisions.

(iii) Status as a chronically ill individual is determined as of the participants date of death. A beneficiary who becomes chronically ill at a later date is not eligible to be an EDB.

E. Individual not more than 10 years younger than participant.

IV. Impact on Estate Planning

A. Post-SECURE Act Plans

(i) Conduit (see-through) Trusts – all distributions made from the retirement plan to the trust during the lifetime of the "conduit' beneficiary of the trust must be passed out (after deduction of applicable expenses) to the lifetime individual beneficiary. (This is not changed by SECURE Act.)

a. Trust has to receive IRA within 10 years. If a traditional pass through is used, the trust beneficiary will receive the IRA within 10 years. This defeats the purpose of using the trust in most situations. If the conduit beneficiary also qualifies as a EDB, the lifetime rules could apply.

b. SECURE Act does not refer to the 10-year rule as an RMD. Practitioners need to review and evaluate language if trust is intends for distributions to pass out and not be accumulated. Referring to RMD may not be sufficient to meet new SECURE Act rules.

c. Be careful – the trust has to require distribution of the IRA proceeds annually or it will not qualify as a Conduit Trust.

(ii) Accumulation (see-through) Trusts – An accumulation trust can accumulate IRA distributions during the lifetime of the initial beneficiary(ies) for possible later distribution to another beneficiary but all beneficiaries who might ever be entitled to receive accumulated funds are "counted" as beneficiaries for purposes of applying the RMD rules. All identifiable beneficiaries must be individuals.

a. Accumulation trusts are not going to qualify as EDB (lifetime distribution) without changes to IRS regulations or other published guidance. The problem is that the EDB is not the "sole" beneficiary. This why it is critical to make sure a trust for a disabled or chronically ill individual makes it clear they are the "ONLY" beneficiary during their lifetime

b. Subjects the IRA distributions to fiduciary income tax at the compressed schedule applicable to trust. IRA distributions are not subject to the Net Investment Tax add-on.

c. Negative fiduciary income tax rates result in less accumulation for future benefit of trust beneficiaries as a larger portion will be lost to income tax.

d. Good News – age of the beneficiaries of an accumulation trust no longer negatively impact the distribution schedule – it will be 10-years.

(iii) Charitable Remainder Trusts

a. IRA distribution to the CRT is not subject to income tax under current IRC rules. CRT could allow lifetime distributions to beneficiary which are subject to income but allows retention of a lifetime distribution. Remainder would have to be distributable to charity. Must evaluate whether the benefit of lifetime payout without the immediate income tax is beneficial give that remainder passes to charity.

(iv) Questions to evaluate with client when planning with retirement benefits after SECURE Act

a. Do the people they want to benefit meet the definitions for an extended distribution period?

b. Can a charitable trust be used to achieve the lifetime payout goal?

1. Will not work for very young beneficiaries due to statutory requirements for CRTs.

2. Client should have a charitable intent and not use this just to save taxes.

c. Is client in a lower tax bracket than the ultimate beneficiary (e.g. trust)? If so, a ROTH conversion might be a good strategy. Paying the income tax now at a lower rate will ultimately preserve funds for the future beneficiary since trust will not pay tax on ROTH distributions.

d. Would it make sense to use an existing (or new) life insurance product to generate the funds to pay the income taxes to allow fuller funding of the trust?

B. Pre-existing Plans

1. Consider shifting of assets. Could IRA be used to fund a sibling's bequest who may be within 10 years of age and qualify for lifetime distribution? Does one child/heir qualify for lifetime distribution and others do not? Consider funding each bequest differently. Review each asset and plan to see of things can be moved around among beneficiaries.

2. Evaluate the use of existing life insurance policies to pay the income tax.

3. Detail the benefits of using a trust to determine if the payment of income tax is a cost to achieve the goal of trust

a. Creditor protection

b. Marital spousal protections

c. Heir protection (from themselves and bad decisions)

V. Effective Date: January 1, 2020

Appendix: The SECURE Act (Slides)

Setting Every Community Up for Retirement Enhancement (SECURE) Act

P.L. 116-94
House Bill 1865 (Division O) (starts at page 604)

Impacts defined contribution plans, defined benefit plans, individual retirement accounts (including Roth) and 529 Plans.

Annual distributions are not required – just have to make sure all funds are withdrawn by 10th anniversary of year of death

i.e. January 10, 2020 DOD
Last withdrawal must occur by 12/31/2030

Age of deceased participant is not relevant

NEW:

Definition of Eligible Designated Beneficiary (EDB) (life expectancy payout with modifications

Surviving Spouse – note that on spouse's death, the 10-year rule applies to successor beneficiaries'

Minor child of the participant (but only during minority)

Upon attainment of "age of majority" – flips to the 10-year payout rules

"Age of majority" not defined in SECURE Act – it is controlled by state law

It is unclear if the exception found in the regulations under IRC §401(a)(9)(F) which provides that "a child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26."

Does not apply to step-children

Disabled individual within definition of definition of §72(m)(7)

- unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.

- Entitlement to Social Security benefits is evidence of disability but other evidence can be presented to the IRS.

It may be necessary to use the provisions of the PA Uniform Trust Act to amend existing irrevocable trusts.

Consider defining the beneficiary as "disabled person as defined on IRC §72(m)(7) so the trust document ties back directly to the SECURE Act provisions.

Status as disabled is determined as of the participants date of death. A beneficiary who becomes disable at a later date is not eligible to be an EDB.

Chronically Ill Individual

- Within the meaning of §7702B(c)(2) except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to such individual is an indefinite one which is reasonably expected to be lengthy in nature
- Consider defining the beneficiary as "disabled person as defined on IRC §7702B(c)(2) so the trust document ties back directly to the SECURE Act provisions.
- Status as a chronically ill individual is determined as of the participants date of death. A beneficiary who becomes chronically ill at a later date is not eligible to be an EDB.

Individual not more than 10 years younger than participant

Conduit (see-through) Trusts – all distributions made from the retirement plan to the trust during the lifetime of the "conduit' beneficiary of the trust must be passed out (after deduction of applicable expenses) to the lifetime individual beneficiary. (This is not changed by SECURE Act.)

Trust has to receive IRA within 10 years. If a traditional pass through is used, the trust beneficiary will receive the IRA within 10 years. This defeats the purpose of using the trust in most situations. If the conduit beneficiary also qualifies as a EDB, the lifetime rules could apply.

SECURE Act does not refer to the 10-year rule as an RMD. Referring to RMD may not be sufficient to meet new SECURE Act rules.

Be careful – the trust has to require distribution of the IRA proceeds annually or it will not qualify as a Conduit Trust.

Accumulation (see-through) Trusts – An accumulation trust can accumulate IRA distributions during the lifetime of the initial beneficiary(ies) for possible later distribution to another beneficiary but all beneficiaries who might ever be entitled to receive accumulated funds are "counted" as beneficiaries for purposes of applying the RMD rules. All identifiable beneficiaries must be individuals.

Accumulation trusts are not going to qualify as EDB (lifetime distribution) without changes to IRS regulations or other published guidance. The problem is that the EDB is not the "sole" beneficiary. This why it is critical to make sure a trust for a disabled or chronically ill individual makes it clear they are the "ONLY" beneficiary during their lifetime

Subjects the IRA distributions to fiduciary income tax at the compressed schedule applicable to trust. IRA distributions are not subject to the Net Investment Tax add-on.

Good News – age of the beneficiaries' of an accumulation trust no longer negatively impact the distribution schedule – it will be 10-years.

IRA distribution to the CRT is not subject to income tax under current IRC rules.

CRT could allow lifetime distributions to beneficiary which are subject to income but allows retention of a lifetime distribution.

Remainder would have to be distributable to charity.

Must evaluate whether the benefit of lifetime payout without the immediate income tax is beneficial give that remainder passes to charity.

Financial and Medical Powers of Attorney

Submitted by Charles B. Hadad

Durable Financial Powers of Attorney

Presented by: The Lynch Law Group
Charles B. Hadad, Esq.
375 Southpointe Boulevard
Suite 100
Canonsburg, PA 15317
chadad@lynchlaw-group.com

I. Purposes:

a. A Power of Attorney is a written document where an individual designates another person to exercise powers or perform acts on his or her behalf.
b. Durability: A Power of Attorney will remain in effect even upon subsequent disability or incompactly of the principle.
c. A Power of Attorney maybe springing which means it does not become effective until the Principal is incapacitated or disabled, as frequently certified by a physician.
d. A Power of Attorney can be revoked in three ways:
    i. Death of the Principal;
    ii. Disability or Incapacity of the Principal, where the Power of Attorney is not durable; and
    iii. The Principal revokes the Power of Attorney.

II. Form and Execution:

a. Each state has their own specific requirements, prior to drafting a Power of Attorney you should reference your state specific requirements.
b. For example, Pennsylvania's ownership requirement are as follows:
    i. Pennsylvania Notice;
    ii. Acknowledgment by agents;
    iii. Dated and signed by the Principal; and
    iv. If the Principal is unable to sign, the document maybe signed by a third party but it must be notarized and witnessed by two individuals.

III. Powers:

a. The Principal may appoint one or more agents and may specify if they can act independently or jointly.
b. Each state has their own enumerated list of Powers that may be granted. Each state has their own specific enumerated Powers, prior to drafting a Power of Attorney you should reference your state specific Powers.
c. Several Powers must be expressly given. For example, in Pennsylvania you must expressly give the following powers:

i. Create, amend, revoke, or terminate a trust;
ii. Make a gift;
iii. Create or change rights of survivorship;
iv. Create or change a beneficiary designation;
v. Delegate authority granted under the Power of Attorney; and
vi. Disclaim property including a Power of Appointment.

IV. Duties as Agent

a. The Agent owes the Principal a fiduciary duty. The Agent has a duty to:
   i. Act in good faith;
   ii. Act only within the scope of authority granted; and
   iii. Act in accordance with Principal's reasonable expectations and in the Principal's best interest.
b. The Agent also has a duty to do the following:
   i. Act loyally for the Principal's benefit;
   ii. Keep the Agent and Principal's funds separate;
   iii. Potentially render an accounting of their actions as Agent to the Principal;
   iv. Act so as not to create a conflict of interest between the Principal and the Agent; and
   v. Act with care, competence, and diligence ordinally exercised by Agents in similar circumstances.

Healthcare Directives

Presented by: The Lynch Law Group
Charles B. Hadad, Esq.
375 Southpointe Boulevard
Suite 100
Canonsburg, PA 15317
chadad@lynchlaw-group.com

I. Healthcare Power of Attorney

a. Purpose and Powers: Generally, a Healthcare Power of Attorney is a writing made by a Principal designating an individual to make health care decisions for the Principal.

b. Form and Execution: Each state has their own specific requirements, prior to drafting a Power of Attorney you should reference your state specific requirements.

c. Revocation: A Healthcare Power of Attorney can be revoked at any time by the Principal.

II. Living Will

a. Purpose and Powers: Generally, a Living Will is a writing that expresses a Principal's wishes and instructions for healthcare once the Principal is determined to be incompetent and has an end stage medical condition or is permanently unconscious.

b. Form and Execution: Living Wills generally can be executed by an individual of sound mind who is eighteen years or older and express their wishes by executing a living will to govern the initiation, continuation, withholding or withdrawal of life sustaining treatment.
   i. Each state has their own specific requirements, prior to drafting a Living Will you should reference your state specific requirements.
   ii. For example, in Pennsylvania a Living Will must be dated and signed by signature or mark or by a third party on the Principal's behalf and be witnessed by two individuals at least eighteen years or older.

c. Incompetent and End Stage Medical Conditions
   i. Each state will have a threshold for when the use of a Living Will is triggered. Mentioned above, in Pennsylvania the two terms that trigger the use of a living will are incompetent and end stage medical condition.
   ii. In Pennsylvania, incompetent means "a condition in which an individual despite being provided appropriate medical information, communications support, and technical assistance is documented by a healthcare provider to be:
      1. Unable to understand the potential material benefits, risks and alternatives involved in a specific proposed healthcare decision:

2. Unable to make that health care decision on his own behalf: or
3. Unable to communicate that healthcare decision to any other person." 20 Pa. Cons. Stat. §5422

iii. In Pennsylvania, an end stage medical condition is an "incurable and irreversible medical condition in an advanced state caused by injury, disease, or physical illness that will, in the opinion of the attending physician to a reasonable degree of medical certainty will result in death, despite the introduction or continuation of medical treatment." 20 Pa. Cons. Stat. §5422

d. Revocation: A Living Will can be revoked at any time by the Principal.

III. HIPAA Authorization

a. Purpose and Powers: Pursuant to the Health Insurance Portability and Accountability of 1996, a HIPAA Authorization will contain provisions that limit the use, disclosure, and release of an individual's identifiable health information.
   i. Generally, without a direct authorization, such as a HIPAA Authorization, "entities" cannot release or disclose identifiable health information, including information regarding past, present, future medical conditions, diagnosis, treatment, or even billing information.
   ii. Some example of these "entities" are physicians, health care professionals, hospitals, clinics, pharmacies, nursing homes, or assisted living facilities. The Act further defines these "entities."
b. Form and Execution: A HIPAA Authorization may be executed permitting an individual to waive such protections for designated recipients. These may be drafted such that do not expire until after the individual's death.
c. Revocation: A HIPAA Authorization can be revoked at any time by the Principal.

Planning for Nursing Home Care, Medicaid Planning, Aging in Place

Submitted by Richard P. Schulze

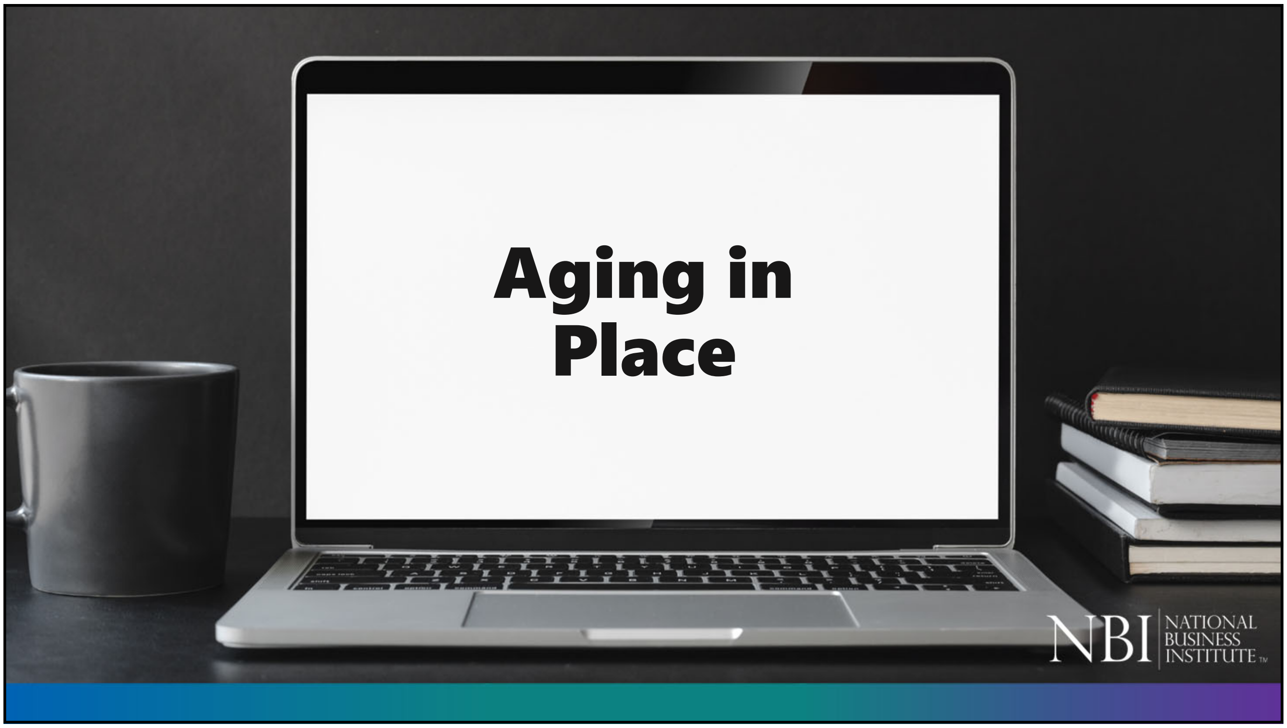
PLANNING FOR NURSING HOME CARE, MEDICAID PLANNING & AGING IN PLACE

NBI | NATIONAL BUSINESS INSTITUTE

Richard Schulze, JD, MBA

ABOUT ME

- Owner, Schulze Law Group, PC
- A law practice focusing solely on Estate Planning & Elder Law for over 20 years



Defined

- Does not mean growing old at home
- Does not mean no care needed or provided
- Growing old where the client wants to grow with the least possible restrictions on her of his life

Goals and Process

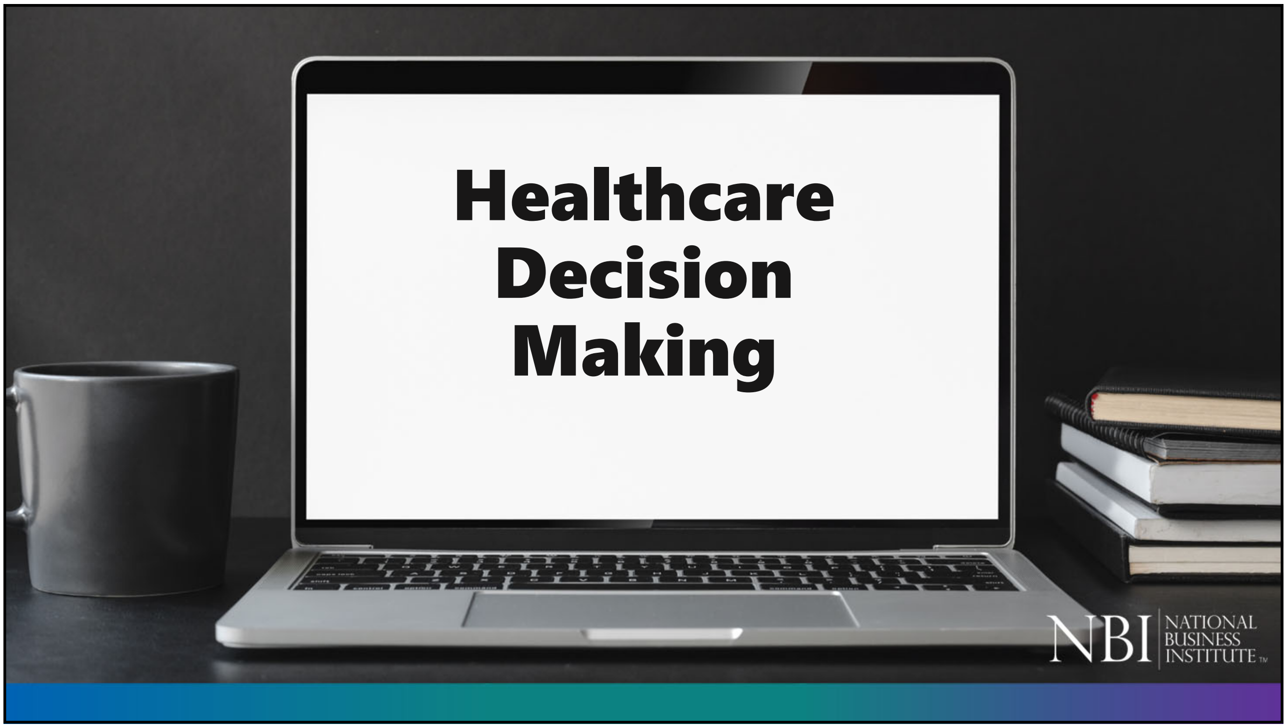
- Need to understand existing condition(s) [physical or cognitive impairments; now and likely in the future]
- What is needed to:
  - Maintain independence
  - Choice in healthcare / end of life
  - Maintain personal dignity

NBI NATIONAL BUSINESS INSTITUTE

Benefits & Drawbacks

- Benefits
  - Independence
  - Privacy
  - Less Expensive (typically)
- Drawbacks
  - Dementia / Alzheimer's Disease
  - Functional realities
  - Limited Social Network / Interactions

NBI NATIONAL BUSINESS INSTITUTE



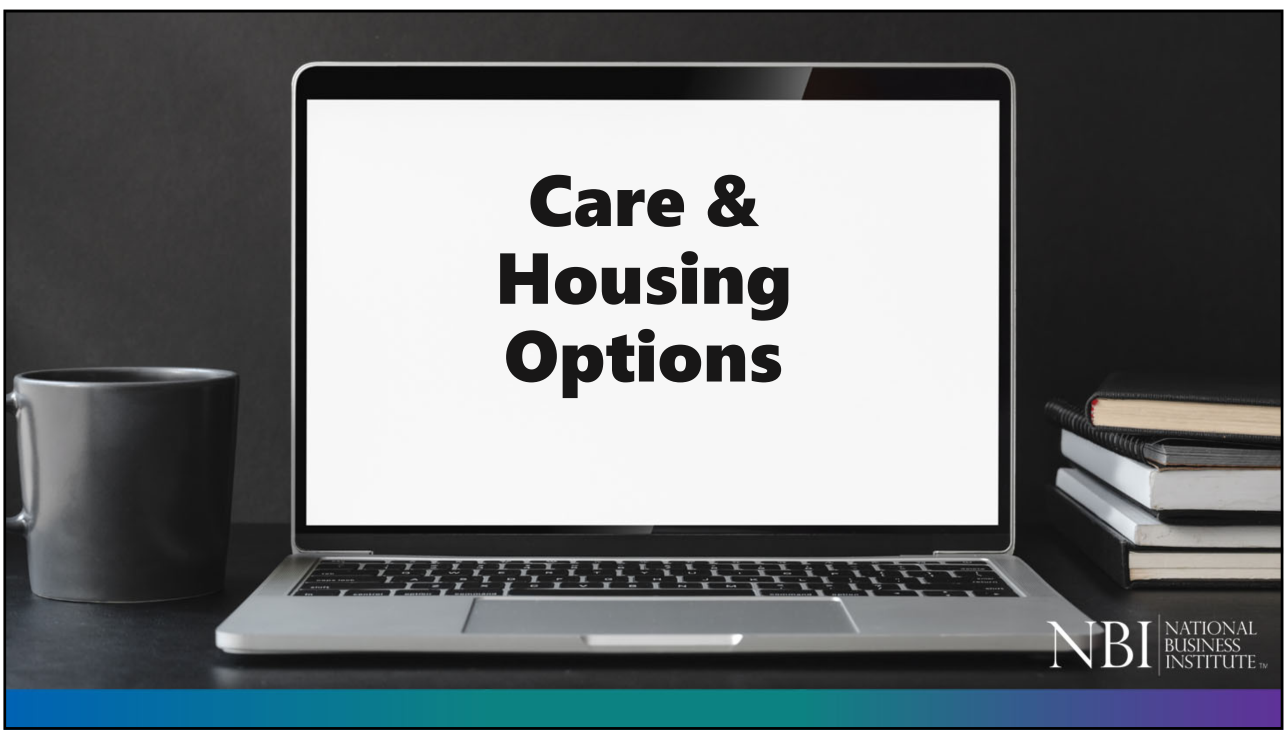
Patient Self-Determination Act

- Grants a Federal right to each individual to decide ahead of time the nature and extent of health care interventions
- Each State has some version of the PSDA
- Most States also have specialized statutes for impaired individuals (mental impairment, dementia, Alzheimer's, etc.)

NBI NATIONAL BUSINESS INSTITUTE

Healthcare Documents

- Healthcare Power of Attorney
- Advance Directive
- POLST / MOLST / MOST / POST / TPOPP



Housing & Care Options

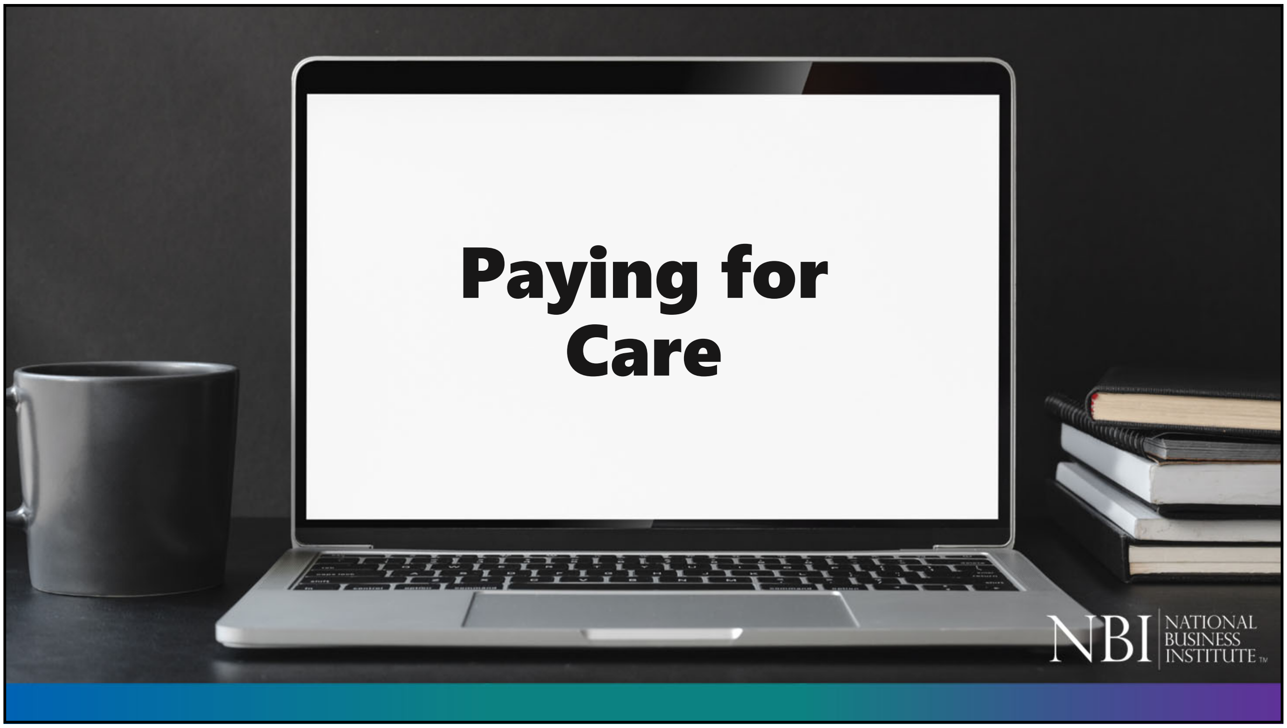
- Independent Living Apartments
- Enriched Housing
- Adult Homes / Group Homes / Board & Care Homes
- Assisted Living Communities

NBI NATIONAL BUSINESS INSTITUTE

Care & Housing

- Adult Homes / Group Homes / Board & Care Homes
- Memory Care Facilities
- Nursing Homes

NBI NATIONAL BUSINESS INSTITUTE



Paying for Care

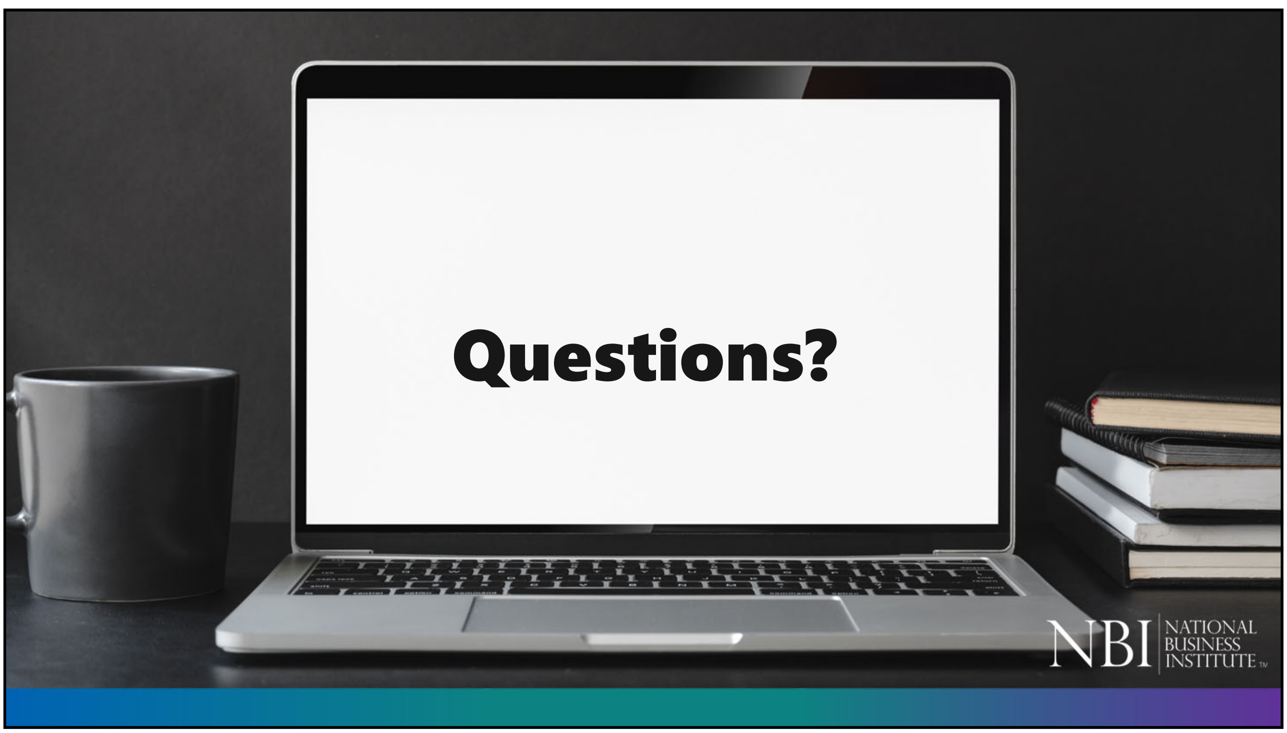
- Most Senior Living Arrangements Require Private Payment
  - Savings
  - Family
  - Long Term Care Insurance
- NOT Medicare or other forms of Health Insurance
  - Custodial Care is not deemed Medical Care
- Medicare / Medicare Supplement Insurance (Rehab only)

NBI NATIONAL BUSINESS INSTITUTE

Government Assistance

- Medicaid Home / Community Waiver Programs
  - Varies by State and by County
  - Eligibility Basics
- Institutionalized Medicaid Benefits
  - Eligibility Basics
- Veterans Benefits

NBI NATIONAL BUSINESS INSTITUTE



Paying for Care

- Most Senior Living Arrangements Require Private Payment
  - Savings
  - Family
  - Long Term Care Insurance
- NOT Medicare or other forms of Health Insurance
  - Custodial Care is not deemed Medical Care
- Medicare / Medicare Supplement Insurance (Rehab only)

NBI NATIONAL BUSINESS INSTITUTE

Richard P. Schulze, JD, MBA
SCHULZE LAW GROUP, PC
rps@renolegal.com
TEL: (775) 853-5700

PLANNING FOR NURSING HOME CARE, MEDICAID PLANNING, AGING IN PLACE

1. AGING IN PLACE

Despite the growing number of assisted living and retirement communities, research shows that older adults today prefer to age at home for as long as possible, if not indefinitely. They'd rather grow older in the comfort of their own homes and communities rather than relocate, which is exactly 'what aging in place' means. The majority of older adults still wish to remain living at home even in light of increased care needs.

Being able to stay in your own home as you age can be very beneficial. However, it can also have many drawbacks if you're not able to receive the assistance and care you may need.

A. Definition of 'Aging in Place'

Seniors who are aging in place make choices about how they live and will continue to live their lives. They may consider plans on how to meet their needs in the future and who will help them. It's important to note that aging in place doesn't mean having to do everything by yourself or even, necessarily mean staying in your current residence.

A major component of aging in place is determining which types of assistance our client may need in the future. It also involves discussing and planning for the client's preferences for major life events with others such as housing transitions, treatment plans, and end-of-life planning preferences.

The primary goal of aging in place is to maintain independence, good quality of life, and to remain around familiar surroundings. Aging in place refers to the ability to grow older in one's residence of choice while maintaining some level of independence. For our purposes, aging in place can be interpreted to mean maximizing independence, freedom of choice, and personal dignity.

B. What are the Benefits and Drawbacks of Aging in Place?

As mentioned above, aging in place can be a very good option for people who have a strong support system in place. However, as care needs increase, aging in place can bring risks which must at least be discussed. Below are a few of the common advantages and disadvantages of aging in place.

Benefits

Independence. Remaining in one's own home lets the individual continue living independently where they are most comfortable; cooking their own meals, eating their favorite/familiar meals, having control over their schedule, and participating in activities that bring them happiness. It can also mean being able to keep pets and friends nearby. In sort, aging in place helps preserve a sense of identity and autonomy.

Privacy. Compared to other long-term care facilities, aging in place allows for more privacy. In long-term care facilities, a client will have daily check-ins with nurses and may possibly be living with roommates. By contrast, receiving care at home allows one to can schedule and coordinate it themselves.

Finances. On the financial end, receiving care at home can be lower than long-term care facilities. This is because, in long-term care, you aren't just paying for the residence alone. You would also be paying for meals, transportation, employees, and care.

Prevents or delays the need for long-term care. Research shows that aging in place with proper support and planning helps delay or prevent unnecessary and traumatic relocation to institutional settings. Moving later in life can be especially disorienting for some, especially if it's a decision made without their input or if they suffer from some version of cognitive impairment. This is why planning ahead of time is extra important. It ensures that the client will be able to have a say or control over how they live their life despite declines in health and mobility.

Drawbacks

A number of factors serve as barriers to aging in place.

Health decline. As adults age, they can experience increasing declines in health and functionality, which can make them more vulnerable to poor health outcomes. It also takes longer to recover from illness, injury, and other stressors associated with physical aging processes.

Functional limitation. It is estimated that nearly one-third of older adults living alone in a community may have functional limitations. These limitations put them at risk for relocation to long-term care facilities. In addition, age-related frailty is associated with increased risk for falls, hospitalizations, hospital readmissions, and mortality.

Limited social networks. Limited social networks, weaker social ties, and fewer opportunities for meaningful engagement may also hinder aging in place. Aging in place with the absence of meaningful social interaction and connection may lead to feelings of loneliness, helplessness, boredom, and depression. All these can have increasingly negative impacts on health and well-being that threaten quality of life. In fact, declines in social participation and disengagement from social activities may be one of the reasons that lead to nursing home placement.

Parkinson's Disease, Dementia or Alzheimer's Disease. A growing number of older adults experience dementia and have difficulty remembering things. This could be as simple as forgetting to turn off the light, or as serious as leaving a burner on the stove, which could be a fire hazard. If your client has received a diagnosis of dementia, consider more intensive care options if they wish to continue remaining at home; although, it is very likely their placement in a care facility will be inevitable.

2. AGING IN PLACE: HEALTHCARE DECISION MAKING

Healthcare instructions are a vital component of an aging in place plan. While there are many reasons for this, the most obvious one is that placement in a care facility often follows a near-death experience by the senior or an experience that, but for the “heroic interventions” of health care professionals and family would have resulted in a “natural” or “timely” death.

Research shows that 80 percent of Americans will die in some type of medical facility. There have been considerable advancements in technology, machines, and treatments to prolong life and delay a natural death. But while the time spent living may be increased, the quality of life may be drastically reduced. In other words, do you want to stay alive, just because you can be kept alive? The answer to that question is where the planning for healthcare decisions begins.

Many seniors have very strong feelings about the level of health care they want to receive if they experience a medical crisis or face admission to a hospital. Unfortunately, our culture generally does not encourage discussions about end-of-life decisions and choices. As brutal as this may sound to some, proper end of life decision-making and communication of those wishes may be the most effective way to avoid placement in a long-term care facility.

Because of this, it is often the estate planning attorney who initiates this discussion. There are six typical documents an attorney, or anyone advising seniors, needs to be familiar with.

Federal and State Law

The 1990 Patient Self-Determination Act (PSDA) encourages everyone to decide ahead of time about the types and extent of medical care they want to accept or refuse if they become unable to make those decisions due to illness.

Each state has statutes that address healthcare decision-making. These statutes may or may not be easy to locate. For example, there may be specific documents to be used for a competent adult, minor children, mentally challenged adults,

adults with cognitive diseases (e.g. Alzheimer's Disease), mental health powers of attorney and others.

Healthcare Power of Attorney

A healthcare power of attorney (HCPOA) is a state law authorized document allowing an individual (the "principal") to nominate another individual (the "agent") to make healthcare decisions for that individual if the principal becomes temporarily or permanently unable to make decisions for themselves. An HCPOA allows the principal to choose the individual they want to make these decisions and to discuss with them what you want those decisions to be.

In addition to appointing an agent of the client's choice to make healthcare decisions, the HCPOA may also allow for the creation of limitations and instructions for healthcare decision-making. Oftentimes, the instructions in the HCPOA may be customized to fit a client's desires and needs.

If a person does not complete an HCPOA and becomes unable to make their own health care decisions, there may be health care decisions that need to be made for you. This may require the appointment of a guardian of the person and court involvement and oversight of health care decision-making. Most clients would prefer that the state court system not control their lives and end of life decision-making.

Advance Directive or Living Will

An Advance Directive (sometimes known as a "Living Will") is a document that addresses your medical care at end of life. It differs from an HCPOA in that an AD only becomes effective if the client is permanently unable to communicate his or her healthcare desires and death is “reasonably imminent” without the provision of medical interventions (i.e., life support). An AD is considered a directive regarding life support and medical care thus limiting (and guiding) what an agent’s or healthcare provider’s decisions for the client’s health care.

The AD is a legal document that allows individuals to share their wishes with their health care team during a future medical emergency. An AD allows an individual to state what treatments he or she would want in a medical crisis, but it is not a medical order. Advance directives are not portable in the sense that it is not accessible across medical systems, so it is the individual's responsibility to have the form on them at all times. This can bring up challenges as it can be difficult to locate and may need to be interpreted when it is needed. Because advanced directives are filled out by healthy individuals, the form is considered to be a "living will".

Physician’s / Provider’s Order on Life Sustaining Treatment (POLST)

POLST (Physician Orders for Life-Sustaining Treatment) is an approach to improving end-of-life care in the United States, encouraging providers to speak with the severely ill and create specific medical orders to be honored by health care workers during a medical crisis. Unlike advance directives, a POLST should only be used when the individual is at the end of life. Typically, if a provider believes that a person's condition will increasingly worsen and make it hard for the individual to survive another year, then a POLST Form is used.

A POLST form turns a person's treatment wishes outlined in an advance directive into medical orders. The POLST Form provides explicit guidance to healthcare professionals under predictable future circumstances based on the individual's current medical condition. The POLST form is reviewed more frequently compared to an advance directive to make sure that the form complies with the individual's wishes in treatments as the disease progresses.

Compared to the advanced directive, there is no designated surrogate when using a POLST Form. To designate a healthcare agent, people must use an HCPOA. An individual does not need to have an HCPOA to have a POLST form; although, health care professionals recommend that all competent adults have an HCPOA in place. This will help healthcare providers shape a more concise medical decision that better reflects the individual's wishes.

Lastly, the POLST form is very portable, unlike the advance directive. It is the physicians' responsibility to make it accessible across different medical facilities. POLST orders are also known by other names in some states: Medical Orders for Life-Sustaining Treatment (MOLST), Medical Orders on Scope of Treatment (MOST), Physician's Orders on Scope of Treatment (POST), or Transportable Physician Orders for Patient Preferences (TPOPP).

3. TYPES OF CARE FACILITIES / CARE & HOUSING OPTIONS

If an individual is unable to age in place, there are a wide range of housing and care options which may be available depending on the person’s needs and what their community may have available. This range of housing options and varying levels of care, offered within senior communities, help ensure that every senior will find a perfect match—for their housing needs and for their lifestyle.

Independent Living Apartments. Independent living apartments are ideal for seniors who do not need personal or medical care but who would like to live with other seniors who share similar interests. In most independent living facilities seniors can take advantage of planned community events, field trips, shopping excursions, and on-premise projects. These apartments are not licensed or regulated.

Adult Homes / Group Homes. Adult homes are licensed and regulated for temporary or long-term residence by adults unable to live independently. They usually include supervision, personal care, housekeeping, and three meals a day. In most states, the number of residents in the facility must be below a certain level (typically 10 or 12 individuals needing care). The type of care provided is very similar to that provided in Assisted Living Communities or Memory Care Facilities.

Enriched Housing. Enriched housing is similar to adult homes, with the exception that seniors live in independent housing units. They offer a minimum of one meal per day and are licensed by the State Department of Health. This is often a bridge between independent living and assisted living or memory care.

Assisted Living Communities. Assisted living is a type of residential senior care well-suited for seniors who need some assistance with their activities of daily living, but do not need any regular medical care. Residents have access to staff around-the-clock for emergency assistance and receive assistance with their daily tasks, including eating, dressing, and bathing. Assisted living residents only receive the care that they need, enabling them to retain their independence as much as possible while also having help available whenever it is required.

The services offered in assisted living focus on the activities of daily living, which include essential daily tasks such as bathing, dressing, eating, grooming, and transferring (walking). Residents of ALFs have access to as much assistance with ADLs as they need, but can also live as independently as they wish. Along with ADL assistance, ALFs offer other personal care services, including housekeeping and linen services, laundry, and transportation.

Memory Care Communities. Memory care, sometimes referred to as Alzheimer's care, is a specialized form of senior living specifically for seniors living with advanced memory impairment. Seniors living with Alzheimer's and dementia often have very different needs, both physically and emotionally, than other older adults. Dedicated memory care communities offer services and activities tailored to meet the needs of the memory-impaired, and all staff must be trained in how to best work with and support seniors with these cognitive conditions.

Memory care staff is available 24-hours a day to assist residents with any of their personal care needs. This includes assistance with ADLs, housekeeping, laundry, and transportation services. Additionally, many memory care communities offer specialized activity programming intended to stimulate and engage residents. These programs may include music therapy, gardening groups, puzzle clubs, and more. While memory care communities may have fewer lifestyle amenities than independent and assisted living communities, they do have enhanced safety and security measures, such as monitored entry and exit points and community-wide use of personal medical alert systems.

Memory care communities do not offer regular medical care beyond basic first-aid and medication management services. Seniors in need of regular skilled care and around-the-clock access to a doctor are better suited for skilled nursing facilities. Memory care is an appropriate choice for seniors who are in the mid-to-late stages of Alzheimer's or dementia.

Continuing Care Retirement Communities (Lifecare Communities). Continuing care communities offer a variety of facilities, from assisted living to nursing homes, all on one campus. They guarantee "aging in place," that is, the resident can move from one level of care to the next as needs change. For residents, the transition to a nursing home is easier, because they are able to remain in familiar surroundings. They may require a buy-in or an up-front annuity purchase followed by monthly payments which cover services, amenities, and needed medical care.

Nursing Home (Skilled Nursing Facility). Nursing homes offer 24-hour-a-day care for those who can no longer live independently. In nursing homes, trained medical professionals provide specialized care to seniors with severe illnesses or injuries. Specially trained staff assist residents with daily activities such as bathing, eating, laundry and housekeeping. They may specialize in short-term or acute nursing care, intermediate care, or long-term skilled nursing care. Often, someone transitions to a nursing home after being treated in a hospital for an illness or injury. Unlike other senior living options like ALFs and CCRCs, nursing homes focus entirely on resident health rather than lifestyle. Thus, these facilities tend to offer fewer amenities and activities than other types of senior living.

4. PAYING FOR CARE & HOUSING OPTIONS

Most versions of senior care amount to what is referred to as "custodial care." Custodial care is non-medical care that helps individuals with activities of daily living and basic care needs. Custodial care is a popular form of long-term support for seniors whose primary needs involve non-medical assistance on a daily or ongoing basis. Caregivers working in a custodial care setting are not required to have any type of medical background, official training, or certifications. Custodial care can occur in a range of environments including in-home senior care, adult daycare, group or adult care homes, assisted living centers, and residential care facilities (such as memory care facilities). Because custodial care is not deemed to be medical care, Medicare, and in most cases, Medicaid will not pay for this needed care. Most families and individuals must pay privately for this type of care.

Medicaid Home and Community Based Waiver Programs

However, in some states, Medicaid may pay for all or a portion of custodial care through a Home and Community Based Services (HCBS) waiver. The HCBS Waiver program enables states to tailor services to meet the needs of a particular target group. Within these target groups, states are also permitted to establish additional criteria to further target the population to be served on an HCBS waiver. For example, the population can be targeted by age or diagnosis, such as autism, epilepsy, cerebral palsy, traumatic brain injury, or HIV/AIDS. Eligible individuals must demonstrate the need for a Level of Care that would meet the state's eligibility requirements for services in an institutional setting. States choose the maximum number of people that will be served under an HCBS Waiver program.

States can offer a variety of unlimited services under an HCBS Waiver program. Programs can provide a combination of standard medical services and non-medical services. Standard services include but are not limited to: case management (i.e., supports and service coordination), homemaker, home health aide, personal care, adult day health services, habilitation (both day and residential), and respite care. States can also propose "other" types of services that may assist in diverting and/or transitioning individuals from institutional settings into their homes and community.

The unifying principle of an HCBS Waiver program is that it must be designed to keep people who would otherwise end up in an institution in the community.

Medicaid Institutionalized Benefits

Medicaid covers certain inpatient, comprehensive services as institutional benefits. If an individual is eligible for "institutional benefits", Medicaid typically covers the vast majority (if not all) of the individual's costs of care.

The word "institutional" has several meanings in common use, but a particular meaning in federal Medicaid requirements. In Medicaid coverage, institutional services refer to specific benefits authorized in the Social Security Act. These are hospital services, Intermediate Care Facilities for People with Intellectual disability (ICF/ID), Nursing Facility (NF), Preadmission Screening & Resident Review (PASRR), Inpatient Psychiatric Services for Individuals Under Age 21, and Services for individuals age 65 or older in an institution for mental diseases.

For an institution to be eligible to receive payment for Medicaid for services rendered to an individual, the institution must:

- Provide residential facilities, and assume total care of the individuals who are admitted; and

- Provide comprehensive care which includes room and board (other Medicaid services are specifically prohibited from including room and board); and
- The comprehensive service is billed and reimbursed as a single bundled payment. (Note that states vary in what is included in the institutional rate, versus what is billed as a separately covered service. For example, physical therapy may be reimbursed as part of the bundle or as a separate service.); and
- Institutions must be licensed and certified by the state, according to federal standards.
- Institutions are subject to survey at regular intervals to maintain their certification and license to operate.
- Eligibility for Medicaid may be figured differently for residents of an institution, and therefore access to Medicaid services for some individuals may be tied to the need for institutional level of care.

For an individual to be eligible for Institutional Medicaid, they must:

- Be medically needy (i.e., need to the level of medical required to be in a Medicaid institution); and
- Have very limited financial resources (typically less than $2,000 for an individual); and
- Pay all of his or her income towards the cost of care. Some states (known as "income cap states") place a limit on the amount of income an individual may receive and be eligible for Medicaid benefits. This income limit is currently $2,523 of gross income per month. In these states, an additional

tool is known as a "qualified income trust" may be used to reduce income to an allowable level.

Because of the high-level medical care provided in nursing homes, costs are high. Medicare does cover a portion of nursing home costs, but only for short-term stays (the benefit runs out entirely after 100 days in a nursing home). Medicaid provides the most comprehensive nursing home benefit of the available insurance options, but exact coverage and eligibility vary between different states.

Non-Service Connected Disability Benefits for Veterans and Spouses

There is a stipend that some veterans and their spouses may be eligible for, commonly known as the "Aid & Attendance Benefit". The formal name for the benefit is the "Non-Service Connected Disability Pension with Aid & Attendance." The benefit is a monthly stipend paid to qualifying veterans and/or their spouses. Eligibility requirements are:

- Qualifying military service (90 days of active duty, at least one day of which was during a period of conflict. There is no requirement to have actually been in combat); and
- The veteran must have had a discharge "other than dishonorable"; and
- The applicant (veteran or spouse) must be over the age of 65 or permanently disabled; and
- A spouse must have been married to the veteran at the date of the veteran's death and not have remarried; and

- Require assistance with at least one (or more commonly 2) of the activities of daily or be in memory care; and
- Be paying for that assistance; and
- Costs of care must exceed income (combined income if married) (there are exceptions); and
- Net worth (exclusive of a primary residence and most personal property) must be less than $138, 489.

There are several significant benefits to receiving this benefit. The first is that it is a cash payment paid once eligibility is determined. The second is that the veteran will automatically be eligible for full VA medical benefits, including placement in a VA residential care facility. The major disadvantage to this benefit is that the stipend is relatively small compared to the costs of care ($1,300 (widow of veteran) to $2,431 (married veteran, both spouses need care)). It can be very helpful but frequently does not pay the entire cost of care.

5. ELIGIBILITY FOR GOVERNMENT LONG TERM CARE BENEFITS

Each government-funded long-term benefit program has distinct and strict eligibility requirements. In addition to any federal requirements, each state imposes different eligibility requirements for its Institutional Medicaid and Medicaid HCBS Waiver programs. Because the VA Aid & Attendance program is administered solely by the VA, it may appear to be slightly less complex than Medicaid eligibility but it is also very complex.

In short, each of these benefit programs can be important in allowing an individual or family to be able to pay for needed long term. At a minimum, a practitioner should be aware of each of these programs and the general scope of benefits available and be able to make a referral to a professional skilled and knowledgeable about these programs when and as needed.

Reviewing Estate Planning Documents and Fixing Old Trusts

Submitted by Richard P. Schulze

Reviewing Estate Planning Documents

NBI NATIONAL BUSINESS INSTITUTE

Richard Schulze, JD, MBA

ABOUT ME

- Owner, Schulze Law Group, PC
- A law practice focusing solely on Estate Planning & Elder Law for over 20 years

Common Problems & Common Sense Issues

Document Problem

- Where are the original documents? Does the client have them?
- Does the client have a complete documents? (all pages and full set of documents)
- “Simple Changes”
- Amending vs. Restating Documents

The High Level Review

- Names correct?
- Identify children / heirs / trustees completely identified?
- Legally valid in state of execution?
- Last Will properly executed?
- Date of Signing? Date of Notarization?

The Deeper Review

- See chart in materials

Tax Issues of Concern

- Federal Estate / Gift / Generation Skipping Taxes
- State Inheritance / Estate Taxes
- State Real Property Transfer Taxes & Reassessment

NBI NATIONAL BUSINESS INSTITUTE

Document Execution Mistakes

- Not using legal names
- Improper Dating (execution, notarization, etc.)
- Expired Notary Stamp
- Failure to Adhere to State Requirements for a valid document (e.g. deed or POA)

NBI NATIONAL BUSINESS INSTITUTE

Trust Funding Mistakes

- General Assignment
- Ensuring client understands need/importance of trust funding
- Exhibits vs. No Exhibits
- Title on transfer documents (e.g. Deed) matches trust name exactly

NBI NATIONAL BUSINESS INSTITUTE

Trust Funding Mistakes

- Failure to include "close enough" clause in trust agreement
- Using Quit Claim Deeds
- Attempting to Transfer Tax Deferred Retirement Accounts to trust
- No regular review of trust funding

NBI NATIONAL BUSINESS INSTITUTE

Richard P. Schulze, JD, MBA
SCHULZE LAW GROUP, PC
rps@renolegal.com
TEL: (775) 853-5700

REVIEWING ESTATE PLANNING DOCUMENTS & FIXING OLD TRUSTS

Many individuals have existing estate plans of some sort and as their lives change over time, and the laws change, updates and reviews are often needed. This article will address how to approach a trust or estate plan engagement and what to look for in reviewing documents and existing plans.

A. Common Problems and Common-Sense Issues

In the practice of law and estate planning, the technical aspects can often be overwhelming and can make the common-sense aspects of estate planning appear either irrelevant or (more commonly) overlooked. The following is a punch list of items to address:

Original Documents. Does the client know where their original documents are located? You cannot update or review an estate plan if there is no estate plan. An operative, functioning estate plan requires the original documents to be available so that all parties know that they are following the individual's actual intentions. If the original documents cannot be located, the entire estate plan will have to be recreated regardless of any technical changes needed.

Complete Estate Planning Documents. This is similar to the preceding issue. Does the individual have a complete set of their estate planning documents? Often times over the years, pages are lost or otherwise missing, or the individual cannot locate their entire estate plan. This matters for two reasonably obvious reasons. First, an attorney cannot review a trust (or any other estate planning document) if the entire document is not provided or available. Second, unless the entire estate planning package (trust, will, powers of attorney) is made available and reviewed, it is impossible to determine who the documents interact with each other, if the provisions of one conflict with the other, etc.

If pages are missing or cannot be located, the entire estate plan must be recreated as a partial document is often worse than no documents. Similarly, if the client does not provide all of the estate planning documents, the plan cannot be reviewed and the attorney should seriously consider not reviewing the plan or advising the client (in writing) of the limitations of the engagement.

Simple Changes. Often times a client will want the attorney to make a "simple change" to an existing estate plan. Sometimes this may actually be the case; however, often the simple change is more dramatic or extensive than the client may appreciate. For example, a change in trustees may appear to be a simple amendment. This simple change is not so simple when the change also applies to the powers of attorney and the will as is often the case when the client names the same individual as successor trustee, attorney-in-fact, and personal representative.

Another not so simple change may be when the individual requests a change in the final allocation or distribution of trust assets. This could be very straightforward or complex depending on the reasons why and the terms of the distribution. Many times, the entire plan (and the documents) is built around the dispositive provisions of the plan and a change in disposition may impact the remaining planning documents.

Amending vs. Restating Documents. The question of one's willingness to amend another attorney's work product is one of potentially great significance. Many commentators have expressed a belief that the last attorney to touch a document (even if that touch is a simple amendment) is potentially liable for the effectiveness or ineffectiveness of the entire plan and for any omissions or other potential errors in the plan. Regardless of your personal beliefs on this issue, it is definitely something to keep in mind when reviewing estate planning documents. Most clients will not be willing to pay an attorney's hourly rate to read each and every page of their existing estate plan, particularly if the amendment or requested change is simply a change in trustee or beneficiary designation.

While there are no clear answers to this issue, it is important that each attorney address and resolve it for themselves. At a minimum, if the client does not permit a restatement or a complete review of all documents, the attorney should document that in a letter to the client acknowledging the limitations of the engagement.

B. The High-Level Review

For many, estate planning documents are simple forms in which the only variables are the client's name(s) and the date of signing. While this may lead to a "profitable" and "simple" practice, it can also lead to many problems.

Stage One Document Review. The following checklist is a "must review" list of items whenever an estate plan is reviewed:

1. Are all names spelled correctly and consistently?
2. Does each estate planning document (will and trust) identify children by full legal name and date of birth?
3. Are the documents legally valid in the state where the client now resides (e.g., powers of attorney and health care documents)? Do the power of attorney grant the powers necessary to ensure guardianship and other court involvement is minimized or eliminated?
4. Is the Last Will properly witnessed and executed?

5. Does the date of notarization match the date of signing? Was the document properly notarized (acknowledgment vs. affidavit, etc.)? Was the notary stamp valid when the document was notarized (e.g., was the stamp expired)?
6. Does the client actually have the documents they think they do? Do they have a will instead of trust? Is there a power of attorney for property? For healthcare?
7. Are the documents overly complex for the client's needs? (e.g., Does a client with less than a $1mm estate have an estate plan with an ABC trust and generation-skipping tax provisions?
8. Are the documents complete or are pages missing?

Stage Two Document Review. The following is a checklist to be used when beginning the review of the actual documents:

1. Do the documents clearly identify the current successor fiduciaries (e.g., trustees, attorneys-in-fact, personal representatives, etc.)?
    a. Do the documents match what the client wants or intended?
2. Identify and outline the distribution provisions of the trust, including current and contingent beneficiaries.
    a. Do the documents match the client's intentions?
    b. Are the safeguards in place for the untimely death or disability of a beneficiary?
    c. Is there contingent planning documented if a beneficiary is not currently able to receive or benefit from the inheritance? (e.g., drug or alcohol problems, disability/government benefits, divorce or bankruptcy, etc.)

B. The Deeper Level Review

Very often, the straightforward review above will demonstrate to the attorney and the client the need to update and/or restatement of the estate plan without a deeper review being required. The following is a checklist used by this author when doing a trust review. It serves as both a review checklist, an agenda for the trust review meeting, and an opportunity for the client to discuss what items are important to them. Depending on the nature of the engagement, the client's needs, and the attorney's practice, this chart can be customized extensively and easily. For example, a client who is facing a chronic illness (dementia or Parkinson's disease) may be more intrigued by a discussion about avoiding guardianship and the Medicaid spend-down than avoiding taxes.

Important provisions included in various estate plans	Schulze Law Group Elder & Estate Plan	Your Current Plan

ALIVE & WELL

1. Power to revoke or amend	•	
2. Trustmaker acts alone	•	
3. Names children for identification purposes	•	
4. Avoids pretermitted heirs	•	
5. Trustmaker as Trustee	•	
6. Family philosophy, memorial instructions	As desired	
7. Complete Funding of Trust Assets	•	
8. Provisions for Community Property	•	
9. Provisions for Separate Property	•	

Notes / Comments:

ALIVE & NOT-SO-WELL

1. Defines disability without court proceedings	•	
2. Uses Disability Panel to determine Incapacity	•	
3. Disability Safeguards	•	
4. Instructions on disability	•	
- order of payments	•	
- personalized care guidelines	•	
- funds available for dependents	•	
- Disability Guardianship Provisions for minor children	•	
5. Medicaid Protections	•	
6. "Comeback" Provisions		
7. Long Term Care Asset Preservation Planning	•	
8. Placement supplement to DPOA	•	
9. Coordination with healthcare documents	•	

Notes / Comments:

FIRST DEATH

1. Payment of Decedent's Final Expenses	•	
- Use of "Administrative Trust"	•	
2. Family Trust to provide Protection	•	
- Standards for Distributions	•	
- Spousal Access	•	
- Family Access / Rights / Options	•	
- Priority to Spouse's Needs	•	
- Take other resources into account	•	
- Remarriage Protections	•	
3. Keep assets out of Spouse's Taxable Estate	•	
4. Pour Back Provisions (Medicaid Protections)	•	
5. Purchase Probate Assets / Loans to Probate	•	
6. Transfer Assets to Probate Estate	•	
7. Cutoff Claims in Lieu of Probate	•	
8. Trustee's powers to make Tax Elections	•	
9. Spouse compel conversion of non-productive assets	•	
10. Ability to Disclaim Assets	•	
11. Lifetime Power of Appointment	•	
12. Testamentary Power of Appointment	•	

Notes / Comments:

IRA / RETIREMENT PLAN PROVISIONS

1. Provisions for Insurance Policies	•	
2. Provisions for Retirement Plans	•	
3. Protections for IRA Distributions	•	
4. Prevent losing tax exemption due to choice of funds to pay taxes	•	
5. Provisions for "Stretch IRA"	•	
6. Asset Protection for IRA / Retirement Account	•	
7. Conduit Trust Provisions	•	

Notes / Comments:
No provisions for qualified plans, annuities, or life insurance

SECOND DEATH

1. Use of memoranda to transfer personal assets	•	
2. Payment of Spouse's Final Expenses	•	
- Use of "Administrative Trust"	•	
3. Transfer Assets to Probate Estate	•	
4. Cutoff Claims in Lieu of Probate	•	
5. Trustee's powers to make Tax Elections	•	
6. Purchase Probate Assets	•	
7. Choose method of tax payment	•	
8. Common Trust for Beneficiaries	•	
- Treat children according to need, not balance sheet	•	
- Take other resources into account	•	
- Distributions for Advanced Needs	•	
9. Assistance for Guardians	•	
10. Take into account the special needs of children	•	
11. Springing Supplemental Needs Trust	•	
12. Lifetime Protective Trusts	•	
- Bankruptcy / Lawsuits	•	
- Divorce	•	
- Spendthrift Protections	•	
13. Comprehensive Guidelines for distribution of principal and income	•	
14. General and Limited Powers of Appointment	•	
15. Describe distribution to children's heirs if no other estate planning	•	

TRUSTEESHIP

1. Trustee Succession Defined	•	
- Default Provisions	•	
2. Removal of Trustee by Beneficiaries	•	
3. Removal and Replacement of Trustee by Trustmakers	•	
4. Delegation/Substitution of Trustee	•	
5. Provisions for Independent Special Trustee	•	
6. Provisions for Trust Protector	•	
7. Disability Provisions for Trustee	•	
8. Protections for Trustmakers	•	

Notes / Comments:

OTHER PROVISIONS

1. Comprehensive Definitions	•	
2. Effective No Contest Provisions to avoid heirs/beneficiaries/others from contesting Trust and estate plan	•	
3. Accountings Required upon Beneficiaries' request.	•	
4. Pet Trust for the care of companion animals	•	
5. Simple Dispute Resolution	•	
	•	
	•	

Notes / Comments:

C. Old Tax Formulas and Planning Methods to Reassess

Over the last few years, there have been numerous changes to state and federal tax laws. The most obvious of which to estate planners is the ever-increasing federal estate tax exemption amount. Due to this increase, the VAST majority of clients will not require any type of federal estate tax planning. However, this does not mean that a client may not be impacted by state or local taxes.

Federal Estate, Gift and Generation-Skipping Transfer Taxes. The federal estate and gift tax is the most well-known of the various taxes that may be imposed on an estate of a decedent upon death. A related, although much less known, federal transfer tax is the generation-skipping transfer tax. Because the current exemption amounts for each of these taxes exceeds $12 million dollars, very few individuals or families need to be concerned with these taxes. That does not mean that the planning documents do not include provisions for tax planning upon death. This can lead to an unnecessary and complex trust administration.

For most clients, in most situations, removal of the tax planning provisions of their documents may be advised. This can simplify the trust administration and the documents. However, if there are continuing trusts for beneficiaries you must be sure to include the language necessary to shield those trusts from future estate or gift taxes. There may also be non-tax reasons to require a division of the trust estate at the first death (such as protecting one spouse's chosen heirs) which must be addressed.

State Inheritance / Estate Taxes. Increasingly client's own property in two or more states and, due to the $11,000,000 plus federal estate tax exemption, believe that taxes will not impact their estate. However, the reality is that 17 states impose an estate or inheritance tax on the decedent's estate (or the inheritors from the estate). The tax rate varies from 0.8% to 20% and the exemption levels vary from $1,000,000 to $5.9 million. It may be very simple to avoid these taxes or it may require complex planning. Regardless of the planning required, it is very important that your client know if there is a potential for these taxes to be imposed on their estate. You and your client do not want to be surprised if a state imposes an estate/inheritance tax on the estate when it could have been avoided or planned for. Given the increasing real property values across the country, a client may have potential exposure to a state inheritance tax and not know it.

Property / Real Property Transfer Taxes. Nearly all states impose some version of a real property tax. Many states and/or counties impose a tax on the transfer of ownership of real property and have different rules regarding exempt transfers. The tax rates vary greatly, the re-assessment rates vary greatly, the exemptions vary by state and sometimes by counties within a state. The taxes imposed vary from a one-time payment of sometimes thousands of dollars for a transfer tax to annual payments of several thousand dollars for property tax changes.

Know the property tax and real property transfer tax laws in your state and avoid transferring real property in another state if you do not know and understand the applicable rules.

D. Document Execution Mistakes

Legal documents, specifically including documents used in estate planning, have very strict requirements regarding proper execution to ensure they are valid. Something as simple as failing to use the property form of notarization (acknowledgment vs. jurat vs. attestation) may invalidate and render useless an entire estate plan. Some common errors related to the execution of estate planning documents include:

- Not using the client's legal name on the documents;
- Not completing the date of execution (the date the documents were signed by the client) on the documents;
- The date of notarization not matching the date of execution;
- Notary stamp expired;

- Failure to properly witness the Last Will and Testament;
- Failure to use State required notarization/attestation format on powers of attorney or deeds;
- Not ensuring that page numbers are consecutive and in order prior to execution (signing page is not numbered or not numbered to follow the last page of document).

What do these all have in common? Some form of either laziness, too much to do-ness, or simple sloppiness. Another common failure is the overreliance on generic forms. Each of these failures will also render the planning useless and ineffective. Always schedule time for you or your staff to check each of these items prior to execution.

D. Trust Funding Mistakes

Failure to properly fund a revocable living trust results in a very expensive, very complicated will. Ensuring that a revocable living trust based estate plan implements the client's wishes requires that the trust be properly funded and assets be titled in the name of the trust. The following are some of the most common trust funding mistakes.

- Failure to ensure the client understands the need to fund the trust and what that means. Many clients assume that simply signing the trust document will avoid probate, protect their privacy and ensure that their estate planning desires are implemented. This is of course, incorrect. The best way to ensure the client understands this is to repeatedly emphasize it during client meetings and to provide a funding acknowledgment wherein the client acknowledges the importance of funding their trust.
- Failure to explain that the beneficiary designation on assets (e.g., life insurance or IRAs) will trump any desires expressed in the trust or estate planning documents unless the trust is named as the owner.

- Failure to include a general assignment of all assets (including but not limited to personal property) with the trust documents expressing the client's intent that all current and future assets be titled in the name of their living trust.
- If the attorney is funding the trust by use of exhibit to the trust, failing to list every asset on the exhibit, and failure to adequately identify the asset.
- Not ensuring that the title of the trust on any funding documents (e.g., deeds) used exactly matches the name of the trust.
- Failure to provide in the trust document that any title to an asset that "reasonably identifies the trust by name and date" is sufficient to convey title to the trust in case of an error in the name of the trust on a deed or other transfer documents.
- Attempting to transfer title to tax-deferred assets (IRAs, 401k, annuities) to a trust. Doing this may result in an acceleration of income and an immediate deferred income.
- Using Quit Claim deeds to convey real property to a trust. This may negate any title insurance available to the trust or to the beneficiaries.
- Failure to regularly ensure that assets are properly titled in the name of the trust. Oftentimes when a home or other real estate is refinanced, the title is conveyed from the trust to the individual creating the trust and not reconveyed to the trust. Similarly, it is not uncommon to have the title to CDs change from the trust to the trustmaker as the CDs rollover from time to time or when the client opens new CDs at a new bank (to gain the .025% increase in interest rate).

Trust funding is the key to a revocable trust working as intended, yet it is the most commonly overlooked aspect. When a client is using a living trust based estate plan, it is vital to periodically review the trust agreement (per the guidelines in this article) and to review the status of funding and title to the client's assets.

Legal Ethics in Estate Planning

Submitted by Dianna D. Murphy

Estate Planning: New Laws, Old Tools, and the Changes You Need to Make

DIANNA D MURPHY

ABOUT ME

- Associate Dean/Legal Studies Professor
  Morehead State University, Morehead, Kentucky
- Kentucky Bar Association Member
  - Elder Law Section
  - Licensed: State & Federal Courts
- ABA Member
  - Legal Education Section


Legal Ethics
in Estate
Planning
NBI NATIONAL BUSINESS INSTITUTE


Who Is Your Client
NBI NATIONAL BUSINESS INSTITUTE

ASK

- Who Retained Me?
- To Do What?
- For Whom – *Who is the Real Party in Interest?*
- Who is Paying Me?
- Is There a Conflict of Interest?

NBI NATIONAL BUSINESS INSTITUTE

Estates & Trusts

Representing the Fiduciary

NBI NATIONAL BUSINESS INSTITUTE

The Lawyer Does Not Represent the Beneficiaries

"This Committee agrees with ABA Formal Opinion 94-380, and adopts the majority view; that is, that a lawyer who represents a fiduciary <u>does not</u> also **represent the beneficiaries**."

KBA E-401

HOWEVER

Duty of Truthfulness to Third Parties, Beneficiaries Included.

A lawyer *"shall not knowingly make a false statement of material fact or law to a third person."* Rule 4.1(a).

<u>BEST PRACTICE</u>

- Tell the beneficiaries who the lawyer represents
- Do <u>NOT</u> say or state,

"I'm the attorney for the trust or estate"

Rule 1.14

Clients with Diminished Capacity

NBI NATIONAL BUSINESS INSTITUTE

Client with a Legal Guardian

(2) The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. **Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client,** particularly in maintaining communication.

Commentary to Rule 1.14

Joint Representation
&
Conflicts of Interest

NBI NATIONAL BUSINESS INSTITUTE

Analyzing a Conflict under Rule 1.7

First

- Determine if there is a concurrent conflict of interest.
- Is there a significant risk that representing more than one client would materially limit my responsibilities to another or former client, or third person?

Next,

- Do I think that I will be able to competently represent each affected client?

If so,

- Is the conflict a consentable?

See Comment 28, 30, 31 to Rule 1.7

Consentable Conflict

- Does each client have the capacity to consent to the conflict?
- Clients will have to provide *informed consent* in writing.

What Constitutes *Informed Consent?*

- Provide written information of the implications of the common representation.
- Provide a written explanation of the advantages and risks.

Representing Clients Serving in Multiple Capacities
&
As Parties in Multiple Cases from a Common Incident

NBI NATIONAL BUSINESS INSTITUTE

"Avoid conflicts of interest when representing more than one party in matters involving minors. You are likely to be sued either for malpractice or fiduciary breach if you fail to do so."

https://www.lmick.com/item/kentucky-supreme-court-expands-malpractice-exposure-for-claims-by-minors

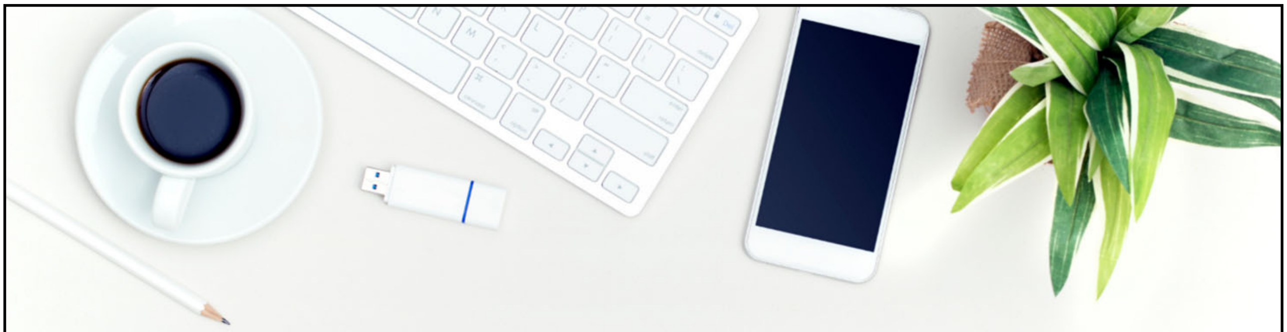
NBI NATIONAL BUSINESS INSTITUTE

Lessons from Case Studies

- Know the Real Party in Interest
- Secure Assets with Adequate Bond
- Carefully analyze Conflicts of Interest when client serves in multiple capacities or actions
- Engagement Letter
- Termination Letter

Rule 1.8 (g)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.



Representing Multiple Clients/Generations

Informed Consent & Waivers

Attorney Fees
&
Client Trust Accounts

NBI NATIONAL BUSINESS INSTITUTE

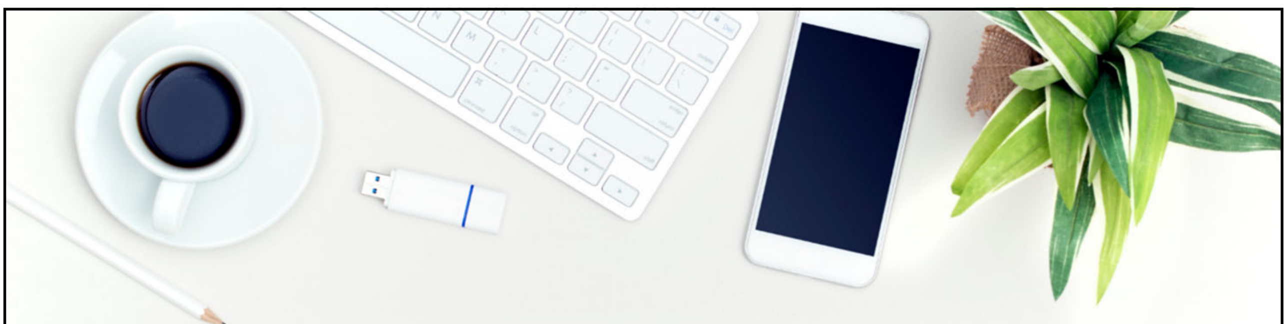
Third Party Payer Issues
Rule 1.8(f)

- Payment must be Agreed to in Writing by the Client
- Does not Interfere with attorney's professional judgment owed the client
- Protect Information relating to the representation of client Rule 1.6
  - 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

NBI NATIONAL BUSINESS INSTITUTE

Conflicts of Interest: Attorneys Serving in Dual Roles

- Rule 1.7 & 1.8 Disclose Conflicts & Financial Interest inherent in Dual Roles
- Rule 1.8 Fiduciary Roles = Pecuniary Interest
  - Must Inform & Provide Client Adequate Time to obtain Independent Legal Advice
- Rule 1.5 Charging & Documenting Legal Fees



Attorney Technology Competence & Guarding Confidentiality

NBI NATIONAL BUSINESS INSTITUTE™

Rule 1.6 *Confidentiality of Information*

(b) A lawyer shall make ***reasonable efforts*** to prevent the inadvertent or unauthorized ***disclosure of***, or unauthorized ***access to***, information relating to the representation of a client.

NBI NATIONAL BUSINESS INSTITUTE

ABA Ethics Committee Formal Opinion 477R (5/27/17)
Securing Communication of Protected Client Information

- Have a Process to Assess Risks
- Identify & Implement Security Measures
- Verify Effective Implementation
- Update – Be responsive to new risk & safeguards

Best Practices for Engagement

- Signed engagement letter that identifies the client & describes the extent of the representation.
- A written policy to analysis Conflicts of Interests
- Provide a written summary of the discussion with clients regarding the implications and effects of common representation on the attorney client privilege, confidentiality, and waiver of conflicts, AND have each client acknowledge and sign the summary and waiver agreement.
- Provide Clients reasonable time to seek additional legal advice when waiving a conflict
- Signed acknowledgement & Waivers.

Best Practices: Rule 1.6, 1.1, 5.3

- Train Staff on Rule 1.6 Confidentiality
- Make sure staff know who the client is in family & estate planning matters.
- Train Staff on Technology Policies designed to maintain Client Confidentiality
- Train Staff on Protocols when technology breaches occur
- Educate and inform clients with respect to electronic communications with the attorney and office.

Dianna D Murphy
Associate Dean/Legal Studies Professor
Morehead State University
Morehead, Kentucky

VIII. Legal Ethics in Estate Planning

A. Identify the Client

Estates

It is imperative that attorneys know who they represent. In most jurisdictions, it is well established that the attorney hired by the personal representative of an estate represents that person in their capacity as executor/administrator, *See* Reporter's Note to the Commentaries of the American College of Trust and Estate Counsel (ACTEC) to Rule 1.7 of the Model Rules of Professional Conduct from October 1993. In those jurisdictions, attorneys are prohibited from stating that they represent the "estate", and should disclose in all correspondence to third parties that their client is 'X', the personal representative of the estate. Regardless of the jurisdiction, it is imperative to identify the client to all interested parties.

DUTY to BENEFICIARIES & OTHER THIRD PARTIES

The Lawyer's duty to beneficiaries is the same as that owed to most non-clients or third parties. The lawyer owes a duty of truthfulness to third parties, beneficiaries included. Specifically, a lawyer "shall not knowingly make a false statement of material fact or law to a third person." ABA Model Rule of Professional Conduct Rule 4.1(a), (hereinafter referred to as Rule).

Attorneys representing a fiduciary have a duty to provide information about estate distributions and expenses to the beneficiaries. Without such information, beneficiaries cannot *knowingly consent* to waivers and releases. In *Hale v. Moore*, 289 S.W.3d 567, 583 (Ky. App. 2008) the court stated that "[c]onsidering the information that was not provided to the beneficiaries, the validity of the releases, as they pertain to the actions of Fernandez (the attorney), is at least suspect." The waivers failed to fully identify that the beneficiaries' distributive share of the remainder assets would decrease as a result of the tax impact effected by the waiver.

In trust situations, when trustees breach their duties to beneficiaries the attorney representing the fiduciary is not generally liable to third parties. However, an attorney who assists the fiduciary in their breach or its cover-up may be liable to beneficiaries. In *Pierce v. Lyman*, 3 Cal. Rptr. 2d 236 (Ct. App. 1991), the court held that the beneficiaries of a trust could state a cause of action against the trustee's lawyer based on the lawyer's alleged active participation in the trustee's breach of fiduciary duty. In that case the court held that active concealment, misrepresentations to court, and self-dealing for personal financial gain were sufficient to state a cause of action for breach of fiduciary duty against lawyer for trustees. Keep in mind that the Uniform Trusts Code also places a duty on attorneys to notify trustee clients of their duties under the code. Failure to do so may give rise to professional negligence.

MINORS & OTHER PERSONS UNDER A LEGAL DISABILITY

Generally, an attorney retained by a minor's next friend or legally appointed guardian establishes an **attorney-client relationship with the minor,** and the attorney owes the same professional duties to the minor that the attorney would owe to any other client. This also applies to adult wards under a legal disability.

Many ethics opinions reference Rule 1.14 *Clients with Diminished Capacity* for guidance in maintaining the attorney client-relationship when representing individuals under a legal disability. Dual representation when representing a client under a legal disability is ill-advised. Dual representation may give rise to a Rule 1.7 conflicts of interest that cannot be waived by a client under a legal disability, and actions for breach of fiduciary duty or professional negligence are tolled until the disability lifts.

B. Joint Representation & Conflicts of Interest

MRPC 1.7 *Conflict of interest: current clients*

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, <u>confirmed in writing</u>. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

<u>REPRESENTING CLIENTS SERVING IN MULTIPLE CAPACITIES & AS PARTIES IN MULTIPLE CASES</u>

Beware of conflicts of interest issues that may exist in representing a client who serves in multiple capacities in a single action, or in separate related cases involving the same incident. *See Branham v. Stewart*, 307 S.W.3d 94 (Ky. 2010). The potential for conflicts of interest greatly increases when the client serves as the personal representative and beneficiary of an estate, as well as the legal guardian of minor beneficiaries of the estate. *See GGNSC Stanford, LLC v. Rowe,* 388 S.W.3d 117 (Ky. App. 2012); *Pete v. Anderson,* 413 S.W.3d 291 (Ky. 2013).

Case Study 1:

Branham v. Stewart, 307 W.W.3d 94 (Ky. 2010) is a malpractice and breach of fiduciary duty case that illustrates the potential myriad of ethical, and legal issues that joint representation can create, especially when one client is a minor. This case grew out of attorney Branham's earlier representation of the plaintiff who then was a minor. Branham had been retained by the plaintiff's mother following an incident that left one son dead, and one (Plaintiff) severely injured. Branham represented the mother in two probate court proceedings wherein she was appointed as the personal representative of her deceased son's estate, and separately, as legal guardian for her surviving son. A short time later, he also filed a tort action on behalf of the two sons and, obtained a 1.3 million dollar collective settlement. The mother allocated half of the proceeds to her surviving son (Stewart), and the other half to the estate of her deceased son of whom she was the sole beneficiary. Time passes, the surviving son marries, after which, he is declared incompetent as a result of brain injuries suffered in the prior incident. As his legal guardian, his wife files an action for malpractice and breach of fiduciary duty against attorney Branham. The lawsuit claimed the attorney had breached his duty to the surviving son when he failed to ensure that adequate bond was posted. Prior to receipt of the settlement proceeds, bond had been posted in the amount of $5,000., and was not subsequently increased in the amount of the tort settlement proceeds. Branham argued that he represented the mother as the son’s legal guardian, and therefore, did not owe a duty to the son. The court held that an attorney retained by an individual serving as a minor's next friend or legal guardian establishes an **attorney-client relationship with the minor** and owes the same professional duties to the minor that the attorney would owe to any other client. The minor was deemed the *real party in interest* regardless of whether the attorney was retained by a legal guardian or next friend. Branham then argued that the duty to ensure adequate bond belonged with the probate court, however, the appellate court held that the attorney owed a duty of protection to his client/minor, that was not alleviated by the role of the court.

The court left open the question of when, if ever, the attorney-client relationship may have terminated, but provided guidance as to the evidence that would be determinative, such as:

- Motions or orders of withdrawal from representation,
- Letters to clients advising that representation has been concluded, or
- Court documents showing that the attorney is no longer listed as attorney of record

While the issue was not raised, the court noted that the attorney had accepted simultaneous representation of clients who had potential conflicting interests, specifically regarding the allocation of the proceeds from the aggregate settlement of the tort case. Being the sole beneficiary of her deceased son’s estate, the mother allocated the collective settlement proceeds between her inheritable interest and the interest of her surviving son.

Rule 1.8(g) Conflict of Interest: Current Clients

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients … unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims … involved and of the participation of each person in the settlement.

<u>Case Study 2</u>

A later case, *Pete v. Anderson*, 413 S.W.3d 291 (Ky. 2013), again involves an attorney who had previously failed to clearly identify those individuals who were his clients. This case also involves a question regarding representation of minor children. In *Pete,* the attorney was sued for malpractice based on his earlier failure to have filed a loss of parental consortium claim on behalf of two children, both of whom were minors at the time. Two years prior to the malpractice action, the attorney was retained by the children's mother following a truck accident in which her husband, the children's father, was killed. The attorney represented the mother/wife in her capacity as the administrator of her husband's estate, and also filed a loss of consortium action on her behalf against the tortfeasor, but failed to file a loss of parental consortium claim on behalf of the deceased's children. At the time of the accident the deceased was survived by his wife and four children, two of whom were minors. It is the two minors who file an action against the attorney alleging professional negligence, gross negligence, breach of fiduciary duty, and negligent or fraudulent misrepresentations. The attorney unsuccessfully argued that the children did not have privity and standing to sue as the claim belonged to the estate. **The court explained that privity is not required for standing to sue when the injured party was the one intended to benefit from the representation.** The court found that while the personal representative of the estate must initiate the wrongful death action, the proceeds are for the benefit of the surviving spouse and children, and are disbursed to them outside of probate. Finding that the children had standing to sue, the court also found that the the one-year statute of limitations had been tolled until the minor children reached the age of majority. The case was remanded to determine whether the attorney, in fact, represented the children at the time he failed to file the loss of parental consortium claim. The Kentucky Supreme court, held that whether the attorney owed the children a duty depends on whether there was a “reasonable belief or expectation” that he represented the minors. The court held that the mother’s affidavit presented sufficient evidence for a jury to decide whether she had a reasonable belief that the attorney was representing the interest of her children, as well as her own.

These two case studies exemplify that the attorney who accepts representation of a minor is cautioned to heed the following warning, to-wit: “Avoid conflicts of interest when representing more than one party in matters involving minors. You are likely to be sued either for malpractice or fiduciary breach if you fail to do so.” https://www.lmick.com/item/kentucky-supreme-court-expands-malpractice-exposure-for-claims-by-minors

REPRESENTING MULTIPLE PERSONS/GENERATIONS

In estate planning attorneys are faced with difficult ethical issues when asked to represent multiple family members and generations. It is necessary to proceed carefully to comply with Rule 1.6 *Confidentiality,* and Rule 1.7 *Conflicts of Interest.* Even before talking with spouses about joint estate planning lawyers should brief them on the consequences of waiving confidentiality, and attorney-client privilege that will be inherent in disclosing information for an effective estate plan. Knowing there is a potential conflict necessitates a conflicts analysis.

<u>Analyzing a Conflict under MRPC Rule 1.7</u>

First, determine if there is a concurrent conflict of interest.

- Is there a significant risk that representing more than one client would materially limit my responsibilities to another or former client, or third person?

Next,

- Do I think that I will be able to competently represent each affected client?

If so,

- Is the conflict a consentable one? *See Comment 28, 30, 31 to Rule 1.7*
- Does each client have the capacity to consent to the conflict?
  Clients will have to provide *informed consent* in <u>writing.</u>
- What constitutes *informed consent*?
    - Provide the client with written information of the "implications of the common representation.
    - Provide a written explanation of the advantages and risks.

Note that the implications of common representation should address the consequences for the clients if they sign a waiver of confidentiality <u>and</u> conflicts. For example, comment 30 to Rule 1.7 states that the jointly represented clients must be told that the **attorney-client privilege will not protect any communications** should litigation occur, as perhaps in a later divorce case. This information should be provided in writing to the clients along with face-to-face discussions. The clients' acknowledgement regarding the implications and waiver of the conflict and confidentiality <u>must be in writing</u> and <u>signed by the client</u>. Note that waivers of confidentiality may be required <u>before</u> conducting the initial consultation.

Confidentiality of Information

Rule (1.6) Confidentiality of information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

C. Attorney Fees & Client Trust Accounts

<u>Third Party Payer Issues</u>

Rules of Professional Conduct Rule 1.8(f) reads:

(f) **A lawyer shall not accept compensation for representing a client from one other than the client** unless:

(1) such compensation is in accordance with an agreement between the client and the third party or the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Commentary:

Person Paying for a Lawyer's Services

(11) Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an

indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations <u>unless the lawyer determines that there will be no interference</u> with the lawyer's independent professional judgment and <u>there is informed consent from the client</u>. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

(12) Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality.

Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). A common estate planning example is that of a married couple. Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), again, the informed consent must be confirmed in writing.

<u>Gifts from the client</u>

Rule 1.8

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Commentary:

(6) A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client <u>gifts as presumptively fraudulent</u>. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

(7) If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

(8) This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 <u>when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary</u>. In obtaining the client's informed consent to the conflict, the lawyer should advise the

client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Note: If your jurisdiction does not have statutory limits on fiduciary fees this could be problematic if later faced with claims of overreaching.

<u>Attorneys Serving in Dual Capacities & Fees</u>

Attorneys also need to recognize the limitations imposed when serving in dual roles. An attorney who undertakes the multiple roles of attorney and fiduciary for a probate estate or trust usually cannot charge for services performed in both roles. *Kentucky Bar Ass'n v. Calvert*, 607 W.W.3d 700 (Ky. 2020). Post *Calvert*, an attorney may serve in both capacities, but only charge fees for one. An attorney who performed legal work for the deceased prior to his death, and later claims fees for that work will have to document the contract, the tasks, and time. *See Kentucky Bar Association v. Greene,* 386 S.W.3d 717 (Ky 2012)

<u>Ethical Issues for the Attorney Who Agrees to Serve as the Fiduciary</u>

Assume that the Settlor/Grantor is the attorney's client and asks the attorney to draft the trust instrument and serve as the trustee. The dual roles entail a conflict of interest. In drafting the trust, the attorney represents the grantor and the grantor's interest in the trust. However, trustees have a legal duty to represent the beneficiaries' interest in the trust. The conflict requires a Rule 1.7 analysis. First, the attorney must answer whether this is a "consentable" conflict. If so, Rule 1.7 places a duty on the attorney to inform the grantor about the consequences of waiving the conflict. Specifically, the grantor will be waiving not just conflicts of interest, but also confidentiality, and possibly attorney-client privilege. It is not enough to say these rules are in jeopardy. The attorney will need to explain worst case scenarios in how these waivers may disadvantage the grantor/client. Also, since the attorney will be receiving compensation as a trustee, under Rule 1.7 the attorney/trustee will be acquiring a pecuniary interest under the trust. Therefore, in addition to informing the client of the attorney's interest, the attorney must advise and give the client adequate time to obtain independent legal advice before the client waives conflicts, confidentiality, and attorney-client privilege. In many states, it is well settled that given the proper disclosures and waivers, an attorney may serve the dual roles of drafter and executor of the testator's will. Likewise, an attorney may serve as the drafter and trustee of a trust. However, these dual roles leave the attorney more vulnerable to claims of overreaching, especially, if there is no formulae to calculate the compensation. Hence, the best practice for an attorney who serves as drafter and trustee, is to emphasize the compensation and conflicts of interest in this arrangement. Should any of the trust beneficiaries be minors, claims of overreaching and breach of fiduciary duty may lay dormant until the minor is 18 years old.

Similar claims of overreaching and financial interest may arise when the attorney/fiduciary hires another attorney in her law firm to advise and represent her as the fiduciary, or suggests another attorney in her firm to serve as the trustee. In addition to the conflict rules, attorneys would be wise to also review Rule 1.8 and its comments.
Rule 1.8 Conflict of interest: current clients; specific rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other <u>pecuniary interest adverse to a client unless:</u>
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Commentary:
(8) This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position

D. Attorney Technology Competence & E. Guarding Confidentiality

In today’s law practice, guarding client confidentiality requires knowing how we, our staff, and clients use technology.

Rule 1.6 *Confidentiality of Information*

(a) A lawyer shall not reveal information relating to the representation of a client....

(b) A lawyer shall make ***reasonable efforts*** to prevent the inadvertent or unauthorized ***disclosure of***, or unauthorized ***access to***, information relating to the representation of a client.

Rule 1.1: *Competence*

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with *relevant technology....*

Comment [8]

ABA Ethics Committee Formal Opinion 477R (5/27/17) *Securing Communication of Protected Client Information* describes the key areas needed for technological competence pursuant to Rule 1.1

- Have a Process to Assess Risks
- Identify & Implement Security Measures
- Verify Effective Implementation
- Update – Be responsive to new risk & safeguards

According to Google and several cyber security firms the greatest risk to security is us. They find that human error accounts for 70-90% of security breaches. The risk often occurs when attorneys fail to comply with our duty to supervise staff pursuant to Rule 5.1 and 5.3. Knowing the risk makes training of staff imperative. Training is a key component of Implementing

Security measures. At a minimum, staff should be trained to spot red flags in communications, especially email, such as:

- The sender is unknown
- The email address does not match the sender's name
- Email address is not the sender's usual email address
- You are instructed to reset your account by clicking a link
- You are asked to review an invoice or charge by clicking a link
- Something is about to expire & you are asked to click the link or update an account.
- The tone differs from that of the known sender

There should be a Social Media policy that:

- Applies to use at and outside of work.
- Never disclose sensitive, private, or confidential information. If you are unsure whether the information you wish to share falls within one of these categories, you should discuss this with [insert position of relevant person].
- Do not post or forward a link to any abusive, discriminatory, harassing, derogatory, defamatory or inappropriate content.
- If harassed or bullied, or are offended by material posted by a colleague onto a social media website, inform [insert position of relevant person].
- Do not post material in breach of copyright or other intellectual property rights.
- Be honest and open, but be mindful of the impact your contribution might make to people's perceptions of the company.

- You are personally responsible for content you publish – be aware that it will be public for many years.
- When using social media for personal use, use a disclaimer, for example: 'The views expressed are my own and don't reflect the views of my employer'. Be aware though that even if you make it clear that your views on such topics do not represent those of the organisation, your comments could still damage our reputation.
- You should avoid social media communications that might be misconstrued in a way that could damage our business reputation, even indirectly.
- Do not post anything that your colleagues or our clients would find offensive, insulting, obscene and/or discriminatory.
- If you have disclosed your affiliation as an employee of our organisation you must ensure that your profile and any content you post are consistent with the professional image you present to client and colleagues.

Duty to Educate and Warn Clients Regarding Technology

Risk Assessment to prevent the inadvertent and unauthorized *DISCLOSURE of* or *ACCESS to* Information requires that attorneys ALSO assess the risks of their clients' use of technology. There should be written notification and mutual agreement that identifies if, and what, technology will be used to communicate with the client. Document the client's acknowledgement that they were informed of the risks inherent in the use of specific technology. This should include mobile technology, email addresses, password protection, password security, and Wi-Fi. Know who has access to the client's email accounts. Make sure that staff knows the preferred method for contacting and sending information to the client. Methods may vary depending on the sensitivity of the information. Identifying the levels of sensitive information in office policies will be important.

Best Practices

- Use signed engagement letters that identify the client, and describe the extent of the representation.
- Written Policies should include protocols for assessing and acting on behalf of clients wherein diminished capacity may be an issue.
- Written policies to conduct a conflicts analysis for current and former clients
- Written summary of the discussion with clients covering the implications and effects of common representation on the attorney client privilege, confidentiality, and waiver of conflicts, AND have each client acknowledge and sign the summary and waiver agreement.
- If the Conflict involves an attorney's financial interest in their work for the client, provide the client adequate time to seek other legal advice.
- In correspondence to third parties, including trust beneficiaries, attorneys will identify their client, and role with respect to representation.
- Clients affirm in writing the list of assets provided the attorney & sign an acknowledgement that the trust and/or plan will be created in reliance on the accuracy of the assets and information provided.
- Develop and Update a Technology Security Policy
- Train Staff on Policies
- Verify/Test Staff Knowledge & Implementation of Policies
- Clients sign acknowledgement that they were informed of the risks and discussed the agreed upon use of electronic communication, and technology.
- Send a letter to confirm termination of representation.

Sources for Ethical Guidance:
Restatement (Third) Governing Lawyers § 51, 48;
American College of Trust and Estate Counsel (ACTEC)

nbi-sems.com

Thank you

for choosing NBI for your continuing education needs.

NBI, INC.

PO BOX 3067 | EAU CLAIRE, WI 54702

800.930.6182 | NBI-SEMS.COM