

Chapter 7.

Tools





INTRODUCTION

The pages in this chapter explore numerous legal and financial tools you can use to develop a strategy for continuing to build, protect and enjoy your assets while assuring that they will be transferred to your heirs in accord with your explicit directions.

The various topics included in this section are avenues used to protect your assets, reduce your taxes and capitol gains, continue to conduct business on a daily basis, provide an income stream for the day you decide to retire, provide for your spouse and children and be protected from liability. This section gives you the tools to put all that together in a way to ease your mind about the future of your family and your property.

Some think they have planned their estate when they execute a will. That is only the beginning step for ranchers and farmers who have land, livestock and machinery.

It is a good decision to complete an estate plan since the Wyoming Legislature has taken steps to do it for you if you do not. Judges and probate are the tools the state uses to divide your property if there is not an Estate Plan when an asset owner dies.

These ideas can be discussed with your attorney or estate planner, your accountant and other professionals whom you choose to talk with about your options.

No estate is the same, so the expression of your personal desires is vitally important. Discussion about your estate and a plan in this section will include: wills, probate, trusts, insurance, gifting, effects of title ownership of property, annuities, taxes, conservation easements and living wills.



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Wills

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A will is a declaration in which you specify what is to be done with your property when you die. It not only describes your wishes regarding the property in your estate, it deals with a number of other matters also. The only property that can be disposed of by a will is property that is solely owned by the one who makes the will. When a Wyoming resident dies without a will, the laws of Wyoming take over and in essence, the State makes a will for that individual.

A will is a key feature of an estate plan. One drawback is that a will must go through probate. It is important to keep it up-to-date as the originator of the will may alter his wealth position, marital status or have other significant changes. Keeping those kinds of changes in one's head does not provide protection for survivors and may cause them distress.

Who can make a will?

Any person of legal age (18) who is of sound mind may dispose of all his or her property by will except for the amount needed to pay debts and that which by law goes to a spouse and minor children.

The right to pass property to anyone of personal choice after death is granted by law. Since laws deems what can and cannot occur it is important to know what those restrictions entail. The maker of a will (the testator) cannot deprive his or her surviving spouse from taking a share of the property. For example, if the testator has all the property in joint tenancy at death, the spouse can claim a percentage of the estate even though she or he is not a party to the joint tenancy.

Is a will necessary?

For most people a will is the heart of who gets what. At a minimum a will is a backup device essential to any transfer of property that somehow got left out of other methods, such as a trust, that avoids probate. A will is best for transferring some types of property like a checking account, frequent flyer miles or a vehicle.

Wills can be used to disinherit a child and are used to name an executor or personal representative of your estate upon death. Your executor/personal representative should be the person you trust the most and who is willing to do the job. It is generally best to name the same person you name as the successor trustee of your trust as your executor/personal representative.. Your executor/personal representative is responsible for arranging probate and supervising the transfer of your will property to your beneficiaries. If your property is over the federal estate tax threshold your executor/personal representative is responsible for filing a federal estate tax return. Since Wyoming has no state tax there is no state tax to file.

A will is used to name a personal guardian for minor children as minors cannot legally own more than a minimal amount of property without adult supervision.

A non-earner spouse should have a will. It is not advisable for spouses to have a joint will.

Some spouses choose to have "mutual wills" drawn. They are separate wills that have reciprocal provisions. Usually each spouse leaves all his property to the other.

After the death of one spouse, the survivor's estate will usually include all or part of the deceased spouse's estate. It is important that each spouse's estate plan, including wills, be coordinated according to how the property is titled.



Types of Wills

Formal, Witnessed Wills

This is the most common type of will. Spouses do not have to have identical wills, and it is advised against spouses having joint wills. There must be a witness and that witness cannot benefit from the will. Once the will has been executed, it can be placed in a protected place, usually in an attorney's vault or in a bank box.

Attorneys generally advise having one original will with conforming copies that can be kept at home for reference.

Holographic Wills

Generally, a holographic will is one that is entirely handwritten. An attesting witness is not needed for a holographic will. However, it is suggested that a will be executed with witnesses since challenges can be brought by those who believe formalities of law have not been met. A lawsuit is possible for such a small thing as the will being handwritten on a sheet of paper that has a typed letterhead.

Pour-Over Wills

A pour-over will directs that the property in the will go to (pours over into) a trust. This can be handwritten or typed and there must be at least one substantive section. The most common provision leaves all or a part of your property to whomever you desire. You must appoint at least one executor, the will must be dated and you must sign the will in the presence of two witnesses who are adults of sound mind and who will not inherit under the will.

Pour-over wills are not desirable to use with a basic probate-avoidance living trust as pour-over wills do not avoid probate. All property that is left through a will must go through probate unless the amount left is small enough to qualify for exemption from normal probate laws.

It simplifies things just to use a standard backup

will to take care of any left over property. In a backup will you can name the people you want to get the property and skip the step of pouring the property through a living trust after your death.

There are two situations when a pour-over will is desirable.

1. If you have set up an AB living trust to save on estate taxes and the spouses want up to the maximum amount allowed under the federal estate tax exemption to wind up in the trust of the deceased spouse: Each spouse writes a pour-over will leaving his or her will property to the AB trust. After one spouse dies the other spouse should amend his or her will or make a new one.
2. If you set up a child's trust as part of your living trust, providing for the management of property left to a young beneficiary, then you may want any property that child inherits through your will to pour over into your living trust. If you did not do it that way you would create two trusts for the child, one in the will and one in your living trust.

Can a will be changed?

Yes, a will can be changed either by codicil (an amendment to the will) or, by making a new will. It is important to keep a will up to date. If you have a child or get married after you made your will, you must revise it, and your estate plan, to reflect your new situation. If you don't, your estate may become enmeshed in laws designed to protect "after born children" and spouses.

Usually simple changes to a will are made by codicil (amendment). A codicil is much like a "P.S." in a letter. When there are too many codicils then it is advisable to rewrite the entire will. The goal in a rewrite is for clarity. A new will automatically revokes all prior wills. Revoking a will also revokes the codicils.

Divorce or annulment revokes the disposition of property made by the will to a former spouse. A separation decree does not revoke a disposition of property under a will unless specific language terminates the status of separation.



An executor or personal representative is the individual you name in your will who will carry out your wishes in settling your estate. Wyoming law uses the terms "executor or personal representative"

interchangeably. That person must be of legal age and of sound mind and does not have to be a resident of Wyoming. If the personal representative is not a Wyoming resident there must be an agent or attorney within the state who can receive notice.

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Probate

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The word "probate" has acquired a negative and notorious connotation commonly thought of as an unnecessary rip-off of a dead person's estate by lawyers and the court. Probate serves a valid purpose in providing a legal forum for determining the outcome of a disputed will, especially an estate that has many debts or claims by creditors. A wise choice is to reduce or eliminate probate fees by transferring property outside of probate through living trusts, pay-on-death designations, life insurance and individual retirement programs as well as other devices. Contact an attorney for a complete discussion of probate.

What is Probate?

Probate is the legal process by which a district court in Wyoming oversees and settles an estate, regardless whether the decedent died with or without a will. During probate, your assets are identified, all debts and death taxes are paid, fees for lawyers, appraisers, accountants and for filing the case in court are paid, and the remaining property is distributed to your inheritors. The process can take a year or more before your estate assets are distributed.

The process of probate includes:

- Filing the deceased person's will with District Court
- Identifying and inventorying the deceased person's property
- Having the property appraised
- Paying off debts and taxes
- Having the will proved valid by the court
- Distributing what is left of the estate as the will directs

The individual you appoint in your will as your executor will administer your estate by filing your will, paying off debts, paying estate taxes and appearing in court when necessary. Many functions are accomplished without the supervision of the court and a complete report is submitted to the court at the end of the process.

Disclaimers

When a person wishes to disclaim any interest in property that he or she would receive by gift, bequest, devise, inheritance, beneficiary designation, by power of appointment or would pass by right of survivorship, he or she must do so in writing. The interest disclaimed usually reverts to the transferor if living, or under a residuary clause of the transferor's will if he or she is dead. If the interest disclaimed would have passed by right of survivorship, the interest passes just as though the individual was not a survivor.

Court Fees

The Clerk of Court collects all fees associated with probate. Court fees can change, so it's important to get an updated list.

1. Original filing fee..... \$50.00
2. Filing fee at five thousand dollars or more, additional fees based on value is collected as follows:
 - A. \$5,000...\$10,000.....\$5.00
 - B. Each additional \$5,000.....\$1.00
3. In addition to the above, a court fee \$10.00
4. Additional court fee \$10.00
5. The cost of the court reporter for the hearing \$5.00
6. For each order \$2.00

Small Estates Distribution Process

In addition to probate avoidance methods, there is another avenue an asset holder can utilize that allows him or her to avoid formal probate. Application can be made for a simplified probate process call "**Informal Probate**" under the Uniform Probate Code. In Wyoming, the process



is known as "Distribution by Affidavit and Summary Procedure." Estates under \$150,000, less liens and encumbrances are eligible for distribution under this law. A personal representative is not required for making distributions as is necessary under formal probate procedure.

Applications for an affidavit can be made to the County Clerk, NOT the court, 30 days after the death of the decedent. The affidavit provided by the county clerk can then be presented and dividends are then given to the beneficiaries. Personal property of all kinds can be distributed by affidavit under this section of the code when the estate is small.

Intestacy

If the deceased person did not leave a Will, or the Will isn't valid, the estate must still go through probate. In the event of intestacy, (dying without a will) the Wyoming code lists the order in which eligible persons may inherit:

1. If the intestate leaves a spouse and children, or the decedents of any children surviving, one half (1/2) of the estate descends to the surviving spouse, and the residue goes to the surviving children and descendants of children.
2. If the intestate leaves a spouse and no children, nor descendants of any children, then the estate of the intestate goes to the surviving spouse.
3. In addition to the above, any surviving children of the intestate and descendants of his children who are dead, the living descendants collectively take the share which their deceased parents would have taken if living.
4. If there are no children or their descendants, then collectively the father, mother, brothers and sisters receive the estate. If the brothers and sisters are dead, then their children take equally the shares their parent would have taken.

5. If the father, mother, brothers and sisters or their children are not living, then the estate goes to the grandfather, grandmother, aunts, uncles and their living descendants taking equal shares collectively.

If a child is conceived before the decedent's death, but born after, that child inherits as if they had been born during the lifetime of the decedent.

Who is eligible to administer the estate of a person dying intestate?

Administration of the estate of a person dying intestate is granted to the relatives of the deceased only when they are entitled to succeed to his or her personal estate, or a portion of the estate. The following order sets out the hierarchy:

1. The surviving spouse, or some competent person whom he or she may have appointed
2. The children
3. The father or mother
4. The brothers or sister
5. The grandchildren
6. The next of kin entitled to share in the distribution of the estate
7. The creditors
8. Any person legally competent

A nonresident of Wyoming cannot be appointed as administrator unless a resident of Wyoming is appointed as co-administrator.

Avoiding Probate

A will does not avoid probate and inheritors face attorney's fees and other costs and time delays, but it is a simple and easy way to distribute an estate. A will provides for naming a guardian for minor children. Probate proceedings are a court record that the public has access to, which is a sensitive area for many individuals and families.

Several transfer devices avoid probate and are listed below:

1. A living trust gives complete control over your property while you are alive. It provides



flexibility in providing for beneficiaries. It takes more effort than a will to establish and is more trouble to maintain than a will.

2. Joint tenancy avoids probate and is simple to put together, but is usually not a good substitute for a living trust. Each joint tenant can sell their interest and there may be gift taxes involved in creating joint tenancy. It may mean partial loss of stepped-up tax basis.
3. Payable-On-Death Bank Accounts avoid probate, are very easy to create and there are no additional costs. They may not be a good idea if small children are involved since a property guardian will have to be appointed.
4. Naming a beneficiary of a Pension Plan or Retirement Account avoids probate and generally easy to do. A specific plan can impose limits.
5. Life Insurance is probate free and a good way to provide quick case for beneficiaries or to use to pay estate taxes.

There is a way to avoid both probate and double death taxes. By creating a funded revocable living trust, it avoids probate as it is funded, and drafting it as a by-pass trust it avoids the second estate tax or the double estate tax; resulting in a dual benefit.

When you may want probate

If your estate is in a lot of debt, probate may be a good idea when your executor chooses to contest some of the larger debts. In addition, if your business was failing at death and/or you have complicated business transactions or litigation is pending, probate is beneficial as there is a ready-made, fast court procedure for resolving creditor issues. The probate process is faster than a lawsuit. Under probate law only a brief time is allowed for attacking a will.

Probate is a legal administrative process that allows for the collection, management and protection of estate assets until final distribution. On the whole, probate is a helpful process.

With good estate planning most probate can be avoided, and when it cannot, the process is helpful in many instances.

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What Everyone Should Know About Trusts

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We are not lawyers, accountants or investment advisors. We do not offer legal, accounting or investment advice. This article provides information designed to help you understand that there are several legitimate uses for trusts. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a competent specialist attorney if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation. This article is provided without warranty of any kind, either express or implied.

When people talk about trusts, it is usually difficult to really pin down what they are talking about. Most people have heard the term "trust fund" but when pressed to explain what that really is, most of us can't do it. With that in mind, the point of this article is to explain the history of trusts, outline the basic types of trusts and finally address the operation of trusts.

This information is not presented as legal or accounting information. It is presented as a common-sense guide from a professional estate advisor and analyst point of view.

The History of Trusts

The concept of the trust has been around longer than most people realize. As the story goes, the very first trust dates back to the days of the Roman Empire – about 800 A.D. In that society, only citizens of Rome could own property. When

faced with deployment, soldiers would transfer ownership of their property to a trusted friend to make sure their families were cared for. During the Roman occupation of the British Isles, the trust became a familiar tool to protect lands from rogue governors and lords. The concept of the trust arrived on American soil along with the colonists.

Trusts were once regarded only as a tool available to the ultra-wealthy. While this was true for many decades, there has been a proliferation of use of these flexible and powerful planning tools. People have discovered that trusts can be useful for almost any socioeconomic class.

The Structure of a Trust

Every trust must have four primary elements. The first element is the trust maker – the person who makes the trust. This person can also be called the "Grantor" or "Settlor." The second element is the person who manages the trust assets and performs the functions of the trust. This person is called the "Trustee" and can sometimes be the same person as the trust maker or can be a professional or institutional trustee. There are more levels of trusteeship. For instance, when the original trustees are deceased or no longer to serve, then another person is appointed to take their place. That person is called the "Successor Trustee." The third element is the person or class of persons who will benefit from the existence and operation of the trust. This person is called a "Beneficiary" and the original beneficiary is sometimes the trust maker, however in many types of trusts the trust maker is not the beneficiary. After the trust maker is deceased, then normally their children become the next line of beneficiaries. Of course, if more than one person exists, they are called "Beneficiaries." The final element consists of the assets inside the trust. These assets are called the trust "Corpus."

These elements are completely interdependent - no trust could exist if even one of these elements did not exist.



Types of Trusts

Trusts can be formed in literally thousands of configurations. The uses are almost unlimited. Despite these almost limitless possibilities, there are

only four major types of trusts – Revocable, Irrevocable, Testamentary and Living. Some advisors would mention Domestic trusts and Offshore trusts, but even these must fit within these four classifications.

Revocable Trusts

This type of trust can be amended, added to or revoked during its maker's competent lifetime. After the maker is deceased, this type of trust typically becomes irrevocable.

Irrevocable Trusts

These trusts can't be changed after they are made. There are many uses for irrevocable trusts – like funding legacies for children or grandchildren. Others might use an irrevocable trust to make gifts of property or life insurance.

Testamentary Trusts

This is the type of trust that is typically included in a person's Will. A testamentary trust goes into effect only after its maker has deceased. This trust could also be considered a revocable trust because your Will can be changed at any time during your lifetime.

Living Trusts

Any trust that takes effect during the maker's lifetime is considered a living trust. Most people – and sometimes even legal professionals – misinterpret the distinctions presented here. People are often heard talking about "living trusts" when they really mean "revocable trust." Sure enough, the revocable trust is typically a living trust, but irrevocable trusts are very frequently living trusts, too!

The distinction here is important because you need to have a thorough understanding

of the terminology before you can have an understanding of what these trusts can or can not do.

Common Uses for Different Types of Trusts

While we're discussing the common uses for trusts, let's address the most common type of trust first – the Revocable Living Trust.

For most families, this trust acts much like a Will – its primary purpose is to distribute assets to the beneficiaries after the trust's makers are deceased. That's about where the similarities between the Will and revocable living trust end, however.

The revocable living trust's ability to avoid probate is often the primary reason families use them for distributing assets. Many generalist attorneys argue against making a revocable living trust and encourage their clients to have their estates settled through the probate process. This mindset is in direct conflict with the national organizations that support specialist estate planning attorneys. The National Network of Estate Planning Attorneys supports the notion that most people benefit from a revocable living trust – based estate plan. The American Academy of Estate Planning Attorneys lists the revocable living trust as its number one estate planning strategy.

Why does a revocable living trust avoid probate? That's a good question. The answer is that all of us are not going to be living at some point in the future. If we have assets titled in our names, then those assets will need to be probated so they can go to our heirs. If we have a revocable living trust, the assets are already out of our name. And even though we will all be deceased at some point, the trust lives on. In essence, when you fund your living trust (retitle your assets into the name of your trust), you have performed what some refer to as a "living probate."



Why Should You Care About Probate?

The estate planning community consists of professionals knowledgeable about estate law and regulations. The professional estate planners and lawyers steer clear of the pro and con debate over probate. Most of the specialists would prefer that their clients' estates not be exposed to the probate process. The reader should note that even though there are reasons why specialists don't want their clients' estate exposed to probate listed here, not every potential problem listed will occur in every probate.

Probate can be time consuming. It can take anywhere from four months to several decades to complete a probate. The national average is somewhere around thirteen months. Many states have passed the Uniform Probate Code to simplify and standardize informal probate proceedings and this has had a very positive impact on the process.

Probate can be expensive. It is almost impossible to find anyone who can tell you how much it costs to probate an estate. Some states have the rate set in law. In other states, attorneys, accountants and others charge whatever they want to charge. The issue is that there is no way one can predict what a probate might cost. National estate planning expert and author Henry Abts III, in his book [The Living Trust](#), writes that you can expect five percent to fifteen percent of your estate to be gone after the probate process is completed.

Probate is a matter of public record. Some people are really shocked to discover that their parents' wills and other private financial and business information become a matter of public record as soon as their estate is presented for probate. Some Wills even have the date of birth and Social Security numbers of the heirs published in these public files! One recent discovery of this fact had a client particularly angry at the attorney

who put her very personal information in the parents' Wills. There is frequently other very private information contained in probate files that families would prefer to keep private.

Formal probate provides very little or no flexibility. The process to complete a probate is written in law. There is very little or no flexibility in a formal probate. However, the adoption of the Uniform Probate Code has provided much more flexibility on estates that can be settled by informal probate.

During the probate process, it is relatively easy to challenge the Will. Any family member and even some people who are not considered family members can challenge the Will. Most Will challenges are not successful, but can lead to messy family fights in the public court forum. Challenges make the settlement process take longer, cost more money and add aggravation to everyone involved.

Probate can make it expensive to manage an inheritance for a disabled heir. When a disabled person inherits an asset, there are several issues that may make that inheritance ineffective. The first is the disabled person's ability to manage the asset. The second is the inheritance often disqualifies the disabled heir from government programs they might be on. To avoid this, another person may be appointed as a guardian or conservator of the disabled person's estate. This process can and often does lead to family fights.

Probate can't protect an inheritance from creditors. Once a person receives an inheritance out of a probate estate, that asset can be confiscated and applied to any judgment, including IRS liens and judgments from creditors or former spouses.

Advantage – Once Probate Is Done – It's DONE

Once a probate is closed and over, it is done. Ordinarily, creditors are not allowed to make



any more claims against the estate. With a revocable living trust, legitimate creditors typically have the length of time outlined in that state's statute of limitations laws to challenge

distributions.

When you compare the probate process to the benefits of a revocable living trust, it may be quite easy to determine what might work best for you. In contrast to a Will, a revocable living trust is: *Normally inexpensive to settle*. One of the arguments against making a revocable living trust is the initial cost. While it is true that most attorneys charge more to draft a trust than they do to draft a Will, the savings are very frequently offset by the savings when the probate fees and costs are eliminated. This is not to say that the revocable living trust can eliminate settlement costs entirely. For instance, if an estate would need an appraisal for federal estate tax purposes, that appraisal would still have to be done. If an estate distributed by a Will would need an extensive amount of accounting work done, the same estate distributed by revocable living trust would probably need the same amount of accounting.

However, if an estate would not need any of these types of extra work conducted, trust settlement costs can be significantly lower than estate settlement costs through a Will. One issue that needs to be pointed out here is the effectiveness of any trust in probate avoidance is gauged directly by the quality of the "funding" of the trust – or having the assets titled in the name of the trust. If you have a trust that has not been funded, what you really have is expensive scratch paper. *Assets must be titled in the name of the trust for the trust to be an effective estate management and probate avoidance tool!*
Normally easy to settle.

When one spouse is deceased, it is very typical for a surviving spouse to just sign just a couple of legal documents and that allows that surviving

spouse to take over the trust entirely. Obviously, the larger estates with federal estate tax issues will require far more work than just signing a couple documents. However, the properly funded trust still avoids the potential headaches of probate.

A national estate planning expert recently stated that most of his clients' trusts can be settled with only a couple of hours of work. Of course every planner has a different system, but specialists can attest that revocable living trusts are normally very easy to settle.

Revocable living trusts are private. There is no probate file for strangers to look at. The trust is completely private and is only for the eyes of those involved – trustees and beneficiaries.

Revocable living trusts are flexible. The trust makers can write in all the flexibility that they think is prudent. In reality, most of the modern trust drafting programs have standard language attorneys use to provide flexibility and control, but each trust must be customized to meet the needs of the trust makers.

Trusts are more difficult to challenge. The debate rages on over this statement. As our society is forced to become more and more legalized, many people have endured the rude awakening that there is no way to avoid being sued. In most states, trusts are under the same scrutiny as are Wills – and the scrutiny lies with two major issues. The first issue is mental competency – did the person writing the Will or trust have the mental capacity to make that document. The second issue is undue influence – did a person who got a larger share of inheritance have an undue influence over the person writing the Will or trust. A mediation/arbitration clause can help keep the trust's affairs out of the theatrics of the courtroom and a no-contest clause can help keep troublemakers from causing mischief. There are more explanations about these and other clauses later in this article.



Revocable living trusts can make it easier to manage a disabled heir's inheritance.

The trust maker states exactly how all the heirs' inheritances are handed down. There are literally many different

variations of how inheritances can be distributed and managed. This is not only true for disabled heirs, but also for all heirs. If an heir had a lien placed against them by any person or governmental agency, the trustee of the trust could pay for the benefit of that heir instead of just distributing money. In other words, a properly written and operated trust could allow the trustee to buy a house and let that heir live there. The trustee could buy a car for that heir's use. The trustee could pay medical bills, energy bills, provide vacations and provide relief for a variety of other expenditures. Of course, the trust has to have the proper language and be operated properly for the heirs to enjoy this level of asset protection.

Revocable living trusts can be an essential piece of keeping the family peace, especially in second or subsequent marriages. Most matrimonial attorneys want their clients to execute prenuptial agreements to avoid major problems later on. Estate planners are seeing more and more cases where "blended" families are at odds with each other. By far, the best way to deal with this is to use a revocable living trust that outlines very clearly what is to happen with assets. Typically the spouses want the entire trust assets available to support the surviving spouse, but may want those assets distributed to their own children after the surviving spouse passes.

How Does A Revocable Living Trust Work?

Now that we have addressed the primary differences between the probate process (Will or nothing) and the revocable living trust, let's address how a revocable living trust works. It's very simple.

A person making a revocable living trust decides how their assets will be used when they are living

and then how the assets are to be distributed when they are deceased. There are several ways to retitle assets in the name of the trust. Real estate is typically deeded into the name of the trust. Personal property that does not have a title is transferred into the name of the trust by assignment or bill of sale. Titled assets, like vehicles, bank accounts investment accounts, stock certificates, etc. are simply retitled. We typically don't want to retitle qualified accounts such as IRAs, 401(k)s, TSAs, etc. into the name of a trust, but the properly worded trust can be a beneficiary of qualified accounts. Even though a trust maker has retitled assets into the revocable living trust's name, the trust maker still maintains complete control of the assets.

Normally, in a situation where a couple makes a trust their lives do not change one bit. They still have complete control of the assets. They still file the same income tax returns. They still maintain the same tax ID number on their bank accounts. They do not even have to change the name on their check blanks if they don't want to.

During their lives, all of the assets in the trust are used to support the surviving spouse during their lifetime. Then, after both spouses are deceased, the property is distributed to the heirs. During the spouse's lifetime, the trust is typically still amendable and revocable. In some cases, however, the trust can become irrevocable on the death of the first spouse to pass. What happens depends on what is written in the trust document.

Estate Tax Avoidance

Over the decades, there has been much ballyhoo over the federal estate tax. One author recently wrote that the federal estate tax has been "permanently repealed" three times! The reality is that even though many people would like to see this tax repealed, it will always be a political football. After all, when the government needs money, who is the easiest mark? Dead people don't vote or complain or give money to political opponents.



Whether you support the federal estate tax or not, you will always have the ability to avoid all of it if you really want to by using legitimate planning techniques which

include splitting the revocable trust into two trusts at the first death of a trust maker to take advantage of the automatic estate exclusion amounts, currently known as the *Applicable Exclusion*. The term that applied to this concept was, for many years, referred to as the *Unified Credit*.

Some trusts include provisions that instruct the Successor Trustee to automatically protect the deceased spouse's Applicable Exclusion. The Applicable Exclusion is the amount of assets a person can own at death before their estate is subject to federal estate taxation. For tax year 2006, this exclusion for each deceased person is \$2 million. So if a family had an estate that was near \$2 million or over that amount, they would want a trust that had a provision to utilize the deceased person's lifetime exclusion. This type of sub-trust is sometimes called the "Bypass Trust," or "Credit Shelter Trust." Sometimes this trust is called the "Decedent's Trust." The entire point of this sub-trust is to utilize the deceased person's lifetime exclusion amount and reduce or eliminate federal estate taxes.

The A-B Trust Arrangement

If the Bypass Trust is used, then we have what we call an A-B Trust arrangement. It is easy to remember which trust is which. The A trust is for the above-ground spouse and the B trust is for the below-ground spouse. When the first spouse passes and the B trust is funded, the B trust becomes irrevocable – the terms of the trust can not be changed. The A trust is typically completely amendable and revocable by the surviving spouse. The surviving spouse typically remains as trustee of the A trust. Many different people or institutions could act as trustee of the B trust. Most families appoint a child or children to serve as trustees after the parents are gone. Others can appoint professional trustees

or institutional trustee, such as a bank trust department.

Making these two trusts is a function of utilizing several benefits all under one umbrella. As you read earlier, we can split an estate with this mechanism to make sure that the deceased spouse's lifetime exemption is utilized. We can also use this A-B arrangement to put rapidly growing assets in the B trust, so the estate growth takes part outside of the surviving spouse's estate. The Trustee of the B trust can take cash inside of the trust and purchase life insurance on the surviving spouse, so the wealth is leveraged for the beneficiaries on an income tax free basis.

We want to take great care when constructing an estate plan with the A-B trust. Although the surviving spouse can have some limited control over the assets in the B trust, there is not nearly as much control over these assets as there once was. The surviving spouse has complete control over the assets in the A trust, however.

Why does the surviving spouse lose most control over the assets in the B trust? It has to do with what the IRS calls "Power of Appointment." Basically, a person with power of appointment over an asset in a trust is the owner of that asset for federal estate tax purposes. In essence, if the surviving spouse could appoint any and all assets out of the B trust, all of those assets would be included in that spouse's estate when they deceased, probably causing much waste from estate taxes and the administrative work required to file the Form 706 (Federal Estate Tax return).

Potential Problems Funding the A-B Trust

When the first spouse deceases, a decision must be made on which assets to place in the A trust and which to place in the B trust. We call this "funding" the trusts. As you will recall, when we originally made the first Revocable Living Trust, we had to change the titles of the assets we owned to the name of our trust, thereby "funding" it. Now we get to do it again. This is not a difficult chore.



The difficult part of this process is deciding which assets go where. Because we want the surviving spouse to benefit from all the assets in the estate, we need to make

sure there is control over the assets the surviving spouse wants control over. For instance, if a ranch had land worth \$2 million, cattle and equipment worth \$1.5 million and cash worth about \$500,000, the surviving spouse would probably want the land placed in the B trust and the cattle, equipment and cash placed in the A trust. This way, the surviving spouse has the most flexibility with the most liquid assets, the heavy land value appreciation is probably taking place in the A trust, and the depreciating assets are in the A trust.

The only changes required in this arrangement would be to change the deeds to read that the land is owned by the B trust. Ownership might read like this: Grantee: The John and Jane Doe Family Trust, Credit Shelter Trust or The John and Jane Doe Family Trust, Decedent's Trust. The name of this trust depends on how the main trust document refers to it.

Some trusts have a forced funding of the B trust. In the event a spouse passed, the trust would require the trustee to fully fund the B trust with the maximum amount allowed by law. So in the year 2006, if a person passed and their trust had this clause, a mandatory funding of \$2 million in assets would be required to be placed in the B trust. This is all fine and dandy, except in the event the estate is only \$2.25 million. Essentially, that would mean the surviving spouse might lose control over all the assets but \$250,000. Once the surviving spouse finds out about that, they are usually not very happy. There is a better way to do this, and it is called a "Disclaimer" trust.

A Disclaimer trust is really a state-of-the-art estate planning arrangement. With this type of trust, the trustee only funds the B trust with

assets that are "disclaimed" by the surviving spouse. By operating the trust this way, we can ensure that the surviving spouse gets to keep control over the maximum amount of assets that make the most sense for their case. So in this case where the family had \$2.25 million in assets, the surviving spouse could fund the B trust with the fastest-growing assets and retain control over the liquid assets and depreciating assets.

Because this is a state-of-the-art arrangement, it also requires a state-of-the-art plan that is put together by someone who knows what they are doing. It is not difficult to operate this strategy, but the right steps have to be taken at the right time. Many attorneys shy away from this arrangement because they either don't understand how it works or they don't want the burden of having to keep track of the funding process. Most specialists, however, point out that this is often the best of what we can offer to families. It is important to note that using a qualified disclaimer falls under certain rules that have to be adhered to or risk losing the exemption! If you use this strategy, it should only be with the help of a qualified estate planning specialist.

One Trust or Two?

One of the more popular misconceptions about larger estates is the notion that in an estate that has a potential estate tax liability, two trusts are needed – one for the husband's assets and one for the wife's assets. It is rare to find an arrangement like this done by specialists today. There is still an occasional occurrence where two trusts are better than a joint trust. There are two major reasons why specialists don't make two trusts any more. First, the surviving spouse can lose control over too many assets. Second, there is potential for a major lack of flexibility in funding the trusts.

Here is an example: Let's say that Mr. and Mrs. Doe have gone downtown to their lawyer and he has made them two trusts. The lawyer has funded Mr. Doe's with the ranch land, half the



cattle and half the money. The lawyer has funded Mrs. Doe's trust with a small acreage close to town, half the cattle and the money. As they aged, Mr. and Mrs.

Doe discovered that none of their children wanted to come back and ranch. Just prior to Mr. Doe's death, they had begun negotiations with the neighbor to sell the ranch land for a premium price. The Does' oldest son is named as trustee of Mr. Doe's trust and is really not looking out for his mother's interest. As Trustee, he now decides when and if that land is sold. Even though Mrs. Doe wants to sell the place, she may no longer has a real say in the matter. The son, as Trustee, is obligated to perform the trust, but probably has wide discretion in the disposition of the trust as long as he keeps the trust assets safe and productive. In contrast, if the Does had made an A-B Disclaimer trust, Mrs. Doe could have disclaimed other property into the B trust and then have the ranch land in the A trust and finally sold the land inside the A trust. That gives her maximum flexibility and control.

Many non-specialist attorneys want to make two trusts because they can generate two trust drafting fees. Others don't want to keep track of funding an A-B trust. Still others are not up to speed on the A-B trust, so their clients get what the attorney wants them to get. What is best for you? Well, only you can make that decision after your specialist estate planner or estate planning attorney gives you the proper amount of information to make an informed decision.

Other Sub-Trusts

A family trust can have a variety of sub-trusts. These sub-trusts are typically meant to serve individual heirs who are not capable of managing their own affairs – such as a mentally disabled child or a child who has drug or alcohol dependency or even a spendthrift child. So it would be possible in a family with five children to have shares of the trust distributed outright to three children, while another share

is managed for one mentally disabled child and the last share managed for the benefit of the children of a deceased child. Sometimes people leave a portion of their trust estate to provide a scholarship or other ongoing support for a worthy organization. The management possibilities when using sub-trusts are almost limitless!

Trust Clauses

Every trust consists of a series of paragraphs or groups of paragraphs. These paragraph groups are called "Clauses." Clauses are the tools the trust drafter uses to make sure the trust makers get what they want. Here are a few of the most widely-used clauses that can be used in almost every trust:

Mental Competency Clause: This clause instructs the Successor Trustee to have the original trustee examined if there are serious concerns about the original trustee's mental competency. It is common to have the person examined by a regular doctor, a neurologist and a psychologist. The entire point of this clause is to avoid the public nature of a competency hearing. If the original trustee is found to be not competent by consensus of the examination team, the trusteeship automatically transfers to the Successor Trustee with no need for a court order secured through conservatorship hearings.

No-Contest Clause: This clause clearly states that any beneficiary of the trust who challenges the distribution of the trust is automatically punished – typically by losing part of all of their inheritance. This clause is usually used to discourage any mischief from disgruntled heirs and/or their spouses. When properly and aggressively enforced, this clause can put an end to challenges.

Mediation/Arbitration Clause: This clause requires that any and all disputes regarding the trust be handled in mediation and binding arbitration. The reason more and more specialists are using this clause is to remove the supervision of the trust from a frivolous



and ineffective court system that is often based on tricks, harassment, discover and courtroom tactics and place the dispute under the auspices of an arbitration system that is based more

on reason and common sense. It is very rare to find an attorney who supports the addition of this type of clause because they prefer the court system which is most familiar to them, but if the client demands it, the attorney will put it in.

Spendthrift Clause: This clause is designed to protect the beneficiaries' inheritance from their creditors. However, you must note that a revocable living trust will not protect the trust makers' assets from their own creditors! The spendthrift clause works by not allowing the beneficiaries of the trust to assign, pledge or anticipate their inheritance from the trust. In essence, as long as the assets are inside the trust, they can be protected from the beneficiaries' creditors.

Gone Missing Clause: This clause is self-explanatory. The trust maker instructs the next trustee to take over once the original trustee – the trust maker – goes missing or is not heard from for a certain period of time.

Distributions to Minors Clause: This clause exists because sometimes minors become beneficiaries of trusts. Most people agree that the worst thing one could do to a 20-year-old is to give them \$100,000 outright as an inheritance. This clause instructs the trustee on how to manage those funds for the benefit of the minor. Some trusts give the "minor" all the income from their share, but no principal from their share until age thirty-five. Other trusts "sprinkle" income to the young beneficiaries, pay education costs and then give parts of their inheritance at different ages – for example one-third at age twenty-five, one-half of the remaining share at age thirty and the balance of the share at age thirty-five. There are very few limits on how this can be set up.

Distributions to Disabled Persons Clause:

This clause instructs the trustee on how to proceed with distributions to a disabled person. Very often, if a disabled person is receiving government benefits, an inheritance would disqualify them. Typically, the trustee is instructed to give the disabled beneficiary just enough to keep them qualifying for benefits.

Powers and Duties of Trustees Clause: This is an important clause – usually about ten or twelve pages long – that specifically outlines the powers and duties of the trustees. This clause does not have an impact on the trust makers as long as they are living and in control of their trust. While the trust makers are living and in control, they have unlimited powers over the assets in their trust.

Other Types of Trusts and Their Uses

There are literally thousands of possible trust configurations. Here are a few of the trusts most commonly used on agricultural operations and small business situations.

Testamentary Trust

As mentioned earlier, this trust is contained in the Will and is used to manage and distribute assets after its maker is deceased. After the testamentary trust is funded by probating the deceased person's assets into it, it acts almost exactly like a revocable living trust would act after the trust makers were deceased. The primary difference is that the assets have to be probated into this trust. Most estate planning specialists agree that this is not the best type of arrangement to have, especially considering the availability of the revocable living trust to avoid probate. Many generalist or probate attorneys will encourage their clients to have this type of arrangement.

You will not witness the specialist estate planning attorney organizations touting the use of this trust, but both organizations mentioned in the "resources" section of this article have high regard for a properly drafted, funded and operated revocable living trust.



Irrevocable Life Insurance Trust

This trust has many uses, but the most common use is to provide cash to pay federal estate taxes. Another popular use is to equalize inheritances. In many farm and ranch operations, one or two of the children stay on and operate the place and, ultimately, inherit it. Parents, wanting to be as “fair” as possible, set up the life insurance trust and provide the cash to pay the insurance premiums. By doing this, parents can move assets out of their estate, thereby reducing any estate taxes they might owe and at the same time produce income tax free cash to their children. When the situation is right, this is a powerful and effective strategy.

Another strategy is to convert money that is currently subject to federal estate taxes and income taxes into money that is income tax free and estate tax free. Some larger estates that have IRAs, 401(k)s, pension plans and other qualified accounts can lose up to 80% of the value of those accounts when eroded by federal estate taxes and state and federal income taxes. With income stream planning along with the irrevocable life insurance trust, the erosion can be reduced dramatically and the wealth can be leveraged.

Children's Trust

This trust is typically used to take advantage of the annual gifting exclusion and get this gift out of the parent's or grandparent's estate to a minor without the minor having control of the gift. When the minor reaches the age of majority, they can have access to the trust funds, unless they are disabled. Wealthy families teach their children to not take distributions of principal from this trust to use the trust as an asset protection vehicle.

Generation Skipping Trust

Some people try to minimize death taxes not only for their children but also for their grandchildren by using their Generation Skipping

Tax (GST) exemption. Typically, a generation-skipping trust is a trust that distributes only income to a child of the trust makers. Then, upon the death of the child, the trust ends by distributing the principal in the trust to the child's children (the grandchildren of the trust makers). This is why planners say that the ownership of the principal of the trust has “skipped” the child's generation.

There are many variations on this estate plan. Instead of a trust for one child, the trust might include all of the trust makers' children as beneficiaries and terminate only when all of the children have died. A Generation Skipping trust might leave out the children entirely, so that only the grandchildren are included. A trust like this might last for several generations, the principal of the trust skipping both the children and the grandchildren and ultimately being distributed to the great-grandchildren or grandchildren even further down the line. Now that is planning ahead!

Special Needs Trust

A Special Needs Trust might be set up because a child is disabled. The trustee manages the trust assets to support the special needs child to the extent that the trust instructs.

Spendthrift Trust

Many families have members who just can't handle money. That is the function of the Spendthrift Trust. Parents fund this trust with the trustee appointed as the person to manage the funds for the family member who can't manage money. The trustee trickles money out to the beneficiary on an ongoing basis. The trustee can still purchase assets that benefit the spendthrift. The entire intent of this type of trust is to protect the nest egg from financial mismanagement and provide ongoing support for the beneficiary. This trust can be a subtrust of a revocable living trust.

Charitable Remainder Trust

This trust is used very frequently to erase immediate capital gains treatment from the sale of a highly appreciated asset. The basic setup



(in simplest terms) of this trust is to (i) donate the asset to the charitable trust, (ii) the trust sells the asset and provides a lifetime income to the donor, and (iii) to give the remainder of the assets

in the trust to the named charitable organization after the donor has passed. This is a very simple explanation of a very complex legal arrangement. If you are interested, you should seek competent specialists to help you.

Conclusion

As you can see, there are many uses for trusts. Tremendous advantages can be gained by using the right trust in the right situation. The reader is cautioned, however, that trusts can't cure all the ills of an estate. Experienced professionals understand that even though a family might have the "perfect" document package, the process is still impacted by the people involved. No trust can perfect family problems that have existed for thirty or forty or fifty years.

It is absolutely imperative that if you are considering a trust, you search for people who specialize in trust work and legitimate estate planning issues. Specialists in any area should spend at least seventy-five percent of their time practicing specifically in that area. Your local attorney may or may not qualify under this burden and may not agree with this standard. However, if you pay attention to the national experts and the credible organizations that support specialist estate planning attorneys, it will become clear that specialists are better-equipped to help you produce a desirable outcome.

Credible Specialist Estate Planning Resources

You can find estate planning information just about anywhere. Most people talk to their local attorney who may or may not be competent in the area of estate planning. Like choosing a

medical professional to treat a specific problem, people should depend on specialist estate planning attorneys and other estate planning specialists to help them negotiate the maze of choices available.

The National Network of Estate Planning Attorneys, one of two credible national organizations solely supporting estate planning specialists states on its website, "During the 1980s and early 1990s, estate planning attorneys debated wills and probate versus living trust planning. That argument has been settled. Most Americans now recognize that living trust-centered estate planning is more suited for the modern, mobile society in which we now live.

The American Academy of Estate Planning Attorneys, the other credible national organization lists the revocable living trust as its number one estate planning technique.

The National Institute of Certified Estate Planners, an organization that supports financial and legal professionals who specialize in helping their clients with estate planning issues. This organization provides education and support.

The American Academy of Certified Estate Planners, another organization that supports and educates specialist estate planners.

Henry Abts III spent 35 years as a financial adviser and estate-planning specialist to businesses, corporations and individuals. A nationally recognized authority on the living trust, Henry has dedicated his life to educating people about what he feels is one of the most crucial and beneficial concepts to family wealth planning. His book The Living Trust is now in its third printing, with more than 1,000,000 copies sold.



Acknowledgements

The National Network of Estate Planning Attorneys <http://the.nnepa.com/public/Default.asp?m=p>

The American Academy of Estate Planning Attorneys www.aaepa.com/topten.aspx

The National Institute of Certified Estate Planners www.nicep.org

The American Academy of Certified Estate Planners www.americanestateplanners.com

Mr. Henry Abts III and his firm The Estate Plan <http://theestateplan.com>

Stephen Leimberg – [The New, New Book of Trusts](#)

Alexander Bove – [The Complete Book of Wills, Estates and Trusts](#)

Martin M. Shenkman www.laweasy.com



Gifting

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What is a gift? A gift is a transfer for less than full consideration. Two types of gifts are recognized Gifts during life – Inter vivos and gifts in contemplation of death – Gifts Causa mortis. State property laws will determine how and when gifts are effective and whether they are characterized as inter vivos or causa mortis. This discussion will focus on Gifts during life – Inter vivos gifts, how they are made and the tax consequences of lifetime gifts. But the making of gifts is more complex than understanding the property law in your state. Although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be subject to federal taxation. Not only do you need to consider gifts from the state law stand point but also from the federal Gift tax law aspect.

To understand gifting some terms or definitions will help.

Annual exclusion: The donor to exclude gifts of up to a certain total amount (currently \$12,000.00) which are made during any calendar year to a donee.

Donor: The person making the gift

Donee: The recipient of the gift

Form 709: United States Gift (and Generation-Skipping Transfer) Tax Return

Gift Tax: The transfer tax imposed on transfer by a natural person for less than full consideration to

natural persons, charities, or corporations or other business entities.

Generation Skipping Transfer Tax (GSTT): The tax imposed on transfers to a “skip generation” that is usually beyond next generation i.e. grandchildren or great-grandchildren.

Joint of Split Gifts: Gift by spouses to a single donee (Requires a Gift Tax Return to be filed.)

Skip person: A donee who is a natural person is a skip person if that donee is assigned to a generation that is two or more generation below the generation assignment of the donor.

Unlimited marital deduction: Unlimited transfers between spouses that is tax exempt.

State Law

For a gift to be effective in Wyoming the essential elements of a gift must be met. Those requirements under Wyoming property law are:

1. The donor must be competent to make the gift;
2. The donor must make a clear, unmistakable, and unequivocal intention on his or her part to make a gift of his or her property;
3. There must be an absence of adequate consideration;
4. There must be a conveyance, assignment, or transfer sufficient to vest legal title in the donee without power of revocation at the will of the donor;
5. A relinquishment of dominion and control of the gift property by delivery to the donee; and
6. There must be an acceptance by the donee of the gift.



Federal Gift Tax Law

With two (2) modifications, this Wyoming property law definition of a gift may be applicable to gifts subject to federal gift tax. First, donative intent is not a significant element in determining whether or not a taxable gift has been made. Second, taxable gifts are not limited to transfers made without any consideration. Even if consideration is received in return for a transfer of property, the transfer will still be subject to the gift tax unless the consideration received is a full and adequate consideration in money or money's worth. Such consideration is more than the consideration sufficient at common law to enforce a contract. The consideration must be the full economic equivalent of the transferred property in terms of money.

In other words, an individual who receives for a transfer an equivalent value in money or money's worth has not made a taxable gift, but rather has made a sale, or exchange which generally is not subject to gift tax. If the transfer is made for less than an adequate and full consideration in money or money's worth, the amount of the gift is generally the excess of the value of the transferred property over the amount of the consideration received.

Gifts can be an effective estate planning tool. They provide an estate owner with the opportunity to transfer assets to family members to save income and death taxes and also to reduce probate costs on the owner's death. Since the enactment of the Tax Reform Act of 1976, which unified the previously separate estate and gift taxes, it is not as easy to reduce federal estate taxes in very large estates by making gifts as it formerly was.

The gift tax statutes (26 U.S.C. § 2501 et. seq.) have many refinements and complexities, well beyond this brief summary. However it is necessary to have a general understanding of the history of the tax, what the tax is, and how it operates.

A History of Gift Tax

The federal gift tax is transfer tax. It is imposed at graduated rates on the gratuitous transfer of property during each calendar year commencing after June 6, 1932, and ending with 1970, and after 1981, by any individual, resident or nonresident. For gifts made after 1970 and before 1982, the federal gift tax was imposed at graduated rates upon the total amount of taxable gifts made during each calendar quarter during such years. The gift tax was cumulative, which meant that the aggregate of gifts subject to the tax made in prior periods was added to the aggregate of taxable gifts for the current calendar period in determining the tax rate bracket applicable to the current period's taxable gifts.

For gifts made after December 31, 1976, one making gifts was allowed a "unified credit" of \$3,000 annually against the gift tax. For gifts made prior to January 1, 1977, no unified credit was allowed, but instead, a \$30,000, lifetime exemption was deducted in computing the pre-1977 taxable gifts. Since 1982 an annual exclusion has been applied.

The Economic Recovery Tax Act of 1981 (1981 Act) increased the amount of the annual exclusion starting in 1982 from \$3,000 to \$10,000. The 1981 Act also eliminated the gift tax on interspousal gifts (unlimited marital deduction.) As a result, gifts became a more widely used and more valuable estate planning tool.

The Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Act) made sweeping changes to the taxation of gifts and the coordination of the gift and estate tax. The changes under the 2001 Act are not permanent. Unless a future Congress provides otherwise, the new tax law sunsets (expires) after December 31, 2010. On January 1, 2011, the existing law will be re-instated. If the law is not extended or made permanent, then the gift tax changes will only be effective for the year 2010.

Some of the changes made by the 2001 Act included elimination of the 5 (5%) percent surtax



that was imposed on taxable transfers between \$10 million and the amount necessary to phase out the benefit of the graduated rates. In addition to repealing the surtax the 2001 Act repealed and commenced a reduction in the maximum estate and gift tax rates from 50 percent for decedents dying and transfers after 2001 in excess of \$2.5 million.

Reduction in maximum rate 2002 through 2009: The maximum gift tax rate will be phased down for years 2002 through 2009 The new rates are as follows:

<u>Calendar Year</u>	<u>Tax Rate</u>
2006	46%
2007	45%
2008	45%
2009	45%
2011	35%

New gift tax rate after 2009: After 2009, the estate and generation-skipping transfer taxes will be repealed. The gift tax will not be repealed. The maximum rate of gift tax will be reduced to the top individual income tax rate under the 2001 Act.

Exempt Gifts

Not all gifts are subject to the gift tax. Certain charitable and other gifts are specifically exempt from the tax. In addition, a donor making a gift is allowed a deduction for gifts made to a U.S. citizen spouse; that is, the unlimited marital deduction. The donor also is allowed a deduction for gifts made to third parties in which a spouse joins; that is, gift splitting. One making a gift also is allowed an annual exclusion, which permits the donor to exclude gifts of up to a certain total amount which are made during any calendar year.

What is Taxed

While the tax is not imposed upon property as

such, the amount of tax is measured by the value of the property transferred. Gift tax is not applicable to transfers by corporations or persons other than individuals, but it is applicable to transfers by individuals to corporations or other persons.

In most cases, it is not difficult to determine if a transfer by gift has occurred for gift tax purposes. For example, when an individual gratuitously and irrevocably transfers outright ownership of property to another, a transfer by gift has occurred (and the gift is completed). Further, in many cases when an individual creates an irrevocable trust for beneficiaries other than that individual, and gratuitously and irrevocably transfers property to the trustee of that trust, the transfer is a transfer by gift (and the gift is completed).

More difficult cases arise when transfers occur or are deemed to occur between related parties. For example, if related parties enter into a debtor-creditor relationship, then a forgiveness of indebtedness or a failure to receive adequate interest on a loan may result in a gift. In a recent Letter Ruling, the IRS held that a guarantee of the indebtedness of the taxpayer's children constitutes a taxable gift when the guarantee became binding, whether or not any amounts were ever called on to be paid by the guarantor.

Sometimes mere inaction by a person can be considered a taxable transfer, such as when an income beneficiary of a trust fails to object to a transfer of trust corpus to the remainder beneficiaries in an acceleration of their interest. Similarly, a distribution from a purported constructive trust can result in a gift if the basis by which the constructive trust was to have been created is not conclusively established.

Payments alleged to have been for care giving services may be characterized as gifts. For payments made by the estate, the Service may challenge their deduction as debts of the decedent; if the payments were made by the decedent, they may be characterized as unreported gifts that are includible in the gross estate. A similar issue occurs when an employer "gives" something to a former



(or long-time) employee; the question is whether the transfer is actually a gift, rather than compensation for past services.

Another issue that can confuse the situation is ownership; the transferor must have owned the property in order for the transfer to constitute a gift. Such an issue might arise, for example, where an unmarried couple live together under an informal property sharing arrangement. The survivor's title to the property might then be disputed.

The Annual Exclusion

When the amount of the gift exceeds the amount of the annual exclusion, and the available applicable credit amount is not sufficiently large to eliminate the gift tax liability, a gift tax will have to be paid by the donor. The annual exclusion Economic Recovery Tax Act of 1981 increased the amount of the annual exclusion from \$3,000 to \$10,000. Later tax law changes indexed the annual gift tax exclusion and in 2002 it increased to \$11,000 and this year to \$13,000. This exclusion applies each year and is per donee.

Liability for the Tax

The donor is primarily liable for the federal gift tax, although the donee may become liable if the donor defaults.

The Generation Skipping Transfer Tax (GSTT)

The GSTT is a gift or transfer tax. GSTT is imposed in addition to gift tax for gifts made to a person who is defined as a "skip generation." The donee is liable for the tax although the donee may become liable if the donor defaults. Determining if a gift will also be subject to the GSTT is difficult and requires the assistance of professionals. For this discussion suffice it to say if a transfer is made to a second generation without the death of the intervening parent it is likely a gift has been made and the donor should immediately seek professional advice.

Like the gift tax the GSTT an exemption amount is allowed for gifts that would have to pay as GSTT. Currently (2006) \$2,000,000 is the exemption amount. Unfortunately lifetime gifts are limited to \$1,000,000. So a gift that would use all the GSTT exemption would require payment of gift tax on the excess above \$1,000,000. Starting in 2004, the exemption amount was pegged to the applicable exclusion amount for estate tax purposes. In the year 2010, the GSTT is scheduled to be repealed and in 2011, the law prior to the 2001 Act is reinstated.

The following table shows the GSTT exemption amount and tax rate under The Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Act).

<u>Calendar Year</u>	<u>GST Exemption Amount</u>	<u>GST Tax Rate</u>
2002	\$1,100,000	50%
2003	\$1,120,000	49%
2004	\$1,500,000	48%
2005	\$1,500,000	47%
2006	\$2,000,000	46%
2007	\$2,000,000	45%
2008	\$2,000,000	45%
2009	\$3,500,000	45%
2010	Tax repealed	
2011	\$1,000,000 + indexing	55%

Comparing lifetime and deathtime transfers

The effect of the unified rate schedule was that lifetime gifts and deathtime transfers were aggregated in computing the estate tax. Therefore, no advantage in terms of a lower tax rate is gained by making lifetime gifts rather than transfers at death since lifetime gifts will be added back to the taxable estate in computing the estate tax. Even though we are now limited to using only one-half of what way previously a unified credit lifetime gifts and deathtime transfers there are still several advantages to making lifetime transfers. These include the following:

- Any gift tax paid by the donor is not included in the donor's estate except for gift taxes paid within three (3) years of death.
- If the gifted property increases in



value, the post-gift appreciation is excluded from the donor's estate.

- A gift is less costly than a transfer at death,

A transfer at death is paid out of the property on a "tax inclusive basis" while the gift tax is paid in addition to the transfer on a "tax exclusive basis."

Illustration: John is in the 50 percent gift and estate tax bracket. A gift of \$50,000 to his child costs John \$75,000 (gift tax of \$25,000 in the 50 percent bracket, plus the gift of \$50,000), while the same transfer at death requires \$100,000 (\$50,000 estate tax, in the 50 percent bracket, plus the transfer of \$50,000).

Observation: A key disadvantage of a lifetime transfer is that the donee takes the donor's basis (carryover basis) in the transferred property. If the basis is less than fair market value, the donee will recognize gain if the property is sold.

Fair Market Valuation Discounts

Gifts of entities such as corporations (a regular C or subchapter S), partnerships (general or limited), limited liability companies (LLCs), and ownership as tenants in common, joint ownership create opportunities for making a discounted gift. What the discount permits is transfers of assets at less than what might otherwise be considered full book or fair market value.

Types of valuation discounts: The most common discounts allowed are those for lack of marketability and minority interest (or lack of control). A discount which applies most frequently to real estate is the discount for fractional ownership. There are other discounts, including those for key man discount, built-in capital gains, blockage, restrictive covenants, and the discount applicable to restricted securities under the Federal securities laws.

Real estate may be owned in several different forms. These include ownership by entities such as corporations (a regular C or subchapter S), partnerships (general or limited), limited liability companies (LLCs), and ownership as tenants in common, joint ownership and individual ownership. Generally, the discounts for lack of marketability and minority interest are effective when real estate is owned by an entity. The discount for fractional ownership is applicable when real property is owned by different interests as tenants in common. Those ownership interests may be individuals, entities or any combination of entities and individuals.

The blockage discount is applicable to publicly issued securities, but may also apply whenever a large quantity of an item (even real estate) is suddenly available but may be too much for the market to absorb (the market absorption discount discussed below). The discount for restricted securities is applicable to securities restricted under the Federal securities laws. The discount for built-in capital gain is applicable to regular C corporations. The discount for restrictive covenants refers to agreements among individuals and/or entities which impose restrictions on the ability of the owner to dispose of the interest. The various discounts are discussed below.

What is the proper amount of a discount? That is a fact and circumstances test. Preparation is important. The discount should be supported by a valuation performed by a qualified valuation expert (Certified Valuation Appraiser, CVA is a common designation.) If the entity owns real estate, the valuation expert will need recent appraisals showing the fair market value of each property owned by the entity. This must all be completed prior to any gift.

Illustration: John and wife Jane are the owners of Ranch LLC. Each own 100 units. Ranch LLC only asset is the land appraised at \$6 million dollars. John and Jane each transfer by gift to their child 65 shares or a total of 130 of the 200 units. Prior to the transfer a certified appraiser appraised the land at \$6 million dollars and then a business evaluation



was done on the Ranch LLC. The Certified Valuation Appraiser determined because of lack of marketability and minority interest or lack of control the value of each unit of the LLC would not be \$30,000 but would be reduced to \$18,000, a 40% discount. The same transfer without the fair market valuation discount would mean only 80 units total could be transferred without paying gift tax. With discount up to 133.33 of the 200 units can be transferred without John and Jane paying any gift tax. They use their annual exclusion of \$12,000 per year per donee and their lifetime exemption or tax credit of \$345,800 which is equal to a \$1 million dollar gift each. This can mean the difference of keeping the ranch in the family when John and Jane die or their child having to sell the ranch or a portion to pay the estate tax upon the last of their deaths.

Conclusion

Giftting one of several tools used in estate and financial planning. Like all tools gifting has advantages and disadvantages. Before making a significant gift you should seek professional advice. Speak with your financial advisor, and your attorney and CPA or accountant know the gift tax consequences, the GSTT consequences and possible discounting of the gift. Also understand the tax advantages as well the disadvantages for both the donor and donee of gifting.



Effects of Title Ownership on Property

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Until substantial amounts of property are acquired, few focus on estate planning. However, the method by which titles are held to land, livestock, machinery and other property can have important estate planning implications. When, late in life, it is decided to plan an estate, making changes in title ownership can create problems such as gift taxes.

Deciding on ownership is generally based on the following five factors: Preference as to sole ownership or co-ownership (joint tenancy and tenancy in common); desired disposition of property at death; estate and inheritance tax effects; gift tax implications; and differences in estate settlement costs. This document will look at real and personal property and two types of co-ownership: Joint tenancy and tenancy in common.

Types of Property

There are two types of property, real and personal.

Real property is land and anything that is constructed on it, grown on it or affixed to it. On a ranch or farm the fences, barns and out buildings, water systems that cannot be moved, and growing timber are real property.

Personal property means property that is movable. There are two types of personal property – tangible and intangible. Personal property that can be felt or touched is tangible (livestock, machinery, vehicles, jewelry, a spur collection, stored grain). That which is unable to be touched or felt is intangible personal property (stock certificates, bonds, promissory notes).

Title and or physical possession is the manner in which both real and personal property is owned. Title may come in the form of deed, certificate, bill of sale, contract or some other document. These pieces of paper designating title are important designations that cannot be separated from a will.

Forms of Property Ownership

Sole ownership of property is the simplest and gives the holder the most complete ownership possible. When the property is transferred, there is a minimum of red tape since the titleholder has the right to dispose of the property. During the titleholder's life there are laws of the state that dictate how the property is to be managed. You cannot infringe on the rights of a neighbor, zoning restrictions dictate whether an agriculture operation is allowed in certain areas, and you cannot disregard the interest rights of a surviving spouse. Wyoming is a common law state and thus protects spouses and keeps them from being left out in the cold when the other spouse dies. Each spouse, under law, has a legal right to a portion of the other's property at death.

At death, solely owned property passes under a will or according to state law if there is no will. Estate taxes may reach the total value of the property when it is held in sole ownership. Sole ownership property usually goes through probate to clear title for heirs.

Savings and checking accounts are typically closed as soon as possible after the decedent's death and a personal representative is appointed. The personal representative then moves the balance of all accounts to a new account, opened in the name of the estate. The personal representative pays outstanding bills and distributes the remaining money to the heirs. The process can take a very long time, sometimes years.

Co-Ownership Types

Joint tenancy and tenancy in common are the two most common forms of co-ownership. Co-



ownership exists when two or more persons hold legal title to undivided ownership of property.

Joint Tenancy

Joint tenancy with right of survivorship is a popular co-ownership method of owning property. There is a belief by many that joint tenancy substitutes for a will, saves death taxes and can reduce estate settlements costs. In general, the larger the estate the less desirable or advisable joint tenancy becomes because of the death tax "traps" that can arise. A joint tenant cannot leave his or her interest to someone in a written will as joint tenancy title takes precedence. Neither does his interest pass to his heirs by intestacy. Joint tenancy title is proof of a contract, and by law it has priority.

When a couple marries, they sometimes place their real and personal property in joint tenancy. Perhaps it is to show each other that they now trust enough to share their property. The decision to do so should only be taken after very serious consideration. A joint tenancy bank account is advisable for spouses. Banks have a standard form for checking, savings and certificates of deposits to be owned in joint tenancy.

When a joint tenant dies, his or her economic interest passes automatically to any surviving tenant(s). The following example shows how this can cause an unexpected disinheritance. A father and son have held farm property in joint tenancy for two decades, each expecting the father to die first, leaving the son to inherit the total farm. As it happened the son had a fatal tractor accident. His share of the joint tenancy interest in the farm went to the father. This, in essence, jerked the rug out from under the son's wife and children's future. They must depend upon the goodwill of the son's father for their economic survival.

There can be problems with personal property placed in joint tenancy. For example, should an elderly person living alone place a checking

account in joint tenancy with a trusted friend who does her shopping and performs other tasks, then dies unexpectedly, the entire amount goes to the trusted friend. Those who would have inherited the money in the checking account as the deceased might have intended, now are ineligible to receive the money.

A gift tax problem arises when there is a death of one joint tenant and the other joint tenant moves the property to some other ownership pattern such as tenancy in common. A liability also arises when one of the joint tenants put more money into the business than the other. Upon the death of the one who has contributed all or most to the joint tenancy, there is a gift created when the surviving joint tenant inherits all the property.

Tenancy in Common

Tenancy in common is any property held in shared ownership that is not in another type of ownership. All shared property not owned in joint tenancy, partnership, corporation, or LLC is tenancy in common. You can own any percentage of tenancy in a common law state such as Wyoming.

The major difference between joint tenancy and tenancy in common is in the disposition of the interest of a deceased co-owner. Another difference is that the owner's shares do not have to be equal. At the death of a co-owner that person's undivided interest passes to that individual's heirs either by a will or by law. There is no right of survivorship for the tenant in common. Each tenant in common has the right to sell, give away or transfer his or her proportional share.

In the joint tenancy example had the father and son owned the property as tenants in common, when the son died his share would have gone to his wife and children either by will or by law.

If you are in a corporation, partnership, or LLC don't delay in checking your documents to see what share of the business you own.



Disclaimer

This manual is not intended to be a substitute for legal advice. It is designed to help you become familiar with some of the tools

available in planning an estate and the need to do such planning. Laws change when the Wyoming legislature meets and votes to change a section of the law. This publication is based on laws as they exist at the time of printing.



Annuities

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An *annuity* is a contract or agreement on the part of another person or company to pay another person (the annuitant) a fixed sum at periodic intervals usually for as long as the person lives or for a specified term of years.

The most important reason for purchasing an annuity is to ensure the annuitant an "income" for the rest of his or her lifetime without the burdens and risks of management. Many times individuals become concerned that their estate or assets will be used up or dissipated prior to their death, leaving nothing to live on. Also as we age the burden of management of our assets and especially investments in securities become difficult, if not impossible. An annuity can help alleviate these problems and concerns.

To understand annuities some terms or definitions will help.

Accumulation period: The time during which your fund builds up for a deferred annuity.

Annuitant: The person during whose life the annuity is payable, usually the person who is to receive the annuity.

Annuity: A contract that provides a fixed sum at periodic intervals for life or certain number of years.

Deferred Annuity: An annuity which payments begin at some future date.

Fixed Annuity: An annuity which the amount paid out is fixed sum and is usually guaranteed.

Loads: The fees or charges paid when you purchase an annuity. Includes sales commissions.

Mortality Table: A table showing the statistical death rates at each age.

Owner: The person who purchases the annuity.

Payout Phase: The period when income is received from the annuity.

Principal: The amount paid into the annuity (basis) as distinguished from the interest or growth inside the annuity.

Qualified Annuity: An annuity sold as part of a tax-qualified Keogh plan, retirement plan IRA, or TSA (403(b)).

Straight Life or Single Life Annuity: An annuity that pays a predetermined amount periodically (usually monthly) but ceases when you die.

Variable Annuity: An annuity which has security investment options for investment of the principal and where the periodic payments will vary based upon the performance of the stock or other investments.

There are two (2) types of annuities, commercial annuities and private annuities.

Commercial Annuities

Commercial annuities are sold by companies, primarily insurance companies. The annuity may be purchased for a single premium, in which case the annuity payments frequently commence immediately or the annuity payments may be deferred to commence at some future date. Many times we see the date on which the annuitant reaches age 65 as a beginning date. The annuity may also be purchased where the purchaser pays a monthly or other periodic premium. In that case the annuity payments usually commence at a future date. Also an



annuity can be established from the transformation of a life insurance policy or the cash value in the policy may be exchanged for an annuity contract (1031 tax free exchange).

This exchange must be prior to the insured's death and the conversion into an annuity must be in accordance with the policy terms and the Internal Revenue Code.

There are two (2) major disadvantages in purchasing a commercial annuity compared to other investments. In the usual type of annuity, in which the annuity payments are fixed in amount, continuing inflation presents a serious problem.

The annuity will be paid for with "expensive" dollars, and the insurance company will pay it back with "cheap" dollars. In recent years, insurance companies have developed a so-called variable annuity, where theoretically at least, the payments will keep better pace with inflation.

The second major disadvantage of an annuity is its lack of flexibility. The annuitant may be faced with extraordinary expenses in any given month or other period, but the annuity payments will be made in accordance with the prearranged fixed schedule.

Commercial annuities are categorized by when the income begins, this is referred to as the "settlement".

An *immediate* annuity begins payments to the "annuitant" within 12 months of issue. These are most commonly purchased by people who have reached retirement age.

A *deferred* annuity begins payments to the "annuitant" 12 months or more after issue. These are most commonly purchased by people who have not yet reached retirement age.

The payout of an annuity are based upon the initial investment, plus interest or accumulation prior to and during distribution less the costs of administration. Several "settlement options" or methods of payout are offered by insurance companies.

A *straight life annuity* is one which ceases on the annuitant's death. It is not included in the annuitant's estate.

A *term annuity* is paid for a specific term i.e. 10 years. Under the "term certain" clause the annuity pays for the term stated regardless of the death of the annuitant.

A *joint life and survivor annuity* pays on the joint live say of a husband and wife. After the death of the first annuitant the payment may have to be reduced ("cut down"). Joint life annuities may have a portion of the value included in the deceased annuitant's estate, at least to the extent the deceased annuitant's contributed to the value of the annuity that is still to be paid after the deceased annuitant's death. See I.R.C § 2039.

Annuities, both straight life and joint life and survivor may also contain a "refund certain" clause. This guarantees the annuitant's beneficiary a refund any portion of the principal not paid out at the death of the annuitant.

Private Annuities

The term "private annuity" generally refers to an annuity (a payment in cash of a sum certain at least annually) for the lifetime of the annuitant by a purchaser of the property who does not otherwise issue annuities. The private annuity is contract between the annuitant and someone other than an insurance company or entity regularly engaged in the business of issuing annuity contracts. The most typical situation where a private annuity is used is when an elderly family member transfers assets to a younger family member who makes an unsecured promise to pay a lifetime annuity to the elderly family member.



One of the primary purposes of the private annuity is an estate planning tool to help reduce the estate owner's potential estate tax liability. The following are some of the advantages and disadvantages of using private annuities:

Advantages

1. The asset transferred will be kept out of the owner's estate, regardless of when the transferor's death occurs.
2. If the owner needs "income" during his or her lifetime, the annuity payments can satisfy this need.
3. A portion (the basis) of the annuity payments will be excluded from the owner's taxable income.
4. The private annuity may be used as a device to provide the estate owner with more liquidity during his or her lifetime. The asset transferred will immediately receive a new income tax basis to the purchaser equal to the then present value of the annuity payments to be made. If the asset produces little or no income, the purchaser could sell the asset at its then fair market value without paying an immediate capital gains tax and convert the asset to one that produces income. The owner, without using a private annuity, could not have made a sale of the underlying asset to a third party without the payment of a capital gains tax, which would have reduced the after-tax net proceeds.
5. When compared to a gift, the private annuity transaction results in no gift tax, unless the actuarial value of the annuity payments is less than the fair market value of the property. Moreover, if the owner had made a gift rather than a sale under a private annuity, the receipt by the owner of payments from the donee may have constituted a transfer with a retained life estate, causing the gifted assets to be included in the estate. See I.R.C. § 2036.

6. When compared to selling the property for a fixed price on the installment basis, nothing will be included in the owner's estate at the time of the owner's death. Under the installment sale, the unpaid balance of the purchase price would have been included in the estate.

Disadvantages

1. The owner may live too long, and the annuity payments will tend to increase the estate beyond what it would have been if the owner had kept the transferred asset.
2. If the owner lives longer than his or her life expectancy, the purchaser will have paid out more than the value of the asset.
3. The purchaser may not deduct any portion of the payments which he or she makes, even if they exceed the fair market value of the asset. Under an installment sale; however, the "interest" component of the installment note might be currently deductible.
4. If the annuitant dies substantially before the expiration of his or her life expectancy, the purchaser could receive a much lower income tax basis for the property than would have been the case if the annuitant died still owning it. The receipt of a lower basis may offset some of the advantage of keeping the asset out of the owner's estate.
5. When a private annuity is entered into to provide "income" for the owner, the promise to pay the annuity must be unsecured. The owner may have difficulty collecting on the contract and his or her objective may be unfulfilled. If the purchaser should die before the owner, the obligation would become a burden of the purchaser's estate. It might then be even more difficult to enforce, particularly if the transferred asset were the major asset of the purchaser's estate and he or she left a family which had been dependent on him or her for support. Whenever the estate owner is dependent on receiving the annuity payments for his or her own support, he or she should consider these



possible consequences before entering into a private annuity transaction.

Tax Considerations

Income Tax: The income taxation of annuities is governed by Section 72 of the Internal Revenue Code and the Regulations. These rules are very detailed and, particularly in the case of refund, term certain, and joint and survivorship annuities, there are many complex rules that require professional advice.

The basic principle is to permit the return of the purchaser's investment (basis) in equal tax-free amounts over the payment period and to tax the balance of the amounts received. As a result, each payment is in part a nontaxable return of cost and in part taxable income. To determine the nontaxable part, the "exclusion ratio" for the annuity contract must be determined. Such ratio is determined by dividing "the investment in the contract" by the "expected return." See *I.R.C. § 72 (b)*.

To discourage early withdrawals from an annuity contract, there may be a penalty tax of 10 percent of the amount included in income.

An annuity contract issued after January 18, 1985 must include specific rules for distribution in the event of the owner's death. The contract must provide that:

1. If the owner dies on or after the annuity starting date, any remaining undistributed portion of the annuity must be distributed at least as rapidly as under the method of distribution in effect at the owner's death.
2. If the owner dies before the annuity starting date, the entire interest in the annuity contract must be distributed within five (5) years of the date of death. However, the annuity may provide that distributions will be payable over the lifetime of the beneficiaries if such distributions are scheduled to begin within one (1) year of

the owner's death. Moreover, if the beneficiary is a spouse of the owner, the annuity may be continued in the name of the spouse as the new owner (spousal rollover). See *I.R.C. § 72(s)*. If a contract issued after January 18, 1985, does not include these provisions, it will not be taxed as an annuity and the payment will generally be treated as income. See *Reg. § 1.72-1 (d)*.

Gift Tax: One may purchase an annuity and make a gift of it to another person. If the donor gives it away immediately after the purchase, the value of the gift for gift tax purposes is the premium paid for the annuity. However, if the donor makes the gift at a later date, the value of the gift is the single premium the insurance company would charge at that time for a comparable annuity.

The value of an annuity on which premiums are still to be paid is the terminal reserve, adjusted to the date of the gift, plus the unearned portion of the last premium payment. See *Reg. § 25.2512-6*. Since the value of an annuity policy tends to increase with the passage of time, there is a tax incentive to gift these policies, even though such gift may be subject to immediate gift taxation.

One may also incur gift tax by purchasing a joint life and survivorship annuity. The amount of the gift is the cost of the annuity less the portion of the cost attributable to a single life annuity for the purchaser. See *Reg. § 25.2512-6*. If the donor reserves the right to change the survivor beneficiary, there will be no taxable gift.

When one spouse purchases a joint life and survivorship annuity and designates the other spouse as the survivor beneficiary, the gift tax marital deduction is allowed under the special qualified terminable interest property (QTIP) rules. See *I.R.C. § 2523(j)(6)*.

The gift of an annuity contract issued after April 22, 1987 is treated as an assignment for income tax purposes. The donor of the annuity contract, at the time of the gift, must therefore include in such donor's gross income the amount by which



the net surrender value of the contract exceeds the investment in the contract. See *I.R.C. § 72 (e)(4)(C)*. The donee will receive a new basis in the contract equal to the donor's investment

in the contract, plus the amount includible in the donor's income. See *I.R.C. § 72 (e)(4)(C)(iii)*. These rules do not apply if the gift is made to the donor's spouse or, if made in connection with a divorce, to a former spouse. See *I.R.C. § 72 (e)(4)(C)(ii)*.

Estate tax: A straight life annuity is not subject to death taxation in the annuitant's estate because it ceases on the annuitant's death, and there are no residual payments to be made to any other persons. However, annuities with refunds, term certain annuities, and joint and survivor annuities are subject to estate tax to the extent of the fair market value of the survivor's interest in the annuity.

If the amount to be paid after the annuitant's death is payable to the estate, the entire amount is included in the gross estate. See *I.R.C. § 2033*. When such amount is payable to a named beneficiary under an annuity purchased after March 3, 1931, it is includible in the estate only to the extent of the portion of the purchase price which the decedent paid. See *I.R.C. § 2039(a) and (b)*.

The value of the survivor's interest in the contract when issued by a company regularly engaged in selling these contracts is established through the sale of comparable contracts. If the contract was not issued by a company that regularly engages in that business, it is necessary to determine the present value of the annuity to be paid after the decedent's death by using the appropriate annuity valuation tables. See Internal Revenue Service Publication 1457 Actuarial Values Book Aleph (July 1999). A survivor's annuity payable to

the surviving spouse will qualify for the marital deduction. See *I.R.C. § 2056(b)(7)(C)*.

Conclusion

Annuities are one of several tools used in estate and financial planning. Like all tools used they have advantages and disadvantages. Like CD annuities are a saving tool, they have better rates of return but the surrender period and charges are greater. Unlike a CD during the accumulation phase the taxation of growth inside the annuity is deferred.

Before purchasing an annuity you should seek professional advice. Speak with your financial advisor, and your attorney and CPA or accountant know the sale charges, the surrender periods and charges, any limits or guarantees on rate when the annuity is annuitized and the "settlement" options available. Also know the tax advantages as well the disadvantages for both income and estate tax of using or purchasing an annuity.



THE FEDERAL ESTATE and GIFT TAX

Timothy Lindstrom, Esq.**

I. Introduction.

The first version of the federal estate tax was enacted in 1797 to help fund anticipated military conflicts. According to the Congressional Budget Office, total revenues raised by the estate and gift tax over the past sixty years have only amounted to 1% to 2% of total federal revenues and are expected to amount to about \$420 billion between 2010 and 2019, or about 1.2% of projected revenues for that period. In 2003, revenues generated by the federal estate tax amounted to just over \$20 billion. In 2012, revenues generated by the tax amounted to about \$8.5 billion.

In 2003, there were 73,100 estate tax returns filed. In 2012, only 9,400 returns were filed. This 87% decline in the number of returns filed primarily represents the increase in the amount of a decedent's estate that can pass tax-free (the "Exclusion Amount" described in Section IV.C.). In 2003, that amount was \$1 million; in 2012, it was \$5.12 million. In 2014, the amount is \$5.34 million.

In other words, if you are liable for federal estate tax you are in an extremely small class of people: 9,400 decedents' estates filed returns in 2012 and there were approximately 2.5 million U.S. deaths in that year. The percentage of decedents whose estates had to file returns was 0.376% of all decedents' estates.

However, farmers and ranchers sometimes overlook the value of their land in a way that someone with a large portfolio of stock never would. No farmer or rancher with substantial land holdings should assume that the Exclusion Amount will shelter his or her estate entirely. This

is particularly true in areas where development pressure or "amenity values" are high and land is in demand for uses other than farming or ranching. Estates that are land rich are extremely vulnerable to destruction by the estate tax because a decedent's family may be forced to sell the family farm or ranch in order to generate funds to pay the tax.

Even if your estate is unlikely to be liable for estate tax, it is still wise to plan how you want your assets to pass to your children or other beneficiaries and how you want those assets to be used in the future.

II. Current Status of the Estate and Gift Tax.

The current estate tax law excludes the first \$5.34 million of a decedent's estate from any estate tax. The tax rate on amounts in excess of \$5.34 million is 40%.

As described in Section IV.C., current law (2014) excludes from tax up to \$10.68 million in assets for a married couple or \$5.34 million for a single person so that only a handful of estates are taxable (9,400 in 2012 as noted above).

III. The "Unified Estate and Gift Tax" (Code §§2001–2801)

The federal estate and gift tax provisions are contained in §§2001 through 2801 of the Internal Revenue Code of 1986, as amended (the "Code" – note that section headings will include, where appropriate, references to relevant sections of the Code); and §§20.0-1 through 26.7701-1 of the U.S. Treasury Regulations (the "Regulations."). The purpose of the Code is to tax transfers of wealth from one person to another whether made during a person's lifetime or at a person's death. Because the tax is imposed on transfers during life and at death, and because it applies cumulatively to both types of transfers, it is called the "Unified Estate and Gift Tax." In other words, tax is due on gifts and on bequests (or on assets passing without a will, i.e., by "intestacy") and



all such transfers are added together to determine the amount of tax due.

Under the current law, the first \$5.34 million of a single person's transfers, whether by gift, will, or intestacy, are exempt from both estate and gift tax. This exemption is known as the "Exclusion Amount." The Exclusion Amount covers both lifetime gifts and assets passing at death. As such, only \$5.34 million in assets can be transferred tax-free. The current tax on anything transferred in excess of the \$5.34 million exemption is 40%.

The law also makes the Exclusion Amount "portable" (see Section IV.C.). Portability means that if the estate of the first spouse to die fails to take full advantage of the Exclusion Amount, the surviving spouse's estate may use that portion of the Exclusion Amount unused by the decedent spouse's estate plus the surviving spouse's own Exclusion Amount (provided that the estate of the first spouse to die timely filed an estate tax return with the proper election).

IV. The Gift Tax (Code §§2501–2524)

As described in the preceding section, the estate tax and the gift tax are unified. However, they are not identical. A person making gifts during his lifetime that do not otherwise qualify as charitable contributions is liable for the payment of tax on the amount of the gift with certain exceptions discussed below.

A. The Gift Tax and the Exclusion Amount (Code §2505)

As noted, both lifetime gifts and property passing by will or intestacy are taxable subject to the Exclusion Amount. The current Exclusion Amount allows a single person to make up to \$5.34 million in tax-free lifetime gifts, and a couple to make up to \$10.68 million in tax-free lifetime gifts.

B. The Annual Exclusion from Gift Tax (Code §§2503(b) and 2513)

In addition to the Exclusion Amount, lifetime gifts are also entitled to an "Annual Exclusion" from gift tax. The Annual Exclusion, like the Exclusion Amount, is indexed for inflation. The amount of the Annual Exclusion for 2014 is \$14,000.

The Annual Exclusion is available annually for each gift made to an individual person (or to any number of individuals—but only to individuals or to so-called "Crummey Trusts," a discussion of which is beyond the scope of this summary). In addition, the Annual Exclusion is doubled for gifts made jointly by a husband and wife. Such gifts are known as "split gifts." At current rates, split gifts to an individual (or any number of individuals) are tax-free up to \$28,000 annually.

Example: *Don and Jean have three married children and four grandchildren. Using the Annual Exclusion, and making split gifts, they can make gifts sheltered by the Annual Exclusion amounting to \$280,000 per year. This can be done by making a \$28,000 split gift to each child (amounting to \$84,000); similar split gifts to the spouse of each child (also amounting to \$84,000); and four \$28,000 split gifts to each of the four grandchildren (amounting to \$112,000).*

The Annual Exclusion is an important part of many basic estate plans. Annual gifts to children, if started while parents are relatively young can, over the years, effectively transfer very substantial amounts of property tax-free. While it is easier to transfer liquid assets (stocks, bonds, or cash), it is also possible to transfer land or business interests.

Note that assets passing by lifetime gifts do not receive a stepped-up basis (see Section V.L.), which is one reason to exercise caution in using lifetime gifts as part of an estate plan.



(i) Gifts of land or interests in family businesses.

Land and family-owned businesses are not “liquid” like cash or stocks and bonds, and dividing land or family-owned businesses and valuing the resulting interests is difficult. For purposes of this discussion, land and family-owned businesses will be referred to as “illiquid assets.”

Illiquid assets may be gifted in several ways. With land, the most obvious way is to make the gift outright “in fee simple.” The problem with this is that existing parcels of land are unlikely to fit neatly within the Annual Exclusion amount. One way of dealing with this problem is to divide land into smaller parcels based upon an appraised per-acre value. This is not very practical and may violate local land use regulations.

One alternative is to gift an undivided percentage interest in land (typically called a “tenancy in common”). For example, if a ranch is worth \$2 million, an undivided 1.4% interest in the ranch would equate to \$28,000 (actually less, because there would be a substantial discount in value for such a small minority interest; see the discussion of “discounting” in Section IV.C.).

Partial interests in family-owned businesses, if owned as sole proprietorships, are also difficult to transfer.

However, transferring illiquid assets to a so-called “pass-through entity” can greatly enhance transferability. Typical entities used for estate planning include family limited partnerships (“FLPs”) and limited liability companies (“LLCs”). These entities allow an illiquid asset to be divided fairly simply. Title to the illiquid asset is transferred from the current owners to an FLP or LLC that is wholly owned by the asset owners. Such a transfer is not taxable. Once title has transferred, the original owners continue to own the formerly illiquid asset, but in the form

of limited partnership interests or memberships in an LLC, both of which are easily transferred to others without requiring any division of the underlying asset.

In addition, FLPs and LLCs allow a form of centralized decision-making (by the general partner in an FLP or by the managing member in an LLC), so that the parents, for example, may continue to control the use of the assets of the entity regardless of who holds limited partnership interests (FLPs) or memberships (LLCs).

LLCs and FLPs are called “pass-through” entities because they allow the income and deductions generated by the property held by the entity to pass through to the limited partners or members in proportion to their ownership interests, or according to the terms governing the operation of the FLP or LLC. FLPs are taxed as partnerships. LLCs can elect to be taxed as partnerships, S corporations, or C corporations (except single-member LLCs, which are ignored for taxation purposes).

Another entity that is sometimes used for estate planning is the “S corporation.” An S corporation is also taxed like a partnership, with some exceptions. An important exception, for example, is that charitable deductions by an S corporation are limited to the amount of the shareholder’s adjusted basis in his or her shares in the corporation.

“C corporations” are not suitable for estate planning. This is due, in part, to the fact that C corporations do not allow a pass-through of income and deductions to shareholders. In addition, C corporations are taxed separately from their shareholders and the transfer of assets or income from a C corporation to its shareholders generates an additional tax. Also, charitable contribution deductions by C corporations are limited to 10% of the corporation’s taxable income and these deductions cannot pass through to shareholders.



(ii) The “present interest” requirement (Code §2503(b)(1))

The Code requires that gifts eligible for the Annual Exclusion must be gifts of “present interests” in property. This requirement does not apply to the Exclusion Amount. As a result of Tax Court decisions in 2002 and 2010, the use of LLCs and FLPs (and possibly S corporations) in connection with the Annual Exclusion has become more complex and, in many cases, impractical. This is because the Tax Court has ruled that gifts subject to substantial restrictions on present use fail to comply with the present interest requirement and are therefore not eligible for the Annual Exclusion, unless there are specific provisions in the entity’s controlling documents allowing for the sale of gifted interests back to the partnership or LLC at fair market value (the discussion of such provisions is beyond the scope of this summary). The Tax Court decisions dealt with gifts made via LLCs and FLPs.

It is still possible to structure gifts via LLCs and FLPs; but care needs to be taken that these entities are structured to comply with the present interest requirements. However, it is likely that such gifts will not qualify for the discounting treatment described below.

Gifts of partial interests in real property (e.g. the gift of a 10% undivided interest in the family farm to a family member) should be considered gifts of a “present interest” because the recipient of the gift has the immediate right to sell the interest (if anyone would be willing to buy) or to seek partition of the property. Such gifts, because they constitute gifts of a present interest are eligible for the Annual Exclusion. They may also be eligible for discounting.

Gifts to minor children, even if they are not present interests because enjoyment is deferred, are not subject to gift tax provided that they can be enjoyed when the minor reaches age 21.

Note that Tax Court rulings do not preclude gifts using LLCs and FLPs from eligibility for the one-time Exclusion Amount (the \$5.34 million amount). In any event, the use of an LLC, an FLP, or an S corporation should only be undertaken with the guidance of qualified estate tax counsel.

C. Discounting

Discounting reduces the value of lifetime gifts (or transfers made at death) below their “face value” and is an effective and popular estate planning tool. Discounting applies to transfers of less than the controlling interest in property, particularly assets such as interests in FLPs, LLCs, and S corporations. For example, the face value (technically the “par value”) of a one-third interest in an FLP whose assets are worth \$1 million would be \$333,333. However, the value of the gift of such a one-third interest might be discounted to something like \$233,333, when the gift is valued for tax purposes.

Discounting gifts or transfers made at death of property that is (i) not readily marketable (e.g., an interest in an FLP) and (ii) that represents less than a controlling interest in the property gifted is allowed by the Code for two reasons. First, owning an interest in property that is not readily marketable (as is the case with interests in FLPs, LLCs, and S corporations) is worth less than an interest in property that is readily marketable (e.g., shares of stock traded on a recognized exchange). This is sometimes referred to as the “discount for lack of marketability.” Second, owning less than a controlling interest in an asset is worth less than owning a controlling interest. This is sometimes referred to as the “discount for lack of control” or “minority discount.”

As discussed in the previous section regarding the present interest requirement, the restrictions on use that make discounting effective may prevent discounted gifts from qualifying as present interests eligible for the Annual Exclusion. However, discounting can be very important in maximizing the amount of property that can be



gifted under the one-time Exclusion Amount, which is not limited to gifts of present interests.

Gifts of partial interests in real property conveyed outright (e.g., by conveying an undivided interest in common) will also result in a discount for both lack of marketability and lack of control. Discounts of as much as 30% have been suggested as appropriate for gifts of partial interests in real property, although a recent Tax Court case has ruled that a 20% discount should apply to such interests. Because they can be sold or allow the owners to seek partition, such interests are likely to be considered present interests, therefore qualifying for the Annual Exclusion as well as a discount.

There are also other types of discounts available. "Blockage," for example, is applicable where a gift or bequest is made of a very large amount of publicly traded stock or similar asset. "Market Absorption" is applicable where a number of similar assets (e.g., lots in a residential subdivision) are gifted or bequeathed that will require a considerable amount of time to sell because of market circumstances.

Determining the actual amount of discount for any given asset is a very complex process and is subject to challenge by the IRS if the discounting appears too aggressive. However, as a very general rule, lack of marketability discounts range from 20% to 25% (although they may be much higher or lower depending on the circumstances). Lack of control discounts range from 20% to 40% (again, they can be much higher or lower depending on the circumstances). As noted above, partial interests in real property may generate discounts of 20% to 30%.

Example: *The James family owns a 500-acre dairy farm in central Wisconsin. In addition to Mr. and Mrs. James, there are three children, all of whom work on the farm. The farm operation, including land, buildings,*

equipment, and livestock, is valued at \$17 million. The farm is titled jointly in the names of Mr. and Mrs. James, who decide to create a family limited partnership as a vehicle to begin transferring ownership of the farm to their children. Mr. and Mrs. James become the "general partners" with the sole authority to control the operations of the farm. At the time of the creation of the FLP, they are also the sole limited partners holding 100% of the value of the farm.

To take advantage of the current \$10.68 million Exclusion Amount they transfer limited partnership interests to each of their three children with a face value of \$5 million. Without discounting this would amount to \$15 million in gifts and would trigger the gift tax. However, their estate tax attorney advises them that they can safely discount the value of these gifts by 35% (10% for lack of marketability and 25% for lack of control). Thus, the collective taxable value of the gifts is approximately \$9,750,000, an amount that will be completely sheltered by the \$10.68 million Exclusion Amount available to married couples. Note that because the gift of limited partnership interests might not constitute a gift of a "present interest" it is possible that no portion of the gifts will qualify for the Annual Exclusion.

As with the use of LLCs and FLPs, discounting through partial interest transfers is a very complex business and should **only** be undertaken with qualified estate tax counsel. Any further discussion is beyond the scope of this summary.

D. Other Gift Tax Exemptions

The following is a list of transfers that are not subject to gift tax. This list is not exhaustive, but does cover some of the most important exemptions from the tax.

(i) Gifts between spouses (Code §2523)

All gifts between spouses are exempt from the gift tax due to the "Marital Deduction" discussed in Section V.D.



(ii) School and Medical Payments (Code §2530(e))

Payments made for tuition (but not room, board, books, etc.) and for medical expenses on behalf of another

(regardless of the relationship to the donor) are exempt from the gift tax, regardless of the amount paid, provided that such payments are made directly to the institution providing the service rather than the individual for whom such expenses are paid.

(iii) Charitable Contributions (Code §2522)

Contributions to qualified charities and public agencies are not subject to the gift tax. Note, however, that “charitable intent” is required. Also, note that gifts of partial interests in property, with some exceptions (e.g., conservation easements), are not considered charitable contributions and may be subject to gift tax.

(iv) Transfers to Political Organizations (Code §2501(a)(4))

Transfers to political organizations are not subject to gift tax, even though they are not considered charitable contributions.

E. Some Cautions about Gifts

It may not always be advisable, as a family matter, to transfer ultimate control over the family farm, business, or other significant assets, to children during the parents’ lives. This will depend a great deal on family dynamics. In the case of a family farm or other business, how should a family divide the asset where some children are involved in the farm or business and some are not? Where some love the farm or other business, and others would be happy if they never saw the place again? The point is this: tax planning is important, but not always as important as what will happen to the family when the parents shift control of major family assets to other family members.

Another important point is that assets transferred

by gift do not receive a “stepped-up” cost basis (see the discussion of “stepped-up” basis in Section V.L.). In addition, giving land subject to a conservation easement wastes the 40% estate tax exclusion allowed by §2031(c) of the Code (discussed in Section V.I.(ii)), because this exclusion does not apply to gifts.

Finally, trying to minimize estate or gift taxes by making annual gifts from parents to children in amounts that do not exceed the Annual Exclusion can take a long time and, if the asset being gifted is appreciating in value, it is possible that the annual gifts won’t even keep up with appreciation.

V. The Estate Tax (Code §§2001–2210)

A. The Gross Estate (Code §2031)

An important concept in estate tax law is the “gross estate.” The gross estate is to be distinguished from the “taxable estate” discussed in Section V.B. The gross estate includes the value of everything titled in the decedent’s name, whether solely or jointly with others, as well as any other property over which the decedent had discretionary control for his or her personal benefit.

For example, if the decedent was the trustee of a trust and had the authority to direct the use of the assets of the trust for his or her own benefit, the value of the assets of the trust must be included in the decedent’s gross estate. If the decedent owned a bank account jointly with another person and could withdraw the entire sum for his or her own use, the entire value of the account is included in the decedent’s estate. If a decedent owned life insurance and controlled the cash value or the designation of beneficiaries, or had other “incidents of ownership” over the policy, the value of that policy is included in the decedent’s estate.

With certain exceptions (see §2040(a) of the Code), if the decedent owned land jointly with another person (except for undivided interests



held in common without survivorship rights), the entire value of the land is included in the estate of the first joint owner to die. In addition, the value of interests in limited liability companies, trusts, corporations, partnerships, limited partnerships, and the like are included in the decedent's estate to the extent of the decedent's ownership in such entities. The value of property owned by a decedent through a "revocable trust" (one which the decedent had the right to amend or terminate at will) is also included in that decedent's gross estate.

A person's gross estate may also include gifts of certain interests made in the three years prior to a person's death, and gift tax paid within that period (see §2035 of the Code).

In order to ensure that the value of property owned by a person is excluded from that person's estate, the person must completely divest himself or herself of all rights to any personal enjoyment of, or control over, the property, except for property placed irrevocably in trust for the benefit of another (in which case some limited control of the trust property may be retained). A person should assume that the value of virtually everything he or she has any control over for his or her personal benefit will be included in the person's gross estate.

The value of property included in a decedent's estate for estate tax purposes is its value measured on the date of the decedent's death or, if the decedent's executor makes a special election to do so, on a date six months after the decedent's death. The six-month deferral of valuation protects the estate from dramatic downward changes in asset values that might occur shortly after a person dies. The valuation of estate property is obviously an extremely important aspect of the estate tax.

B. The Taxable Estate (Code §2051)

The taxable estate is the gross estate reduced by all allowed estate tax deductions. Deductions are allowed for the following: costs of estate administration, executor's fees, funeral expenses, debts of the decedent including mortgage debt, taxes including state estate taxes, contributions to qualified charities and public agencies provided for in the decedent's will, "post-mortem" conservation easement contributions (discussed in Section V.I.(iii)), and the value of all property passing to the decedent's spouse (whether by the terms of the will, or by operation of law, e.g., survivorship accounts, real property owned jointly with right of survivorship, etc.), unless the spouse is not a U.S. citizen, in which case special rules apply.

C. The Exclusion Amount (Code §2010)

As previously noted, the Code excludes a certain amount of every decedent's estate (the Exclusion Amount) from taxation. Technically speaking, the Exclusion Amount does not actually exclude any part of a decedent's estate from taxation. Rather, a dollar-for-dollar credit (the "Unified Estate and Gift Tax Credit") completely offsets the tax on gifts or estates valued up to \$5.34 million. The credit is indexed for inflation and may therefore change from year-to-year.

The credit is called "unified" because it applies to the estate tax as well as the gift tax. The unified credit can only be used once—either against the estate or gift tax, or a mixture of both—and the total value sheltered by the credit cannot exceed the Exclusion Amount. Calculating the amount of estate and gift tax due requires that the amount of all taxable gifts (i.e., those in excess of the Annual Exclusion, or otherwise exempt from gift tax) be combined and added to the taxable estate. The total is the amount subject to the estate tax and to which the Exclusion Amount applies. If the total amount of taxable lifetime gifts made exceeds the Exclusion Amount, gift tax must be paid at that time the gift is made, and none of the Exclusion Amount will remain to



shelter estate assets. A credit equal to the amount of gift tax previously paid is allowed against the estate tax due, if any.

Example 1: Suppose that Mr. Jones made taxable gifts (over and above the Annual Exclusion of \$14,000) during his lifetime amounting to \$800,000. Because this amount does not exceed the Exclusion Amount, which, due to the Unified Credit applies to both gift and estate tax, no tax is due. When Mr. Jones died his taxable estate amounted to \$5 million. However, because taxable gifts must be added to the gross estate to determine total tax due, his gross estate will be \$5.8 million for taxation purposes. Assuming Mr. Jones died in 2014, the Exclusion Amount would only shelter \$5.34 million of this amount leaving \$460,000 subject to tax. The rate of tax on everything in excess of \$5.34 million is 40%. In this example Mr. Jones's estate would be liable for \$184,000 in tax $[(\$5,800,000 - \$5,340,000) \times 40\%]$.

Example 2: Mr. French made a \$5.8 million dollar lifetime gift and had assets of \$5 million at the time of his death. Under these circumstances gift tax would be payable at the time of the gift on the amount in excess of the Annual Exclusion and the Exclusion Amount or, in this case, \$178,400 $[(\$5,800,000 - \$14,000 - \$5,340,000) \times 40\%]$. At the time of his death, Mr. French's executor would be required to add the total of taxable gifts made during Mr. French's lifetime to his estate to determine total tax due. The executor would figure the tax due on this total of \$10,786,000 $[(\$5,800,000 - \$14,000) + \$5,000,000]$, which would be \$2,178,400 $[(\$10,786,000 - \$5,340,000) \times 40\%]$. From this amount he would subtract the \$178,400 of gift tax previously paid (or Mr. French would be paying the same tax twice)

to determine the net tax due $(\$2,178,400 - \$178,400 = \$2,000,000)$.

(i) "Portability" of the Exclusion Amount (Code §2010(c)(2))

When Congress reinstated the estate tax at the end of 2010, it added a new provision allowing a person to use his or her predeceased spouse's unused Exclusion Amount. In other words, if John dies and only uses \$2 million of the \$5 million Exclusion Amount, his wife Susan may use the remaining \$3 million of John's Exclusion Amount plus her own \$5 million Exclusion Amount, if John's estate timely filed an estate tax return and made the proper election.

Many folks have wills that provide that everything in their estate goes to their surviving spouse when they die. Under this approach, the Marital Deduction (see discussion in Section V.D.) shelters all of the first decedent's estate and none of the Exclusion Amount is used. Under the law that existed prior to 2010, the entire Exclusion Amount available to the first decedent's estate would be lost in such a case. With portability, the unused Exclusion Amount from the first spouse to die is not lost but can be used by the surviving spouse. However, as previously noted, the estate of the first spouse to die must timely file an estate tax return on which the proper election is made to allow portability of its unused portion of the Exclusion Amount.

The portability provisions eliminate the need for special estate planning to avoid losing the Exclusion Amount (see Section V.C.(i)). However, some planning may still be needed in order to avoid the potential estate tax resulting from the inflation in the value of assets passed from the first decedent's estate to the surviving spouse. In other words, if a bypass trust is used (see Section V.D.(i)), assets qualifying for the Exclusion Amount may "bypass" the survivor's estate (while providing benefits to the survivor) and go directly to the children, thereby avoiding appreciation of those assets in the survivor's estate that would increase the estate tax due when the survivor dies.



Unlike the Exclusion Amount, the generation-skipping tax credit (see Section V.G) is not portable.

D. The Marital Deduction **(Code §2056)**

As already noted, the Code allows a decedent's estate to deduct the total value of all assets passing to the decedent's spouse upon the decedent's death, provided that the surviving spouse is a U.S. citizen. This is known as the "marital deduction." The amount of this deduction is unlimited. In other words, Bill Gates could leave his entire estate to his wife Melinda and the estate would pass to her estate tax free. The marital deduction also applies to lifetime gifts made to a spouse, regardless of amount.

(i) "Bypass trusts"

Prior to the enactment of the "portability" provisions, bypass trusts were frequently used in estate planning to avoid the loss of the Exclusion Amount that resulted from gifting assets directly to the surviving spouse. Such direct gifts or bequests qualified for the Marital Deduction but failed to use the Exclusion Amount which, under prior law, was then lost. Although the Exclusion Amount is no longer lost if properly elected in the estate tax return of the first spouse to die, bypass trusts still have a role to play where the estate of the first spouse to die contains appreciating assets. In such cases, a bypass trust can divert the appreciation from the surviving spouse's estate and place it directly in the hands of children or other beneficiaries, thereby avoiding tax on the appreciated asset in the survivor's estate.

A bypass trust provides income and as much of the principal of the trust as may be needed for the surviving spouse's "health, education, maintenance, or support" (or some other ascertainable standard), with all of the principal of the trust existing on the death of the surviving spouse payable to children or other persons or entities. The name of the trust comes from

the fact that the trust assets "bypass" the estate of the surviving spouse while still providing substantial benefits to the surviving spouse. In bypassing the estate of the surviving spouse, the trust assets will qualify for the Exclusion Amount rather than the marital deduction and neither the assets nor their appreciation will be included in the surviving spouse's estate.

A bypass trust may not be suitable for certain assets, such as a principal residence, automobiles, or other assets that a surviving spouse requires for everyday living. However, stocks, bonds, cash, and other relatively liquid assets that generate income or liquidate easily may fit very well in a bypass trust.

Many assets are titled in the joint names of husband and wife, in which case the assets automatically pass by operation of law to the survivor, regardless of the provisions of the decedent's will. Where such automatic transfers would defeat operation of a bypass trust, or other estate planning goals, it is necessary to re-title some (or all) jointly owned property so that such property passes according to the terms of the owner's will or revocable trust, rather than automatically as a matter of title.

The following example illustrates the use of a bypass trust:

Example:

Suppose that George and Mary jointly own \$11 million in assets. When George dies everything passes to Mary (as it will regardless of the provisions of George's will because the title dictates the disposition of jointly held assets—not the joint owner's will). These assets include stock in a number of "start-up companies" which are likely to appreciate significantly. There is no estate tax due because George's entire estate is sheltered by the marital deduction. When Mary dies everything goes to the couple's two children, according to the



terms of her will. Had the value of the couple's joint assets not increased beyond their values on the date of George's death there would be no tax (or very little depending upon

deductions for administrative expenses, etc.) when Mary died. This is because the \$5.34 million Exclusion Amount available to George's estate would be "portable" to Mary's estate and combine with her \$5.34 million Exclusion Amount. However, by the time Mary dies, the value of her estate has appreciated to \$15 million and there will be tax due of \$1,728,000. Had George and Mary changed title to some of the jointly owned start-up stocks so that George could place some of them in a bypass trust whose ultimate beneficiaries are the children, and had George used such a trust, it would have been possible to have passed the entire \$15 million to the children without estate tax liability.

(ii) The Marital Deduction and "Qualified Terminable Interest Property Trusts" (Code §2056(b)(7)(B))

For estates with values exceeding the Exclusion Amount, it is important to take advantage of the marital deduction. Remember that the Exclusion Amount is limited to \$5.34 million for the first spouse to die (in 2014). Passing more than \$5.34 million in a manner that fails to qualify for the marital deduction will result in estate tax on the estate of the first spouse to die. Therefore, to minimize tax both in the first decedent's estate and in the surviving spouse's estate, consideration should be given to insuring that all assets in excess of the first decedent's Exclusion Amount pass to the surviving spouse either directly or through a qualified terminable interest trust ("QTIP" trust).

A QTIP trust is very much like a bypass trust in that the income from the assets of the trust is to be paid to the surviving spouse together with as much principal as the trustee determines

necessary to support the surviving spouse. However, the trust must explicitly provide that none of the income or assets of the trust may be paid to or used for the benefit of anyone other than the surviving spouse during his or her lifetime. The provisions of a QTIP trust must also allow the decedent's executor to make an election to have the trust treated as a QTIP trust on the decedent's estate tax return. Failure by the executor to make the election on time will result in denial of the marital deduction and taxation of the trust's assets in the decedent's estate.

Example: Assume that Max and Minnie own property worth \$15 million. They divide their ownership to eliminate any survivorship joint ownerships so that their wills or revocable trusts control the disposition of their property when either of them dies. They then create bypass trusts and provide that all of the assets owned by the first decedent are transferred to that person's bypass trust. Assume Minnie dies first in 2014. Her gross estate will include \$7.5 million. All of it goes to a bypass trust, none goes to Max. The Exclusion Amount shelters the first \$5.34 million of assets in her estate. However, that leaves \$2.16 million of assets subject to tax. That tax will be \$864,000. Had Minnie left everything in excess of the Exclusion Amount to Max (or to a QTIP trust) there would have been no tax because of the marital deduction.

In considering the foregoing example, it should be recognized that the portability of the Exclusion Amount only allows portions of the Exclusion Amount unused by the first spouse to die to pass to the survivor. It does not allow the estate of the first spouse to die to use more than the \$5.34 million Exclusion Amount.

(iii) Don't Forget to Be Practical

It is important to keep the avoidance of estate taxes in perspective. It is possible to come up with a perfect estate plan that saves lots of tax but that is completely unworkable for a family.



For example, it rarely makes sense to put a personal residence in a bypass trust because the surviving spouse should not have to work with a trustee and a trust structure for his or her day-to-day living arrangements. The same may be said for other basic assets necessary for the normal conduct of the surviving spouse's life.

E. Credit for Prior Transfers (Code §2013)

If a decedent received property from someone who died within ten years prior to the decedent's death, or two years after the decedent's death, a credit is allowed for some or all of the federal estate tax paid by the estate of the person who provided for the transfer to the decedent.

F. Special Valuation for "Qualified Real Property" (Code §2032A)

The estate tax is particularly troublesome for farmers, ranchers, and others whose small businesses may include substantial real property. This is the case because such persons often have very valuable estates due to the value of the real property that is part of the farm, ranch, or other small business. However, these folks may have little cash or other liquid assets, such as stocks and bonds that easily convert to cash, with which to pay estate taxes.

To address this problem the Code provides that estates meeting certain criteria may value their "qualified real property" based upon the income the farm, ranch or other business generates as a farm, ranch, or small business rather than upon the development value of such real property. The criteria includes: (1) the farm, ranch, or small business must make up at least 50% of the value of the gross estate; (2) the real property included in the value of the farm, ranch, or other small business must make up at least 25% of the value of the gross estate; (3) the decedent or members of the decedent's family must have operated the farm, ranch, or other small business for at least

five of the eight years preceding the decedent's death; (4) the "qualified heir" receiving the real property cannot dispose of it, or any portion of it (other than by contribution of a conservation easement) for at least ten years after the decedent's death; and (5) the qualified heir must continue to use the real property as a farm, ranch, or other small business for at least ten years after the date of the decedent's death.

In 2014, the maximum amount by which the value of qualified real property may be reduced under this provision is \$1.09 million, although this amount is indexed for inflation.

The foregoing are summaries of only some of the requirements of §2032A.

Example: *John has been divorced for many years. He owns Two-Rivers Ranch, which he has operated with his son, Bill, for over 20 years. John dies in 2014 leaving the entire ranch to Bill. The appraised value of the ranch, taking into consideration its development potential (it has over two miles of scenic frontage on a nationally recognized trout stream) is \$6 million. John also had \$380,000 in equipment and \$50,000 in cash, and no debt at his death. Therefore, John's gross estate amounts to \$6,430,000.*

The Exclusion amount covers the first \$5.34 million of John's estate. John's executor elects the special valuation treatment for the ranch allowed by §2032A. The value of the ranch, as a ranch, using the valuation method provided in the tax code, is \$1.5 million, not its fair market value of \$6 million. However, the maximum reduction in value allowed in 2014 by §2032A is \$1.09 million. Therefore, combining the \$5.34 million Exclusion Amount and the \$1.09 million reduction under §2032A, John's taxable estate is \$0 (\$6,430,000 - \$5,340,000 - \$1,090,000) and there is no tax. The estate tax on the \$1.09 million sheltered by the 2032A special valuation



would have been \$436,000
(\$1,090,000 x 40%).

G. Generation-skipping Transfer Tax (Code §§2601– 2664)

Generation-skipping transfers (GSTs) are subject to special estate tax rules. A generation-skipping transfer is one in which a person transfers property, by lifetime gift or by will, to a generation at least twice-removed from his or her own generation; that is, to a grandchild, great-grandchild, grandniece, grandnephew, etc. The tax law assumes that the normal way to transfer property from one generation to another is one generation at a time, without skipping over intervening generations. In other words, generation 1 passes property on to generation 2 for its use, generation 2 passes on what is left of the property to generation 3, and so forth. A generation-skipping transfer, by contrast, is one in which generation 1 passes property directly, or in trust, to generation 3 or 4, etc., skipping over generation 2, while allowing some benefits of the property to be enjoyed by generation 2. Prior to the imposition of the GST tax, this was a good way to minimize estate taxes.

From a tax standpoint, the normal (in the eyes of the tax law) transfer from one generation to the next, to the next, and so on, generates a tax at each step. However, the GST skips one or more generations thereby eliminating the tax for the generations that were skipped.

The tax on GSTs is intended to generate, more or less, what would have been the tax if property passed from one generation to the next without any skips. There is an exemption from the GST tax equivalent to the 2014 \$5.34 million Exclusion Amount. The exclusion from the GST replicates the Exclusion Amount that would have been applicable to the second generation's transfer to the third, had the second generation not been skipped. The tax on the GST is also equivalent to the "unified estate and gift tax" amount—40% in 2014.

Example: Mary is a widower with two children and four grandchildren. Her gross estate at the time of her death amounts to \$10 million. Her will provides for the creation of four trusts, one for each of her grandchildren. Each trust receives one-quarter of her estate. The trust provides that the income from each trust and so much of the principal as necessary to maintain her children is to be paid to her children quarterly during their lifetimes. Upon the death of each child, the trusts established for that child's children are to be distributed outright, and free of trust, to those children (depending on state law a later distribution date may be chosen which would defer the time when estate tax comes due). Each of these four trusts constitutes a generation-skipping transfer trust. An explanation of the application of the tax in this situation is beyond the scope of this summary. Note that for the exclusion from generation-skipping transfer tax to be available Mary's executor must allocate that exclusion to the trusts.

H. Installment Payment of Tax (Code §6166)

An important tool for lessening the burden of the estate tax on family ranches or farms operated as a business or any small business owned by a decedent is the Code's provision allowing the deferral and installment payment of estate tax. The deferral and installment payment provisions only apply to that part of a decedent's estate tax imposed on the family ranching or farming business or other small business, and only if the family ranch, farm, or small business makes up more than 35% of the value of the decedent's adjusted gross estate.

If a decedent's estate qualifies for the deferral and installment payment benefits, the decedent's executor is required to make a special election on the estate tax return (Form 706). Payment of tax can then be deferred for up to five years and installment payments can be spread over a maximum of ten years thereafter. In other words, a decedent's estate can spread the payment of that portion of the estate tax applicable to the



family ranch or farm business or other small business over a total of fourteen years.

Interest on the first \$580,000 of tax eligible for the deferral and installment payment is 2% per year. Any eligible tax over that amount is subject to interest at 45% of the amount of interest imposed on regular underpayments of tax (currently 3%), or 1.35% (3% x 45%).

In the event of the disposition of more than 50% of the family ranching or farming business or other small business prior to the end of the deferral and installment period the entire amount of the unpaid tax becomes due and payable at that time.

I. Conservation Easement Estate Tax Benefits (Code §§2055(f); 2031(c))

One tool that is particularly well suited to a family owning valuable land, **if** the family wants to keep the land, is a conservation easement. Conservation easements are not for everyone, and should be carefully considered because they impose permanent restrictions on the future use of land. However, in the right circumstances they can be the easiest and quickest way to avoid estate tax.

(i) What is a Conservation Easement?

Conservation easements are voluntary agreements entered into between landowners and either a governmental agency or a private charity whose purpose is land conservation (typically called "land trusts"). A conservation easement imposes permanent restrictions on the future use of land to protect the land's agricultural, open space, natural habitat, historic, and/or scenic values. A conservation easement may allow continued ranching or farming, recreational (for example, hunting and fishing), and limited residential use—depending upon the size and character of the land. Unlike most "easements," conservation easements **do not** give anyone the right to use the property that

is subject to the conservation easement. A conservation easement necessarily gives the agency or land trust that "holds" (has the right to enforce) the easement the right to come on the easement property to monitor compliance with the easement.

(ii) Two Types of Estate Tax Benefits for Conservation Easements

Conservation easements can result in substantial income and, most importantly for this summary, estate tax benefits. Two kinds of estate tax benefits arise from the grant of a conservation easement. First, when land subject to a conservation easement is included in a decedent's estate the land is valued taking into account the restrictions imposed by the easement (what we will refer to as the "reduction in value" due to the easement). In other words, the value represented by the conservation easement is eliminated from the decedent's estate for valuation purposes. Second, under §2031(c) of the Code the decedent's executor may elect to exclude a certain amount of the value of the land remaining after the grant of the easement.

The "reduction in value" is simple: so long as a conservation easement is in place at the time of the decedent's death, the land is valued taking into account the restrictions imposed by the easement. It is also possible for a landowner to provide for the contribution of a conservation easement by will. Such a contribution is deductible from the decedent's gross estate as a charitable contribution under §2055(f) of the Code (see Section VI.(iv)).

In addition, §2031(c) of the Code allows a decedent's executor to exclude up to 40% of the value of any land in the decedent's estate that is subject to a conservation easement. This 40% exclusion applies to the value of easement land as already reduced by the conservation easement. The maximum amount that may be excluded from a decedent's estate under this provision is \$500,000.

However, the exclusion is allowed per estate, not



per easement. For example, the estates of four brothers, each owning an undivided one-quarter interest in land over which they granted a conservation easement, could each claim the \$500,000

exclusion so that the conservation easement on their land actually generated an exclusion of \$2 million. It is relatively easy for the estates of a husband and wife to each claim the \$500,000 exclusion, if the easement land is properly titled (e.g., as tenants in common rather than as a survivorship interest).

§2031(c) is complex in terms of the requirements that must be met and the limitations imposed. For example, in order to claim the full amount of the exclusion the conservation easement must reduce the value of land by at least 30% or the amount of exclusion allowed will be reduced. In addition, if residential development rights are reserved in the conservation easement, the value of such rights must be subtracted from the exclusion. Furthermore, the decedent or a member of the decedent's family must have owned the land with respect to which §2031(c) is applied for at least three years prior to the decedent's death; the use of §2031(c) must be affirmatively elected by the decedent's executor; and, to the extent of the §2031(c) election, land will not receive a "stepped-up" basis (see Section V.L.). There are other conditions and requirements as well.

Example: Susan and Bill own Red Apple Farm which contains about 500 acres and is located on the Old Mission Peninsula extending into Grand Traverse Bay outside of Traverse City, Michigan. The farm has tremendous resource values, beautiful views over Grand Traverse Bay, spring creeks and a great trout stream. Susan and Bill operate substantial commercial orchards on the farm. Their two children, Ruth and Doug, live on the farm with their families and help in the operation of the orchards. The farm, because of its high "amenity

values," is worth \$15 million for large lot "trophy home" development.

In addition to the farm, Susan and Bill have about \$500,000 in investments and another \$250,000 in equipment. Therefore, their gross estate amounts to \$15,750,000. Susan and Bill have done some basic estate planning: the farm is titled 50% in Susan's name and 50% in Bill's name as tenants in common (not a "survivorship" interest). To deal with potential appreciation in the value of the land, Susan and Bill each have a will providing that no more than \$5.34 million (or whatever amount is equivalent to the Exclusion Amount allowed for the year of death) in the value of the farm owned by the first to die will go to a "bypass trust" for the benefit of the survivor, then to the children. Thus, they have each maximized use of the Exclusion Amount and have minimized exposure of the survivor's estate to appreciation in land values. All of the assets of the first to die, other than the assets passing to the bypass trust, pass outright to the surviving spouse and are sheltered by the Marital Deduction. In the event there is no surviving spouse, all of the assets go directly to the Ruth and Doug.

Bill dies in January of 2014, the first to die. Bill's gross estate is valued at \$8,750,000. This is one-half of the value of the farm, plus all of the other assets (which are owned jointly with survivorship rights). However, there is no tax payable on Bill's estate because the entire estate is sheltered by the combination of the Exclusion Amount and the marital deduction.

Susan dies in November of 2014. Her estate is valued at \$10,750,000. This is all but \$5.34 million of the value of the farm (remember that \$5.34 million was transferred by Bill's will to a bypass trust), plus the value of the rest of the assets, which automatically passed to Susan's ownership on Bill's death because



they were jointly titled. After subtracting debts, administrative expenses, etc. Susan's taxable estate amounts to \$10.5 million. Taking into account the \$5.34 million Exclusion

Amount, the estate tax that will be due on Susan's estate is \$2,064,000 $[(\$10,500,000 - \$5,340,000) \times 40\%]$.

However, let's assume that Susan and Bill donated a conservation easement on the farm before Bill died. The easement allowed continued operation of the orchards and other agricultural uses. In addition, the easement allowed the farm to be divided into four parcels, each with one home site, guesthouse, barns, etc. The easement reduced the value of the farm from \$15 million to \$11 million. The easement changes the estate tax liability as follows:

Bill's gross estate now amounts to \$6,750,000 (because the easement removed \$2 million in value from Bill's estate). In addition, Bill's executor elects the 40% exclusion allowed under §2031(c) of the Code. That removes \$500,000 from the gross estate, bringing it down to \$6,250,000. \$5.34 million goes into the bypass trust and the remaining \$910,000 goes directly to Susan. There is no tax due on Bill's estate because of the combination of the Exclusion Amount and the marital deduction.

When Susan dies her gross estate amounts to \$6,410,000. This reflects her one-half interest in the farm as reduced by the easement (\$5.5 million) plus what she received from Bill's estate (\$910,000) Susan's executor also elects the 40% exclusion, reducing the gross estate by \$500,000 to \$5,910,000. After payment of debts, administration expenses, charitable bequests, etc. Susan's taxable estate amounts to \$5,660,000. Taking the \$5.34 million Exclusion Amount into account, the

estate tax that will be due on Susan's estate is \$128,000 $[(\$5,660,000 - \$5,340,000) \times 40\%]$.

The conservation easement saved Bill's and Susan's estates \$1,936,000 in estate taxes, allowing their children to keep the farm instead of selling it to pay estate taxes.

(iii) The "Post-mortem Election" (Code §§2031(c)(8)(A)(iii) and (C) and §2031(c)(9)).

"Post-mortem" estate planning is estate tax planning that is still possible after a person dies. This can be done in very few ways. One is the renunciation by a surviving spouse of some or all of the assets passing to him or her from a deceased spouse (further discussion is beyond the scope of this summary). Another is the special use valuation provision of §2032A discussed above which a landowner's executor might elect after the landowner dies.

Another important post-mortem estate planning tool is provided by §2031(c) of the Code—the same section that provides the 40% exclusion. Sections §§2031(c)(8)(A)(iii) and (C) and §2031(c)(9) of the Code combine to allow the heirs of a decedent to elect to contribute a conservation easement over property included in the decedent's estate. The heirs' election qualifies the property for the reduction in value due to the easement (treated as a formal deduction in this case) and for the 40% exclusion—just as though the decedent had donated an easement before his or her death. This is known as the "post-mortem easement election." In certain situations, this post-mortem election can make a big difference for heirs who want to keep land in the family. Note, however, that the Code prohibits the use of a federal income tax deduction in connection with a post-mortem easement deduction.

Example: Assume that George, who is divorced, dies in 2014 leaving an estate containing a \$7 million farm and \$250,000 in other assets to his only child, Sam. Sam



lives on the farm but works in town as a schoolteacher. The estate tax on George's estate will be \$764,500 [(\$7,250,000 - \$5,340,000) x 40%]. Sam does not want to sell the farm, but

he cannot pay this tax without doing so. He decides to direct George's executor to contribute a conservation easement on the farm, allowing continued residential use of the two houses on the farm, one division for each house, as well as agricultural and recreational uses. The contribution of the conservation easement reduces the value of the farm from \$7 million to \$5.5 million. George's executor also elects to use the §2031(c) 40% exclusion, thereby excluding an additional \$500,000 of the farm's value (already reduced by the conservation easement) from George's estate. Due to the conservation easement, the value of George's estate is now \$5 million. Taking into consideration the \$5.34 million Exclusion Amount, there will be no estate tax. The conservation easement saved George's estate \$764,000 in estate taxes and allowed Sam to stay on the farm.

(iv) Tax Requirements for Conservation Easements

In order to be eligible for federal estate tax benefits, as well as income tax benefits, conservation easements must meet the requirements of §170(h) of the Code, §1.170A-14 of the Regulations, and state law requirements governing the creation of conservation easements. In addition, there are extensive requirements imposed by the Code and Regulations to substantiate any income tax deduction claimed in connection with the charitable contribution of a conservation easement (see §170(f)(11) of the Code and §1.170A-13 of the Regulations).

To qualify for any federal tax benefits,

conservation easements must be: (1) contributed to "qualified organizations" (as defined in §170(h)(3) of the Code and §1.170A-14(c) of the Regulations); (2) enforceable under state law; (3) created for a "qualified conservation purpose" (as defined in §170(h)(4) of the Code and in §1.170A-14(d) of the Regulations); and (4) granted exclusively for conservation purposes (see §170(h)(5) of the Code and §170A-14(e) of the Regulations).

The Code limits the amount of any income tax deduction that may be claimed for the charitable contribution of a conservation easement to 30% of the donor's "contribution base" (essentially, its adjusted gross income) and allows any portion of the deduction that cannot be used in the year of the contribution to be carried forward for five years.

All of these requirements, a detailed discussion of which is beyond the scope of this summary (see *A Tax Guide to Conservation Easements* by the author, available from Island Press or at amazon.com, for a detailed discussion of these requirements¹), must be met by conservation easements contributed during a person's lifetime. However, §2055(f) of the Code allows a charitable deduction for conservation easements contributed by the provisions of a person's will without regard to whether the conservation purposes requirements of §170(h)(4) of the Code and §1.170A-14(d) of the Regulations have been met. This exception from the conservation purposes requirement is also applicable to post-mortem conservation easements (see Section IV.I.(iii)).

In addition, there is no limitation on the amount of deduction against estate taxes allowed for the charitable contribution of a conservation easement by the provisions of a decedent's will. Note also that, although there is a limit on the amount of the income tax deduction available

¹ This text is scheduled to be re-published in the summer of 2014 in an expanded and updated version by the Land Trust Alliance.



for lifetime contributions of conservation easements as discussed above in this Section, the reduction in estate tax and the estate tax exclusion are not similarly limited, even though the

easement was granted during the decedent's lifetime.

H. The Use of Conservation Easements in Estate Plans

Following are some examples of the role that conservation easements can play in typical estate plans.

(i) Use with the Annual \$14,000 Gift Tax Exclusion

Conservation easements can facilitate an estate plan by increasing the amount of land that may be transferred and sheltered by the Annual Exclusion from gift tax each year. As discussed in Section IV.B., current law (2014) allows an individual to gift up to \$14,000 per donee without incurring the gift tax. A couple can make "split gifts" of up to \$28,000 per donee without incurring gift tax (also discussed in Section IV.B).

By reducing the economic value of land, conservation easements allow more land to be transferred under the Annual Exclusion. For example, if a conservation easement reduces the value of a farm by 50%, that farm can be transferred twice as fast as it could without a conservation easement. Of course, if the principal goal is to maximize the financial value of assets passing to the next generation, a conservation easement would not be a good choice. However, where the principal goal is to transfer the maximum amount of land and minimize estate or gift tax, a conservation easement may be the best choice.

One of the problems inherent in transferring land to children using the Annual Exclusion is that the value of land remaining in the hands of the parents may continue to appreciate at a rate that

is greater than the value that can be transferred and sheltered by the Annual Exclusion. By eliminating all or most of the development value of land, a conservation easement can significantly reduce the rate of appreciation of land remaining in the parents' hands so that annual gifting is more effective.

Another problem is that outright gifts of land or gifts of interests in common transfer control over the gifted land to the person receiving the gift. Outright gifts or gifts of interests in common, the kind of gifts most likely to constitute "present interests" as required for the Annual Exclusion, vest in the recipients the rights to sell their interests or to seek partition or, with outright fee interest gifts, the right to use the land in the recipient's discretion. Placing a conservation easement on the land prior to making outright gifts or gifts of interests in common ensures that the terms of the conservation easement control the future use of the land regardless of the desires of the recipients.

The following are two examples of how a conservation easement can increase the rate at which land can be transferred using the Annual Exclusion.

Example 1: *The Browns own Green Farm located in Virginia on the Chesapeake Bay. The farm consists of 950 acres. Mr. Brown planned to develop the farm into a luxury resort with 500 dwelling units, a boutique hotel and large marina. The local government approved the plans. However, Mr. Brown suffered a heart attack and died before the project was developed. Mr. Brown's estate's appraiser valued the land at \$30 million, all of which was titled in Mr. Brown's name and in other entities owned by Mr. Brown. Mr. Brown also owned \$10 million worth of stocks and other securities in his own name. Mr. Brown's estate plan conveyed \$5.34 million to a bypass trust leaving the rest outright to Mrs. Brown. Therefore, Mrs. Brown received \$34.66 million from Mr. Brown's estate, all of which*



the marital deduction sheltered from tax.

In addition to the \$34.66 million received from Mr. Brown's estate, Mrs. Brown owned other real estate and securities amounting to \$6 million. The total value of Mrs. Brown's assets at that time amounted to \$40.66 million. Mrs. Brown gave \$5.34 million to her children shortly after Mr. Brown's death so that, between Mr. Brown's bypass trust and Mrs. Brown's gift, the entire \$10.68 million Exclusion Amount was exhausted. That left \$35.32 million in Mrs. Brown's name. The Browns have eight married children, each with two children of their own. Therefore, Mrs. Brown has a total of 32 children, children-in-law, and grandchildren so that she may make annual gifts tax free of \$448,000 ($\$14,000 \times 32$). At that rate, it will take Mrs. Brown 79 years to completely gift her estate using the Annual Exclusion (assuming no appreciation in the assets).

As noted in Section IV.C, gifts of land made outright, even as a tenancy in common interest, may be discounted by as much as 20% to 30%. Assuming that the Browns gifted or bequeathed \$10.68 million of Green Farm to their children; assuming that Mrs. Brown has \$35.32 million remaining to transfer; assuming no appreciation; and not considering discounting, each annual set of gifts of \$448,000 represents approximately 1.3% ($\$448,000 / \$35,320,000$) of Mrs. Brown's estate. However, if a 30% discount was applied to these fractional interest gifts, each annual set of gifts could convey approximately 1.8% ($\$448,000 / 70\% / \$35,320,000$) of Mrs. Brown's estate, reducing the number of years necessary to transfer \$35,320,000 of value to 56 years.

Example 2: *Mrs. Brown never liked the idea of developing Green Farm, a place she dearly loved. Her children grew up on the farm and similarly disagreed with their father's plans. Therefore, after gifting the \$5.34 million to her children, she placed a conservation easement on Green Farm. The easement allowed the farm to be divided into one hundred-acre parcels and reduced the value of the farm from \$40 million to \$10 million thus removing \$30 million from the value of Mrs. Brown's assets and leaving her with a net worth of \$5.32 million.*

At \$448,000 per year she could entirely transfer her estate to her children, children-in-law and grandchildren in 12 years or, taking a 30% discount rate into consideration, in 9 years. A more restrictive easement would have reduced the value of Green Farm even more and might have allowed it to pass without estate tax.

In summary, here are the principal ways in which a conservation easement can help in an estate plan that relies on the Annual Exclusion:

1. It increases, sometimes dramatically, the amount of land that can be successfully transferred by lifetime gifts sheltered by the Annual Exclusion.
2. It reduces the rate of appreciation on the land that has yet to be gifted.
3. It ensures how the land will be used regardless of who owns the land.

ii) Use with §2032A Special Valuation

By reducing overall land values, conservation easements can also effectively increase the amount of land that can pass through a decedent's estate under the special use valuation rules of §2032A discussed in Section IV.F. By reducing the value of land through the grant of a



conservation easement, more land will be sheltered by the \$1.09 million limit currently imposed on special valuation reductions.

Example: *John's estate amounts to \$7 million. Of this amount, the family ranch makes up \$5 million, most all of which is in the value of the land. John's son, Paul, operates the ranch and, when John dies, Paul agrees to continue to operate the ranch for ten years and elects to have the ranch valued under §2032A. The value of the ranch and the land making up most of the value of the ranch exceeds the 50% and 25% levels as required by the Code.*

Paul's election of §2032A treatment allows a reduction in the value of the ranch by up to \$1.09 million, reducing the estate to \$5,910,000 million. Taking into account the \$5.34 million Exclusion Amount, the estate tax due is \$228,000 [(\$5,910,000 – \$5,340,000) x 40%].

If John contributed a conservation easement on the ranch (or if Paul directed John's executor to make a post-mortem easement contribution as described in Section VI.(iii)) and if the easement reduced the value of the ranch to \$4 million, the ranch would still qualify for special valuation under §2032A, and the easement would eliminate an additional \$1 million from the estate, plus an additional \$500,000 excluded under §2031(c), as discussed in Section IV.I. (ii). In this case, there would have been no tax.

One caution: §2032A requires that the value of the family ranch or farm make up at least 50% of the value of the decedent's estate in order to qualify for the special valuation benefits, and that the value of the real property included in the farm or ranch must make up at least 25% of the value of the estate. Therefore, if a family plans to use this provision coupled with a conservation

easement, it needs to be careful that the grant of a conservation easement does not cause the total value of the farm or ranch to fall below these levels.

(iii) Use with the Exclusion Amount

Because a conservation easement reduces the value of land, it also allows the transfer of more land under the current \$5.34 million/ \$10.68 million Exclusion Amounts.

Example: *John wants his ranch to go to his son Paul. The ranch consists of 2,700 acres valued at \$3,000 per acre, for a total value of \$8.1 million. At \$3,000 per acre the Exclusion Amount of \$5.34 million will allow 1,780 acres (65%) of the ranch to pass to Paul tax-free (\$5,340,000/\$3,000). The tax due on the remainder of the ranch will be \$1,104,000 (\$8,100,000 - \$5,340,000 x 40%).*

Now, assume that John places a conservation easement on the ranch before he dies. The easement reduces the value of the ranch to \$5 million, or \$1,852 per acre. With this easement in place 100% of the ranch can pass to Paul without estate tax.

If John failed to grant the conservation easement before he died, Paul could direct John's executor to grant the easement pursuant to the post-mortem easement election provisions described in Section VI.(iii), thereby reducing the value of the land and the estate tax just as though John had done so during his lifetime.

(iv) Conservation Easements and Value Replacement

Value replacement is an estate planning technique whereby a person converts the income tax savings resulting from a charitable contribution (or cash from a bargain sale) into additional cash for his or her estate. This works particularly well where the income tax savings or cash results from the contribution or bargain sale of a conservation easement, because such



tax savings represent “new money” to the donors (as opposed to the contribution of a liquid asset, such as cash, stocks, or bonds). Additionally, in the case of a conservation easement, value replacement replaces illiquid real estate value with cash.

Example: Assume that John and Joan are aged 51 and 43 respectively. Assume that they donate a conservation easement worth \$1,800,000 and that the income tax deduction resulting from this donation saves them \$738,000 in income tax. They spend \$58,000 on a new car and buy a “second to die” insurance policy (such a policy pays out when the surviving spouse dies, and premiums are generally lower than on a single-life policy) with the remaining \$680,000 of their income tax savings. They place the policy into an “inter-vivos” trust (a trust created during their lifetimes) for the benefit of their children and transfer all of the “incidents of ownership” to the trust.

A premium payment of \$680,000 for a second to die policy on a couple John and Joan’s ages will buy approximately \$12,500,000 in coverage.² Properly placed in an inter-vivos trust, there will be neither income tax nor estate tax on the policy proceeds. Thus, John and Joan have replaced \$1,800,000 in land value lost due to the conservation easement with \$11,820,000 (face value of the policy less the premium) in tax-free cash payable directly to their children, a ten-fold increase!

Note that investing the \$680,000 in stocks or mutual funds transferred to an inter-vivos trust could generate substantial results as well. There are many variations.

² The cost and payout of policies varies greatly with time and the health and age of the insured. There are other types of policies that may also generate significant revenue to a decedent’s estate at relatively low cost.

I. Other types of Restrictions

Restrictions on the use of land other than conservation easements (such as restrictive covenants in a subdivision) can also reduce land values for estate tax purposes. However, to do so the restriction must be the result of a “bona fide business arrangement” not a restriction merely intended to transfer property to family members for less than fair market value. The business arrangement must be typical of similar arrangements entered into by people in arm’s length transactions in order to reduce value for estate tax purposes (see §§25.2703 – 1(b)(1) and (2) of the Regulations).

Of course, governmental regulations such as local planning controls or federal endangered species restrictions, can also reduce the value of property included in a decedent’s estate and must be taken into account in appraising estate assets.

J. “Stepped-up” Basis for Estate Assets (Code §1014)

There are few silver linings to the estate tax. However, there is one important one. Assets passing through a decedent’s estate receive a “stepped-up” basis. Basis is important when a person sells property because it has a significant effect upon the amount of capital gains tax paid on the sales proceeds. Essentially, basis is what a person pays for property, plus expenditures for capital improvements. When the property is sold, a tax is imposed on the difference between the sales price and the basis.

Example: Susan buys 50 acres for \$100,000 and builds a barn on it for \$20,000; her cost basis in that property is \$120,000. If Susan sells the property several years later for \$200,000, she will pay capital gains tax on the difference between what she sold the property for and her basis in the property. This difference is her “taxable gain” and in this example it is \$80,000 (\$200,000 - \$120,000 = \$80,000).



When property passes through a decedent's estate, its basis is "adjusted" to the value that it had on the date of the decedent's death (or alternate valuation date, if such a date is elected). This

means that when heirs sell such property they only pay tax on the difference between the adjusted, or "stepped-up" basis, and the selling price, rather than on the difference between the selling price and the decedent's original basis.

Example: *Using the preceding example, if Susan died before she sold the property, assuming it was worth \$200,000 when she died, her heirs could sell the property for \$200,000 and realize no taxable gain. This is because the basis was stepped up to its value on the date of Susan's death.*

It is important to note that if a person makes a gift of property during his or her lifetime, the gifted property does not receive a stepped-up basis. Instead of a "stepped-up" basis, the property that is gifted during the owner's lifetime has a "carry-over" basis in the hands of the person receiving the gift. A carry-over basis is identical to the basis in the hands of the person making the gift. This is a drawback to making lifetime gifts, although there are also many advantages to lifetime giving.

Example: *If Susan gave the property to her son before she died, and her son sold the property for \$200,000, he would have the same taxable gain as Susan: \$80,000. On the other hand, if Susan devised the property to her son in her will and he sold it for \$200,000, assuming it was valued in Susan's estate at \$200,000, there would be no taxable gain on the sale. Therefore, the lifetime gift cost \$12,000 more in capital gains tax than the tax that would have been due if the property passed to Susan's son at her death. On the other hand, by making a gift of the land during her lifetime*

Susan may have transferred appreciation in that land away from her estate, thereby potentially saving estate taxes, which are higher than the capital gains taxes that would be due on the sale of the property.

K. Estate Tax Returns and Tax Payment

An estate tax return (Form 706) must be filed with the IRS within nine months of a decedent's death. Extensions of the return date are allowed on a discretionary basis for up to six months. Six-month extensions are automatic if the extension application is (1) filed before the normal due date for the return; (2) the application is filed with the proper IRS office; and (3) the application includes payment of the estimated amount of estate tax due.

Returns are only required to be filed by estates whose value exceeds the Exclusion Amount.

Unless the election to defer tax and pay in installments (see Section V.H.) is made, the entire estate tax must be paid nine months after the decedent's death, even if an extension for filing is granted, unless the extension expressly extends the time for payment. After that date interest will begin to accrue and penalties for late payment may apply.

In addition to the ability to collect estate tax in installments where family-owned farming or ranching businesses or other small businesses are involved, the IRS has the discretion to enter into installment payment agreements with the estates of all decedents. Such agreements are not uncommon and are permitted in any case in which the IRS determines that the agreement will facilitate the payment of tax. Such agreements can provide for payment of the entire amount of tax due, or a portion of the tax due.

L. Life Insurance (Code §2042)

Life insurance is a particularly useful tool for payment of the estate tax. This is because life



insurance provides a payment of cash at the time when estate tax liability occurs. Furthermore, if properly handled, life insurance is subject to neither income tax nor estate tax. If the

policyholder places the insurance policy in a trust created during his or her lifetime, and relinquishes all “incidents of ownership” (that is, the right to change beneficiaries, borrow against the policy, terminate the policy, draw down the cash value of the policy, etc.), the proceeds of the policy will be excluded from the decedent’s gross estate. However, the face value of insurance policies transferred by a person within three years of his or her death will be included in the person’s estate for estate tax purposes (see §2035(a)(2) of the Code).

N. Charitable Giving and Estate Taxes

In addition to the gifts of cash or testamentary conservation easements already described, several other charitable giving methods that can generate income and estate tax savings. This summary is not intended to provide an exhaustive description of gifting techniques.

(i) Charitable bequests (Code §2106(a)(2))

Outright bequests to charity are deductible from the gross estate, if they are qualified under §170(h) of the Code as charitable contributions.

(ii) Charitable Remainder Trusts (Code §664)

A charitable remainder trust (CRT) is a vehicle for selling appreciated assets (such as stocks or bonds) tax free, generating lifetime income from the sales proceeds, and claiming a charitable contribution deduction equal to the present value of the remainder interest of the charity that is the ultimate beneficiary of the trust. Transferring these assets to a CRT also removes them from the donor’s estate for estate tax purposes. This tool works particularly well for wealthy people who can leverage the benefits of the transaction on their ability to use tax deductions.

Example: Frank owns 500 shares of highly appreciated Microsoft stock. If he sells it himself, depending upon his other income, he may have to pay as much as 23.8% of the gain in federal income taxes (that assumes he has held the stock for more than one year, qualifying the sale for capital gains tax rates). Frank would like to convert this stock to an asset that pays regular income. He also has substantial income already and could use a tax deduction. Finally, Frank is a great fan of his alma mater and wants to provide for it when he dies. By using a charitable remainder trust Frank can accomplish all of his goals, including avoiding paying tax on the sale of the Microsoft stock. Here is how it works:

1. Frank’s lawyer sets up a charitable remainder trust. Note that there are two types of CRTs, Charitable Remainder Unitrusts (“CRUTs”) and Charitable Remainder Annuity Trusts (“CRATs”) the difference primarily has to do with the way in which income is paid to the trust beneficiary. The trust provides that it will pay income to Frank for so long as he lives and, when he dies, it will pay the amount remaining in trust to his alma mater. The trust is irrevocable—Frank cannot change the trust, except in limited ways, and he cannot revoke it. In addition, once Frank puts assets in the trust he cannot get them back.
2. Frank contributes the highly appreciated Microsoft stock to the CRT.
3. The trust sells the stock (there can be **no** agreement to sell the stock prior to the contribution in order for all of the tax benefits of this arrangement to be available). Because the trust is a charitable entity, it pays no income tax on the proceeds of the sale. If we assume that the value of the stock sold was \$2 million, the sale by the trust will generate a net amount available to pay income to Frank of \$2



million. If Frank sold the stock himself, assuming his basis was \$200,000, he would have netted \$1,571,600 after tax from the sale.

4. Frank is entitled to a federal income tax deduction (and a state income tax deduction if he is a resident of a state that imposes an income tax and recognizes and allows charitable contribution deductions). The tax deduction is equal to the value of the remainder interest in the stock, based upon Frank's age at the time of the gift and the value of the stock when Frank transferred it to the trust.

5. Frank receives income for his lifetime from the trust, based upon the terms of the CRT. In this case, the income will be from a portfolio worth \$2 million, as opposed to one of \$1,571,600 if he had sold the stock himself.

6. The value of the stock will be excluded from Frank's estate for estate tax purposes.

(iii) Contributions of Remainder Interests in a Farm or Residence (Regulations §§1.170A-7(b)(3) and (4))

In addition to the charitable remainder trust and variations described in Section V.O.(ii), an individual can contribute a remainder interest in a farm, ranch, or personal residence. A remainder interest is an interest that comes into existence upon the death of the owner or after a set period of time. If the remainder interest is granted to a public charity or governmental agency, the conveyance generates a federal income tax deduction equal to the value of the remainder interest. In addition, the value of the asset will be excluded from the owner's estate when he or she dies. Code §7520 provides the rules for determining the value of a remainder interest.

VI. The Use of Trusts

Trusts can be a very valuable tool for estate planning. They have income tax, estate tax, and gift tax implications. The trusts that are commonly used in estate planning strategies include: (1) "grantor trusts" (trusts ignored for taxation purposes because the creator of the trust controls it; however, such trusts may remove assets from a decedent's estate for purposes of probate); (2) CRTs (charitable remainder trusts, discussed in Section IV.O.(ii)); (3) QPRTs (qualified personal residence trusts); (4) GRATs (grantor retained annuity trusts); and (5) GRUTs (grantor retained unitrusts). The structure and tax aspects of these trusts are beyond the scope of this summary. Suffice it to say, they are all used to facilitate the transfer of property from one person to another while allowing the grantor to retain some use or enjoyment of the trust property and minimizing either gift or estate taxes.

In addition to estate planning benefits, trusts have the very practical benefit of controlling how property given to children is used until those children have grown and developed the judgment necessary to manage the property for themselves. Without a trust, property transferred to children becomes theirs to manage and use upon their eighteenth birthdays (the actual age may vary according to state law).

Note, however, that if a trust is irrevocable, the trust instrument must expressly allow charitable contributions for a deduction to be available, and some types of contributions will generate no deductions, such as the contribution of conservation easement on land owned by the trust unless that land was acquired with income earned by the trust.

VII. State Estate or Inheritance Tax

Many states no longer tax estates or inheritances, including the State of Wyoming. However, some states do impose an estate or inheritance tax. In past years, state-level taxes such as these had no net financial effect because the federal estate tax



law allowed a dollar-for-dollar credit against the amount of federal tax for any state estate or inheritance taxes paid by the estate. That credit was phased out beginning in 2001 and replaced with a

federal deduction from a decedent's gross estate for purposes of determining the federal tax. In 2012, Congress permanently eliminated the credit for state-level estate or inheritance taxes. As of 2014, twenty states had some form of estate or inheritance tax.

Unless a decedent's estate is liable for some tax, the federal deduction for state estate or inheritance tax is meaningless. Thus, the estate of a decedent in those states that impose such a tax may be liable for the entire amount of the state tax without offset or benefit in terms of federal tax.

VIII. Conclusion

Even though very few estates will be subject to federal estate tax, it is still important to plan for the disposition of family assets. A conservation easement, for example, can be useful in ensuring the future of family farms and ranches, even where estate tax is not an issue.

In addition, families with substantial illiquid assets, such as farms, ranches, or family-owned businesses, need to be proactive about estate planning if they want to keep the farm, ranch, or family-owned business in the family. The intra-family transfer of illiquid assets whose value exceeds the Exclusion Amount must be carefully and aggressively planned—the sooner the better.





SAVE ESTATE TAXES and SAVE YOUR RANCH

How a Conservation Easement Can Help

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Approaching the Porcupine

One accountant I talked with who specializes in estate planning for farmers and ranchers describe the issue for many families as: "Like finding a porcupine in the cab of your pick-up truck, you know you have to do something, but you don't know what."

Families searching for ways to pass on the family ranch between generations face many challenges. Frequently there are multiple heirs. Some may wish to keep ranching while others would rather have the cash that could be raised by selling out. Or, all of the children are interested in ranching, but the property is too small to support everyone.

Another problem is the federal estate tax. While the estate tax lapsed at the end of 2009, it went back into effect January 1, 2011. The new tax allows up to \$5 million in assets per estate to pass free of tax. With a simple plan a husband and wife can pass up to \$10 million to pass free of tax. Any assets in excess of the \$5 million or \$10 million level will be taxed at 35%. However, in 2013, unless Congress acts, the estate tax reverts to year 2000 rules. In that case the amount exempt from tax drops to \$1 million per estate and the top rate goes to 55%.

\$10 million covers a substantial amount of land in Wyoming. However, while land values have stagnated recently, in many places land values are still near an all time high. This makes it imperative that ranching families take a serious look at the value of their operation. In many areas, land values have escalated rapidly, this can leave families with significant estate tax burdens when members pass on. If the family doesn't have much in the way of cash or stocks and bonds, the only way to pay the estate tax may be to sell the ranch. Similarly, high property values may increase the temptation of heirs to sell-out. This can be especially true with in-laws or other relatives who may not have grown-up on the ranch or do not have a similar associations.

These challenges create an environment where disputes may arise between family members when the ranch-owner dies. Such disputes may not only lead to ranches being broken apart and sold out of agriculture, but to permanent rifts within families.

Conservation Easement Basics

A conservation easement is a voluntary agreement between a landowner and a conservation organization ("land trust") or public agency. The agreement permanently limits the development potential of the land made subject to the easement (the "easement property"). Easements can be written to allow continued ranching, recreation (including hunting and fishing), and even limited residential development, provided that these uses are consistent with the conservation values of the easement property. Such values may be agricultural, scenic, wildlife habitat, or a combination of these. Conservation easements typically do not require public access.

Conservation easements can be donated or sold. In the case of an easement sale it is typical for the landowner to sell the easement for less than its fair market value and claim a tax deduction for the difference. This is known as a "bargain sale." In a bargain sale the difference between the fair market value of the easement and what

¹ The authors thank Glenn Pauley who co-authored the first edition of this paper in 2006.



the landowner sold it for may be deductible as a charitable contribution.

A conservation easement can be granted during the owner's life-time or by will; it is even possible for a landowner's heirs to direct the landowner's executor to contribute a conservation easement that has retroactive effect, therefore saving estate taxes.

An easement may be placed on an entire property or on only a portion of the property. Conservation easements are typically granted in perpetuity. This means that the easement cannot be amended or revoked at the will of the person granting the easement, and that the easement binds future owners, ensuring the land will be maintained as ranchland and open space for future generations.

The value of a conservation easement donated by a landowner is deductible from the donor's federal income tax as a charitable contribution. In such cases, the tax code requires that the value of a conservation easement be determined by a qualified appraiser according to what is called the "before and after" method. In the "before and after" method the value of the easement is the difference in the value of property before the easement is in place and after the easement is in place. For example, a ranch may be worth \$1 million with all of its development potential intact before an easement is donated over the property, and \$400,000 after the easement is donated. The difference in value of \$600,000 (\$1,000,000 - \$400,000) is the value of the easement and the amount of the charitable deduction allowed the donor.

The value of conservation easements vary widely depending on the terms of the easement and development pressure in the area. However, conservation easements used to preserve working agricultural operations typically range from 25% to 50% of the property's fair market value. In some places where development

pressure is significant, a highly restrictive conservation easement may be worth as much as 90% of the unrestricted value of the property.

The ability of a conservation easement to limit development on a property and the related reduction in the land's appraised value may have a number of beneficial implications for transferring a ranch within a family and associated estate tax planning.

Estate Tax Basics

Valuation of Assets.

Estate taxes are based on the fair market value of a decedent's assets at the time of the decedent's death, not the original purchase price or current use value. Where ranch land is owned by a decedent, this can result in substantial estate tax burdens if a ranch has appreciated over time, especially if the increase is largely represented by the ranches' development potential.

Example 1:

Sally and Sam bought the Razorback Ranch in 1965 for \$100,000. Sally died in 1980 and the ranch has been in Sam's name ever since. The Ranch is about 2,000 acres in size and has substantial "amenity values" such as trout fishing, beautiful views, springs and ponds. At the time that Sam dies, in 2011, the Ranch is valued by the IRS at \$13,000,000. Taking into account the estate tax exclusion (discussed below) the estate tax on the Ranch will be \$2,800,000. This tax is 28 times what Sally and Sam originally paid for the ranch.

The Estate Tax Exclusion and Tax Rate. The first \$5 million of a decedent's estate is excluded from the federal estate tax. In other words, if you own assets with a net value less than \$5 million, your estate won't be subject to tax. (However, remember that the current \$5 million exclusion drops to \$1 million in 2013.) In addition, all assets passing to a surviving spouse are exempt from this tax (this exemption is known as the "marital deduction").



In 2011, the first dollar of assets in a decedent's estate over \$5 million will be taxed at 35%.

Doubling the Exclusion with "By-Pass Trusts."

It is typical for a husband and wife to provide that all of the first decedent's assets pass outright to the surviving spouse. This is accomplished through a simple will and by titling assets jointly with right of survivorship or as tenants by the entirety. Even if a person changes his or her will to name someone other than his or her spouse as a beneficiary, if all of that person's assets are jointly held with their spouse, those assets will pass directly to the spouse regardless of the provisions of the will. This is because the title controls.

As noted above, the law now allows the first \$5 million of a decedent's estate to pass tax free. In addition, also noted above, all of a decedent's assets, no matter how valuable, may pass to the surviving spouse tax free. If a person leaves all of his or her assets to the surviving spouse there will be no tax. However, doing so will waste the \$5 million exemption from tax because the marital exemption supersedes the \$5 million exemption. It will also increase the value of the assets in the survivor's estate, potentially increasing the estate tax on that estate.

This is what can happen with "I love you" wills in which the first decedent gives everything to the surviving spouse. From an estate tax standpoint "I love you wills" are rather like pouring ten gallons of milk into a 5-gallon bucket: a lot spills out. If two 5-gallon buckets had been used, all of the milk would have been saved.

This is where "by-pass" trusts can make a huge difference; effectively doubling the \$5 million exemption to \$10 million. The by-pass trust works like this: Each spouse creates a trust that provides that the assets of the trust will be used to support and provide for the other spouse and, upon the death of that spouse, the trust assets will pass

to the children, or other beneficiaries that the creator of the trust may name. The key is that the assets of the by-pass trust may be used for the benefit of the surviving spouse, *but do not become the property of the surviving spouse*. This qualifies the assets in the trust for the \$5 million exemption. It also ensures that those assets do not increase the surviving spouse's estate, thereby exposing it to increased estate tax.

However because, as noted earlier, the title to property controls its disposition regardless of the provisions of a person's will, in order for a by-pass trust to work assets that are jointly held (other than relatively small items such as equipment or vehicles) should be transferred to a joint tenancy without rights of survivorship. This way, the jointly held assets do not automatically pass to the survivor, thus defeating the purpose of the by-pass trust.

Example 2:

Assume that John and Mary Smith own a 2,500-acre ranch along the Green River in the Pinedale area. The Ranch has high "amenity values" because of its scenic qualities and location along the Green. The value of the ranch for large lot development is \$5,000 per acre, without considering improvements. John and Mary both die in 2011 and the IRS values their ranch at \$12.5 million. The Smiths left other assets worth about \$1,000,000, including buildings, investments and equipment making their total estate \$13.5 million.

John and Mary have three married children, each in their 30s. All of the kids and their families make their home and living on the ranch. Although they could make a lot of money by selling the ranch, none of them wants to do so because they fear they could never afford to buy another place as nice to raise their children.



John and Mary had "I love you wills." They die in an auto accident in 2011. All of the assets end up in John's estate as he survived for two months after the accident.

All of Mary's assets, including jointly titled property, pass to John, and there is no tax on her estate because of the marital deduction. John's estate can take advantage of the \$5 million exclusion. However, that leaves \$8.5 million subject to estate tax. The estate tax on this amount is \$2,975,000 $[(\$13,500,000 - \$5,000,000) \times 35\%]$. It is easy to figure out what will happen to John and Mary's ranch. Note that the estate tax can be paid in installments by heirs under certain conditions. However, the tax still must be paid, plus interest.

If John and Mary had used by-pass trusts, and properly titled their property, the estate tax would have been reduced from \$2,975,000 to \$1,225,000 $[(\$13,500,000 - \$5,000,000 - \$5,000,000) \times 35\%]$.

How Conservation Easements can Help Pass on the Ranch

In the right circumstances, conservation easements can be a very effective and relatively simple estate planning tool. In cases in which ranch property is the primary asset, conservation easements can reduce ranch values to levels that can substantially reduce, or eliminate, the estate tax.

Example 3: In the previous example, the Smith's life is their ranch and neither they nor their children have any intention of developing. John and Mary's by-pass trusts reduced the estate tax on their assets dramatically, but still left over \$1 million in estate tax liability.

Now assume that, in addition to providing for by-pass trusts, John and Mary contributed a conservation easement over 1,000 acres of their ranch. The easement covered the 1,000 acres along the Green River, which was prime wildlife habitat (and development land as well), but not very good for ranching. Assume that the easement allowed the 1,000 acres to be divided into two 500-acre parcels, each with one homestead.

With the easement in place, the value of the ranch is reduced from \$12.5 million to \$10 million because of the removal of the potential for large-lot development on the 1,000 protected acres. The easement allows the family (and their successors in title) to continue to use the 1,000-acre protected portion of the ranch just as they always have, and by reserving two division rights it provides for some financial flexibility in the future. The easement also insures that 1,000 acres will remain available for ranching and recreational use, such as fishing and hunting in the future.

The conservation easement reduces the taxable value of John and Mary's assets from \$13.5 million to \$11 million, an amount that can mostly be sheltered by the two \$5 million exemptions available to each estate (due to the by-pass trusts). Note that, in addition to the reduction in value of the ranch due to the conservation easement, the law also allows each of John's and Mary's estates to exclude 40% of the value of the Ranch remaining after the easement is in place. However, there is a \$500,000 per estate limit on the amount of that exclusion. Nevertheless, it reduces the taxable estate by an additional \$1 million to \$10 million.

In any event, the combination of the use of by-pass trusts and a conservation easement have entirely eliminated the estate tax on John's and Mary's estates, saving their children



\$3,850,000 in the estate taxes that would have been due if John and Mary had done nothing to plan for estate taxes.

John and Mary could have contributed the easement over the entire ranch, and in order to ensure that it continued to be available for ranching purposes might very well have done so. However, given these particular circumstances, the 1000-acre easement was all that was needed for estate tax purposes.

As seen in the preceding example, the estate tax code (Section 2031(c)) allows the Smith's executor to elect to exclude up to 40% of the restricted value of the ranch included in each estate (up to a maximum of \$500,000 for each estate), from each of their estates. This additional exclusion for land subject to a conservation easement further reduces the estate tax due. Both the reduction in value due to the conservation easement and the 40% exclusion will be available to the Smith's children if they own the ranch when they die.

"Post Mortem" Easements

If a decedent's estate includes valuable land, the decedent's heirs may direct the estate's executor to put a conservation easement on the land. If the easement is put in place before the due date for the estate tax return (9 months after the decedent's death, plus extensions, if any) it can qualify the estate for the same estate tax benefits that would have been available if the decedent had donated the easement during his or her lifetime.

All persons with an interest in the estate must consent to the easement, and no income tax deduction can be allowed. However, the donation of a "post mortem" easement can mean the difference between keeping the ranch in the family, and selling to pay estate taxes.

For example, if John and Mary, from the preceding example, had done nothing, their

children, assuming they acted together and quickly, could have directed John's and Mary's executor to contribute a conservation easement over the Ranch that reduced its value sufficiently to eliminate the estate tax due. Unless John's and Mary's wills authorized their executors to do this, the children would probably be required to go to court to obtain that authority for the executors.

Note that NO income tax deduction may be claimed in connection with the contribution of a post-mortem easement.

Conservation Easements to Assist with Intergenerational Ranch Transfers During the Owner's Life.

A typical estate planning tool is the annual gift. Federal tax law allows an individual to give up to \$13,000 to other individuals without paying a gift tax, and without reducing the \$5 million estate tax exemption. By taking advantage of this "annual gift tax exemption" individuals over a period of years can transfer a substantial amount of assets to their children, thereby avoiding either gift or estate tax on the value of what has been transferred.

Example 4: John's and Mary's three children have a total of four children among them. Using the annual exclusion, and making joint gifts, John and Mary can make gifts sheltered by the gift tax exclusion amounting to \$260,000 per year. This can be done by making a \$26,000 joint gift to each child (amounting to \$78,000 for all three children); similar joint gifts to the spouse of each child (also amounting to \$78,000); and four \$26,000 joint gifts to each of the four grandchildren (amounting to \$104,000).

Conservation easements can facilitate this type of annual gifting plan by increasing the amount of land that can be transferred each year. An easement does this by reducing the value of the land, allowing more to be transferred at one time.



Example 5: Assume that a couple owns 2,000 acres of land that they wish to transfer to their two children. They can transfer a maximum of \$52,000 per year under the annual gift tax exemption ($\$13,000 \times 2 \times 2 = \$52,000$). Assume that the land is worth \$3,000 per acre making the entire property worth \$6 million. It will take 116 years to transfer the entire property (assuming no increase in the value of the land) using only the annual gift tax exclusion ($\$6,000,000 / \$52,000 = 115.38$).

Now, suppose that the couple contributes a conservation easement over the 2,000 acres reducing its value to \$1,000 per acre. The property is now worth \$2 million and can be entirely transferred to the children using the annual gift tax exemption in 39 years ($\$2,000,000 / \$52,000 = 38.46$).

Of course there are many other factors to be considered here and the annual gift alone isn't going to allow the couple to effectively transfer the entire value of the property, even with a conservation easement in place. However, this illustrates the role that a conservation easement can play in facilitating annual transfers of land (or memberships in an LLC, family partnership, or shares in an S corporation) using the annual gift tax exemption.

Conservation Easement Sales

Conservation easements can also be sold. In these instances, landowners receive a direct cash payment for entering into the conservation easement. A landowner's ability to sell a conservation easement is often most limited by the availability of funding for this purpose in their area and the natural features of their land. Funding for conservation easement purchases in Wyoming has been available from such sources as the USDA Farm and Ranchland Protection

Program and Grassland Reverse Program, Wyoming Wildlife and Natural Resources Trust Fund, Wyoming Game and Fish Habitat Conservation and Sportsmen Access Programs, as well as mitigation dollars from energy development. Historically, funding has been limited, competition intense, and the application process may be long and complex. In other words, it is unlikely, given existing funding, that more than a very few conservation easements can be sold in Wyoming annually.

Most conservation easement sales are structured as "bargain sales." This means the easement is sold to a land trust or government agency at a price below its appraised value. The good news is that the difference between the appraised value of the easement and its purchase price can be considered a charitable contribution, and may entitle the landowner to income tax benefits if the easement meets the requirements of the federal tax code. Because of the limited dollars, and the time and work involved in completing a conservation easement purchase, the larger the bargain sale the more attractive the purchase is to both land trusts and funding agencies.

Example 6: Jack agrees to sell a conservation easement on his ranch to the local land trust. The land trust has \$500,000 in grant money available for the purchase. However, Jack estimates that the easement will be worth \$2 million. The land trust and Jack strike a bargain to sell the easement for \$500,000, with the expressed intention that any difference between the sale's price and the actual value of the easement, as determined by a qualified appraisal, is to be treated as a charitable contribution by Jack to the land trust. After the easement is sold, Jack obtains a qualified appraisal showing that the easement was worth \$1.8 million. Jack is entitled to a federal income tax deduction of \$1.3 million ($\$1.8 \text{ million} - \$500,000$).



While the obstacles to selling a conservation easement can be significant, the benefits for ranch estate planning can be equally rewarding. Money from selling a conservation easement can be used to

provide retirement income, retire debt, buy additional equipment or land (where easement sale's proceeds are used to acquire more land, the transaction may qualify as a "tax-deferred exchange" so that no income tax is due on the proceeds). The landowner may choose to give the proceeds of the easement sale to one heir and the land encumbered by the easement to another. The proceeds of easement sales can also be used to buy life insurance for the same purpose. Additionally, the same reduction in the value of land that occurs with a contributed conservation easement also occurs with an easement that is sold, so that estate taxes will be reduced. Of course, the reduction in the value of the land will be offset to the extent of cash received for the easement.

Additional Ranch Planning

Beyond potential financial benefits, conservation easements can assist with inter-generational ranch transfers by providing a mechanism for making decisions about the land's future when everyone is at the table. All too often heirs agonize over "what mom and dad would have done." A conservation easement is a permanent decision. Everyone knows at the signing of the easement whether and how the ranch may be subdivided and what lands may and may not be developed. Portions of the ranch suitable for development can be left out of the conservation easement or incorporated into designated building envelopes; areas with high scenic, agricultural, wildlife or historic qualities may be preserved in the easement. These choices are made by the landowner. Such options not only offer new possibilities for finding equitable arrangements among family members, but also provide an opportunity to insure a permanent

tribute to a family's agricultural legacy and the land they love.

Conservation Easements and Income Tax

In December 2010 Congress reinstated a law that was initially enacted in 2006, but that expired at the end of 2009. The law greatly enhances a landowner's ability to use the federal income tax deduction for the contribution (or bargain sale) of a conservation easement.

Generally speaking, the difference between the value of land before granting a conservation easement and the value of that land after the easement is deductible as a charitable contribution, provided that the conservation easement meets the requirements of section 170(h) of the Internal Revenue Code. This is also true of the bargain sale of a conservation easement, except that the deduction will be reduced by the amount of cash received for the conservation easement.

Under the old law an easement donor was allowed to use the deduction against 30% of his contribution base (essentially, adjusted gross income). Any amount of that deduction that could not be used in the year of the contribution could be "carried-forward" to future years, up to a total of five years. If the value of a conservation easement was substantial only people with large annual incomes could fully enjoy the tax benefits of the contribution of the easement.

The law enacted in December makes it possible for easement donors with smaller incomes to enjoy a much greater amount of the deduction arising from the contribution or bargain sale of a conservation easement. The law now allows the deduction to be claimed against 50% of the donor's adjusted gross income, and it allows unused portions of that deduction to be carried-forward for 15 years. In addition, if over 50% of the donor's income is from the business of farming or ranching the deduction can be used against 100% of the donor's adjusted gross income, with unused portions allowed to be



carried forward for 15 years – at the 100% write-off rate, regardless of the source of the donor's income in future years.

This new law applies to easements granted in 2010 and 2011. It is set to expire at the end of 2011.

Example 7:

Under the old law, a landowner earning \$50,000 a year who donated a \$1 million conservation easement could take a \$15,000 deduction for the year of the donation and for an additional 5 years – a total of \$90,000 in tax deductions. The new law allows that landowner to deduct \$25,000 for the year of the donation and for an additional 15 years. That equals \$400,000 in deductions. If the landowner qualifies as a farmer or rancher, he can deduct the full amount of his annual income (\$50,000 in this case) annually until the deduction is used up, or for up to fifteen years after the original contribution, whichever period is shorter. In this example, the landowner could use \$800,000 of the \$1 million deduction, essentially paying no income tax for 16 years. However, if his income did not increase, the landowner could still not use the entire deduction within the 16-year period allowed. Additionally, estate tax benefits for conservation easement donations, both through a reduction in the land's appraised value, and additional exclusions, remain unchanged.

The maximum income tax benefit that can be enjoyed for the easement donation under federal tax law is easily calculated: simply multiply the deduction by the top federal tax rate (35% in 2011). In the preceding example, the maximum federal income tax benefit would be \$350,000 (\$1,000,000 x 35%). If the donor were a resident of California, which has a top income tax of 9%

and recognizes easement contributions, he or she could save an additional \$90,000 in state income tax from the contribution (\$1,000,000 x 9%). However, in calculating tax benefits it is important to keep in mind the annual limitation on the amount that may be deducted, and to consider other deductions that the taxpayer may have available.

The only reliable way to estimate the tax benefits of a particular easement contribution is to obtain a preliminary appraisal of the value of the easement. This preliminary value should then be given to someone familiar with the tax benefits of conservation easements and with the landowner's income circumstances who can then calculate how the potential deduction will actually affect future tax liability.

The tax code further requires that the amount of any conservation easement deduction resulting from a contribution made during the first year of ownership of the property subject to the easement be limited to the donor's basis in the easement (not the property itself). After the first year of ownership the deduction is not limited.

Caution

It is important to remember that the tax consequences of the contribution or bargain sale of a conservation easement are complex and that the federal requirements for properly substantiating any deduction claimed for the conveyance of a conservation easement are strict. It is important to obtain the advice of a professional experienced in and knowledgeable about conservation easements.

For more information you may want to obtain a copy of *A Tax Guide to Conservation Easements* by Tim Lindstrom (a co-author of this article) which was published by Island Press in 2008 (note that examples of both the new and old law are contained in this text). It can be purchased through Amazon.com or directly from Island Press.



Additional Estate Planning

There are many effective techniques for inter-generational ranch transfers and estate tax planning.

These and other approaches should be examined with an estate tax professional. Proper estate planning is the only way to insure that the federal government does not become one of your biggest heirs.

Organizations which hold conservation easements in Wyoming include:

Green River Valley Land Trust
PO Box 1580
136 West Pine
Pinedale, WY 82941-1580
Phone: (307) 367-7007
Fax: (307) 367-7207
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Website: www.grvlandtrust.org

Jackson Hole Land Trust
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Phone: (307) 733-4707
Fax: (307) 733-4144
E-Mail: info@jhlandtrust.org
Website: www.jhlandtrust.org

Rocky Mountain Elk Foundation
PO Box 8249
Missoula, MT 59807-8249
Phone: (406) 523-4500
Fax: (406) 523-4550
E-Mail: rmef@rmef.org
Website: www.rmef.org

The Nature Conservancy
Wyoming Field Office
258 Main Street, Suite 200
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Phone: (307) 332-2971
Fax: (307) 332-2974
Email: wyoing@tnc.org
Website: www.nature.org/wherewework/northamerica/states/wyoming/

Wyoming Game and Fish Department
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Wyoming Stock Growers Agricultural Land Trust
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Life Insurance

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If estate planning was only about dividing up assets, and all estates consisted only of cash, estate planning would be simple. But since reality doesn't work that way, proper planning becomes essential.

Estate planning consists of many things. The best and shortest definition of a good estate plan that I've heard is:

- 1) A plan that allows you to control everything that you have, for as long as you want or are able to.
- 2) A plan that provides for you in the event of a disability, and your spouse in the event of your death.
- 3) A plan that allows you to pass on what you have, to whom you want and the way you want.
- 4) A plan that does this at the cheapest cost possible. Life Insurance can help.

Occasionally when I am working with my clients, one of them will say something along the lines of "If I die then ----", I am always quick to gently remind them, that it is not if they die, but rather when they die and that their passage will not only leave a hole in the hearts of their family, but in their business as well.

Life Insurance cannot fill that emotional void left when a loved one passes, but it can provide the means to make sure that your loved ones can grieve your passing, and celebrate your life without worrying about what will become of them and the business when you are gone. It is not purchased for the benefit of the dead, but for the living to provide financial security for the

people and things you care about. For pennies on the dollar a Life Insurance policy cannot only give peace of mind to the insured/owner that their loved ones will be well cared for and their business will survive. This in turn can allow the family the opportunity to move forward with security and strength because life insurance creates dollars at the very time it is needed most.

- Life insurance allows your spouse to be confident that they will be financially secure.
- Life Insurance can provide the dollars to provide for children not involved in the business, so that children or heirs that are involved in the family business do not have to be worried about how to buy out their siblings. These siblings, who may not have spent most of their adult life in the business, but none the less, expect their portion of the whole.
- Life Insurance can pay off business debts, debts that may have stifled the ability to exploit the opportunities of the business to grow, expand and diversify.
- Life Insurance can create dollars outside the estate to pay probate, estate taxes and other finale expenses.
- Life Insurance can fund a trust for a special need's child, or endow your favorite church, college or other charity.

I have been involved in many estate plans, and the need for estate planning is not measured by how large the estate might be, but rather in the desire to preserve, build and protect the people, things and ideals, most dear to an individual.

Over the years of my involvement in estate planning and Life Insurance sales, I have developed a mental check list that I go through before involving myself too deeply in the planning process:

- 1) Is there an estate worth saving?
- 2) Is there a desire to save it?
- 3) Is there somebody, or something to save it for?
- 4) Is there the ability to save it?



The first three (3) points are an individual assessment made by the estate owner, and it is not based on the size of the estate. If the first three (3) points are answered in the affirmative, usually the ability

to save the estate can be structured, and Life Insurance can help.

I have never delivered a Life Insurance proceed check to a widow or widower who told me I knew it was too much Insurance. But while the casseroles and baked goods of friends and relatives are going stale, the death claims I have delivered mean the difference between financial uncertainty and financial stability.

When estate owners pass away and challenges arise:

- 1) How do we pay the federal estate taxes?
- 2) How do we buy out deceased partners' shares?
- 3) How do we buy out interest of non-participating siblings?
- 4) How do we pay off business debt and position the business for growth?

There are only a few ways these problems can be solved:

1) If your estate is fortunate enough to have liquid reserves in the bank, an investment portfolio, or other liquid assets, they can simply pull the money out and pay the bills. But this means that your family loses 100% of the principle plus the interest or income that it would have produced.

2) Your heirs can maybe borrow the money to meet these obligations, but this means that even if the business can absorb the additional burden of the loan, it will still have to be paid back. 100% of the principle plus 100% of the interest.

3) Your heirs might be able to sell something to raise the cash to meet obligations, but if

it's to pay estate taxes, this money must be paid within nine months of the date of death, and the IRS does not take cattle or land or equipment. They want cash and if your estate is selling land or some other asset that might not move quickly, they may have to discount the sale price to sell within the nine-month period. In any event nobody goes to an auction expecting to pay full. Under this option not only does your family and estate lose the value of the asset, and its productive value, but they would probably have to take a significantly reduced price if sold at an auction or under duress.

4) The way that many of these estates deal with these problems is to use discounted dollars now, to deliver a large sum of money at the time it is needed most. Life Insurance is one of the simplest and most effective tools to solve large cash needs and make plans work effectively. The estate pays a premium each year, the premium is generally less than an interest payment would be on a similar sum of borrowed money, and your family and/or estate never has to pay back the Principle.

To use an agricultural analogy, consider the Government Rat Hole. We all know what a Rat Hole is, it's a place where once you put something in it, and it never comes back. If your estate is faced with the choice of either throwing a cow down the government rat hole or a bucket of cream down the rat hole, which choice makes the most sense? Obviously you would throw the cream down, because if you throw the cow down the Rat Hole you lose both the cow and the cream. That is the idea behind Life Insurance you skim off some of the cream to preserve the cow.

Proper planning and the use of Life Insurance go hand and hand together. Knowledgeable professionals can help devise a structure that meets your goals and protects your loved ones, and life insurance in the proper place can help.



Long-Term Care

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For many of you, the discussion of long-term care is a reminder that you won't always be independent and self-sufficient. It points to a conversation many of you would just soon ignore. However the need for long-term care is not something that can be ignored. The need for long-term care is a very real possibility and the ability to have a plan in place to deal with this need could be crucial to you ensuring you and your family's financial health. This article will discuss the need for long-term care planning and the ways that long-term care can be financed.

Essentially long-term care (LTC) is the day-in, day-out assistance that you might need if you ever have an illness or disability that lasts a long-time and leaves you unable to care for yourself.¹ A long-term disability is any medically determinable physical or mental impairment which can be expected to result in death or which as lasted or can be expected to last for a continuous period of not less than 12 months.² In 2009 the Bureau of Labor Statistics reported that farmers and ranchers had a fatality rate of 38.5 deaths per 100,000 workers; with a ranking that is only below the fishing and logging industries, and aircraft personnel.³ A 2002 study by the Americans for Long Term Care Security (ALTCS) found that one in five Americans over the age of 50 is at risk of needing some form of long-term care within the next 12 months.⁴ These statistics give a strong indication that at anytime, in any profession we are all susceptible to a disability or the loss of completing basic day to day functions that will require us to utilize long-term care. This may be

a sudden farm accident, or care for your elderly parents.

Planning for long-term care (LTC) needs are just as important as creating a tax strategy for your estate or deciding who gets which piece of property. This is certainly an area where you want to determine the level of risk, the cost, the potential length of use, and begin to develop a plan about how to pay for LTC needs when they arise. An injury at the age of 45 may require you to utilize LTC on a permanent basis or just for a few months. Either way the costs of LTC are going to be very high regardless of the reason or the amount of time you spend in such a facility.

Marlene Strum of the University of Minnesota Extension Service indicates a few factors to consider when planning for the use long-term care.⁵ These factors include age, health status and lifestyle, family medical history, and the availability of family assistance. The University of Minnesota⁶ also states that you should consider your goals or expectations regarding the need to be financially independent; maintain control, maintain privacy, involve family members, being able to leave an inheritance, or utilizing government resources. These factors will help you decide how much you need to plan for financially and allows you to convey to others your wishes regarding the use of long-term care. It may be inevitable that you have to use long-term care, but there isn't any reason that you shouldn't have a say in what you want.

It's critical to start the planning process as early as possible, no matter what your age. Also every individual needs to have a plan for a short-term disability or permanent long-term care. A short-term disability typically lasts one year or less. It may be true that you may not utilize some of the funding options until your older, but it's important to have a strategy, know the costs, and when that strategy should be implemented and by who. You also need to have a backup plan in case your first options are no longer available or circumstances drastically change.



The cost of long term care is astronomical. A survey by MetLife and Genworth Financial⁷ indicates that in 2008 the average costs of nursing home care was \$70,000 per year, and

assisted living facilities were around \$35,000 per year. Most individuals or families do not have this amount of excess money available to pay for long-term care costs. It's also important to consider that the rate of long-term care costs are increasing steadily and that in planning you should account for the cost of inflation. Most stays in a long-term care facility will not last that long, but even a year of care could be devastating to you or your family's finances.

Financial costs are not the only concerns one should consider with the need for long term care. If you become incapacitated without a plan, others will be required to step in and make your decisions. These could be related to your health or your business. That's why planning for long-term care needs to be more than just a financial analysis. Everyone needs to be aware of the long-term care plan and who is responsible for making health decisions as well as who is in charge of the business during your absence. One should also consider how to make up for the labor contribution that will be lost when you are not available on both a short-term and long-term basis. Essentially this is an area that needs to tie directly into a short-term disability scenario and the permanent need for long-term care insurance. Families need to recognize that long-term care could greatly disrupt their family and business life.

There are several options to utilize when planning to fund long-term care. Some of these options represent your own funding and some are related to government programs. It's important to understand the risks and benefits of the options available to you to create a plan that you can afford and that will allow you to adequately pay for long-term care.

Medicare

An important note to consider is the common misconception that Medicare will pay for all long-term care expenses. It is true that Medicare will help pay for a small percentage of short-term skilled nursing home care or at home care. However this is very limited in payment and time and only applies for those that qualify for Medicare. Thus it should not be considered as an option for paying for long-term care. Medicare is a health insurance program for people age 65 or older, under 65 with certain disabilities, and people of all ages with End-Stage Renal disease.⁸ You are eligible for Medicare if you or your spouse worked for at least 10 years in Medicare-covered employment. You can become eligible for Part A (hospital insurance) at age 65 without paying a premium if you are eligible or already receive retirement benefits from Social Security or the Railroad Retirement Board, or you and your had Medicare-covered government employment.

Medicaid

Medicaid is a jointly funded federal and state program that helps individuals pay for necessary medical expenses if they do not have enough income or assets to pay for long-term care. The federal government picks up most of the bill, while states contribute a certain percentage in funding. Medicaid is not available to everyone. There are certain eligibility rules⁹ set up by the federal and individual state governments that dictate who can utilize Medicaid. It's important to check the eligibility rules of your individual state. The Wyoming Department of Health website, <http://www.health.wyo.gov/healthcarefin/equalitycare/index.html> contains information about Medicaid eligibility under its program called EqualityCare Wyoming Medicaid. You must be at least age 65 or older or be blind or disabled. You must be a permanent U.S. Resident, be a resident of the state you are applying in and have a valid social security number. You also may need to be admitted to a nursing care facility under doctor's orders or meet the medical need criteria.



You will also be subject to an assets test that will determine which assets are considered countable towards your eligibility and which are not. If you are married, have children under the age or 21 or

disabled children you may be entitled to have less assets included in your test. While some assets and income are kept for the spouse, it's important to know that Medicaid greatly reduces the assets of the couple and you should be planning for this affect on the spouse who in a long-term care facility and for the spouse that is still at home. Medicaid is going to require that you spend down your eligible resources to a certain limit before they will provide assistance. You should be aware of the financial implications of selling or transferring assets and/or property with regards to Medicaid Look-back rules. Medicaid can go back five years to when you applied for Medicaid/ went into the nursing home and penalize you for the transfer/sale of these assets because it give the appearance that you were deliberately trying to avoid payment of your own medical costs. You should also be aware that trusts may be accessible by Medicaid as well depending on how they are set up and who is receiving the income or interest. There also rules regarding the gifting of assets. It's incredibly important to consult with a financial planning professional or attorney who has experience and knowledge about federal and individual state Medicaid guidelines and elder care issues.

Long-Term Care Insurance

Another option to consider is long-term care insurance. This insurance product is purchased specifically to pay for long-term care costs. There are many types of policies and riders available. Policies can be tailored to meet your needs. It should be noted that it's not recommended to purchase long-term care policies when you are really young; but more commonly policies are purchased when you are in your mid 40's and older. It's important to note that as you age the cost of long-term care policies increase. There are many factors to consider with policies, including

length of coverage, cost, and elimination period. You may also want to consider that some preexisting conditions or genetic disorders may not be covered. If you do not pay your premiums your policy could be cancelled. You may want to consider adding riders that have coverage for Alzheimer's, inflation, a guarantee that your policy cannot be cancelled, etc. The cost of long-term care is pretty high and thus may not be the most appropriate choice for some due to the fact that you may never use it or other events prevent you from utilizing the policy.

Self-Funding Options

You should consider some of the following options as well when planning how to fund long-term care needs. You may want to consider a life insurance policy with a cash value that can be sold and used to pay for long-term care costs. It may also be appropriate to self-fund by using retirement accounts, land, other assets, cash, a reverse mortgage, Social Security benefits, annuities, pension plans, etc. You may also want to talk with your family to see if they may be able to assist in the process.

Overall the process of planning for long-term care is pretty uncertain. You really cannot predict when and for how long you will need long-term care. However you can have plan in place that deals with the possibility that you may need to utilize long-term care on a short- term (disability) basis or on a more permanent basis such as elderly care. It's important to consider the financial, medical, and emotional issues associated with long-term care. Not having plan could jeopardize not only you, but your entire family and even business for a very long time.



Resources

Centers for Medicare and Medicaid Services: <http://www.cms.gov/home/medicaid.asp>

Complete Long Term Care: <http://www.completelongtermcare.com>

Long Term Care Education: http://www.longtermcareeducation.com/learn_about_the_field/links_to_other_websites.asp

Medicare.gov: <http://www.medicare.gov/longtermcare/static/home.asp>

Rural Assistance Center: Long-Term Care: http://www.raonline.org/info_guides/longtermcare

Wyoming Department of Health: <http://www.health.wyo.gov/healthcarefin/medicaideligibility/index.html>

(Endnotes)

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Advanced Health Care Directive

Including living Wills, Durable Power of Attorney and Organ Donation

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A traditional will addresses what you want to happen to your property and minor children if you die. A living will expresses what you want to happen to you regarding medical treatment while you are alive. In Wyoming, the law also provides for a "health care power of attorney" which gives someone you trust authority to make decisions about your medical treatment in the event you cannot. (See Appendix for document)

WYOMING HEALTH CARE DECISIONS ACT OF WYOMING

The document in the Appendix of this manual, "Make Your Wishes Known", expresses the Wyoming law and includes forms that are meant to be utilized by individuals to convey their health care wishes.

Your desires may have changed since you previously generated a living will, a durable power of attorney and/or an organ donation designation. Although these documents are still valid under Wyoming law, you may wish to fill out the "Wyoming Advanced Health Care Directive" to ensure that your current wishes are adequately recorded and will be honored. If you do complete the Directive, please destroy old documents.

What is the Wyoming Health Care Decision Act?

It is a law that provides a way to make your decisions known about prolonging life when you

are in a hospital and are unable to communicate or breathe on your own. Decisions on whether to prolong life can involve great turmoil and debate, and individual members of your family may not agree.

The Wyoming law provides a simple and comprehensive form for you to record your personal wishes in the event your attorney has not already drawn up a health care directive document for your benefit.

Should I have a Health Care Directive?

Yes, each of us should have a Health Care Directive as well publicized end-of-life cases have shown. Every adult, regardless of age or status of health, should have an advanced health care directive in place—just in case. It can serve as a gift to those you love. It saves them the anguish of worrying whether they are making the decision that you would have wanted.

What Does The Wyoming Advance Health Care Directive Do?

It allows you to:

1. Name an agent to make health care decisions for you if you become incapable of communicating or making your own decisions.
2. Name an alternate agent in case your first choice is not able, willing or reasonably available to make decisions on your behalf.
3. Designate the level of decision-making power of your agent (s).
4. Nominate a person to act as your guardian if a court determines that you need one.
5. Give specific instructions on whether to continue or withhold or withdraw treatment, including nutrition or hydration, as well as pain relief.
6. Express whether you wish for your organs, tissues, or entire body to be donated upon your death.
7. Designate a supervising primary health care provider to have primary responsibility for your care.



What does the Advanced Health Care Directive Replace?

It has the potential to take the place of a living will, a durable power of attorney and an organ donation designation. If

you do complete the Wyoming Advanced Health Care Directive, please destroy any old documents to avoid confusion. Also, notify your designated agent, family, friends, your primary physician and your local hospital of your new advance directive.

Do I need a witness and must the document be notarized?

Yes, to both questions, and the Wyoming law also states that no matter what form you use for an advance directive, a witness may not be any of the following:

1. A health care provider
2. The agent or agents designated in your advance directive
3. An employee of a health care provider or a health care facility of which you are a patient at the time of the signing

What else should I do?

- Keep the original, signed document in a safe place. It is an important legal document.
- Let others know of the document and where it is kept.
- If you are hospitalized, take a copy of the document with you so it can be placed in your medical records.

Can I make changes to my Advanced Health Care Directive?

Yes. Remember that a new document must be witnessed or notarized for the changes to take place. To revoke your advanced directive, you must express that in writing, and it is wise to notify anyone who may have a copy of your advance directive.

Wyoming Resources include:

- AARP Wyoming – 1-866-663-3290
- Wyoming Bar Association – WyomingBar.org
- Wyoming Department of Health, Aging Division – 1-800-442-2766
- Wyoming Legal Services – 1-800-442-6170
- Wyoming Senior Citizens, Inc. 1-800-856-4398

Disclaimer

This manual is not intended to be a substitute for legal advice. It is designed to help you become familiar with some of the tools available in planning an estate, and the need to do such planning. Laws change when the Wyoming State Legislature meets and votes to change a section of the law. This publication is based on laws as they exist at the time of this document's printing.

Wyoming Advance Health Care Directive Form for:

(print your full name)

Please place the completed document on the front of your refrigerator or another location where an emergency responder might easily see it.

These materials have been prepared as a public service by AARP Wyoming and are for informational purposes only and should not be construed as legal advice or as official State of Wyoming documents.

Print your full name: _____

Today's date: _____ **Initial that you have completed the page:** _____

PART 1: POWER OF ATTORNEY FOR HEALTH CARE

PLEASE NOTE: *Answering any of the following questions is optional, but the more information you provide on this form, the better your designated agent may act on your behalf. This form is not to be used to designate a financial power of attorney. It is for health care matters only. This form is in compliance with Wyoming State Statute 35-22-401 through 416.*

(1) Designation of agent: I designate the following person as my agent to make health care decisions for me:

(name of person you choose as your agent)

(address)

(city) (state) (zip code)

(home phone) (work phone) (cell phone)

If I revoke my agent's authority, or if my agent is not willing, able or reasonably available to make a health-care decision for me, **I designate as my alternate agent:**

(name of person you choose as your alternate agent)

(address)

(city) (state) (zip code)

(home phone) (work phone) (cell phone)

(2) Agent's authority: My agent is authorized to make all health care decisions for me, including decisions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care, except as I state here:

(Add additional sheets if needed.)

Print your full name: _____

Today's date: _____ **Initial that you have completed the page:** _____

(3) When agent's authority becomes effective: My agent's authority to make health care decisions for me takes effect at the following time (check and initial only one (1) option):

Check Initial

_____ If I check the box and initial, my agent's authority to make health care decisions for me becomes effective only when my primary physician or, in his/her absence, my treating primary health care provider determines that I lack the capacity to make my own health care decisions; **OR**

_____ If I check the box and initial, my agent's authority to make health care decisions for me becomes effective only when my primary physician (and **not** when any then treating health care provider of mine) determines that I lack the capacity to make my own health care decisions; **OR**

_____ If I check the box and initial, my agent's authority to make health care decisions for me becomes effective as necessary immediately upon my execution of this Advance Health Care Directive Form.

(4) Agent's obligation: My agent shall make health care decisions for me in accordance with this power of attorney for health care using any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent that my wishes are unknown, my agent shall make health-care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

PART 2: INSTRUCTIONS FOR HEALTH CARE

(5) End-of-Life decisions: I direct that those involved in my care provide, withhold or withdraw treatment in accordance with the choice I have checked and initialed below (check and initial only one option):

Check Initial

_____ **(a) Choice to Prolong Life:** I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

OR

_____ **(b) Choice Not to Prolong Life:** I do not want my life to be prolonged if:

- (i) I have an incurable and irreversible condition that will result in my death within a relatively short time;
- (ii) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness;
- (iii) The likely risks and burdens of treatment would outweigh the expected benefits.

(6) Artificial nutrition and hydration: Artificial nutrition and hydration must be provided, withheld or withdrawn in accordance with the choice I have made in paragraph (5) unless I have checked and initialed **one** of the boxes below:

Check Initial

_____ I **want** artificial nutrition regardless of my condition.

_____ I **do NOT** want artificial nutrition regardless of my condition.

_____ I **want** artificial hydration regardless of my condition.

_____ I **do NOT** want artificial hydration regardless of my condition.

Print your full name: _____

Today's date: _____ Initial that you have completed the page: _____

(7) Relief from pain:

Check Initial

_____ I want treatment for the alleviation of pain or discomfort at all times;
OR

_____ I do NOT want treatment for the alleviation of pain or discomfort.

(8) Other wishes: (If you do not agree with the choices above, you may write your own or add to the instructions above. Examples may include: blood or blood products; chemotherapy; simple diagnostic tests; invasive diagnostic tests; minor surgery; major surgery; antibiotics; oxygen; wish to die at home if possible; etc.) I direct that:

PART 3: DONATION OF ORGANS AND TISSUES UPON DEATH

(9) Upon my death (check and initial applicable boxes):

Check Initial

_____ (a) I have arranged to give my body to science.

_____ (b) I have arranged through the Wyoming Donor Registry to give any needed organs and/or tissues (For enrollment information, call 1-888-868-4747 or visit WyomingDonorRegistry.org).

_____ (c) I do NOT wish to donate my body, organs and/or tissues.

Print your full name: _____
Today's date: _____ **Initial that you have completed the page:** _____

PART 4: INFORMATION ABOUT MY HEALTH CARE PROVIDER

(10) The following physician is my primary physician:

(name of physician)

(address)

(city) (state) (zip code)

(phone)

More information about my health care can be obtained through:

(name of health care institution/hospice)

(address)

(city) (state) (zip code)

(phone)

(11) Effect of copy: A copy of this form has the same effect as the original.

SIGNATURE (Sign and date the form here):

(print your name)

(sign your name) (date)

(address)

(city) (state) (zip code)

SIGNATURES OF WITNESSES or NOTARY PUBLIC:

I declare under penalty of perjury under the laws of Wyoming that the person who signed or acknowledged this document is known to me to be the principal, and that the principal signed or acknowledged this document in my presence.

Please Note: *Under Wyoming State Statute 35-22-403 (b), a witness may not be a treating health care provider, operator of a treating health care facility or an employee of a treating health care facility.*

First witness

(print witness' name) (address)

(signature of witness) (date)

Second witness

(print witness' name) (address)

(signature of witness) (date)

OR

Notary (in lieu of witnesses)

State of Wyoming

County of _____ } SS.

Subscribed and sworn to and acknowledged before me by _____,
the Principal, this _____ day of _____, _____.

My commission expires: _____.

Notary Public's signature

Wyoming Advance Health Care Directive Form

Guidance and Glossary

You have the right to give instructions about your own health care. You also have the right to name someone else to make health-care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs.

Unless you state otherwise, your agent may make all health-care decisions for you. This form has a place for you to limit the authority of your agent. Unless you limit the authority of your agent, your agent will have the right to:

- a) Consent or refuse consent to any care, treatment, service or procedure to maintain, diagnose or otherwise affect a physical or mental condition;
- b) Select or dismiss health-care providers and institutions;
- c) Approve or deny diagnostic tests, surgical procedures, medication and orders not to resuscitate; and
- d) Direct the provision, withholding or withdrawal of artificial nutrition and hydration and all other forms of health care.

If you use this form, you may choose whether to complete all or any part of it or you may modify any part of it. You also are free to use a different form.

Once you have completed the form:

Give a copy of the signed and completed form to your primary physician, to any other health-care providers you may have, to any health-care institution at which you are receiving care, and to any health-care agents you have named.

Post a copy of the form on the front of your refrigerator or another location where an emergency responder will easily see it.

You should talk to the person you have named as agent to make sure that he or she fully understands your wishes and is willing to take the necessary responsibility.

You have the right to revoke this advance health care directive or replace this form at any time.

Glossary of Advance Health Care Directive Terms

Advance Health Care Directive: A general term describing two kinds of legal documents, an individual's instruction and a power of attorney for health care. These documents allow a person to give instructions about future medical care in case they are unable to participate in medical decisions due to serious illness or incapacity.

Agent is a person designated in a power of attorney for health care to make health-care decisions for the person granting the power.

Artificial nutrition and hydration: Supplying food and water through a conduit, such as a tube or an intravenous line where the recipient is not required to chew or swallow voluntarily, including, but not limited to, nasogastric tubes, gastrostomies, jejunostomies and intravenous infusions. Artificial nutrition and hydration does not include assisted feeding, such as spoon or bottle feeding.

Capacity: An individual's ability to understand the significant benefits, risks and alternatives to proposed health care and to make and communicate a health-care decision.

Health care: Any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition.

Health care decisions: A decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, which may include: a) Selection and discharge of health care providers and institutions; b) Approval or denial of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and c) Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.

Health care institution: An institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

Hospice: An institution or service that provides palliative care when medical treatment is no longer expected to cure the disease or prolong life.

Individual Instruction: An individual's wishes concerning a health-care decision for the individual.

Glossary of Advance Health Care Directive Terms - Continued

Notary Public: A person who administers oaths, certifies documents, takes affidavits, and attests to the authenticity of signatures.

Physician: An individual authorized to practice medicine under the Wyoming Medical Practice Act.

Principal: The person who gives authority to an agent to make health-care decisions in the event that he or she becomes incapacitated. Also, the person for whom the advance health care directive has been created.

Power of Attorney for Health Care: The designation of an agent to make health-care decisions for the individual granting the power. This type of advance directive might also be called a health care proxy, or durable power of attorney for health care.

Health care provider: Any person licensed under the Wyoming statutes practicing within the scope of that license as a licensed physician, licensed physician's assistant or licensed advanced practice registered nurse.

Primary physician: A physician designated by an individual or the individual's agent, guardian or surrogate to have primary responsibility for the individual's health care or, in the absence of a designation, or if the designated physician is not reasonably available, a physician who undertakes the responsibility.



How to Select a Professional Advisor

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A critical question you need to ask yourself when you begin the estate planning process is "Who should be on my planning team?" An article from the Virginia Cooperative Extension indicates that there are several professionals that you should consider having on your planning team. These include a financial planner, accountant, attorney, insurance agent, investment advisor/broker, and a banker/lender.¹ Here are some general questions you should ask before you hire a professional advisor. It's important to find an advisor that fits your style and needs. This will be a potentially large investment and you want to make sure the person or business you employ is going to be honest and strive to fulfill your needs and wishes.

General Advisor Questions to Ask:

The Certified Financial Planner website² lists 10 questions you should ask when choosing a professional advisor (investment advisor/broker, lawyer, accountant, financial planner, and insurance agent). They include the following:

- 1) What experience do you have?
- 2) What are your educational qualifications?
- 3) What services do you offer?
- 4) What is your approach to financial planning?
- 5) Will you be the only person working with me or will there be others?
- 6) How will I pay for your services?
- 7) How much do you charge?
- 8) Could anyone besides me benefit from your recommendations?
- 9) Have you ever been publicly disciplined for any unlawful or unethical actions in your professional career?

- 10) Will you provide a written agreement for the services to be performed?

Additional questions that you should ask when selecting a professional advisor:

- 11) Do you have any professional credentials? Are these credentials updated?
- 12) Do you have proper business/operating licenses if required?
- 13) What is the reputation of the business/individual?
- 14) What are your presentation and learning styles?
- 15) Will you present material in a manner that fits my learning style?
- 16) Will you respect my risk tolerance level?
- 17) Will you consider my personal financial goals?
- 18) What kind of clients do you have? Can you relate to me and "where I come from"?
- 19) What are your ethical standards?
- 20) What is your mission and vision statement?
- 21) Do you use confidentiality clauses?
- 22) Who do you release my information to?
- 23) Who do you work with? Who will see my information?
- 24) Who do you associate with? Are there any conflicts of interest?
- 25) Do you provide a cost estimate?
- 26) Are you a specialist in this area of work?
- 27) Will you work with your other professional advisors if needed?
- 28) Will you show me a sample financial plan that you have produced?
- 29) Will any of your clients provide testimony about the work you've done for them?

Definition of Professional and License Requirements: Investment Advisor/Broker

An investment advisor is someone who sells expert opinion or buy-sell recommendations on a particular type of investment such as bonds, commodities, mutual funds, and stock.³ A broker is an individual that takes orders and places them in the market on at the request of clients, as well as gives investment advice and plan trades.⁴



According to the Securities and Exchange Commission (SEC)⁵, you should ask an investment advisor and/or broker if they are/or have to be registered with the SEC, the state they work in, and

if they are registered with the Financial Industry Regulatory Authority (FINRA). Their registration requirements will depend on what they sell and the amount of money they manage in client assets. If they are registered with the SEC, you should ask them to provide you with an ADV form which lists the adviser's education, business and any disciplinary action within the last ten years, as well as information about what services are provided, investment strategies used, and fees. Most are required to register with the SEC and pass proficiency exams. Specifically brokers are required to register with FINRA, pass an exam, and be registered in their respective state.

Insurance Agents

An insurance agent is a licensed individual who can sell insurance products to clients for specific needs. They help clients determine the amount and type of coverage as well as provide claim service.⁶

According to the Financial Industry Regulatory Authority (FINRA)⁷ insurance agents are regulated by each states insurance commission. Insurance agents can be licensed in several areas depending on the type of products that they sell. They obtain these licenses through testing and being approved by the state insurance commission. The state insurance commission imposes marketing rules and requires financial reports from the business/individual.

Accountants/Tax Preparers

Accounts are individuals who are trained in bookkeeping, preparation, auditing, and analysis of accounts. They help to prepare annual reports, provide monthly financial services, provide tax planning, and advise on tax laws and investment opportunities.⁸ Accountants also usually prepare income tax returns.

According to the American Institute of CPAs⁹ a Certified Public Account (CPA) is required to have a bachelor's degree in accounting, obtain professional experience, pass an exam, and meet licensing requirements for their state. This qualifies them to prepare taxes, complete audits, and work in accounting. There are others who work as accountants that have other education credentials such as a degree in accounting, software training in certain programs or who may be enrolled agents. According to the National Association of Enrolled Agents,¹⁰ an enrolled agent is tax practitioner who is federally authorized by the U.S. Department of Treasury to represent taxpayers before all levels of the Internal Revenue Service. In essence they are also capable of preparing income tax returns.

Financial Planners

A financial planner is a professional who works with clients to achieve an overall financial plan based on goals, investments, tax planning, asset allocation, risk management, education, insurance, retirement, and estate planning.¹¹ Their goal is to help clients develop an overall plan for their financial situation now and into the future.

The credentials of financial planners are varied among planners. There are no specific requirements in this area. The most common credential is a Certified Financial Planner® according to the SEC.¹² CFP's are required to pass an educational requirement, a standardized exam, and have a certain amount of professional experiences. You need to verify the accuracy of each credential a planner has, and what it involves.

Lawyers

A lawyer is a professional who can provide legal advice and assistance to clients, or represent them in a court of law.¹³

According to the Wyoming State Bar¹⁴ lawyers are required to have a four year degree and graduate from law school. They are also required to pass the bar exam in the state they are going to practice.



Most of these professional advisors must adhere to specific rules laid out by their credentials. They also must abide by ethical guidelines and take continuing education courses to keep their

credentials current. Below are some resources to look for planners and to find out more about what their designations mean. Remember that credentials do not necessarily mean they will be a good advisor for you, so like everything else in life; comparison shop.

Resources to Find Professional Advisors

Once you have a general idea of what to look for in soliciting a professional advisor's assistance, you need to be able to actually locate an advisor. The best place to start looking for an advisor is right in the area where you live. Even if you live in a rural location, it would be wise to start looking in the nearest town that you conduct other business. Look in the phone book for these specific advisors. Observe advertisements placed in local newspapers, magazine publications, or billboards. You can also utilize the library or web to search for advisors in your area. Asking your friends, business associates, or family members for recommendations or referrals is also a good way to locate potential advisors. You should conduct individual research about these individuals or businesses. You can also utilize state associations or certification sites to locate an advisor or check their credentials. Here is a brief listing of potential sites to search for potential advisors.

- Financial Planning Association www.fpanet.org or 800-282-7526
- National Association of Personal Financial Advisors www.napfa.org or 888-333-6659
- American Institute of Certified Public Accounts/Personal Financial Planning Division www.Aicpa.org or 888-999-9256
- Society of Financial Service Professionals www.financialpro.org or 888-243-2258
- Certified Financial Planner www.CFP.net or 888-237-6275
- The American College of Trust and Estate

Council (ACTEC) www.actec.org/public/roster/search.asp

- AARP www.aarp.com/lsn/locations.html
- FINRA Broker Check <http://www.finra.org/Investors/ToolsCalculators/BrokerCheck> or 800- 289-9999
- North American Securities Administrators Association at www.nasaa.org or 202-737-0900.
- National Association of Insurance Commissioners (NAIC) at www.naic.org
- The American Bar Association (ABA) <http://www.abanet.org/referral/home/html>
- Wyoming State Bar Association www.wyomingbar.org or 307-632-3737

Resources to Check the Disciplinary History of a Professional Advisor

- Certified Financial Planner Board of Standards, Inc. www.cfp.net/search or 888-237-6275
- North American Securities Administrators Association www.nasaa.org or 816-842-3600
- National Association of Insurance Commissioners www.naic.org or 816-842-3600
- National Association of Securities Dealers Regulation www.nasdr.com or 800-289-9999
- National Fraud Exchange (fee involved) 800-822-0416
- Securities and Exchange Commission www.sec.gov or 202-942-7040



(Endnotes)

- 1 A. White. *Managing Prosperity: Estate and retirement planning for all ages, building your financial team: financial planners*. Pub.448-063 (2002). Virginia Cooperative Extension. <http://www.ext.vt.edu/pubs/agecon/448-063/448-063.html>
- 2 *How to choose a planner: 10 Questions to ask when choosing a financial planner*. Certified Financial Planners. <http://www.cfp.net/learn/knowledgebase.asp?id=6>
- 3 BusinessDictionary.com
- 4 Financial Web <http://www.finweb.com/investing/what-is-a-broker-dealer.html>
- 5 *Investment Advisors: What you need to know before choosing one*. <http://www.sec.gov/investor/pubs/invadvisors.htm>
- 6 InvestorWords.com
- 7 *Selecting investment professionals. Learn about different types of investment professionals*. <http://www.finra.org/Investors/SmartInvesting/GettingStarted/SelectingInvestmentProfessional/P117278>
- 8 BusinessDictionary.com
- 9 *FAQs: Become a CPA*. American Institute of CPAs. <http://www.aicpa.org/BecomeACPA/FAQs/Pages/FAQs.aspx>
- 10 *What is an Enrolled Agent?* National Association of Enrolled Agents (NAEA). http://www.naea.org/memberportal/Resources/ForTaxpayers/whatis_EA.htm
- 11 InvestorWords.com
- 12 *Financial Planners*. Securities and Exchange Commission (SEC). <http://www.sec.gov/answers/fin-plan.htm>
- 13 Thefreedictionary.com
- 14 *Admissions-frequently asked questions*. Wyoming State Bar. <http://wyomingbar.org/admissions/index.html>



Who Gets My Personal Stuff?

Transferring Personal Property

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In giving attention to the details and issues of developing an estate plan, there is one area that is often missed, even by attorneys and professional estate planners. This is an area that is not nearly as well defined by law, and often is not of the same financial value as land, real estate, vehicles or other titled property. However, the failure to properly plan and itemize succession of ownership of this class of property often causes as much or more stress, misunderstanding, and anger as lack of estate planning of other types of property.

We all have personal items that are important or precious to us or to those that are associated with us. In estate planning, personal items are often ignored, yet they may cause some of the most significant emotions and conflicts. This is because the collection of family photos or the heirloom that belonged to our great grandparents is often of more emotional significance than a piece of land, the barn, or tractor. We sometimes assume that our personal items are not worth planning their passing, even though they were important to us and they may be a significant source of memories or comfort to those we leave behind. We also tend to assume that everyone will cordially receive or pass out our personal goods with no stress or argument about who should

receive what or how these items should be divided.

Inheritance plays an important dynamic in whether and how families remain connected following our death. Making decisions and talking about inheritance issues, including non-titled property, is not easy for some family members. Such issues may be avoided in part because:

- Everyone has to face his or her own mortality and the mortality of family members
- Individuals fear how others may interpret their motives.
- Conflict or disagreement is expected – feelings can too easily be hurt due to the emotion attached to personal property
- Individuals may be grieving the loss of their own or another's independence, changes in health, or moving from one's house

What can we do to get property owners to talk about property transfer? Try asking some "what if" questions. An example might be, "Mom, what would you want us to do with the things in the house if you and Dad had to move out or were gone? What special things do you have and where would you want them to go? What if we had to make decisions by ourselves about what happens to your belongings, like Grandma's china set or the family albums?"

Or you might say, "What would happen if you were in an accident and couldn't handle your affairs? You've got a house full of antiques, a gun and a train collection and you've got eight grandchildren and eleven nieces and nephews that have used or played with them. Who would be responsible for distributing your things and how would you want it handled?"

Look for opportune moments when the person(s) involved might be more open to discussing the subject – when a neighbor passes or grandma goes into the rest home. Use the situation to introduce the subject and start the thought process.



If property owners refuse to face the issue and discuss solutions, you cannot force them; you can only voice your desire and opinion. Your only recourse may be to warn them of the consequences of not developing a plan and leave it in their hands.

Inheritance of Personal Items is Important

Inheritance is not simply an economic and legal issue and personal items are a major part of the process. These personal items create complex emotional and family relationships which impact decision making.

- Guns, sports equipment
- Tools
- Furniture
- Books, papers
- Dishes
- Collections
- Hobby or handmade items
- Linens, needlework, quilts
- Clothes
- Jewelry

Inheritance decisions concerning non-titled personal property involve economic and emotional consequences and can enhance family continuity or add to its destruction.

For these reasons, most families will face less stress and emotional issues if they develop a plan for personal property transfer before death and while the property holder is of clear mind and sound health.

What is personal or non-titled property? Versus things like land, cattle, vehicles, or stocks and bonds, personal property includes items that do not have a registered title and the owner is not identified with a written document. This would include property items like:

- Tack
- Photos, pictures
- Personal care items
- Antiques
- Gifts

- Toys
- Musical instruments
- Anything that has emotional and/or economic value

Unique Challenge

Passing on personal items adds some unique challenges over other types of estate planning.

The sentimental meanings of the items involved make the decisions more emotional. One person may attach a high degree of sentimental value to an item because of its importance to a parent or family member, its place of importance within the family culture, or their own use and/or relationship to the item at some point in their life. At the same time, the same item may be of little emotional significance to some other members of the family. Also the degree of emotional attachment accorded an item, or group of items, by a potential heir may be unknown to the present owner or administrator of an estate if they feel the item is of little value. It is also possible that the person to whom an item is important may not have voiced their attachment to it. The issue is further complicated if more than one potential heir sees great value in certain items, setting the stage for conflict, jealousy, and hurt feelings.

Passing on the ownership of property involves the process of grieving and saying goodbye, even more so if the property is of an intensely personal nature. Even if the planning is carried out before the death of the present owner, the process itself forces the present owner to face the fact of their own death, and the potential heirs with the passing of a loved one. This heightens the level of emotion that is already present in the estate planning process. If owner has already passed, then heirs and/or administrators are left dealing with the issue of how to pass on personal items at a time when loss, hurt, and heightened emotions may cloud clear and rational thinking.

Personal family objects often help preserve memories, family culture and history, and family rituals for us. The hat and boots Dad always



wore or the favorite china that Mom used on special occasions take us back in time and give us a handle to hold on to family traditions and memories.

Due to all of these issues, the concept of being “fair” is often much more complex with personal items than with titled property. Titled property can often be appraised and valued and some sort of economic division can be developed. How do you “fairly” divide up family heirlooms, photos, knick knacks, or antiques? As already explained, many of these personal belongings have different meanings to different family members and it is difficult to measure their worth or value. What is “fair” to one family member may seem entirely “unfair” to another. When the “rules” as we perceive them are not followed or they are broken, we deem the process unfair and often take offense. To further complicate the process, these “rules” often remain unwritten, are not the same from family member to family member, and are seldom discussed or agreed upon. Family discussions should be designed to bring to the forefront members’ expectations and understanding of the “rules.” Where and how these differ should lead further discussion to help the family come to a level of agreement on how to proceed.

Often family history and past relationships have created unresolved conflicts that interfere with clear and objective discussions and decisions are not made until there is a family crisis, which may be the debilitation or death of someone.

Consequently, it is often impossible to divide things “equally” and distribution methods and consequences become clouded.

In determining how to be fair there are several questions to answer. We must determine:

- Who is involved (in-laws? grandchildren?)
- How we proceed (informing everyone, determining values)

- When to proceed
- What methods and standards to use to be consistent

Family members will consider the process unfair if they feel moral and ethical standards are not followed and if they have not had a voice in the decisions made. This is especially true if a few persons with dominate personalities walk off with everything they want and everyone else gets what is left over.

Some Factors to Consider

Realize that these are sensitive issues and even in the best of situations their discussion will create internal stress for family members and may strain some relationships. For that very reason it is usually much better to face the truths of the situation and develop a workable plan before the death of the family member involved.

Just as other parts of estate planning should include discussion and input of all family members, developing a distribution plan for personal non-titled property should include discussions and family conferences about values and goals, what family members view as “fair” versus “equal,” and what is important to the family as a whole and to those passing on the property.

Carefully select a meeting location and time. Designate a person to record decisions made by the group. Unrecorded decisions will be a fertile field for disagreements later on. A decision needs to be made here by those responsible concerning whom to include in the process. Is it parents and siblings only, with the siblings acting as representatives for their spouses and children? What about including spouses? Grandchildren? Other family members? Consider friends, significant others and ex-spouses, as well as caregivers, attorneys, and mediators. Remember that the final decision for disposition belongs to the property owner(s), and potential heirs, once having the opportunity to voice their wishes and feelings, should respect the decision



of those passing on their “important stuff.” It is also important to remember that family relationships, and their continuity, are vastly more important than the possession of an inanimate object.

There are a number of topics that family members need to discuss and on which to seek reaching consensus before proceeding to the next steps in the process. Please review the guide sheet titled *Transfer of Personal Property: Rules for Deciding Who Receives Which Items* at the end of this section to become familiar with these topics. As your family prepares to discuss the estate planning process, they will find themselves faced with these issues and it will be greatly helpful if you have had some time to think them through first. Prepare a copy for each family member involved and ask them to rate each topic according to its importance to them. After everyone has had a chance to complete the worksheet, schedule a time everyone or most everyone can be present to compare views and reach an agreement. If a consensus cannot be reached easily, don’t give up. If necessary, go on to inventory the items that should be passed on and then come back to this document to attempt to reach agreement.

As illustrated by *Potential Transfer Goals*, members of the family need to consider the various options for distribution of personal property and what the consequences are of each. Some questions that should be answered are:

- Are there other goals beyond those that were listed that you feel are important?
- Which goals are the *most* important to you and which *least* important?
- Do any of your own goals conflict? Do any of the goals of family member’s conflict?
- Are there others (other owners, other family members) that need to have input into these goals?
- As you transfer this property, what do you really want to accomplish? Family

continuity and relationships? Conflict avoidance? Preserving a heritage? Maintaining privacy? Contributing to society?

Remember that there is no perfect method of transfer – each method has its own advantages and disadvantages. Be creative and stay focused on your goals, but be sure to follow all applicable state or federal laws. It is also important to remember that there are more transfer options available when planning is done *before* death of the owner than after.

Inventory

Once the family has reached some degree of consensus or agreement on their values and goals in disbursing personal items, it is time to take inventory of the items that need to be distributed. This is not a simple task if a distribution plan is being considered for an entire household. As indicated previously, the owner of the property may feel like they don’t have much to give away. “What?! These old things?”

However, when it comes to listing everything that may be of interest to potential recipients, don’t overlook the many small and personal items that may hold memories or significance to them. In fact it is best for the owners and potential recipients to go through the items together to develop the list. If there are too many grandchildren, nieces, and nephews to include, then consider including all the children at least, or another representative of each household or branch of the family.

Make several copies of the *Personal Property Inventory* form at the end of this section. Start in one location, such as the house or garage, barn, etc. Be sure to list the owner’s name, the location (house, storage shed, garage, etc.) and the date. List the room where each item is found and a description. Leave the last two columns titled “Requested By” and “Agreed Receiver” until later. At this point you are just developing as complete a list as possible.



Request of Items

Once a listing of personal items has been developed it is time to allow potential recipients to request those items they might prefer, and for the present owners and/or

administrators to determine who will actually be designated to receive various objects.

A variety of methods may be used at this point. One possibility is for participating family members to decide who gets the list for review and requests. It may be the siblings only, or siblings, spouses, and grandchildren, or whatever combination makes sense to the family. As in all these proceedings, if the parents or person who owns the personal property is of sound mind, they have the right to make the final decisions. However, the input of other family members should be encouraged. After copies of the inventory list have been distributed to those agreed upon, they should mark which items they are interested in receiving by listing their name in the "Requested By" column and returning it to the family member(s) or administrator that will be compiling the requests. Transfer all the requests to one master list. Some items will have no interested parties or very few. These items will provide easy decisions for those distributing the property. On the other hand, some items may be requested by several persons. These decisions will be more difficult and may take some time to settle.

Another possibility is for the property owner(s) to make all the decisions about who receives what without distributing the list for requests. This method is usually less desirable because it does not allow family members to share what is important to them and why. The person(s) distributing the property is/are only guessing, based on their suppositions of what their heirs would like.

There are several methods which can be used to allow potential recipients to participate in the process of determination of how items are distributed, especially for those items that

are desired by more than one. In using these methods, distribution may take place item by item, or items can be placed in groups of approximately equal value.

Shake dice: Family members shake dice and the high roller receives first choice, next highest gets second choice, etc. After making a complete round, reverse the order of choice. After the first two rounds are complete, shake the dice again to determine a new order.

Draw: Each draws a number, straw, card, etc., which then determines choice order as with dice.

Private auction: Family members buy items in open auction, using real money or equal amounts of "funny money" such as play money, marbles, or chips. If real money is used, the proceeds go to the owner or their estate. Using real money allows wealthier family members to outbid others, which may make for hurt feelings.

Silent auction: Written bids are placed on items and the highest bidder gets the item. The money generated goes to the owner or estate. Again, using real money allows wealthier family members to outbid others, which may make for hurt feelings.

Grouping preference: Selection begins with oldest and proceeds to youngest or vice versa; males go first, then females or vice versa; or the two may be integrated.

Generation preference: Priority is given to parents, siblings, children, grandchildren, blood relatives, etc.

Other methods of distribution which may be used are public auction, yard sale, or estate sale, with the proceeds going to the owner and estate or being divided according to an agreed on formula between the owner and heirs.

Legal Transfer

Once a determination has been made by the property owner or administrator concerning



who will receive which item, a couple of methods may be used to actually assure transfer of items to the proper recipient. One method is to actually gift the items at the time of decision, so that they

no longer belong to the original owner, but are taken by the person to whom they were given.

If the original owner is still living, he/she usually does not want to give away all personal belongings at this point. Therefore, the owner needs to complete a legal document called *Personal Property Memorandum* to make his/her distribution decisions binding. This document must be referred to in the owner's will and should be on file either with the will or other important documents. Each item that is to be distributed to a specific individual should be listed, along with the name, address and relationship of the person receiving the item. Each page must be dated and signed for the document to be legally binding.

Once the personal property inventory has been completed and the owner and/or administrator has made a determination of who is to receive each item, complete and file the *Personal Property Memorandum* with other estate documents to complete the process. If items are subsequently added or removed from the property owned, those changes will need to be made on the *Memorandum* and a new page signed and dated. A generic copy of this memorandum can be found at the end of the section. However, it is best to have one prepared by the attorney preparing the will for the property owner.

Agree to Manage Conflict

As indicated at the beginning of this section, conflicts and disagreements can arise during this process, even under the best of situations and with families having healthy relationships. Be committed not to let stress and conflict destroy your family and your relationships. No object, no matter how precious, is worth that.

When conflicts do arise, have a plan for dealing with them. The possibility of conflicts and how to handle them should be discussed at the beginning of the process, before they arise, not when emotions have gotten heated.

It is important to realize that conflict is a normal part of life and is not necessarily "good" or "bad," but merely reflects lack of communication, miscommunication, or differences in values, beliefs, or expectations. Often these conflicts are heightened by prior conflicts that have been unresolved, with each additional difference tending to escalate the intensity of the issue.

Most conflicts can be resolved by proper listening skills, and making statements about how we feel, rather than making statements about the motives of others. Work at listening skills like eliminating distractions, keeping eye contact, facing the speaker, keeping a comfortable distance, and listening for feelings and facts rather than using their speaking time to frame your reply or counter-attack. Practice reframing what you thought you heard back to the speaker to see if they really meant what you think you heard. When you express your side of the issue, try to stick to statements that reflect *your* understanding of the problem, how it makes you feel, and what effect the behavior of others has on you. Try to continue the discussion without assigning blame until each side has had an opportunity to express their views and feelings. Then see if you can come up with suggestions and/or solutions that might address the issue in such a way that all can receive some satisfaction.

If the conflict cannot be resolved, then consider bringing in a facilitator or mediator that may help to bring objectivity to the process. Friends or acquaintances or other non-family members may work, but sometimes they are often too involved with family members, or inexperienced in negotiating conflict, to appear or be impartial. Consider using a professional mediator or other person that has been trained in reconciling conflicts to help you through to consensus.



Completion Steps

As you bring the process of determining distribution of “my important stuff” to a close, there are some final steps that should be considered.

Be sure that all the legal documents, including your will and personal property memorandum are in order and properly filed with an attorney, administrator, or in a safe deposit box, etc. Be sure someone else knows where these documents are filed and has access to them. This is usually the person(s) named in your will as executors of the estate.

Share the outcome of the process with family and other concerned persons, unless it would cause more family turmoil. Sharing your wishes before your death can help to reduce tensions and reduce misunderstandings. Remember that one of the purposes of estate planning is to reduce the pain, stress, and suffering of heirs after you are gone.

If you have chosen gifting of important items before your death as one of your distribution methods, start the process. Decide whether you want to use special occasions like birthdays or Christmas as a vehicle to make the gifts, or whether you would like to develop your own schedule.

Since family heritage, culture, and continuity are important, and one of the basic reasons for distributing personal property, tell stories as you give away items that are important to you. Explain why these things are important, what they mean in family history, and what you feel you are passing on to recipients when you give them away. Story telling might become a family tradition as various items are passed down to those who will own them next.

As situations and family member’s change, as items are gifted and/or acquired, be ready to revisit and update your decisions. If you do make changes, be sure those are reflected in your personal property memorandum.

Resources:

Who Gets Grandma’s Yellow Pie Plate? A Guide to Passing on Personal Possessions (1999) University of Minnesota. MI-6686-WG. 800-876-8636. www.yellowpieplate.umn.edu/



TRANSFER OF PERSONAL PROPERTY

Rules for Deciding Who
Receives Which Items

Both the person(s) who presently own the personal items and the person(s) who would potentially receive the items should review these rules and discuss which would be most appropriate in their situation. The final decision for the rules used and the disposition of the property rests with the owner of the property as long as they are alive and of sound mind.

Below are various rules which could be used and which place emphasis on different values. It is up to the family to decide which rules will be used.

Should Family Members Be Recognized For Their Differences?

1. Will specific items go to persons in certain birth order (oldest, youngest)?
2. Will the designation of specific items be influenced by current age of recipients?
3. Will gender influence what they receive?
4. Will marriage status (married, widowed, divorced, or never married) influence what they receive?
5. Will birth status (children by birth, adoption, or remarriage) influence what they receive?
6. Will distance from home influence what family members receive?
7. Does having a personal interest in the item influence what members receive?

Should Everyone Be Treated Equally?

1. Should family members be treated the same regardless of what they may have contributed to the family over the years?
2. Regardless of differences in needs, should family members be treated the same?
3. Regardless of differences (such as birth order, gender, or marital status), should family members be treated the same?
4. Regardless of sentimental meaning, should

family members receive equal numbers of items?

5. Regardless of the sentimental meaning to them, should family members receive equal numbers of items?
6. Should family members receive equal dollar value of appraised items?
7. When more than one might want an item should all have an equal chance of getting items regardless of financial resources (drawing names, lottery system, taking turns at selecting, using chips or pretend money)?

Is It Important That Recognition Be Made For Different Needs?

1. Does financial need dictate that family members will receive more?
2. Does physical or disability needs dictate that family members will receive more?
3. Does greater emotional need dictate that family members will receive more?

Should Different Contributions Be Recognized?

1. Should items received as gifts from family members be given back to the same giver?
2. Should rewarded be provided for family members who have helped do work around the home or business?
3. Will rewards be provided to family members who have helped financially?
4. Will those who have helped provide care and support over the years be rewarded?
5. Should family members who have shown the most love be rewarded?
6. Should organizations or individuals outside the family be rewarded?

DETERMINING HOW TO DECIDE

Once agreement has been reached concerning which values are important in deciding who receives which items of personal property, the family needs to discuss when decisions will be made and who will be involved in making them. Review the various choices below to make those determinations.



Who is Involved in the Decisions?

1. Are children asked what they would like to receive?
2. Are spouses of children asked what they would like to

receive?

3. Are grandchildren asked what they would like to receive?
4. Should an appraisal be obtained for items of financial value?
5. Which family members will be informed of decisions the owners have made?
6. Do we wait for all to be present to make decisions?

When Will Decisions be Made?

1. While owners are able to make decisions should they make determinations of who get what now?
2. Should owners give selected items away before they die?
3. Should owners mention their wishes in their wills?
4. Should the executor decide what happens to belongings at death?
5. Should surviving family members decide what happens to belongings at death?
6. Do family members need to be prevented from taking items without others knowing?
7. Should family members be allowed to make requests for items from the owners now?



Funeral Planning

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Introduction:

Planning for your eventual death is one area most people would like to ignore. It's a scary process and it makes people realize they are not immortal. While we know that one day we will no longer be here, it's incredibly hard to walk into a funeral home and sit down and arrange for that day. Possible reasons people don't pre-plan for their funeral may be because they are unaware of their options, due to a lack of subject knowledge, cost, and it's hard for people to deal with their own mortality. Although it may be scary, it is very important to have a plan. Dealing with a death is hard enough, without having to add in all of the details associated with planning a funeral. By pre-planning you can minimize the stress on your loved ones at a time where their emotions are reeling. This article will address some of the factors involved at the time of death and when to consider pre-arranging a funeral.

Unattended & Attended Deaths

One of the first things one should consider is what to do initially when someone has passed away. If you experience an *unattended death* then the first thing you need to do is call 911 or the sheriff's office. They will send out a police unit, an ambulance, and the county coroner. If the coroner determines there is no reason to further investigate the death, then the funeral home of you or your family's choosing is contacted and they will make the removal of the deceased. If however the coroner determines there is a need to further investigate the cause of death, then the deceased is transported to the coroner's office

for further testing until the decedent is able to be released to a funeral home of one's choice.

If it is an *attended death (i.e. hospice)*, then the appropriate action would be to call hospice, who will send a nurse immediately. Once the family is ready, hospice will contact the funeral home of one's choosing and they will arrive to make the removal and answer questions you may have.

When you pass away, the funeral home will be in contact with your family to make funeral arrangements. In the state of Wyoming, cremation requires a signed cremation authorization by one's self or legal next of kin. There is also a mandatory waiting period of 24 hours before cremation can take place.

Choosing a Funeral Home

The most important factor when choosing a funeral home is to feel welcome and comfortable with the funeral director and the establishment as a whole. Funeral home selection is often based on previous experience with an establishment and its reputation. If one does not have experience with any specific establishment and is pre-planning, you can visit the different funeral homes to get a feel for their establishment and find out all the different funeral options, and services that may be specific to that particular one. In your research, you may want to find out if they are a part of any associations or the local Better Business Bureau. The type of funeral service chosen influences the price of the service. Like all businesses, prices vary from establishment to establishment and each will provide you with pricelists for comparison.

Pre-Planning

The biggest factor with either pre-planning or *at-need* planning is to communicate your wishes to your family and friends, either verbally or more importantly through a will. It's hard for loved ones to know what you may have wanted, so take the guess work out of the equation and communicate with them on your wishes. The first benefit of pre-planning is lightening the burden on your loved ones. Decisions have already been made for



them; they are just following though with your wishes. Death is a very emotional and stressful time.

The second benefit of pre-planning is that your funeral prices are locked in at today's rates, avoiding the cost of inflation over the years, whether you make monthly payments on your funeral plan or pay it all at once.

Along with making decisions regarding the following questions pre-planning also allows you to plan your funeral exactly how you want it. You can write your own obituary, choose musical selections, clothing, etc. The funeral home will keep this information on file, but it's recommended to have a copy in a known location for your loved ones as well. It can be updated at any time.

The following are a list of questions you should consider with planning a funeral.¹

- 1) How much do you want to spend?
- 2) Would you like a traditional casket and burial or cremation?
- 3) Where would you like to be buried, do you need to purchase a cemetery plot?
- 4) What type of casket or urn are you interested in?
- 5) What type of vault or grave liner would you like, if required and desired?
- 6) What type of marker or monument would you like?
- 7) Are there certain religious, fraternal, or military customs that you want followed?
- 8) Is there a particular charity or beneficiary you want to receive memorial gifts?
- 9) Have you decided who you would like your pallbearers to be?
- 10) Do you have specific clothes or jewelry that you would like to be buried in?
- 11) How would you like your memorial services to be conducted regarding any special readings, ministers or other speakers, music, power points, etc.?
- 12) What do you want to happen to your ashes if

you are cremated?

13) Do you want your body donated to medical science?

14) Do you want to donate any organs or body tissues at your death?

At-Need

This is when no pre-arrangements have been made as of the time of passing. As a result all details must be attended to at that time. The list of questions used above for pre-planning also applies to making decisions for at-need funerals.

Costs

The cost of a funeral can be overwhelming. The average funeral runs about \$6,000-\$10,000. Cremation can be less expensive than traditional casket and burial. It's recommended to take out at least a \$20,000 life insurance policy to cover not only funeral costs, but help defray the costs associated with estate and attorney fees, and other bills. There are many costs to consider with a funeral whether pre-planning or at need. Some of these potential costs are the services provided by the funeral home staff and facility, embalming, dressing, casket, headstone, cemetery plot, vault liners, viewing services, memorial services, flowers, clergy, musicians, obituaries, death certificates, remembrance items, and the reception.

Options

There are several methods available to pay for funeral costs. The first is to utilize your own resources to pre pay or have your family pay for your final needs at your passing. Life insurance can be used as well to help pay for funeral costs, but it may take some time to receive the funds, and they will not be available until after your funeral. It is possible to have the funeral home submit some of their costs to the insurance company to pay for them. However you will still be responsible for costs of products or services the funeral home itself doesn't have or provide. It's possible to fund a funeral trust or other type of trust to use for funeral expenses as well. There may be problems accessing the fund immediately in the event of your death if the trust is not



accessible by others until after your death certificate has been presented. Social Security provides a one-time lump sum death benefit of \$255 to your surviving spouse or dependent children.

Veterans may qualify for benefits including a headstone, a burial and plot allowance, or the option of burial in a national cemetery. Active Duty related deaths may have a higher funeral allowance.²

It's important to determine which method will work best for you and your family and to explore your options as some will have additional requirements or qualifications.

Where does my pre-paid money go and is it secure?

In the State of Wyoming, funds that are pre-paid for funeral costs are put into a funeral trust, which is regulated by the State Insurance Commission. This ensures the amount you paid is protected in the event of that business closing. If this would happen, one would need to contact the insurance commission immediately. Like all important documents, always keep a copy of your contract.

When to start planning

While planning for a funeral at a young age was more common in decades past, today it's quite different due to our mobile society. It's recommended that pre-planning now begins in your 40's or 50's. By this age one is more likely to be settled and financially stable. Upon entering retirement disposable income decreases.

If one chooses not to purchase a funeral plan, keep in mind that having plan of action, such as money set aside for this expense and/or life insurance will be a chief benefit for your family.

Where to Keep Important Documents

Another important topic to discuss is where to keep your funeral planning documents. Like all other important financial, legal, tax, and ownership documents, it's imperative to have

a central location of the documents. It's also important that someone you trust knows where to find these documents when the need arises. If using a safety-deposit box at your financial institution, please inquire with that institution as to who has access upon your passing and what documents they may need. It's also significant to note that if you keep these documents strictly with your lawyer, then it may be difficult to reach the attorney or gain access to these documents when you need them.

It's highly recommended to plan ahead and have your plan on file at your chosen funeral home and/or in a file at home that someone can easily find. It's also important to know that if you keep your documents in a home safe, that someone else will need the access information to retrieve those documents and fulfill your wishes.

The following is a list of information to keep on file; that should include facts about your marriage, relative, and dependents, social security number, birth certificate, military service discharge (DD214), personal history including education and employment records, items such as bank accounts, insurance policies, credit cards, and safe-deposit boxes, a list of people to be contacted after your death, a letter of last instructions regarding your funeral, facts for your obituary, a copy of your will, and a cemetery deed.³

How to Make Changes

When purchasing your funeral plan and/ or cemetery plots, inquire as to the ability to make changes before your passing. A situation to consider is if you should move, what becomes of your plan? Can it be cancelled or transferred? If you no longer need your cemetery plot, can it be sold or given to someone or sold back to the cemetery itself? And what kind of paperwork is involved in the process?

Each funeral home and cemetery will have different rules and regulations, please inquire with that particular establishment as to what they are and how they apply to your situation.

Death Certificate & Obituary Information Sheet

(Provided by Wiederspahn-Radomsky Chapel of the Chimes)

Contact Phone #: _____

NAME: _____ M/F AGE: _____

ADDRESS: _____

DATE OF BIRTH: _____ PLACE OF BIRTH: _____

DAY OF DEATH: _____ DATE OF DEATH: _____

PLACE OF DEATH: _____

SOC. SEC. #: _____

MARITAL STATUS: MARRIED DIVORCED WIDOWED NEVER MARRIED LEGALLY SEPERATED

HISPANIC ORIGIN: NOT SPANISH/HISPANIC/LATINO MEXICAN, MEXICAN/AMERICAN, CHICANO
SPANISH/HISPANIC/LATINO (Specify) _____ CUBAN PUERTO RICAN

RACE: WHITE BLACK/AFRICAN AMERICAN AMERICAN INDIAN (Specify) _____ OTH-
ER _____

EDUCATION: <8th 9-12 (no degree) HS/GED SOME COLLEGE/NO DEGREE
ASSOCIATE'S BS/BA MASTER'S DR./ Ph.D.

VETERAN: Y/N BRANCH: _____ RANK: _____

WAR(s): _____

GRAVESIDE RITES: _____

PRESENT TO: _____

OCCUPATION: _____ EMPLOYER: _____

#DC: _____ MAIL TO/CALL: _____

LENGTH OF RESIDENCE HERE: _____ PRIOR RESIDENCE: _____

CHURCH AFFILIATIONS/MEMBERSHIP: _____

CLUBS/ORGANIZATIONS/HO _____

RESERVE SEATING: _____

OTHER SPECIAL REQUESTS: _____

MEMORIAL CONTRIBUTIONS: _____

HUSBAND/WIFE: _____ MAIDEN NAME: _____

WEDDING DATE: _____ PLACE: _____

FATHER: _____

MOTHER: _____ MAIDEN NAME: _____

SON(s): _____

DAUGHTER(s): _____

GRANDCHILDREN: _____ # GREAT-GRANDCHILDREN _____

BROTHER(s): _____

SISTER(s): _____

TYPE OF SERVICE:

FULL MEMORIAL GRAVESIDE RENTAL PRIVATE OWN NONE SHIP-IN/OUT FIRST CALL

ROSARY:

DAY: _____ PLACE: _____ DATE: _____ TIME: _____ AM/PM

SERVICES:

DAY: _____ PLACE: _____ DATE: _____ TIME: _____ AM/PM

OFFICIATING: _____

ORGANIST/PIANIST: _____ SOLOIST _____

MUSICAL SELECTIONS: _____

PALLBEARERS: _____ / _____ / _____

_____ / _____ / _____

HONORARY PALLBEARERS: _____

CEMETERY: _____ EXISTING HEADSTONE: Y/N

RECEPTION: _____

JEWELRY REMOVED: _____ CASKET OPENED/CLOSED: _____

CASKET/URN SELECTION: _____ URN PRESENT: Y/N

VIEWING DAYS: _____ VIDEO TRIBUTE: Y/N



Definitions⁴

Casket/Coffin- A box or chest for burying remains.

Cremation- Exposing remains to extreme heat and flame and processing the resulting bone fragments to a uniform size and consistency.

Embalming- The art and science of temporarily preserving human remains to forestall decomposition and to make them suitable for display at a funeral.⁵

Funeral Ceremony- A service commemorating the deceased, with the body present.

Funeral Services- These are services provided by the funeral home which can include consultation with family, transportation, shelter, embalming, preparing and filing notices, obtaining authorizations and permits, and coordinating with the cemetery or other third parties.

Grave Liner or Vault- A type of cover or container that fits over or around the casket for protection of the casket and to prevent the ground from sinking

Interment- Burial in the ground, interment or entombment.

Inurnment- The placing of cremated remains in an urn.

Memorial Service- A ceremony commemorating the deceased, without the body present.

Opening/Closing- This is the physical act of opening a dig or burial site and closing it back up after the remains have been placed in it.⁶

Urn- A container to hold cremated remains.



Resources

Council of Better Business Bureaus, Inc: www.bbb.org

Department of Veterans Affairs National Cemetery Administration: www.cem.va.gov
or 1-800-827-1000

Funerals Consumers Alliance: www.funerals.org or 1-800-458-5563

Funerals: A Consumer Guide. Federal Trade Commission: www.FTC.gov or 1-877-FTC-HELP

Funeral Goods and Services and Pre-Paying for Your Funeral. AARP: www.aarp.org or 1-800-424-3410

Funeral Home Trusts, Wyoming Insurance Division: <http://insurance.state.wy.us/>

Funeral Service Consumer Assistance Program: 1-800-662-7666

National Funeral Directors Association (NFDA): www.nfda.org

Schrader Funeral Home: www.schraderfuneral.com or (307) 634-1568

Wiederspahn Radomsky Chapel of the Chimes: www.wrcfuneral.com or (307) 632-1900

Wyoming Funeral Directors Association: www.wyfd.org

(Endnotes)

- 1 *Being prepared: A practical guide to government benefits and funeral planning*. M.K. Jones & Associates, Inc. Provided by Wiederspahn Radomsky Chapel of the Chimes.
- 2 *Funeral Planning. Fact Sheet 409. Maryland Cooperative Extension.*
- 3 *Funeral Planning. Fact Sheet 409. Maryland Cooperative Extension.*
- 4 *Funerals: A consumer's guide*. Federal Trade Commission
- 5 en.wikipedia.org/wiki/Embalming
- 6 *Funeral and Cemetery Terms*. Schrader's Funeral Home



GLOSSARY

Compiled by Carolyn
Paseneaux

AB TRUST – A trust giving a surviving spouse or mate a life estate interest in property of a deceased spouse or mate. It is used to save eventual taxes on the estate. Sometimes called a “spousal bypass trust”, a “credit shelter trust” or an “exemption trust”.

Abatement – Cutting back certain gifts under a will when it is necessary to meet expenses, pay taxes, and satisfy debts or other items that have a priority under the law or as per the will.

Administration (of an estate) – The court supervised distribution of the probate estate of a deceased person. The person who manages the distribution is usually called the executor when there is a will, and called an administrator if there is no will.

Administrator – The person appointed to manage the estate of the decedent who did not have a will or appointed executor.

Adult – Any person 18 or older.

Affidavit – A written statement made under oath.

Annual Exclusion – The amount under the Federal Gift Tax law allowing a donor to give to a donee per year without paying taxes on that amount.

Annuity – Payment of a fixed sum of money to a specified person on a regular basis by contract or agreement. The contract or agreement usually lasts for the person’s lifetime, but can be for a specified term of years.

Beneficiary – A person or entity that is legally entitled to receive gifts under a legal document such as a will, a trust, retirement program. A primary beneficiary is one who is certain to benefit from a will or trust. A contingent beneficiary may or may not become a beneficiary depending on the terms of the will or trust, and what happens to the primary beneficiary.

Bond – A document guaranteeing that a certain sum of money will be paid to those injured if a person in a position of trust (an executor, trustee, or guardian) does not carry out their legal/ethical responsibilities.

Business Structures- These are forms of ownership that can be either public or private (ex: C or S corporations, sole ownership, Limited Liability Companies, and partnerships)

Charitable Trust – A trust used to make a substantial gift to a charity, and also to achieve income and estate tax savings for the grantor.

Children’s Trust – A trust created for a minor child or young adult.

Codicil – A separate legal document that changes a will after it is signed and witnessed.

Conservator – A person appointed by a court to manage the affairs of a mentally incompetent person.

Contract – An agreement between two or more people to carry out specific duties, that is either oral or written.

Death Taxes – Taxes levied on the property of the person who died.

Descendant – A person who is a progeny, however far removed, of a certain person or family.



Disclaimant – An individual who refuses to accept property that has been gifted or left to them by some written instrument. The beneficiary renounces their right to receive the property

in question.

Distribution – The passing of personal property to the beneficiaries of an individual who has passed away.

Domicile – The state or country where one has his or her primary home.

Donee- The individual who receives the gift.

Donor – The individual who gives a gift.

Dower and curtesy – The right of a surviving spouse to receive or enjoy the use of a set portion of a deceased spouse's property in the event the surviving spouse is not left at least a third or one half and chooses to take against the will. Dower refers to what a surviving wife gets, and curtesy refers to what a surviving man gets.

Durable Power of Attorney – A power of attorney which remains effective even if the person who created it (the principal) becomes incapacitated. The person authorized to act (the attorney-in-fact) can make healthcare decisions and handle the financial affairs of the principal.

Encumbrances – If property is used as collateral for payment of a debt or a loan, then the property is encumbered. The debt must be paid off before it can pass to a new owner.

Equity – The difference between the current fair market value of the property and the amount owed, if any.

Escheat – Property that goes to state government because there are no legal inheritors to claim it.

Estate – This refers to all the property that is owned when an individual dies.

Estate Taxes – Taxes imposed on property as it passes from the deceased to the beneficiary.

Executor (Personal Representative) – The person named in a will to manage the deceased estate, deal with the probate court, collect and distribute assets as specified by the will.

Financial Beneficiaries – People or institutions designated to receive life estate trust property outright upon the death of a life beneficiary.

Formula AB Trust – A trust funded with an amount no larger than the personal federal estate tax exemption as of the year of death.

Future Interest – A right to property which cannot be enforced in the present, but can at some future time.

Generation-skipping Trust – An estate tax-saving trust, where the principal is left in trust for one's grandchildren, with one's children receiving only the trust income.

Gifts – Property given to another person or organization.

Gift Taxes – Taxes levied by a government on gifts made during a person's lifetime.

Grantor – The person who establishes a trust. Sometimes called a "trustor" or a "settler".

Grantor Retained Income Trusts – Various types of trusts where the grantor retains some interest in the trust property during his lifetime.

Guardian of a Minor's Property – The person named in a will to care for property of a minor child not supervised by some other legal method, such as a minor's trust.



Guardian of the Person – An adult appointed or selected to care for a minor child in the event no biological or adoptive parent of the child is able to do so.

Heirs – Persons entitled by law to inherit an estate if there is no will or other document/devise to pass property at death.

Holographic Will – A will that is completely hand written by the person making the will.

Inherit – To receive property from someone who has passed away.

Inheritance Taxes – Taxes imposed on property inherited from a deceased's estate.

Insurance – Is a risk management tool to provide income to beneficiaries in the event of someone's death.

Intestate – To die without a will or other valid estate transfer device.

Intestate Succession – The method by which property is distributed when a person fails to distribute it in a will. The law of Wyoming provides for the distribution to certain surviving relatives.

Irrevocable Trust – This is a type of trust that cannot be revoked, amended or changed in any way after it is set up.

Joint Tenancy – A form of ownership in which two or more individuals own property together.

Letters of Administration – A written document issued by the probate court authorizing the administration to act on behalf of the estate of a person who died intestate. (I.e. without a valid will)

Letters Testamentary - A written document issued by the probate court authorizing the

executor named in a decedent's will to act on behalf of the estate.

Life Beneficiary – A person who can receive use of trust property and benefit of trust income for his or her life, but does not own the trust or have the right to dispose of it.

Life Estate – The right to use trust property and receive income from it, during one's lifetime.

Life Insurance Trust – An irrevocable trust that owns a life insurance policy to reduce the size of the original owner's taxable estate.

Liquid Assets – Cash and other assets that can be readily turned into cash.

Living Trust – A trust set up while a person is alive and that remains under the control of that person until death.

Living Will – A document in which you decide that you do not want to have your life artificially prolonged.

Marital Deduction – A deduction allowed by the federal estate tax law for all property passed to a surviving spouse.

Minor – Persons under 18 years of age. All minors are required to be under the care of a competent adult unless they qualify as emancipated minor.

Mortgage – A loan to finance the purchase of real estate.

Mutual Wills – The separate wills of two or more persons with reciprocal provisions in each will in favor of the other person(s).

Net Taxable Estate – The value of all property at death, less encumbrances and other liabilities.

Non-Probate Property – Property that passes outside the administration of the estate, other than by will or intestacy.



Ongoing Trust – Any trust that is designed to be irrevocable and operational for an extended period of time.

Pay-On-Death Designation – A method of making provisions on a form stating who will inherit the remains of their property when they pass away. Most commonly used for bank accounts.

Personal Property – All property other than land and buildings attached to land. (I.e. vehicles, bank accounts, wages, securities, a small business, furniture, insurance policies, jewelry, pets, etc).

Pour-over Will – A will that “pours over” property into a trust. Property left through the will must go through probate before it goes to the trust.

Power of Appointment – Having the legal authority to decide who shall receive someone else’s property.

Power of Attorney – A written document that enables an individual to designate another person as his “attorney in fact” who will act on his behalf. The scope of the power can be very limited or quite broad.

Pretermitted Heir – A child who is either not named or not provided for in a will. Assuming that persons want to be provided for, a child is entitled to share in the estate.

Probate – The court proceeding in which the authenticity of a will, if there is one, is established, where the executor or administrator is appointed, debts and taxes are paid, heirs are identified, and the property in the probate estate is distributed according to the will, if there is one.

Probate Estate – This is the property that will pass through probate, except property that has

been placed in joint tenancy, a living trust, a bank account trust or in life insurance.

Probate Fees – These are fees, often a percentage of the estate, paid to an attorney and others who handle the probate proceeding.

Property Control Trust – A trust that imposes limits or controls over the rights of beneficiaries; for a number of reasons.

Proving a Will – The process where the court verifies that your will is valid.

QDOT Trust (Qualified Domestic Trust) – A trust used to postpone estate taxes, when more than the amount of the personal estate tax exemption in the year of death is left to a non-U.S. citizen spouse by the other spouse.

QTIP Trust (Qualified Terminable Interest Property Trust) – A marital trust with property left for use of the surviving spouse as life beneficiary. No estate taxes are assessed on the trust property until the death of the life beneficiary spouse.

Real Property – All land and items attached to the land, such as buildings, houses, stationary mobile homes, fences and trees.

Residual Beneficiary – A person who receives any property left by will or trust not otherwise given away by the document. If there is a life beneficiary, then a person who receives the property after the life beneficiary dies.

Right of Survivorship – The right of a surviving joint tenant to take ownership of a deceased joint tenant’s share of the property.

Rule Against Perpetuities – A rule of law which limits the duration of trusts, except charitable trusts. Wyoming has a rule against perpetuities; generally, a trust cannot last longer than the lifetime of someone alive when the trust is created, plus 21 years.



Special Needs Trusts- This trust is created to ensure disabled or mentally ill beneficiaries are cared for and can enjoy the property that is intended for them.

Spendthrift Trusts- This trust is designed to prevent a beneficiary from being able to waste the trust principal.

Sprinkling Trusts- This trust designed so the trustee can decide how to distribute trust income or principal among different beneficiaries.

Successor Trustee – The person or an institution who takes over as trustee of a trust when the original trustee has died or become incapacitated.

Taking Against the Will –The ability of a surviving spouse to choose a statutorily allotted share of the deceased spouse's estate instead of the share specified in his or her will.

Tenancy by the Entirety – A form of marital property ownership, with a right of survivorship between spouses. Similar to joint tenancy.

Tenancy in Common – A way for co-owners to hold title to property that allows them maximum freedom to dispose of their interests by sale, gift or will. At a co-owner's death, his or her share goes to beneficiaries named in a will, trust or to the legal heirs, not to the other co-owners.

Testamentary Trust – A trust created by a will.

Testate – One who dies leaving a will or other valid property transfer device.

Testator – A person who makes a will.

Trust – A legal arrangement under which a person or institution controls property given by another person for the benefit for a third person. The person or institution who gives the trust is called the grantor, the person who controls the trust is called the trustee and the person who receives assets out of the trust is the beneficiary.

Trustee – People or institutions that manage a trust and trust property under the terms of the trust.

Trust Corpus – The property transferred to the trust.

Uniform Anatomical Gift Act – A law adopted by most states that enables the donation of body parts for the use of science, education or individuals needing certain organs.

Uniform Transfer to Minors Act – A series of state statutes that provide a method for transferring property to minors.

Will – a legal document in which a person states various binding intentions about what he or she wants done with his or her property after death.

Wyoming Health Care Decisions Act – A law passed in 2005 that allows a person to express his or her wishes about all forms of health care decisions, it also allows an individual to designate another person to make health care decision on their behalf when that individual can no longer do so.