Estate Planning 101

(An easy read for a hard subject)

by

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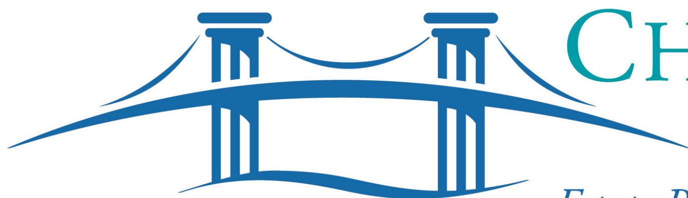

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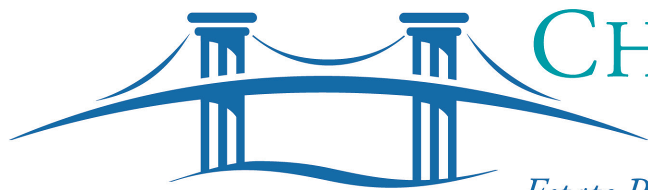

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Chesapeake Legal Counsel provides an array of legal services for individuals, their families and their businesses including estate, tax, charitable, Medicaid, and Special Needs Trust planning because the transfer of wealth, like the transfer of values, from generation to generation, demands care and attention.

Founded in 1993, Chesapeake Legal Counsel, LLC is a Delaware based company with offices in Ocean View, Delaware and Annapolis, Maryland. The attorneys at Chesapeake Legal Counsel use their years of legal experience to design those strategies that allow the client to transfer wealth to whom they want, when they want, and how they want in an efficient and understandable process.

THE STRENGTH OF FAMILY

The transfer of wealth, like the transfer of virtue,

from generation to generation demands care and attention.

The strength of the family, like the strength of counsel,

depends on commitment, perseverance, patience – and humor.

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rev: August 23, 2023

TABLE OF CONTENTS

Introduction 5
Goals and Objectives 11
Planning Goals & Objectives 12
What To Do When You Die 13
The Will 15
The Revocable Trust 17
The Inherited Trust 19
The Revocable Trust (Part Two: The Process) 22
The Design Meeting 24
The Revocable Trust (Part Three: Other Issues) 27
The Medicaid Asset Protection Trust
(Part One: Why the MAPT) 32
The Medicaid Asset Protection Trust
(Part Two: What is the MAPT) 35
The Veteran's Asset Protection Trust 40
Wills VS. Trusts — It Depends 42
The Powers 44
What If I Move 47
What Does "IT" Cost 48
A Final Note 49
Glossary 51
About the Author 56

INTRODUCTION

So you* want to do estate planning but you are not sure what it entails. You watched a TV show where the doctor says you have a terrible disease and you need to get your affairs in order. Or you wrote a will when the kids were very young but that was 25 years ago and besides you don't know where they are. Or one of the children has become estranged and you don't want to leave anything to him – or, God forbid, the spouse of that child.

Whatever your motivation, you have accumulated some assets over your lifetime and you would like to make some decisions about how those assets will be used after your death. So in its simplest form, estate planning is giving:

1. What you want;
2. To whom you want;
3. When you want;
4. And how you want.

Sounds simple but each of those statements can be turned into a question that is not always so simple to answer. For example, many clients can easily answer "whom you want" but many struggle with this. This lovely couple had a list of twenty beneficiaries and they visited the office every January to make changes: change Harley from 5% to 3% but Davidson from 3% to 5%. When I asked why they changed their plan so frequently and why each January? "*Well,*" they said, "*it depends on who sent us Christmas cards!*"

"When you want," also vexes some clients. Many clients do not want their children to have control of an inheritance until they have proven themselves mature enough to manage those assets, let's say, when they turn 50 or thereabouts. Actually most parents would not like to see their children burdened with managing appreciable assets until they are at least 25 or 30 years of age.

"*I don't want to rule from the grave,*" is also a frequent refrain but I ask, "*Why not?*" In fact you have a responsibility to do so, especially if you are beneficiaries are young or, for whatever reason, not mature or responsible enough to manage their own affairs. As a parent you would be remiss if you gave a loaded gun to five year old son to play with; likewise as a parent you would be remiss to give your addicted child a small fortune to spend on his habit.

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*This ebook is written for you but I sometimes refer to you as client or maybe even as the trustmaker. Whether I use the second person or the third person, the important thing to note is that it is written for you, the lay reader, and not meant to be a law review treatise. I trust that you will forgive any inconsistency in style.

Likewise I sometimes write in the first person singular ("I") and sometimes in the plural ("we") and yet at other times in the third person (the office, the firm, or Chesapeake Legal Counsel, LLC). Whatever the style, I am writing for all the attorneys at Chesapeake Legal Counsel, but my guess is that you knew that already.

All of these issues are explored as part of the planning process and that is when the counseling starts. To counsel is to give advice or an opinion prior to a making a decision or taking some action. Writing a will or a trust involves more than taking your name, your children's names, and filling in the blanks on a form. (Although this is what some attorneys may do, especially those who do not practice estate planning on a regular basis.) It is the attorneys job to listen first, learn your story, render counsel, and make recommendations but in the end, this is your plan and one that you brings peace of mind from knowing your affairs are in order.

The Estate Planning Puzzle

[This article was written many years ago when the federal government imposed an estate tax on all assets in excess of a million dollars. I have removed explanation of the specific techniques but the approach to planning remains the same.]

Ultimately the value, and some would say the curse, of accumulated wealth is the privilege of deciding what to do with it: spend it, give it away, or just hold it until you die. All three options carry consequences, psychological and social as well as taxing and financial. How one approaches the issue depends on a myriad of factors such as one's sense of security, one's philosophy (what do I owe my children, what do I owe my community and the institutions that supported me), and perhaps, most importantly, one's need to control (that is, when to let go).

All of these factors are thrown into the pot, stirred around, and out pops a solution to the estate planning conundrum. Were it that easy! To add to the mix is a set of tax rules that are in a state of flux. The ever changing tax landscape alone is excuse enough for many individuals to postpone their planning — until when? Ah, timing another important factor and one of particular significance to those whose strategy is to spend it all before they die. If we only knew the date.

Decisions, decisions, decisions. What many call the complexity of estate planning relates not to the tax rules (which can be complex) but rather to the difficulty of predicting the future and the decisions that must be made based on those predictions. This is particularly burdensome task for those who have a need to control. Dissatisfaction is inevitable when we expect to find a permanent solution for an impermanent state of affairs. The fact that things will change is not itself another excuse to not make any decision but if we are aware that things (issues, tax rules, our beliefs) will change over time it mollifies the dissatisfaction. A flexible, open mind not only makes it easier to resolve the estate planning conundrum for today but it also makes it easier to adapt as circumstances change as they always do.

Unfortunately estate planning is not like buying socks: one size does not fit all. There is no simple set of rules that, if followed, will result in the best of all possible solutions. There are no secret techniques, no hidden formulas. What you do have is your own beliefs and your own set of principles that will guide you. The choices that you make about these interlocking sets of principles impact the whole.
Think of the smorgasbord of techniques as puzzle pieces that change in size and shape depending on the principles that you adopt. Once the principles are established and the contour of the pieces set, the puzzle

can be assembled. Yes, the winds will come and the earth will shake and our nicely fashioned, beautifully constructed work of art will fall into disarray. (Children will die before we do; there will be a reversal of fortune; tax laws will change; even our beliefs may change.) When that time comes our solution can change along with it but in the meantime, the dissatisfaction of incompleteness can turn to peace of mind.

What then are some of the principles that shore up the foundation of our plan?

I want to take care of me and my spouse, I don't want to pay any taxes, and then I want to leave it all to the kids — and I want to keep it simple. How do we do that? To even think that there can be a simple solution can be a fatal flaw since the inevitable "complexity" becomes the excuse to abort the process. Such a thought process is also fatal in that it focuses on the techniques to avoid taxes without first sorting out what one really wants to accomplish and what one is willing to let go of to accomplish that goal.

Rule #1: the more time and effort one expends on the preliminary questions, on articulating one's goals and objectives, the less time and effort one then spends on techniques.

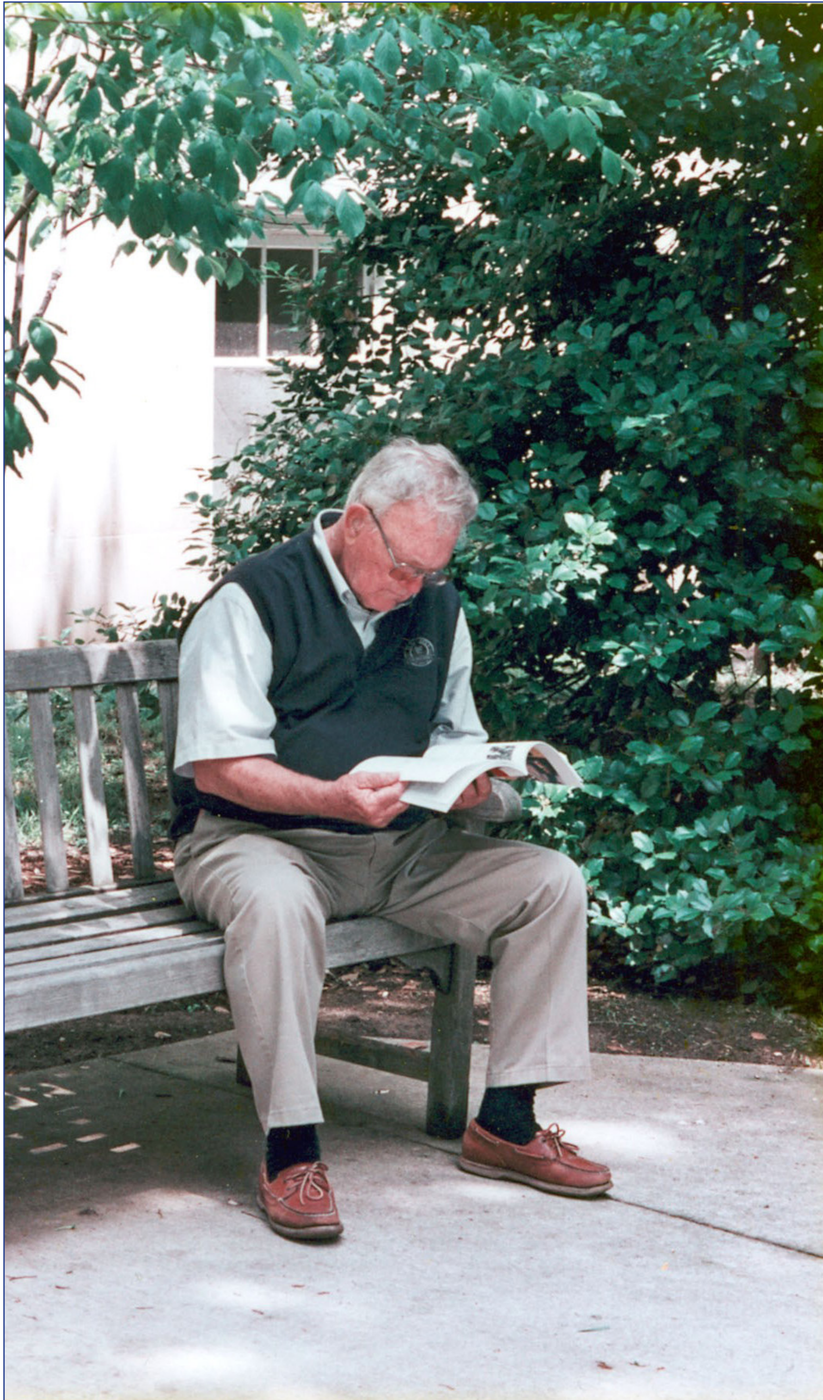
Consideration of all the subjective factors appears to be a daunting task but one made simpler by breaking it down into some objective benchmarks. What follows is some of those benchmarks to guide you towards a conclusion:

WHAT ARE OUR CASH FLOW NEEDS? When asked about their estate planning goals, most clients report that their primary goal is to maintain current lifestyles — or, better yet, an improved lifestyle. Determining what you need to meet current obligations is a good first step but just as important is consideration of what else is possible or desired.

In making this determination one should bear in mind the relationship between time and money: deciding how to spend your money is also a decision on how to spend your time. For example, do you want to spend more time with the family or take more leisure trips? If so, then who will tend the shop? Who will fix the plumbing when the tenant calls: you or the other guy? Having the other guy do the work gives you more free time but certainly impacts to whom the revenue flows.

Implicit in this decision is a value judgment that is not readily apparent. It sounds trite when a businessman says that he wishes that he could spend more time with his family. A demanding career or business pursuit can be a jealous mistress that does not like to share its time; it isn't a demand that can be put on hold nor is it a demand that can easily be turned on and off. Yet when it comes down to whether to fix the plumbing myself or pay the other guy, what is the cost of fixing it myself?

I'LL JUST SPEND IT ALL. Making decisions, especially about the future, creates such consternation that the complexity of it all causes many clients to throw their hands up with a comment that they will just spend it all before they die. This is virtually an impossible task not only because we do not know when we will die but also because for many clients it is against their nature to spend freely. There is little joy in frivolously spending what was painstakingly acquired — and for the frugal, any spending is frivolous.



Saying that you will spend it all is but another way of saying that you can't make a decision.

Unfortunately not making a decision is not an option. Objectively it is not an option because no-decision is in fact a decision; subjectively it should not be an option because the responsibility of deciding what to do with your wealth accompanies the accumulation of that wealth; deciding what to do with your wealth is also a parental responsibility and takes us to the next question that needs to be addressed.

WHAT DO WE WANT FOR OUR CHILDREN? It was Warren Buffet who said something to the effect that he wants to leave his children enough money so that they can do whatever they want but not so much that they can do nothing. If we want our children to be industrious, hard working, contributing members of society, do we further that goal by simply giving them all we have? Or does such a legacy deprive our children of the opportunity to learn the lessons that we did when we figured out how to make our way in the world.

An alternative approach might be to decide what it is that we would like to provide for them: enough to own a home (and maybe a second one) free and clear, enough to educate their children, enough to play golf (with lessons) for the rest of their life and enough to take extended vacations every now and then — if we could provide that would we be satisfied? What was not given to heirs could then be used to address whatever situation/condition/circumstance we would change/rectify if money were no object.

Nevertheless, it is not an unusual response for the clients to decide that they want to leave it all to the kids. However they condition that decision with the proviso that they would willingly give to charity if there were a tax advantage in doing so. At death all of our assets must be distributed either to our heirs, our charities or our government and it would be nice if we could just shift what was going to our government to a charity. Alas, it doesn't work this way and what goes to charity generally comes from a little here (heirs) and a little there (IRS). In other words, the goal of maximizing what we leave to the kids is not always compatible with the goal of paying as little estate tax as possible. Trade-offs are necessary.

Another compromise that needs to be made reconciles that same desire to pay as little estate tax as possible but to maintain control over our assets as long as possible.

This same question can be flipped around: what do I want to do for the world after which I can provide for my children who so far have managed quite well on their own and whose lives will continue marvelously even if they don't inherit a dime.

CAN I HAVE MY CAKE AND EAT IT TOO? It is not that unusual to hear the anecdote of the client who did too much estate planning, who got so caught up in the rush to avoid taxes that he gave away the store only to live long enough to regret that decision. Although philosophers will argue that life is impermeable and that in the final analysis we cannot really control anything, one must decide carefully to give up control of what we think we can control. Control is easily understood in the business setting but it also extends beyond that. You will not find much satisfaction in making gifts to your children if you don't like their spending habits.

Fortunately for those who do like to control, the estate planning community has developed ways to give away an asset yet continue to control it. Which leads us to the mechanics: how do we start putting the pieces of the puzzle together? Although there is no recipe, no set formula, the following steps are a guide through, and an explanation of, some of the techniques that can be pieces of your puzzle.

So where does this leave you? All you want is to have a plan so you don't have to pay taxes. I guarantee I can do that for you! All I need is your list of assets. Of course, I do not guarantee that you will like the plan because it will be my plan and not your plan. And it would be terribly inefficient for me to continue to trot out one plan after another until I created one that suits you. Far better for you to start to describe what your plan might look like; what are its major features and primary objectives? Once you know that then you can ask yourself what is standing in the way of that plan? Generally that turns into a question

about cost: what are you willing to pay to achieve your plan, that is, what are your prepared to let go of. What shift of income, principal, and control will result from this plan? How will this plan affect my desire, if any, to continue to accumulate?

The purpose of the dialogue with your estate planning attorney is to answer these questions. The work of the estate planner does not start with the creation of paper (or even the explanation of a really neat technique) but rather with the very first conversation about you and your family. All of that information shapes and forms the pieces of the puzzle that eventually fits together to become your estate plan.

GOALS and OBJECTIVES

The first question I always ask a client is what motivated you to make this appointment. More of than not, there is a primary factor that motivated them to pick up the phone and make a call. You would be surprised how often the reason to write a will is the result of a trip; what is we both died in a plane crash? Unfortunately the plane takes off in a week or two which hardly leaves any time to make an appointment, much less finish a plan. Other motivators include the diagnosis of a fatal disease or a horrible experience managing a relative's estate.

More often than not, when I ask a client what you want to achieve, the typical answer is "*We want to take care of each other, take care of our children equally, avoid taxes, and avoid probate.*" These are the only goals that are mentioned because the clients may not know what other options are available. On the next page is a list of possible goals and objectives that I ask clients to consider prior to the first meeting.

To articulate a goal or objective is just the first step in developing the plan. Those goals and objectives need to be prioritized because they are not all compatible. For example, you make check that you want to control your assets over your lifetime and you also check that you want to protect your assets if you go into a nursing home. To achieve the latter you may need to forego the former, at least in part.

The other goal that is commonly mentioned is the desire to keep it simple; the question is, simple for whom? When assets are passed from one generation to the next, there is a certain amount of work that needs to be done and that work can be done before you die or after you die. If you want to make the transition simple and easy for you children, then you need to do the work; on the other hand, if you want it to be simple for you, then you can do nothing and the courts and your kids can sort it all out after your death.

It also helps to remember that because you are dealing with legal and tax issues, a certain amount of complexity is to be expected. The attorney's role is to explain the concepts in as understandable fashion as possible. The client's role is to be patient with the process and to know that the attorney (and maybe I can only speak for myself and my associates) will repeat the explanations as often as necessary for you to reach a comfort level.

Also it helps to remember that, unless you are an engineer, it is not necessary to understand all of the complexities. You are like the general who says to her troops, I want the army on top of that mountain peak tomorrow morning; it is up to her lieutenants and sergeants to figure out how to get there. You decide what the goals and objectives are and it is up to the attorney to get you there. If nothing else, just keep your eyes on the prize.

PLANNING GOALS & OBJECTIVES

Estate planning should always be done with your goals and objectives in mind. To assist you in articulating those objectives, please circle those issues that concern you. Write any other goals on a separate sheet of paper.

1. I want to create a consistent and comprehensive estate plan, which includes my own health care plan.
2. I want to plan for my elderly parents.
3. I want to preserve my privacy.
4. I want to reduce estate and death taxes to the lowest possible level.
5. I want to avoid probate and minimize settlement expenses for my family.
6. I want to plan for disability of my spouse or me and avoid court conservatorship.
7. I don't want to be forced to spend all of my assets if I go into a nursing home.
8. I want to protect my children from a failed marriage by preventing their divorced spouse from taking my child's inheritance.
9. I want to protect the inheritance of my minor or disabled children or grandchildren and avoid court conservatorship/guardianship.
10. I want to disinherit one or more of my children or other family.
11. I want to plan for my grandchildren directly rather than have them receive their parent's share of my estate.
12. I want to plan the transfer and survival of the family business.
13. I have one or more pets that should be protected and cared for.
14. I want to control all of my own assets while I am alive and healthy.
15. I want to save 100% of the estate tax on my life insurance so that all proceeds can pass to my heirs' estate tax free.
16. I want to create a special tax-exempt trust to which I can transfer some of my assets for a lifetime income and to avoid capital gains tax.
17. I want to control who will make health care decisions for me in the event of my incapacity.
18. I want to protect my children's inheritance in the event my surviving spouse chooses to remarry after my death.
19. I want to plan for a child with disabilities or special needs.
20. I want to plan for my children from a previous marriage.
21. I want to leave an endowment for my church or favorite charities.
22. I own one or more registered firearms that will be transferred upon my death.

WHAT TO DO WHEN YOU DIE

What to do when you die? Nothing; someone else has to do it. But how? One part of the definition of estate planning is giving your assets *"how"* you wanted. There are several options.

One popular way is to add someone's name to an asset. This option is so popular that one can easily conclude that most estate planning in this country is done by bank tellers who recommend to their older clients that they add a child's name to the client's checking account. Jointly owned assets immediately become the property of the remaining joint owner(s) upon the death of one owner. This is simple and easy but one must proceed with caution.

One client added his brother's name to her account but when he filed for bankruptcy, he had to list the account as an asset. Another client added her son as a joint owner with the son's promise that he would divide it with his siblings. Mom dies and son keeps it all with the explanation: *"Before mom died, she said she wanted me to keep it all."*

Assets may also be transferred by beneficiary designation. Most notable in this category are qualified plans [IRA, 401(k), 403(b)] and life insurance but there are other options. Checking accounts can be made payable on death (POD) and brokerage accounts can be designated transfer on death (TOD).

One cannot designate a beneficiary for real estate but you can execute a "life estate deed." I give my home to my daughter but I reserve the right to live in the house for the remainder of my life. Upon your death, your daughter becomes the owner. Life estate deeds can be with reservation of powers (I retain the power to sell, mortgage or whatever without consent of the remainder owner) or without the reservation of such powers in which event I would need permission of the remainders to mortgage or sell the property. This makes a critical difference in planning to avoid nursing home costs. (See page 32 for more details.)

Joint ownership, beneficiary designations, and life estate deeds trump one's will or trust. Even if the will says "I give my checking account to all my children," the joint owner on the account takes it all. This happens because the joint assets and beneficiary designated assets do not go through probate.

What is probate? It has been described as a lawsuit that you file against yourself for the benefit of your creditors – and at your expense. It is government oversight of the transition of your assets from your estate to your heirs but first making sure that your bills have been paid. A will does not avoid probate; it guarantees it and it is up to the court to make sure that it is implemented exactly as you wish.

This is not to say that one should not have a will. You just need to understand that there is a certain amount of time and aggravation that can come from dealing with the government and all its rules and regulations.

Another way to dispose of your assets it by means of a trust. (For the explanation of trusts, see page 17.) The trust can be either revocable or irrevocable but for most clients in a typical estate plan will utilize the revocable trust. It acts like a will but with the benefit that it is commonly not subject to judicial supervision. And like the will, it can always be revoked, changed, amended; asset can be put in the trust and taken out of it. It is especially popular with clients who own real estate in two different states since one must go through probate in every state where you own real estate; the trust would avoid probate in both states.

All of these methods are tools available for the transfer of your estates and most plans involve the use of all of them. Deciding when to use which technique for what assets is part of the planning process.

THE WILL

A will is an estate planning tool and like any other tool it has a time and place when it is most helpful. For many of my clients, this will mean prior to half time, that is, they are still in that phase of life where they are still acquiring assets, still wheeling and dealing, and not ready to engage in more robust planning with trusts. Wills are frequently used with clients who plan to avoid probate with other tools (joint accounts, beneficiary designations, life estate deeds) but need a document for any assets that remain in the client's name at death. However the group that needs a will more than any other group are young marrieds with children.

Harry and Sally never wrote a Will because they could not agree on whom to appoint as the guardian of their three children. If they failed to write a Will and the worse happened to both of them, they realized that some judge who had never met their children would be making that decision. Thus they decided that if the second one died in an even numbered year, his parents would be guardian and if the second one died in an odd numbered year her parents would be guardian. Not the best solution but not the worst either. But what really spurred them to take action was the realization that if they did nothing about a Will and they both did die, their darling son would have one-third of everything they have available to him at age eighteen. Yikes!

Because couples need to make provisions for their young children, including the protection of the children's inherited assets as they get older, and because they also want to protect the assets in the hands of the survivor of them, some of the benefits of more detailed planning are included in the typical will that I suggest for couples with minor children. The will designed for young couples is meant as an alternative to the "I-LOVE-YOU" Wills in which couples leave everything to each other. A young-married-with-children Will also makes disposition of everything to each other, or, at least, to the control of each other, but it provides for control in a way that achieves other purposes such as tax avoidance and asset protection.

In the event of a tragic death of a young mother or father, it can be assumed that the surviving spouse will remarry at some point. The question is how to protect the assets for the children of the deceased spouse. My Young-married-with-children Will includes provisions for a Family Trust, that is, a trust where the surviving spouse may be the trustee of this trust as well as the beneficiary of it. The terms of the Family Trust state that the surviving spouse cannot withdraw the principal for just any reason but that spouse can receive all of the income and also principal for health, education, maintenance and support. This is not an onerous standard to meet in any event but it is certainly not an obstacle whatsoever when the surviving spouse as the Trustee of the Trust is the one who makes the interpretation of what is necessary for maintenance and support. The trust will also provide that in the event that the survivor remarries, there is to be no distributions of principal from the Family Trust unless the survivor enters into a prenuptial agreement with the new spouse. When the second parent dies, the assets in the Family Trust must be distributed to the couple's children. (Like many explanations in this book, this is just one way of doing this; there are certainly many variations.)

Typically most young couples own their assets jointly and there is no need to go to probate just because of the Family Trust. There are several ways that assets can get into the Family Trust after a death but for purposes of this Will, two ways stand out. The first way to fund the Family Trust is to make it the beneficiary of any life insurance policies on the life of the decedent. A second way would be to make investment accounts transferable on death (TOD) to the Family Trust.

Other features of a will for someone with young children:

THE COMMON TRUST

The Common Trust comes into play only if both spouses are deceased; it continues the use of your wallet for the benefit of those of your children who are most in need. Rather than dividing your assets into equal shares for each child, your pocketbook stays intact until your youngest child reaches the age of 25 or graduates from college. This is a way of insuring that the whole family shares in the cost of raising and educating your youngest just as it did for the oldest.

CHILDREN'S TRUST SHARES

The Will distributes the assets equally to your children but in Trust that will continue for their lifetimes and protects those assets from divorce, from lawsuits, and from other creditors and predators. While they are young they need this protection and as they get older they want the protection. However, this does not mean that they do not have control over the assets; they do, just as the surviving spouse had control over the assets in the Family Trust. The difference is that they are not given this control until an age that you deem appropriate. Prior to your child gaining control, the Trustee that you name will have that control and make distributions to your child as needed.

THE REVOCABLE TRUST

Many people hear the word "trust" but are not quite sure exactly what it means. The best way to understand it is with an example. Louie says to Huey, *"I am going to give you a hundred dollars and I want to you hold this money for me but if Dewey needs money for a haircut, give him the money that he needs. Will you do that for me?"* When Huey gives his consent, there is a trust; assets are given to someone who agrees to hold them and to follow the instructions. Bottom line, a trust is nothing but a written set of instructions.

In that example, Louie was the trustmaker (also called grantor or settlor); he is the one who makes up the terms of the trust. Huey was the trustee; he is the one who manages the assets and makes distributions in accordance with the trustmaker's instructions. Dewey was the beneficiary. Every trust has a trustmaker, a trustee and a beneficiary.

With the revocable trust, the client may wear all three hats: she is trustmaker, trustee and beneficiary. Sounds redundant. Why would one want to do this? Three major reasons:

If the assets are in the name of the trust at the time of the trustmaker's death, the assets do not have to go to probate. Assets are distributed to the beneficiaries of the trust by the trustee who follows the trustmaker's instructions.

By avoiding probate, the disposition of the decedent's estate remains confidential. Probate records are open to the public. Because the probate process requires an inventory of the decedent's assets and because the probate record contains pertinent information about the decedent and his family, the probate records are fertile grounds for those interested in stealing an heir's identity. The revocable trust also frustrates the curiosity of nosy neighbors.

The trust is also an excellent plan in case of mental incapacity of the trustmaker. In the trust, the trustmaker names a successor trustee who can step into the trustmaker's shoes in the event of death or disability. To this extent the trust is an insurance policy against guardianship. Guardianship is probate while you are alive, only worse; it requires period accountings to a court and continuing court supervision; it is also very expensive.

Because the trustmaker is also the trustee, the revocable trust is characterized as a "grantor trust" for tax purposes which means that it does not have a separate tax identification number and there is no need for a separate tax return. All that you do with a trust is take your assets out of your right-hand pocket (i.e., in your name) and put those assets in your left-hand pocket (i.e., in trust name) but you are still wearing the pants and you remain in control of your assets.

With married couples, each spouse may have a separate trust but they also have the option of creating a joint revocable trust. In the joint trust the assets are deemed to be owned one-half by each spouse except for those assets that the couple identifies as a separate asset.

After creation of the trust and transferring assets into the trust, it falls into the background until something happens: a) clients desire to make a change in the trust due to a change in wealth or family circumstance; b) client's mental capacity starts to diminish; or c) client dies.

At first death the assets generally splits into two parts, the decedent's half and the survivor's half. The decedent's half is then distributed to what I call the Family Trust but is generically called either a bypass trust or credit shelter trust. It doesn't have to be divided this way and some practitioners may suggest keeping the entire trust intact. Why do I recommend the division?

Once upon a time, the bypass trust was standard operating procedure when the couple's assets could exceed one million dollars, that is, the amount over which federal estate taxes had to be paid (the "exemption amount"). The exemption now is over eleven and a half million per person ($23M/married couple), a range greater than most of my clients. The bypass trust was used to take advantage of the exemption amount of the first spouse to pass away. If taxes are out of sight for most clients, then why still include it? In a word, asset protection.

If the assets are held in the Family Trust the assets in that trust are protected from the survivor's creditors and predators. Depending on how the clients opt to design their revocable trust, the Family Trust may also be considered as remarriage protection to insure that the assets in the Family Trust be distributed to the decedent's heirs and not to a new spouse.

When the second spouse dies, the assets are then distributed to children and/or other beneficiaries. I always suggest that these distributions be made in trust, again for purposes of asset protection. (See next page for a description of the inheritor's trust.)

What I am describing is one way to design the trust. I emphasize that every trust is unique and the usual way of doing things is a helpful framework from which to start and then add a change here or there. In the end it is the client's trust, not mine.

As stated earlier, a trust is nothing but a set of instructions and the trustmaker is free to include any instructions he/she wants so long as the instructions do not violate the law or public policy. One client said his son could have his inheritance if he was leading a good and moral life which he defined as not smoking, drinking, or having sex outside of marriage and then he set up a committee of the elders of his church to pass judgment. Not that I would recommend anyone else follow suit but it is an example of how unique it may be.

THE INHERITED TRUST

When a client creates a revocable living trust, at the time of the client's death the assets in the trust in almost all cases will devolve into a trust for the benefit of the client's descendants. The primary purpose of this new trust is to protect the assets from any claims that might be made against the descendant/beneficiary. For this reason it is frequently referred to as an asset protection trust. Those potential claims include demands from an ex-spouse, automobile accidents where the damage exceeds the amount of any insurance, or any of the thousand and one other reasons upon which lawyers can base a claim. Think of this trust as an insurance policy against all of that.

Like all things in the law, no guarantee comes with the trust that it will be 100% effective but it does place a formidable barrier between the beneficiary's assets and the potential creditors and predators. Various factors can either strengthen or weaken that barrier in the event that an aggressive creditor attempts an assault against it.

Some lawyers believe that the barrier can be made stronger by naming the trust department of a financial institution as the trustee but there is a cost to this and the loss of some control. Other lawyers argue that the beneficiary can act as the sole trustee without diminishing the barrier in any way. Many parents opt for a middle ground that allows the beneficiary to act as a trustee but, to further strengthen the barrier between assets and creditors, require that the beneficiary name an independent trustee to act with the beneficiary. In some cases there is a further requirement that the independent trustee be a CPA, an attorney, or a trust department of a financial institution.

One other option, and the one favored by many of my clients, is to make provisions for the appointment of a Distribution Trustee. This option was developed to eliminate problems associated with a beneficiary naming a co-trustee. In most cases the trust or will contains provisions for discretionary distributions by the Distribution Trustee but only if a creditor or other third party attempts to seize the assets in the beneficiary's trust. In that event, the beneficiary of the trust will appoint an individual or corporate fiduciary to serve as the Distribution Trustee for the trust.

To maintain this protection the beneficiary should not commingle the assets in the trust with the

beneficiary's other assets. Most often the beneficiary will instruct the company holding the trust assets to sweep all income out of the account and into another account in the beneficiary's name. In addition to the practical reasons for distributing the income from the trust to the beneficiary's own account, there is a tax reason for doing so. Income accumulated in a trust is taxed at a higher rate than if that same income was earned by an individual; the trust income is not taxed to the trust if it is distributed to the beneficiary of the trust.

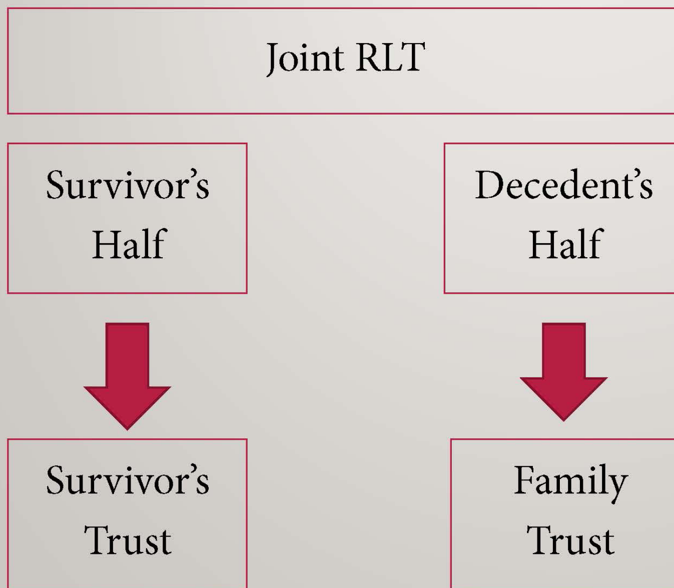
In most cases because the beneficiary is also the trustee, the Trust is a "grantor trust" for income tax purposes. As such, trust income may be reported under the beneficiary's social security number. Because this memorandum is not addressed to any particular client, this memorandum should not be taken as tax or legal advice and each beneficiary should visit this issue with his or her tax advisor. It is strongly recommended that the beneficiary stay in close communication with the beneficiary's accountant when structuring the trust account and when taking distributions from the trust, especially at the end of each tax year.

Note should also be made of the provisions in the typical trust relative to powers of appointment and the appointment of successor trustees. The trust is designed to last over the beneficiary's entire life and it usually gives the beneficiary the power to leave the trust assets to whomever the beneficiary wants (this is what is called the "power to appoint"). However, the beneficiary must exercise this power by means of the beneficiary's own will or revocable living trust. If the beneficiary fails to do this, then at the beneficiary's death the trust will be distributed to the beneficiary's descendants and, if none, as set forth in that particular trust. This too is something that each beneficiary should bring to the attention of his/her legal advisor.

As previously mentioned, the beneficiary may serve as one trustee and the beneficiary must have an independent trustee serve with him or her. The beneficiary also has the right to appoint a successor trustee if for any reason the beneficiary cannot continue to serve. The appointment of a successor trustee must be in writing.

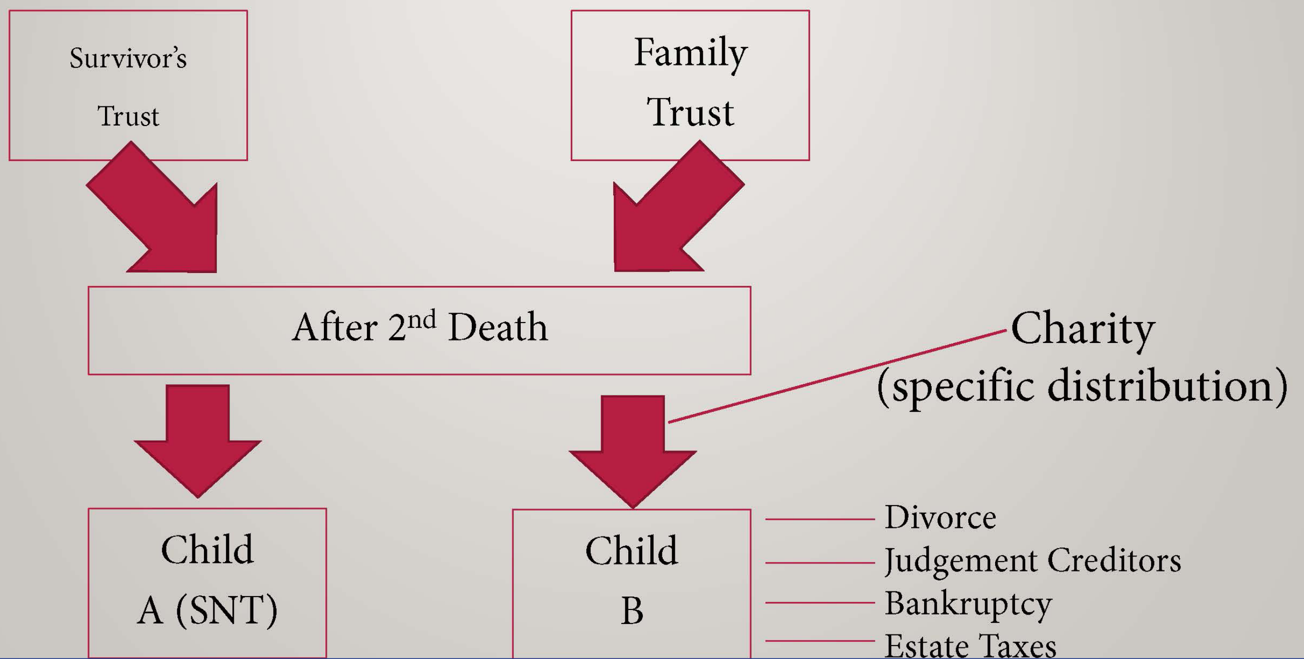
To reiterate, this is a generic explanation and the provisions for any particular trust may vary. The purpose of this explanation is not meant to illustrate the terms of any one trust but rather to highlight the major advantages and disadvantages of a beneficiary's trust.

PRESERVING & TRANSFERRING MY ASSETS



1st Death

PRESERVING & TRANSFERRING MY ASSETS

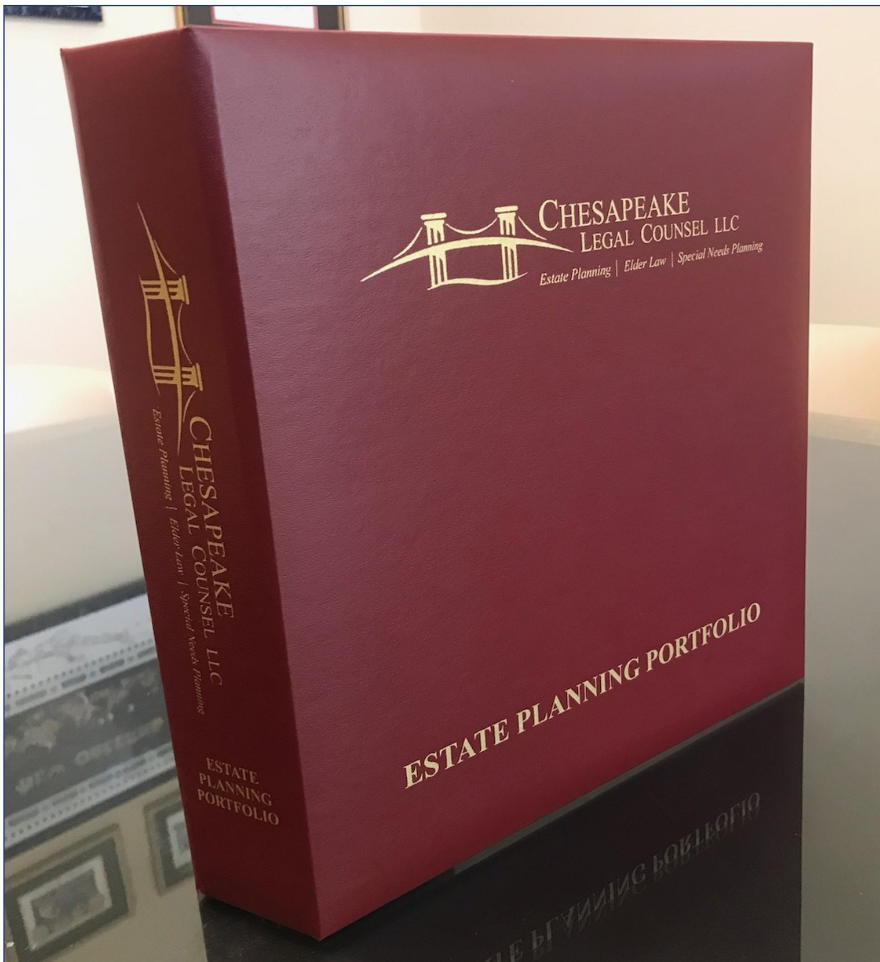


THE REVOCABLE TRUST (PART TWO: THE PROCESS)

There are three primary stages from beginning to end of the estate planning process: the design meeting, the signing meeting, and the funding meeting.

After some type of information meeting (this could be in the office, at a seminar or webinar, or from reading this book) and the client's grasp of the fundamental concepts, the first stage is a design of the trust. This is where the client makes all the necessary decisions that gives the attorney the information that he needs to create the trust. (See the following explanation of the design meeting and some of the issues to be decided.)

The attorney then creates a draft of the trust as well as a draft of all the other documents that are part of the plan. In most cases, we then send a summary of the trust and a summary of all the names in the trust to the client for review. Comments, questions and concerns are then addressed, usually in a phone conversation, after which the trust is finalized and ready for signing.



At the signing the trust is again reviewed but not read word for word (it is usually 70 or 80 pages long). After signing the client can take the trust home and read it, study it, memorize it because we have a third meeting where any changes can be made to the trust to meet the thorough satisfaction of the client. This is the funding meeting, the purpose of which is to make any necessary changes but also to sign those documents necessary to fund the trust.

Creating a trust without funding it is much like buying a new car and never putting gas in it; it just won't get you where you want to go. For this reason need an accurate list of all the client's assets along with copies of account statements, deeds, titles to vehicles (including boats), life insurance policies, and any and all

other documents evidencing a property interest. Upon receipt of these documents we create an asset chart that list all of your assets, even those that are not going into the trust. One of the more difficult task for surviving family members is to determine what the decedent owned at the time of death. This chart provides that information, or, at least that information at the time the trust was created.

IRAs and other qualified plans [e.g., 401(k) and 403(b)] cannot be held by a trust while the plan participant is alive; although a trust may be the beneficiary of a qualified plan, in most cases with responsible adult children we normally suggest naming the spouse as primary beneficiary and the participants descendants, per stirpes, as the contingent beneficiary. [The net effect of the "per stirpes" designation means that the share of a deceased child will be distributed to the deceased child's children.] Because distributions from traditional qualified plans creates an income tax liability careful planning with these plans is can get complex but is a must.

As part of the funding process we also review all life insurance policy designations and normally name the trust as the primary beneficiary so that any proceeds would enjoy the asset protection benefit of the trust.

THE DESIGN MEETING

At the Design Meeting I will ask all of the questions necessary to provide me with the information that I need to create a trust that is unique to you and your circumstances. Many of the questions are relatively easy to answer but others require more thought. The purpose of this memo is to give you a summary of the more thought-provoking questions.

FIDUCIARIES: The most important decision in any trust design is the selection of fiduciaries; this includes successor trustees in your trust, personal representatives in your will (we no longer use the term executor), an agent in your durable power of attorney, and a healthcare representative in your healthcare power of attorney.

In the trust, in most cases you would serve as your own trustee(s). If you cannot serve or no longer want to serve, whom would you appoint? In a harmonious family situation, we generally do not recommend joint trustees since it tends to complicate the administrative process at the time of death. You do have the option of naming one successor trustee for disability and yet another successor trustee at the time of death; most clients keep the appointments the same.

Likewise, the personal representative in your will should be the same as the trustee at the time of death and the agents on your durable power of attorney should be the same as a trustee acting in the event of your disability.

Most spouses appoint each other as their respective healthcare representative; if the spouse cannot act, then there are a couple of options for a successor. Some clients prefer to name all of their children and state that anyone of them can act alone. This is done because one never knows who will be available when a quick decision is necessary; however it also presupposes that the children are in general agreement on your care and will discuss any major decision among themselves. The other option, of course, is to name individual representatives and to require a majority decision (again a procedural hurdle when time may be of the essence).

If children are still minors, you will need to name a guardian for the child, that is, someone who is charged with making decisions in the best interest of the child, including where the child will live; consequently the guardian does not also have act as custodian of the child. We also recommend that you strongly consider not naming the guardian as the trustee of the child's inherited assets.

You will also be asked whether you want your fiduciaries compensated.

INCAPACITY: Because this is your trust, you can define incapacity anyway that you desire. A determination of incapacity is the trigger to transfer control from you to your successor trustee. Most often we state that the decision is made by your spouse and attending physician or, if there is no spouse, then two physicians. You do have the option of creating any combinations of individuals that you care to but we do not recommend anything that creates a burden to implement.

SPECIFIC DISTRIBUTIONS: You will need to decide whether to make any distributions to anyone such as a child who is not sharing in the residual distribution. For example, some clients prefer to leave a specific asset to one heir (Child A gets the house) or a vacation home is not divided but left in a trust designed just for that asset.

Note: We do not recommend specific distributions of tangible person property in the will or trust. This can be accomplished by means of a memorandum; at the time documents are signed, we provide the memorandum which you can complete at your leisure.

The same decision needs to be made for any distributions to a charity.

CONTROL AFTER THE FIRST DEATH: Most estate planning issues at their core are issues of control. While some people call trying-to-control-from-the-grave estate planners call prudent planning. There is always a balance between giving your beneficiaries flexibility but with some guardrails.

For married couples this means dividing the assets at the death of the first spouse to create a decedent's half and a survivor's half. The purpose of separating the decedent's half is to provide that half with a modicum of asset protection from the survivor's creditors and predators including nursing home expenses as well as new spouses. These assets would be earmarked for the children although we most often give the survivor the power to alter the percentages for each child.

The issues are of particular importance with a blended family and children who are his, hers, and ours.

INHERITANCE TRUST: We almost always create a trust for the benefit of your children or other family members/friends for whom the assets will be distributed. The purpose of doing this is, again, for asset protection, to protect the asses from creditors/predators when the children are young and, if necessary, to protect the assets from the child who lacks maturity/responsibility to manage huge sums of money. However to balance the control/flexibility issue, we generally allow the child to serve as his/her own trustee at a particular age, most often between 25 and 35 years old.

Obviously naming those individuals is the first question but along with that is a decision whether to treat them equally. (As an example, in a blended family where one spouse has three children from a prior marriage and the other spouse has two, are the assets divided so half goes to each spouse's children or will the assets be divided equally among all the children?)

Also many parents have made gifts or loans to one child but not others. In that situation we can add an equalization clause to take this into account when the ultimate distribution is made. We would need to know the amount of such gifts/loans.

When minor children are involved, we recommend a "common trust," that is, a trust for the benefit of all the children jointly; distributions from the trust can be made according to each child's need, very similar to the way you care for them now. Once the youngest child reaches a certain point in life or age, the trust divides into individual trusts for each child's benefit; for simplicity sake, we usually make this age 23 when the youngest should have completed college.

REMOTE CONTINGENT: We always include what we refer to as the "family reunion atomic bomb provision." It is the least likely thing to happen but is the most confounding question for many: how to distribute assets if all your named beneficiaries (that is, all descendants, including grandchildren and even great grandchildren) predecease you? The easiest answer is that the assets will be divided among the closest family members of each spouse or you can name particular family members or friends or charities or some combination of all of that.

TRUST PROTECTOR: In some cases, maybe a third of them, clients opt to name a trust protector, that is, someone who can be given extraordinary powers such as removing and replacing the trustee or making tax and administrative changes to the trust after it becomes irrevocable (i.e., after a death). The trust protector does not play an active role but rather is on stand-by until a trustee or beneficiary asks for some assistance.

WILLS: When creating a trust, the will is a pour-over will, that is, it simply states that any probate assets will be distributed to the trust. However the will also states a preference for burial or cremation.

FUNDING: Assets that are distributed by means of a beneficiary designation may, or may not, be distributed according to the distribution pattern in the trust; the beneficiary designation form furnished to the financial institution will control. However in many cases, life insurance and qualified plans may represent the bulk of value in the estate. A decision needs to be made whether to name the trust as the beneficiary of those type assets. In almost all cases the trust is the beneficiary of life insurance and frequently is the beneficiary for qualified plans. In any event, it should be called to our attention any intention of distributing those assets outside the trust and, if necessary, we can state in the trust your intended outcome. The trustee can be given the authority to re-distribute assets as necessary to achieve that outcome.

THE REVOCABLE TRUST (PART THREE: OTHER ISSUES)

Every client has a story and in the telling of the story various issues surface that require serious attention in the design of the trust. These are some of those issues.

Don't forget the will: Even with a revocable trust, you still need a will. What it says is that *"If I have anything just in my name when I die, I give it to my trust,"* and the trust then does all the work. The assets "pour over" into the trust; hence the name, "pour-over-will." There is usually something left in the decedent's name, most often an automobile; however with minimal value of what is left, probate is managed as a "small estate" and it is very quick and easy.

Don't forget the stuff: What lawyers call tangible personal property, real people call *"stuff.,"* the silver, the china, the lawnmower and golf clubs — and all the other stuff in the house (or some storage unit.) In many cases this is not a big issue; it is not a case who gets it but rather a case of who is going to come and get it. Children don't seem to want anymore stuff. On the other hand, because all other assets (houses, brokerage accounts, qualified plans) can easily and objectively be divided, there is no room for argument; but the stuff is not so easily or objectively divided and if one child is looking for an argument, a proxy war over childhood grievances, this is one place to create conflict.

I represented the estate of a lady who had two daughters, both very wealthy. When mom died, they argued over who was going to get momma's spaghetti bowl. They could buy as many spaghetti bowls as they wanted but each wanted momma's. We encourage clients to prepare a memorandum to distribute the stuff so you can decide who gets the spaghetti bowl; we also provide a form for this purpose.

Don't forget charity: There is a difference between philanthropy and charity in the same sense that there is a difference between giving a man a fish and teaching him how to fish. We find that with persons who have accumulated wealth they are not interested in so much as making a contribution but in making a contribution that they believe will make a difference.

One of the true privileges of accumulating wealth is the privilege of deciding how to give it away and give it away you must either to your heirs, to charitable and other non-profit organizations, or to the government. The part that you cannot leave to your heirs, the part that must go either to charity or to the government, we call Community Capital, that is, capital that must be used for the benefit of the entire community. The question is, who will decide what is the best use of that money: you or the government.

Fear of the government spending their Community Capital is the motivation that brings many clients to the threshold of philanthropic planning but once there they encounter a new world of possibilities. They get beyond the notion of simply leaving it all to the kids and discover the importance of transferring their values as well as their valuables. They explore the ways in which they might want to benefit their favorite cause themselves or establish the means for their heirs to be the benefactor. With appropriate planning our clients can keep more of their income, can pass on a greater inheritance to their heirs, and make substantial gifts to the charities of their choice, all in lieu of taxes. Once a client gets it, the planning process explodes with joy and excitement. "What legacy do I want to leave" is a far more interesting question than asking how much will my heirs have to pay in taxes.

One of the more interesting statistics about charitable statistics is the number of people who donate and who receive no tax benefit whatsoever. For those who are of modest means but who have a charitable intent, the charitable gift annuity is a strategy often overlooked. This strategy is particularly helpful to those who rely on income from certificates of deposit and other low yield investments and who would appreciate greater income without substantially greater risk. In the end, charity begins at home. The big question is: how do you define home?

Don't forget the instructions: Children can require particular attention for several reasons: some are special needs children who are not mentally developed to the point where they can care for themselves; others are chemically dependent or otherwise not financially responsible. And in some cases parents just don't want their children to become too dependent on what is being left to them. Even when the children do not fall into a special category, most parents want to protect their child's inheritance from failed marriages and future creditors. A trust for the child is almost always included in the plan. By using the appropriate strategy, you can protect your child's inherited assets in ways that they cannot do themselves after your death. Parents will often ask, "How will assets be distributed to my child." The answer is however you want. As previously explained, a trust is a set of instructions that you the trustmaker give to your trustee who agrees to carry out those instructions and the instructions can be anything so long as it is not against the law or public policy. That is why in the trusts that I create I always include guidelines to the trustee so that the trustee understands in some detail the manner in which it should exercise the discretion that you have given to it.

When instructions are not enough: Some children, even as adults, are just not good with money. Good kids but lacking in financial managements skills. And sometimes children have more serious issues: drug and alcohol addiction, gambling problems, poor choice of spouse/partner/friends, prone to frivolous spending, or overly generous to charitable solicitation. Yet hope springs eternal; parents cling to the belief that the prodigal son shall return. How then do these parents write an estate plan that both protects the assets from the improvident child but also gives the child the opportunity to earn greater control as he/she exhibits greater maturity and responsibility.

Most of estate planning ultimately comes down to an issue of control of assets and most people want each child to control their own share of an inheritance. When does one cede control to the previously improvident child? One way is to create an “allowance trust” for the child that provides the child with a fixed income, the purpose being that the child will always have a resource to keep; a roof over his/her head. However in order to give the child some independence the trustee (or some committee of trusted persons) can be given the authority to distribute more (or all) to the child as he exhibits the maturity to manage his own affairs. (One big clue: if child is incessantly asking the trustee for money in excess of the income, the child sees every bill as a financial emergency and is not ready for self- management of the trust assets.)

Don’t forget the child – or do so: Unfortunately we see too many cases of parent/child estrangement. Although we counsel to heal a broken relationship (and we have had some success), at times there is no alternative but to disinherit a child and sometimes the children of the estranged child.

Don’t forget the special child: Estate planning tools allow an individual to distribute their assets as they wish using all sorts of tailored options. There is no one size fits all estate plan, and this is especially true when it comes to families with members who have disabilities and may thus have special needs. Protecting their future when you are no longer there to care for them is an extremely important task. A special needs trust, also called a supplemental needs trust, (SNT) is one way to ensure your family member will be protected.

When a Special Needs Trust is established, a trustee — working on the behalf the beneficiary — manages the financial and administrative affairs of the beneficiary and has complete discretion as to whether to make any distributions. The beneficiary of a SNT may be completely incapable of managing their own financial matters and can be among the most vulnerable in society. If done properly, a special needs trust can supplement any benefits a disabled beneficiary receives from the government, such as Supplemental Security Income (SSI) and Medicaid, without disqualifying the beneficiary from receiving those benefits.

There are different types of SNT’s depending on the source of the funds that go into the trust. Moreover, many family members have questions such as how much should go into the trust, who should be the trustee and what kinds of things can the trust be used for. When establishing a SNT it is important to receive the counsel of an attorney with experience in drafting these specific types of trusts because there are different rules and requirements that affect the validity of these types of trusts and an experienced attorney can help answer your questions.

A Special Needs Trust may be a stand-alone trust or it may be included as a sub-trust in either a revocable or irrevocable trust. In every trust we do, we include provisions for a contingent supplemental needs trust that only applies if a beneficiary, at the time of a distribution, is receiving or applying for needs-

based government benefits. In many circumstances the receipt of an inheritance would disqualify a person from receiving needs-based government benefits; but if the inheritance is distributed to a special or supplemental needs trust, the beneficiary may keep the inheritance and still receive the government benefits. We include this because one never knows when a beneficiary may need such benefits, even as an adult.

Don't forget your new spouse: Second marriages almost always present a planning challenge and almost always end with a unique resolution. The first big issue is whether the husband and wife want to treat all of their combined children equally or whether the husband will direct his half (or his estate) to his children and the wife's half (or her estate) to her children. The second big issue is how to provide for each other during the survivor's remaining life in a way that gives the survivor a modicum of control over the assets but at the same time make sure that these assets will ultimately go to the deceased spouse's children. It is a balancing act that needs to be handled with sensitivity and understanding of each spouse's perspective.

One way to address this is to create two family shares upon the death of the second spouse to die. Typically it is the intent of the couple to treat their respective Family Shares equally and that goal of equality encompasses all of their assets including those assets distributed by the trust agreement as well as those assets passing outside of the trust and distributed by means of joint tenancy, beneficiary designation, or any other means. To assure this outcome, some control must be placed on the surviving spouse's power of appointment in the Survivor's Trust as well as in the Family Trust.

How to provide for the new spouse will also depend on any pre-nuptial agreement that the parties have agreed to.

Don't forget your old spouse: Never have I counseled a married couple where the thought of one of them passing away and the survivor remarrying invoked a chuckle and a swear that it would never happen. I delicately advise them that it could happen and, depending on age — and to some extent gender, most likely would happen. I have prepared prenuptial agreements for clients aged 83, 86, 88 and 90, all of whom who had marriages of 50 or 60 years.

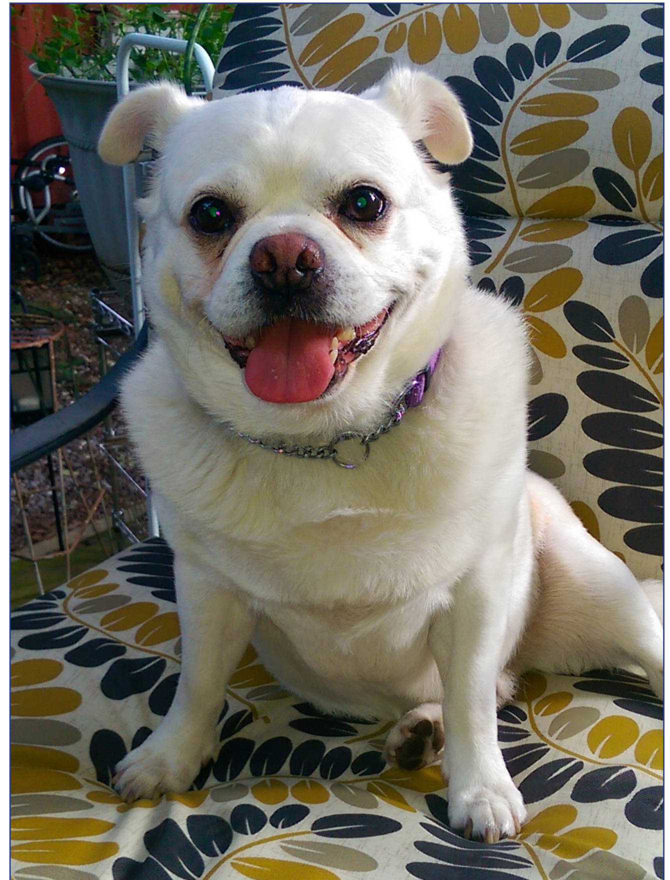
At a minimum we recommend inclusion of a provision that states that no principal should be distributed from the Family Trust unless the survivor has a prenuptial agreement. Without one a surviving spouse is entitled to a share (usually a third) of the deceased spouse's estate.

Don't forget your guns and pets: Most states have some laws that restrict who can own a firearm and they cannot be treated as just any other piece of tangible personal property; care must be taken to avoid an inadvertent violation of the law. Hence we recommend provisions for a gun trust be added to the revocable trust when there are firearms in the family.

The same goes for pets. Upon your death who will care for them? How will they get paid. Most state laws allow the inclusion of specific provisions for your animals.

Don't forget to plan: After many years of research attorneys have discovered the optimum time for their clients to make a plan – when they are alive. It gets difficult after that but all to many are what we call *The Wary and The Waited Too Long*. Those who fear malpractice cases (doctors, nurses, engineers, lawyers), those who fear environmental claims (service station owners, heating oil distributors, landfill operators), and those who just fear litigation (auto accidents, slip and fall, apartment owners) present additional planning problems and opportunities. Estate planners talk about "asset protection" that can protect not only those who are in the just described categories but also your children and other heirs. As one very successful entrepreneur said, *"Only the paranoid survive."* Special techniques are available to the paranoid and others who wish to avail themselves of the available protection

No strategy is necessary to transfer wealth if there is no wealth left to transfer. When a loved one needs to go into a nursing home, the family is frequently facing not only a medical emergency but also a financial emergency. That problem is so pervasive, the government has adopted the Medicaid program to assist those families in need. However the process of applying, and qualifying, for Medicaid can be arduous at best. For those who waited until they or a loved one is already admitted, or about to be admitted, to a nursing home, it is still not too late to plan. Strategies are available to save some of what's left, generally about half of what's available. Thus the strategy often referred to as "half a loaf;" half a loaf is still better than no loaf at all.



THE MEDICAID ASSET PROTECTION TRUST (PART ONE: WHY THE MAPT)

Until the death of the trustmaker, a revocable trust can always be changed, amended or even revoked; assets that go in the trust can come back out. The trustmaker remains in control. However there are occasions when the client is ready to cede control and create an irrevocable trust, that is, one that cannot be changed or revoked. When the estate tax is a possibility there are many uses for the irrevocable trust but for purposes of Estate Planning 101 there are two circumstances when the irrevocable trust is warranted: when one might apply for Medicaid benefits or where one might apply for Veteran's benefits.

Why the Medicaid Asset Protection Trust (the "MAPT")? Let me start with a story.

"*Who wudda thought?*" My sister lives in New Orleans in the home where I grew up. Although it is a couple of miles from any body of water or even a bayou, who would have thought that it could fill with sixteen feet of water for a couple of months such as it did as a result of Hurricane Katrina. Despite the misgivings of her husband, she kept flood insurance intact over the years. "*You never know,*" she said in response to his argument that the insurance was an unnecessary expense. The only way that they were able to rebuild was a result of that unnecessary expense.

I would venture to say that no one has ever experienced a calamitous event without saying, "*I could never imagine this happening to me!*" In our comfortable lives we can never imagine being in necessitous circumstances. However, I can imagine being in an automobile accident so I insure against that. I can imagine passing away and my income no longer being available to my family so I insure against that. I may have health issues, so I insure against that.

What I cannot imagine is growing old. I can't see myself in a nursing home — despite the fact that statistics show a 70% probability of this happening. Some people have insurance for this; most don't. In addition to the explanation that such insurance is too expensive, all too often I hear the comment, "*We will never let mom go into one of those places.*" I am not always convinced that this is a realistic assessment of the situation.

My mother had Alzheimer's. My father took care of her at home for three years before it started taking a serious toll on his health. Momma would get up in the middle of the night and roam around and this was after she had fallen down a flight of steps doing this. Notwithstanding the fact that he lived in the other side of duplex where my sister lived (*yes, the same one that flooded!*), and notwithstanding my sister's able assistance, my father slept with one eye open and this was eventually taking its toll on his health. He made the courageous decision to put her in a nursing home; he was there to feed her every meal but now he could also get some rest.

WHAT'S THE RISK: Risk is defined as the probability or threat of quantifiable damage, loss or other negative occurrence that is caused by a vulnerability that may be avoided through preemptive action. Statistics already tells us that there is a high probability of one being in a nursing home but what is actually at risk? With expenses of seven to ten thousand dollars a month, what is at risk is: being able to leave your heirs with any inheritance; keeping the homestead in the family; preserving the vacation home. One father told me that he could always count on "stuff" happening to his children and when they came to him for help, he wanted to be able to provide; what was most important to him was preserving the family emergency fund. But risk is not just the probability of a negative occurrence; the second part of the definition is important: it is a vulnerability that may be avoided by preemptive action.

PREEMPTIVE ACTION: The risk of being in a nursing home is that the expense of being there will exhaust all family resources. Is there something that can be done ahead of time, before the expense is incurred, to avoid draining the family bank? To understand what can be done ahead of time, one must also have a basic understanding of Medicaid, the program administered by individual state governments and funded by the federal government; it will pay for nursing home expenses but only after family resources are exhausted or nearly exhausted. Needless to say, like any government program, the rules and regulations on what must be spent and what is exempt are extremely complex; it suffices to say that all assets are at some risk.

If the government will pay for my nursing home expense if I have little or nothing, why don't I just give it away and then apply? Giving your property away is a good strategy; the critical issue, however, is the timing of the gifts. The Medicaid administrators will always look at what has been given away over the five years prior to the Medicaid application. Any gift (and that term is broadly interpreted) made during

that time will result in a penalty period based on a prescribed calculation. If you have given away all your assets and if you cannot qualify for Medicaid because you are in the penalty period, how then will you pay the nursing home?

There may be some ways to plan around that (like telling the kids to keep the money handy in case they need to give it back – and that's no problem since they always listen to you – and since stuff never happens to them), but the best strategy is to make the gift at least five years before you apply. Rather than giving the assets directly to your children, you give it to them in trust, that is, the Medicaid Asset Protection Trust.

But how do I know when I might go into a nursing home? All we really know is that sooner is better than later. It reminds me of the time I was on the St. Charles Avenue streetcar. A group of tourists asked me if I knew where the Canal Street stop was. I said sure since I get off at the stop after that. So I told them to watch me closely and get off at the stop right before I do.

THINKING FAST AND SLOW: It is curious how the mind works. It tends to fret over things least likely to happen ("*What if my kids run away with my money?*") yet it will casually dismiss what is most likely ("*I don't ever see myself in a nursing home!*").

Of all the men age 60, close to seven of them will have prostate cancer within the next ten years but I don't have to worry because chances are, I will not be one of those seven. Half of all regular smokers will die from the habit but most think that it is the other half. Seventy percent (70%) of all people age 65 will need some type of long term care; even though those inflicted by Alzheimer's increased 46% from 2000 to 2006, I can still believe that I won't be the one in a nursing home.

Studies have shown that the mind will jump to conclusions based on emotion despite statistical evidence that such a conclusion is not warranted. All circumstances are different and most folks can find "reasons" why they will fall into the 30% category rather than falling within the 70% group that will need nursing home care. Resist the temptation to jump to that conclusion; consider the risks and leave your family with more than the question "*Who wudda thought?*"

THE MEDICAID ASSET PROTECTION TRUST (PART TWO: WHAT IS THE MAPT)

At the expense of being repetitious, this Part reiterates the trust fundamentals in part to emphasize those critical concepts but also to show how they apply to irrevocable trust as well as to revocable ones. Also I have learned that for many of my clients who are struggling to comprehend legal and tax concepts, repetition is good.

A trust, in general terms, is nothing but a set of instructions that a Trustmaker gives to a Trustee who agrees to carry out those instructions. A trust may be revocable or irrevocable. A Medicaid Asset Protection Trust is irrevocable but irrevocability does not mean inflexible. After you create the trust you transfer your assets to the trust; such transfers are considered a "gift" for Medicaid purposes but are not considered as "completed gifts" for purposes of the estate and gift tax.

By signing the trust instrument (that is, the Trust Agreement), you create a new legal entity, or legal being. This is the Trust itself. Within it, you establish a number of rights and responsibilities for persons named in the Trust. These persons serve four roles.

The first is the role of "Trustmaker." The Trustmaker of a trust is the creator of the trust. When married, husband and wife are the creators of the Trust, and therefore the Trustmakers of the Trust, and they will transfer their assets into it.

The second is the role of "Trustee." The Trustee of a trust manages the trust, makes decisions regarding the use of trust assets, and makes distributions pursuant to the terms of the trust. Typically one or more of your children are appointed as Initial Trustees of your Trust. You may also appoint a Successor Trustee in the event that the Initial Trustees are unable or unwilling to serve.

The third is the role of "beneficiary." A trust exists for the benefit of the beneficiaries. A trust has two types of beneficiaries: the income beneficiaries, who are the recipients of distributions of trust income, and the principal beneficiaries, who are the recipients of distributions of trust principal. While you are alive, both the income and principal beneficiaries of your Trust are usually your descendants, who may receive distributions at the Trustee's discretion. After both of you have died, the income and principal beneficiaries of your Trust are, in most cases, your descendants, per stirpes, who will receive their shares in trust as specified in your Trust. (Trusts for each child can be individually structured to meet the needs of each child. Per stirpes means one share for each child who survives you and one share for a deceased child who leaves children.)

The fourth is the role of "Trust Protector." A Trust Protector is responsible for protecting the purpose and intent of the trust. In your Trust, the Trust Protector will have the limited ability to make certain amendments to the Trust, and fill Trustee vacancies. The Trust Protector cannot, however, change the beneficiaries of the Trust.

Your Trust is a "Medicaid Asset Protection Trust," meaning the assets transferred to it are protected from counting as resources for Medicaid qualification purposes. Your Trust is "irrevocable," meaning that you, as Trustmakers, have given up the power to revoke the Trust and cannot thereby end its existence.

No Amendment of Trust Permitted: You **do not** have the power to amend your Trust. This means that you cannot change any of its terms. You do, however, have a "limited power of appointment" to change the remainder beneficiaries of the Trust estate through your Wills, living trusts, or other written instrument. The power of appointment is "limited" in that you can only appoint the assets to your descendants, and not to yourselves, your estates, your creditors, or the creditors of your estates. Further, this power is a "testamentary" power, meaning that the instructions you leave will be effective upon your death.

Although the provisions of the trust cannot be changed, your Trustee has the power to change investments, buy and sell assets, and, generally, manage your assets as you would have done.

Tax Issues: Your Trust is a "grantor trust" for income tax purposes. As such, trust income may be reported under either the social security number of the husband or wife, but it is a good idea to be consistent. Because income is reported on your social security number, no separate income tax return needs to be filed for the trust.

Because the Trust is a "grantor trust" under the Internal Revenue Code, any income generated by Trust assets will need to be reported on your tax return, regardless of whether you, as Trustmakers choose to receive such income or if such income is being accumulated in the Trust and not paid out to either of you. You will file your return just as you have always done; the Trust does not file a separate return.

One of the advantages of a grantor trust is that you still have the benefit of Section 121 of the IRS Code which eliminates any capital gain tax on the first $500,000 ($250,000 for a single person) of gain upon the sale of your residence. At the time of death, the cost basis of the assets in the Trust are also adjusted to reflect the value as of the date of death.

Other Features of the MAPT:

1. Special Power of Appointment

In creating this Trust, you have reserved a Special Power of Appointment. This means that an incomplete gift has been made for tax purposes and any appreciated assets placed into the Trust will receive a step-up in basis upon the second death. It also means that the value of these assets will be brought back into your estate for estate tax purposes. This should not present a problem as long as you do not have a taxable estate; therefore, no estate tax will be due, notwithstanding the inclusion of these assets in your estate.

2. Distributions to Lifetime Beneficiary/Trustee

When a lifetime beneficiary of the Trust is also a Trustee, distributions to the Beneficiary/Trustee must be limited to an "ascertainable standard" for tax purposes. This means that distributions can only be made to them for their health, education, maintenance, and support. This language prevents what is known as a general power of appointment, which would otherwise cause the Trust assets to be includable in their estate in the event that the beneficiary predeceases you.

While either of you are alive, distributions do not need to be made equally to the beneficiaries Income Tax Returns. Please be advised that this Trust is a "grantor trust" under the Internal Revenue Code. Please note that any income generated by Trust assets will need to be reported on your tax return, regardless of whether you, as Trustmakers chose to receive such income or if such income is being accumulated in the Trust and not paid out to either of you. You will file your return with the same information as before.

3. Distributions of Income and Principal to You

You are not beneficiaries of Trust principal. Although income may be distributed to you, I do not recommend it and most clients elect not to receive income from the Trust. This means that if either of you later qualifies for Medicaid, Trust income will not be budgeted by Medicaid as available income for Medicaid eligibility purposes. Under no circumstances may principal of the Trust be paid to or for the benefit of either of you.

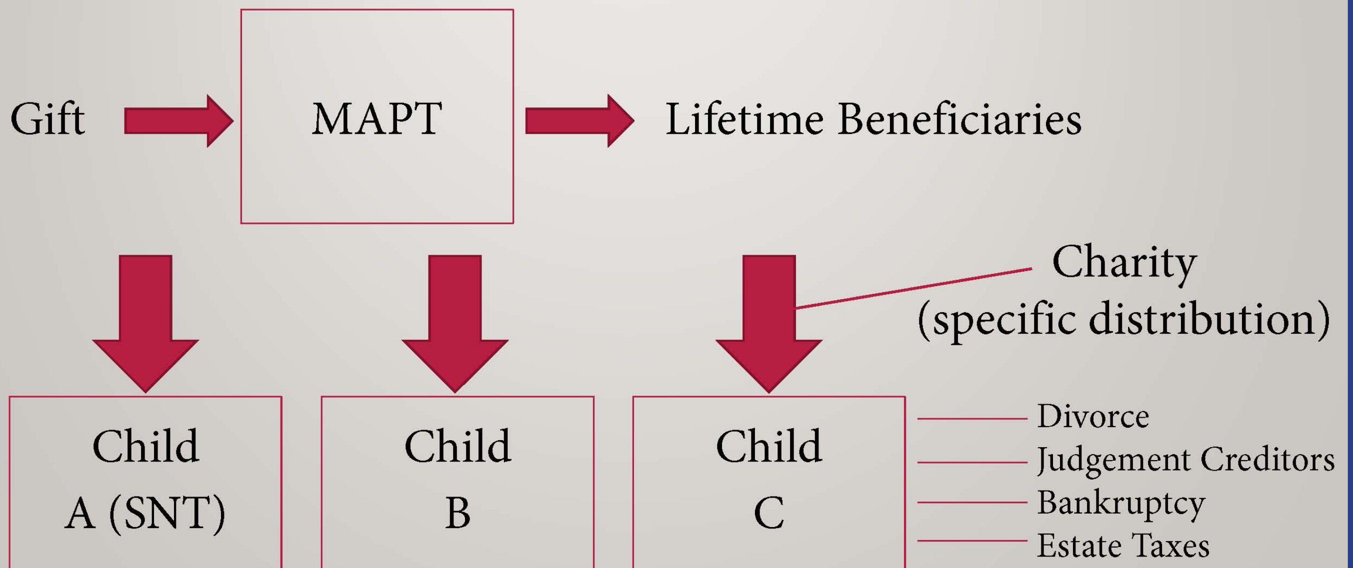
4. Funding the MAPT

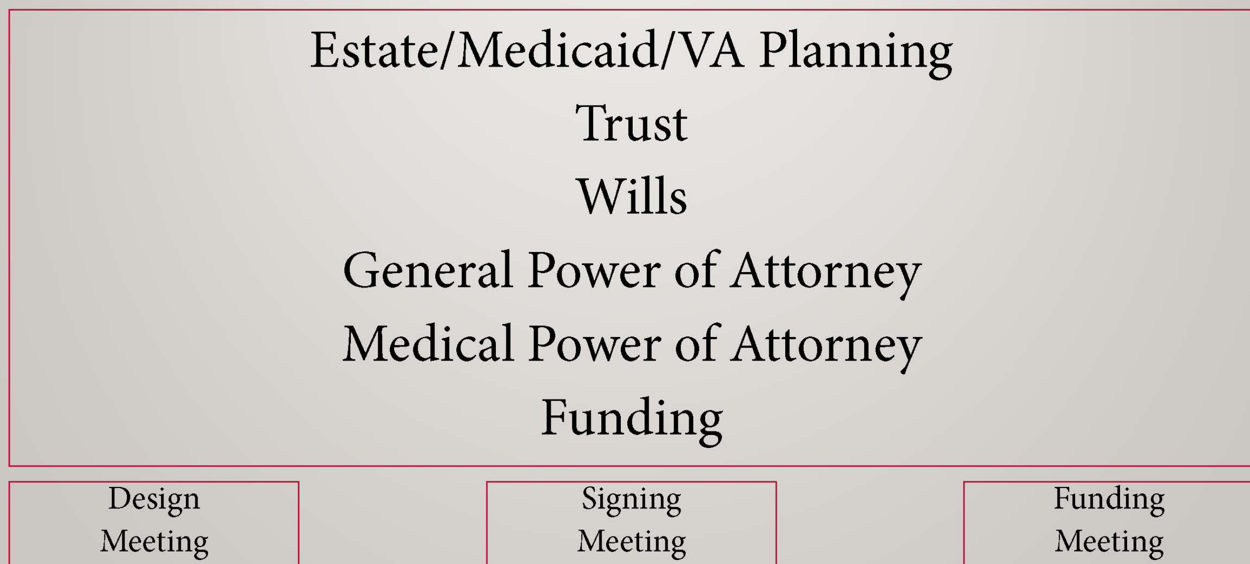
Your assets must be transferred into the Trust if it is to achieve its objectives. This is commonly known as "funding your Trust."

The Trustee only has control of the property if it is in the Trust. You have no control of your assets once they have been transferred into the Trust. The major reason for establishing the Trust (that is, removal of assets from your ownership) will only be achieved if the assets are transferred into the Trust. To the extent that you, as Trustmakers, do not transfer assets into your Trust, such assets will not be protected for Medicaid eligibility purposes.

How Much Should Go Into the Trust? You should transfer as much of your assets at one time that you wish to protect from being considered an available resource for Medicaid purposes to an account (or various accounts) opened in the name of your Trust. Furthermore, the transfers made into the Trust are subject to a 60-month lookback period for Medicaid eligibility purposes. Therefore, depending upon the amount of assets used to fund your Irrevocable Trust and other factors relating to Medicaid eligibility as required by the Deficit Reduction Act of 2005, either of you might not qualify for Medicaid benefits for a full 60 months after the month in which your Irrevocable Trust is funded.

When the first spouse passes away, the trust is not changed and the administration of it continues as it did before that first death. Upon the second death, in the typical trust the assets are distributed to the heirs just as they would have in a revocable trust with all the same options available.


PRESERVING &
TRANSFERRING MY ASSETS
Gift
MAPT
Lifetime Beneficiaries
Charity
(specific distribution)
Child
A (SNT)
Child
B
Child
C
Divorce
Judgement Creditors
Bankruptcy
Estate Taxes


PRESERVING &
TRANSFERRING MY ASSETS
Estate/Medicaid/VA Planning
Trust
Wills
General Power of Attorney
Medical Power of Attorney
Funding
Design
Meeting
Signing
Meeting
Funding
Meeting

THE VETERAN'S ASSET PROTECTION TRUST

Similar to the Medicaid Asset Protection Trust (the MAPT) is the Veteran's Asset Protection Trust (the VAPT). Like the MAPT, the VAPT is an irrevocable trust. There are differences, especially with income tax consequences, but for the right person in the right situation, the VAPT can be most beneficial.

The Department of Veteran's Affairs (VA) sponsors a major benefits program for non-service connected disability called the VA Improved Pension. It provides financial assistance to qualified veterans and their surviving spouses. The biggest problem with the program is the fact that the VA does a poor job of publicizing and explaining the program. The goal of Chesapeake Legal Counsel is to remedy the VA's shortcomings so that all veterans are aware of the benefits that Congress makes available to them.

The Basic Criteria for Qualifying

- Veteran must have served at least one day during a qualified war period
- Veteran must have served at least 90 days of active duty
- Veteran received a better than dishonorable discharge
- Claimant is over the age of 65 or permanently or totally disabled
- Claimant is a surviving spouse of a qualified veteran and did not remarry
- Claimant or spouse needs assistance with daily living requirements
- Claimant's monthly medical expenses (as broadly defined by the VA) equals or exceeds their monthly income, all of which is determined after the veteran's affairs are appropriately arranged

Why YOU Should Care

Unlike "compensation" which is the benefit paid to veterans who have disabilities incurred or aggravated during active duty, the pension benefit is available to any veteran who served during a period of war and who is disabled from a cause not necessarily related to their military service.

Because pension benefits are based on the disability, the income, and the net worth of the veteran, many veterans assume that they would not qualify for this benefit. However, in regard to taxes the Supreme Court has said over and over again that "*there is nothing sinister in arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands.*"

The pension is a benefit that veterans earn due to their service to the country and they can so arrange their affairs as to qualify for this benefit. An accredited VA Planning Attorney can guide the veteran and his/her

family through the process and assist them in arranging their affairs that not only considers all pertinent laws (on trusts, on taxes, on real estate), but also takes into consideration the individual dynamics of the veteran's family situation. The big picture is considered in every small detail.

What is Available

The VA Improved Pension was established to provide financial assistance to veterans and their spouses, allowing them to live our their lives in dignity and afford basic necessities.

The benefit is NOT dependent upon service related injuries. It helps cover the cost of qualified, unreimbursed medical expenses, including in-home care and assisted living facility care.

Though it has been in existence for decades, most veterans and their families have never heard about it, and if they have, they are not given guidance on how to qualify.

Why I Care

My father was a veteran of World War II who, in addition to his two Purple Hearts, was awarded the Bronze Star and the Silver Star for his heroism in saving the lives of those who served with him. When my mother developed Alzheimer's, dad tried to care for her at home until the task started to take a toll on his health and mom was placed in a nursing home at great expense. The VA neglected to advise dad that Pension Benefits were available. ***I believe all veterans have a right to know what's available.***

WILLS VS. TRUSTS — IT DEPENDS

Often clients will ask, *"Do I need a trust? I don't have that much."* Whether one needs to go to the added effort, and expense, of a trust depends on the client's goals and objectives. The trust is a tool, a vehicle that can be used to meet those goals and objectives. I had a little ole lady client, call her Neaux Nonsense, who owned a row house in Baltimore that had relatively little value but that was about all that she had; but it was her home and living in the house with her were her son and the daughter of a deceased son. Unfortunately Neaux's son and granddaughter were not the most responsible of people and she was concerned about their management of the house after her death. So she put it in a trust and named her very reliable niece as the trustee. In her trust she included guidelines for her niece: as long as my son and granddaughter keep the house clean, pay the taxes and insurance, and not quarrel (too much!), they could continue to live in the house. But if they fail to keep up their end of the bargain, the trustee was told to sell the house and distribute the proceeds to a variety of other relatives.

Guess what son and granddaughter did after Neaux's death? They complained about paying the taxes and insurance (which was much less than rent on anything else). And guess what the trustee did: she sold the house.

If Neaux Nonsense asked a rhetorical question about the need for a trust with so little assets, she may have received a negative response from a less thoughtful attorney but as a vehicle to meet her goals and objectives, she most certainly needed a trust.

This is not to say that a trust is the best fit in all circumstances. Many clients prefer to just have a will for a variety of reasons. In those cases, the will meets their goals and objectives.

Nonetheless, there are many reasons why the trusts work better for many clients, especially those who are past halftime, that is, those who are closer to death than to birth, whose family structure and finances have stabilized, and whose goals and objectives for the ultimate distribution of their assets have come into focus.

What can a trust do that a will cannot do? The answer is somewhat easy for those who need an irrevocable trust such as those who want to protect the assets from nursing home costs or who want to qualify for veterans' benefits. It is almost as easy an answer for those who opt for the revocable trust. See page 16 for the benefits of the revocable trust but in brief:

- It avoids probate;
- It keeps everything confidential;
- And it is an excellent plan in case of mental incapacity.

One more reason to have a trust: if you expect heirs to fight. Probate invites objections whereas the trust remains outside of the court and a complaining heir has less opportunity to be disruptive. It is sad to see an older parent lose some of the power to say no and became subjective to the undue influence of a greedy child. A revocable trust is not fool-proof but it makes it more difficult for that child to change the trust. In sever situations a parent may either create an irrevocable trust or appoint a trust protector (most frequently her attorney; see page 26) who can remove and replace the overbearing child.

THE POWERS

Every estate plan, in addition to either a will or a trust, should include a general power of attorney and a medical power of attorney. One is relatively straightforward, almost all boilerplate, the other not so much.

The General Power of Attorney: The purpose of this power of attorney is to give the person you designate (your "Agent") broad powers to handle your property, which may include powers to sell, dispose of, or encumber any real or personal property without advance notice to you or approval by you. This power of attorney does not authorize your Agent to make health-care decisions for you. Unless you specify otherwise, your Agent's authority will continue even if you become incapacitated, or until you die or revoke the power of attorney, or until your Agent resigns or is unable to act for you.

Financial institutions had a history of refusing to accept powers of attorney, either because they were too long, too short, too old, too new, too vague, etc. Because of customer frustration, many legislatures adopted a uniform power of attorney that made it more palatable for the financial companies to accept. Because the format was created by state statute, it is referred to as a statutory power.

It is not infrequent that the child of a client will call to report a mishap with mom or dad and they need a power of attorney to manage their financial affairs. All to often they are referring to assets that are in the client's revocable trust. One does not need a power of attorney for trust assets; the successor trustee named in the trust has all the power to manage those assets without a power of attorney. Even if all assets are in the trust, we still prepare a power of attorney to manage any asset outside of the trust. And what is outside the trust is mostly the IRA and other qualified plans.

If clients just have wills, the power of attorney takes on added importance. In any event, we would not let the client leave the office without one.

The Medical Power of Attorney: This form is a legal document that lets you name another individual or individuals as your "agent(s)" to make health-care decisions for you. It is sometimes referred to as an Advance Directive or Healthcare Power of Attorney. It is the subject of much confusion even among those in the health care field. The attorney generals of most states have created a form for the citizens of the state but there is no requirement that a specific form be used.

One form in vogue is the type of advance directive that dictates how you would like to be treated near the end of life. I personally would never sign one of these forms. These forms give you various options about treatment and clients check here or there, not knowing what the medical circumstances will be — and not knowing that this willy-nilly check the box form has life or death consequences. (I have also

encountered situations where hospital personnel have insisted that they were in a better position to interpret the advance directive than family members of the patient.)

The approach at Chesapeake Legal Counsel is to name a health care representative that is empowered to make health care decisions for the patient. We then encourage the client/patient to have a conversation with the appointed representative to explain in some detail how the client would like to be cared for. It is too long to be replicated here but the firm has developed Healthcare Guidelines, a tutorial on how to write the last chapter of your life. Contact the office if you would like a copy. That said, as a tease, I reiterate the preface to those guidelines:

When my father died I asked the doctor what was the cause of death. He said it was from ODTAA. Not being familiar with that, I asked if it was some type of weird condition or disease. No the doctor said, it means *"One Damn Thing After Another."* That is why I think our bodies are like automobiles; when the thing starts breaking down and its one damn thing after another, we get rid of it. With cars we can trade it in for a new one but we don't have that luxury with our bodies. But to a large extent the thought process is the same.

With both, hope springs eternal. We hope that the old jalopy can make one more trip but at some point the fear of breaking down on the highway overtakes our hope and we know it is time to trade in the clunker. Even though hope is not a plan, for too many hope is THE plan – and then fear happens – and then a decision has to be made. It is at that point, when your fears outweigh your hopes, that you become motivated to develop a plan of action based on something other than hope. Fear or hope, what matters most to you?

To answer that question you must know your fears and your hopes. When it comes to death and dying, what are your biggest fears and concerns? (Physical or emotional pain, dying alone??) What would push you to stay alive? (Attending your daughter's wedding, seeing a grandchild graduate, watch the Cubs win a World Series??) What trade-offs are you willing to make to achieve your goals.

The purpose of this exercise is to assist you in articulating an answer to these questions, to enable you to find an answer within yourself and to encourage you to discuss your answers with the person who will eventually be called upon to make medical decisions for you.

This, by the way, is not a final exam. It is the start of a process and one that will continue until the ole clunker can clunk no more.

Recently I was going through some old papers and found the poem below that my mother wrote many, many years ago. I find it ironic that we chose the same metaphor for aging:

If We Only Could

by
Anna Dell Robbert

When people's cars get old and worn
And then begin to toddle,
They go somewhere and turn them in
And get the latest model.

Now I have very often thought
That when my joints get achy,
And when my hair has all turned gray
And knees are rather shaky.

And when the onward march of time
Has left me rather feeble,
How nice t'would be to find a firm
That deals in worn out people.

How nice t'would be when feet give out
Or we have damaged livers,
If we could go and buy new parts
Just like we do for flivers.

And when my form is bent with age
And gets to looking shoddy,
How nice t'would be to turn it in
And get a brand new body.

Final Note of Powers: We usually think of medical powers as something for older people. It is just as important for the young, especially in regard to two specific situations. The first is when children are still minors and being left with a sitter over a weekend or more extended time; in your absence the sitter needs the authority to act for your child.

The second situation is when your child, now an adult – at least in the eyes of the law – goes to college. Without a healthcare power of attorney, including a release from the HIPAA (the Health Insurance Portability and Accountability Act of 1996) restrictions, you will have difficulty getting information from the school infirmary in the event of the child's mishap.

WHAT IF I MOVE

It is not infrequent that a client will call the office to inform us that he/she/they are moving out of the state and asks what needs to be done relative to their estate plan. The quick answer is "Nothing." A will that is valid in the state where it was originally drawn is good in every other state. A valid trust is also good in every other state. However, that does not end your inquiry.

Each state has its own rules to determine the validity of a will. By way of example, in Maryland the two witnesses to the will do not have to personally go to the Register of Wills office to authenticate their signatures; in Delaware, the witnesses must personally appear unless the person executing the will and the two witnesses sign a self-proving affidavit as to the will's authenticity. Because of these procedural differences, it is recommended that a client moving to a new state have his/her will reviewed by an attorney in the new state.

There is also a practical reason for contacting an attorney in the new state. Because you are establishing your domicile in a new state, in the event of your death, the estate process, and any death taxes, will be governed by the laws of that state (no matter where the will was drawn). Consequently, it is recommended that you establish a relationship with a local attorney to assist your heirs in the event of your mental incapacity or death.

To find a local attorney, I recommend that you visit the following website **www.wealthcounsel.com**. At the website, click on Member Directory; enter your new zip code (or city and state) and you will find a list of the nearest attorneys who focus their practice on estates, trust and elder law issues. I am a member of the organizations that sponsors this site. The members are most often in small firms such as mine and share my philosophy of taking care of clients. Because I use similar software for the preparation of documents, these attorneys will also be very familiar with the documents that I prepared for you.

Once you have established that relationship with a new attorney, please confirm that with my office so that I can note that in your file. As always I remain available to you and/or your new counsel should you need further assistance or have other questions. It has been my honor to have represented you and wish you well with your move.

WHAT DOES "IT" COST

Every client wants to know what "*it*" costs. I can always answer that question but I must first ask the client what "*it*" is? Its like asking me what a car cost? Do you mean a Rolls Royce or a Volkswagen? With the revocable trust "*it*" usually includes:

All client meetings, advisor discussions, faxes, emails, phone calls and other communications necessary to create your estate trust plan, the design, drafting, preparation and funding of custom Revocable Living Trusts with family and marital trusts as necessary, lifetime protective trusts for your children, standby special needs trust, remarriage provisions, and specific and charitable bequests as requested, Pour-over Wills, Certification of Trust, Trust Transfer Documents, Durable General Powers of Attorney, and Health Care Power of Attorney; comprehensive review and explanation of all documents, the execution and notarization of all legal documents in accordance with state law; counsel, research, review and preparation for the initial transfer and funding of all appropriate assets into your Revocable Living Trusts; assembling and review of your Estate Planning Portfolio binder, including instructions for successor Trustees, document finder, and memorial instructions; and delivery of your original Wills to the Register of Wills for safekeeping.

That said, there is no cost for the first informational meeting. At the end of the initial meeting with a potential client and after we have recommended a particular strategy to achieve that client's goals and objectives the client inevitably asks, what does it cost? We usually spare the client a complete lecture on what "it" is but it includes all of the services that we provide, services that start with the first contact with our office and includes our availability well after all documents are signed, sealed and delivered. Those services include our ability to listen to your cares and concerns, identify for you issues that you might have trouble articulating yourself, suggest options that you didn't realize you could do, and ultimately give you a sense of fulfillment and satisfaction.

We also prepare documents. Admittedly it is those documents that are the vehicles to implement the strategies that you have chosen to achieve your goals. For individuals those documents might include wills, living trusts, powers of attorney, insurance trusts, charitable trusts, family limited partnerships, family foundations and more. For business owners, additional documents might include buy/sell agreements and tax-free sales of business interests. For non-profit entities, services could include a planned giving review and seminar presentations for the group's members and benefactors.

However, our services do not end with the design of a plan or even with the preparation of plan documents. We also assist with the implementation of the plan. For the typical client for whom we have prepared a revocable living trust, services include funding the trust. It may even include a family meeting for your heirs and family to get their reaction to your proposed strategies or to let them know how to proceed upon your death or disability. What we do impacts the family both financially and emotionally. It is important to us and to you that you understand all of those possible consequences. That is part of the service.

A FINAL NOTE

One area where clients seem to struggle is in the appointment of the fiduciaries: the Personal Representative in the will (the "PR" is what we used to call the executor), the Successor Trustee in the trust, the agent in the general power of attorney, and the healthcare representative for medical decisions. What I have to remind them is that they are not awarding an honorary degree. I asked them if their son ever complained when he was a teenager and you told your daughter to clean the dishes after supper? It is the same with fiduciary appointments: you are assigning work and it should be assigned to the one most willing to devote the time and energy to complete the task. Hint: this is usually not the one with the most advanced degree.

"But how do we tell the kids this? Some feelings will be hurt." My advice is to blame it on the lawyer; just tell them the lawyer said to do it this way. In fact whenever there is a difficult decision it is not uncommon for the client to ask the attorney to be the bearer of bad news.

A familiar situation where this arises is the decision to give a little more to the child who cared for the aging parent. Inevitably the burden of caring for an elderly parent fails unequally upon the shoulders of one child yet the other siblings demand equality in the division of the parent's assets.

When a client asked me to write to his children to explain a particularly difficult decision, this is how I explained it:

"THAT'S NOT FAIR!!!" You are exacerbated, your parents are exacerbated, fingers are pointing, motivations are questioned, feelings are hurt — over what? Over your parents trying to make a gift to each of you! They explained the situation in some detail to me and asked me for guidance in not only assisting in the completion of the subdivision process but also in completing that process in a way that promotes harmony within the family.

Before I get into any details, allow me a moment to share some observations garnered as a father and as a counselor to hundreds of families dealing with the entanglement that ensues when relatives and money mix. On a simple level I can recall my son complaining about me not being "fair" in my treatment of him compared to his brother. Every parent has heard that (and continue to hear that no matter what age children might be) and it is a constant refrain that I hear in dealing with estate administrations: it's not fair that you got the favorite heirloom; it's not fair that I am the one who had to care for our parents; it's not fair that they gave you the money to buy a house; it's not fair that they treated you [more, better, different] than me. My general advice to clients is twofold: advise your children that: one, inheritance is not an entitlement; and two, nothing is so unfair as trying to treat unequals equally.

Most parents respond to the needs of their children: one might get a loan/gift to buy a house or go to school; another needs a loan/gift to pay off a creditor; and others are blessed and need no assistance. Perhaps one could argue that those that need help need it because of their own poorly-

made decisions but that is something for parents to decide when determining whether, and to what extent, to offer aid to any child. Although it is the goal of almost every parent to treat their children equally, in the end there will be differences because their children are different, their circumstances are different and their needs are different. Parents do their best and pray that their children understand.

As I said at the outset, it is the goal of most parents to treat their children equally and fairly although those two terms are not synonymous. It is no different for your parents. They ask for your patience and understanding as they endeavor to give to you as much value as they can.

Those were my words and I encourage clients to put their own thoughts in writing; it means more coming from you than from me. You can write what I call a spiritual will:

A SPIRITUAL WILL

Perhaps the single most mentioned reason for doing estate planning is the desire to makes things as simple and easy as possible for your spouse and family at the time of your death or disability. Certainly, it would be easier to do nothing but there is a satisfaction and peace of mind that comes from putting your affairs in order; it is what many clients describe as a sense of completion or fulfillment even though they know that they may change their plans in the future.

For many of you, developing the right estate plan can be difficult work, but because it can be so difficult it is also a very loving gesture on your part. Ironically, while we are willing to express our love for our family by working through a maze of financial, tax and trust planning options, we tend to be more reluctant to specifically describe our emotions and our hopes, dreams and aspirations for our family, particularly how they might use the assets in our estate to achieve those hopes, dreams and aspirations. You might want to put such expressions in writing as part of your estate plan.

For that matter, why not take the time now to tell your children, family and friends what you have wanted to say but never took the time to say? Or tell them what you have thus far been too embarrassed to tell or what you didn't know what to say. If nothing else, you may want to tell your beneficiaries why you wrote the estate plan that you did. It is much easier to write such sentiment knowing that your words do not have to be read for a long time to come and the satisfaction and peace of mind that comes from completing the emotional issues is at least as great as, if not more so, than completing the financial issues.

Many of my clients also take this as an opportunity to reconcile, resolve, forgive or simply to emote. In any event, this is your chance to get the last word in.

GLOSSARY

Allowed Gift Amount – The total original amount of the gift less the amount returned to the applicants equals the allowed gifted amount (the amount protected).

Annual Gift Tax Exclusion – Technique to allow gifts without the imposition of estate or gift taxes and without using lifetime exclusion.

Annuity – An annuity is an insurance contract that provides regular income to the owner, in exchange for a lump sum investment.

Beneficiary – A person who derives advantage from something, especially a trust, will, or life insurance policy.

Burn Rate – The amount of money that an applicant will "burn" through in one month of a plan. When dividing the spend-down amount by the burn rate, the resulting figure is the number of months the applicant can afford to privately pay throughout a penalty period.

Children's or Grandchildren's Irrevocable Education Trust – A Trust used by parents and grandparents for a child's or grandchild's education.

Charitable Remainder Interest Trust – A trust whereby donors transfer property to a charitable Trust and retain an income stream from the property transferred. The donor receives a charitable contribution income tax deduction, and avoids a capital gains tax on transferred property.

Community Spouse – The spouse who remains at home or in an assisted living community and does not require Medicaid benefits.

Community Spouse Resource Allowance (CSRA) – The amount of countable assets the spouse is entitled to retain, in order for their spouse to obtain Medicaid benefits.

Conservatorships/Guardianships – This is the court-supervised proceeding which names an individual or entity to manage the affairs of an incapacitated person.

Crisis Medicaid Planning – Financial and legal planning done to accelerate one's eligibility for Medicaid benefits, particularly when no previous long-term strategy or planning has been performed.

Durable Power of Attorney for Health and Living Will – These documents authorize termination of life support if you are terminally ill and appoint an Agent, of your choice, to make health care decisions for you if you become incapacitated.

Federal Estate Tax – A tax levied by the federal government upon the estate of a deceased person. The federal government gives certain exclusions and deductions and then taxes everything above a set level.

Fiduciary Responsibility – Where one person places complete confidence in another in regard to a particular transaction or one's general affairs or business.

Fractional Interest Gift – Allows a donor to transfer partial interests in real property to donees and obtain fractional interest discounts for estate and gift tax purposes.

Funding – Is the process that entails transferring assets you own as an individual into the name of your Trust.

General Durable Power of Attorney – This is a General Power of Attorney that remains valid even during your incapacity.

General Power of Attorney – Provides your Agent with broad authority. It says that at any time – and in just about any capacity – your Agent can conduct business in your name. The Agent can be given great discretion.

Generation Skipping Tax – This is a tax levied on assets that are given to individuals who are more than one generation away from the donor. An example would be a grandparent giving an asset to a grandchild either during the grandparents life or at death. Effective use of generation-skipping exemption allows the assets to avoid estate tax inclusion in the child's taxable estate.

Gift – A gift is when any money, property, items, or other assets are conveyed to another person for less than they are worth.

Gift Tax Exclusion – An IRS regulation that allows an individual to give away a certain amount of money each year, without incurring a tax. This exclusion is NOT applicable when planning for Medicaid benefits.

Gifting Language – Special language that may be drafted and included with your Trust document and Power of Attorney to give authority to gift assets to accomplish planning goals.

Grantor – The party who transfers title in real property (seller, giver) to another (buyer, recipient, donee) by grant deed or quitclaim deed.

Guardianship/Conservatorship – Is a court-supervised proceeding which names an individual or entity to manage the affairs of an incapacitated person (minor child or incompetent adult). A guardianship may also include the duty to care for the incapacitated person.

Health Care Power of Attorney – Instrument used to allow a person you name to make health care

decisions for you should you become incapacitated.

HIPAA Release – The Health Insurance Portability and Accountability Act of 2003, known as "HIPAA," created privacy protections for medical information which prevents hospitals and physicians from providing your personal health information to anyone that is not listed in a signed HIPAA Release. This release allows the Agents under your Advance Health Care Directive/Durable Power of Attorney for Health Care, and the Trustees under your Revocable Living Trust to carry out their duties.

Individual Resource Allowance – The amount of assets a Medicaid applicant can retain and still qualify for benefits, typically used for discretionary spending.

Institutionalized Spouse – The spouse who is in or requires nursing home facilities and is seeking Medicaid benefits.

Intestate – Referring to a situation where a person dies without living a valid will.

Irrevocable Life Insurance Trust – A Trust used to prevent estate taxes on insurance proceeds received at the death of an insured.

Joint Tenancy – When property is held in joint tenancy with rights of survivorship by two or more people, upon the death of one of the owners, all of his or her interest in the property is transferred immediately to the surviving owners.

Last Will & Testament – A legal document that states in writing how the testator (the person preparing the documents) would like to have their estate distributed upon their death and who will carry out those duties. It must be by two (2) or more credible witnesses in the presence of the testator.

Living Will – Sometimes called a physicians directive, is a document in which you give directions for life sustaining treatment should you become unable to communicate your wishes. Some states have combined this into the advanced health care directive.

Long Term Care – The care provided to an individual who is in need of daily assistance with basic functions of daily life. It includes eating, bathing, dressing, transferring, toileting, medication management, and assistance with prosthetic devices. 70% of individuals over the age of 65 will require some type of long-term care during their lifetime.

Look Back Period – The lookback period is the 5-year period in which a state's Medicaid agency will "look back" to determine if a Medicaid applicant has made any transfer of assets. If the individual and/or spouse has made any uncompensated transfers, and the transfers are not cured/returned, the applicant will be subject to a penalty period of ineligibility.

Medicaid – A state and federal government program intended for people with low income or limited resources. Provides payment for the majority of long-term care services required by elderly citizens.

Medicaid Triggers – These "triggers" or events can put into motion the shift of assets out of the name of the person who is incapacitated in order to qualify for Medicaid benefits.

Medical Requirements for Medicare – Aged (meaning over the age of 65), blind or otherwise disabled.

Medicare – A program directed by the federal government that functions primarily as a health insurance program for people over age 65. Medicare benefits are intended for short-term services, when the medical condition is expected to improve, and acute care. In most cases, Medicare does not pay for long-term care services.

Monthly Maintenance Needs Allowance (MMNA) – The amount of monthly income to which a community spouse is entitled. If the community spouse's income does not meet his or her MMNA, he or she is entitled to a shifting of income from the institutionalized spouse.

Mirror Wills – The wills of a husband and wife which are identical except that each leaves the same gifts to the other, and each names the other as executor

Monthly Income Shortfall – The monthly cost of the nursing home minus the applicant's available income.

Partial Cure – If an ineligible gift has been made during the look-back period, the gift can be returned to the Medicaid applicant, and potentially reduce the penalty period and/or eligibility for Medicaid benefits.

Penalty Period – The period of ineligibility imposed by the State Medicaid agency if uncompensated transfers have occurred within the lookback period. The length of the penalty period is based on the amount transferred and the state's specific divestment penalty divisor.

Pre-Planning – When someone plans for long-term care costs and/or their estate is structured to allow them to qualify for Medicaid benefits with consideration for assets, income, gifts, look-back period, etc.

Pour Over Will – Is used first to name a guardian for minor children. Second, it protects against intestacy in the event any assets have not been transferred into the Trust at the death of the Trustor/Owner. Its function is to pour any assets left out of the Trust into it so they are ultimately distributed according to the terms of the Trust.

Power of Attorney – You empower someone else to act on your behalf. Technically, this person becomes your "Attorney in Fact," but is more commonly referred to as your "Agent."

Private Foundation – An entity used by higher-wealth families to receive charitable income, gift, or estate tax deduction while allowing the family to retain some control over the assets in the foundation.

Probate – Is the court procedure used to change title to assets from the name of an individual who has passed away into the name of the beneficiaries. It is also where all creditors of a decedent file claims to collect their debts and where interested parties can contest the Will. An individual who passes away with a Will or no estate plan will go through this process.

Property Power of Attorney – Instrument used to allow an agent you name to manage your property.

Revocable Living Trust – A device used to avoid probate and provide management of your property, both during life and after death.

State Estate or Inheritance Tax – A state estate tax is a tax levied by a state government upon the estate of a deceased person. It is levied in much the same way as the federal estate tax. A state inheritance tax is a tax levied by a state government that varies depending upon the relationship of the inheritor to the deceased person. Nearly half the states have a separate state estate or inheritance tax which kicks in at a lower level than that of the federal government.

Step-up in Basis – A step-up or step-down in basis is an adjustment for income tax purposes to an asset's fair market value at the date of the death of the owner of the asset. For example, if you bought a share of stock for $100 that increased in value to $500 at the time of your death, your tax basis was $100 but increases to $500 at the time of death.

Testator – A person who has died leaving a will.

Trust – A legal instrument that holds property as its nominal owner for the good of one or more beneficiaries.

Trustee – The person or entity in charge of the assets in a Trust. While you are alive, you may act as Trustee. For married couples, either one or both spouses may act as Trustee or co-Trustees. The successor Trustee is an individual or corporation fiduciary whom you designate to be in charge of your Trust in the event of disability or upon death.

Trustor – The creator of a trust (who normally places the original assets into the trust), called a "settlor" or "donor" in many states.

Will – A legally enforceable declaration of how a person wishes his or her property to be distributed after death. In a Will, a person can also recommend a guardian for his or her children.

ABOUT THE AUTHOR

John F. Robbert is admitted to practice in Delaware, in Maryland, and in Louisiana, as well as in the United States Tax Court and the U.S. Supreme Court. In addition to graduating from the College of the Holy Cross (Worcester, Massachusetts) and Tulane University School of Law (New Orleans, Louisiana), he also holds a Master of Law in Taxation from the University of Baltimore.

Mr. Robbert is a member of *WealthCounsel*, a national network of attorneys who focus their practice on estate planning and elder law matters. He is also a member of the Anne Arundel County Bar Association, the Sussex County Bar Association, Delaware, Maryland, Louisiana, and American Bar Associations, and the Sussex, Delaware Estate Planning Council.

Not only does Mr. Robbert participate in various professional organizations, he has also served on numerous charitable, civic and governmental boards and agencies. Having taught at various educational levels, including tenure as an adjunct professor of law, he is an accomplished speaker and frequently lectures on issues related to gift and estate tax planning.

In 2022 he celebrated his 50th year as an attorney!