Should Cinderella's Parents Have Had a Trust?

Life Is Not a Fairy Tale: 21st Century Estate Planning

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Foreword

I spent the first part of my career as a full-time life insurance agent. I remember attending a program at which a noted senior agent — decades later I still remember his name: Norm Levine — spoke about the responsibility that all of us have to take care of our families, whether we live or die.

It takes a lot of money to fund for the caring of widows and the raising of children, and Norm stated that there were two ways to arrange societies to accomplish that task. The first was to socialize the risk through government, as was done in the former Soviet Union and other command-control economies. The alternative was to take care of the risk ourselves. Since few people could accumulate the assets necessary to do so, and even if they did it may have been undesirable to tie up those assets to fund a contingency that may or may not have occurred until many years in the future, in Norm's view the best way to do that was to shift the risk to another. In a highly advanced, capitalistic society, the most efficient way to shift that risk was by acquiring a life insurance policy. Life insurance companies are in the business of accepting that risk—and for a small portion of the total assets involved all of us could meet our obligations to our families through the payment of a small, affordable sum from our income or assets. That small sum is known as a premium.

It seems like so long ago that I learned that concept. At the time the Soviet Union was still the major threat to the free world, but the lesson is as valid today as it was then. The passage of time has not lessened or changed the message. We must assume the risk for the future care of our families, and be fortunate that in the highly advanced, capitalistic society in which we live we have options that allow us to do so.

In other words, ***Insurance is Freedom***. That is what motivates me: freedom. Liberty is at the core of the foundation of the United States, and I believe that no greater society has ever been created on earth because it has provided that liberty to countless millions, the results of which have been nothing short of spectacular. One institution integral to this freedom and liberty is the insurance industry. It is why I still function as an insurance agent to this day.

The same freedom for survivors that is provided by life insurance proceeds is provided by a legal structure wherein people can order their affairs in such a way as to take individual responsibility for them. Just as there are two models for organizing society in order to take care of those in need, there are two ways for people's property to be distributed at death: people will either have taken action to designate who will administer their post-death affairs or they won't—and, if they don't, the responsibility for overseeing the administration of their estates, for determining how their property will be distributed, will go to the state. ***Insurance is freedom—and so is an Estate Plan.***

I make these points by discussing insurance first and the rule of law second, because that order represents my experiences in life: I was an insurance agent first, and then I became an attorney. In fact, from the standpoint of organizing societies based on models, for free societies the rule of law comes first and insurance follows. As it pertains to estate planning, the law creates the structure and provides for the distribution of people's estates according to their wishes. Once that framework is in place funding can be provided to make sure that there is money available to implement the plan, to make it come true. Whether that money should come from life insurance or other sources of private wealth is a decision for people to make, and they can make that decision after having arranged their affairs by using the legal structure and instruments which comprise their own Estate Plans.

Fortunately, as noted in Chapter 2, new estate tax law changes, passed as part of 2017's tax reform and effective in 2018, now provide for up to $11,200,000 per person, and $22,400,000 per couple, to be free of federal estate taxation. Estate tax laws require tax to be paid on assets left by a decedent before those assets can be transferred to heirs. (In contrast, inheritance taxes require heirs to pay tax from their inherited assets.) While each state may impose its own, additional estate tax, and people should be cognizant of their own state's rules, the $11.2 million per person/$22.4 million per couple federal exclusion serves to eliminate the estate tax for almost all the population. The online magazine WealthManagement.com (November 6, 2017) estimates that fewer than 1,000 estates per year will be subject to the estate tax. Therefore, for the vast majority of the population, federal estate taxation is no longer a consideration. This book is intended for those who won't have federal estate tax considerations. For those who are fortunate enough to have assets exceeding $11.2 million per person/$22.4 million per couple, this book may still be valuable, but further estate tax planning is advisable.

It has taken me a lifetime of study to appreciate and learn the techniques associated with effective estate planning. My ability to share them with you, the reader, as well as my past and future clients legal and insurance clients, in a straightforward and non-legalese manner so that you, too, can function within the rule of law and provide dignity for yourself and your loved ones, is my objective in writing this book.

Note: for clarity, this book capitalizes several words relating to specific legal documents that are normally not capitalized in order to emphasize their importance in the narrative: i.e. "Will," "Trust," "Trustee," "Special Needs," "Probate," "Estate Plan." Also, the words "heir" and "heirs" are used to refer to people who inherit, whether there is a Will. Historically, the words "heir" and "heirs" apply to those who inherit when there is no Will.

This book is dedicated to

My wife, Linda, and my daughter, Sabrina—my beneficiaries!

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Of Fairy Tales—and Life

Chapter 1

Life Is Harsh

Fortunately, in societies governed by the rule of law, options are available:

You can let the state decide how your property will be distributed upon your death, or YOU can decide for yourself.

One fact is very clear: A Complete Estate Plan will help make your dreams come true—for you and your family.

We are all familiar with the story of Cinderella. A wealthy young couple marries and has a lovely young daughter—Ella.

The mother dies prematurely, leaving the father alone to raise the daughter. Seeking a companion for himself and a mother for his daughter, the father remarries, joining with a widow who has children herself—two daughters who become Ella's stepsisters. Ella's father then dies prematurely, leaving Ella in the custody of Ella's stepmother, his second wife who is widowed once more.

Then revealing her true character, the stepmother turns upon Ella, treating her cruelly and confiscating her father's assets for herself and her daughters. Ella is forced to be a servant to her stepmother and stepsisters. She is ultimately banished to the basement, where the wood used for heating turns to ashes—or cinders. Once her circumstances change Ella's name appropriately changes, too. She becomes known as Cinderella. There being no humanly way out, Ella's rescue needs to come through magic, in the form of a "Fairy Godmother," one who can provide Ella with an opportunity to escape, marry the prince of her kingdom and become the princess—ultimately queen—of the land. And this is indeed what happens. Cinderella subsequently lives a fairy tale life that her stepmother and stepsisters could only dream of leading.

❖ *Life Is Harsh*

A lesson learned well throughout human history is that life is harsh. Medieval populations experienced this first-hand. Fairy tales lessened the dramatic impact life had on so many. Coming up with stories that had endings such as "…And they lived happily ever after," helped people cushion the negative impact that so many felt from life's events. The main reality was that people were often in positions where they did not live happily ever after. Had it been otherwise, fairy tales wouldn't have been so popular.

But life is not a fairy tale; the impact the loss of a loved one can have on a family can be devastating. The emotional burden is hard enough, but when financial wealth is confiscated - by taxes or theft - or misdirected due to poor management and incompetency, children (and adults) with bright futures can find themselves located in the equivalent of the cinders, with no "Fairy Godmother" available to rescue them.

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SECTION 2:

Of Morality—And the Reasons for Estate Planning

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Chapter 2

Why Have an Estate Plan?

The reasons to have an Estate Plan
range from personal to psychological to financial.

Why Have an Estate Plan?

When making decisions one of the most important questions that we can ask ourselves, if not the most important question, is "Why?" Asking "Why?" allows us to focus on the intended result first—and then work backward to see if what we're seeking to do justifies the time and energy we will put into our efforts, let alone whether we really want the outcome that we at first thought that we did.

So, ask yourself, "Why should I have an Estate Plan?"

Personal Reasons: Morality

Morality deals with what is right and what is wrong. It has become less fashionable to speak in terms of morality, but I believe that issues of morality should factor into all our decision-making—and that it is a moral responsibility to have an Estate Plan. If you don't have one, your loved ones will have to incur considerable time and expense, and perhaps conflict, to decide after your death how you intended your estate to be distributed. Isn't it moral for you to assume and make decisions pertaining to yourself and your property during your lifetime, and not force that decision-making on your loved ones after you are gone?

Moreover, modern Estate Plans go further than dealing with issues of death and the post-death distribution of our property: they put in place provisions for us to designate others to serve as our agents—to manage our affairs and make medical decisions for us—during our lifetimes. We can influence and/or control our destinies.

Psychological Reasons: You May Feel Better

Many people who don't have Estate Plans carry the burden of knowing that they should establish them. Nonetheless, they don't do so. This often causes a nagging concern in people, one that is either just below or above the surface, but one that is in existence. Having an Estate Plan can allow you to do all the following:

- Feel secure that you have done everything that you legally can do to provide for yourself and your family. Take a trip or vacation without worry!
- Protect yourself should you get sick or hurt
- Protect your family should you die
- Provide this protection by making your own rules, within the parameters and framework established by your state government
- Make sure that your beliefs and decisions are honored

Once you establish an Estate Plan, won't you feel better?

❖ *Financial Reasons: Estate and Inheritance Taxes, Probate and Bond, Financial Management, Focus for an Organized Life*

Estate and Inheritance Taxes—and Portability

The federal government, along with some states, levies taxes on the wealth that people accumulate over their lifetimes. For many, wealth is what remains after they have paid income taxes on their earnings and capital gains. Estate taxes tax that accumulation.

Also, to avoid situations where people give away their assets just prior to their deaths in order to escape estate taxes, gift taxes were enacted. Gift taxation coordinates with estate taxation, and wealth transfer during lifetime is part of estate planning.

A small number of states tax the recipients of inheritances, most exempting surviving spouses. These recipients are subject to inheritance taxes.

After federal government estate and gift tax changes that were enacted in late 2017, most of the population is no longer subject to federal estate taxes. As of this writing in 2018, singles with more than $11.2 million in assets, and couples with more than $22.4 million in assets, must still confront estate taxation on amounts over those thresholds. But the full $22.4 million exclusion from estate taxes is not automatic. A concept relatively new to estate planning, that of "Portability," has arisen so that married couples can take advantage of the full $22.4 million exclusion amount, but Portability requires procedures to be met in order for couples to avail themselves of the full $22.4 million exclusion amount. Portability is not automatic.

Even for those couples who do not have $11.2 million per person in assets, taking advantage of the Portability procedures may be advisable because it will cement the possibility that $22.4 million per couple can ultimately be excluded from estate taxation. For example, a couple may have $16 million in total assets, or $8 million per person. The way that Portability works, the first spouse to die would not have his/her assets subject to estate taxation because $8 million is less than $11.2 million. There would be $3.2 million of an individual's estate tax exclusion that would be unused. ($11.2 million less $8 million = $3.2 million.) Without taking advantage of Portability, the surviving spouse will have her/his $11.2 million available, but the $3.2 million that wasn't claimed upon the death of the first spouse to die would be lost. Using Portability, the unused $3.2 million would be carried over to the surviving spouse, who can then subtract that figure from the $22.4 million exclusion available for couples. That would allow for the surviving spouse to capture the unused $3.2 million unused exclusion of the first spouse to die, and have the ultimate exclusion be $14.4 million. ($3.2 million carryover + $11.2 million surviving spouse exclusion = $14.4 million.) A couple whose assets at the death of the first of them to die are less than $22.4 million may ultimately be able to shelter $22.4 million from estate taxation over their joint lifetimes. This is a situation that could occur should assets under the control of the surviving spouse grow due to appreciation. Moreover, because the $11.2 million per person/$22.4 million per couple figures are indexed to inflation, they may increase over the upcoming years. However, because these figures are set to expire in 2025, careful consideration and monitoring of estate tax laws is warranted.

When engaging in estate planning, federal and state estate taxes, and state inheritance taxes are factors to be considered.

Probate—and the Cost of Bond

Title is the way ownership to property is held. Probate is the court process that allows for a decedent's title to property to be transferred. If you desired to gift or sell your property to another during your lifetime, you could sign documents transferring ownership of your property to another. But, if you are not alive to do so, a court must step in and authorize those transfers—providing for the legal transfer of assets and the finality of debts by making sure that creditors are paid and cannot come back in the future to assert additional claims. This process is known as Probate, overseen by the Probate Court. Probate fees are set by state law—and can be expensive—often to the surprise and amazement of heirs.

When property is to pass subject to a decedent's Will, or when a decedent dies without leaving a Will, the Probate Court oversees the administration of the estate. A Will may name an Executor or Personal Representative to handle the estate's affairs, but in cases where the Will doesn't specify that bond will be not be required (i.e., bond is waived), and in circumstances where no Will was left at all, the Probate Court will require that a bond be posted, to guarantee that the estate's funds will be there for the beneficiaries. The cost of a bond can be expensive. A Complete Estate Plan can eliminate both the cost of Probate and bond.

Financial Management

What happens if you get sick or hurt and can't manage your own affairs during your lifetime? It happens often, and unless there's another person appointed to be your agent financial issues may not be attended to—perhaps to your significant detriment. A Trust and a Durable Power of Attorney for Financial Management can provide for the care of your financial matters during your lifetimes.

Tax Planning—and Unintended Consequences

Taxes impact so much of our decision-making that almost any type of financial decision requires tax planning. There are multiple systems of taxation, including but not limited to income, estate and gift, and corporate systems of taxation. Absent adequate tax planning there is the possibility of unintended tax consequences, with the further possibility that substantial, unplanned-for costs, in the form of unexpected taxes, could arise.

Modernly, it's been fair to say that we no longer engage solely in Estate Planning: it is Estate ***Tax*** Planning that's appropriate. The same holds in other respects: we no longer can engage solely in Business Planning, but Business ***Tax*** Planning, or Financial Planning instead of Financial ***Tax*** Planning. The high estate tax exclusion has lessened this concern on the federal side of the tax ledger when it comes to estate planning, but multiple forms of taxation, include Probate, still may tax planning important in the Estate Planning field.

Focus—for Organization

Estate Planning entails and overlaps with many other different subject matters. Preparing an Estate Plan helps focus attention on many different aspects of life. By focusing that attention on other, related areas, you will become more organized during your own lifetime—perhaps taking steps that you would otherwise not have taken. For example, you may decide to acquire or rearrange your insurance program or take legal steps relating to asset protection that you wouldn't otherwise even have considered.

Chapter 3

Life Without an Estate Plan

What if I don't have an Estate Plan?

Why don't people have Estate Plans?

I define a Complete Estate Plan as one which is comprised of the 5 Essential Documents noted in Chapter 4, and a Simple Estate Plan as the same as a Complete Estate Plan – but without a Trust.

If you don't have a Complete Estate Plan, you'll deny yourself all the benefits that accrue from having one. I think that everyone needs at least a Simple Estate Plan, allowing them to specify their wishes for treatment during lifetimes should they become sick or hurt, and to make a direct disposition of any property owned at their deaths to relieve others of shouldering those responsibilities for them.

The following summarizes what will happen if you don't have an Estate Plan:

- Your property may be subjected to transfer by Will Substitutes (see Chapter 7).
- There could be uncertainty regarding your wishes should you be sick or hurt during your lifetime, leading to conflict and court battles should you be unable to make your own financial and/or medical decisions.
- Your assets could be mismanaged and/or jeopardized if you are unable to manage them.

- You and/or your heirs may incur higher-than-needed expenses and/or taxes relating to your lifetime care and post-death affairs.

- Your heirs could be short-changed by receiving a lower inheritance because your assets may have been depleted due to those unnecessary extra costs and expenses.

- Your heirs could be further short-changed because your estate may not be distributed in the way in which you may have wanted it to be distributed.

- If you have minor children, you may not have decisive input into who will care for and rear them.

- You could face the consequences of decisions that others may decide for you. This could affect you during your lifetime—and you and your heirs after your lifetime—when decisions regarding your remains, the affairs associated with your remains and your property after your death will not have been made by you.

Many People, from All Walks of Life, Don't Have Estate Plans. Why Not?

There are multiple reasons why people fail to establish Estate Plans. Here are some of them:

- They don't want to deal with the issues of illness and death.

- Even if they are willing to confront the issues of illness and death they believe that their estate planning preparation can be delayed, that nothing will happen to them in the interim.

- They don't want to talk about their innermost feelings with their closest family members/children.

- They don't love their families enough.

- They don't know an attorney whom they trust who can help them.

- They think that the cost is too high, that they can use substitutes that are less costly than establishing a comprehensive Estate Plan.

But these facts don't negate the lessons of life: one fact is very clear—an Estate Plan, be it Complete or Simple, will help make your dreams for you and your family come true.

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Section 3:
The Complete Estate Plan

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Chapter 4

A Complete Estate Plan Can Provide for Yourself During Your Lifetime—and Help Assure that Your Children Don't End Up Like Cinderella

The Complete Estate Plan: 5 Essential Documents.

The Simple Estate Plan: 4 Essential Documents.

Estate Planning documents can be correlated to life insurance products.

Endgame: The goals for implementing a Complete Estate Plan.

Don't let your children end up like Cinderella.

I have been using the term "Complete Estate Plan." For most people, certainly those of modest and above means, whether they own real property or not, those who own real property, and those with minor children, I define a Complete Estate Plan as one that consists of five essential documents. This is a minimum requirement, and may increase depending upon wants and needs. For example, business owners require additional documents.

- Will
- Trust
- Durable Power of Attorney for Financial Management

- Living Will/Advance Health Care Directive
- Medical Release Forms

Every adult, though, needs an Estate Plan. If they are of very modest means and/or don't own real property or have dependent children, then a "Simple Estate Plan" is mandated. I define a Simple Estate Plan as one that consists of four essential documents—the same as the Complete Estate Plan without a Trust:

- Will
- Durable Power of Attorney for Financial Management
- Advance Health Care Directive
- Medical Release Forms

In a society governed by the rule of law, the alternative to a fairy tale is reality. Reality is the creation of legal documents that deal with the problems of death and disability. Failing to deal with those problems can create real-life problems on par with what Cinderella faced.

Whether your need is for a Simple or a Complete Estate Plan — you can take the appropriate steps to make sure that your family need not end up like Cinderella!

Chapter 5

What Documents Are Applicable in What Circumstances?

Legal Instruments Can Be Correlated to Life Insurance Products

Many people are less familiar with legal documents than they are with insurance products, so it may be easiest to define the event that occurs, and then note the primary insurance products and legal instrument(s) that will deal with that event:

Event	***Insurance Product***	***Legal Instruments***
Death	Life Insurance	1) Trust 2) Will
Disability	Disability Insurance Long-Term Care Insurance	1) Power of Attorney for Financial Management 2) Advance Health Care Directive 3) Trust 4) Medical Release Forms

The Goals When Establishing a Complete Estate Plan

Strive for Permanence

Creating an Estate Plan can be a burdensome process, requiring the expenditure of time and money. While change may be the constant in life and estate planning documents should reflect contemporary circumstances, crafting the Estate Plan so that it can exist for quite some time should be a goal. For example, if a young couple has a child and names that child as a beneficiary, then has another child and wants to name that second child as a beneficiary, a change to the Will or Trust would be necessary to accomplish that objective. However, if the distribution is to go to the parents' "children," no change would be required upon the birth of the second child. Similarly, naming multiple people to serve as back-ups for various roles (e.g., Executor, Trustee, Agent) will minimize the need to change your estate planning documents just because some of your initial choices may no longer be available to serve in their intended roles. Perhaps these people have gotten sick, died or moved away, no longer making them suitable choices for you.

Laws will change, and Estate Planning documents should be reviewed at least every few years, or sooner should laws change significantly—but structuring your Estate Plan in a way that strives to make it adaptable to changes in circumstances so that it can last for a longer—not shorter—period should be the goal.

Always Ask "What If?"

It's natural to assume that life as we know it now will continue along as we know it. But we also know that that is not true. Disaster and tragedy can strike at any point, whether it's through an accident or sickness. Because of this, when we're creating our Estate Plans we should always ask "What If?"

Here are just a few "What if" questions:

What if my child predeceases me?

What if my spouse predeceases me?

What if I can't take care of myself?

Ask such questions, answer them, and then write up the answers in your estate planning documents!

SECTION 4:
Distributions After Death

Chapter 6

Wills

> ***Wills control who shall take property -***
> ***and how it should be distributed to***
> ***another/others upon a person's death.***
>
> ***Wills nominate people to serve as guardians of minor children.***

Everyone is familiar with Wills, but they may not be certain of the role that Wills play in modern estate planning.

A Will is a legal document that takes effect at death and states how a decedent would like his/her property to pass at death. In very limited circumstances, varying on a state-by-state basis, oral Wills are permissible—but to provide certainty and avoid ambiguity and/or fraud, Wills should be in writing and witnessed, completed according to the laws of the state in which they're signed.

Wills also serve to nominate guardians for minor children in the event there is no parent left to raise those children. A court is not bound by the nomination of a guardian but, practically speaking, unless there is sound reason not to honor a nominee, courts approve of nominations made by parents.

Wills may operate by themselves, or they can function in tandem with separate Trusts. When a Will works in tandem with a separate Trust the Will is known as a "Pour-over Will." If ownership of property has been transferred to the Trustee, assets that would normally pass by the Will pass to the Trust—they "pour over" into the Trust, and the Trust governs their distribution. For the distribution of property in this type of situation, the Will is, essentially a backup document.

A person dying without a Will is said to die "intestate." In that case, state law determines who the lawful beneficiaries of a decedent are, and what interests they will take. If you don't want your state of residence to determine how and in what percentage your property will be distributed, you need a Will. The maker of a Will could override state laws and determine how his/her property should transfer upon death.

As noted in Chapter 2, a Will must be submitted to the Probate Court, subjecting the estate's distribution to the Probate process. If a Will doesn't waive bond, a bond will also need to be procured.

Chapter 7

Will Substitutes

Some people prefer to use "Will Substitutes" as the means of transferring some or all of their property at death.

Will Substitutes affect the transfer of property at death.

Using a Will Substitute method of holding title to property means that there need not be a Will that applies to the transfer of that property, nor is Probate required.

Some people prefer to use "Will Substitutes" as the means of transferring their property at death without having to have their assets subject to Probate. A Trust is a Will Substitute that avoids Probate, which is why it is a popular estate planning instrument, but since the creation of a Trust should be done in writing as part of a formal Estate Plan, some people prefer to hold title to property in certain ways that will also serve to avoid Probate and not require that they adopt a formal Estate Plan. Holding title to property in these ways eliminates the need for formal estate planning documents to govern the transfer of the asset/property at death.

Here are some examples of Will Substitutes:

- Trusts
- Property held in Joint Tenancy with Right of Survivorship
- Property held by married people in certain ways, such as "Community Property,"

or "Community Property with Right of Survivorship," or "Marriage by the Entirety," all of which are available only in certain states

- Retirement Plans, such as IRAs and 401(K)s
- Transfer on Death (TOD) accounts, for accounts consisting of securities/mutual funds
- Property transferring by contract, such as
    - Life Insurance policies, including annuities
    - Agreements by business partners, such as Buy-Sell Agreements

When Will Substitutes are used, it doesn't matter what your Will or Trust says—the Will Substitute governs. For example, the beneficiary of a person's life insurance contract, who may be different from the beneficiary of the same person's Will or Trust, will take the policy proceeds. The beneficiary on the Beneficiary Designation Form is the legitimate beneficiary, regardless of any other legal document.

While Will Substitutes are effective means of transferring title at the death of the first person to die, such transfers provide no guarantee that the survivor(s) will transfer the property in ways that assure that the assets will go as the first person to die wishes. They will transfer to the survivor—with the possible outcome the same as happened to Cinderella's parents' property.

Chapter 8

Trusts—Your Own Private Court

There is a significant difference between holding title as "Jack and Jill," and "Jack and Jill, Trustees."

> *What is a Trust?*
>
> *How does a Trust Work?*
>
> *Why have a Trust?*

What Is a Trust?

A Trust is a fictitious entity that is created with the intent to hold property, manage it in the event of the Trust creator's disability, and then distribute it immediately or sometime after the creator's death, according to the creator's wishes.

Practically speaking, Trusts can replace most of the functions of a Will. Trusts allow for property to be controlled from beyond the grave, so a creator of a Trust can provide for the financial management and/or distribution of his/her assets after death, as well as during lifetime should s/he become disabled.

Trusts can be revocable or irrevocable. Changing the title of property to make sure that it is subject to the Trust is essential.

The use of a Trust is, in essence, the establishment of your own private court, complete with your own judge (the Trustee).

❖ *How Does a Trust Work?*

A Trust is a fictitious entity created by people intending to create the Trust. Either single people, or married persons operating individually or jointly, can create a Trust. We'll assume a married couple to be the creators, and speak in the plural, but the singular would be just as applicable.

These people are known as "Settlors" (or, interchangeably, "Grantors"). The Settlors write a document which contains terms defining how the Trust will operate, including who will manage their property during their lifetimes as well as who will inherit their property and how. They appoint a person or persons to oversee the Trust, known as the "Trustee," whose decision-making and management must be in accord with the terms that the Settlors wrote in their document, as well as state law.

Typically, the Settlors are the initial Co-trustees, followed by successors who are named in order of priority to take over when the Settlors can no longer function in their oversight roles. (In a corporate setting, the Trustees would be known as CEOs.) Those successors can step in during the Settlors' lifetimes if the Settlors get sick, hurt or just wish to step down, or they can step in after the last of the Settlors dies.

The authority of the Trustee to act over property extends only to property whose title has been changed to be owned by the Trustee. That is why it is critical for people who establish Trusts to change the title of their properties to the Trust—and why the biggest mistake pertaining to Trusts is the failure to do this—the failure to "fund the Trust." This is especially true for real estate, because people's homes are often the largest assets people have. The transfer of real estate must be in writing to be effective, and for real property, at a minimum a written deed is required, transferring title from "Husband and Wife" to "Husband and Wife, Trustees." Should the Settlors own a home in their own names but not change the title of the home to themselves as Trustees of their newly-established Trust, for that home it would be as if the Trust did not exist. The Settlors' act in creating the Trust, at least as far as the home is concerned, would have been self-defeating.

Certain assets, which by law cannot be held in Trust (retirement plans in existence during the Settlors' lifetime, for example, because retirement plans are separate Trusts in and of themselves), are not subject to the authority of the Trustee. Their title cannot be changed to put them into the Trust even if the desire to do so exists. For another person or entity to have direction and control over those types of assets other documents are required, such as a Power of Attorney.

❖ *Revocable and Irrevocable Trusts*

Trusts can be revocable or irrevocable. The Revocable Trust (also known as a "Living Trust" or "Revocable Living Trust") has become the workhorse document for many Estate Plans, and is the type of Trust referred to in this book. For our purposes, the word "Trust" will refer to Revocable Trusts.

People may wish to make changes to their Estate Plans during their lives. Since Revocable Trusts can be amended, changed or revoked, they provide for flexibility.

Irrevocable Trusts, which are separate entities, just like corporations or LLCs, are important for those whose assets are large enough to be subject to the estate tax or who want asset protection, but for are unnecessary for most people who are just seeking to avoid Probate.

The Revocable Trust is a document created either by declaration or contract. It is considered to be interchangeable with its creator because it may be amended or revoked at any time. When couples create a Trust the trust splits upon the death of the first to die, and a Sub-trust attributable to that person is established; that Sub-trust is irrevocable. The Trust continues in effect for the survivor, who may continue the Trust, or amend or revoke the Trust as it affects that survivor. If continued, with or without future amendments, the Trust will become irrevocable upon the death of the survivor.

Unless title to property is changed to reflect that the Trustee is the owner, the Trust doesn't operate over an asset, defeating its purpose for that property. Just like ownership of a bank account held by an individual who also has a corporation is determined by whether the name of the individual or the name of the corporation is shown as the account owner, so, too, is it with a Trust.

A Trust Functions Like Your Own Private Court

Since assets in a Trust avoid Probate, when someone creates and places all his/her assets into a Trust, the Trust serves as a private court. The Trustee, a person or company (or both working together) functions just like a judge would in the Probate process. That Trustee must act according to the law, which in the case of a Trust is the terms and conditions that have been set down in the Trust document by the Trust's creator(s); however, this law cannot conflict with, and, and is overridden by, state laws.

But Trust distributions are private. Unlike the court process of Probate, where all records are open to the public, a Trust is a private document that is not open to public inspection. The distribution of your estate is a private matter.

Why Have a Trust?

To Provide for the Financial Management of Your Property During Your and Your Spouse's Lifetime.

If you and/or your spouse are unable to manage your financial affairs during your lifetimes, your Trustee, including any Co-trustee or Successor Trustee, can take over your financial management for you, either temporarily or permanently, overseeing all Trust assets. (Your Agent under your Durable Power of Attorney can oversee any assets that are not held in your Trust.)

This is another reason why placing all your assets into your Trust is important. The Trustee can manage only those assets that are held in the Trust.

In circumstances where one spouse manages the household finances, but then becomes unable to manage those finances, a Trust can also provide for the non-managing spouse to work with a Co-trustee, lessening and/or relieving that non-managing spouse of the burden that financial management can impose.

To Provide for Terms and Conditions Relating to the Distribution of Your Property Long After You Die.

Traditionally, Trusts were used to control property from beyond the grave. A Will typically states that property is given to another upon the death of the Will's maker:

> Example: *Upon my death I, Jack, give all my property to my wife, Jill, if living, and if Jill is not living then to my children.*

A Trust can provide for that distribution to occur over time, assuring that property and money are distributed to your heirs in the manner and at the time that you believe would be suitable:

> Example: *Upon my death I, Jack, give my property to the Trustee to hold for my wife, Jill, and to provide Jill during her lifetime with all the income and as much of the principal that she may need for her health, education or support (or any combination of them); upon Jill's death the remainder of the principal shall be distributed to each of my children, in three equal installments, as they each respectively attain the ages of 30, 35 and 40.*

Assets in a Trust Avoid Probate

The cost and time of Probate are avoided for the assets that are placed into the Trust. The entire provisions of a Trust can be placed in a Will, but doing so subjects the Trust's assets to Probate, creating what may be unnecessary costs: A Will can contain a Trust, but separating the Trust by making it its own separate legal instrument could save significant transfer taxes and costs.

A Will Can Contain a Trust—but Separate, Pour-over Wills Are Preferable

A Trust can be created within a Will, eliminating the need for a separate Trust document.

The assets of such a Trust, though - known as a "Testamentary Trust" - will become subject to Probate, because the Trust's provisions are a part of a Will, and a Will is subject to Probate. Since most people who create Trusts seek to have their assets avoid Probate, the creation of a Testamentary Trust defeats most people's purposes. Therefore, people desiring the benefits of a Trust are best advised to create a separate Trust, along with a Pour-over Will.

Records Are Private

Since Probate is the use of a public court to transfer an estate, and since court records are open to the public, a Will is open to public inspection. But a Trust is a private document. There is no court record of your Trust. Your affairs are a private matter.

What Revocable Trusts Don't Do

Revocable Trusts Do Not eliminate Estate and Inheritance taxes.

It is a common misconception that estate and/or inheritance taxes can be avoided if a Trust is established. This is not true. The Trust will provide terms under which property will be distributed, but, before the distributions occur, taxes may need to be paid by the Trustee from Trust assets. A Trust will provide for the payment of taxes, but it will not affect how much in taxes is owed. With more sophisticated planning, Irrevocable Trusts may be used to minimize or eliminate estate taxes, but the common Trust will not accomplish that task.

Revocable Trusts Do Not Provide for Asset Protection

Trusts are commonly misunderstood, with many thinking that they provide asset protection. They do not. For asset protection, an Irrevocable Trust, which is a separate entity from the individual, must be used.

Chapter 9

Beneficiary Designations

Beneficiary Designations serve as Will Substitutes — completing them on certain types of accounts is like having a separate Will or Trust.

Gifts to charity, designated on Beneficiary Designation Forms from IRAs, Retirement Plans and Annuities, can result in a higher net amount for heirs.

Life insurance policies, annuities, IRAs and/or retirement plans transfer upon death according to Beneficiary Designation Forms, regardless of what a Will or Trust may provide, making Beneficiary Designations for them critical. People often fail even to fill out such forms, and many do not update them the way that they would update a Trust or Will.

Each person is unique, and how they wish to name their beneficiaries varies, but in general people should name their desired adult beneficiaries as first (and perhaps second) beneficiaries, and their Trusts as contingent beneficiaries. If a Will or the estate of the person is named as Beneficiary, the assets of these types of accounts, which avoid Probate, will be pulled back into the Probate process.

If first beneficiaries are minor children, then guardians/custodians, or preferably a Trust, should be named as first beneficiary, thereby assuring that the Trusts will be the receptacle of the property, and that it will be distributed according to the terms of the Trust.

But naming a Trust as beneficiary of an IRA (whether first or contingent beneficiary) may have additional tax consequences, so Beneficiary Designations should be thoroughly considered. (See Chapter 12.)

Because IRA and retirement plan distributions are subject to income and estate tax, people with IRAs or retirement plan assets who also wish to make charitable gifts at their deaths should consider making those gifts through their IRAs and/or retirement plans. Gifts to charity are not taxed when made through such accounts, so directing the charitable gifts via beneficiary designations from IRAs and retirement plans will allow those dollars to escape taxation. Gifts to heirs from other moneys should not be subject to such heavy taxation, if any taxation at all, so allocating charitable gifts from one type of account instead of another can greatly increase the amount available for heirs.

Because each situation is different, counsel should be consulted to make sure that these types of property transfer in the most tax-efficient way that also meets the decedent's objectives.

Chapter 10

IRA Trusts

Trusts can receive and distribute IRA assets, but the Trust must meet certain criteria to assure that creditor protection and favorable income tax treatment is afforded.

IRA assets are taxed upon their receipt. Distributions from IRAs must start no later than when the IRA holder reaches the age of 70 1/2, and are based on IRS life expectancy tables. While the distribution could be made all at one time, in one lump-sum, most prefer to take the distributions in installments over their life expectancies to minimize the tax that would be assessed on the amount distributed. Allowing much of the assets to remain in the IRA so that they continue to grow tax-deferred can be very positive.

Upon death, spouses and children of the IRA holder are given the option of 1) taking the entire account balance in one lump sum, or 2) receiving installment distributions over their life expectancies. Since the distributions are subject to income tax when received, income tax is likewise payable in either one lump sum or in installments, which could be over many decades. Many people, seeking to maximize growth by minimizing taxation, prefer to take distributions over time. When a Trust is named as a beneficiary of an IRA, and the Trust's beneficiaries are a spouse and/or children who could take distributions over time and thereby qualify for favorable tax treatment, a Trust could be a valuable way to transfer IRA assets, especially when the children are young.

But some states do not provide for IRA assets to be fully-exempt from creditors. When there are creditors waiting in the wings they could seek to seize assets that are held in IRAs, denying those funds from passing to the Trust's intended beneficiaries.

Enter the IRA Trust, which is a type of Trust drawn up to meet certain criteria and to provide for IRA assets to receive creditor protection. If the IRA Trust meets those criteria it can serve as the recipient for IRA distributions and allow for the stretching out of distributions over time. It is possible that the common revocable Trust can also meet these criteria and be used in lieu of an IRA Trust—but some may not work as intended. For those parents who have large IRA balances and young children—or for those who have substantial assets and want to direct their IRA distributions differently than their revocable Trust may direct, regardless of the ages of their children—IRA Trusts can help accomplish their goals. For those seeking to use their revocable Trusts as beneficiaries of their IRA accounts, a review of the criteria necessary to pass IRA assets from one generation to another without the heirs being subjected to immediate, often heavy, income taxation is important. Otherwise, the general benefits of using a Trust may be available, but the creditor protection and/or tax deferral benefits associated with IRA Trusts may not be – with the result that IRA beneficiaries may pay a heavy price.

Chapter 11

Wills and Trusts:
Key Questions—and Answers

Important questions to ask when preparing an Estate Plan include the following:

Q. If I am married, are my spouse and I on the same wavelengths? Are we willing to waive conflicts of interest and have the same attorney assist us so that we may have convenience and save costs, or are our interests better served by having separate counsel?

A. For most people, having one attorney work with both spouses offers both convenience and cost-savings—and is the preferred method of doing business. But when one spouse has individual assets or concerns, or feels uncomfortable or intimidated by the other spouse, separate, independent attorneys are advisable.

Also, when people go to attorneys they have the right to expect that the attorney-client privilege will be present, requiring the attorney to keep communications confidential. The privilege attaches to individuals. When an attorney represents both spouses the privilege will be lost for communications made between spouses, and an attorney therefore has a conflict of interest when representing both spouses. For this reason, spouses need to waive in writing this conflict of interest, acknowledging that their privilege will be lost.

Q. Do I want to be able to control my property distributions after my death so that they take place immediately or over time?

A. If so, then a Trust is needed.

Q. Are Trusts for wealthy people?

A. No—this is a common misconception, dating from the past. Anyone with even modest assets, real property or children who are minors, young adults or of any age but unable to manage their affairs—should have a Trust.

Q. If I move to a different state, do I need to make a new Will or Trust?

A. No. Valid Wills that are made in one state are valid in other states. Trusts take effect during lifetime, when they are made, and are administered according to the laws of the state shown in the Trust. If Settlors move to another state, they can amend the Trust to be in compliance with the laws of their new state, or revoke and create a new Trust should they choose. Depending upon the laws and rates of taxation in their new state, amendment may or may not be a desirable action.

Q. Do I need to amend my Trust when acquiring new property, financial accounts or other assets?

A. No, the Trust remains the same. Title to the new property or account should be taken in the name of the Trustees, specifying the name of the Trust for which they are acting. It's the title to the property which must reflect the name of the Trustees and the Trust. No changes to the Trust are necessary when acquiring new assets.

Q. If I need a Trust, should it be contained within my Will or be a separate document?

A. A Will that contains a Trust is subject to Probate, but will not require any time during lifetime to administer. It is executed and filed away for use after death. A revocable Trust, also known as a "Living Trust," requires a small amount of time to administer during lifetime. From my perspective the amount of time required during lifetime to administer a Trust (after it is set up and funded) is so small as to be insignificant, the benefits of establishing a separate Trust being far superior to having created a Will that contains a Trust.

Q. If I establish a Trust, must I administer it as a distinct entity and file separate tax returns for it?

A. Unlike a Will, which takes effect at death, a Trust takes effect during lifetime. This is why it is also known as a "Living Trust." Trusts are separate entities, but Revocable Trusts, due to their revocable status, do not require the same formalities in their operation that Irrevocable Trusts do. Once set up, Revocable Trusts require little formal operation. For example, when it comes to tax reporting, an Irrevocable Trust is considered to be a completely independent entity from its creator. It is like a separate business, requiring separate accounting and tax returns. A Revocable Trust, though, does not require separate accounting—nor is there a need for separate tax returns to be filed while the Trust is revocable.

Q. Who are the people I should name in my Estate Plan to take care of me and my heirs—or should I name a professional?

A. The people you name should first and foremost be honest and dependable. These people should be 1) financially capable, and/or 2) warm and caring—people who share your values and whom you can trust. One person can fill both roles, or different people can be used in each role. Professional Trustees, either individuals or corporations such as bank Trust departments, could be named to take on this role should there not be close family members or friends available.

Financially-capable people

These people typically serve as

- Trustee of your Trust
- Executor of your Will
- Personal Representative (Modernly, this role is most often considered to be interchangeable with the person who serves as Executor: An Executor is typically also the Personal Representative.)

Frequently, the same financially-capable people also serve in other estate planning roles, too.

- Agent for your Durable Power of Attorney for Financial Management, and
- Nominated to be the Conservator of the Estate (a person who steps in when you are relieved of all financially responsibility during your lifetime)

Warm and caring people

These people typically serve as

- Guardians of minor children
- Agent for your Advance Health Care Directive

Frequently, the warm and caring person is also nominated to serve as the

- Conservator of the Person (a person who steps in when you are relieved of all individual responsibility during your lifetime)

Q. Whom do I want my beneficiaries to be?

A. Your beneficiaries are whoever you wish them to be, although courts tend to look closely at circumstances that shortchange spouses. If you don't have an Estate Plan, your state's laws establish who your beneficiaries will be—but, if you do have one, you can name your beneficiaries, including or omitting people at your option, subject to the procedures outlined in your state's laws.

Q. If my beneficiaries include minor children, whom do I want to name to take care of them should I die?

A. For a married couple, when both are the natural or adoptive parents of their children, the surviving parent was and will continue to serve as the person responsible for the children. But in the event of the couple's simultaneous death, or for a single parent where there is no other parent available, a guardian will need to be named to take custody of the children. Who will that guardian be? The responsibility for naming that guardian belongs to the court, but when a Will nominates a guardian or guardians the court takes that nomination very seriously, and most often follows it.

Whether you wish to have your estate probated is a personal decision. Many people who own real property or don't have small estates opt to create a Trust and avoid Probate.

Q. Should I use a Will Substitute?

A. Since Will Substitutes transfer property differently (a retirement plan operates differently from property held in joint tenancy), close attention to the Will Substitute should be given. A contract to transfer a business may be a very preferred way to accomplish an objective between partners, but other types of Will Substitutes may not provide for a desired result. Even if certain Will Substitutes are used—notably retirement plans and life insurance policies—a formal Estate Plan would be recommended so that the Will Substitute can be assured of passing to future generations as desired. For example, a life insurance policy can name an individual as the first beneficiary, and a Trust as the second/contingent beneficiary. In short, Will Substitutes may be desirable or undesirable methods of transferring property, but their use does not eliminate the need for formal estate planning, which is what many people try to avoid when using Will Substitutes.

Further, since modern estate planning provides for care during lifetime should you get sick or hurt, and since Will Substitutes deal only with the transfer of property at death, Will Substitutes are no substitute for comprehensive estate planning.

Q. Should I change title to my property by adding my children on title as co-owners?

A. No. Unintended consequences can arise that are detrimental to you and the children. Society recognizes a Will or Trust as the fundamental method of transferring property at death.

- If someone has multiple children and lists only one child, it invites a challenge from the others as to whether the favored child used undue influence to obtain the gift. The parent will not be around to testify to the contrary. Moreover, what happens if one of the children should predecease, die simultaneously with (say, in a car accident) or die soon after the parent? How does her/his share transfer? What if she/he has children? Her/his share won't necessarily go to those children, or spouse.

- If someone has just one child, what if that child predeceases the parent? The purpose of placing the child on title is defeated. The parent will still need an Estate Plan.

- Placing a child on title to property provides the child with an ownership interest in the property. Ownership creates income and/or estate tax consequences, as well as liability. The child may now be liable for damages resulting from the ownership change. Alternatively, the child's ownership interest makes the property an asset of the child, and if there is a lawsuit against the owner of the property the child could now have joint liability. A creditor can now sue both the child and/or the parent to seek the asset. Alternatively, if the child is sued for something unrelated to the property the child's property interest could be seized by a creditor to satisfy the child's obligation— affecting the parent's ownership position. Tax and insurance issues should be carefully reviewed, lest unintended consequences arise.

- When someone transfers an interest in property without receiving something in return, the transfer is a gift. Tax laws currently permit gifts of $15,000 per person per year without any requirements. After that, at a minimum, a Gift Tax Return is required to be filed with the IRS. If the gift is substantial, tax consequences may result. Gift taxation is beyond the scope of this book, but it's important to note that a property transfer could have Gift Tax consequences.

- What if the child predeceases the parent? It's not intended to occur as part of the planning, but it could and does happen. The parent needs to assure that the parental interest will be safeguarded.

Q. In community property states, is my property my own or does my spouse have an interest in it? Can or should those interests be changed?

A. Community property laws were originally designed to protect non-working wives. Derived from Spanish law, they are found in states that were influenced by Spanish tradition, most notably California. The hallmark of community property laws is that one-half of all money earned by either spouse belongs to the other spouse. Rules also apply to determine whether community and separate property are subject to creditors.

Community property laws provide that a spouse may have an interest in the other spouse's property—whether that interest is documented or not. Community property laws serve to create non-documented transfers of ownership between spouses. It is possible to opt-out of the community property system before marriage by entering into prenuptial (also known as premarital) agreements, or to change the impact of the community property system after marriage by postnuptial (also known as postmarital) agreements. Spouses can assign and re-assign ownership of property between themselves.

If married or in a domestic partnership, it is wise to review the ownership of property to see whether undocumented ownership interests have been acquired by the other spouse/partner. If so, and if the ownership interests do not comport with what the parties want, they can be changed. Once changed, the property affected by the change can be placed into and then held by a Trust. The characterization of property in a Trust retains the characterization that the property had just prior to being placed into a Trust, and will affect estate tax and ownership calculations upon divorce or death.

Q. Can a spouse in a non-community property state gain the equivalent of a community property interest in the other spouse's income or property?

A. Yes, not necessarily by law—but possibly by court award. For example, in a non-community property state where a husband worked for many years and the wife stayed home to raise the children, the husband's income would belong to him. The wife would not have a claim to his earnings earned during the marriage. Were they to become divorced late in life, the husband's assets would most likely reflect his earnings during marriage—and it's likely that the court would award a portion of the husband's assets to the wife. A premarital or postmarital agreement could clarify this type of uncertainty.

Q. If I am married, would I want to have my property held as community property before I place the property in my Trust?

A. Most probably, if income tax planning is a concern. Holding property as community property offers an income tax benefit upon the death of the first spouse. Under federal law, the cost of an owner's interest, often known as its cost basis—let's assume 50% ownership of a property with a spouse, or 100% ownership for a single person—is raised so that the cost of the property is considered to be its fair market value as of the date of death. For married couples and domestic partners, this allows a step-up for the share owned by the first to die, but not the surviving spouse. But for property owned as community property, the cost of a property steps up to the property's fair market value as of the date of death for both spouses/partners. The surviving spouse/partner has a cost basis equal to the then fair market value of the home. This is not true of property held otherwise, such as joint tenancy with the right of survivorship. This step-up can be considerable.

Let's look at an example. Take a home that was bought by a couple for $100,000 many years ago (and for this example ignore exclusions from gain due to the fact that the property was a principal residence). Its value is now $2,100,000, reflecting a $2 million gain. (Such situations are common in certain states, such as California.) If the property were owned in joint tenancy with right of survivorship, upon the death of the first of the couple to die, the decedent's property (one half of the couple's interest, or one half of $2,100,000 = $1,050,000) would be "stepped-up" in cost for income tax purposes. If the surviving spouse were to sell the property upon the death of the first of the two of them to die, the taxable gain for income tax purposes would be $950,000 ($2,100,000 sales price—$50,000 cost (1/2 of the original $100,000 purchase price, representing the surviving spouse's share)—$1,050,000 (step-up basis of decedent's share) = $1,000,000 in capital gain) resulting in income tax that could easily approach 25% of that gain, or $237,000.

However, had the property been held as community property, there would have been no taxable gain! The cost basis would step up for both spouses as of the date of the first spouse's death, making the cost basis in this example $2,100,000. If the surviving spouse were to sell the property for its $2,100,000 fair market value, the gain at sale would be $0. ($2,100,000 sales price—$2,100,000 stepped-up cost basis on both spouse's halves of the property = $0). ***In this example, the difference in income tax to the surviving spouse/heirs is $500,000.***

If the property is sold after the death of the survivor, there would be no income tax because the cost basis would be stepped-up again, but often there is a need to unlock equity and sell real estate after the first death. While other considerations may apply when titling assets as community property, such as claims by creditors, for spouses who assure that their property is titled as community property there can be substantial income tax benefits at death for surviving spouses/partners.

There are non-income tax considerations involved when holding property as community property, so these issues should be explored in detail.

Q. What if I want the tax advantages of holding property as community property, but don't live in a community property state?

A. Relatively recent procedures, involving the setting up of Irrevocable Trusts by spouses, are options to consider to accomplish this objective.

Q. What if I own property outside of my state of residence?

A. Real property is probated in the state in which it's located. By holding title to out-of-state real property in your Trust, for Probate purposes the ownership will shift to the state in which your Trust operates, and because the property is held by your Trust, which is a Will Substitute, the Probate process in the state of the property's location will be avoided. (Transferring the title to the Trust may require the services of an attorney licensed in the state in which the property is located.)

If the real property is located in a state that imposes estate taxes, the state may impose an estate tax upon the property owner's death. To avoid this, ownership could be transferred to a form of ownership that is personal property, resulting in the avoidance of both Probate and estate taxes. For example, an out-of-state owner could create a corporation or LLC in his/her resident state, then have the corporation or LLC own the real property. The corporate shares or LLC interest would be personal property held by the owner. Ownership of those shares could then be transferred to the owner's Trust. At the owner's death they would be taxed just as owner's other shares of securities or LLC interests are taxed: the estate taxes, if any, would be those imposed by the owner's state of residence, and there would be no Probate because ownership belongs to the Trust.

However, changes in ownership of real property could trigger property tax reassessment, resulting in higher real estate taxes, so be careful!

Q. I own intellectual property, such as a copyright. How may I transfer that intellectual property at my death?

A. Intellectual property may be passed by Will or Trust. For example, copyright law permits for a copyright to be transferred by a Will. It is advisable to specify and pay extra attention to certain types of intellectual property in your Estate Plan, such as copyrights, trademarks, trade secrets and patents, along with royalties that provide continuing income. Consult with an Estate Planning attorney to assure that they transfer as you intend.

Q. Does my Trust contain the provisions required for it to serve as a Beneficiary of my IRAs?

A. IRAs that are transferred to beneficiaries may allow for the distributions to be made over time instead of in one lump sum—stretching the distributions over the life expectancies of the beneficiaries, and likewise the taxes on those distributions. To assure that this takes place, the beneficiaries must be individuals. But what if the individuals are minors or if distributions to a Trust would be more desirable? After all, that's why people establish Trusts— to create terms and distributions that are more comprehensive than outright gifts to individuals.

The answer is that a Trust with specific provisions may qualify for an "IRA Trust." If those provisions are contained in the Trust, the beneficiaries may still be able to stretch IRA distributions—and taxes—over their life expectancies. The specific Trust that accomplishes this is named an "***IRA Trust***." Either a separate IRA Trust for IRA assets, or a Trust that meets the provisions for an IRA Trust, is necessary to accomplish this important tax-saving strategy.

Q. I have an annuity. How will that affect my estate planning?

A. There are two aspects to annuities. As insurance policies, they fall into the Will Substitute category—and therefore avoid Probate. Similarly, to IRAs and retirements plans, annuity earnings accrue income tax-deferred during lifetime but are subject to income and estate taxation at death: they do not receive the step-up in cost basis at death that is available to assets held in non-annuity form. For most annuity owners, the decision to acquire an annuity turns on whether the income tax deferral during lifetime is more valuable than the possibility of there being no income or estate tax at death.

Q. What if I name an individual or company as Trustee, and that Trustee doesn't act in what could be considered to be the best interests of the beneficiaries?

A. Trustees can be removed by court action, but that can be a costly and time-consuming process. People who care about the beneficiaries, but who may be unwilling or lacking in skills to serve in the Trustee role, can be named to provide oversight over the Trustee and replace that Trustee, should it be deemed necessary. These people are known as "Trust Protectors." The naming of Trust Protectors is becoming more common.

Q. Do we want to give the power to the Trustee to make significant changes to our Trusts, should tax laws or other circumstances justify them?

A. This process is known as decanting. Sometimes a Trust should be changed, but the power given to a Trust Protector is insufficient to allow for this. Because the giving of the power to decant is the giving of substantial discretion, whether to give that power should be carefully considered.

Q. Should I review my life insurance program - including life, disability and long-term care insurance protection?

A. Absolutely. A Complete Estate Plan begins with the legal documents necessary to accomplish your objectives. It then continues with an evaluation of where funding will come from to accomplish those objectives. Since a modern Estate Plan deals with both death and disability during lifetime, life, disability, health and long-term care insurance options (collectively referred to as your "life insurance program") should be evaluated. You need not purchase such products, but you should consider them within the context of your estate planning. It could be malpractice for an estate planning attorney to prepare your Estate Plan while failing to mention the need for you to review your life insurance program.

Q. Do I have pets that I want to make sure are provided for after my death?

A. An issue growing in importance to many is who will care for household pets during the incapacity and/or death of the Settlors. Direct gifts to pets are not allowed, but Trust provisions can provide funding to another to assure for the care of pets—either during your lifetime or after your death.

Chapter 12

Additional Planning Issues

Additional issues to consider and questions to ask when establishing a Trust

> *What happens if my child who is my beneficiary dies before I do, and if that child has children?*
>
> *How do I want my grandchildren to receive their shares?*

Should I Earmark My Assets?

In the Cinderella story, had the mother and father earmarked their assets upon their deaths so that each of them could have access to the assets should they have been needed for their own care during their lifetimes—using the income from them and whatever part of the principal they may have needed—but directing that upon the death of the survivor the principal would be earmarked for their daughter, Cinderella's father would not have had his and his wife's combined estates to share with his new wife, who turned out to be an evil stepmother after the father died. He could have used money for his care, and even, say, taken out a life insurance policy to provide for his new wife in the event of his death—but the principal would have been preserved for Cinderella.

There are tax and other consequences of earmarking. People who trust each other implicitly to safeguard their assets for their children may wish not to earmark, but the consequences and decision should be considered, evaluated and reviewed with extreme attention.

The Family Pot Trust

Q. Do I want all my assets available to raise my family as a unit, and only after that have my assets distributed in equal shares?

A. Designed for families with minor children when both parents die while the children are still minors, a Family Pot Trust recreates the circumstances under which the typical distribution would occur.

Had the children grown to adulthood and both parents then died, the likelihood is that the children would have shared the estate equally. But the net of the assets comprising the estate would have been what was left over after the costs of rearing for all the children were incurred. Say that there are three children in the family—and that one develops a costly illness. Family assets would have been diverted to pay for that child's medical expenses, with the remaining estate including only what was left after deducting those expenses. Had the parents' Estate Plan provided for an equal distribution to each of the children, each would have been entitled to receive a 1/3 share at the time of the parents' death. But the 1/3 share for the child who became ill before growing up may not have provided enough money to pay for that child's medical expenses. The 1/3 share to the sick child would have been used to pay for that child's expenses, and the other two children would have received their 1/3 shares free of the burden of them having to pay for the medical care.

A Family Pot Trust avoids this circumstance. It takes the entire family's assets, places them in a Trust, and then uses the assets for the care of the entire family, distributing their shares to them after they are adults—with each receiving the same amount that they would have received had the parents lived to a ripe old age.

Q. What if you have children and grandchildren, and your child dies before you do?

A. Should an adult child who is a beneficiary have another child (who is a grandchild), and should the adult beneficiary predecease the decedent, leaving grandchildren as his/her survivors, how will the adult child's share be distributed to those grandchildren? Trusts can be very specific and spell out who gets what, when, but often don't have such specific provisions for future generations. Instead, they state that shares should pass *per stirpes*, or per capita.

Let's say that Settlors have two children, Jack and Jill, and that the Settlors wish for Jack and Jill to inherit from them equally after the Settlors have died. Jack and Jill in turn each have two children, so that the Settlors have four grandchildren. Then say that Jack dies while the Settlors and Jill are alive. Who will get Jack's share, and how?

A different method, known per stirpes designation (also known as "right of representation) would have Jack's 50% share distributed to his children. In this example, Jack has two children, so Jack's children would split his share equally, each receiving 25% of the total estate. Had Jack had three children Jack's 50% share would have been distributed among them, with each receiving 1/3 of Jack's 50% share, or 1/6 of the total estate.

A per capita designation would end with a different result. The total number of survivors would share the estate equally. With Jack having two children, those two children are added with Jill, bringing the total to three beneficiaries. Each of the three would receive 1/3 of the estate. Had Jack had three children the estate would be divided in four, with Jill and Jack's three children each receiving ¼ of the total estate, and so on.

Because this concept is confusing, specifying each beneficiary and how much she/he should receive can be a wise approach. Because this would require amendments to the Trust each time a beneficiary is born or dies, many don't wish to incur the extra time and expense that would be required. Whether you choose to list each beneficiary or use the terms of per stirpes or per capita, careful consideration to this issue is important.

Q. What happens if my now-young child grows up to become irresponsible, or an alcoholic, substance abuser, member of a cult or a criminal?

A. People disappoint, and that holds true for our loved ones as much as it does for others. Our dreams for our children may be boundless. We may leave them assets, and depending upon how they turn out, those assets may endanger them. Most of us feel that making Estate Plans when our children are young that will provide them with inheritances is essential. However, how beneficial are those inheritances to them later in their lives should they have turned out wrong? Would you want your young adult child with a drug problem to inherit money, only to turn around and squander it all on drugs? The child could be enabled, the inheritance serving to fund self-destructive behavior.

Trust provisions can restrict distributions to heirs should they engage in inappropriate or unlawful conduct.

Q. Can I prevent creditors from attaching claims against my heirs, preventing my estate's assets from being available to them?

A. Yes. Spendthrift provisions can prevent creditors from attaching Trust assets—and give further discretion to the Trustee as to whether to distribute those assets to beneficiaries, only to have them seized upon distribution.

Q. Do I want to deny a beneficiary a share of my estate if she/he contests my documents?

A. Since you can name your beneficiaries without restriction, you can deny a beneficiary a share of your estate.

If a beneficiary would receive a small amount, less than she/her thinks they are deserving of, you could include a "No-Contest Clause" in your Will or Trust. A No-Contest Clause denies a beneficiary from receiving anything at all should they contest the terms of your Will or Trust. If the beneficiary were to receive nothing from the outset, a No-Contest Clause won't be operative. For example, if you have two children and wish to leave $1.1 million to one of them and nothing to the other one, a No-Contest Clause would have no effect. However, if you were to leave $1 million to one of them and $100,000 to the other, the one who would receive $100,000 could challenge the $100,000 distribution. A No-Contest Clause would pose a risk to the beneficiary who challenges the $100,000 gift: the challenge could fail, and that beneficiary would receive nothing. No-Contest Clauses are tricky, and courts are questioning them with increased frequency.

Q. Do I want to make gifts to my beneficiaries during my lifetime? Are there tax consequences to doing so?

A. Gifts to beneficiaries during your lifetime allow you the benefit of interacting with them during your lifetime, forging or building upon your relationships while you're alive. Gifts can be to children, grandchildren, friends or charities. However, because estate and gift tax laws work in tandem, the making of gifts could have unintended estate and/or gift tax consequences, and should be done after those tax consequences have been evaluated. For gift tax purposes, as of this writing, gifts from an individual to another individual of up to $15,000 per year do not incur gift tax liability. This means a married couple could jointly gift up to $30,000 to a child.

Also, in general there should not be income tax liability for gifts that are made. However, non-cash gifts made to beneficiaries during your lifetime may have income tax consequences that the gift of the same property made after death may not have. People are well-advised to seek tax and/or legal counsel before making gifts.

Q. What if I wish to make gifts to my grandchildren through my Will or Trust, but not my children?

A. Many grandparents feel closer to their grandchildren than they do to their children. In other circumstances, many children, whether very close to their parents or not, have obtained affluence and wealth to the point that they do not need to receive inheritances from their parents; those inheritances would be better served going to their children—the Settlors' grandchildren. Enter Congress, which in 1976 passed the Generation-Skipping Tax. That legislation was fraught with problems, and in 1986 it was repealed and replaced, today's Generation-Skipping Tax dating from the 1986 law. In short, parents giving directly to their grandchildren through their Estate Plans may be subject to unfavorable taxation. In short, unless parents give directly to their children, and only to their grandchildren if their children predecease the parents, parents could find that their direct gifts to their grandchildren—which skip their children's generation—are subject to taxation. Direct gifts to grandchildren should be planned carefully. If an estate could be subject to Generation-skipping tax, lifetime gifts to grandchildren may be desirable.

Q. Do I want to give to charity during my lifetime or after my death? What are the most tax-efficient ways of making charitable donations? Are there any other considerations?

A. Many people find charitable giving to be meaningful for them. For most, giving significant gifts to charity through their Estate Plans is a desirable way to make those contributions because they will not need to part with money that they will need during their lifetimes. On the other hand, giving during lifetime provides the opportunity to see the results of their gifts.

Charitable giving—during lifetime and after death—can provide income and/or estate tax benefits. Solid planning, with post-death gifts made from IRAs and retirement plan accounts, can result in significant tax savings because those types of accounts are otherwise taxed very heavily at death.

There are non-tax considerations to consider, too. Placing restrictions on your charitable gifts may allow for your dollars to be used by the charities in much more efficient ways. As examples, designating that a gift to a college be used to provide scholarships or go to research into a particular disease will direct your money to those purposes rather than allowing it to be used without restriction by the charities' management.

How to give to charity, both from tax and non-financial perspectives, is a subject requiring strong evaluation.

Section 5:

Your Wishes—Your Lifetime

Chapter 13

Durable Power of Attorney for Financial Management

A Power of Attorney authorizes another person to handle your financial affairs in the event of your inability to do so.

"Durable" documents extend through disability; standard Powers of Attorney are automatically revoked when the maker becomes disabled.

Even if you have a Trust providing for financial management in the event of your disability, some assets are not held in Trust. A Durable Power of Attorney is needed.

Who will manage your IRA?

Powers of Attorney are written documents authorizing another (who need not be an attorney) to act for you on your behalf. You, as the "Principal," give someone else, your "Agent," the power to act for you according to the terms and provisions of your legal instrument.

Powers of Attorney are automatically revoked upon the Principal's disability or death. For estate planning purposes, this is the opposite of the intended result: we want the Power of Attorney to serve us when we are disabled, when we are temporarily or permanently unable to handle our financial affairs ourselves. The vehicle allowing another to act for us during the time we are disabled and unable to act for ourselves is the Durable Power of Attorney for Financial Management. Because the document is "Durable" it will be effective during the time that we are disabled.

Spouses and Other Family Members Cannot Act for You

Spouses and other family members do not have the legal capacity to act for you absent a written Power of Attorney. While some financial institutions and/or others may work with spouses and other family members, doing so would be on an informal basis—and without your written authority. If you hold accounts and property on a joint basis with your spouse, you may be able to act as the other named party on the account. You must have executed a Durable Power of Attorney for Financial Management to allow for such action.

The powers granted under a Durable Power of Attorney for Financial Management can be narrow or broad. Some states have laws stating the exact language that a Durable Power of Attorney for Financial Management can have. This is "statutory" language (contained entirely within the law, or statute), offering people the choice of using that exact language or writing their own independent document.

A Trustee or Successor Trustee may be able to manage property that is owned by your Trust, but anyone seeking to act on your individual behalf must do so under a grant of written authority. Since some assets are not commonly owned by or allowed to be owned by a Trust (e.g., insurance policies, annuities, IRAs and other retirement plan accounts), unless a Durable Power of Attorney for Financial Management is in place no one will be able to manage these types of assets.

Who will manage your IRA? A Durable Power of Attorney for Financial Management may nominate a Conservator of the Estate, and specify that should such a Conservator be appointed no bond be necessary—or at least limit the amount of bond required. It can also authorize your Agent to make gifts for you—or even to make changes to your Estate Plan. However, if the authority to make gifts or change your Estate Plan is too widespread it could create its own set of estate tax consequences for the Agent. If the Agent can act with complete independence, the Agent is interchangeable with you for estate planning purposes. Your assets are considered to belong to your Agent—and included along with your Agent's own assets for the purpose of determining whether the Agent is subject to estate tax.

Chapter 14

Advance Health Care Directives/Living Wills

Decisions regarding your end of life medical care require a separate legal document.

It's time to talk about religion!

A Durable Power of Attorney for Financial Management (also referred to as a Durable Power of Attorney) authorizes an Agent to make decisions for you in a wide expanse of areas that affect almost all your affairs. However, one subject area is so important that, while the Durable Power of Attorney could deal with it, laws require that a separate document be made. This document concerns who will make decisions for you when you cannot make them yourself, when those decisions could affect whether you live or die.

Trust law dates to feudal England. It is well-established in Anglo-Saxon common law, developed over centuries that even now governs our affairs in the absence of specific laws passed by legislatures or Congress. But laws dealing with our decisions as to whether to accept life support, or how we should be cared for should we be in comas or persistent vegetative states, are relatively recent. The case of Terry Schiavo, who was in a persistent vegetative state, kept alive by life support machinery—and whose husband's wishes conflicted with those of her parents in wanting to deny her food and water in order to let her die—extended from 1990 to 2005, ultimately becoming a headline issue and reaching the halls of Congress.

It was in 1969, not long ago from a historical perspective, when the concept of a "Living Will" was first proposed in a law review article by a far-sighted Illinois attorney, Luis Kutner, who deserves praise and credit for his insight. (Luis was also a co-founder of Amnesty International.)

Discussions soon followed about how we could express our end-of-life issues through written legal documents. While these conversations centered on the need for seniors to begin to recognize and cope with issues and circumstances that most of humanity had never even considered, it was the experiences of two young women and their parents, Karen Ann Quinlan and Nancy Cruzan, and the women's ultimate deaths, that also drew headlines and spurred discussion.

Both were kept alive in persistent vegetative states. Karen, after embarking on a radical diet and not eating for two days, reportedly "in order to fit into a dress," went to a party and then took alcohol and drugs, resulting in her collapse. (Source: Wikipedia.) Nancy was injured in an automobile accident. Both cases left the parents in the unenviable positions of seeing their brain-dead daughters kept alive by artificial means. The parents claimed that there was a "right to die," that removing the women from life support would not be the illicit act of euthanasia (assisting someone die to avoid pain) — but prosecutors in both cases threatened to bring charges against the women's parents for homicide should the women be removed from life support.

Finally, the case of Nancy Cruzan reached the United States Supreme Court. In 1990, the Court ruled that Nancy's parents, as her guardians, could have removed her from life support had there been "clear and convincing evidence" that Nancy would have wanted to die rather than live as she was. The court left it to the states to create their own rules regarding this issue, and finally, after a subsequent state court hearing into what Nancy's wishes were, Nancy's parents were authorized to remove her from life support, after which she quickly died. The ruling paved the way for legal documents dealing with end-of-life issues to become part of the mainstream. Advance Health Care Directives, providing clear and convincing evidence in writing of one's intentions, began to come into vogue.

Different states call their documents by different names, but the terms Living Wills, Advance Health Care Directives or some combination of the two are common terms. As examples, California authorizes the use of an "Advance Health Care Directive," which is a combination of a Durable Power of Attorney, naming and authorizing Agents, and an Advance Directive which states a person's wishes relating to end-of-life care; Pennsylvania provides for a "Combined Living Will and Health Care Power of Attorney." For this book, we'll refer to the document as an Advance

Health Care Directive.

As with Durable Powers of Attorney for Financial Management, some states have statutory Advance Health Care Directive forms now. Using such a form, which is often a check-the-box type of form with additional room for personal wishes to be inserted, assures that the language of an Advance Directive conforms precisely to the law. There are benefits to these types of forms—notably that medical providers are familiar with them, know just where to look for specific authorizations and are less likely to question them. On the other hand, they are template documents; by definition, they are less comprehensive than customized documents that are written by attorneys.

Advance Health Care Directives can address what your values are and how you wish for your Agent to make decisions for you in different circumstances, including whether to:

- Prolong life—or not prolong it
- Have your values stated whether you wish for economic considerations to play a factor in end-of-life decisions that are made for you, or whether want to be a burden to your family
- Receive nutrition and hydration
- Have life discontinued if you are in a coma or persistent vegetative state—and if so how long should you be in such a condition before life is discontinued
- Have your visitors restricted
- Be an organ donor or have your body used for medical research
- Have religious values considered—and to what extent

It's Time to Talk about Religion

To paraphrase the adage, we shouldn't talk about politics and religion in polite company. But when it comes to Advance Health Care Directives the adage shouldn't hold. In fact, Advance Health Care Directives should consider religious issues, and include them when desired.

Different religions deal with end-of-life and death-related issues differently. Our civil laws derive from religious—or canonical—laws, and there are many religious laws regarding life and death. To take widely-known examples, the Catholic Church has laws dealing with the issues of contraception and abortion. These differ from, say, Jewish laws, which may in turn differ from the civil laws established by Congress and the legislatures.

In the world of Advance Health Care Directives, people can spell out how much influence over their care they wish their religious beliefs to have. Also, certain religions, such as Catholicism and Judaism, have more detailed laws on the subjects than do other religions.

- Should your Agent be directed to a member of the clergy or representative of your religion to make sure that your treatment is in concert with your religious beliefs?

- Even if your religion is identified, your denomination should be stated so that its beliefs can be used. For example, there is a big difference between the religious beliefs and practices of Orthodox and Reform Judaism. Solely stating that Jewish law should be adhered to may not be specific enough to provide you with treatment in accord with your beliefs.

- Are there some aspects of your religious beliefs that are not in accord with your personal beliefs? To take other examples from Jewish law, organ donations and autopsies are not permitted. If the religious beliefs of someone who is Jewish should be abided by in general, but that person believes in organ donation, then the Advance Directive should clarify that: it should state that notwithstanding the fact that your Agent should act in accord with Jewish law, you specifically approve organ donations and authorize your Agent to donate your organs.

- Civil law overrides religious law, so even though a religious law proscribes an action, if civil law requires it the action must be taken. Judaism provides another example of this in that traditional Jewish law prohibits autopsies, but our society feels that in certain instances an autopsy is required to determine the cause of death. Society's civil law will govern, so if the Advance Directive of a Jewish person states that law of a Jewish denomination should be followed, an Advance Directive could state that and not authorize an autopsy—unless otherwise required by civil law.

- Other religious or civil preferences should also be addressed:

    - Do you want to be cremated or buried?

    - Where and how should your remains be disposed of—where you live, or in the area where you were raised or where your family now lives if you come from someplace else?

    - Do you want a Memorial Service? If so, what type, where and when—at the time of your burial or cremation, or in another city within a month of your death, or both? Buddhists have lengthy periods of time for mourning. If you are a Buddhist, do you want a week-long religious ceremony/mourning process that comports with your religion? Whatever your preferences are, list them!

  - If you don't wish religious beliefs to impact your care, you should state that, too. Agents are often family members, and their own preferences may guide their decisions, consciously or unconsciously. This is another reason that it is good to understand and know your Agent well. Your understanding and knowledge will help you determine whom to choose as your Agent—and whom not to choose.

Chapter 15

Medical Release Forms

> ***Privacy laws prevent your medical information from being released to another — even your spouse — without your permission.***

Suppose that your loved one were incapable of making health decisions for himself/herself, and that you, as the Agent under his/her Advance Health Care Directive, had to step in and make medical decisions for that loved one. One of the first requests that you would want to make would be for the access to medical records, either for you to review—or more likely— to give them to another to review, perhaps for a second or third opinion. Without information how could you make quality decisions for your loved one.

While that may be a very logical approach—allowing your decisions to be made on the basis of the patient's medical history—privacy laws would prevent the disclosure of those medical records. Should doctors, hospitals or other medical providers release medical records, they could be sued for the violation of those privacy laws, the most notable one being the federal Health Insurance Portability and Accountability Act (HIPAA).

To avoid this outcome, a Medical Release Form will authorize the release of your private medical information to certain individuals, be they your Agent under your Advance Health Care Directive, your Trustee under your Trust, or another relevant person. Should there be a separate state privacy law—for example, California has a Confidential Medical Information Act—compliance with that law can be made, too, either in a separate document or one combined document meeting both federal and state authorizations requirements.

When someone else is charged with literally making life and death decisions for you, and when you are unable to authorize the release of your medical records, your Medical Release Form will allow your medical providers to provide those records to another—providing information that can aid in making the soundest medical decisions for you.

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Section 6:

Life's Circumstances—Now What?

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Chapter 16

I'm a Newlywed—Now What?

Newlyweds can be those marrying for the first time or entering second marriages with blended families.

Estate Planning should begin before marriage.

Newlyweds can fall into three different categories:

- A couple, neither of whom has ever been married
- A couple, both of whom have been previously married and divorced
- A couple, one of whom has been previously married and divorced and the other for whom the marriage is a first marriage

For any of these couples, dependent or adult children could be involved. However, whether there are children or not, estate planning before marriage is very important.

- Prenuptial agreements should be considered. Many, especially younger adults, are not keen on such agreements, preferring to feel that they are starting new lives together, and that their marriages will last throughout their lifetimes. For them, beginning their new lives together by entering into a prenuptial agreement is quite distasteful. But in an era with a significant number of marriages ending in divorce, the parties will have to consider whether it is prudent or not to enter into a prenuptial agreement. One option is to compromise: begin married life by entering into a prenuptial agreement, with the agreement calling for its own termination after a certain point, after which all assets will be combined.

- For those who reside in a community property state, a further discussion should ensue about how they will handle their financial accounts and/or real property. Ownership of accounts and property in community property states can be affected by the commingling of each spouse's assets, including businesses. Further, each of the parties' separate property owned before marriage, as well as community property, could be liable for the debts of the other spouse. Careful planning can help.

- If minor children are involved, all the planning required of anyone who has a minor child should be done before marriage, with a new Estate Plan executed upon becoming married. Protecting the children, by naming guardians and providing funds for their rearing, are very important tasks and protect the children from the consequences that could arise from blended families—Cinderella's circumstances.

- If adult children are involved, the nomination of guardians is not needed but the careful distribution of assets is, to protect the interests of the family members of the blended families.

- These are unpleasant issues to contemplate and questions to ask, but since life is not a fairy tale it's important to ask and answer them—and prepare to the extent that we can.

- The laws of intestate succession may not work as the newlyweds intend. As an example, while laws vary by states, for newlyweds without children it's not uncommon to have the assets of a newlywed who dies without an Estate Plan divided equally between the newlywed's spouse and parents/other blood relatives. An Estate Plan can override state intestacy laws.

The Cinderella story is the story of blended families. Whether the circumstances are two newlyweds who have no children to a couple, both of whom were divorced and have children, their story can be the Cinderella story. A Complete Estate Plan, earmarking each of the newlywed's assets for the children and/or spouse as desired, can help avoid that very harsh result of life.

❖ *For Those Never Married—and Who Don't Have Children*

For the couple never previously married, multiple concerns come into play.

First, in an era when many marriages end in divorce, the parties should consider whether to have a prenuptial agreement, allocating their assets and/or future income in the event of a divorce.

For those entering a first marriage and who plan to have children, a Complete Estate Plan identifying how assets will pass to future children is advisable. Many people have children and then execute Estate Plans, but if we are always going to ask, "What if?" and plan accordingly, what if both parents of a newborn are driving home from the hospital with the newborn, get in a car accident and die? The Estate Plan prepared before the child was born, providing for that child, will make a world of difference in the life of the child. Otherwise, the laws of the state for those who don't leave Estate Plans—the laws of intestacy (intestate succession)—apply. Those laws may not be suitable for the newlyweds' circumstances.

❖ *For Those Never Married — but Who Have Children*

For the couple who have always been single, but with one or both having children, the planning needs may be different, but the need for estate planning is even more critical.

Where One or Both of the Newlyweds Were Previously Married and Divorced—but Who Have No Children

For marriages where one or both newlyweds were previously married and divorced but who don't have children, Estate Plans are needed, too. Like those who have never been married, prenuptial agreements and consideration of community property issues where applicable are important considerations.

Where One or Both Newlyweds Were Previously Married and Divorced—but Who Have Children: The Blended Family

A "Blended Family" can be described as one where one or both newlyweds have children. Typically, where children are present, the parent was previously married and divorced, but that is not always the case.

This is truly the Cinderella story. The newlyweds may wish to provide for each other in their Estate Plans, but each are usually concerned first about their children – and how they can provide for them. This is particularly true if the children are minors or young adults.

In Blended Family situations the newlyweds should evaluate their needs, and then establish their Estate Plans in the way that provides for their beneficiaries in the order of priority that the newlyweds desire.

For those newlyweds living in community property states, they should also ascertain whether they wish to keep their pre-marital property separate. Commingling of their property (failure to keep separate accounts and records for it) could result in the property's status being changed from separate to community property. Such changes are undocumented, but are recognized upon subsequent divorce or death.

Chapter 17

Same-Sex Couples

Same –sex couples can now marry.

Same-sex couples who marry are treated the same as heterosexual couples for estate planning purposes.

Same-sex couples who are not married are treated the same as singles/unmarrieds.

In June 2015 the U.S. Supreme Court declared that same-sex couples in the United States have the same right to marry as do heterosexual couples. For estate planning purposes, this means that any rights granted to heterosexual married couples now apply to same-sex couples, including community property laws. There is no longer any distinction.

The relationships of same-sex partners who are not married are, for estate planning purposes, treated as are those of other unmarrieds. These partners are either Single or Unmarried, and their estate planning should be approached in the same manner as any other single or unmarried person.

Chapter 18

Non-U.S. Citizens

Wealthy married couples where one of the spouses is a non-U.S. citizen may be subject to different rules at death than are wealthy couples where both spouses are U.S. citizens.

A QDOT Trust may be a solution.

Gifts to a non-U.S. citizen spouse are not unlimited.

Married couples where both spouses are U.S. citizens can leave unlimited amounts of money to each other at death. Estate taxes are not payable until the death of the surviving spouse. This is called the unlimited marital deduction. As previously noted in this book, since, for most people, the estate tax is not a concern because their assets do not exceed the exclusion amount of $11.2 million per person (the 2018 figure, which is indexed for inflation and which is set to expire in 2025), a citizen who dies and leaves that amount or less to his/her spouse will not be subject to estate tax. The estate tax is levied at the time of the survivor's death. This is true, also, for couples where one of the spouses is a non-U.S. citizen.

However, if the beneficiary is a non-U.S. citizen, and the decedent's estate exceeds the $11.2 million figure, estate tax on the amount over the $11.2 million will be due at the first of the couple to die. On the other hand, if a non-U.S. citizen dies first and leaves his/her estate to his/her U.S. citizen spouse, no estate tax will be due at the first death.

For very wealthy individuals, where the U.S. citizen spouse dies first and leaves more than

$11.2 million to his/her non-U.S. citizen spouse, one option to avoid the estate tax would be to leave it to a special type of Trust instead of to the non-citizen spouse directly. This special type of Trust is called a Qualified Domestic Trust (QDOT). Where the Trust, and not the non-U.S. citizen spouse, is the beneficiary the Trust could pay income from the Trust's principal to the non-U.S. citizen spouse. The U.S. government is concerned that it would be easy for the non-U.S. citizen to take the assets out of the country and escape the estate tax on them, so the Trust's principal must remain in the Trust – otherwise the estate tax may be levied on the principal. (An exception applies where need for the principal can be demonstrated.) Wealthy non-U.S. citizen spouse beneficiaries can also become U.S. citizens within nine months of the date of the decedent's death. Becoming a citizen will allow for an unlimited amount of money to be transferred to the former non-U.S. citizen spouse, delaying the imposition of the estate tax until the death of that survivor.

Couples where both spouses are U.S. citizens may also give each other an unlimited amount of money without becoming subject to gift taxes. However, where gifts between married couples are made, gifts from the non-U.S. citizen to the U.S. citizen can be unlimited, but gifts from the U.S. citizen to the non-U.S. citizen are not unlimited – they cannot exceed $153,000 per year (the 2018 figure, which is indexed for inflation).

Chapter 19

I'm Single

Singles may not have the practical and legal benefits accruing to those who are married.

Singles may be living in relationships with others, but their rights are not the same as are those who are married.

They may need contracts to secure their rights.

Single people are those who have never been married. Unmarried people are those who have been married but who no longer are, be they divorced or widowed.

This chapter refers to singles living in the following types of circumstances:

- They may live alone
- They may live with dependent children
- They may live in committed relationships with other adults
- They may live in committed relationships with other adults, and have dependent children

Married people are often able to rely on their spouses for backup support. Whether it's an assumption that a spouse will be there for them to provide long-term care assistance, or the fact that they believe that they may not need to have an estate plan until after the death of the first spouse, the feeling that one can be dependent on the other is a belief that the institution of marriage creates: "…until death do us part."

And there is something to this belief. However, whether it's accurate or inaccurate, practical or engaging in denial, singles often don't have the luxury of depending upon another in the way a married person can. Therefore, singles have the extra burden of ensuring that they have Estate Plans in place.

Legally, too, singles don't have the same luxuries available to married couples. A married couple with substantial means, enough to subject their assets to estate taxation, would have the opportunity of having estate taxes postponed until the death of the survivor. Singles cannot do so. Additionally, two people in a committed relationship may own a home or other assets jointly, but upon separation or death their rights are not the same as are those who are married. To assure their rights they may need to have contracts between themselves—in addition to Estate Plans.

A single person should review her or his insurance program, especially the life, health, disability and long-term care insurance portions, making sure that any needed safety nets are in place.

Whether singles live alone, are in committed relationships or have children—most of them don't have the type of support structure that is inherent in a marriage—and there's often no margin for error.

Chapter 20

I'm Divorced: Now What?

> ***Change your estate plan immediately upon your divorce.***
>
> ***Powers of Attorney, Advance Health Care Directives and Medical Releases may also be able to be changed during divorce.***

Divorced people can be in classified into different circumstances. They can be:

- Divorced, without children
- Divorced, with adult children
- Divorced, with dependent children

The divorced person is newly-single, and the concerns as outlined for the single person are similarly applicable to those who are divorced. Upon divorce there is an abrupt change of legal relationships, and once again there may be little, if no margin for error, especially if dependent children are involved.

While going through divorce proceedings, if the divorcing person's then in-effect Estate Plan (if there is one) makes provisions for the divorcing spouse, whether as a person who will act in a role of responsibility such as Executor, Co-trustee or Agent, or as a person who will be a beneficiary, the moment a divorce is final is the moment that a new Estate Plan is needed. In fact, one is needed during the divorce proceedings, but often courts don't allow for changes to Estate

Plans during the divorce proceedings—unless those changes are made by agreement between the parties or relate to property that is clearly the separate property of a divorcing spouse. Anyone going through divorce proceedings should consult with her/his divorce attorney to determine whether they can make changes to their Estate Plan during divorce proceedings, and if so, what types of changes are permissible. Powers of Attorney, Advance Health Care Directives and Medical Releases may also be able to be changed during divorce. Consult your divorce attorney because it's possible that these personal documents may often be terminated upon legal separation, prior to divorce.

If no changes are permissible or desirable during divorce proceedings, the divorcing person should consult with an Estate Planning attorney during the divorce proceedings—setting in place the foundation for a new Estate Plan, then signing that new Estate Plan as soon as possible, and certainly the moment the divorce is final.

As with singles, the divorcing person should also review his/her insurance program, especially the life, health, disability and long-term care insurance portions, making sure that any needed safety nets are in place and that Beneficiary Designations are updated.

Chapter 21

I'm 18: Now What?

***Except for the purpose of consuming alcohol,
18-year-olds are adults—and need their own Estate Plans!***

Once minors become adults, with few exceptions the law holds them accountable for their own actions—and they should be instructed to act accordingly.

For the purposes of estate planning, this means that minors should adopt their own Estate Plans. Just as the divorced person should have a new Estate Plan the moment her/his divorce is final, so, too, should an 18-year-old create an Estate Plan immediately upon becoming an adult. For most 18-year-olds Simple Estate Plans will suffice, since most don't have substantial assets at that age, but that may not always be the case. Young adults could be beneficiaries of their parents' or grandparents' Estate Plans, with those Estate Plans calling for outright distributions to them, with the possibility that those distributions could arise within the near future. In that instance, even young adults need Complete Estate Plans with their own Trusts that provide for the avoidance of Probate on assets that they will inherit.

Parents and grandparents seeking to give birthday presents to 18-year-olds would do well to consider paying for them to establish their own Estate Plans, inducting them into adulthood by sharing the importance of life's lessons with them—and the steps that they can take to prepare for them!

Chapter 22

Minors

> ***Those under age 18 are minors—and minors can't control their own property!***

Adults can act for themselves, but minors require guardians to act for them. If parents die without Estate Plans someone will have to step in to manage assets for minors. A court will appoint the guardian(s), but control of money may be as valuable as ownership of money—and conflict could arise between parties competing to control the funds that are left to the minors when parents don't nominate guardians. Moreover, once the minors turn age 18 they are entitled to the property—and few 18-year-olds are knowledgeable or responsible enough to manage property.

Circumstances could also arise where a minor incurs liability. A creditor could lie in wait until the minor is over the age of 18, then seize the assets that are distributed to the former minor who has now become an adult.

Putting procedures in place to safeguard assets for minors, then distributing those assets carefully, is an important part of estate planning.

Chapter 23

I'm a Grandparent Who Wants to Give to My Grandchildren—Now What?

It has been said that grandparents and grandchildren get along so well because they have a common enemy: the children of the parents, who are the parents of the grandchildren!

Many grandparents want to provide for their grandchildren. There are multiple ways to do this, some tax efficient. Grandparents can

- Make outright gifts of money or property, including shares and LLC interests representing fractional ownership, to grandchildren (but gifts of more than $15,000 per person—allowing two grandparents to give $30,000 to each grandchild—could have Gift/Estate Tax consequences).

- Provide for their grandchildren in their Estate Plans (but gifts through Estate Plans could have tax consequences under the Generation-Skipping Tax rules).

- Pay directly for educational expenses for their grandchildren (direct payment for tuition and fees – as well as medical expenses - not being subject to Gift/Estate Tax consequences).

Parents could do the same. As mentioned in Chapter 21— *"I'm 18—Now What?"*—grandparents who want to leave a legacy for their grandchildren who are young adults could also make an outright gift of money for paying for the grandchildren to establish their own Estate Plans, demonstrating to those grandchildren the importance of taking responsibility for their own legal affairs once they become adults.

Chapter 24

My Child Has Special Needs—Now What?

> ***A child with Special Needs may need lifetime supervision.***
> ***A Special Needs Trust may be appropriate.***
> ***ABLE Accounts may work, too.***

Children with Special Needs come in all categories: Some may be able to take care of their financial and personal lives themselves; others may require oversight throughout their lifetimes.

In the past, before government benefits became available for Special Needs children, Trusts would be sufficient to provide for the care and supervision of a Special Needs child, throughout that child's lifetime. A Trustee would be empowered to spend Trust assets to acquire care and provide living expenses for the Special Needs child, according to terms spelled out by parents. Today, depending upon the ability of the Special Needs child and/or the amount of assets that the parents leave their Special Needs child, that option may still be an adequate solution.

If the Special Needs child cannot manage his/her affairs sufficiently, however, or if the assets available to provide for the child over his/her lifetime are inadequate, then a Special Needs Trust may be a solution. A Special Needs Trust provides assets for the child's use and support, but significantly restricts the availability of those assets in accord with government rules so that the Special Needs child may qualify for government-supported benefits and programs.

If the Special Needs child's limitations are very significant, parents can seek to become the child's conservators once the child turns age 18. A conservator acts for another completely, and is empowered to make all decisions for her/him, ranging from determining how s/he may enter into contracts (including marriage), to how her/his money will be spent.

ABLE Accounts – Permitting Increased Assets to Become Available for Special Needs Children

2014 also saw the passage of federal legislation allowing for accounts held by Special Needs children, in their names, to be set up without the child jeopardizing his or her eligibility to receive public benefits such as SSI and Medicaid. These accounts are known as ABLE Accounts, created by the Stephen Beck, Jr. Achieving a Better Life Expectancy Act.

Prior to ABLE accounts a Special Needs child could hold very little money, up to $2,000, meaning that to receive public benefits the child had to be poor. Now, ABLE accounts, which do have limits and restrictions, allow for a Special Needs child to have some money in her/his own name that is above the $2,000 threshold, without jeopardizing Special Needs benefits that they may receive.

Chapter 25

I'm a Business Owner

Business owners can own their businesses in whole or in part, and in different formats.

For business owners, there are 7 essential Estate Planning documents.

Professional Corporations have additional requirements for transfer upon death.

Life Insurance planning is tied to Business Succession planning.

In community property states community property interests should be considered.

Estate planning for the business owner can be quite complex, and this is only a brief highlighting of those issues, intending to make owners aware of the need for additional estate planning.

Businesses can be owned in whole or in part. One person may own 100% of a business, a married couple may together own 100% of a business, or individual and/or couples may own part interests, in partnership with others. Here are some examples of business ownership structures:

- Sole proprietorship
- General partnership

- Corporation
- Professional Corporation
- S Corporation
- Limited Liability Company (LLC)
- Limited Partnerships

These different ownership structures may affect how the business interest will transfer. For example, two people doing business as a partnership will arrange for the transfer of their partnership business interests differently than will two people who do business as a corporation, and who will transfer shares of stock.

If the Complete Estate Plan is comprised of 5 essential documents, the Complete Estate Plan for a business owner should contain a minimum of 7 essential documents:

- The first 5 documents are the same as are needed by individuals

The additional 2 documents are the following:

- Limited Power of Attorney for Business Management
- Buy-Sell Agreement

Limited Durable Power of Attorney for Business Management

A Durable Power of Attorney provides for another to manage your affairs according to the terms you set forth, continuing through incapacity and ending at death. But even if you execute a Durable Power of Attorney for Financial Management, your Agent, even if your spouse, may not have the knowledge and/or skills that are necessary to manage your business. When there are business partners, even if an Agent is a spouse or other trusted person, the other partners may not wish to have that outsider assume responsibility for the disabled partner's role. Most often, partners are partners with each other, and don't want an outsider stepping in—even temporarily.

To prevent the outsider from stepping in, a Limited Durable Power of Attorney for Business Management can be used. This legal document from a Principal grant the right to another to serve as Agent—but only for the limited purpose of assuming specified business and management responsibilities during the time that the business partner is incapacitated.

As an example, two partners who own a business have Complete Estate Plans, and get along well with each other's spouses. But, because neither of the spouses is involved in the day-to-day operations of the business, the owners want to eliminate the prospect that neither spouse will become involved in the business's management should either of the owners become unable to work in the business. The owners could grant Limited Durable Powers of Attorney for Business Management to each other, assuring that if one of them becomes incapacitated the other could run the business independently should one be absent.

Buy-Sell Agreement as Part of Business Succession Planning

Similarly, business owners may wish to assure that, in the event of their deaths, they are not in positions where they become partners with their now-former partner's heirs. (This situation could also arise in other circumstances that could jeopardize their businesses, e.g., permanent disability of or divorce by the other partner, or the partner declares bankruptcy or is convicted of a crime. Also, absent Business Succession Planning, should a non-managing spouse re-marry after the death of his/her spouse, a partner could find himself/herself in partnership not only with the non-managing spouse, but the non-managing spouse's new spouse, too, should the non-managing spouse re-marry.)

To avoid such consequences, parties enter into Buy-Sell Agreements, which are contracts in which both parties, not knowing what will happen in the future, obligate themselves either to buy or sell the other's business interest, as future circumstances would warrant.

Even individuals without partners can enter into Buy-Sell Agreements. The death of an owner could destroy a business's value overnight, requiring heirs to sell business interests hastily, frequently at fire-sale prices.

The Professional Corporation—Prevent It from Becoming the Unprofessional, Professional Corporation Upon Death

Professional corporations are corporations whose owners must have professional licenses, such as law, medicine, accounting or architecture. The only person authorized to own the stock of a professional corporation is the professional. If that's the case, what happens when the professional dies and the spouse seeks to operate the business, even if for no other reason than to wind up the corporation's affairs? Unless the spouse is also licensed as a professional, the process may be very difficult.

To avoid this, provisions in an Estate Plan can permit a non-professional to inherit and dissolve the business efficiently. For example, in California, certain language in a Will or Trust authorizing the non-professional heir to transfer the Professional Corporation allows for the ease of transfer of the Professional Corporation's stock.

Proper estate planning here can prevent the Professional Corporation from becoming an *Unprofessional, Professional Corporation.*

Subchapter S Corporations Require Additional Attention

Owners of corporations operating as Subchapter S Corporations may pass their stock on to their heirs, but tax laws prevent inheritors of Subchapter S Corporation stock from retaining the Subchapter S status for more than two years after the death of the Corporations' owners unless the stock is owned during the owners' lifetimes by certain types of trusts. The two primary types of trusts that allow for Subchapter S status to continue past an owner's death are Qualified Subchapter S Trusts (QSST) and Electing Small Business Trusts (ESBT). Subchapter S Corporation owners who want their Subchapter S corporate status to continue for more than two years past their deaths need to act during their lifetimes to make sure that their Subchapter S stock is owned by one of those qualifying trusts.

❖ *Community Property Laws Can Result in Undocumented Ownership Transfers to Spouses*

Since community property laws provide that income earned by either spouse during marriage is jointly owned by the non-earning spouse, income from a business that is reinvested back in the business, or the increase in the value of a business which can be attributed to the efforts and skill of a spouse—which is a form of income—can result in the business's appreciation. This increase can become the property of the non-earning spouse, regardless of any formal ownership transfer to the non-earning spouse.

At the time of divorce or death, these non-documented ownership transfers can affect the ownership of a business, with a spouse who is not involved with a business being able to claim an ownership interest. Careful planning is advised, here, too, to assure that the ultimate outcome reflects the intention of the parties.

❖ *Life Insurance Planning as Part of Business Succession Planning*

Life Insurance planning goes hand-in-hand with Business Succession planning and Buy-Sell Agreements. The Buy-Sell Agreement is a contract to buy or sell a business when a contingency occurs. That obligates a party to have money to meet that contractual obligation should the contingency arise. Rather than tie up funds to meet that contingency, life insurance is often used. Budgeting for small premiums out of cash flow to create a reserve in the event of a contingency often works well for business owners.

Many business owners have worked lifetimes to build their businesses. Business Succession planning, incorporating Buy-Sell Agreements, is a must to assure that the value of a business is preserved for heirs.

Chapter 26

What If?

Insurance and Asset Protection

Life, Disability, Health and Long-term Care Insurance Can Provide Financial Resources When Those Resources May Be Needed Most.

Property and Casualty & Liability Insurance Can Indemnify You in the Event of Catastrophe.

Entrepreneurs continuously seek financial rewards. Attorneys are trained to think in terms of minimizing risk. A middle ground is needed so that individuals as well as entrepreneurs can take risk with safeguards. That's what insurance allows.

Insurance products can fund issues arising from two general categories:

- Those that arise from our existence as human beings. These are Life Insurance products.
- Those that arise from our endeavors as human beings. These are Property and Casualty Insurance products.

Life Insurance Products

We can classify life, disability, health and long-term care insurance products under the general category of Life Insurance products. These products step in to fund obligations that may arise—in the case of permanent life insurance there may be a guarantee of funding at death regardless of age, an event that we know will arise—minimizing the financial harm that could accompany sickness or injury.

Life Insurance may:

- Create an Estate
- Pay Taxes and Costs Due at Death
- Preserve and/or Protect an Estate
- Preserve and/or Protect a Business Interest

Disability Insurance may:

- Replace Salary When Income May Be Needed Most
- Preserve and/or Protect Savings
- Preserve and/or Protect a Business Interest

Health Insurance may:

- Indemnify against medical expenses that can arise—and cause financial devastation
- Fill in coverage gaps for people age 65 and older, most of whom are on Medicare. Most people become eligible for Medicare at age 65, but Medicare doesn't pay for all expenses. Medical Supplements, insuring for medical care and prescription drug coverage, can be acquired to fill in what Medicare doesn't pay for.

Long-term Care Insurance may:

- Create Money to Pay for Long-term Care Expenses, from in-home help to the cost of a facility
- Prevent your loved ones from becoming overburdened due to the need to provide care for you
- Preserve and/or Protect Savings
- Provide Funds for You to Live in Dignity Should You Require Assistance to Live

Any estate planning discussion should contain a discussion of your life, disability, health and long-term insurance needs. If you don't have these insurance products, answer the question of why you don't. If you do have some or all the products, review those that you have. There have been many changes in the insurance marketplace over the last decade. Many people are living longer; as a result, life insurance has come down in price. But as people live longer they tend to incur more sickness, which has raised the cost of disability and long-term care insurance products.

Your job is to review your policies, with the objective of ascertaining if whether your money—in the form of premium dollars you are paying—is working as hard as it can for you. If you're not paying any premiums because you have no coverage, you'll want to consider whether obtaining some coverage, and what type, is in the best interest of you and your family.

These insurance products work in tandem with your estate planning—and no Estate Plan is complete without a review of your life, disability and long-term care insurance program.

❖ *Property and Casualty Insurance Products*

Property represents the fruit of our labors. Property and Casualty Insurance products protect against the financial loss to our property that can be sustained. Comprehensive policies also provide liability protection for us. In non-business settings people can slip and fall in our homes, be injured by our animals or hurt when we drive. We can also be hurt and injured by others when we drive, and if those others don't have sufficient assets or insurance to reimburse us for our losses we may be forced to look to our own policies for coverage. An example of this is the uninsured/underinsured motorist protection offered under our automobile and personal umbrella liability policies.

Accidents that we cause and circumstances for which we are liable can easily deplete our assets—or we may find that those assets are depleted just by the legal defense costs that we may be forced to incur, whether or not we are found liable. For these reasons procuring insurance products—and ascertaining that the coverage is sufficient—is a key way to protect your assets.

❖ *Asset Protection*

If insurance is one form of Asset Protection, another form is the use of legal instruments to shield your assets from potential future claims of creditors, some of which could be frivolous.

Asset Protection steps are beyond the scope of this book, but when engaging in estate planning it may be prudent to consider how your assets are positioned, and whether your lifestyle and/or business endeavors could expose those assets to creditors unnecessarily. Your assets and their growth represent your future estate. Protecting them for your heirs is a function of Asset Protection planning.

Section 7: The Organized Life

Chapter 27

Living Life in an Organized Way

Disorganization can cost time and money;
In Estate Planning, it can defeat your dreams.

Most people want to live life in an organized fashion—but many do not. Too often life gets in the way. Having an Estate Plan can force organization for when it's needed most: when we are no longer able or present to step in and correct the perhaps-disorganized situation that would otherwise allow for our plans to be met—during and/or after our lives. Whether time and money are required to organize our affairs, or whether your heirs don't receive what you had wanted them to receive without conflict or extra cost, creating and maintaining your Estate Plan can help achieve your dreams—not defeat them.

Chapter 28

Compiling Data

Personal information can be scattered.

Organizing your information will save your Trustee, Executor and/or Agents countless hours of time and effort.

Where are and/or who knows your passwords for all your accounts? Who knows where all your accounts and insurance policies are held, as well as the account numbers and/or passwords and other confidential information, which may be needed to access them? Do you have a safety deposit box with valuables and/or valuable documents? Do the people who are authorized to access it even know of its existence, let alone how they can gain access? Do they know your medical history, or at least the doctors and professionals upon whom you rely?

I highly recommend that clients compile this information, and then write instructions to their loved ones as to how they would like their affairs to be managed – both during their lifetimes in the event of disability or after their deaths.

I work with my clients in this area. As I explain it, my number one job is to help them get organized. Accumulating data, reviewing and then managing insurance and financial portfolios, writing estate plans and ensuring that other needed documents are created and/or up-to-date, that's part of the estate planning process.

Make sure that you act in this arena. People who ignore the organizational process do so at their own and their family's peril!

Chapter 29

Access to Data: The Cloud Is the Limit

The world of computers and the Internet poses unlimited growth opportunities, along with the potential for high-tech crime.

Many say that the world is experiencing a third Industrial Revolution. The first Industrial Revolution came about in the 18th century, when the inventions of machines and tools generated substantial economic growth, with almost every aspect of life touched to some degree. The Second Industrial Revolution took place in the 19th century, with advances in the use of steam and the steam engine. The modern factory and the Assembly Line followed, further spurring growth. The Third Industrial Revolution arose with the advent of computers, and then the Internet. Computers and the Internet have brought about changes in lifestyle and ways of doing business that were unimaginable just a few years ago. The potential for growth, change and the accumulation of wealth that computers and the Internet have brought are enormous, but like everything else in life, there are two sides to every coin: good comes with bad. The bad of the computer and Internet world is the security breaches that have resulted in identity theft, jeopardizing privacy and personal data in heretofore unknown ways. One could say that the sky is the limit in terms of future growth in the high-tech world, but the maintenance of information in "The Cloud," which is the keeping of data off-site, has its risks.

In the Internet world, we are only permitted to access our data—including our e-mail accounts—ourselves. Should we become disabled or die it may be essential for others whose names are not on our accounts, including our spouses and other family members, to access our data, but when they do access that data without authorization they may be violating federal and/or state laws. This is a changing area, as evidenced by California's 2017 implementation of the California Revised Uniform Fiduciary Access to Digital Assets Act.

An Estate Plan can provide the written authorization for our representatives to authorize our on-line information, helping smooth out the operation of our affairs for us during our lifetimes or others after our deaths. Authorize others to act in The Cloud in your stead—and the sky will be the limit!

Chapter 30

The Ethical Will

An Ethical Will is a non-binding expression of your love, affection and values.

This non-legal document can be the most important document to express your values; modernly, it can be in writing and/or by video, serving as a method to document your feelings.

An Ethical Will can serve as a mid-life course correction.

Formal estate planning documents, being legal documents, are not often the place to express personal preferences and values. Explaining why you crafted your documents the way that you did, as well as your values, feelings and love for others, can be a wonderful thing to do. Putting your feelings in writing for others to have and view after you are gone can serve as an irreplaceable memoir.

A document that can do this is an Ethical Will. It is really nothing more than a letter to those who are dear to you, expressing values, convictions, love and appreciation to them. You can write it – or in this high-tech day and age, prepare an audio or video that states who you are, what motivated you and what you accomplished in life, and the gratitude to others for the roles that they played in your life.

Writing an Ethical Will can also provide the opportunity to take stock of your present state in life. A good way to work on any project is to start with the desired result and work backward, thinking through and creating a plan to accomplish the end result. If you are not on target to reach what you want the end result of your life to be, the process of writing an Ethical Will can serve as a mid-course correction: alter or change the course of your life completely to make sure that you're headed in the right direction – which is the direction that you want for yourself, one which no one else can provide for you.

Section 8: Conclusion

Chapter 31

Conclusion

Everyone Needs Estate Planning—and an Estate Plan!

While we are all human beings, subject to life's enjoyments and challenges, each of us experiences life differently. In our society, governed by the rule of law, we can influence how we will react to the challenges of life—and how we will dispose of our property after our death. We can plan for the care of ourselves and our families: the estate planning process presents that opportunity. Through it we can arrive at and create Estate Plans, taking advantage of our abilities to secure futures for the ones whom we love.

Life is harsh. Providing for our loved ones through our Estate Plans presents a significant opportunity for us to affect our and our families' lives. I can't think of any reason that anyone would not have an Estate Plan. For those of us who do, we can make sure that those loved ones do not have to resort to the need to invent fairy tales to lessen the otherwise steep burden that could befall them.