ESTATE PLANNING FOR THE MODERN EVOLVING FAMILY

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Modern families take many forms, and estate planning professionals must advise them all. This article describes some of the distinct issues faced by a modern family. Given the wide range of configurations of the modern family, there may be more considerations than one may realize.

Under the Tax Cuts and Jobs Act (TCJA), federal gift, estate and generation-skipping transfer tax exemptions were substantially increased, albeit temporarily. With inflation adjustments, the exemption in 2021 is $11.7 million per person. This so-called "bonus exemption" (along with other provisions in the TCJA) is scheduled to sunset at the end of 2025, so the current rules are designed to be temporary by default. In the past couple of years fewer than 0.04-0.09 percent of estates were in a position to be concerned about federal transfer taxes.[1]

Regardless of any potential changes to the transfer tax laws, much estate planning will not be impacted. This article will first discuss the reasons for implementing an estate plan and then will address the particular issues applicable to the modern family.

Loss of capacity

Without a plan, if a client becomes incapacitated and unable to manage their affairs, a court will select the person to manage the client's finances and medical decisions. With a plan, the party who fills that role has already been identified and authorized so that court involvement can be avoided.

End-of-life decisions

Without a plan, there may be no documentation regarding a client's wishes regarding life-sustaining treatment and comfort care. With a plan, clients have an opportunity to express their wishes and inform family members of their preferences. In some cases, mandating that health care providers do not resuscitate or refuse to administer life-prolonging treatment may be desired by the client to avoid having family members make decisions or implement the client's wishes in that regard.

Minor children

Without a plan, a court must determine who will raise minor children if neither parent is alive. With a plan, parents can nominate (and in some states can determine without court intervention) the guardians of their choice to take care of and handle the finances for minor children in the event of both parents' deaths.

Avoiding intestacy

Without a plan, assets of the decedent pass to heirs according to state laws of intestacy, which vary by state. Family members (and perhaps not the ones the client would choose) receive a deceased client's assets outright, without benefit of trust protection. With a plan, the client—not the state—makes decisions concerning who inherits which assets, along with how and when the designated recipients receive those assets.

Avoiding probate

Without a plan, assets in the decedent's name owned outright go through probate (subject to certain small estate transfer exceptions in some states, usually for amounts typically not exceeding $100,000). Probate can be an expensive, public, and time-consuming process and usually gives creditors an easy forum for filing claims. Waiting for a personal representative to be appointed through probate can delay the timely administration of assets. Although many states boast that probate is not cumbersome in their state, it is still desirable for planners to help clients avoid being forced to go through probate.

Privacy

As referenced above, clients who die without a plan, or with a plan that hasn't made an effort to protect their privacy, may subject their family to undue public scrutiny. With careful planning, including transfer-on-death and/or trust planning, clients' privacy can be protected.

Blended families

Without a plan, children from multiple relationships may not be treated as the decedent intended and the interests of surviving spouses may be in direct conflict with those children. With a plan, the creator of the estate plan determines what goes to the current spouse, if any, and what goes to any children from current and prior relationships.

Special needs planning

Without a plan, recipients with special needs risk being disqualified from receiving Medicaid or SSI benefits and may have to use an inheritance to pay for care. With a plan, a trust can be created that should enable recipients to remain eligible for government benefits while using the trust assets to pay for non-covered expenses.

Keeping assets in the family

Without a plan, if the decedent's adult child predeceases his or her spouse, the surviving spouse could receive the child's inherited assets. If the child divorces the current spouse, a significant portion of the inherited assets could go to the spouse. With a plan, a trust can be created to help ensure that assets will stay in the family and, for example, pass to grandchildren or more remote descendants instead.

Retirement accounts

Without a plan, the beneficiary of any IRAs, or other retirement account funds, may not reflect the client's current wishes and may result in burdensome tax consequences for the heirs, particularly if the probate estate is the default beneficiary. With a plan, a designated beneficiary reflecting the client's wishes can be selected.

Digital information and assets

Without a plan, the family may not be able to access the decedent's online photo albums, music files, email accounts, financial accounts, social media accounts, websites, blogs, online subscriptions, online memberships, and domain names. With a plan, the governing instrument can specify who is to manage or inherit such assets, or alternatively, direct that such assets be deleted, terminated, or closed after death.

Business ownership

Without a plan, a business owner may not be able to control who runs the business at the owner's death, thus risking both a reduction in value and loss of control of the business for the family. With a plan, the business owner chooses who will own and control the business after the owner dies.

Minimizing family discord

Without a plan, there is a greater risk that the client's wishes will not be well documented and that survivors will have conflict over the administration of the estate and remaining assets. With a well-conceived, well-communicated, and well-executed plan, a client can manage expectations, reduce legal conflicts, and put in place mechanisms for dispute resolution prior to litigation.

Creditor protection

Without a plan, assets have no protection from creditors. With a plan, it is possible to engage in asset protection, avoid probate, and take other reasonable steps to prevent creditors (including those with frivolous claims and/or divorcing spouses) from taking assets that could be retained instead in carefully structured trusts for the original owner or intended beneficiaries.

Philanthropy

State intestacy statutes do not include charitable beneficiaries. With a plan, clients can choose to support the causes they care about at death.[2]

Values legacy

Without a plan, there may be no written record of the clients' values, wishes, and intentions for how descendants should conduct themselves. With a plan, clients can be given the opportunity to document their values and wishes for their family members.

As indicated by the considerations above, planning is still essential regardless of the tax considerations. Moreover, all such planning must account for the changing nature and composition of families in the 21st century, and developments in laws, social norms, and science and technology.

At a minimum, the following situational variables and issues should be considered in planning for modern families in particular:

- Single clients;
- Divorce;
- Blended families;
- Same-sex married couples;
- Multinational couples;
- Unmarried couples;
- Polyamorous relationships;
- Special needs;
- Transgender clients and family members;
- Adoption;
- Nonmarital children;
- Assisted reproductive technologies;
- Longer life spans in retirement;
- Longer life spans and fading capacity;
- Cryonics and cloning;
- Digital assets and cryptocurrencies;
- Intellectual property;
- Pets; and
- Modern philanthropy.

Each of the above topics will be considered below to flag a few of the basic considerations. Then the article describes how to draft for flexibility in estate planning for all modern families.

CONSIDERATIONS FOR MODERN FAMILIES

Single clients

Years of declining marriage rates and changes in family structure have created a new subset within American society—the never-married or single by choice. In 1950, 22 percent of American adults were single, while in 2012 that number was almost 50 percent.[3] Approximately one in seven adults lives alone. Single persons may be widowed, divorced, cohabiting, opposed to the institution of marriage, or simply still searching. There are roughly 109 million unmarried adults in America.[4] Traditional nuclear families with two married heterosexual parents have now become the minority in American modern families.[5]

According to the Pew Research Center, 20 percent of adults over 25 years old in 2012 had never been married, a figure that had risen from nine percent in 1960. Multiple factors have contributed to the rising number of unmarried people. Adults are generally marrying later in life, and many choose to cohabit and raise children outside of a formal marriage. Shifting public attitudes, the struggling economy, and changing demographic patterns have also influenced the rise in the number of never-married adults.[6]

The number of single parents by choice is also a booming phenomenon, especially single mothers who have chosen to adopt or utilize donor sperm.[7] The rise of single motherhood is the driving and largest influence on this trend. These patterns vary by socioeconomic class. The single-parent rate for college-educated households is under 10 percent. By contrast, nearly 70 percent of children born to parents with a high school education or less live in a single-parent household.[8]

Although estate planning often focuses on married couples, given the trends described above, there is understandably an increasing need to plan for single clients and focus on their distinct needs. For married couples, there is an expectation that the surviving partner will receive and manage assets if something happens to one of them. But unless there is planning, it is not clear whom a single client would choose to handle such affairs. In the absence of planning, a single person's estate will pass to children (if any), otherwise to any living parents or siblings, otherwise to more distant relatives through traditional rules of intestacy.

For single clients, it is imperative to ensure that the client has designated the appropriate beneficiaries for retirement accounts and life insurance policies. Events such as marriage or divorce, death of a named beneficiary, or birth of a child/children merit

revising any such retirement plans. This applies to single clients who are divorced even when their state has in place revocation-upon-divorce statutes that automatically remove a former spouse.[9] In addition, state statutes do not affect beneficiary designations under retirement accounts that are subject to the Employee Retirement Income Security Act (ERISA).[10]

Lawyers, accountants, bank trust officers, and other advisors are equipped to handle legal and financial tasks, but sensitive medical decisions are typically best reserved for relatives or close friends. If relatives live far away, single clients may want to consider using advance medical directives to give powers to trusted friends who live nearby.

Although single clients cannot take advantage of interspousal tax-free transfers or gift-splitting, many tax planning strategies are available. Single clients can take advantage of the lifetime estate and gift tax exemption and the gift tax annual exclusion, and they can make unlimited gifts for education and medical expenses. Single persons often use the gift tax annual exclusion to benefit a significant other, children, nieces, nephews, and other relatives. The lifetime gift tax exemption can also help single clients who want to transfer assets during their lifetimes in order to exclude the appreciation on those assets from their estates at death.[11]

Because single client plans often have less stability in naming fiduciaries and beneficiaries, such clients—particularly those who do not have children—should consider reviewing their decisions and estate planning documents much more frequently than their married peers.

Divorce

Divorce is an inevitable aspect of the estate planner's work in planning for the modern family. Studies show that 40 to 50 percent of first marriages in the United States end in divorce.

Accordingly, estate planners should help clients plan for the contingency of divorce and ensure that divorced clients understand their options. Although couples in second marriages may consider a prenuptial agreement, an increasing number of couples in first marriages are doing so as well.[12] Such agreements can keep assets separate during the marriage and ensure waiver of any elective share rights. At divorce, the Uniform Probate Code (UPC) provides for revocation upon divorce of any provisions in favor of the ex-spouse in a will or through non-probate assets beneficiary designations.[13] Most states have adopted this presumption that divorce revokes any bequests to a former spouse in a will that predates the divorce. An increasing number apply this to life insurance, retirement plans, and transfer-on-death account beneficiary designations.

Trusts are a useful planning tool, prior to divorce, for many reasons, including permitting the settlor control over assets being transferred, providing financial security for trust beneficiaries, minimizing the need for future contact between divorcing parties, and providing potential tax benefits to transfers in trusts from an income tax and/or transfer tax perspective. The following trusts may be particularly useful in the context of divorce:

- Alimony trusts;
- Child support trusts;
- Irrevocable life insurance trusts (ILITs);
- Special needs trusts; and
- Special securities trusts.

Keeping property for descendants in a lifetime spendthrift trust is an effective way to safeguard those assets from future creditors, including divorcing spouses.[14] However, practitioners must still take care to research whether their jurisdiction treats spouses as exception credits who can receive alimony even from a spendthrift trust.

Blended families

Also known as stepfamilies, the blended family is increasingly important for estate planners to understand, with more people forming families after a previous relationship ends. In these situations, attorneys must look at all prior divorce agreements and

nuptial agreements and take care to understand family dynamics that can have an impact on estate planning for a blended family.

With multiple marriages comes the opportunity for multiple sets of children and/or stepchildren, meaning there may be potential beneficiaries who face different inheritances and economic circumstances. These disparate situations can often cause discord within a family. Thus, balancing the interests among children from prior marriages and stepchildren is a critical and delicate issue that estate planners must consider when working with blended families.[15]

The greater the wealth disparity between spouses, the greater the likelihood there will be hostilities between the poorer spouse and children from the wealthier spouse's prior marriage. For smaller estates, estate planners may recommend using a pot trust and appointing an independent trustee to use its broad discretionary powers to equalize the economic status of the various beneficiaries. Estate planners should urge caution to avoid permitting a surviving spouse to act as trustee for trusts for children who are not also that spouse's children, having such children act as trustee for the spouse, or having one sibling act as a trustee for another. Except in rare cases, this puts the individual family member fiduciary in a fraught position. This conflict can be exacerbated when siblings who do not share both parents are put in the position of acting as trustee for each other.

Clients with children from prior marriages may seek to eventually pass most of their assets to those children, rather than to the current spouse. These circumstances may suggest the use of a trust that distributes income to the spouse for life, with the remainder to the children. It may also make sense to divide the assets immediately at death between the children from former relationships and the surviving spouse in order that the children do not need to wait until the surviving spouse's death to receive an inheritance. In particularly tense relationships, it may be desirable to name a charity as the remainder beneficiary (instead of children from a prior relationship).

Married couples

In the relatively recent past, drafting for same-sex couples was an exercise in finding ways to treat a same-sex life partner as a fiduciary and beneficiary in light of three limitations:

1. Without the many allowances that state law provides to a legal spouse (such as right of health surrogacy and to dispose of remains);
2. Without the benefit of the unlimited marital deduction for transfer tax purposes; and
3. Without the many other privileges that the federal government provides to a legal spouse.

Consequently, it was essential to have powers of attorney for property and healthcare naming a client's same-sex life partner as agent, and clients were advised to have copies ready to be provided to custodians and healthcare providers. It was also essential to have testamentary documents permitting the partner to dispose of remains and to receive property at death—particularly tangible property. Additionally, it was often important to have significant life insurance in place in an irrevocable life insurance trust to offset any estate taxes that would be due when transferring assets to the surviving same-sex life partner without the benefit of the marital deduction. In some cases, same-sex partners would go through an adult adoption in order to make the partner a legal relative who could inherit and be entitled to some benefits under the law.

Some states that did not grant the right to marry instead offered civil unions as an alternative.[16] Civil unions were intended to provide the same legal protections as marriage in those states. For example, the Illinois statute provided: "A party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law."[17] Note that a civil union (or the related domestic partner status) does not entitle the parties to the same protections of marriage under federal law.[18]

In 2015, the Supreme Court in *Obergefell v. Hodges* held that all states must allow same-sex couples to marry and must recognize same-sex marriages from other states.[19] The right to marry (with its accompanying advantages and disadvantages) that has long existed for traditional different-sex couples is now available to same-sex couples anywhere in the country.

Because same-sex marriage is now universally recognized in the United States, most of the prior drafting concerns have been eliminated or become irrelevant for same-sex spouses. Nonetheless, because not all countries recognize these marriages and because, even in the United States, same-sex couples continue to face discrimination, estate planning advisors should be alert to specific recommendations for a same-sex couple that would be unnecessary for a different-sex couple (e.g., carrying electronic copies of a marriage certificate and powers of attorney for each other).[20]

Multinational couples

The modern family is increasingly multinational. The US Census Bureau has estimated that 13 percent of the population was not born in the United States.[21] Further, 21 percent of married-couple households in the United States (11.4 million) consist of at least one spouse who was not born in the United States. Of those 11.4 million couples, 36 percent (4.1 million) consist of one spouse who was born in the United States and one spouse who was not, and 64 percent (7.3 million) consist of both spouses who were not born in the United States.[22] Thus, an increasing number of married couples have highly specific estate planning needs relating to international and noncitizen planning. Estate planners must first establish the citizenship and resident status of each spouse in order to determine what special planning might be useful. A person is domiciled in the United States if living in the United States with no intent to leave and move to another country.

Estate planners should review any existing premarital agreement and identify any jurisdiction-specific issues. The advisor should consider the citizenship of the couple, their resident status, and location of their assets to establish which jurisdiction's laws apply. Moreover, documents provided by clients may contain choice-of-law clauses, which will have a bearing on the ultimate outcome.

A US citizen who is married to a non-US citizen spouse who has in excess of the estate tax exemption amount should consider planning to minimize estate taxes. Chief among these options is creating a marital trust that meets the requirements for a qualified domestic trust (QDOT). QDOTs are an effective way for such couples to defer estate tax on assets that would otherwise pass outright to a non-US citizen surviving spouse. Estate planners should make plans to use QDOTs for the benefit of surviving spouses whether the decedent spouse is a US citizen or resident.

It is also important to avoid unintentionally creating foreign trusts by failing the "court test" or the "control test" (i.e., having a non-US person control any substantial trust decisions).[23]

Unmarried couples

As of 2017, there were about 7.9 million unmarried-partner households in the United States.[24] The rights and responsibilities afforded to them vary greatly across jurisdictions. Some states allow nonmarital couples to establish civil unions, or domestic partnerships, and may allow parties in such a status the same state rights as married spouses. Approximately a dozen jurisdictions recognize common law marriage. If a couple satisfies all of the legal requirements to qualify as common law spouses, then they will have the same legal rights as ceremonially married couples who have a marriage license.

The Internal Revenue Code (Code) views unmarried couples as legal strangers. Donative transfers between non-spouses are taxable gifts if they exceed the annual exclusion of $15,000. However, some couples in a nonmarital relationship can structure their financial affairs to reduce tax liability in ways that married couples cannot. For example, they can still utilize old-fashioned grantor retained income trusts.

A cohabitation agreement is a contract between two unmarried individuals. A legally enforceable cohabitation agreement covers property and finances; the couple may include other provisions not subject to legal enforcement, for example, referring to day-to-day activities such as how the household will operate.[25] A cohabitation agreement should address some of the most common issues, such as expenses incurred while living together and any obligations the couple wishes to undertake involving assisted reproductive technologies, children, and dispute resolution.

If partners do not want a cohabitation agreement, there are alternatives. Partnership and LLC agreements, joint revocable trusts or holdings trusts, and tenancy in common agreements are potential arrangements to govern two unmarried persons.

Polyamorous relationships

Planning for polyamorous relationships invokes some of the issues that arise in planning for blended families and planning for unmarried couples (and sometimes also planning for nonmarital children, discussed below). While polyamorous relationships have traditionally been associated with old-fashioned plural marriage, the 21st-century version appears in alternative forms.[26] The most common version of traditional plural marriage in the United States occurs among fundamentalist followers of the Church of Jesus Christ of Latter-Day Saints. The structure involves one legal spouse in addition to one or more "spiritual" spouses committing to each other for life, and usually results in children raised together in a compound arrangement. While this concept has been somewhat normalized in modern culture, these types of arrangements remain illegal and presumably very rare. Thus, while they may have become popularized on television, they remain rare issues for estate planners and are outside the bounds of this article.[27]

The modern polyamorous relationship instead may arise when spouses choose to spend many years in amicable separation or to establish an open marriage, taking on other known and accepted romantic partners.[28] Surprisingly, this is an increasingly common phenomenon among ultra-high net worth individuals. Investment guru Warren Buffett took advantage of such an unconventional marital arrangement, remaining married to his first wife Susan until her death despite residing with his full-time partner, Astrid Menks.[29] Film producer Jerry Weintraub even memorialized his marital and nonmarital relationships in the final lines of his obituary, which read that he was survived by his wife of many years, Jane Morgan, from whom he was separated but never divorced, as well as his "longtime companion," Susan Ekins.[30] Prominent philanthropist David Rubenstein famously elected to remain separated from his wife for 12 years despite other relationships, stating that "it's complicated" as the reasoning behind maintaining the marriage despite the lengthy separation.[31] The pair ultimately divorced in late 2017. Typically, in such arrangements, the new romantic partners become integrated into the family, raising estate planning concerns both for the existing spouse as well as the new romantic partner. This issue is being discussed by family offices and others who serve high net worth clients as advisors seek to ensure the plan adequately provides for all involved parties.

Planning for spouses, nonmarital partners, and/or children raises separate and distinct issues, so clients need to think through different options for each type of family member. No marital tax-free transfers are available for the unmarried partner, but they are available for the spouse. Thus, in taxable situations, often it will be best if the exemption from federal transfer taxes is reserved for the unmarried partner and children, and the marital deduction should be utilized for the spouse via marital trust planning for increased control.

Where there are children from both marital and nonmarital relationships, it is especially important to consider the definition of descendants. For example, where an older trust document includes only "legitimately born" descendants as beneficiaries, this excludes nonmarital children.[32] The results under older trust documents may also impact the current generation's estate planning, as a client may

want to protect descendants not provided for by an older instrument.

Depending on the openness of the relationship, it may be prudent to engage in separate planning for a nonmarital partner. Specifically, for some clients (who, unlike Buffett or Weintraub, prefer more discretion), it may be best to rely on an entirely separate irrevocable trust to make provisions for the nonmarital partner. One possibility is to fund the trust with some version of "permanent term" insurance. Ideally, there will be premiums of the annual exclusion gift (currently $15,000 per year) or less, so in the event of a breakup, the insured/settlor can simply turn off the insurance payments and let the trust terminate for want of any assets. In designating the remainder beneficiary, it may be best to either include the nonmarital partner's family, or a charity, to limit the opportunity for conflict between the nonmarital partner and any surviving spouse or children from other relationships.

The client needs to determine whether the currently married spouse, the adult children, if any, or the nonmarital partner should act as agent under powers of attorney. Often, it is advantageous to nominate a neutral third party rather than the nonmarital partner.

Special needs

Approximately one quarter of adults in the United States are living with some type of disability.[33] Moreover, according to the Centers for Disease Control and Prevention, about one in six children in the United States had a developmental disability as measured in 2006 to 2008, with one in 59 being diagnosed on the autism spectrum. Between 1979 and 2003, the number of babies born with Down syndrome increased by about 30 percent.[34] Accordingly, considering disability planning is an imperative when working with the modern family. Some important considerations when planning for these special needs involve the impact of the Affordable Care Act (ACA) and Medicaid, and the potential use of third-party trusts, self-settled trusts, and ABLE[35] accounts.

The ACA closed the gap in coverage for individuals with disabilities by loosening resource limitations for Medicaid coverage, which made it available for a larger pool of low-income families, subject to state participation in that expansion. Additionally, it prohibited private insurers from denying coverage on the basis of pre-existing conditions. The ACA has expanded access to health coverage for disabled individuals without forcing them to transfer most of their assets to either a d(4)(A) supplemental needs trust or a d(4)(C) pooled trust (both are discussed below).

Third-party supplemental needs trusts are the most commonly used and flexible type of supplemental needs trust. These types of trusts must be created and funded by anyone other than the individual with the disability and is often done by parents, grandparents, or siblings through a lifetime or testamentary gift.[36] Third-party supplemental needs trusts may be used to enhance the beneficiary's quality of life by way of providing goods and services that are not covered by government benefits. Any trust assets that remain upon the death of the beneficiary will then be distributed pursuant to the terms of the trust instrument as set forth by the trust settlor, without any Medicaid reimbursement requirement.

The Omnibus Budget Reconciliation Act of 1993 (as amended) permits the creation of self-settled supplemental needs trusts (also known as "pay-back trusts") for funds belonging to a disabled individual under the age of 65.[37] These trusts provide a method of preserving public benefits for an individual with disabilities who has or acquires assets in their own name, such as by gift, inheritance, or lawsuit settlement. So-called (d)(4)(A) trusts must be for the individual's sole benefit, and any remainder at the disabled beneficiary's death must be used to pay back the government for expenditures to or for the beneficiary during life.[38]

Pooled trusts under section (d)(4)(C) provide an alternative to a privately created supplemental needs trust. Under this type of arrangement, funds for multiple beneficiaries are pooled for investment

management purposes under a common trust agreement, but each beneficiary has their own separate account within the trust for their own sole benefit. They may be created by a court, parent, grandparent, or guardian of a person with disabilities, and also by the person with the disability themselves. These assets are exempt for purposes of Social Security and Medicaid eligibility during the beneficiary's life but are subject to Medicaid reimbursement upon the beneficiary's death—unless the funds were retained in trust by a nonprofit association to benefit other beneficiaries of the pool.[39]

Created in 2014, ABLE accounts are tax-advantaged accounts for individuals with marked and severe functional limitations beginning before age 26. They offer a greater degree of flexibility than supplemental needs trusts and pooled trusts, and they are often more cost-effective to administer. Note that many individuals with disabilities view ABLE accounts not as a replacement to supplemental needs trusts, but rather as a helpful complement. Contributions to an ABLE account must be made in cash and cannot exceed the annual gift tax exclusion amount from a single donor to a single donee. The TCJA increased ABLE contributions to the lesser amount of: (i) the amount of federal poverty line for one-person households; or (ii) the individual's annual compensation.[40] The contribution limit was expanded for years after 2018 and before 2026.

After the general limitation is reached, the designated beneficiary of the ABLE account may make additional contributions up to the lesser of: (i) their compensation includable in gross income for the tax year; or (ii) the federal poverty line for a one-person household. Additionally, individuals are allowed to roll over amounts from 529 qualified tuition plans to an ABLE account, if the ABLE account is owned by the same designated beneficiary of the 529 plan, or a member of the designated beneficiary's family.[41]

Transgender clients and family members

An estimated 1.4 million adults in the United States identify as transgender.[42] A transgender individual is a person whose assigned gender at birth does not align with their gender identity. In other words, the state of the individual's "gender identity" does not match their "assigned sex." An awareness of transgender issues has led to a rise in transgender individuals coming out, most notably seen among the nation's youth. Transgender public figures like Chaz Bono, Caitlyn Jenner, and Laverne Cox have taken to mainstream media, using it as a platform to increase transgender visibility and dialogue surrounding the subject. Estate planners must be increasingly sensitive to the fact that their clients, or members of their clients' families, may be transgender.

Estate planners must be intentional not only in ensuring that their planning documents reflect the wishes, intent, and goals of transgender clients, but also that any client contemplates having descendants or other beneficiaries who could be transgender. Because these are politically charged times in which transgender clients or family members may face discrimination or challenges, advisors should be sensitive to those concerns as well.

Advisors and attorneys must handle such delicate issues as the use of gendered references and pronouns. They must also understand that a client's preferred gender identification may change over time. Drafting with complete gender-neutrality so that gender-identifying pronouns are not necessary is often preferred. However, when a client is concerned that family members who do not recognize their transition may attempt to recharacterize their gender post-mortem, estate planners should include statements about the individual's gender identity within the estate planning documents. When using a gender identifier in documents such as wills, trusts, powers of attorney, and pleadings, it is important to use names and pronouns consistent with how the person identifies. Assumptions regarding the client's preferences to identify as a "he" or "she" should be avoided.[43] The following are guidelines for specific provisions unique to transgender clientele that should be included or considered when drafting estate planning documents:

- Giving the fiduciary the right and directive to take whatever action is necessary to preserve a client's self-identity post-mortem; and
- For transgender individual beneficiaries of a trust, consider whether psychological and medical expenses for realigning gender and physical sex are covered as permissible expenses. Estate planners can achieve this by expressly including such expenses in a definition of medical expenses, drafting the definition broadly so that these expenses would not be excluded, or adding a sentence such as: "Medical expenses shall also be construed liberally to include elective procedures."

Medical powers of attorney are often statutory forms, many of which do not typically address important issues particular to transgender clients. Depending on who is named as agent, estate planners may need to anticipate the possibility of challenges by family members and specifically grant visitation rights to certain individuals in any medical power of attorney. This also might include establishing which individuals do not have visitation rights and whether or not the agent has the power to control who visits. Finally, a medical power of attorney should direct whether certain medical therapies, such as hormone replacement therapy, should be continued during a period of incompetence and under what circumstances they should be discontinued.

Advising modern families mandates a working knowledge of the sensitive and unique considerations involved in working with transgender clients. There are other distinct legal issues inherent in representation of transgender clients involving everything from medical expenses, income tax considerations, marriage, and changing gender identifiers on legal documents from licenses to birth certificates.

Adoption

Adoption is another important aspect for the modern family. The 2010 Census indicated that nearly four percent of families with children under 18 include at least one child who has been adopted.[44] Some important issues relating to adoption include:

- The adoption of minors, including international adoptions;
- Adoption of stepchildren or foster children;
- Adult adoptions, including the adoption of same-sex partners; and
- The treatment of adopted descendants in estate planning documents.

While trusts for one's "descendants" historically included only one's biological descendants, that assumption generally no longer holds true. Children who are adopted may now inherit not only from their legal parents, but also from other ancestors, siblings, and other collateral relatives. Correspondingly, when an adoption is granted, children who are adopted typically are cut off from their genetic parents for purposes of inheritance law. In the eyes of the law, legal children (regardless of how they became so) now have the same rights for purposes of inheritance. However, the former so-called "stranger-to-the-adoption rule" continues to be relevant when working with older trust instruments in jurisdictions relying on state law interpretations of definitions that were in effect when the trust was created, rather than on current interpretations under the law.[45]

Another aspect in serving modern families with issues pertaining to adoption can include international adoptions—both the process of adopting from other countries and any racial, ethnic, or cultural aspects of raising children who were born in other countries. The popularity of international adoption exploded in the 1990s and early 2000s, with rates tripling from 1990 to a peak in 2004.[46] However, due to increased regulations, international adoption has fallen by 82 percent since 2004.[47]

A stepparent or foster-parent can adopt a minor child only where both biological parents have provided explicit consent, which generally requires that one biological parent has their parental rights terminated by agreement or by a court or is deceased.

Some states and the UPC have established special intestacy rules for children adopted by the spouse of one of the genetic parents. While a stepparent can adopt a child only once the other parent's rights have been terminated, either voluntarily or involuntarily, these special rules preserve the ability of the child to inherit from the biological family. Under this exception, the child may inherit from the adopting stepparent and the stepparent's family, as well as from both genetic parents and their families. As a drafting tip, clients should be encouraged to expand limitations in the definition of descendants in their documents to include that a child may be adopted past the age of 18 until at least age 21 or 25.

Many states allow adults to adopt other adults. This commonly occurs where stepparents or foster-parents adopt a child after the child has reached 18 years old. Prior to *Obergefell*, same-sex couples used adult adoption to establish a legally recognized relationship through which they could inherit or obtain other rights from each other.[48] While this practice is no longer necessary—and some of these adoptions have actually been undone so the parties could marry one another—some of these relationships may still exist. Courts are divided on whether they are willing to allow inheritance from a non-parent relative based on adult adoption.[49] Under Illinois law, for example, a person adopted after reaching age 18, who never resided with the adoptive parent before attaining the age of 18 years, is not considered a descendant of the adoptive parent for purposes of inheriting from ancestors or relatives of the adoptive parent.[50]

For both initial drafting purposes and for interpreting older documents, it is critical to understand whether a child who was adopted is included in a class term such as "children," "nieces and nephews," "grandchildren," or "descendants" in a will or trust. Older wills and trusts may include express language excluding all adoptees, or those adopted as adults. Such exclusionary language may also be implied for trusts executed in past decades.[51]

Nonmarital children

Under common law, children born outside of marriage generally did not inherit from either genetic parent. The law today, however, presumes that references to classes such as "descendants" or "issue" in a will or trust instrument include nonmarital children unless a showing of contrary intent rebuts the presumption. This presumption does not apply to all existing documents and in some jurisdictions, class definitions may be determined based on the law at the time the document was written. In these jurisdictions, it is presumed that a settlor used a particular term with reference to the law that was then in effect. Further, there are many trust documents in existence today, particularly older trusts, which still define the class of beneficiaries based on their marital birth.[52] Just under 40 percent of children today are nonmarital.[53]

Social norms have evolved over the last century with regard to the treatment of nonmarital children, and the law has generally followed suit. Historically, states effectively barred nonmarital children from inheriting, unless the parents married. State statutes instead created additional ways for the child to inherit from the father, such as presenting evidence of paternity, with some states requiring paternity to be established during lifetime and some allowing posthumous determinations. However, there remain certain circumstances in which a client may not want to include nonmarital children for inheritance purposes. Establishing definitions determining whether a parent-child relationship exists will allow clients to provide for descendants they intend to benefit, rather than relying on state law.

Establishing the mother of a nonmarital child has typically been straightforward but is becoming less so with the increased use of certain assisted reproductive technologies. Identifying paternity can be even more challenging. Paternity statutes in many states now apply without regard to the sex of the parent, and they may require the following types of proof:

- The subsequent marriage of the biological parents;

- The child living with the second parent for a specified period of time along with that individual holding out the child as his or her child;
- A court order determining parentage; or
- The person consenting to being named as the parent on the child's birth certificate.

Some jurisdictions permit children to have more than two parents, depending on the circumstances. In some cases, jurisdictions will recognize the parental rights of a nonbiological de facto parent. In Maine, courts allow a de facto parent to establish parental rights if they can demonstrate the undertaking of a permanent, unequivocal, committed, and responsible parental role in the child's life, and that there were exceptional circumstances sufficient to allow the court to interfere with the legal or adoptive parent's rights.[54] In Delaware, courts have recognized the de facto parental rights of a nonbiological same-sex spouse to children born using assisted reproductive technologies.[55] In California, courts have recognized the parental rights of three parents, all sharing custody of one child.[56] Conversely, in New York, courts have recognized that when a biological father had established a parental relationship, through acting as a father, the father cannot use equitable estoppel to prevent the mother from declaring him the father.[57]

For both initial drafting purposes and for interpreting older documents, it is critical to identify, and then clarify, the status of nonmarital children. If parenthood is established, then they will be included in a class term such as "children," "nieces and nephews," "grandchildren," or "descendants" in a will or trust.

Assisted reproductive technologies

The increased use of assisted reproductive technology has confronted the modern family with unique planning issues surrounding the creation of children and preservation of genetic materials involving the creation of children. While there are many different modes of assisted reproduction, the term encompasses the general definition of conception by any means other than sexual intercourse. Estate planners refer to these modes of conceptions collectively as assisted reproductive technologies (ART).

The widespread use of ART has raised many critical and challenging questions for estate planners, chiefly how to define parentage and descendants for legal purposes and how to determine who can control the disposition of frozen genetic material.

The widespread use of ART and the evolution of family relationships have created the possibility that more than two individuals can have a parenting role. ART has thus brought about three distinct categories of "parentage":

1. Biological or genetic parentage—contributing the genetic materials to the child (i.e., sperm or egg);
2. Gestational parentage—carrying and bearing the child; and
3. Functional parentage—raising the child following the birth.[58]

Some of the most common fertility procedures include artificial insemination, in-vitro fertilization (IVF), and surrogacy. Artificial insemination involves sperm being injected into a woman's cervix or uterine cavity. It often involves the use of a couple's own genetic material, but also may use sperm from a donor. IVF refers to any procedure that involves conception outside of the human body, followed by transfer of one or more embryos into a woman's uterus. IVF can use the genetic material of both intended parents, or that of one or two third-party donors, to create an embryo; the embryo can then be transferred immediately or frozen for later use. Surrogacy is an arrangement in which a woman other than the intended mother carries the child to term and gives birth to the child. In a "gestational surrogacy," the surrogate's own egg is fertilized with the intending father's sperm, such that the surrogate is the biological mother of the resulting child. Conversely, the surrogate in a "gestational carrier" arrangement has no genetic relationship with the child and carries to term an in-vitro fertilized embryo produced with the genetic material from one or both of the intended parents.

Parentage determinations are established pursuant to state law. Estate planning documents should clearly state that any child born from assisted reproduction is considered the child of the intended parent(s) rather than the genetic donors.[59]

In surrogacy situations, the child's intended parents will become the child's legal parents by way of adoption or through a petition to be named on the child's birth certificate. The parental rights, if any, of third parties, including the surrogate, are then terminated in connection with the adoption or petition. The type of legal procedure varies among jurisdictions.[60] It is important to hire counsel with the requisite expertise in this particular area as drafting definitions that account for surrogacy situations is challenging. Counsel has the option to use the UPC approach, which includes a presumption that a birth certificate identifying an individual other than the birth mother as the parent of a child presumptively establishes a parent-child relationship between the child and that individual.[61]

Considerations motivating the storage of genetic material include a multitude of factors, such as expense, potential infertility from disease (or risk of death), and the emotional toll of the process.

The gamete provider may designate the desired disposition of the genetic material at the time of initial storage. However, problems often arise where the contract is not entirely clear, or there is competing evidence of the donor's intent regarding the treatment of the genetic material.

The issue turns on whether the genetic material is "property" in the traditional sense, meaning it would typically be passed by will. State law is currently unsettled in this area, and decisions regarding the destruction and disposition of cryogenically preserved genetic material are not uniform. Courts have overturned orders to destroy cryogenically preserved sperm of decedents.[62] Conversely, courts have determined that genetic material should be destroyed based on language in a storage document that established the decedent's intent to discard the material at death.[63]

Estate planning attorneys should determine whether clients have stored genetic material. This can be done during the intake process by way of questions regarding the client's family, background information, and assets. If so, then the estate planner should review any contracts with fertility providers and storage facilities. Attorneys should consider reiterating the testator's intent with regard to the disposition of genetic material in a will.

Because of ART, children may now be born long after the death of a genetic parent through frozen gametes or even through reproductive materials retrieved after the death of an individual. Issues concerning the rights of posthumous children can result in litigation.

For children born after the death of a parent, the traditional common law approach was that a child born within 300 days of a father's death was a child of that parent. Some statutes simply permitted that an afterborn posthumous child was a descendant and could inherit.[64] Governing laws vary dramatically across jurisdictions.

The UPC has been revised to take ART into consideration and in states that have adopted the UPC, the child must have been in utero not later than 36 months after a parent's death; or born not later than 45 months after the individual's death. Only three states, Colorado, North Dakota, and New Mexico, have adopted the UPC approach.[65] In total, 25 states have enacted statutes that explicitly address whether a posthumously conceived child is considered an heir of the deceased parent. Twenty-one of those states grant inheritance rights to these children on the basis of various requirements, such as consent from the gamete provider or timing of the birth of the child.[66] Four states have explicitly rejected inheritance rights for posthumously conceived children; the remaining 21 state legislatures, along with the District of Columbia, have yet to address this issue.[67]

Including statements concerning limitations on both consent and time in any document clarifies the ability of a posthumously conceived child to

benefit—such as consent, timing, legitimacy, and notice.

Consent for a posthumously conceived child to inherit can be given at the time of gamete or embryo freezing or through a written instrument. The instrument should clearly define what constitutes evidence of consent.[68]

Including a time limit in which a posthumous child must be born or conceived provides certainty of property rights for other beneficiaries and avoids the potential of posthumous children frustrating estate or trust administration.

Some states, namely those that have adopted the Uniform Parentage Act of 2017, appear to only recognize the posthumously conceived children of a married couple. Consequently, a posthumously born child might not inherit if the parents were not married or if the marriage of the child's parents ended before the child was born.[69] When posthumous birth is contemplated, drafters should ensure that such a child inherits by including language to that effect.

Drafters may consider adding a time period during which the person in control of the decedent's genetic material must notify the fiduciary that a child may be conceived. This ensures the fiduciary does not make premature distribution of assets that could potentially be affected by a child's birth.[70]

The term "descendants" should be carefully defined to be broad enough to include those whom the transferor intends to benefit. Estate planners should discuss the groups of children who currently exist or may exist in the future. If the transferor intends to include individuals who are not clearly the settlor's legal children (such as a stepchild or the legal child of a same-sex partner), such individuals should be specified by name and included in the definition of descendants to avoid future contention. The class of "children" could also include someone born to or adopted by a spouse or partner (perhaps within a time limitation). Additionally, the class of descendants should be defined to include more remote descendants. Keep in mind that anti-lapse statutes may not protect descendants of a predeceased child of a partner. Consideration should be given as to whether those individuals should still be provided for even if the relationship with the partner has ended.

Longer life spans in retirement

Life expectancies are generally increasing in the United States.[71] Increased access to primary medical care, advances in medical treatments, improvements in motor vehicle safety, and clean water supply and waste removal are all factors that have contributed to improvement in the mortality rate. However, with longer life spans come new challenges, including how to guarantee adequate income for a potentially longer retirement. Retirement plans are critical for estate planners to consider as they now constitute a large portion of the wealth of Americans.

The division of retirement assets is often a contentious issue in divorce. In general, value attributable to funds in a qualified plan or IRA before the marriage remains separate property, but contributions during the marriage, and the appreciation thereon, usually are treated as marital assets. The spouses may dispute the portion of retirement assets that is separate or marital property, the valuation of future pension rights or unvested benefits, or both.

A significant interest in a separate account plan or IRA often is a useful asset for satisfying one spouse's obligations to the other. The division can be accomplished tax-free, with the former spouse receiving a separate account, or rolling the proceeds over into their own IRA. The former spouse then assumes the tax obligation as funds are withdrawn.

To ensure a legally valid and tax-free division of a retirement plan or IRA, a qualified domestic relations order (QDRO) must be used. The Code defines a QDRO as a domestic relations order that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan" and that meets additional detailed requirements set forth in the Code and the regulations.[72]

The "alternate payee" is most often the spouse; however, it can be a child or other dependent.[73] The order cannot alter the form or timing of payment of the benefits. For example, it cannot require distribution of benefits that are not yet distributable under the plan.

Note the existence of state statutes that provide for revocation upon divorce of beneficiary designations in retirement assets not covered by ERISA.[74] It is nonetheless important to check beneficiary designations upon any major change in the client's family situation.

Longer life spans and fading capacity

Fading or diminished capacity is becoming more common as Americans live longer. When presented with a client who may have diminished capacity, attorneys should first determine whether the client is competent to engage the lawyer's services. When it comes to the estate planning process, the tests for testamentary capacity, contractual capacity, capacity for healthcare decisions, and donative capacity can differ.

Undue influence is a challenging legal issue when dealing with the elderly population. Circumstances implicating undue influence often involve a challenge to a will after the death of a testator. The laws vary from state to state, but the most common definitions acknowledge that this is a process that happens when the client still retains capacity. There are also medical and psychological models of undue influence.[75]

Beginning with the initial client meeting, attorneys can take targeted steps in managing situations implicating questions about capacity. Lawyers must take care to remember that they are the gatekeepers and must be on alert for the possibility of undue influence. It is the competent testator or donor who is subject to undue influence. Attorneys facing these situations should consult all available resources including the ABA Handbook, the ethical rules for the particular jurisdiction, the ACTEC Commentaries on the Model Rules, and their state statutory and case law.

Powers of attorney are the private alternatives to guardianship and involve private delegation of decision-making. Creating a durable power of attorney is the first step in disability planning. It allows the principal to appoint an attorney-in-fact or agent to act on the principal's behalf to handle the principal's financial affairs if the principal is incapacitated.

Powers of attorney can be either:

- Springing powers, under which the agent's authority only begins upon the principal's incapacity; or
- Durable, under which the agent can act during the principal's capacity as well as upon the principal's incapacity.

The agent is expected first to act in accordance with the principal's instructions or wishes and not to substitute their own judgments for that of the principal. In the event the principal's wishes are not known, the agent should act in the principal's best interest by respecting the principal's individuality and life choices, and by honoring those values in carrying out the agent's duties.

Court-supervised proceedings, such as guardianships or conservatorships, are the default option for those who have not planned for potential disability. Each state has its own guardianship law, but guardianship law nationwide displays a trend towards focusing on the "person first" using person-centered language in drafting to show a commitment to the person's expressed wishes rather than on what a third party believes to be best.[76] Major issues in guardianship decision-making involve healthcare and residential placement decisions. Financial management issues in conservatorships of the estate and how to balance greater personal autonomy with third-party financial management are other challenges.

Cryonics and cloning

Modern estate planning professionals must also deal with clients who wish to plan for what is currently in the realm of science fiction. While still unusual, more and more clients are deciding that in lieu of burial

or cremation, they prefer instead to be cryogenically frozen. Cryonics is an experimental procedure that has the goal of preserving a human body (or at least a human brain) for decades or centuries until a future time when medicine and technology can somehow restore that person to a version of life.[77]

Robert Ettinger introduced the concept of cryonics to the mainstream in a 1962 book, The Prospect of Immortality, arguing that a person frozen at the exact moment of death could later be brought back to life. The first cryopatient was cryopreserved in 1967, and the total number of cryopatients has grown exponentially since then. Perhaps the most famous case of cryonic preservation was baseball legend Ted Williams. Prior to his death, Williams executed a will saying he wished for his body to be cremated. However, he also signed a "pact" that stated that he, his son, and his daughter would all like to be cryonically frozen. A bitter legal battle ensued. Ted's eldest child, Barbara Joyce Williams Ferrell, filed a petition demanding the return of her father's body to Florida to be cremated after the body had already been frozen in Arizona. Barbara and her husband spent much of their retirement funds on the lawsuit and eventually dropped the lawsuit after settlement. Today, Ted Williams and his son are still cryonically preserved, waiting to see if science can someday bring them back to life.[78] More recently, public figures such as PayPal founder Peter Thiel and computer scientist Ray Kurzweil have publicly disclosed they, too, have booked their space to be cryonically preserved.[79] The practice has become a lucrative and mystifying pursuit, with cryonics companies appearing in the form of Alcor in Arizona, the Cryonics Institute in Michigan, and KrioRus in Russia. Many view cryonics as a scam.[80] Accordingly, estate planners should remain appropriately skeptical while also being respectful of their clients' beliefs and hopes.

Most people are skeptical of cryonics because there is no evidence that it can be successful on a human.[81] However, some living creatures, including insects and some varieties of frogs, have successfully been frozen and brought back to life.[82] Proponents of cryonics argue that its ultimate success does not depend on the status of current cryopreservation technology, but rather on the potential for continued developments in the field.

For a client or loved one who is cryonically frozen, a primary planning issue is how to provide for themselves upon revival. Estate planners must determine how to assist the client in establishing an estate plan that ensures that their wishes to be cryonically preserved are honored, and that provides sufficient funds available to the settler when they are revived. Similarly, it is important to consider establishing a trust for the care of a cryonically preserved client during the period of biostasis. Increasing popularity of cryonics as an option has prompted a surge in the creation of trusts created to hold assets for a person in cryonic preservation until they are revived, often called personal revival trusts (PRTs).[83] These trusts name individuals both as the settlor and as the future beneficiary. PRTs can be established in states that have repealed or significantly modified the rule against perpetuities. There are multiple trust theories pertaining to cryonics, most notably the "intermediate being" theory, which is considered the most effective in achieving the purpose of the PRT. Under this theory, a cryopreserved settlor is considered analogous to a cryopreserved pre-embryo.[84] This theory was legitimized in a Tennessee Supreme Court case concerning a custody dispute over cryopreserved embryos, which the court classified as "intermediate beings."[85] Other theories involved in the creation and consideration of PRTs include the "undead contingent beneficiary" exception.

Relatedly, the scientific process of cloning involves "human asexual reproduction, accomplished by introducing the genetic material of a human somatic cell into a fertilized or unfertilized oocyte, the nucleus of which has been or will be removed or inactivated, to produce a living organism with a human or predominantly human genetic constitution."[86] Cloning humans encompasses two distinct activities: therapeutic cloning and reproductive cloning. Reproductive cloning involves implanting an embryo into a uterus and bringing the embryo to term. Therapeutic cloning does not ever contemplate bringing the embryo to term, but rather uses

the project to harvest stem cells from that embryo.[87] While there is no federal ban on therapeutic cloning, it remains controversial, and reproductive cloning has been banned by several states. Because cloning of self is an alternative to revival of a cryogenically frozen self, a well-drafted PRT should include cloning as a permissible form of revival so that any future clone or clones could benefit from the trust assets if legally permissible in the future.

Both cryonics and cloning present many legal, moral, scientific, and ethical considerations for estate planners and their clients. It is vital for estate planners to communicate honestly and respectfully with their clients, while making sure their clients understand the underlying scientific technology, the uncertainty of success, and the potential future ethical and legal limitations.

Digital assets and cryptocurrencies

In addition to new ways of thinking about the preservation of frozen genetic material, cryonics, and cloning, the modern family must contend with new types of assets that did not exist for prior generations of estate planners. A "digital asset" is defined in the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)[88] as: "an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record."[89] The act also defines "electronic" as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."[90] Many different items fit into this broad definition: personal computer files, social media accounts, financial accounts, business accounts, domain names, blogs, and loyalty benefit programs, among others.[91] By excluding the non-digital underlying assets, the RUFADAA definition applies only to the records, not the assets that may be stored in digital form.[92]

Access to digital assets is governed by both federal and state laws. Most states have adopted RUFADAA. Consequently, unless a client's estate planning instruments specifically confer the power to access digital assets, the power will be extremely limited and typically not include content.[93] RUFADAA establishes a three-tier hierarchy for fiduciary access.[94] If the internet provider has established an online tool (such as Facebook's Legacy Contact or Google's Inactive Account Manager) for addressing issues of fiduciary access, and the user has filled out that form, then that controls the fiduciary's access to that particular asset, regardless of what the user's will, trust, or power of attorney might otherwise provide. This is analogous to a beneficiary designation. Thus, for example, Google has established an Inactive Account Manager, which, if activated by the user, will override any contrary provision.

Where the provider has not established an online tool, or the user has not used that tool, then the user's written direction in a will, trust, power of attorney, or other record overrides a general direction in the internet service provider's terms-of-service agreement.

If a user provides no specific direction as described above, then the internet service provider's terms of service will govern fiduciary access. If the terms of service do not address fiduciary access, the default rules of RUFADAA will apply.

Estate planning for digital accounts is an important part of working with a client to ensure asset management upon incapacity and transfer upon death. Under federal law, it is a crime to intentionally access without authorization and obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage.[95] Without the proper authority, it would be a crime for a fiduciary to access the digital assets. Thus, preparing a plan for a client's digital assets is critical. Possible steps include:

- Identifying the digital assets;
- Deciding what the client wants to do with them;
- Naming a digital fiduciary and granting the fiduciary the necessary powers to access digital assets; and

- Preparing instructions to accomplish the decedent's intent regarding digital assets.[96]

Explaining the importance of planning and the consequences of failing to plan for digital assets will help clients understand which accounts and assets can and should be shared with family members or other individuals and who will act as a fiduciary over the assets. It is important to ascertain exactly and entirely what digital assets the client owns. Clients may be initially reluctant to disclose some digital assets that are sensitive. However, failing to account for these in planning may result in access to them being given to an unintended (or unwanted) party. Planners can encourage disclosure through a conversation or a written questionnaire.

A digital fiduciary can be given the right to access and manage digital assets and accounts on behalf of the decedent to the full extent of state and federal law. Choosing a digital fiduciary should be done with the same care as choosing a trustee or executor. Desirable qualities include a familiarity with modern technology, discretion, and the ability to seek outside help in situations that require additional technical skills. The will, trust, or other document appointing the fiduciary should grant the specific authority to access and inspect any online accounts, hard drives, or other electronic devices that store digital information. Under RUFADAA, unless the user consents to disclosure of electronic communications to a fiduciary through the use of an online tool or in estate planning documents, the fiduciary may find it impossible to access those assets.

Because clients may have privacy concerns, it is incumbent to help them consider certain issues such as whether they want their fiduciaries (e.g., parents, spouses, or children) to have full access to their digital lives or if they want accounts destroyed. Do they want their likenesses to continue to exist on social media for future generations? Are they concerned about active Facebook accounts after their deaths? These are some of the many questions estate planners need to anticipate when working with clients concerning the maintenance and disposition of their digital assets. Instructions to a digital fiduciary should indicate the decedent's intent regarding each digital asset or class of assets along with the means to carry out that intent. If the client has used an online tool, then the client should ensure the fiduciary is aware of the tool and has been granted access through it. Google has a process for accessing mail accounts upon a user's death[97] and, in addition to its Legacy process, Facebook has allowed access to deceased users' accounts through a special form.[98] Of course, the Facebook and Google tools apply only to those products.

The estate planner can discuss the utility of a password manager, which can be regularly updated. In addition, a comprehensive list of digital assets should include cryptocurrencies, which are a technology that can be used to transfer money, record data, and invest. They do not exist in any physical form, and are considered digital assets, but are not controlled by a centralized bank or government. Rather, they are generally recorded on a decentralized, public ledger called blockchain.[99] Popular forms of this currency include Bitcoin, Ethereum, and Litecoin. As of January 2021, the total cryptocurrency market had a capitalization of around $1 trillion, with Bitcoin worth over $30,000 per coin.[100] Regulators struggle with the decentralized structure of cryptocurrency. Gains from virtual currency investments are subject to the capital gains tax, according to the IRS.[101] Regulators warn that cryptocurrencies are hotspots for theft and fraud,[102] so planning for them is important.

The estate planner should ensure that the client is aware of the online digital tools and plans accordingly. If the client has not used an online tool, then the client can set out plans for digital assets in a will, trust, or other planning document.

Intellectual property

When working with modern families, it is also important to determine whether the clients have any intellectual property that should be taken into consideration. Intellectual property—copyright, trademarks, patents, and trade secrets—continues to present unique challenges for practitioners in estate planning. Intellectual property constitutes an

intangible asset that can potentially generate significant amounts of income for generations if structured and disposed of properly. Planners must consider not only income, gift tax, and estate tax rules, but also intellectual property laws that present different issues from other categories of assets.[103]

The Copyright Act protects original literary works, music (including lyrics), dramatic works, choreography (including pantomime), pictures, graphics, sculptures, movies and other audiovisual works, sound recordings, and architecture.[104] In situations where a creator has a new copyright and its value has not yet been established, planners can encourage the creator to sell the copyright to a trust for the benefit of the creator's children or grandchildren, which should result in a tax imposed at capital gains rates.[105]

Pets

Humans and charitable institutions are no longer the sole beneficiaries for whom clients wish to provide when disposing of their assets at death. There has been a surge in planning for pets where high net worth or high-profile individuals die with provisions in their wills or trusts for the benefit of their animals.[106] The development of "pet trusts" can be attributed both to the intense emotional bond between owners and their animals, and also to changing social values whereby animals are considered not just companions, but "fur babies."[107]

Pet trusts are a type of noncharitable purpose trust that allows an individual owner to designate a specific amount of money for the future care of a pet in the event of the owner's death or incapacitation.[108] While its purpose does not serve the public, it simultaneously does not violate any public policy, thereby neither helping nor hurting society. There are two forms of pet trusts: common law and statutory. For a comprehensive collection of animal statutes organized by state, see Texas Tech Professor Gerry W. Beyer's website.[109]

In 1990, section 2-907 of the UPC was amended to provide statutory recognition of honorary trusts for pets and domestic animals. It required the trust to end either 21 years after its creation, or when no living animal was covered by the trust, whichever came first. The original 21-year limit was later put into brackets, indicating that an enacting state may select a different figure and create a specific exemption to the rule against perpetuities to perhaps create an enforceable trust for the duration of the pet's lifetime and any offspring.[110] The amendments to section 2-907 prompted similar amendments to the Uniform Trust Code (UTC) in 2000.

The UTC was amended in 2000 to make honorary trusts for pets and domestic animals enforceable. The main difference between the UTC and the UPC is that the UPC recognizes honorary trusts but does not deem them valid or enforceable per se.[111] Several states have enacted the UPC, UTC, or a variation of the two.[112]

Often, pet trusts will designate a trustee to manage the money and a caretaker to provide for the daily care of the pet. The pet owner generally names a remainder beneficiary to receive the residual property when the pet passes away or the trust terminates. When drafting the terms of the trust, the settlor should expressly provide for "expenditures for food, shelter, veterinary care, medication, boarding or pet-sitting, and costs for the disposition of the pet's remains."[113] Additionally, any preferences or instructions for the disposal of the pet's remains upon death or directions for euthanizing the pet should be explicit.

The funding for a pet trust is a taxable event. Any amount gifted to a pet trust will be included in the gross taxable estate.[114] Income tax is also a concern, because the IRS does not recognize pets as beneficiaries. There are two Revenue Rulings that are directly on point in regard to pet trusts and their tax implications. Revenue Ruling 78-105 requires that no portion of the amount passing to a valid trust for the lifetime benefit of a pet qualifies for the charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity.[115] Revenue Ruling 76-486 holds that an enforceable pet trust established under a state statute would be taxed on all of

its income, regardless of any distributions made for the benefit of the pet beneficiary.[116]

State legislatures are increasingly enacting section 2-907 of the UPC or a functional equivalent that authorizes pet owners to create enforceable, long-term care trusts for the benefit of their companion animals.[117]

Modern philanthropy

There is a long-established history of personal philanthropy in the United States. Individual giving and bequests from family foundations contributed to a new high of total charitable donations, in the amount of $390.05 billion in 2016.[118] The classic structures for family philanthropy include private foundations, contributions to other organizations, charitable remainder trusts, and charitable lead trusts, all of which are explored in greater depth below.

Private foundations are appealing to donors because they present a more permanent option for a donor to carry out charitable intentions. Like public charities, they are tax-exempt entities, but due to their private nature, they are subject to more restrictive rules concerning taxpayer deductions. Estate planners should counsel clients about the potential for abuse if the founder engages in self-dealing or the foundation fails to distribute assets in furtherance of active charitable purposes.[119] If self-dealing occurs, the tax code imposes a 10 percent excise tax on the self-dealer and a five percent excise tax on the foundation manager. These figures can rise to 200 percent and 50 percent, respectively if gone unchecked and uncorrected.[120]

Although there are heavy burdens imposed on the founder and the founder's family when operating a private foundation, these are balanced against the benefits of this method of giving. The donor maintains significant control over where the charitable contributions are distributed, and the founder can appoint the initial board of directors (if the foundation is a corporation) or the initial trustees if the private foundation is a trust. This is a useful charitable giving vehicle for donors who have a clear philanthropic goal in mind and want to be able to personally execute their specific charitable giving intentions. Private foundations, however, are not the ideal charitable giving mechanism for all taxpayers; for example, such foundations need significant resources that will generate income beyond what is needed to pay legal and accounting fees to remain in operation.

Charitable remainder trusts are a type of tax-exempt trust that is subject to some, but not all, of the private foundation excise taxes on self-dealing and taxable expenditures. Distributions from charitable remainder trusts are taxed under a special rule known as the "four-tier" rule, which aims to have as much of the distribution as possible be taxable as ordinary income or as a capital gain before the income beneficiary receives anything that is tax-exempt.[121] Charitable remainder trusts may be structured as either charitable remainder annuity trusts or unitrusts. An annuity trust pays the noncharitable beneficiary a fixed-dollar amount that is specified in the trust agreement, while a unitrust pays a fixed percentage of the value of the trust property. The payouts from an annuity do not vary year to year, although distributions of a unitrust can fluctuate based on the increase or decrease in value of the trust.[122] Estate planners generally recommend a unitrust for younger individuals due to its ability to hedge against inflation, and its overall flexibility.[123] Conversely, older individuals might prefer the annuity trust because payments are not subject to short-term risks of assets that might fluctuate in value or changes in interest rates. In order to constitute a charitable remainder trust, the amount or percentage distributed to income beneficiaries each year must not be less than five percent of the value of the property in the trust. The trustee does not have the discretion to pay the income beneficiary more or less than what is in the trust agreement. Payments may be made over concurrent or successive lives to income beneficiaries.

A charitable lead trust is an irrevocable trust structured to provide financial support to one or more charities for a set term. At the conclusion of the trust term, the remainder is distributed to noncharitable beneficiaries, such as family members.

Donor advised funds have become the cornerstone of modern philanthropy and have surged in popularity in recent years.[124] The largest commercial donor advised fund is the Fidelity Gift fund, which in 2020 made a record 1.5 million donor recommended grants, totaling $7.3 billion.[125] These funds resemble a version of the typical private foundation and afford donors a measure of control and involvement without being under the donor's explicit control.[126]

The Pension Protection Act of 2006 provided the first statutory definition of a donor advised fund as a:

> fund or account (i) which is separately identified by reference to contributions of a donor or donors, (ii) which is owned and controlled by a sponsoring organization, and (iii) with respect to which a donor (or any person appointed or designated by such donor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor.[127]

There are many advantages of a donor advised fund. They are easier to create than a charitable trust or a private foundation; moreover, donors do not need to select the recipient charity at the year's end but can elect to defer that decision while still receiving the tax benefits in the year of the contribution despite having delayed the decision on recipients.

The above discussion provided an overview of many of the estate planning concerns for modern families. Estate planning professionals can do a better job in accommodating a wider array of clients by keeping in mind this diversity of issues. To help identify your client's unique circumstances and needs, it is helpful to develop an extensive client questionnaire covering issues common to modern families. Because the shape and constitution of families and their needs will continue to evolve, the other focus in planning must be to preserve flexibility, as discussed below.

DRAFTING WITH FLEXIBILITY FOR ALL MODERN FAMILIES

General approach

In our ever-changing world, where social norms, the composition and structure of families, medical and technological advances, and corresponding tax laws and trust rules are continually evolving, most estate planners acknowledge that drafting to preserve flexibility for future changes is increasingly important.

While historically trustees in the United States primarily have sought to follow the terms of the governing instrument, which presumably reflects the intent of a trust's settlor, under the UTC and evolving modern trust law, there is a trend towards focusing on the best interests of the living beneficiaries of an irrevocable trust over the dead hand of a deceased testator or settlor.[128] There has been an increased relaxation of the traditional Claflin doctrine by refusing to view spendthrift language and other boilerplate as a "material purpose" of a trust, and a growing recognition that every clause of a trust need not be sacred as the manifestation of a settlor's original intent, particularly since a settlor's wishes often change over time.

In many cases, maximizing flexibility means allowing for change in the trust instrument to accommodate the beneficiaries' best interests in the future. The UTC sets out standards for modification to supplement any lack of flexibility in the trust instrument.[129] Many state statutes also now provide for multiple ways to modify existing irrevocable trusts. Accordingly, clients and their estate planning advisors have numerous options to consider in drafting for flexibility and for modifying irrevocable trusts. Some of the most common tools are described below.

Distribution standards and related powers

Utilizing broad distribution standards maximizes flexibility. Enabling an independent trustee to make distributions for a beneficiary's best interests, or just stating that distributions can be made in the trustee's sole and absolute discretion, will be most

desirable when the goal is to maximize flexibility in making distributions.

Individual trustees who have discretionary powers to distribute trust property to themselves not subject to an ascertainable standard will be deemed to possess a general power of appointment.[130] Rather than risk estate inclusion for a trustee who is a beneficiary or a related or subordinate party with such broad powers, the trust should carve back the distribution standards for trustees who are beneficiaries or related and subordinate parties, and instead such discretionary distribution authority should be subject to ascertainable standards like health, education, maintenance, and support. Sample language is included in the Addendum.

For flexibility, the trust should also include a "facility of payment" clause that permits distributions to be made directly to a beneficiary or to third parties for the beneficiary.

Additionally, the trust can permit loans to be made to the beneficiary with or without interest for situations in which loaning the funds may be more desirable than making a distribution—such as where a trust is GST-exempt and the funds are needed by a second generation beneficiary, or where the funds are being used to purchase an asset like a home that may also be used and perhaps partially owned by a beneficiary's spouse.

Finally, to increase flexibility for a primary beneficiary, the trust may include a so-called 5&5 withdrawal power, permitting the primary beneficiary each year to withdraw up to the greater of $5,000 or five percent of the trust value.

Trustee succession plan

Many clients would be comfortable permitting their children to inherit their share of assets outright, if not for the tax and asset protection benefits that trust planning offers. Accordingly, the most flexible trustee planning will name each generation of descendants to be trustee of their own trusts, as long as such descendant is not incapacitated. Many clients may feel, however, that an adult beneficiary who is merely 18 or 21 years old may be too young to serve as sole trustee of a trust. Therefore, it is common to require that the beneficiary can begin to serve as co-trustee with another trustee at a particular age (e.g., 25) and then can act as sole trustee at an older age (e.g., 30). Depending on the amount of wealth and the clients' faith in their own children, the age of sole trusteeship may be even older. But for clients who seek to raise responsible and financially competent children, the goal can be to instill independence at whatever age they expect their children may be assuming other trappings of adulthood, such as marrying, buying a house, and having children.

In addition to permitting descendants to serve as trustees, if the goal is to build in flexibility, the trust will also permit an adult primary beneficiary who has reached a certain age to alter the default trustee succession that is in the instrument. This would include the ability to appoint successor or co-trustees, to remove an acting trustee or co-trustee, and to designate a trustee succession plan, including imposing additional limitations (such as education or experience) on who may qualify for the position of successor trustee. To avoid the risk of estate inclusion, a beneficiary of the trust should not be empowered both to remove an acting trustee and to appoint a related or subordinate party as a successor trustee.[131]

Divided trusteeships and directed trusts

Traditionally, all the functions of a trustee were handled by the same trustee or trustees. This meant that the same person or entity was responsible for trust administration, investments, and distributions.

In recent years, however, there has been a growing recognition that a single trustee performing all functions may not always be ideal. A single trustee may not be able to accommodate all of the needs of the trust. In certain situations, such as where the assets or family dynamics are complex, a more modern "multi-participant trust" governance structure may be warranted. States have recognized the benefit of having several specialists perform distinct

trustee functions, and in order to attract trust business to their state, have been enacting "directed trust" statutes to facilitate this trend. These statutes define the participants' roles and attempt to clearly delineate, with varying success, the duties and liabilities associated with each participant. Although the concept of a directed trust is not new, states have only recently begun enacting the statutory framework for the powers of directed trustees.

A directed trust is one in which the trust instrument provides that a co-trustee or third party will direct the trustee as to one or more of the trustee's responsibilities. The third party has the power to direct the trustee with regard to the matter under the third party's control, and usually the trustee has no discretion over that particular area of administration. This arrangement is quite different from a delegated trust—i.e., one in which the trustee contracts with a third party to perform certain fiduciary acts on behalf of the trustee. In the latter arrangement, the third party acts as an agent of the trustee, subject to the terms of the contractual relationship. In the directed trust, however, the third party has specified control over the trustee.

States with a directed trust statute allow the trustee to avoid liability for the actions or inactions of a third party that is granted the power to direct the trustee in the trust instrument. Courts are reluctant to impose liability upon a trustee when the trust instrument and directed trust statute state that the trustee shall act as directed by the third party. Without the statute, trustees should be cautious in following the direction of a third party, even if the trust instrument grants that power, for fear of future claims brought by the beneficiaries.[132]

The following are common examples of when clients might want to consider naming a directed trustee:

- The trust owns an interest in a family business;
- The trust owns a concentrated position in a company;
- The settlor wants to direct investments as investment advisor;
- The settlor wants the trust to be able to invest in certain so-called "alternative investments," such as private equity or hedge funds;
- The settlor decides that a group of individuals is better equipped than the named trustee at making investment decisions with respect to a family business, a concentrated position, or alternative investments as an "Investment Committee"; or
- The settlor would rather have someone who knows the beneficiary as well as the settlor and who can consider the personal circumstances when making distribution decisions and name that individual as "Distribution Advisor" or multiple individuals as a "Distribution Committee."

Some of the advantages of naming a directed trustee include that it:

- Allows for specialized expertise in an asset class;
- Ensures the family's views and goals are incorporated in the decision making regarding the trust assets;
- May reduce the total cost of trust services as an institutional trustee is likely to charge less for acting in a directed capacity;
- Increases flexibility with respect to the management of trust assets; and
- Can help manage trustee liability (depending on state law).

Some of the disadvantages of naming a directed trustee may include:

- An additional layer of administrative complexity;
- The difficulty of determining the appropriate flexibility;
- Possible additional expenses;
- Lack of clarity as to how much protection the directing party may obtain through exculpatory clauses; and
- The lack of case law and direction provided by the courts. In addition, it may be challenging to bifurcate a trustee's fiduciary duty without

affecting the remaining fiduciary duties of the trustee.

If the trustee no longer has a duty to invest, this can create some uncertainty as to how this impacts the duty to account to beneficiaries and the protection the directed party receives under such an arrangement. There can also be a lack of clarity regarding who is functioning as managing trustee to coordinate between different fiduciaries with different focuses and priorities. For example, what happens if the administrative trustee needs cash to pay taxes or administrative fees, but the investment trustee is unwilling or unable to liquidate, and/or the distribution trustees plan to distribute?

When drafting for a directed trust with divided trusteeship, there are a number of things to keep in mind, and flexibility is crucial. The instrument doesn't need to set forth a divided trusteeship initially, but can merely permit that different roles can be appointed later. The instrument can permit special trustees to be named who assume authority for particular specialty assets, and the instrument can also permit an "investment director" or "investment direction advisor" who directs any other trustees with regard to investments more broadly. Similarly, a "distribution trustee" or "distribution advisor" can be named initially or just contemplated in the instrument.

Even if there is an initial directed trustee and directing party, drafters should include provisions for later combining all trustee functions into one (non-directed) trustee in case that is desirable in the future. Drafters should also always provide for the appointment, removal, and succession of directing parties. Furthermore, drafters should make it explicit that the directed trustee has no ability to remove or appoint the directing party. For example, in Illinois, if the directed trustee appoints a directing party or successor to a directing party, then the directed trustee will assume the same fiduciary and other duties and standards that applied to such directing party.[133]

Drafters should address how the directed trustee will share information with the directing party and vice versa. In addition, drafters should include provisions for sharing information with other participants, including anything that could or should be communicated to a beneficiary.

Flexibility is particularly essential when drafting state governing law clauses in trusts. It is best to provide maximum flexibility for changing applicable state law for the trust in the future. The governing law clause in a trust should designate the initial state governing law for trust administration, construction, and validity issues. It should also include language that allows substitution of another state's laws during the trust term. Typically, the trustee or beneficiary can be given the power to change state governing law. The trust agreement can designate a different state's law to apply to different trust issues.[134]

Powers of appointment

Powers of appointment are among the most useful tools to build in flexibility and allow the settlor to grant a powerholder the option of distributing trust assets among desired appointees in the future. This enables changing beneficial interests in a non-fiduciary capacity, unlike a trustee or trust protector who may be deemed a fiduciary. The most flexibility will include broad lifetime and testamentary special (or "limited") powers of appointment (meaning the powerholder can appoint the trust property among any persons, including individuals or trusts, or organizations other than the party's self, estate, or creditors, during life or at death).[135]

To maximize flexibility, the trust instrument can permit the primary beneficiary (or even an independent powerholder) to have broad special lifetime and testamentary powers of appointment. Such powers can even permit the powerholder to appoint property to a new trust in which the powerholder has rights or powers, as long as those rights or powers are no broader than in the original instrument. Sample language is included in the Addendum.

For most trusts, but particularly for large trusts that are expected to remain in effect for many years, it is best to permit powerholders to have flexibility

beyond the ability to appoint trust assets to the settlor's descendants. Often it will be desirable for the powerholder to be able to appoint for the benefit of a spouse or other lifetime partner (at least in a continuing trust), and for income tax reasons to have the ability to appoint to charitable organizations (including any foundation or donor advised fund) the family may have in place. The most flexible option is for the trust instrument to provide both lifetime and testamentary broad special powers of appointment.

To maximize privacy and flexibility, drafters should be wary of creating testamentary powers of appointment that can be exercised only by a will. Instead, it is prudent to allow the power to be exercised by any instrument that specifically references the power and is delivered to the trustee of the irrevocable trust over which the powers are being exercised. The instrument exercising the power of appointment can require all the same formalities that would be required of a trust amendment (such as a signed instrument delivered to the trustee to be kept with the trust records that makes specific reference to the power of appointment being exercised). Sample language is included in the Addendum.

General powers of appointment can also be used for flexibility in tax planning. One method to trigger inclusion in the gross estate—and therefore obtain a step-up in basis and also utilize the powerholder's own GST tax exemptions—is to provide a powerholder with a general power of appointment either by formula or by permitting an independent trustee or trust protector to add such power. By building in the trigger of a general power of appointment under certain circumstances, or for one to be added, the assets over which the beneficiary has such power will be includable in their estate.[136] The property subject to the power is includable in the powerholder's estate whether or not the power is exercised and will result in a step-up in basis. A general power of appointment is defined as a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. In traditional planning, advisors are careful to avoid general powers of appointment—as such powers cause the property to be subject to the estate tax. However, the use of general powers of appointment to trigger estate tax inclusion should be considered with the minimization of estate tax consequences and the focus on basis planning.

There are several issues to contemplate for advisors who wish to use a general power of appointment to force estate tax inclusion:

- How and when the general power should be given to the beneficiary;
- When the general power should be triggered; and
- How broad the general power should be when given to the beneficiary.

A general power should be employed only if the cost of estate tax inclusion is less than the income tax saved by increasing tax basis. Some commentators have suggested drafting a complex formula to determine when to grant such general powers and over what property and recognized the inherent challenges in such a task.[137]

Because of the numerous challenges with the use of a formula, it may be preferable to incorporate trust language providing an independent trustee (or trust protector) the discretion to grant a general power of appointment when the tax-effective increase in asset basis is desired.[138] The general power of appointment could be dependent on a number of factors including:

- A comparison of estate taxes incurred by using the general power to any income tax savings realized if the property is included in the gross estate;
- The amount of appreciation in each asset;
- Which assets are likely to be sold;
- The federal and state income tax rates at the time of any potential sale;
- The depreciation rate with respect to depreciable property owned by the trust; and

- Whether having a general power of appointment facilitates the desirable use of the powerholder's own GST tax exemption to be applied to the trust property.[139]

Sample language allowing the trustee the discretion to grant a general power of appointment is included in the Addendum.[140] Because many independent trustees or trust protectors will not want to be in a position of having to affirmatively determine whether or not to grant such a power, it has become increasingly common for drafters to add language requiring the independent trustee or trust protector to consider granting such a power only when that has been requested by a trust beneficiary.

Trust protectors

Generally, a trust protector is a third party other than the settlor, trustee, or beneficiary that is granted specific powers to make decisions needed to carry out the settlor's intent or to address changing laws and circumstances. For ideal flexibility, all trust instruments will contemplate that a trust protector can make amendments to an irrevocable trust instrument. The trust protector can be viewed as a surgeon who can make important corrections, clarifications, and updates to the instrument, such as adding financial powers as new investment vehicles, inventing business structures, or converting a trust into a special needs trust.

Trust protectors have been around for centuries in foreign trusts, but they are a more recent trend in US trusts. The desire to build in flexibility to address changed circumstances, coinciding with a trend of trusts lasting longer (e.g., 360 years, or in perpetuity), has led to an increase in the use of trust protectors. While most states have responded to this development, some states do not yet address trust protectors; even those that do are not consistent or fully developed.

Enabling a trust protector can be particularly useful in the following circumstances:

- To provide a third party with certain trustee powers. It may be desirable for a settlor to give a third party powers that traditionally were held by the trustee or even the beneficiary, such as approving trustee compensation, replacing trustee vacancies, or changing governing law or situs. In some situations, the trust protector could provide a check and balance on matters relating to the trustee. For example, if the beneficiary has the right to remove and appoint trustees, the beneficiary could exert pressure on the trustee to exercise the trustee's authority or to make discretionary distributions with the implied or express threat of being removed if it does not comply with the beneficiary's wishes. As a neutral third party, the trust protector can help ensure the right factors are being considered in the removal process. At the same time, the trust protector may be closer to the beneficiary or be privy to information that allows the third party to fully ascertain the situation.
- To provide flexibility in long-term trust. As trusts last longer and longer, it has become important to retain the ability to adjust trust provisions to comply with the settlor's goals as time and circumstances change. Some of these powers include the ability to turn off grantor trust status, add beneficiaries, change the ultimate contingent beneficiaries to facilitate a trust merger, or modify distribution provisions such as to protect a beneficiary with special needs and avoid disqualifying them for public benefits. Because a trustee has a fiduciary duty to the beneficiaries, the trustee often may not be able to perform these adjustments.
- To maintain privacy of trust administration. While many powers given to a trust protector can be achieved by going to court, utilizing a trust protector allows a trust to maintain its privacy by having the trust protector carry out the powers that would have been open to public records in court. Some of these powers include the powers to modify the trust instrument, change the governing law of the trust, remove and replace trustees, resolve disputes among the beneficiaries or between the beneficiaries and the trustee, and interpret the terms of the trust. While granting the trust protector these

powers does not prevent the trustee or beneficiaries from going to court, it does reduce the likelihood of a court proceeding.

- To monitor. Some practitioners believe that a trust protector should be named at the outset in order to protect the trust by monitoring the trustee's administration of the trust. This can be quite challenging since the trust protector is not privy to the day-to-day administration of the trust in the way it would be if it served as a co-trustee. Courts have determined that, unlike a trustee, a trust protector has no standing to bring an action in court, which could leave the party named as trust protector powerless to interfere if such individual did determine that something was amiss with the trust.[141]
- To act as enabler or surgeon. Many believe strongly that the best way to utilize a trust protector is to permit a party (such as the party designated in the instrument with the power to appoint and remove trustees) to appoint an individual who would qualify as an independent trustee to serve as trust protector with the power to engage in making primarily substantive trust revisions. The process of appointing a trust protector to make necessary changes then can be relatively clean. A trustee appointer can appoint an independent party (often an attorney) to amend or restate the trust in ways deemed to be consistent with settlor intent to address changes in tax law, investment powers, or other changed circumstances.
- To mediate. A final approach is to name an individual (or succession of individuals) who could be consulted to resolve a dispute between two trustees, or other parties who have powers within the trust, such as for the appointment or removal of trustees. This may be a situation where the settlor's spouse and child or two children are named together as fiduciaries or powerholders, but if the two of them are in disagreement, the trusted individual can resolve the dispute. As a practical matter, being named as a third party to resolve disputes sounds like a pretty unappealing role. Accordingly, if a client insists on taking this approach, it is best to have the party accept this role in advance, make it clear that the party gets involved only when called upon by the two disagreeing parties, and settle compensation for serving in the role in advance.

Many trust instruments that permit the appointment of a trust protector assume that the party serving in such role is not intended to be a fiduciary. However, some of the statutes that have blessed the existence of trust protectors have now defined them expansively (e.g., to include mere trustee appointers and removers) and have imposed fiduciary duties on such parties. These developments have made the role more frightful, particularly for individuals who are named in trust instruments as trust protector (including as trustee appointer or remover) but may have no other connections to the trust.[142]

Despite being given the title of "protector," a trust protector preferably should not be utilized with the goal of having the trust protector monitor the trustee's administration of the trust. If a settlor wants someone or an entity to monitor the trustee, the settlor should either select a different trustee or appoint the party intended to serve as trust protector as a co-trustee. Oftentimes, a beneficiary is in a better position to monitor the trustee than a named trust protector.[143]

When a client hears that they may make changes to an irrevocable trust, it may be tempting for the client to ask the trust protector to make changes to the trust regularly. Best practice is for trust protectors to act sparingly and in reaction only to changed circumstances and changes in the law, not purely at the settlor's request.

Settlors often want to retain as much power as possible, while minimizing tax consequences. Settlors can grant powers to the trust protector, who will act in a non-fiduciary capacity and carry out the settlor's intent without the estate tax consequences. The following are drafting suggestions for a trust that will either have a trust protector or permit the appointment of a trust protector if there is a change in circumstances:

- The trust instrument should clearly state the trust protector's powers and duty of care. While the state may have established default rules, drafters should be careful of relying on state law because there is little consistency between state trust protector laws. Drafting based on one state's body of laws does not protect against the possibility of a vastly different set of laws if the trust is moved to another jurisdiction. Additionally, even if the trust never changes situs, state laws are still developing, so long-term planning entails setting out the settlor's intent.
- Trust protectors and trust advisors perform separate and distinct roles, even though the terms may be used interchangeably, as many states do not differentiate between the two. Trust advisors should be used when the intention is to have a third party perform specific trustee powers such as investments or distributions. Trust protectors are for powers that the settlor, beneficiary, or trustee may not want to or cannot have the trustee perform. Additionally, unlike trust advisors, trust protectors are not required to act as fiduciaries as long as the governing instrument is specific in so stating.
- The trust instrument should state the standard of care for the trust protector. Depending on the powers granted to the trust protector, the appropriate standard of care will vary. In some cases, it will be lower than the standard applicable to a trustee or trust advisor because the trust protector is not necessarily a fiduciary acting on behalf of the beneficiaries. If that is what the settlor intends, then the trust instrument should clearly state that the trust protector is not a fiduciary; the instrument should specify that the trust protector is not liable for their actions unless they act in bad faith, with reckless indifference to the purposes of the trust, or in their own self-interests. If the trust protector is granted powers comparable to those typical of a trustee, then the trust protector will most likely be a fiduciary and subject to the same standard of care as the trustee. The trust instrument could also provide indemnification for the trust protector from litigation fees and expenses.

Decanting

Decanting allows one trust to pour its assets into a new trust. This can be done at common law in a trust that permits distributions in continuing trust for beneficiaries' best interests, but many states have now enacted laws that govern the process of decanting. State decanting laws will vary. Some are more onerous than others, and over time the laws could change to become even more onerous. If the settlor's goal is to maximize future flexibility, there is no harm—and there could be significant benefit—in having the settlor expressly assent to future decanting. It is even better to spell out what decanting would look like (e.g., provide whether notice to contingent beneficiaries is waived). The Uniform Trust Decanting Act has been enacted in six states.[144]

Note that like the trust protector, decanting should be used with caution if the goal is to remove trust beneficiaries. The *Hodges v. Johnson* case in New Hampshire illustrates that a trustee who goes along with decanting to remove current beneficiaries could be in breach of the trustee's fiduciary duties.[145]

Trust mergers and severances can be utilized as an alternative to decanting. Most state statutes authorize mergers with substantially similar trusts, but it can be helpful to include an express authorization for trust mergers or severances to maximize flexibility in the instruments.

Including broad investment and administrative powers can reduce the need for decanting. Permitting a trustee to have broad flexibility in investments can facilitate trust administration. This can include a comprehensive list of investment and administrative powers, as well as incorporating all state statutory powers as they exist at the time of execution and at any time in the future during the trust administration. For example, the introduction to the list of powers in the trust could state something similar to the following:

> In addition to all powers now or hereafter granted by law regardless of the statutory effective date of the power, the trustee shall have

the following powers with respect to each trust held under this instrument.

Since modern families often wish to divide trustee functions in ways that have one trustee responsible for trust administration and a separate trustee or investment advisor responsible for trust investment, it can be helpful to segregate the administrative powers and the investment powers into separate sections of the trust instrument.

Grantor trust provisions

Utilizing intentionally defective irrevocable grantor trusts maximizes flexibility in that it requires the settlor, who is treated as the grantor for income tax purposes, to pay the trust's income tax liabilities and also permits the settlor and the settlor's spouse to engage in income tax-free transactions with the trust such as installment sales, loans, and leases.

Traditional transfer tax planning has focused on removing assets from the gross estate—or at least discounting the value of assets included in the gross estate. Gift tax planning has encouraged lifetime transfers to take advantage of the tax-exclusive nature of the gift tax and to shift post-gift appreciation out of the donor's taxable estate. However, the landscape of income tax and transfer tax planning has changed dramatically in the past several years. The American Taxpayer Relief Act of 2012 (the 2012 Tax Act) lowered the estate tax rate to 40 percent, increased the income tax rate to 39.6 percent, increased the capital gain rate to 20 percent, and implemented a new 3.8 percent surtax on net investment income tax. As discussed below, the 2012 Tax Act also made permanent the portability of a deceased spouse's unused exclusion amount (commonly referred to as the DSUE amount) for those estates that make an appropriate election on a timely filed estate tax return.

The TCJA increased the exemption amount, now $11.7 million with inflation adjustments, and lowered the highest marginal income tax rate from 39.6 percent to 37 percent, but trusts still pay taxes at the highest marginal rate starting at only $13,051 of income. The reduction of the transfer tax rates accompanied by the increase of the federal income tax rates has changed the estate planning focus with respect to most clients from reducing the estate tax to reducing the income tax of clients. As such, the strategies that planners typically employed to remove assets from a client's estate are now of little value to clients who are unlikely to face a gift or estate tax liability.

Under the current income and transfer tax structures, planners must shift their focus from just reducing federal estate tax to reducing federal income tax. In planning for estate tax inclusion and basis step-up, an advisor must be aware of those assets that reap the most income tax benefits from a step-up in basis. With proper planning, these assets will provide either lower or no recognized gain on sale, a higher basis for depreciation, and, in some cases, preferred capital gain as opposed to ordinary income treatment.

Many advisors have clients who use such trusts to take advantage of the income tax result that the trust settlor/grantor is treated as the owner of the trust for income tax purposes. Thus, a grantor would not recognize gain or loss on a sale of property to the trust, and any income or deduction of the trust would be taxed to the grantor. This is particularly attractive because the trust can appreciate for the benefit of the beneficiaries without having to pay income tax. The payment of income tax by the grantor dramatically increases the value of the trust with the added benefit of not incurring gift tax.

Choosing which grantor trust powers to include can make a difference.[146] A common provision included in a trust to qualify it as a grantor trust is to give the settlor the power, in a non-fiduciary capacity, to reacquire trust assets by substituting assets of equivalent value.[147] A client who is a settlor and grantor may increase basis by swapping assets with a grantor trust. The grantor has the ability to swap a high-basis asset for an asset of equivalent value (and a low basis) held by the grantor trust. This will not be considered an exchange for income tax purposes, and the low-basis asset will then be includable in

the client's gross estate—and will receive a step-up in basis at the client's death.

Including the ability to make loans to the grantor with inadequate interest or inadequate security is another popular provision that increases flexibility (for example, if the settlor has gifted too much and needs access to borrow trust assets to pay expenses).

In addition, including the power to add charitable beneficiaries can also be useful as this may enable the trust to take charitable income tax deductions. This is even more beneficial under the TCJA, where individual deductions have limitations if the grantor trust status will eventually be turned off or after the death of the settlor. Finally, including the settlor's spouse as a permissible beneficiary and/or as a fiduciary with the power to make discretionary distributions can also be useful. A few sample grantor trust powers are included in the Addendum.

Grantor trust reimbursement[148]

While originally intended to punish settlors who tried to evade income taxes by transferring assets to trusts, grantor trusts have become an essential tool in estate planning. With grantor trust status, a trust can accelerate growth without the tax drag. Also, the trust can utilize the settlor/grantor's social security number as its taxpayer identification number and avoid tax preparation complications and fees. It can engage in desirable transactions with the settlor, like renting residential real estate, buying assets in an installment sale at low interest rates, and swapping out low-basis assets for higher basis assets.

A well-drafted grantor trust will always include the ability to turn off grantor trust status in case the grantor tires of paying the trust's taxes. For example, in a year when there is an unusually large capital gain or in which the grantor may be particularly cash-strapped, the grantor might be inclined to turn off the status rather than incur the tax liability.

Turning off grantor trust status, however, is harmful to the trust and is always contrary to the best interests of the beneficiaries. It may also have unintended consequences if the grantor is engaged in otherwise non-recognized transactions with the trust, such as a lease with a qualified personal residence trust, or an installment sale to an intentionally defective grantor trust. In such situations, it is preferable for the trust to contain a discretionary trustee power to simply reimburse the grantor for the taxes in lieu of turning off the status.

Across the country, many practitioners are addressing this issue by inserting language in their trusts giving trustees the authority to reimburse grantors for taxes (or to pay the trust's share of the tax liability directly) as a disincentive for turning off grantor trust status altogether and to build in more flexibility.

The Internal Revenue Service (IRS) permits reimbursement for taxes and will not include the amount of the trust in the settlor's taxable gross estate as long as the payment is not:

- Forbidden by state law;
- Subject to a pattern of abuse that suggests an agreement to reimburse; or
- Mandatory.

In Revenue Ruling 2004-64, the IRS addressed this issue and determined that there would be no inclusion in the gross estate for federal estate tax purposes if the trustee has discretionary authority, under the instrument or applicable local law, to reimburse the grantor for the income tax liability. There must not be any facts indicating control by the grantor, such as preexisting arrangements, powers to remove trustee and name the grantor as trustee, or local law subjecting the trust assets to the claims of the grantor's creditors. On the other hand, if the applicable local law or the trust's governing instrument requires a mandatory payment for the income tax liability, this will trigger inclusion in the grantor's taxable gross estate under Code section 2036(a)(1) for any trust created after October 4, 2004.

Under the holding of the Revenue Ruling, no state statute expressly authorizing reimbursement for grantor taxes should be necessary, as long as such reimbursement is permitted by the instrument, and

there is no local law subjecting the trust assets to the grantor's creditors' claims. Nonetheless, to provide comfort and clarity, many states have enacted statutes that address grantor trust reimbursement.

Funding formulas

Due to federal legislation enacted in 2001 that eliminated the pick-up tax, a number of states have passed separate estate tax regimes. For states in which the federal and state estate tax exemption amounts do not match, the estate taxes are described as "decoupled." As a result, some states like Illinois now have state-only qualified terminable interest trust (QTIP) marital deduction elections to be made upon the first spouse's death.[149]

Planners have several options available to them when drafting documents to take advantage of a state QTIP election—and the strategy implemented will depend on a client's particular situation and the flexibility desired. Additionally, the strategy chosen may also depend on the portability of the predeceased spouse's estate tax exemption amount and the applicability of estate taxes and income taxes.

Consideration of income taxes is increasingly important now that the highest income tax rates can exceed the highest transfer tax rates. Part of planning for flexibility is to consider that sometimes it will be beneficial for trust assets to be distributed outright to a beneficiary such as to shift income from the trust's bracket to the beneficiary's bracket or to receive a step-up in basis at that beneficiary's death. Along the same lines, it may be desirable for certain beneficiaries to be granted general powers of appointment over trust assets to secure a step-up in basis over those assets at death.

When preparing estate planning documents for a client, a planner may utilize one of the following options (and sample language for each is included in the Addendum):

- Rely purely on portability as discussed in more detail below;
- Use a credit shelter trust with the lower of the federal and state estate tax exemptions, and a QTIPable Marital Trust. Under this approach, the funding formula (whether fractional or pecuniary) for the credit shelter trust provides that the largest amount that will not incur federal *or* state estate taxes is allocated to the credit shelter trust. Any remaining assets are allocated to a QTIPable trust. The executor could then make a federal QTIP election over such trust and a state QTIP election over the gap amount—resulting in no federal or state estate tax being payable upon the predeceased spouse's death; or
- Use a credit shelter trust with the *greater* of the federal and state estate tax exemptions and a QTIPable marital trust. Under this approach, the funding formula (whether fractional or pecuniary) for the credit shelter trust provides that the largest amount that can pass free without incurring federal estate taxes only ($11.7 million in 2021) is allocated to the credit shelter trust. Any remaining assets are allocated to a QTIPable trust.

The executor could then make a federal QTIP election over such trust, resulting in no federal estate tax being payable upon the predeceased spouse's death. If the credit shelter trust qualifies for QTIP treatment, the executor may make a partial state QTIP election for the gap amount of the credit shelter trust. While this strategy was utilized widely prior to decoupling and is likely a part of a significant number of existing plans, it has a couple of drawbacks:

- In many cases, the credit shelter trust will not be drafted in a manner that will allow it to qualify as a QTIPable trust—as it will not require a mandatory distribution of income or will name beneficiaries other than the surviving spouse. Therefore, the state QTIP election will be unavailable, and the credit shelter trust will generate some state estate tax—which may potentially be avoided if the credit shelter trust had qualified for the state QTIP election and the surviving spouse was not subject to state estate taxes upon death.

- Even if the credit shelter trust is a QTIPable trust, it will cause the credit shelter trust to be a "leaky" trust—as the income from the entire trust must be distributed to the surviving spouse (as opposed to the discretion to retain the assets in trust for the surviving spouse's benefit).

Three-trust strategy

Pursuant to this strategy, the credit shelter trust is funded with a formula (whether fractional or pecuniary) that provides for the largest amount that will not incur federal or state estate taxes. Any remaining assets are allocated to a QTIPable trust—and further divided by formula between a "state QTIP trust" (for the gap amount) and a "federal QTIP trust" (for the balance of the assets). The executor could then make a state QTIP election over the state QTIP trust and a federal QTIP election over the federal QTIP trust—resulting in no federal or state estate tax being payable upon the predeceased spouse's death. While this approach already works well in some states that have decoupled, it could also be useful in boilerplate in case clients move from a state where it isn't necessary to a state that has decoupled from the federal estate tax and permits a state-only QTIP election.

QTIPable trust approach

Under this approach, sometimes referred to as a "single fund QTIP" approach, all assets are allocated to a trust over which the decedent's executor can make a QTIP election. The executor would then make a partial QTIP election for a portion of the trust to avoid federal estate taxes and a state QTIP election over the gap amount. Similar to the strategy above of funding the credit shelter trust with the greater of the federal and state estate tax exemptions, this strategy will result in all assets being held in a "leaky" trust—as the income from the entire trust must be distributed to the surviving spouse (as opposed to the discretion to retain the assets in trust for the surviving spouse's benefit).

Disclaimer approach

With this approach, there is typically an outright bequest to the surviving spouse with a provision that any amount disclaimed by the surviving spouse passes to a QTIPable trust or to a Family Trust. The disclaimer must be made within nine months. The executor would have up to nine months (or 15 months, if an extension is filed) after the predeceased spouse's date of death to decide whether to make a full or partial QTIP election. If a QTIP election is not made, then the portion over which no election was made could pass to a credit shelter trust. Otherwise, if the QTIP election is made, then the executor could make a reverse QTIP election and allocate the predeceased spouse's GST exemption to the trust. One potential hazard to this approach is that the surviving spouse may decide—after the death of the predeceased spouse—not to execute a disclaimer (and simply receive all assets outright and free of trust).

Clayton-contingent QTIP election

The Clayton-contingent QTIP election is a more flexible variation of the traditional partial QTIP election.[150] A Clayton-contingent QTIP election permits a surviving spouse's income interest in a QTIP marital deduction trust to be contingent on the fiduciary's election to treat the marital trust property as QTIP property under section 2056(b)(7) of the Code. The property elected for QTIP treatment remains in the QTIP marital deduction trust, while the non-elected portion of the QTIP trust property is generally distributed to the surviving spouse and the decedent's descendants in a traditional Family Trust.[151] Under the provisions of a Clayton trust, the residue of the decedent's estate (to the extent the assets qualify for the marital deduction) is left to a single QTIP marital deduction trust for the benefit of the surviving spouse. Through the use of a Clayton-contingent QTIP election, the decedent's fiduciary determines how much of the QTIP trust property should qualify for the marital deduction. With a six-month extension to file the decedent's federal estate tax return, the decedent's fiduciary will have 15 months to determine the appropriate contingent QTIP election amount.

Additional considerations

Although there are several options to be considered with respect to decoupling, the most appropriate option to include will involve other factors—such as:

- Whether the priority is the minimization of estate tax or the reduction of income tax; and
- The option for married couples to take advantage of portability.

For these reasons, the appropriate strategy will involve a discussion and analysis with clients of all such possibilities and their goals.

Portability

Portability was first introduced as part of the Tax Relief, Unemployment Reauthorization, and Job Creation Act of 2010 (the 2010 Tax Act). It became effective for married persons dying on or after January 1, 2011. Specifically, section 303(a) of the 2010 Tax Act provides for the portability of any unused exclusion amount for a surviving spouse if the decedent's executor makes an appropriate election on a timely filed estate tax return that calculates the unused exclusion amount. The surviving spouse can apply the DSUE amount either to gifts by the surviving spouse during their lifetime or for estate tax purposes at the surviving spouse's death. Additionally, an individual can only use the DSUE amount from their last deceased spouse. As a result of the passage of the 2012 Tax Act, portability is now a permanent part of the transfer tax system.

The following summarizes various aspects of portability:

- The portability election is made by the executor of the deceased spouse's estate by filing a timely and complete Form 706;
- The surviving spouse's DSUE amount is not subject to reduction if Congress subsequently reduces the basic exclusion amount;
- If the decedent made gifts requiring the payment of gift tax, the excess taxable gift over the gift exemption amount (on which gift tax was paid) is not considered in calculating the DSUE amount;
- The surviving spouse can use the DSUE amount any time after the decedent's death, assuming the portability election is eventually made by the executor;
- Any gifts made by the surviving spouse are first covered by the DSUE amount, leaving the spouse's own exclusion amount to cover later transfers; and
- DSUE amounts from multiple spouses may be used to the extent that gifts are made to utilize the DSUE amount from a particular spouse before the next spouse dies.

Because the portability provisions are permanent, married clients are more likely to consider implementing a simple plan that leaves all assets to the surviving spouse and relies on portability to take advantage of the estate tax exemptions of both spouses. However, such an approach is not helpful in planning for the estate tax in most states that have an estate tax—as only two of those states have adopted portability, Hawaii and Maryland.

When deciding whether to rely on portability, the following factors should be considered:

- The age and life expectancy of the surviving spouse;
- Whether assets in the predeceased spouse's estate are likely to appreciate substantially;
- Whether assets in the predeceased spouse's estate are likely to be sold during the surviving spouse's lifetime or retained until the surviving spouse's death—and the related tax effects;
- Whether the assets will be used by the surviving spouse during their lifetime; and
- Whether the surviving spouse resides in—or will move to or from—a state with a state estate tax (e.g., Illinois).

Arguments favoring credit shelter trusts

Although spousal portability allows the surviving spouse to avail himself or herself of the predeceased spouse's unused federal estate tax exemption amount, there are possible pitfalls which could occur if married couples rely on it for utilization of the federal estate tax exemption of the first spouse to die, which include the following:

- First, relying on portability does not leverage the federal estate tax exemption of the first spouse to die. If assets appreciate and there is no credit shelter trust (i.e., if all of the couple's assets are in the surviving spouse's name or revocable trust) or if the credit shelter trust is not fully funded (i.e., if the value of the assets in the predeceased spouse's name is less than their federal estate tax exemption amount), then the appreciation on such assets is fully taxable in the surviving spouse's estate. Alternatively, if the assets in the predeceased spouse's credit shelter trust appreciate after the first death, then the appreciation passes free of estate tax to the family.
- In addition, assets passing to a surviving spouse in a credit shelter trust are afforded protection from the surviving spouse's creditors, whereas assets held in the surviving spouse's individual name or in the name of their revocable trust are not protected from creditors. Therefore, if a couple relies on portability instead of titling sufficient assets in each spouse's name (and if the majority of the couple's assets are titled in the name of the surviving spouse), then those assets will lose the creditor protection that they otherwise would have been afforded had the assets passed to the predeceased spouse's credit shelter trust upon their death.
- The predeceased spouse might use a credit shelter trust to restrict the surviving spouse's ability to access the trust assets and provide for the management of the assets by appointing a trustee who is not the surviving spouse.
- Furthermore, a surviving spouse can only avail himself or herself of the unused portion of the federal estate tax exemption of their last spouse to die. As a result of this limitation, it is possible that remarriage by a surviving spouse could cause the loss of the portability if the new spouse predeceases the surviving spouse but uses their full federal estate tax exemption.
- Because portability does not apply to the GST tax, it is still necessary to fund both estate tax exemptions (to the extent possible) to fully leverage the GST exemptions of both spouses.
- Finally, portability is not an option with state estate tax in any state other than Hawaii (and soon to be in Maryland) as referenced above.

Arguments favoring portability

While relying on portability is the simplest approach, there are other reasons why a married couple might employ portability as the better alternative to credit shelter trusts, such as the following:

- A couple may have a desire for simplicity and not wish to be burdened with the extra duties and reporting obligations that are attendant to trusts. Additionally, there may be administrative costs and disadvantageous income tax consequences incurred as a result of the use of trusts.
- A couple may be more motivated in obtaining the step-up in basis of their assets, rather than removing future appreciation of those assets from their taxable estates.
- Portability works well for a married couple who have not been married before and do not have any other children from a prior marriage.
- There are assets in the predeceased spouse's estate that would be difficult to administer in a trust, such as a residence.

Drafting considerations

A married couple's decision on which strategy to use will likely depend on factors such as: the need to protect assets from federal and state estate taxes and from other creditors, control of assets, administrative simplicity, and evaluation of income tax consequences. While planners may draft documents that implement either of the strategies above, the

optimal approach is to draft documents that provide flexibility for the surviving spouse to decide whether to rely on portability after the death of the predeceased spouse. There are a couple of options that provide this flexibility—a QTIPable trust and a disclaimer approach—both of which allow a couple to "punt" on the decision until the first death.

QTIPable trust approach

A QTIPable trust approach affords substantial flexibility to a surviving spouse. By allocating all assets to a trust over which the decedent's executor can make a QTIP election, the factors discussed above can be analyzed after the death of the predeceased spouse. By drafting a QTIPable trust into an estate plan, the predeceased spouse's executor has up to nine months (or 15 months, if an extension is filed) after the predeceased spouse's date of death to decide whether to make a QTIP election and over what portion of the trust the election should be made. If a QTIP election is made by the executor, then a reverse QTIP election could be made to allocate the predeceased spouse's GST exemption to the trust. A QTIPable trust also makes it straightforward to fully utilize the predeceased spouse's exemption amount without paying state estate taxes upon the predeceased spouse's death.

Disclaimer approach

Under this approach, there is an outright bequest to the surviving spouse—with a provision that any amount disclaimed by the surviving spouse passes to a QTIPable trust. The executor would have up to nine months (or 15 months, if an extension is filed) after the predeceased spouse's date of death to decide whether to make a full or partial QTIP election. If a QTIP election is not made, then the portion over which no election was made could pass to a credit shelter trust. Otherwise, if the QTIP election is made, then the executor could make a reverse QTIP election and allocate the predeceased spouse's GST exemption to the trust. Under this approach, there are two different choices:

1. The spouse could decide not to make any disclaimers and keep the assets, and the executor would then make the portability election; or
2. The spouse could disclaim all or a portion of the outright bequest and the disclaimed assets would pass to the QTIPable trust. The executor would have up to nine months (or 15 months, if an extension is filed) after the predeceased spouse's date of death to decide whether to make a full or partial QTIP election.

Clayton variation

The Clayton-contingent QTIP election is often viewed as the most flexible variation. It permits a surviving spouse's income interest in a QTIP marital deduction trust to be contingent on the fiduciary's election to treat the marital trust property as QTIP property under section 2056(b)(7) of the Code. The property elected for QTIP treatment remains in the QTIP marital deduction trust, while the non-elected portion of the QTIP trust property can be distributed to a Family Trust (i.e., Credit Shelter Trust). With a six-month extension to file the decedent's federal estate tax return, the decedent's fiduciary will have up to 15 months to determine the appropriate contingent QTIP election amount, which provides more time than the disclaimer approach.

Combination approach

In fact, the most flexible approach is for an instrument to permit a spouse up to nine months to disclaim and also to permit an independent fiduciary 15 months to make a Clayton election. See sample language in the Addendum.

ADDITIONAL DRAFTING CONSIDERATIONS

Protecting privacy

Protecting privacy in the modern era is increasingly important. Here are some suggestions for how to do so:

- Pour-over wills. Because wills are eventually public instruments, pour-over wills are useful because assets are transferred into a trust, which

does not become public. If a will must reference specific family members or specific assets, the drafter should include adequate details so that the appropriate individuals and property can be identified but disclose as little as possible beyond the minimum amount of information.

- Exercising testamentary powers of appointment. Along the same lines, testamentary powers of appointment should not be required to be exercised in a will, and certainly not a will that must be probated. Ideally, references to existing family trusts and information about a testamentary plan should be in trusts and other instruments that do not need to be filed with a court. This requires specifying that testamentary powers of appointment can be exercised in a will or, for example, "other instrument that is delivered to the trustee during the decedent's life or at death." Then, the terms for any continuing trust can either be made in a separate trust instrument (such as a power of appointment trust) or could be contained within the decedent's revocable living trust.

Gender neutrality

Gender-neutral language should be used in drafting. In the 21st century, there is no reason to risk offending clients, or to be imprecise in gendered pronouns. For example, do not use masculine pronouns and then put in the interpretive rules that such references also include the feminine. Drafting with gender neutrality is particularly critical when thinking about how to be sensitive to the preferences of any transgender clients or family members or those who identify as gender fluid or non-binary.

Encourage mediation

Legal disputes in court are public and can become particularly embarrassing for a high-profile family if the media takes interest. Litigation also can lead to the permanent impairment or even total destruction of family relationships. In states where it is permitted, mandatory arbitration may protect the family's privacy, but has the same impact on the relationships, and may unfairly extinguish legal rights that in some instances might more properly be adjudicated by a court. The family may also desire court involvement and not arbitration when trying to modify a trust or have the court bless a settlement agreement, such as in a state that has adopted the Trust and Estate Dispute Resolution Act (TEDRA). Accordingly, encouraging mediation is the preferred approach. A few sample provisions are included in the Addendum.

CONCLUSION

Over the past several decades, the concept of the family and the planning environment have changed significantly. It is crucial for estate planning attorneys to consider how these changes impact their clients' estate planning needs and wishes. The modern family may include children from assisted reproductive technologies with donor gametes, children from first and second (and subsequent) relationships, multiple ex-spouses, and/or nonmarital partners. Estate planning professionals should be sensitive to this multitude of changes when working with clients. Moreover, to ensure that planning documents are responsive to the evolving family structures and the many anticipated and unanticipated future changes, these professionals should build flexibility into the documents they draft.

ADDENDUM: SAMPLE TRUST LANGUAGE[152]

Distribution standards for Family Trust (or other Spousal Lifetime Access Trust)

The trustee shall distribute to any one or more of my spouses and my descendants living at the time of the distribution as much of the net income and principal of the trust, even to the extent of exhausting principal, as the trustee determines from time to time to be required for their respective health, support, and education, and as the independent trustee, if any, believes to be desirable from time to time for their respective best interests; provided, however, that:

1. The trustee shall add any undistributed net income to principal from time to time, as the trustee determines;

2. My primary concern during the life of my spouse is for the health and support of my spouse, and the trustee shall not make a distribution to any other beneficiary under this paragraph if the trustee believes it may jeopardize the trustee's ability to make such distributions to my spouse in the future;
3. To the extent that the trustee believes it advisable, the trustee shall not distribute principal of the Family Trust to my spouse as long as any principal remains in the Marital Trust;
4. No distribution made under this paragraph to a descendant of mine shall be charged as an advancement; and
5. The trustee may make unequal distributions to the beneficiaries or may at any time make a distribution to fewer than all of them, and shall have no duty to equalize those distributions.

The term "trustee" and any pronoun referring to that term designate the trustee or trustees at any time acting hereunder, regardless of number or gender, and the term "independent trustee" means a trustee who is not a beneficiary of the trust or a related or subordinate party, as defined in Internal Revenue Code section 672(c), with respect to any beneficiary of the trust. The term "trustee" includes the term "independent trustee."

For child's trust

If the child for whom the trust is named is living on the division date, then commencing as of the division date and during the life of that child, the trustee shall distribute to the child as much of the net income and principal, even to the extent of exhausting principal, as the trustee in the trustee's sole and absolute discretion believes to be desirable for the best interests of the child, without regard to the interest of any other beneficiary; provided, however, that if the trustee is not an independent trustee, then the distributions shall be limited to those that the trustee determines to be required for the health, support, and education of the child. The trustee shall add any undistributed net income to principal from time to time, as the trustee determines.

Trustee succession plan

The Trustee Appointer may appoint any one or more Qualified Appointees as additional or successor trustees, Trustee Appointers, or Trustee Removers. Any appointment of an additional or successor fiduciary hereunder shall be in writing, may be made to become effective at any time or upon any event, may be for a specified period or indefinitely, may be for limited or general purposes and responsibilities, and may be single, joint, or successive, all as specified in the instrument of appointment. The Trustee Appointer acting from time to time may revoke any such appointment made by that Trustee Appointer before it is accepted by the appointee, may revoke or supersede an appointment by a previous Trustee Appointer that has not been accepted by the appointee unless the previous Trustee Appointer's instrument of appointment specifies otherwise, and may supersede the appointments otherwise made in this Article. If two or more instruments of appointment or revocation by the same Trustee Appointer exist and are inconsistent, the latest by date shall control. The Trustee Appointer shall act only in a fiduciary capacity in the best interests of all trust beneficiaries. For purposes of this instrument:

1. The Trustee Appointer means my spouse, if not disabled, otherwise the beneficiary for whom the trust is named (the "Named Beneficiary") if any, or if none, the beneficiaries to whom the current trust income may or must then be distributed by majority; and
2. Qualified Appointee means any person who has attained the age of ____ years, or any bank or trust company, within or outside the State of _____.

Divided trusteeship/directed trust

1. The Trustee Appointer acting from time to time may appoint one or more Qualified Appointees as Investment Direction Advisor of the trust pursuant to paragraph of the Trustee Provisions of this instrument. Despite the general powers of the trustee, the following provisions shall apply, where the context admits, to each trust from

time to time held hereunder, during any period in which an investment advisor shall be acting:

a. The trustee shall follow the written directions of the Investment Advisor with respect to the purchase, sale, retention, or encumbrance of trust principal and the investment and reinvestment of funds held hereunder and shall have no duty to review or monitor trust investments.

b. The trustee shall issue proxies to vote all securities held by the trustee to or on the written order of the investment advisor, and the trustee shall not thereafter be liable for the manner in which those securities are voted, for any direct or indirect result of that voting, or for any failure to vote those securities.

c. No trustee shall be accountable for any loss or diminution in value sustained by reason of following a direction by the Investment Advisor or from failing to take an action with respect to trust principal in the absence of a direction from the investment advisor pursuant to the preceding provisions of this paragraph, and no person dealing with the trustee shall be required or privileged to inquire whether there has been compliance with those provisions.

d. Any Investment Advisor acting hereunder may resign at any time, and from time to time may waive for limited periods of time or delegate to any other person (including the trustee with the trustee's consent) any or all of their rights under this paragraph, by written notice delivered to the trustee. In the case of any such delegation, the person to whom rights and powers are delegated may take any action or make any decision for the investment advisor making that delegation, within the scope of the delegated rights and powers, with the same effect as if the investment advisor making that delegation had participated in that action or decision.

e. The rights and powers herein conferred on the Investment Advisor shall be exercisable only in a fiduciary capacity.

f. The term "investment advisor" means the person named or designated in the manner provided in this Article from time to time acting as investment direction advisor hereunder.

Granting broad special lifetime and testamentary powers of appointment

If the primary beneficiary is living on the creation of the trust, then at such time at or after the date of the creation of the trust as the primary beneficiary has reached the age of [30] years, the trustee shall also distribute to any one or more persons or organizations as much or all of the principal of the trust as the primary beneficiary may appoint either by will or from time to time by signed instruments delivered to the trustee during the primary beneficiary's life, which instruments shall specify whether such appointment is to be effective immediately, upon the primary beneficiary's death, or at some other time and shall be irrevocable unless made revocable by their terms. Notwithstanding the foregoing, the primary beneficiary shall not have the power: (i) to appoint any principal under this paragraph to the primary beneficiary, the primary beneficiary's estate, or the creditors of either; or (ii) to satisfy any legal obligation of the primary beneficiary, including any obligation to support or educate any person; provided, however, that the primary beneficiary may exercise this power to create a successor trust of which the primary beneficiary is a beneficiary as long as the primary beneficiary's beneficial interests in, and fiduciary and non-fiduciary powers over, that successor trust are no broader than the interests and powers of the named beneficiary in the trust named for the named beneficiary under this instrument.

Method of exercise of powers of appointment

The trustee shall distribute any trust principal or net income as to which a power of appointment is exercised to the designated appointee or appointees (whether living at the time of exercise or thereafter

born) upon such conditions and estates, in such manner (in trust or otherwise), with such powers, in such amounts or proportions, and at such time or times (but not beyond the period permitted by any applicable rule of law relating to perpetuities) as the holder of the power may specify in the will, revocable trust or other instrument exercising the power. To be effective, the exercise of any power of appointment granted hereunder shall make specific reference to the provision creating the power. The donee of a power of appointment granted hereunder may provide that if no descendant of mine is living, then the property subject to that power may be distributed to one or more beneficiaries other than those set forth in the contingent ultimate disposition provisions of this instrument (excluding the donee, the donee's estate, and the creditors of either) without violating the terms of that power. In determining whether a testamentary power of appointment has been exercised by will, the trustee, without liability (unless there is proof of bad faith), may rely on a will believed by the trustee to be the will of the holder of the power of appointment, or assume that the holder left no will in the absence of actual knowledge of one within three months after the holder's death. The trustee shall not require that any will purporting to exercise a power be admitted to probate.

Power to create testamentary general power of appointment[153]

1. An independent trustee is authorized in its sole discretion with respect to all or any part of the principal of any trust created hereunder, by an instrument in writing, to:
   a. create in a beneficiary a testamentary general power of appointment within the meaning of Internal Revenue Code section 2041 (including a power the exercise of which requires the consent of some other person other than any beneficiary or trustee);
   b. limit a testamentary general power of appointment created under this paragraph, as to all or part of such principal at any time prior to the death of such beneficiary by narrowing the class to whom such beneficiary may appoint the property subject to such appointment, so as to convert such power into a special power of appointment;
   c. eliminate such power for all or any part of such principal as to which such power was previously created at any time prior to the death of such beneficiary;
   d. irrevocably release the right to limit or eliminate such power with respect to such trust; and
   e. divide such beneficiary's share of such trust principal into two fractional shares based upon the portion of such beneficiary's share of such trust that would be then includable in the gross estate of such beneficiary holding such power if they died immediately before such division (in which case the power shall be over the entire principal of one share which has an inclusion ratio of one and over no part of the other share which has an inclusion ratio of zero), including through effecting a qualified severance (as defined in Code section 2642(a)(3)), and each such share shall be administered as a separate trust unless the trustee, in the trustee's sole discretion, thereafter directs the trustee of the trusts to combine such separate trusts into a single trust which the trustee is hereby authorized to do.
2. In granting such power to the independent trustee, it is my desire, which is not binding on the independent trustee, that a testamentary general power of appointment be created when the independent trustee believes the inclusion of the property subject thereto in the beneficiary's gross estate may achieve a significant savings in income taxes by subjecting such assets to an estate tax.
3. I hereby direct that the independent trustee's decisions under this Article shall be absolutely binding on all beneficiaries of the trust and of the estates of all such beneficiaries and that the independent trustee shall incur no liability by

reason of any adverse consequences of such decisions to any beneficiary.

Trust protectors

1. The Trustee Appointer may appoint any one or more individuals who would qualify as independent trustees and who are not then disabled as Trust Protector. Any appointment of a Trust Protector hereunder shall be in writing, may be made to become effective at any time or upon any event, and may be single, joint, or successive, all as specified in the instrument of appointment. The Trustee Appointer may revoke any such appointment before it is accepted by the appointee. An appointment that has not been accepted by the appointee may be revoked by a subsequent Trustee Appointer unless the instrument of appointment specifies otherwise. In the event that two or more instruments of appointment or revocation by the same Trustee Appointer exist and are inconsistent, the latest by date shall control.

2. The Trust Protector may resign from one or more trusts held hereunder by giving prior written notice of such resignation to the Trustee Appointer and any other Trust Protector then acting. No trust created under this instrument is required to have a Trust Protector, and all trusts created hereunder need not have or continue to have the same Trust Protector.

3. The Trust Protector, by written instrument delivered to the Trustee, may modify or amend the terms of the trust, as such terms apply to one or more of the trusts created hereunder, in order to achieve tax advantages or to preserve tax benefits otherwise available with respect to the trust, to convert a beneficiary's interest to a supplemental needs interest that would allow the trust (with respect to that beneficiary) to qualify as a trust for a disabled beneficiary under applicable law or to qualify as a "qualified disability trust" under Internal Revenue Code section 642, or for any other reason that the Trust Protector believes to be necessary or desirable, and, if the instrument so provides, any such modification or amendment shall apply retroactively to the inception of the trust. The Trust Protector may convert a beneficiary's interest to a supplemental needs interest only if the Trust Protector believes that the conversion is necessary for the beneficiary to qualify for benefits from a federal, state, or local government or agency thereof ("public benefits") and that the conversion is in the best interests of the beneficiary. The document implementing a conversion to a supplemental needs interest may provide for the possibility that the beneficiary's interest may be converted back to its original form hereunder if such a reconversion would be in the best interests of the beneficiary. Notwithstanding the foregoing, the Trust Protector may not make a modification or amendment that would: (i) significantly change any beneficiary's beneficial interests under the trust, except if necessary and in a beneficiary's best interests to convert the beneficiary's interest to a supplemental needs interest to allow the beneficiary to qualify for public benefits; (ii) require any beneficiary to return to the trust amounts previously vested or distributed; (iii) modify the qualifications to act as Trust Protector; or (iv) change this sentence. For purposes of the preceding sentence, an amendment that changes the tax characteristics of the trust (including, but not limited to, an amendment that causes the trust to be or not to be a grantor trust or that grants or eliminates a general power of appointment) shall *not* be deemed a significant change in a beneficiary's beneficial interests. The term "supplemental needs interest" means the ability to receive distributions for the beneficiary's safety and welfare to the extent that such needs are not covered by public benefits that the beneficiary receives due to handicap, disability, or financial need. Distributions made to a beneficiary with a supplemental needs interest may only be made to the extent that they supplement (and not supplant) the beneficiary's public benefits.

4. At any time when more than one person is acting as Trust Protector, the Trust Protectors must act unanimously.

5. The Trust Protector, in that capacity, shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this instrument should be exercised. Further, the Trust Protector, in that capacity, shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector and shall be binding and conclusive on all persons. The Trust Protector is not required to exercise any power or discretion granted under this instrument. Absent proof of bad faith, the Trust Protector, in that capacity, is hereby exonerated from any and all liability for the acts or omissions of any fiduciary or any beneficiary hereunder or arising from any exercise or non-exercise by the Trust Protector of the powers and discretions conferred under this instrument.
6. The Trust Protector acting from time to time, if any, on their own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, or modify to a lesser extent any or all powers and discretions conferred on the Trust Protector under this instrument by a written instrument delivered to the trustee and the Trustee Appointer.

Decanting permission limiting notice requirements

An independent trustee shall have the power at any time and from time to time, in the sole and absolute discretion of the trustee, to distribute any portion or all of the principal of any trust held hereunder to the trustee of another trust under any other instrument, by whomever created, to the maximum extent permissible under applicable law. The trustee's exercise of the foregoing power need not comply with the requirements, or any equivalent statute under the laws of the state whose laws then govern the administration of this trust, including, but not limited to, that the trustee need not provide notice to any remainder beneficiary. Notwithstanding the foregoing, if a beneficiary of the trust is acting as a trustee hereunder, such beneficiary may participate in the exercise the power under this paragraph only to the extent that the beneficiary's beneficial interests in, and fiduciary and non-fiduciary powers over, the successor trust are no broader than the interests and powers of the beneficiary under this instrument.

Grantor trust power to substitute

At any time during my life, I may reacquire any part or all of the trust principal by substituting other property of an equivalent value upon written notice to the trustee, which power shall be exercisable for my personal benefit in a non-fiduciary capacity and without the approval or consent of any person in a fiduciary capacity, subject to the requirement that property of an equivalent value be substituted. I may irrevocably release the power at any time by written instrument delivered to the trustee. A guardian, conservator or personal representative may exercise my rights under this paragraph on my behalf during any period in which I am disabled.

Grantor trust power to borrow

Option 1: At any time during my life and upon my request, the independent trustee may from time to time lend to me principal or income of the trust without interest and without security. The trustee may irrevocably release this power by written instrument filed with the trust records and delivered to me and the current income beneficiaries. Any release made under this paragraph shall bind all successor trustees.

Option 2: At any time during my life, I may borrow principal or income of the trust without security, but this shall not relieve the trustee of any fiduciary obligation with respect to the other terms of the loan, including the obligation to confirm that a promissory note or other evidence of indebtedness given to the trust is of sufficient value. I may irrevocably release the power granted to me in this paragraph at any time by written instrument delivered to the trustee. A guardian, conservator, or personal representative

may exercise my rights under this paragraph on my behalf during any period in which I am disabled.

Grantor trust power to add charitable beneficiaries

During my lifetime, the independent trustee may add or delete any one or more charitable organizations as additional beneficiaries under paragraph of this Article, and the trustee may distribute such amounts of income and principal to them, in such proportions, as the trustee believes to be desirable.

Grantor trust reimbursement provisions

Option 1:[154] Income Tax Reimbursement or Payment. If the settlor is treated (under Subpart E, Part 1, Subchapter J, Chapter 1 of the Code) as the owner of all or part of any trust under this Agreement, the Trustees (other than a Trustee who is, with respect to the Settlor, a "related or subordinate party" within the meaning of Internal Revenue Code section 672(c)) may, in their absolute discretion, reimburse the Settlor for any amount of the Settlor's personal income tax liability that is attributable to the inclusion of such trust's income, capital gains, deductions, and credits in the calculation of the Settlor's taxable income. The trustees may pay the Settlor directly or may pay the reimbursement amount to an appropriate taxing authority on the Settlor's behalf, as they see fit. No policy of insurance on the Settlor's life, if any is held in a trust from which the Settlor is reimbursed, nor its cash value nor the proceeds of any loan secured by an interest in the policy, may be used to reimburse the Settlor or to pay an appropriate taxing authority on the Settlor's behalf.

Option 2: For each taxable year that the trust constitutes a so-called "grantor trust," the Trustees may reimburse the Grantor out of income or principal (apportioned among the trusts hereunder) for the Grantor's income tax (federal, state, local, or foreign) on the amount of the trust's income (if any) reportable on the Grantor's individual income tax return under Internal Revenue Code section 671.

Option 3: With respect to each taxable year of the trust (or portion of a taxable year), the trustee may distribute to me such amount of the net income and principal of the trust as the independent trustee, in the independent trustee's sole and unfettered discretion, determines is appropriate to provide for any income tax imposed upon me with respect to the taxable income of the trust for such taxable year; provided that the power to direct this distribution to me may only be exercised (by giving a binding written direction to the acting trustee) by an independent trustee, and at any time that no independent trustee is acting, by a Qualified Appointee who is an independent trustee, appointed by the Trustee Appointer as a special trustee, whose authority shall be limited to exercising this discretion.

Funding formulas[155]

Credit shelter trust (lower of federal and state estate tax exemptions) and QTIPable trust

If my spouse survives me, then upon my death the trustee shall set aside out of the trust estate, as a separate trust (herein referred to as the "Family Trust"), (a) all property in the trust estate, if any, as to which a federal estate tax marital deduction would not be allowed if it were given outright to my spouse, and (b) after giving effect to (a), the largest amount, if any, that would not result in or increase either (i) federal estate tax or (ii) state death taxes based upon the state death tax credit being payable by reason of my death. In determining the amount, if any, the trustee shall assume that none of this Family Trust qualifies for a federal estate tax deduction and that the Marital Trust hereinafter established (including any part thereof disclaimed by my spouse or on my spouse's behalf) qualifies for the federal estate tax marital deduction. I recognize that certain taxes and expenses may reduce the amount. For purposes of this instrument, my spouse shall be deemed to have survived me if the order of our deaths cannot be proved.

Credit shelter trust (greater of federal and state estate tax exemptions) and QTIPable trust

If my spouse survives me, then upon my death the trustee shall set aside out of the trust estate, as a separate trust (herein referred to as the "Family Trust"),

(a) all property in the trust estate, if any, as to which a federal estate tax marital deduction would not be allowed if it were given outright to my spouse, and (b) after giving effect to (a), the largest amount, if any, that would result in no federal estate tax (or the least possible federal estate tax) being payable by reason of my death. In determining the amount, if any, the trustee shall assume that none of this Family Trust qualifies for a federal estate tax deduction, and shall assume that the Marital Trust hereinafter established (including any part thereof disclaimed by my spouse or on my spouse's behalf) qualifies for the federal estate tax marital deduction. I recognize that certain taxes and expenses may reduce the amount. For purposes of this instrument, my spouse shall be deemed to have survived me if the order of our deaths cannot be proved.

Three-trust strategy

1. Creation of Marital Share and Family Trust. After the payment of estate expenses, federal death taxes and state death taxes pursuant to the previous provisions of Article V hereof, if the settlor's spouse survives the settlor, the Trustee shall divide the balance of the trust estate of the trust into fractional shares as follows:

a. Creation of Marital Share. If the settlor's spouse survives the settlor, the Trustee shall, as of the date of the settlor's death, set aside from the trust estate a fraction of the "Qualified Property," as hereinafter defined, as a separate share (undiminished by any federal death taxes and state death taxes to the extent possible) which shall be designated as the "Marital Share." The numerator of the fraction shall be that amount which when added to all marital deductions, if any, allowed for property or interests in property passing or which have passed to the settlor's spouse otherwise than by the terms of this Article, will equal the minimum marital deduction necessary so that the least possible federal death taxes and state death taxes will be payable by the settlor's estate. The minimum marital deduction shall be determined after taking into account all credits and deductions allowed to the settlor's estate for federal estate tax purposes (other than the marital deduction); provided, however, that the credit or deduction for state death taxes shall only be considered to the extent the use of such credit or deduction does not increase the combined federal death taxes and state death taxes payable by the settlor's estate. The denominator of the fraction shall be the federal estate tax value of all Qualified Property. The Marital Share shall be further divided between the "Federal QTIP Marital Trust" and the "State QTIP Marital Trust," as provided in Section 6.2 of this Article VI.

b. Creation of Family Trust. The balance of the trust estate of the trust which shall not be allocable, distributable, or payable pursuant to the foregoing provisions of this instrument shall be retained in trust by the Trustee as a separate trust, to be designated as the "Family Trust," and held, administered and distributed pursuant to the provisions of Article VII hereof.

2. Division of marital share into separate marital trusts

a. Creation of federal QTIP Marital Trust. Upon creation of the Marital Share, the Trustee shall set aside as a separate trust, designated as the "Federal QTIP Marital Trust," a fraction of the trust estate allocated to the Marital Share, to be held, administered, and distributed as hereinafter provided in this Article VI. The numerator of the fraction shall be that amount which when added to all marital deductions, if any, allowed for property or interests in property passing or which have passed to the settlor's spouse otherwise than by the terms of this Article, will equal the minimum marital deduction necessary so that the least possible federal estate tax will be payable by the settlor's estate. The minimum marital deduction shall be determined after taking into account all credits and deductions allowed to the settlor's estate for federal estate tax purposes (other than the marital deduction); provided, however, that the credit or deduction for state death taxes shall only be considered to the extent the use of such credit or deduction does not increase the combined federal death taxes and state death taxes payable by the settlor's estate. The denominator of the fraction

shall be the federal estate tax value of the Marital Share.

b. Creation of state QTIP marital trust. All of the Marital Share not otherwise allocated to the Federal QTIP Marital Trust shall be allocated to a separate trust, which trust shall be designated as the "State QTIP Marital Trust," to be held, administered, and distributed as hereinafter provided in this Article VI.

c. Marital Trusts. The Federal QTIP Marital Trust and the State QTIP Marital Trust are hereinafter sometimes referred to individually as a "Marital Trust" and collectively as the "Marital Trusts."

QTIPable trust approach

If my spouse survives me, then upon my death the trustee shall set aside out of the trust estate, as a separate trust (herein referred to as the "QTIP Trust"), all property in the trust estate. I recognize that certain taxes and expenses may reduce the amount. For purposes of this instrument, my spouse shall be deemed to have survived me if the order of our deaths cannot be proved.

Disclaimer approach

If my spouse survives me, then upon my death the trustee shall distribute, outright and free of trust, all property in the trust estate. Any part of such distribution disclaimed by my spouse or on my spouse's behalf shall be added to or used to fund the Family Trust provided for herein, to be held and administered as a part thereof.

Clayton election

After first satisfying all of my just debts and approved claims against my estate, the expenses of the administration of my estate, and the payment of any specific devises contained in this trust agreement or under my will, if I am survived by my spouse, Trustee shall distribute the remaining trust property to the QTIP marital deduction trust; provided, however, Trustee shall first distribute to the Family Trust any trust property that: (i) does not qualify for the federal estate tax marital deduction, or (ii) is excluded from inclusion in my gross estate for federal estate tax purposes, or (iii) is otherwise exempt from federal estate tax in the first instance. Only property that qualifies for the federal estate tax marital deduction shall be distributed to the QTIP Marital Deduction Trust. If an election is made to qualify a fractional or percentile portion (but not all) of the QTIP Marital Trust for the federal estate tax marital deduction under Code section 2056 (b)(7), I give to the QTIP Marital Deduction Trust only that fractional or percentage share of the QTIP Marital Deduction Trust as to which my fiduciary shall make the QTIP election under Code section 2056 (b)(7). That portion of the QTIP Marital Deduction Trust as to which my fiduciary shall not make the Code section 2056 (b)(7) QTIP marital deduction election shall be distributed to the Family Trust to be administered, distributed, and disposed of under the terms of that trust. If I am not survived by my spouse, Trustee shall instead distribute the remaining trust property to the Family Trust.

Disclaimer/Clayton alternative[156]

Family Trust. If the settlor's [spouse] survives the settlor, the trustee shall, following the death of the settlor, set apart out of the trust estate and hold the following-described property as the principal of a separate trust for the primary benefit of the settlor's [spouse] (which is referred to in this declaration as the Family Trust):

a. If the federal estate tax is applicable to the settlor's estate, and if the settlor's personal representative does not make the election as to any portion of the Residuary Trust Estate, such portion or all of the Residuary Trust Estate as to which the election is not made; and

b. If the settlor's [spouse] makes a qualified disclaimer (within the meaning of Internal Revenue Code section 2518) and/or a disclaimer under applicable state law (which disclaimer, in either case, is referred to in this Article as the 'Disclaimer') with respect to any portion or all of the Marital Trust, such portion or all of the Marital Trust as to which the Disclaimer is made.

Disclaimer by the settlor's [spouse]. If the settlor's [spouse] (or the settlor's [spouse]'s legal representative or agent acting under a duly executed power of attorney) makes a qualified disclaimer (within the meaning of Internal Revenue Code section 2518) and/or a disclaimer under applicable state law of all or a specific portion of the Marital Trust, the property comprising the portion (or all) of the Marital Trust as to which the settlor's [spouse] makes such disclaimer shall be added to and dealt with as part of the Family Trust under Article II or, if the Family Trust is not in existence, as the initial principal of the Family Trust under Article II; provided, however, that, in either case, the settlor's [spouse] shall have no power of appointment under Subdivision (B) of Article II, whether exercisable by written instrument executed during the settlor's [spouse]'s life or by the settlor's [spouse]'s last will, with respect to the property so disclaimed.

Digital assets

[My executor/the trustee] shall have the power to access, control, handle, conduct, continue, distribute, dispose of, or terminate my digital assets, digital accounts, and loyalty programs. The term "digital assets" means, but is not limited to, all digital files, including emails, documents, images, audio, video, and similar files stored on digital devices, including desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device that currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored. The term "digital accounts" means, but is not limited to, email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, and other online accounts. The term "loyalty programs" refers to all frequent flyer programs and similar award programs.

Definition of descendants

In determining who is a descendant of mine or of any other person:

1. Legal adoption before the person who is adopted has reached the age of 21 years, but not thereafter, shall be equivalent to blood relationship;
2. A person born out of lawful wedlock and those claiming through that person shall be considered to be descendants of (i) the natural mother and her ancestors, and (ii) if the natural father acknowledges paternity, the natural father and his ancestors, in each case unless a decree of adoption terminates such natural parent's parental rights;
3. A child born as a result of assisted reproductive technology shall be considered a child of the individual whose status as such child's parent determines whether such child becomes a beneficiary under this instrument. An individual shall be considered the natural parent of a child:
    a. If such child was conceived using: (i) such individual's ovum or sperm and the ovum or sperm of such individual's spouse; (ii) such individual's ovum or sperm and the ovum or sperm of a donor other than such individual's spouse [or partner]; or (iii) the ovum or sperm of a donor and the ovum or sperm of such individual's spouse [or partner, if such spouse or partner provided a signed, written acknowledgment that they are an intended parent of the child]; [or if the individual is an intended parent of such child under a written agreement with a gestational carrier, regardless of the enforceability of that agreement;]
    b. Regardless of whether such ovum was fertilized in utero;
    c. Regardless of whether the child was carried to term by such individual, such individual's spouse, or any other person; and
    d. Regardless of whether such child has been legally adopted by such individual if such

adoption is required under applicable law at the time of such child's birth to establish that such individual is such child's parent;

4. Any individual who may be considered a natural parent of a child solely because of having donated ovum or sperm or having acted as a surrogate mother and who would not otherwise be a beneficiary under this instrument, and any other individual who is related to such individual by consanguinity or affinity, shall not be a beneficiary under this instrument; and

5. A genetic child of a parent who was deceased or disabled at the time of such individual's placement in gestation shall be deemed to be a descendant of such parent only if:

   a. such individual was born within [one / two / three] year[s] after such parent's death;

   b. such parent gave signed, written permission to the surviving parent to use their genetic material to place such individual in gestation after such parent's death or disability; and

   c. such deceased parent would have had legal rights and obligations as a parent of such child upon their birth under local law.

6. The term "partner" means an individual's companion in a marriage, civil union, domestic partnership, or substantially similar legal relationship with the individual.

Expanded definition of spouse

The "spouse" of any individual means the person, if any, who is married to, in a civil union with, or is the registered domestic partner of that individual and not living separate and apart from that individual (other than for medical, business, or professional reasons), or who satisfied these requirements at that individual's death.

Mediation provision options

Option 1: If there is a dispute or controversy of any nature involving the administration or disposition of this trust, I direct the parties to the dispute to submit the matter to mediation or another method of alternative dispute resolution selected by them. The cost of the mediation shall be paid for by the trust. If a party refuses to submit the matter to mediation or other method of alternative dispute resolution, or if a party refuses to participate in good faith in such process, I authorize the court having jurisdiction over this trust to award reasonable costs and attorney's fees from that party's beneficial share or from other amounts payable to that party (including amounts payable to that party as compensation for services as personal representative or trustee).

Option 2: Upon my incapacity or death, if any dispute arises between or among one or more trustees, beneficiaries, trust protectors or any other fiduciary ("disputing parties") with respect to the administration of the trust or any trust created hereunder, prior to filing any actions in court, the disputing parties shall make a good faith effort to settle any such dispute through mediation administered by a certified mediator. The cost of mediation shall be paid for by the trust. The disputing parties shall make reasonable efforts to agree on the mediator to employ for the mediation. Said mediator shall have at least ten (10) years of experience in trust law of the state that governs the situs of the trust.

Option 3: It is the Settlor's hope and desire that any party who is considering the filing of any claim or lawsuit with respect to any trust created under this instrument should attempt mediation to resolve their dispute before any such filing.

Notes

1 See IRS, Statistics of Income Division, Estate Tax Returns Study, available at https://www.irs.gov/statistics/soi-tax-stats-estate-tax-filing-year-tables (in 2019, 2,570 taxable estate tax returns were filed, in 2020, 1,275 were filed); Center for Disease Control, Deaths and Mortality (Oct. 19, 2021) https://www.cdc.gov/nchs/fastats/deaths.htm (In 2019 there were 2,854,838 deaths). Faridah B. Ahmad, Center for Disease Control, Provisional Mortality Data — United States 2020, Center for Disease Control (April 9, 2021) https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e1.htm (In 2020 there were 3,358,814 deaths); see also Howard Gleckman, Only 1,700 Estates Would Owe Estate Tax

in 2018 Under the TCJA, Tax Policy Center (Dec. 6, 2017) available at https://www.taxpolicycenter.org/taxvox/only-1700-estates-would-owe-estate-tax-2018-under-tcja.

2 The above list of nontax considerations is drawn from The Tools & Techniques of Estate Planning for Modern Families (Leimberg Library, 3d ed. 2019) (hereinafter Leimberg, Kamin & Goffe), chapter 1.

3 See Eric Klinenberg, Going Solo: The Extraordinary Rise and Surprising Appeal of Living Alone (Penguin, 2012).

4 Census Bureau, Profile America Facts for Features: Unmarried and Single Americans (Week: Sept. 18-24, 2016), available at https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2016/CB16-FF.18.pdf (Aug. 26, 2016).

5 Gretchen Livingston, It's no longer a "Leave It to Beaver" world for American families–but it wasn't back then, either, Pew Research Center (Dec. 30, 2015), http://www.pewresearChapterorg/fact-tank/2015/12/30/its-no-longer-aleave-it-to-beaver-world-for-american-families-but-it-wasnt-back-then-either/.

6 Wendy Wang & Kim Parker, Record Share of Americans Have Never Married, as Values, Economics and Gender Patterns Change, Pew Research Center (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-shareof-americans-have-never-married/.

7 Emily Green, Working Mother, Single Mothers by Choice a Booming Trend (Nov. 29, 2017), https://www.workingmother.com/single-mothers-by-choice-booming-trend.

8 Matthew Stewart, The Birth of a New American Aristocracy, The Atlantic (print ed. June 2018), https://www.theatlantic.com/magazine/archive/2018/06/the-birth-of-a-new-american-aristocracy/559130/.

9 See Sveen v. Melin, 138 S. Ct. 1815 (2018) (upholding the retroactive applicability of a Minnesota revocation-upon-divorce statute to non-probate assets such as life insurance).

10 See DOL, Employee Benefits Security Administration, Retirement Plans and ERISA FAQs, available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/retirement-plans-anderisa-compliance.pdf.

11 See generally Leimberg, Kamin & Goffe, supra note 2, chapter 8.

12 Jonnelle Marte, Why you're more likely to have a prenup than your parents were, Wash. Post (Aug. 4, 2017), available at https://www.washingtonpost.com/business/economy/why-youre-more-likely-to-have-a-prenup-than-your-parentswere/2017/08/04/51361598-77d8-11e7-9eac-d56bd5568db8_story.html?noredirect=on&utm_term=.664ce9574732.

13 UPC § 2-804.

14 See Leimberg, Kamin & Goffe, supra note 2, chapter 2.

15 See id., chapter 3.

16 See Illinois Religious Freedom Protection and Civil Union Act, 750 Ill. Comp. Stat. 75/1; see also Richard A. Wilson, A Guide to the New Illinois Civil Union Law, 99 Ill. B.J. 232 (2011).

17 Illinois Religious Freedom Protection and Civil Union Act § 20.

18 See IRS, Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions, available at https://www.irs.gov/newsroom/answers-to-frequently-asked-questions-for-registered-domestic-partners-andindividuals-in-civil-unions

19 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

20 See generally, Leimberg, Kamin & Goffe, supra note 2, chapter 6 (with special thanks to Professor Patricia Cain for her contributions to the chapter).

21 Census Bureau, QuickFacts, available at https://www.census.gov/quickfacts/fact/table/US/EDU685216.

22 See Leimberg, Kamin & Goffe, supra note 2, chapter 5 (with special thanks to Leigh-Alexandra Basha and Nicole K. Mann for their contributions to the chapter).

23 Id. (citing Treas. Reg. § 301.7701 and I.R.C. § 672(f)(2)).

24 Census Bureau, Table 1. Household Characteristics of Opposite-Sex and Same-Sex Couple Households: 2017, Am. Cmty. Survey, available at https://www.census.gov/data/tables/time-series/demo/same-sex-couples/ssc-house-characteristics.html. This included approximately 6.82 million opposite-sex and 880,000 same-sex couples.

25 Leimberg, Kamin & Goffe, supra note 2, chapter 7.

26 Morning Glory Zell-Ravenheart, A Bouquet of Lovers, Green Egg Magazine, available at http://www.paganicon.org/wpcontent/uploads/2014/03/A-Boquet-of-Lovers.pdf (where the term "polyamory" was first used).

27 See, e.g., Big Love, HBO 2006-2011; Sister Wives, TLC 2010-present.

28 Susan Dominus, Is an Open Marriage a Happier Marriage?, N.Y. Times Magazine (May 11, 2017), available at https://www.nytimes.com/2017/05/11/magazine/is-an-open-marriage-a-happier-marriage.html

29 Áine Cain, Inside billionaire Warren Buffett's unconventional marriage, which included an open arrangement and 3-way Christmas cards, Business Insider (Nov. 16, 2018), available at http://www.businessinsider.com/warren-buffett-marriagewife-2017-10.

30 Kim Masters, When Jerry Weintraub Threatened to Break My Kneecap, The Hollywood Reporter (July 15, 2015), available at https://www.hollywoodreporter.com/news/jerry-weintraub-threatened-break-my-808559.

31 Roxanne Roberts, Billionaire David Rubenstein and his wife, Alice Rogoff, divorce, Wash. Post (Dec. 8, 2017), available at https://www.washingtonpost.com/lifestyle/style/billionaire-david-rubenstein-and-his-wife-alice-rogoffdivorce/2017/12/08/ba41a5f4-dc49-11e7-b859-fb0995360725_story.html.

32 See Leimberg, Kamin & Goffe, supra note 2, chapter 4 (with special thanks to Lauren Wolven and Carrie Harrington for their contributions to the chapter).

33 Centers for Disease Control and Prevention (CDC), Disability Impacts All of Us, available at https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.

34 Coleen A. Boyle et al., Trends in the Prevalence of Developmental Disabilities in US Children, 1997-2008, Pediatrics (June 2011), available at https://pediatrics.aappublications.org/content/127/6/1034; CDC, Autism Spectrum Disorder, Data & Statistics, Prevalence, https://www.cdc.gov/ncbddd/autism/data.html (last reviewed Apr. 5, 2019); CDC, Occurrence of Down syndrome in the United States, available at https://www.cdc.gov/ncbddd/birthdefects/downsyndrome/data.html (last reviewed June 17, 2019).

35 The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act) of 2014, 26 U.S.C. § 529A (2014), as amended.

36 Leimberg, Kamin & Goffe, supra note 2, chapter 13 (with special thanks to Larry Rivkin and Denise Kaplan for their contributions to the chapter).

37 42 U.S.C. §1396p(d)(4)(A).

38 Leimberg, Kamin & Goffe, supra note 2, chapter 13.

39 Id.

40 Id.

41 IRS News Release IR-2018-239 (Dec. 4, 2018).

42 Lindsey Tanner, More US teens identify as transgender, survey finds, USA Today (Feb. 5, 2018), https://www.usatoday.com/story/news/nation/2018/02/05/more-u-s-teens-identify-transgender-surveyfinds/306357002/.

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60 See, e.g., id. (highlighting California's popularity for surrogacy, where surrogates may be paid, the state permits the intended parents to be listed as the child's parents on the birth certificate, and the legal rights can be established in advance of the child's birth).

61 18 U.S.C. § 2707 (allowing third parties to bring civil actions for violations of the Stored Communications Act (SCA) and including provisions for punitive damages in the case of willful or intentional conduct). The SCA was enacted as part of the Electronic Communications Privacy Act of 1986. The SCA, in part, restricts service providers who provide "electronic communications services" and "remote computing services" to the public from releasing information relating to communications maintained in electronic storage. 18 U.S.C. §§ 2701-2713.

62 See, e.g., Hecht v. Super. Ct. of L. A. Cnty., 20 Cal. Rptr. 2d 275, 282 (Ct. App. 1993) (California Court of Appeals overturned the trial court's order to destroy the cryogenically preserved sperm of the decedent who had bequeathed the sperm to his girlfriend in his will, stating an unambiguous intent that the stored sperm be used by the girlfriend to have a child after his death. The court held that the sperm fell within the broad definition of "property" in California's Probate Code, citing the American Fertility Society's ethical statement that "gametes and concepti are the property of the donors … [who] therefore have the right to decide at their sole discretion the disposition of these items" (citation omitted)).

63 See, e.g., In re Estate of Kievernagel, 83 Cal. Rptr 3d 311 (Ct. App. 2008) (court rejected widow's argument that she had an interest in decedent's sperm because decedent's consent forms signed at the center communicated an unambiguous intent to destroy the material on death).

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773, 775 (2017) (states include Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Iowa, Louisiana, Maine, Maryland, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Texas, Utah, Washington, and Wyoming).

67 Id. The four states rejecting inheritance rights include Florida, Minnesota, Ohio, and Virginia. For example, Florida provides that a "child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." Fla. Stat. Ann. § 742.17(4). Illinois formerly took this approach but modified its statute as of January 1, 2018. IL Probate Code §2-3.

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69 Unif. Parentage Act § 204(a)(1)(B) (2017). The Uniform Parentage Act has been adopted in California, Vermont, and Washington and has been introduced in Connecticut and Pennsylvania. Section 204(a)(1)(B) provides: "An individual is presumed to be a parent of a child if … the individual and the woman who gave birth to the child were married to each other and the child is born not later than 300 days after the marriage is terminated by death, [divorce, dissolution, annulment, or declaration of invalidity, or after a decree of separation or separate maintenance], whether the marriage is or could be declared invalid[.]" (First brackets in original.)

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132 See Rollins v. Branch Banking & Tr. Co. of Va., 56 Va. Cir. 147 (2001) (Where the trust instrument gave the power to make investment decisions to the beneficiaries of the trust and stated the trustee could not be responsible for losses resulting from the retention of an investment. The court ruled in favor of the corporate trustee and cited the trust instrument and the state's directed trust statute in ruling that "[t]he beneficiaries, alone, had the power to make investment decisions" and that "the court cannot hold a trustee, or anyone else, liable for decisions that it did not and could not have made." However, the court refused to excuse the trustee from all fiduciary duties in the case and stated that the trustee cannot rid itself of its "duty to warn." In refusing to grant the trustee demurrer in the case, the court stated that a trustee has a duty to keep beneficiaries informed about the conditions of the trust and as to any subject matter or facts that a beneficiary may need to know to protect his or her interests. Rollins was settled out of court after the court refused to grant demurrer but prior to final determination of the merits of the case.).

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139 Please note that the amount of estate tax incurred will be dependent on a number of factors (e.g., elections made by the executor and administrative expenses incurred by the estate).

140 The Delaware tax trap is another way that a beneficiary may possess a general power of appointment. Under I.R.C. § 2041(a)(3), a beneficiary is deemed to possess a general power of appointment when the beneficiary exercises a non-general power of appointment to create another power of appointment—which under the applicable local law could be validly exercised so as to postpone the vesting of any estate or interest in such property for a period ascertainable without regard to the date of the creation of the first power. This provision has generally been interpreted to mean that a beneficiary who holds a special power of appointment will be subject to estate tax on the assets if they exercise the special power of appointment to create a new trust—the terms of which grant the beneficiary thereof a general power of appointment.

141 Schwartz v. Wellin, No. 2:13-cv-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014) (where trust protector filed suit against trustees, suit was dismissed since the trust protector lacked standing as he was neither a trustee nor a beneficiary).

142 Robert T. McLean Irrevocable Tr. v. Ponder, 418 S.W.3d 482 (Mo. Ct. App. 2013) (court refused to hold the trust protector liable for failing to monitor the trustees or direct their activities; court deferred to the trust instrument, which granted the trust protector the ability to remove and appoint trustees; trust protector was granted no other powers; court held that the trust protector's powers were limited by the trust instrument and no other powers were implied by law or the trust instrument).

143 See id.

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151 Typically, the non-elected portion will be allocated to a credit shelter trust that will provide for discretionary distributions of income and principal to the surviving spouse and/or the grantor's descendants.

152 Unless indicated otherwise, these samples are from the author's prior law firm, Schiff Hardin LLP, as updated through 2014, and with some additional modifications by the author. Permissions were granted for use in connection with the original materials on which this article is based.

153 Sample language based on language provided by Much Shelist, P.C. See Kim Kamin et al., Ill. Inst. of Continuing Legal Educ. 58th Annual Est. Plan. Short Course, Modern Trust Drafting (2015).

154 Sample language from Proskauer Rose LLP.

155 The following sample funding formula language is from Much Shelist, P.C.

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