“Nuts and Bolts Introduction 2025”

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The Client Interview

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Identify the Client

- Husband and/or wife.
- Elderly parent, not a child.
- Adult child, not a parent.

Planning for the initial meeting

- Real estate tax bill.
- Recorded Deeds.
- Obituary of a family member.
- Company website.
- “Google” the client’s name.
- Clerk of Courts.
- Ohio Resident Database


LAST WILL AND TESTAMENT
RON MORGAN
CARTOONSTOCK .com
Search ID: rmo0043
"And to my teenage grandchildren, I leave my unused phone minutes."

Client brings to the initial meeting (if readily available) the following current documents:

- Last Will and Testament
- Power of Attorney
- Trust Instrument
- Health Care Power of Attorney and Living Will
- Financial statement
- Prenuptial Agreement
- Buy-Sell Agreement

The initial meeting – interviewing the client

- In person (location), Zoom, conference call.
- Create the family tree.
- General understanding of assets, legal title.
- General understanding of liabilities.
- What are the client's concerns – what is most important to the client?


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"I'm making out my will. Is there anything you want me to leave to you, other than debt?"

Document preparation – decision points for the client

- You and I die tomorrow – who gets what (tangible personal property, real property, specific bequests or trust distributions, residue)?
- When do they get it – outright or over time? What if the beneficiary predeceases you?
- Asset protection provisions.
- Identify the contingent beneficiaries.
- Who is in charge? Identify the fiduciaries:
- Executor, Guardian, Agent, Trustee and successors.

Practice tip:

- Client is undecided – Follow up email or letter, summarize terms of recommended documents, define what needs to be decided.
- Client is undecided – Draft a document, highlight what needs to be decided.

Practice tip:

- Highlight the fiduciary designations and dispositive terms in draft documents.
- Send within two-three weeks once the terms of the documents are defined.


LAST WILL & TESTA-MENT
' I 'MARVO THE MAGICIAN', BEING OF RIGHT MIND...
... HAVE TAKEN IT WITH ME.'
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Most clients execute estate planning documents so that the distribution of their wealth is as efficient as possible; many clients execute estate planning documents to protect their beneficiaries.

Will, Power of Attorney, Health Care Documents (Living Will, Health Care Power of Attorney)

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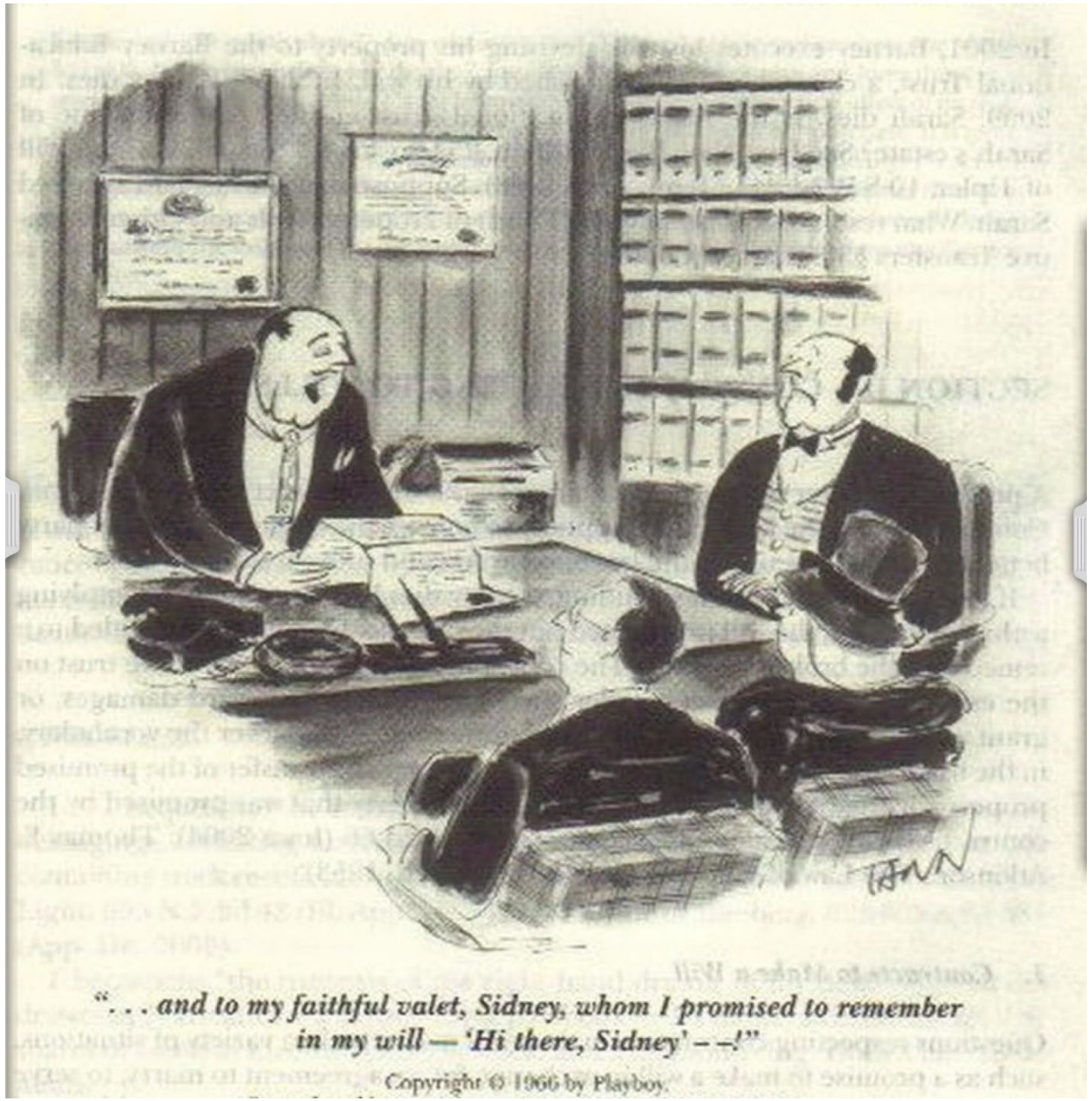
Law School definition:

A Will is a legal declaration of a person's testamentary intent



". . . and to my faithful valet, Sidney, whom I promised to remember in my will — 'Hi there, Sidney' – –!"

Document	Execution
Testator	Safekeeping

Document

The oldest Will known to exist was painted on the walls of an Egyptian tomb in 26 A.D.

All Wills are to be in writing.
They may be handwritten (a holographic Will) or typewritten.

An oral Will is valid if:

- Made in the last sickness; Reduced to writing and signed by two competent witnesses withing ten (10) days after the testamentary words are spoken;

- Admitted to probate three (3) months after the testator's death.
  [ORC §2107.60]

Testator intended to disinherit his daughter. Because the dispositive provision appeared after the testator's signature, the Will was invalid.
In re: Estate of Metz, 2006-Ohio-4809


Will
CARTOONSTOCK
.com
Search ID: jlnn150
"To my favorite waiter
I leave the usual 20 percent."

The witnesses to a Will must be eighteen (18) years of age or older.

Practice Tip:
Witness should be disinterested, and not related to the testator.

[ORC §2107.15] – Interested Witness.

"It shouldn't take long to wind up your Aunt's estate. She only left you an alarm clock."

Even though a Will is not witnessed, it may be admitted to probate.

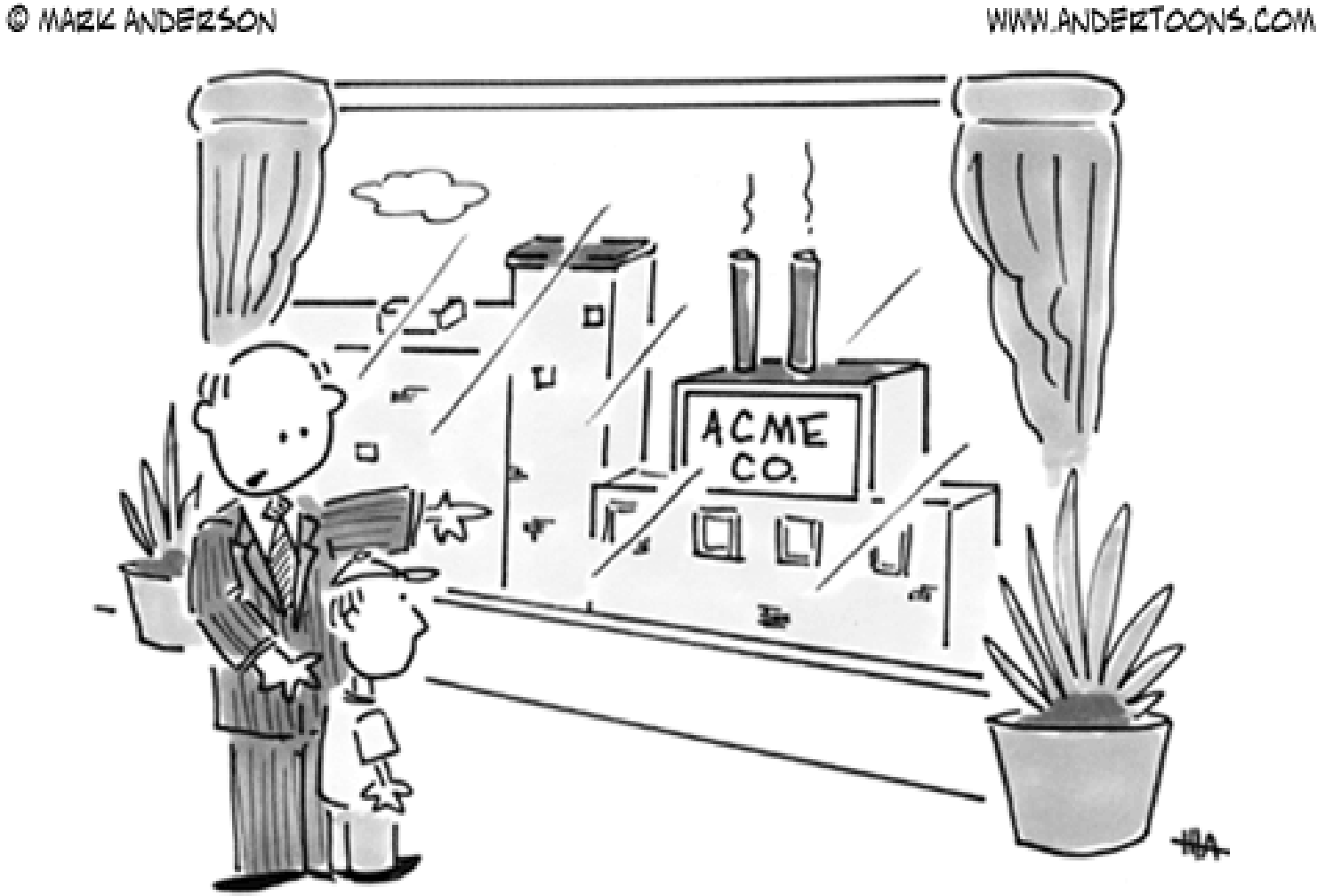
- Harmless error statute [ORC §2107.24]

- In Re Estate of Jordan [2008-Ohio-4385]

No Contest Clauses

- A “no contest” clause in a Will or a Trust causes the revocation of any bequest or gift to the contestant of the document.
- Ohio law recognizes validity of a no contest clause as an unquestionable right of the testator.
- Testator should consider the economics of the situation to ensure gift to beneficiary most likely to challenge the Will is sufficient enough to deter the beneficiary.

"I intentionally do not make any provision in this Will for my son, John, or for his issue, because I have amply provided for him and his children during my lifetime."



"Take a good look, son, someday this will all be your brother Jeff's."

Document

- In Writing
- Signed at the end.
- Two adult witnesses.
- No contest clause.
- Nominates an Executor
- Nominates a guardian
- for minor children.

Execution

Testator

Safekeeping

Execution

A Will must be signed at the end by the testator or “by some other person in the testator’s conscious presence and at the testator’s express direction.”

[ORC §2107.60]

A Will must be attested and subscribed by the witnesses in the conscious presence of the testator.

“Conscious presence” means within the range of the testator’s senses excluding the sense of sight or sound that is sensed by telephonic, electronic or other distant communication.

[ORC §2107.30]

Elderly testator signs her Will in an upstairs bedroom. Witnesses saw the testator sign her Will via a baby monitor. The witnesses signed the Will in the kitchen.

The Will was invalid because the testator did not see the witnesses sign her Will.

Witacre v. Crowe 2012-Ohio-2981

Document

Execution

- May be executed by a third party.
- Signed in the “conscious presence”.
- Electronic Wills are not valid, to date.

Testator

Safekeeping

Testator

A Will may be made by a person who is eighteen (18) years of age, of sound mind, and not under restraint.

[ORC §2017.02]

Although there is a presumption that a person declared insane by the Court and is under guardianship is incompetent to make a Will,

sufficient evidence may be put forward to rebut the presumption.

Meek v. Cowman 2008-Ohio-1123

Evidence that the decedent had dementia or Alzheimer's disease on the day the Will was executed, standing alone, is insufficient.

Smith v. Gold-Kaplan 2014-Ohio-1424

Four-Pronged Test for Testamentary Capacity

A testator must understand how these elements are related so that he/she can express the method of disposition of property:

1. The nature and extent of his or her property.
2. The natural objects of his or her bounty.
3. The disposition that he or she wishes to make of his or her estate.
4. The act of making a Will.

Rank of capacities: Testamentary Capacity, Donative Capacity, Contractual Capacity, Capacity to transact real estate, Capacity to create a Power of Attorney, Decisional Capacity, Capacity to create a revocable trust.

Practice tip:

If you, as the drafting attorney, question the testator's capacity to execute a Will, you may petition the Probate Court to declare the Will to be valid.
[ORC §2107.081]

Recall: A Will may be made by any person who is eighteen (18) years of age, of sound mind, and not under restraint.

[ORC §2107.02]

"I, Jackson Kluck, being of unsound mind, spent it all on therapy."

Undue influence

- A person must not be under any restraint; or
- “undue influence.”
- Elements of undue influence:
- The testator was susceptible;
- Another had the opportunity to exert undue influence;
- The improper influence was indeed exerted;
- The result shows the effect of such influence.
- West v. Henry, 173 Ohio St. 498

Circumstantial evidence often establishes "undue influence"

1. A relationship between the attorney preparing the Will and the influencer.
2. Knowledge of the contents of the Will by the influencer.
3. Influencer instructing preparation of the Will, making first contact with the attorney, meeting alone with the attorney drafting the Will.
4. Influencer pays the drafting attorney.
5. Old age, physical and mental weakness of the testator.
6. An opportunity and motive for the exercise of undue influence.

Important to know:

There is a presumption of undue influence if:

- Fiduciary relationship with the testator;
- Fiduciary is named a beneficiary in the Will;
- Fiduciary is not related by blood or marriage to the testator;
- Fiduciary participated in the preparation of the Will.

Kirschbaum v. Dillon 58 Ohio St. 3d 58

Document	Execution
Testator • Age 18 or older. • Testamentary Capacity. • Undue Influence.	**Safekeeping**

Safekeeping

The original Will can not be found, but a copy exists.

- A copy of the Will may be admitted to probate;
- the proponent of the lost, spoilated or destroyed Will must establish by clear and convincing evidence that the Will was properly executed.

[ORC §2107.26]

A Will has been admitted to probate and a subsequent Will is discovered.

Subsequent Will may be admitted by the proponent if the Court is satisfied the Will was properly executed.

Witnesses may need to testify.

[ORC §2107.22]


"AND TO MY NO GOOD NEPHEW MILO, WHO THOUGHT HE WAS GOING TO GET ALL MY CASH - LOTS OF LUCK!"
CARTOONSTOCK .com
Search ID: epa2316

Document	Execution
Testator	Safekeeping • Document location. • Original Will lost, copy found. • Subsequent Will discovered.


PROBATE
COURT
CARTOONSTOCK
Search ID: rman2572
"I can't believe she left everything
to that stupid *parakeet!*"

Will Contest

- Improper execution
- Lack of capacity
- Undue influence

- A Will Contest action must be brought within three (3) months of the filing of the "Certificate of Service of Notice of Probate of Will."

" Your uncle left everything to Charity . . so far we haven't been able to locate her. "

Live Execution of a Last Will and Testament

“Will Wall”

- Technique that uses costs associated with a Will challenge as a primary deterrent.

- Client signs the same Will on the tenth (10^{th}) day of each month for four consecutive months.

- Challenging party must independently support and prove lack of capacity, undue influence or improper execution for each and every Will.

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Document

- In writing.
- Signed at the end.
- Two adult witnesses.
- No contest clause.
- Nominates an Executor
- Nominates a Guardian
  For minor children.

Execution

- May be executed by a third party
- Signed in the “conscious presence”.
- Electronic Wills are not valie, to date.

Testator

- Age 18 or older.
- Testamentary Capacity.
- Undue Influence.

Safekeeping

- Document location.
- Original Will lost copy found.
- Subsequent Will discovered.

Uniform Power of Attorney Act

- Became law March 27, 2012.
- Power of Attorney means a writing or other record that grants authority to an agent to act in place of a principal, whether or not the term power of attorney is used.

  [ORC §1337.092]

A Power of Attorney is presumed to be durable (survives the incapacity of the principal) unless the Power of Attorney expressly provides it terminates by the incapacity of the principal.

Practice tip:

Signature of principal should be notarized and witnessed by two adult witnesses.

Principal may grant to an Agent “express powers”

- To create a revocable trust.
- To create an irrevocable trust.
- Make a gift to the agent, in any amount.
- Change survivorship designations.
- Exercise fiduciary powers.

Practice tip

A Power of Attorney for Express Powers should be in a separate document.

Each express power needs to be authorized (principal initials).

An Agent may revoke or amend a principal's revocable trust provided the trust agreement expressly authorizes the agent to exercise the power of revocation or amendment.

A principal may nominate a guardian for the principal's person or estate and may also nominate a guardian for the principal's minor child.

Mandatory duties of an Agent

- Must act in good faith.
- Must act only within the scope of the authority granted.
- Must act in accordance with the principal's reasonable expectations.
- Must attempt to preserve the principal's estate plan to the extent actually known by the agent.

A subsequent divorce or legal separation revokes a Power of Attorney signed by the husband or the wife naming the spouse as Agent.

Unless the Power of Attorney states otherwise, co-agents may act independently.

[ORC §1337.31]

An Agent is required to keep a record of all receipts, disbursements and transactions made on behalf of the principal.

An Agent who violates his or her duties is liable for:

- The amount required to restore the value of the principal's property to what it would have been had the violation not occurred.
- Attorney fees paid on the agent's behalf

Ohio Health Care Power of Attorney
Ohio Living Will

Power of Attorney for Health Care of a Minor Child

- Parent appoints a babysitter (or au pair) as the health care agent to make health care decisions for the minor child if the parent is unavailable.

Summary:

- A Will must be carefully written and flawlessly executed.
- Know well the capacity of the testator.
- Contesting a Will is very difficult, but not impossible. based on - execution, capacity, undue influence.
- Your goal as the drafting attorney-a Will you prepared and witnessed is never successfully contested.
- An Agent under a Power of Attorney must keep records and may have personal liability.

4860 1576 5952

The Client Interview

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I. INTRODUCTION

A. The initial interview with the client is a critical part of the entire estate planning process. The type of plan and the necessary documents best suited to a particular client will depend on the nature and extent of the client's wealth and the client's personal objectives. It is essential that the attorney obtain the necessary information about the client's assets and liabilities, as well as the client's family needs and objectives. If the attorney should fail to obtain sufficient facts concerning the property and people affected by the estate plan, or if he or she should improperly evaluate the information obtained, the client's will or trust may not be effective or, in the worst case, can even result in a claim of malpractice. Consequently, it is necessary for the practitioner to develop a system for efficiently gathering the information needed to put together a workable estate plan which meets the client's personal and family objectives with the least amount of emotional and financial cost.

B. The initial meeting with the client is crucial as it sets the tone for the continuing attorney-client relationship. It also gives us an opportunity to make a good impression of ourselves and our profession.

1. Know why you are there.

2. Know how client came to you or your firm.

3. Sometimes client views purpose of initial meeting differently than attorney; who is interviewing whom?

C. Knowing what questions to ask is crucial to drawing out the necessary information to draft effective estate planning documents.

D. Making client feel at ease enhances the effectiveness of the interview.

1. Consider location, length of time.

E. Often clients call in advance to ask what documents and information they can bring to initial interview.

F. Be proactive; if client's business has a website, check it out!

G. Check for conflict prior to obtaining any information or scheduling a client meeting.

II. THE PROCESS OF GATHERING INFORMATION

A. How much information is necessary?

1. Generally.

The attorney of today must require full and complete disclosure concerning the client's family and financial status if he or she is to draft a will or a trust that will properly carry out the client's objectives. In almost all cases, the necessary information can be obtained in a diplomatic and professional manner without giving the client the impression that the attorney is trying to "pry" into the client's affairs. The proper atmosphere for full disclosure of information can be established at the beginning of the relationship by explaining to the client the aims, limitations and methods of estate planning and the planner's need for complete information.

2. Small estates.

The attorney working on the plan for a client with a relatively small estate should focus on the personal and family needs of the client. The typical interview should involve a discussion of the composition of the family and the client's testamentary wishes in general terms; a brief analysis of assets, liabilities and life insurance; selection of a guardian for minor children; and selection of an executor. It is also proper to discuss insurance and retirement plan beneficiary designations and disability planning (including power of attorneys, health care power of attorneys and living wills).

3. Larger estates.

Clients of more substantial means will require a more in-depth interview. For example, they may own closely held businesses, investment real estate, have large inheritance expectancies or powers of appointment. Many hold very valuable stock options, are entitled to substantial deferred compensation upon retirement or have substantial benefits under qualified retirement plans. Others have entered into antenuptial agreements, are parties to alimony or separation agreements, have complicated employment contracts or have entered into buy-sell agreements. Some are supporting their parents. Some have family members with special needs. Many have charitable interests that may need to be addressed. Obviously, more

information is necessary in such cases in order to properly identify and evaluate the people factors and the property factors involved in the estate plan. The attorney must learn a great deal about the client in a relatively short period of time. The more efficient the attorney is in obtaining all the relevant information, the more likely he or she is to develop a complete and workable plan for the client.

B. Special situations.

1. Parents of special needs children or clients who are financially responsible for their parents.

2. The client who underestimates the size of the estate. This is typical of a young executive or professional couple whose income is growing and who have substantial work-related benefits such as group term life insurance and retirement plans. Owners of closely held businesses who need to confront issues relating to liquidity, special S Corporation trust rules, and business succession planning will often underestimate the value of their businesses.

III. METHODS OF OBTAINING INFORMATION

A. Sources of information.

1. The client.

Obviously, the client is and should be the most important source of information. The client will be able to accurately provide a list of family members and their special circumstances and needs. The client should also be able to provide the attorney with information about his or her financial situation, albeit the client may underestimate the nature and extent of property and be uninformed about the way assets are titled.

2. The client's other advisors.

The client's accountant, financial planner, private banker, insurance agent or investment advisor can be a source of valuable information regarding the client's assets, liabilities and business affairs. Frequently, it is one of these advisors who encourage the client to consult an attorney for estate planning purposes. In addition to supplying basic data regarding the client's assets and liabilities, sometimes the accountant or banker can be the source of helpful suggestions for developing an orderly and sensible estate plan. The degree to which these specialists can assist the attorney depends upon the extent to which they are competent in their respective fields.

Under proper circumstances, each of these specialists can make a valuable contribution to the overall estate plan. The development and drafting of a total estate plan, however, is the responsibility of the attorney. A well-rounded, integrated estate plan extends beyond any specialized technique or any single objective. Consequently, although the skills of the other professionals may be very helpful to the attorney, development of the complete plan is the attorney's ultimate responsibility.

3. Contracts and other documents.

Various legal documents and other items should be carefully reviewed by the attorney and will serve as a valuable source of information about the client's financial and personal situation. These items include the following:

a. The client's existing will, any trust established by the client and any power of attorney (either financial or medical);

b. Wills or trusts under which the client is a beneficiary;

c. Deeds, land contracts, mortgages and leases;

d. Buy-sell, cross purchases or other stock purchases or redemption plans (including any information with respect to funding and values), partnership agreements, operating agreements for limited liability companies and other information relating to business interests;

e. Retirement plan documents such as summary plan description and annual participant statements of account;

f. Employment contracts or deferred compensation agreements;

g. Antenuptial agreements, divorce decrees, separation or alimony agreements;

h. Insurance contracts (including annuities, life insurance, group contracts, disability insurance or long-term care policies);

i. Bank passbooks, certificates of deposit, brokerage statements and financial statements (personal and business);

j. Safe deposit box location and list of contents; and

k. Tax returns (last three years income tax returns and any gift tax returns filed).

B. Use of a questionnaire. (See also *www.stark-knoll.com*)

1. A printed form of questionnaire to review at the client meeting (or, if you prefer, to be sent to the client in advance and reviewed at the meeting) is preferable. The main benefit of such a form is that important items are less likely to be overlooked.

a. A suggested form for such a questionnaire is included as Appendix A. The information requested should not be so complex that completing the form will be a burden to the client (or to the attorney, if the form is filled out at the initial client interview). It should be emphasized to the client that the information included in the questionnaire will be kept confidential and will not be given to any other person without the client's permission.

b. If the questionnaire is sent to the client before the meeting, the purpose of the initial meeting will be to review the information and to seek clarification of any items.

The attorney's use of a preprinted form takes away from the perception that the attorney is prying into the client's affairs. A preprinted form makes it appear that the attorney is merely following a procedure used for all clients. The attorney should point out to the client that the use of such a preprinted form is an aid to ensure that important matters are not overlooked, which will increase the client confidence. The questionnaire should not become a burden to complete.

IV. SPECIFIC PROPERTY INTERESTS

A. Generally.

Knowledge regarding the nature of property owned by a client is critical to developing an estate plan. Accordingly, the attorney should review information about the location, title, extent and type of interest, and be able to explain to the client the advantages and disadvantages of certain types of property and ownership. The following are some questions the attorney will need to ask about specific types of property interests.

B. Real estate.

1. How is title to the property held?

   a. Tenants in common?

   b. Joint and survivor?

   c. Sole ownership?

   d. Partnership?

   e. Corporate?

   f. Limited liability company?

   g. Trust?

2. Is the property a condominium or cooperative?

3. Is there a liquidity problem for the estate because a large proportion of the estate consists of investment real estate?

4. Is there enough real property as a percentage of the estate to qualify for special use valuation?

5. Is there real property located outside the State of Ohio?

   a. Possible problems with respect to domicile?

   b. Ancillary administration required?

   c. Tax problems?

C. Tangible personal property.

1. Assets of this nature are usually left to the surviving spouse. Such a gift will qualify for the Federal and Ohio estate tax marital deductions.

2. If the spouse fails to survive, the assets are usually left equally to the children.

   a. If the children are minors, consider giving the executor the ability to give such assets to a custodian or guardian for safekeeping until the children are older.

   b. Consider whether or not to give the executor the authority to pay the expenses of shipment, storage and delivery. If not included in the will, such expenses cannot be paid by the executor.

c. Consider whether to give the testator the ability to leave a previously prepared separate memorandum to be incorporated by reference disposing of a portion or all of the tangible personal property.

D. Cash and marketable securities.

1. Is the account or security held in the individual's sole name?

2. Is the account or security held in joint names?

3. Is the account or security held in a fiduciary capacity?

4. General considerations.

a. Make sure name on account/security is correctly spelled.

b. If the assets are held as fiduciaries, make sure that this is clearly indicated to avoid any confusion.

c. With respect to jointly-owned assets, if the joint tenant is not the client's spouse, determine if the client or the joint tenant is the source of the funds used to buy the asset or to establish the account.

E. Joint and survivorship property.

1. Advantages.

a. Transfer proceedings are simplified and often are less expensive that those encountered in probate.

b. Joint bank accounts are accessible by the surviving joint tenant with little delay.

c. Can avoid guardianships.

2. Disadvantages.

a. Loss of testamentary control may result in diminished use of A/B trust plan.

b. Some action will be required to clear title and resolve any tax questions at first death.

c. Upon creation of a joint tenancy, it is possible that a completed taxable gift may have occurred. To the extent that the creation of the joint tenancy is a completed gift in excess of the donor's annual exclusion, a gift tax return needs to be filed. It is possible that with a substantial gift

some or all of the donor's unified credit exemption will have been used.

3. Specific types of joint and survivorship property.

a. Joint bank accounts.

Typically, a family checking account and perhaps a joint savings account are useful, providing immediately accessible cash for temporary support and family needs.

b. United States savings bonds.

Either person having possession of the bonds may cash the bonds. Survivorship is governed by federal law. *See* 31 C.F.R. §§ 315.60-63.

c. Payable on death (POD) and transfer on death (TOD).

Bank accounts or bonds may be registered in the name of another person to receive the funds at the depositor's death. Such accounts and bonds are similar to survivorship accounts, except that the second person has no lifetime access and must submit proof of death of the depositor before collecting on the bond or withdrawing the assets in the account.

d. Corporate securities.

Corporate securities may be held in joint and survivorship form.

e. Real estate.

Joint and survivorship deeds between spouses are permissible under Ohio Rev. Code § 5302.17. If the client insists that real property is held "jointly" and the date of purchase of the property is before 1976, the attorney should examine the deed to determine if the property is held as tenants in common.

F. Life insurance.

1. The following information about each policy of life insurance is needed:

a. The type of policy (ordinary life, variable life, universal life, term life or group term life).

b. The owner of the policy.

c. The insured.

d. The face value of the policy.

e. The cash surrender value of the policy, if any.

f. Any indebtedness against the policy.

g. The beneficiary of the policy and any contingent beneficiaries.

h. The settlement option elected, if any, otherwise those options which are available.

i. The annual premium.

2. The client's insurance agent can often supply this information in advance to the client in the form of a computer printout.

3. Taxation issues.

a. Income tax.

Under Internal Revenue Code § 101(a)(1), life insurance proceeds received by reason of the insured's death are not included in the recipient's gross income. If a corporation receives the proceeds of insurance on the life of an officer, employee or owner of the company, there is a possibility that the proceeds will be subject to the alternative minimum tax.

b. Federal estate tax.

The proceeds of a life insurance policy on the life of the decedent will be included in his gross estate for purposes of the federal estate tax if (1) the proceeds are payable to the decedent's estate; or (2) the decedent possessed any "incidents or ownership" over the policy.

c. Ohio estate tax.

Life insurance proceeds are included in the decedent's gross estate for Ohio estate tax purposes only if payable to the decedent's estate. It is important, therefore, that a person, testamentary trust or living trust always be named as the beneficiary of the insurance policies on the life of the client.

G. Employee benefits.

It is important for the attorney to determine what funds will be available to the client and his family in the event of disability, retirement and death. The client's disability policy, annuity contracts, pension plans, profit-sharing plans, individual retirement accounts and social security rights should all be examined.

H. Closely held business interests.

1. Information required.

a. The attorney should try to obtain financial statements for the company. To the extent that it is possible, the latest balance sheet (showing assets, liabilities and net worth) and at least three years profit and loss statements should be requested and reviewed.

b. The attorney should determine the type of entity involved. Planning needs will differ for a corporation interest as opposed to a partnership interest. It is also necessary to determine whether the company is an "S Corporation," a regular corporation or a limited liability company, and whether the client's partnership interest is general or limited.

2. Ownership information and control options.

a. It is important to determine the capital structure of the company.

b. The attorney should carefully review any agreements, restrictions, options and refusal rights that affect transfer of ownership at death. This is especially important in light special valuation rules.

c. The attorney should determine whether or not the arrangements involved are funded by life insurance and, if so, whether the insurance amount is still appropriate and whether the ownership/beneficiary designation is correct.

V. LIABILITIES AND LIQUIDITY NEEDS

A. General cash requirement.

Liquidity may be a major problem and should be recognized and considered as part of the estate plan. One of the responsibilities of the attorney is to determine in advance of death approximately how much money will be needed, how soon after death it will be needed, and how the money is to be raised. A review of the current debts of the client and a determination of the estimated expenses of administration, along with an approximation of the tax costs involved, is an essential part of the estate planning process.

B. Specific cash requirements.

1. Death taxes.

a. Federal estate tax.

b. Ohio estate tax.

c. Other state death taxes.

2. Debts.

The precise amount of the client's debts will likely be different at his death. However, the attorney should estimate at the initial client meeting an approximate amount of debt to use for illustrative purposes.

3. Administration expenses.

a. Unless waived by a family member serving as Executor, the attorney must include an estimate of the Executor's commission when projecting the liquidity needs of the estate.

b. It is appropriate to explain to the client how the attorney's fees for representing the client's estate are determined and paid. In fact, many clients will ask for such an explanation at the initial meeting.

c. Court costs and related appraisal fees, although usually nominal, should be discussed with clients.

4. Family living expenses.

The client's spouse and children may need cash for immediate living expenses until tax releases are issued or other assets become available.

C. Sources of funds.

1. Life insurance.

The proceeds of life insurance policies are usually payable to a named beneficiary. If the settlement options chosen by the insured provides for periodic or annuity payments, the cash will not be readily available for the payment of taxes and costs. The proceeds payable in lump sum to a beneficiary may be advanced by the beneficiary for the payment of taxes and costs, or the beneficiary may be able to purchase assets from the estate.

2. Bank accounts.

Some bank deposits will be available for the family immediately. If held jointly, some of the funds may be obtained without any formalities. The balance of the funds will require a tax release. If the accounts are probate assets, a tax release will be required before the funds will be available to the Executor for the payment of expenses.

3. Marketable securities.

Any actively traded security may be converted to cash relatively easily.

4. Close corporation stock.

In some instances, a portion or all of the client's closely held stock will be redeemed/purchased at the client's death based on the business succession plan which should be in place.

VI. SELECTION OF THE EXECUTOR AND/OR TRUSTEE

A. The small estate.

The economics of a small estate usually dictate that an individual member of the family be designated the executor or trustee. Care should be exercised in selecting an individual who will be able to do the job. An alternate executor or trustee should always be named in the event the first person designated should fail to survive or otherwise qualify.

B. The large estate.

Because of the complexities frequently encountered in large estates, it is often desirable to designate a corporate trust company as the executor or trustee. Since the administration of the estate is usually accomplished under close supervision of an attorney, an individual can, in most cases, function adequately as an executor. The trust, however, is usually not so easily administered. The investment, accounting and tax return responsibilities connected with proper trust administration, especially in large trusts, are frequently beyond the capabilities of any

individual member of the client's family. Accordingly, in most cases, it is desirable to designate a corporate trustee. In addition, the continuity of existence of a corporate trust company is more suitable to the time span of most trusts.

Appendix

CONFIDENTIAL
ESTATE PLANNING INFORMATION FORM

Date: _____

IN THE DEVELOPMENT OF YOUR ESTATE PLAN AND THE PREPARATION OF THE APPROPRIATE DOCUMENTS, STARK & KNOLL CO., L.P.A. WILL RELY ON THE INFORMATION PROVIDED BY YOU WITHOUT INDEPENDETLY VERIFYING THE INFORMATION YOU LIST HEREIN. IT IS THUS IMPORTANT THAT THIS INFORMATION BE AS ACCURATE AND COMPLETE AS POSSIBLE.

YOUR SIGNATURE ON THE LINE SET FORTH BELOW EVIDENCES YOUR UNDERSTANDING OF THE ABOVE AND YOUR ACKNOWLEDGMENT THAT THE INFORMATION PROVIDED BY YOU IS ACCURATE AND COMPLETE.

Date: _____ _____
Sign Here

_____
Spouse Sign Here

The information provided in this form is confidential and will not be released or disclosed by Stark & Knoll to anyone without the express written permission of the client.

YOU AND YOUR SPOUSE

Please state each name exactly as you want it to appear in your estate planning documents (For example: William Palmer Jones, William P. Jones, W. Palmer Jones, W. P. Jones, etc.).

NAME (Husband): First Middle Last

NAME (Wife): First Middle Last

HOME ADDRESS:

City: State: Zip: Country:

TELEPHONE (H): Home: Cellular: Fax:

TELEPHONE (W): Home: Work: Cellular: Fax:

EMAIL ADRESS: (Husband) (Wife)

Would you like to receive periodic e-mail updates on estate planning issues from Stark & Knoll? If yes, please check box. ☐

(Check all applicable boxes)

MARITAL STATUS: (H) Married ☐ Divorced ☐ Remarried ☐ Widowed ☐ Single ☐

(W) Married ☐ Divorced ☐ Remarried ☐ Widowed ☐ Single ☐

If married, do you have a pre-nuptial agreement? Yes ☐ No ☐

SOCIAL SECURITY NO:	(H) ____-____-____	(W) ____-____-____
DRIVER'S LICENSE NO:	(H) ____	(W) ____
PLACE AND DATE OF BIRTH:	(H) Place Day/ Month / Year	(W) Place Day/ Month / Year
U.S. Citizen (yes or no):	(H) Yes or No	(W) Yes or No
NUMBER OF CHILDREN: Names, address and ages will be listed on next page.	(H) This Marriage Previous Marriage	(W) This Marriage Previous Marriage
NUMBER OF GRANDCHILDREN: Names, address and ages will be listed on next page.	(H) This Marriage Previous Marriage	(W) This Marriage Previous Marriage
MILITARY SERVICE:	(H) Provide branch, dates and highest rank	
	(W) Provide branch, dates and highest rank	

CHILDREN AND THEIR FAMILIES

For proper estate planning, it is necessary for counsel to know the names of your family members (heirs at law) and their relationship to you. (If the space provided is not sufficient, please attach a list and so indicate.)

CHILD ONE		**CHILD TWO**	
Name:		Name:	
Address:		Address:	
City:	State: Zip:	City:	State: Zip:
Home Phone:		Home Phone:	
Cell Phone:		Cell Phone:	
Birth date: Day:/Month:/Year:	Adopted: ☐ yes ☐ no	Birth date: Day:/Month:/Year:	Adopted: ☐ yes ☐ no
Natural Child of: Husband ☐ Wife ☐ Both ☐		Natural Child of: Husband ☐ Wife ☐ Both ☐	
S.S.N. - -	Married ☐ yes ☐ no	S.S.N. - -	Married ☐ yes ☐ no
Spouse: Name:	Birth date: / /	Spouse: Name:	Birth date: / /
Their children:		**Their children:**	
Name:	Birth date: / /	Name:	Birth date: / /
Name:	Birth date: / /	Name:	Birth date: / /
Name:	Birth date: / /	Name:	Birth date: / /

CHILD THREE		**CHILD FOUR**	
Name:		Name:	
Address:		Address:	
City:	State: Zip:	City:	State: Zip:
Home Phone:		Home Phone:	
Cell Phone:		Cell Phone:	
Birth date: Day:/Month:/Year:	Adopted: ☐ yes ☐ no	Birth date: Day:/Month:/Year:	Adopted: ☐ yes ☐ no
Natural Child of: Husband ☐ Wife ☐ Both ☐		Natural Child of: Husband ☐ Wife ☐ Both ☐	
S.S.N. - -	Married ☐ yes ☐ no	S.S.N. - -	Married ☐ yes ☐ no
Spouse: Name:	Birth date: / /	Spouse: Name:	Birth date: / /
Their children:		**Their children:**	
Name:	Birth date: / /	Name:	Birth date: / /
Name:	Birth date:	Name:	Birth date:

	/ /		/ /
Name:	Birth date: / /	Name:	Birth date: / /

Are any of the previously listed children and/or grandchildren deceased? If yes, please list their names below.

_____

Does any child or grandchild have special needs (for example, long term medical problems, financial irresponsibility, marital issues, incompetency, etc.)? If so, please explain.

_____

(H): NAME PARENTS, BROTHERS, SISTERS (IF LIVING):

Name:	Name:
Address:	Address:
City, State, Zip	City, State, Zip
Birth date: Day/Month/Year	Birth date: Day/Month/Year
Name:	Name:
Address:	Address:
City, State, Zip	City, State, Zip
Birth date: Day/Month/Year	Birth date: Day/Month/Year

(W): NAME PARENTS, BROTHERS, SISTERS (IF LIVING):

Name:	Name:
Address:	Address:
City, State, Zip	City, State, Zip
Birth date: Day/Month/Year	Birth date: Day/Month/Year
Name:	Name:
Address:	Address:
City, State, Zip	City, State, Zip
Birth date: Day/Month/Year	Birth date: Day/Month/Year

GUARDIANS

If you have minor children or an adult with a disabling condition, it may be necessary to designate in your will a guardian(s) for your children. Please list a first and second choice, in addition to the other information requested.

FIRST CHOICE	SECOND CHOICE
Name:	Name:
Address:	Address:
City, State, Zip	City, State, Zip
Telephone: - -	Telephone: - -
Relationship:	Relationship:
Employment:	Employment:

(H) Who would you want to be *your* guardian if necessary?

Name:	Relationship:
Birth date: / /	Home/Cell Phone: ( ) -
Address:	City: State: Zip:
Alternate:	Relationship:
Birth date: / /	Home/Cell Phone: ( ) -
Address:	City: State: Zip:

Do you desire a living will? Yes or No: Do you desire to be an organ donor? Yes or No:

(W) Who would you want to be *your* guardian if necessary?

Name:	Relationship:
Birth date: / /	Home/Cell Phone: ( ) -
Address:	City: State: Zip:
Alternate:	Relationship:
Birth date: / /	Home/Cell Phone: ( ) -
Address:	City: State: Zip:

Do you desire a living will? Yes or No: Do you desire to be an organ donor? Yes or No:

SPECIAL INTERESTS

Please describe any particular goals, needs and/or interests you would like addressed in your estate plan.

Describe Here:

CHARITABLE BEQUESTS

If you would like to make charitable gifts, please list the name and address of the charity(ies). (Your attorney will discuss with you the specific details regarding the amount(s), percentage and tax implications of any charitable gifts.) If you have no interest in making a charitable gift, leave this section blank.

Describe Here:

Husband	Wife
Employer/Company:	Employer/Company:
Address:	Address:
Position:	Position:
Nature of Business:	Nature of Business:
$	$
Ownership: Indicate public or private, if private your ownership interest	Ownership: Indicate public or private, if private your ownership interest

BUSINESS INFORMATION

PERSONAL FINANCIAL INFORMATION

Please list name of company, and individual representative/contact, address and phone number

BANKS:

Company:	Representitive or Contact:
Address:	Phone: ( ) -
Company:	Representitive or Contact:
Address:	Phone: ( ) -
Company:	Representitive or Contact:

Address:	Phone: ( ) -
Company:	Representitive or Contact:
Address:	Phone: ( ) -

ACCOUNTANTS:

LIFE INSURANCE REPRESENTATIVE:

asdf	Representitive or Contact:
Address:	Phone: ( ) -

STOCK BROKER AND FIRM:

Company:	Representitive or Contact:
Address:	Phone: ( ) -

FINANCIAL SUMMARY

Please estimate the value of the following assets:

Bank Accounts
(Checking, savings, and money market accounts, CD's, etc.):

	Owner and Balance			
Account #	*Husband*	*Wife*	*Joint*	*Trust*
Subtotals	$0	$0	$0	$0

Receivables (Notes and mortgages held, land contracts, etc.)

	Owner and Value			
Type	Husband	Wife	Joint	Trust
Subtotals				

Life Insurance (ordinary and term/group insurance)

HUSBAND	WIFE
Company/Type	Company/Type
Owner	Owner
Beneficiary (alternate)	Beneficiary (alternate)
Company/Type	Company/Type
Owner	Owner
Beneficiary (alternate)	Beneficiary (alternate)

Retirement Plans (IRAs, ESOPs, pension plans, profit sharing plans, etc.)

Husband:

Type:	Provider:	Beneficiary:	Amount Vested:	Approx Value:
Type:	Provider:	Beneficiary:	Amount Vested:	Approx Value:
Type:	Provider:	Beneficiary:	Amount Vested:	Approx Value:

Wife:

Type:	Provider:	Beneficiary:	Amount Vested:	Approx Value:
Type:	Provider:	Beneficiary:	Amount Vested:	Approx Value:
Type:	Provider:	Beneficiary:	Amount Vested:	Approx Value:

Totals $_____ $_____

Stocks, Bonds and Brokerage Accounts

	Owner and Value				
Description	**Purchase Price**	**Husband**	**Wife**	**Joint**	**Trust**
Subtotals					

Closely Held Business Interests

Please describe here in detail:

Real Estate

Owner and Fair Market Value

Address and Description	Purchase Price	Husband	Wife	Joint	Trust
Subtotals					

Especially Valuable Items of Personal Property (Jewelry, automobiles, boats, airplanes, etc)

Owner and Fair Market Value

Description	Purchase Price	Husband	Wife	Joint	Trust
Subtotals					

Minor Accounts Held

Minor's Name:	Minor's Name:	Minor's Name:
Account Held:	Account Held:	Account Held:
Custodian's Name:	Custodian's Name:	Custodian's Name:

MISCELLANEOUS ASSETS

Anticipated Inheritance

If you, your spouse, or any members of your family are likely to receive an inheritance in the foreseeable future, please describe below.

Beneficiary:	Source:	Estimated Amount:
Beneficiary:	Source:	Estimated Amount:
Beneficiary:	Source:	Estimated Amount:

Trust Interests
Please describe any trusts from which you, your spouse, or any member of your family has a right to receive distributions, whether or not you are currently receiving such distributions or are anticipating them in the future.

Beneficiary:	Trustee:	
Name of Trust:		Date Created: / /
Short Description:		
Beneficiary:	Trustee:	
Name of Trust:		Date Created: / /
Short Description:		

Gifts
Do you or your spouse make regular gifts of ($10,000+)? If so, please describe below.

Please describe here:

LIABILITIES

Mortgages

Debtor and Mortgage Balance

Address	Purchase Price	Husband	Wife	Joint

Other Debts or Liabilities (car loans, outstanding lines of credit, etc.)

Debtor and Loan Balance

Address	Husband	Wife	Joint

POWERS OF APPOINTMENT

Do you have any powers of appointment? If yes,

Please explain:

ADDITIONAL INFORMATION REQUIRED

It is essential that your attorney be given the personal and financial information outlined below. This information is necessary to draft your estate plan. It will also centralize pertinent family facts and information, making it readily available in case of emergency. All information will be held in strict confidence.

Please provide the information listed below by producing copies of documents where requested or listing information on separate sheets and attaching them to this form. If requested information is not applicable to you, please indicate. Documents furnished will be reviewed and/or copied and returned.

It is vital that your attorney have complete financial information regarding your assets and liabilities. It is also important to know how each asset is titled and, if applicable, the designated beneficiaries of the asset.

PERSONAL

1. Current Wills and Codicils
2. Trust Agreements
3. Financial Power(s) of Attorney
4. Health Care Power(s) of Attorney
5. Living Will(s)
6. Pre-nuptial, Ante-nuptial or other property agreement with spouse
7. Other (please note any other information you deem pertinent for counsel to know)

FINANCIAL

1. Income Tax Returns for previous three years
2. Gift Tax Returns since 1975
3. Financial statements for privately owned businesses (include those owned alone or with a group) Copies of Buy/Sell or Redemption agreements, if any
4. Attach copies of all deeds for listed real property (This is necessary to insure that title is held correctly)
5. Current bank statements for all accounts / CDs.
6. Current account statements for all securities, life insurance and tax deferred accounts.
7. Copies of any bonds / stocks held individually

PRIVACY NOTICE

Attorneys, like other professionals who advise on personal financial matters, are now required by law to inform their clients of their policies regarding privacy of client information. Attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by law. Therefore, we always have protected your right to privacy.

Types of Nonpublic Personal Information We Collect

We may collect nonpublic personal information about you that is provided to us by you or obtained by us with your authorization.

Parties to Whom We Disclose Information

For both current and former clients, we do not disclose any nonpublic personal information obtained in the course of our practice except with your express consent or implied authorization, or as required or permitted by law. Permitted disclosures include, for instance, providing information to our employees who are assisting us in the representation, under a court order, or in order to comply with our professional responsibilities. In all such situations, we stress the confidential nature of information being shared.

Protecting the Confidentiality and Security of Current and Former Clients' Information

We retain records relating to professional services that we provide so that we are better able to assist you with your professional needs and, in some cases, to comply with professional guidelines. In order to guard your nonpublic personal information, we maintain physical, electronic and procedural safeguards that comply with our professional standards.

****

Please call your Stark & Knoll attorney (330-376-3300) if you have any questions, because your privacy, our professional responsibility, and the ability to provide you with quality legal services are very important to us.

Will – Power of Attorney – Ohio Healthcare Power of Attorney – Ohio Living Will

4888-4335-8012

1. What is the law school definition of a Will?

    a. "A Will is a legal declaration of a person's testamentary intent."

2. A Will is a unique document because it is inherently flawed.

    a. The testator is presumed not to be of sound mind, not to understand what the person is doing unless the requirements of execution are met.

3. When a person enters into a contract, the parties are presumed to understand the terms of the contract.

4. However, the purpose of a Will is to deliver the testator's intent. A Will is not interpreted or contested until after the testator has died.

Document

Execution

Testator

Safekeeping

Document

1. The oldest Will known to exist was painted on the walls of an Egyptian tomb in 26 A.D.

2. The formalities of the execution of a Will may be traced back to ancient Greece.

    a. It was considered a privilege to transfer property to another instead of to the state at death.

3. The Statute of Frauds in 1677 was enacted to protect people against fraud.

    a. As part of the Act, Wills were required to be in writing and signed by the testator in the presence of a credible witness.

4. Under Ohio law, all Wills are to be in writing.

    a. A Will may be handwritten (holographic) or typewritten.

    b. Example of a holographic Will:

    "To my son, I leave the pleasure of earning a living. For thirty-three years he though the pleasure was mine, but he was sadly mistaken."

5. If a Will must be in writing, is an oral Will valid?

    a. Ohio recognizes an oral Will if:

        i. Made in the last sickness of the testator.
        ii. Reduced to writing within ten (10) days after the spoken words.
        iii. Admitted to probate within three (3) months of the testator's death.

b. ORC 2107.60

6. Where must a Will be signed?

a. A Will must be signed at the end.

b. Example of a Will not signed at the end.

c. Courts have ruled a dispositive provision which appeared after the testator's signature caused the entire Will to be invalid.

d. *In re Metz*, 2006 Ohio 4809 – Testator wrote after his signature that he disinherited his daughter. The entire Will was invalid.

7. How many witnessed are required to witness a Will in Ohio?

a. Two witnesses (ORC 2107.03)

b. Must be 18 years of age or older.

8. What if the witness is related to the testator, or what if the witness is a beneficiary under the Will?

a. The Will is still valid.

b. However, the related witness may only receive an intestate share (as if the decedent died without a Will).

c. A devise or bequest to an "interested" witness is void.

9. What if a Will was not witnessed, but was signed at the end. Could this be a valid Will?

a. Yes – known as the Harmless Error Statute. ORC 2107.24.

b. Case of first impression – *In Re Estate of Jordan*, 2008 Ohio 4385.

c. Facts of the case – Testator dictated his Will to a church secretary. Secretary typed the Will. Testator signed. Secretary affixed her notary seal but did not sign. Testator's friend was present but did not sign.

Will disinherited testator's son, left estate to his granddaughter. Will was valid.

d. To comply with the Harmless Error Statute:

i. The testator caused the Will to be prepared.
ii. Testator signed the Will – intended the document to be his Will.
iii. Two or more witnesses saw the testator sign the Will.
iv. The Will was established by clear and convincing evidence at a hearing in the Probate Court.

10. What is a "no contest" clause in a Will and does Ohio law recognize a "no contest" clause?

a. A "no contest" clause in a Will or in a Trust causes the revocation of any bequest or gift to the contestant of the document.

b. Ohio law recognizes no contest clauses as an unquestionable right of the testator. Also known as an "In terrorem" clause.

c. Practice Tips: Leave enough money to a contestant so the Will is not contested because of economics, or;

d. Simply state in the Will the person is disinherited.

11. A Will should appoint an Executor and Successors.

a. May appoint an individual or a bank.

12. A Will should appoint a Guardian for minor children.

a. Often a very difficult decision for parents.

Document

1. In writing
2. Signed at the end.
3. Two witnesses.
4. No contest clause.
5. Nominate an Executor.
6. Nominate a Guardian for minor children.

Execution

Testator

Safekeeping

Execution

1. Is the testator the only person who may sign his or her Will?

   a. No.

   b. A Will may be signed by some other person in the testator's conscious presence and at the testator's express direction.

   c. ORC 2107.03

   d. Have you ever signed a Will for the testator?

2. Ohio law requires a Will must be attested and subscribed in the conscious presence of the testator. What does "conscious presence" mean?

   a. Not only must the witnesses see the testator sign the Will; the testator must see the witnesses sign the Will.

   b. *Whitacre v. Crowe*, 2012 Ohio 2981 – The witnesses must sign the Will in the conscious presence of the testator.

3. Is an electronic Will valid in Ohio? May a testator sign the Will electronically in the electronic presence of two or more individuals in different locations communicating in real time?

   a. Answer to date is "no!"

   b. Conscious presence excludes the sense of sight or sound that is sensed by telephonic, electronic or other distant communications.

   c. ORC 2107.03

   d. Legislation is pending in the Ohio House of Representatives (HB 337) and in the Ohio Senate (SB 230) that would allow for the electronic execution of Wills.

e. Proponents argue a person may do anything but execute a Will in front of their computer without leaving their seat.

Document

1. In writing
2. Signed at the end.
3. Two witnesses.
4. No contest clause.
5. Nominate an Executor.
6. Nominate a Guardian for minor children.

Execution

1. Third party signs.
2. Conscious presence.
3. Electronic Will not valid.

Testator

Safekeeping

Testator

1. Must be 18 years or age or older.

2. I recall reading Wills years ago often stated the testator is of "sound mind and memory and not under restraint."

3. This is required by Ohio law - ORC 2107.02

4. May a testator declared to be incompetent and under a guardianship execute a valid Will?

   a. Presumption that a person declared incompetent under a guardianship may not execute a Will.

   b. Presumption may be rebutted by sufficient evidence. *Meek v. Cowman*, 2008 Ohio 1123.

   c. An Alzheimer's patient may execute a Will – if evidence presented when the testator signed the Will – had the necessary testamentary capacity.

   d. Evidence that the declarant had dementia or Alzheimer's disease on the day that the Will was executed standing alone is insufficient – *Smith v. Gold-Kaplan,* 2014 Ohio 1424).

5. A testator must have "testamentary capacity" to sign a Will – What does this mean?

a. Goes back to a 1917 Ohio case *Niemes v. Niemes.*

b. Four elements of testamentary capacity

i. Understand the nature and extent of his or her property.
ii. Know the natural objects of his or her bounty.
iii. The disposition he or she wishes to make of his or her estate.
iv. The act of making a Will.

6. The capacity to execute a Will is higher than the capacity to sign a contract, make a gift, buy or sell real estate, sign a power of attorney, or make a decision.

7. What can be done to resolve the question of whether or not a testator has the capacity to sign a Will or a Trust?

a. A testator may petition the Probate Court to declare the Will to be valid (ORC 5817.02). Also a settlor may petition the Probate Court to declare the Trust to be valid (ORC 5817.03).

b. Petition names as the defendants in the validity of a Will – the testator's spouse, children, heirs, beneficiaries under the Will and beneficiaries under the testator's most recent Will.

c. Petition names as defendants in the validity of a Trust – the settlor's spouse, children, heirs, trustee or trustees under the Trust, beneficiaries under the Trust and any prior beneficiaries if the Trust amends or restates a prior Trust.

d. The testator or settlor has the burden of proof.

e. Court may declare the Will or Trust to be valid.

8. After a Will is signed – what happens is the testator becomes legally separated or divorced?

a. Provisions for divorced spouse are revoked by law. Divorced or separated spouse may not serve as an Executor unless expressly stated.

9. What if after the Will is signed the testator has a child or another child?

a. An afterborn child will receive an interstate share.

b. ORC 2107.34.

10. May a testator disinherit the testator's spouse?

a. Absent a prenuptial agreement, may not disinherit a spouse – who has statutory rights to elect against the Will.

11. May a testator disinherit a child.

a. Yes. A child has no statutory rights similar to a spouse.

12. The testator must not be under restraint or "undue influence."

a. Very difficult to prove, the standard of proof is clear and convincing evidence.

b. What are the elements of undue influence?

i. Testator was susceptible (elderly, ill, dependent on third-party influencer).
ii. Another had the opportunity to exert undue influence.
iii. The improper influence was indeed exerted (most difficult to prove).
iv. The result shows the effect of such influence.
v. *West v. Henry,* 173 Ohio 498.

13. Circumstantial Evidence often establishes undue influence, if by clear and convincing evidence.

a. Influencer – Hires and pays the attorney who prepared the Will.

b. Influencer meets with the attorney, dictates the terms of the Will.

c. Testator is elderly, physically and mentally weak.

d. There is opportunity and motive for the undue influence.

14. Presumption of undue influence if the influencer is a fiduciary.

a. Agent under a Durable Power of Attorney.

b. Influencer named as a beneficiary, not related to the testator by blood or marriage.

c. Participated in the preparation of the Will.

d. *Kirschbaum v. Dillon*, 58 Ohio St. 3d. 58.

Document

1. In writing
2. Signed at the end.
3. Two witnesses.
4. No contest clause.
5. Nominate an Executor.
6. Nominate a Guardian for minor children.

Execution

1. Third party signs.
2. Conscious presence.
3. Electronic Will not valid.

Testator

1. Age 18 or older.
2. Testamentary capacity.
3. Undue influence.

Safekeeping

Safekeeping

1. Where is the best place to safeguard the original Will?

    a. Home safe.

    b. Attorney's office.

    c. Bank safe deposit box.

2. May the Will be filed with the Probate Court?

    a. Yes.

    b. Statutory fee.

3. What if the original Will is not found? May the copy of the Will be admitted to Probate?

    a. Yes.

    b. ORC 2107.26

    c. The proponent of the lost, spoliated or destroyed Will may have the Will admitted to probate if established by clear and convincing evidence that the Will was properly executed.

    d. Probate Form ES-15.

    e. Any experience with this action?

4. What if after a Will was admitted to probate, a subsequent Will is discovered?

    a. ORC 2107.22

    b. A subsequent Will may be admitted by the proponent if the Court is satisfied that the Will was properly executed.

    c. Witnesses may need to testify.

Document

1. In writing
2. Signed at the end.
3. Two witnesses.
4. No contest clause.
5. Nominate an Executor.
6. Nominate a Guardian for minor children.

Execution

1. Third party signs.
2. Conscious presence.
3. Electronic Will not valid.

Testator

1. Age 18 or older.
2. Testamentary capacity.
3. Undue influence.

Safekeeping

1. Document location.
2. Original Will lost, copy found.
3. Subsequent Will.

Will Contest Action

1. What are the most common causes of action to contest a Will?

    a. Improper execution.
    b. Lack of testamentary capacity.
    c. Undue influence.

2. Where is a Will contest action filed?

    a. Probate Court has jurisdiction.

3. Who are the required parties to a Will contest action?

    a. Executor, heirs of law, Ohio Attorney General (if charity named in the Will).

4. Is there a right to a jury trial?

    a. Yes - by both plaintiff and defendant.

5. When must a Will contest action be filed?

    a. Within three (3) months of the filing of the "Certificate of Service of Notice of Probate of Will."

    b. This certification must be filed.

Live Execution of Last Will and Testament

1. Have you seen this document before?

2. Who are your heirs?

3. What do you own? Explain probate vs. non-probate property.
4. What is the disposition of your property in your Will?

5. Do you acknowledge this document as your Will? Do you intend to revoke your previous Will?

6. Why it is important for the drafting attorney to witness the Will?

7. Discuss "Will Wall" – sign four wills, each the same, once a month for four months. Action must be filed to contest each Will.

Review the Will

1. Every 3-5 years.

2. Or if a circumstance occurs:

   a. Beneficiary named in the Will has died and there is no language in the Will as to what happens.

   c. Anti-lapse statute (ORC 2107.52 (A) and (B) - if beneficiary not related, lapses, if beneficiary is related - to beneficiary's issue.

   d. Property bequeathed in the Will is sold -

   e. Ademption Statute: ORC 2107.50. There is a taking away of the specific devise or bequest.

3. Additional children are born.

4. Divorce or separation.

5. Desire to disinherit a beneficiary.

6. Change in testator's intent.

7. Prepare a Codicil or new Will?

Power of Attorney

1. Why is it important for a client to have a Durable General Power of Attorney?

a. Name a responsible person (Agent) to act legally on behalf of the principal, in the principal's best interest, immediately.

b. "Durable" means if the principal is incapacitated, the powers of the agent continue.

c. A Power of Attorney ends at death.

d. It is advisable to name a successor agent(s).

e. Avoids a guardianship of the estate!

2. What is the Ohio Uniform Power of Attorney Act?

a. Became law in Ohio on March 27, 2012.

b. The term "power of attorney" does not need to be in the document.

c. A power of attorney in Ohio is presumed to be durable unless expressly states otherwise. ORC 1337.24.

3. What is a Springing Power of Attorney?

a. Becomes effective only upon the incapacity of the principal.

b. Who determines incapacity? - Generally, physician or psychologist.

4. Does an Ohio Power of Attorney need to be notarized or witnessed?

a. No - however, the principal's signature is presumed to be genuine if acknowledged before a Notary Public.

b. Practice Tip: Have the power of attorney witnessed by two disinterred adult witnesses in case the power needs to be exercised in another state, such as Florida, which requires two witnesses and notarization.

5. Should you notarize a document without seeing the principal sign?

a. Absolutely not!

6. The Ohio Uniform Power of Attorney allows for express powers. What is an Express Power of Attorney?

a. These are often referred to as "hot powers."

b. Examples: to create a revocable trust (Note under 5804.02(F) an Agent may create a trust for the principal);

c. To create an irrevocable trust;

d. To make a gift to the Agent;

e. To change survivorship designations, beneficiary designations;

f. To exercise fiduciary powers - as a Trustee, by example.

7. When would you recommend a client sign a Power of Attorney for Express Powers?

a. Someone diagnosed with onset of dementia.

b. Note – A Power of Attorney for Express Powers should be in a separate document.

c. Each express power needs to be authorized by the principal initialing the express power.

8. May an Agent revoke or amend a principal's revocable trust?

a. Yes, if authorized by the principal as an express power;

b. **And** the revocable trust specifically authorizes an agent to revoke or amend the trust.

9. Note the Probate Court appoints the guardian of an estate and of the person.

10. May the principal nominate a guardian?

a. Yes, if the client was competent when the Power of Attorney was signed. The principal may nominate a guardian of the estate and person for the principal and also for the principal's minor child.

11. What are the responsibilities of an Agent?

a. Must act in good faith.

b. Must act only within the scope of authority granted.

c. Must act in accordance with the principal's reasonable expectations.

d. Must attempt to preserve the principal's estate plan to the extent known by the Agent.

12. The principal names his spouse as the Agent and then divorces or legally separates. Any consequence?

a. Yes—the divorced or separated spouse may not serve as the Agent.

13. If the principal names Co-Agents, is that an issue?

a. Yes - unless the Power of Attorney states otherwise, Co-Agents may act independently.

b. Practice Tip – Suggest to the principal that the Co-Agents must act concurrently, not independently, and draft the document accordingly.

14. Is an Agent required to account for the Agent's actions?

a. Yes – required to keep an accounting of all receipts, disbursements and other transactions made on behalf of the principal.

b. May be required to provide the accounting to a subsequently appointed guardian.

15. Does an Agent have liability?

a. Yes – may be required to restore the value of the principal's property if the Agent violated any of the Agent's duties to the principal, plus pay attorney fees.

Ohio Healthcare Power of Attorney and Ohio Living Will

1. What are these documents? Statutory authority: ORC 1337.13, ORC 2133.02

   a. Preferably, these are form documents.

   b. Principal names an agent who may authorize medical treatment if the principal is incapacitated.

   c. May name up to three agents in succession.

   d. Living Will - the principal makes the decision not to be kept alive artificially if in a "permanently unconscious state."

2. When should the client or an agent provide these documents?

   a. The Healthcare Power of Attorney should be given to a doctor or hospital.

   b. The Living Will should not be given to a doctor or hospital until the "contact" decides to have the directives of the principal known.

3. Should a Power of Attorney for Healthcare authorize the agent to authorize medical procedures for someone other than the principal?

   a. Yes – if the principal has minor children.

   b. Parent or parents appoint a babysitter as agent to make healthcare decisions for the minor child if the parent or parents are unavailable.

Summary

1. A Will must be carefully drafted and executed. State clearly the intent of the testator, no ambiguities.

2. Understand the mental capacity of the testator. Never prepare a Will for an individual who has no clue what he or she is signing. Know who your client is and know who your client is not.

3. Contesting a Will is an uphill battle for the plaintiff. Based most often on improper execution, lack of testamentary capacity, or undue influence.

4. Goal: A Will you prepared is never successfully contested.

5. An Agent under a Power of Attorney must keep detailed records of the Agent's actions and may have personal liability.

LAST WILL AND TESTAMENT
OF
NAME

I, **NAME**, of _____County, Ohio, publish this instrument as my Last Will and Testament (this "Will"), and revoke all prior Wills and Codicils.

Article I - Family

My wife is _____. I have two children, namely: my son, _____; and my daughter, _____.

Article II - Payment of Debts and Taxes

2.1 Payment of debts. My Executor may, but is not required to, in his or her sole discretion, pay any lawful debts and claims properly presented to my Executor out of my residuary estate.

2.2 Tax apportionment. I direct that all Death Taxes be paid from my residuary estate without apportionment and with no right of reimbursement from any person who receives property upon which a Death Tax is imposed.

2.3 Trusts. My Executor may request such additional sums, if any, as he or she deems necessary to pay any part or all of the expenses and taxes imposed on my estate, and any bequest payable under this Will, from the trustee of any *inter vivos* trust which I have established.

Article III – Disposition of My Estate

3.1 Disposition. I give, devise and bequeath all of my estate (excepting any property over which I may have a power of appointment at my death) to the Trustee of the _____ **Revocable Trust Dated** _____ (the "Trust"), to be administered under its governing Declaration of Trust as in effect upon my death.

3.2 Receipt of the Trustee. The receipt of the Trustee shall fully discharge my Executor with respect to the property distributed to the Trust.

3.3 Alternative disposition. In the event the Trust is not in effect at the time of my death, or if for any reason the gift, devise or bequest to the Trust fails, I specifically incorporate by reference all the

terms of the Trust into this Will. I direct my Executor to then establish a new trust under the provisions of this Trust and to distribute the remainder of my estate, excluding any property over which I have a power of appointment, to the Trustee of the new trust to be administered under its terms.

Article IV - Executor

4.1 Line of succession. I nominate my wife, _____, as the Executor of my estate. In the event she fails to become or ceases to act as the Executor of my estate, I nominate **Park National Bank** as the Executor of my estate.

4.2 Conditions of service. I direct that no bond be required of my Executor. To the extent permitted by law, the administration of my estate shall be independent of the supervision of any court.

Article V - Administrative Provisions

5.1 Survivorship. For the purposes of this Will, no person, except for my wife, shall be deemed to have survived me if that person should die within sixty (60) days after my death. If my wife and I die in such a manner that it cannot be determined in what order our deaths occurred, my wife shall be deemed to have survived me.

5.2 Tax elections. My Executor shall make such elections under the tax laws as he or she deems advisable, without regard to the relative interests of the beneficiaries, including (but not limited to) the following:

(a) My Executor may, without court approval, allocate any Federal exemption from the generation-skipping transfer tax to any property with respect to which I am the transferor, or exclude any such property from such allocation.

(b) My Executor may apply the deductions allowable for claims, expenses, indebtedness, taxes and losses as contemplated by Sections 642, 2053, and 2054 of the Code against either the income or estate tax in such manner as to minimize the total Death Taxes, income, and other taxes payable by my estate. This allocation may be made regardless of whether the items deducted are charged to income or principal for distribution purposes. In allocating income to the payment of estate administration expenses, my Executor shall not materially limit my wife's substantial beneficial enjoyment of the income of any assets which qualify for the marital deduction.

(c) My Executor may join with my wife or my wife's estate in filing Federal or state income tax returns for any year for which I have not filed a return at the time of my death, without giving or obtaining consideration therefor, and even though it may result in additional tax liabilities for my estate. Any tax liabilities or refunds shall be allocated between my estate and my wife or my wife's estate as my Executor may deem proper.

5.3 Minor or Disabled beneficiaries. If any individual beneficiary under this Will is a minor or is Disabled, distributions to him or her may be made in whichever of the following ways as my Executor deems best:

(a) to the beneficiary directly;

(b) to the legally appointed guardian, conservator, or attorney-in-fact of the beneficiary; or

(c) to a custodian for a minor beneficiary under a Uniform Gifts to Minors Act or a Uniform Transfers to Minors Act.

A receipt for payment by any of the above persons will completely discharge my Executor in respect to that payment.

5.4 Reliance on opinions and evidence. My Executor may rely in good faith upon the written opinion of an attorney, any facts stated in any instrument in writing and believed true, the representations of members of my family concerning the identity of my issue or collateral relatives, or any other evidence deemed sufficient, and shall have no liability for any action, or for the failure to take any action, taken in reliance on that opinion or evidence if done in good faith and without gross negligence.

5.5 Will Contest. Notwithstanding any other provision of this Will, if any person, on behalf of himself, herself or another as natural guardian or other legal representative, objects to the probate of my Will, or in any manner, directly or indirectly, contests or aids in contesting my Will, or any of the provisions of my Will, or the distribution of any part of my estate hereunder, then the person and any person on whose behalf he or she was acting will be deemed to have predeceased me for the purposes of this Will, and any and all provisions contained herein for the person's benefit or for the benefit of any person on whose behalf the person was acting shall be void and of no effect and this Will shall be construed and its provisions carried out in the same fashion as though the person and any person on whose behalf the person was acting had predeceased me.

Article VI – Specific Powers of My Executor

Any Executor of my estate shall have all of the powers from time to time conferred upon executors or administrators by law, except to the extent a power would conflict with this Will, in which case the provisions of this Will shall control. In addition to such powers, my Executor shall have the following specific powers:

6.1 General powers of sale and retention.

(a) My Executor may retain property in the estate, with no duty to diversify investments.

(b) My Executor may sell or exchange estate property (whether real, personal, or mixed) or any additions thereto, without the necessity of authorization by any court, from time to time (at private or public sale) for such price and upon such terms and conditions (including the extension of credit and receipt of security) as my Executor shall determine.

(c) My Executor may lease estate property for any period of time though commencing in the future or extending beyond the conclusion of estate administration.

(d) My Executor may borrow money from any lender, extend or renew any existing indebtedness and mortgage, or pledge any asset of the estate to secure a loan.

6.2 Securities investment powers.

(a) My Executor may invest and reinvest in property of any kind, real or personal, domestic or foreign, even though particular investments are not of a type, quality or diversification considered proper for fiduciary investments.

(b) My Executor may buy, sell and trade in securities of any nature, including short sale on margin, and may pledge any securities held or purchased by them with such brokers as security for loans and advances made to my Executor.

(c) My Executor may vote in person or by general or limited proxy, or refrain from voting, any corporate securities for any purpose. If the estate contains any security which, if my Executor holds the discretion to vote, would subject the issuing company or my Executor to any law, rule or regulation adversely affecting either the issuing company or the ability of

my Executor to retain or vote those securities, my Executor shall vote as directed by the beneficiaries entitled to receive distribution of that property.

(d) My Executor may grant, exercise, or sell any option, subscription or conversion rights.

(e) My Executor may consent to and join in or oppose any voting trusts, reorganizations, consolidations, mergers, foreclosures and liquidations; and may for such purposes deposit securities and accept and hold other property received in exchange for them.

(f) My Executor, if a corporation, may exercise the investment powers granted by this Paragraph 6.2 with respect to securities issued by itself or an Affiliated Company.

6.3 Claims and choses in action.

(a) My Executor may compromise, contest, prosecute or abandon claims in favor of or against my estate.

(b) My Executor may elect, pursuant to the terms of any employee benefit plan, individual retirement plan or insurance contract payable to my estate, the mode of distribution of the proceeds thereof, and no adjustment shall be made in the interests of the beneficiaries to compensate for the effect of the election.

6.4 Operation of business. My Executor shall have the right to continue and to operate any business owned by me at the time of my death without the necessity of applying to any court for authority to do so, and without the necessity of filing court accountings other than those generally required for the administration of my estate. Without limiting the generality of the foregoing, my Executor shall have the authority:

(a) to cause a business association to be organized under the laws of any state in the United States and to transfer any or all of the assets of said business to the entity so formed;

(b) to repair, add to, change and improve said business or convert it to other uses;

(c) to lease any part thereof in its present form or other form; to sell and convey all or any part of such business at such time or times, for such prices and upon such terms and conditions as my Executor shall determine; and,

(d) to borrow money and to pledge or mortgage any assets of such business whether or not the money so borrowed is used in the management or operation of such business.

My Executor shall not be personally liable for any loss entailed in the retention, management, or operation of any such business.

6.5 Self-dealing, trusts, and other estates. My Executor may deal with, purchase assets from or sell assets to, or borrow funds from or make loans to himself or herself individually, to the trustee of any trust established by me or any member of my family, or a trust or estate in which any beneficiary of my estate has an interest, even though my Executor is a fiduciary or a beneficiary thereof; and may deal with a corporate trustee or Affiliated Company.

6.6 Ancillary administration. If in the course of the administration of my estate it becomes necessary or advisable to have an ancillary administration of my estate, and my Executor is unable or unwilling to act as ancillary administrator, my Executor shall select a suitable ancillary administrator, and that selection shall not be subject to question by any beneficiary. The ancillary administrator shall serve without bond and shall have all of the rights, powers and duties conferred upon my Executor by this Will.

6.7 Estate accounting. My Executor may follow the provisions of the Ohio Principal and Income Act (Ohio Revised Code Chapter 5812) in allocating receipts and disbursements between income and principal, but is not required to do so if my Executor determines that a different allocation will better serve the administration of my estate. No claim may be made or recovery had against my Executor on the basis of any allocation decision made under this Paragraph 6.7.

6.8 Miscellaneous powers.

(a) My Executor may employ agents, attorneys and proxies and delegate to them such powers as my Executor considers desirable.

(b) Unless otherwise specifically directed in this Will, my Executor may make distributions of general or residual bequests in cash or in kind, or partly in each, and allocate or distribute undivided interests or different assets or disproportionate interests in assets, without needing to make adjustments to compensate for a disproportionate allocation of unrealized gain for Federal income tax purposes. In exercising this power, my Executor shall act in fair and impartial manner with respect to all beneficiaries and shall not jeopardize the intended tax

results of the distributions made, including any otherwise available marital or charitable deduction.

(c) My Executor may perform other acts necessary or appropriate for the proper administration of any trust created under this Will; including to execute and deliver necessary instruments and give full receipts and discharges.

6.9 Digital assets. My Executor shall have the authority to access, modify, control, archive, transfer, and delete my digital assets. Digital assets include my sent and received emails, email accounts, digital music, digital photographs, digital videos, gaming accounts, software licenses, social-network accounts, file-sharing accounts, financial accounts, domain registrations, Domain Name System (DNS) service accounts, blogs, listservs, web-hosting accounts, tax preparation service accounts, online stores and auction sites, online accounts, digital currency accounts, and any other digital assets that currently exist or may be developed as technology advances.

6.10 Access, use and control of digital assets. My digital assets may be stored in a cloud or on my own digital devices. My Executor may access, use, and control my digital devices in order to access, modify, control, archive, transfer and delete my digital assets, including my digital assets that are only accessible through my digital devices. Digital devises include desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any other hardware that currently exists or may be developed as technology advances.

Article VII – Rules of Construction and Definitions

7.1 General rules of construction. The section headings used are for convenience only and shall not be resorted to for interpretation of this Will. Wherever the context so requires, the masculine, feminine or neuter gender shall include the other two genders, the singular shall include the plural and the plural shall include the singular.

7.2 "Affiliated Company." If a corporation or other entity authorized to do business as a trust company is serving as Executor, an Affiliated Company is any parent or subsidiary of my Executor, or any business entity under common ownership with my Executor.

7.3 "Code." References in this Will to various provisions of "the Code" are to the Internal Revenue Code of 1986, as amended, or any future tax law which may replace it. References to specific sections of the Code include the associated Treasury Regulations and corresponding provisions of any future tax law.

7.4 "Death Taxes" are all estate, inheritance, succession, or generation-skipping taxes imposed by any jurisdiction, including interest and penalties thereon.

7.5 "Disabled." A person is Disabled for purposes of this Will if either of the following are true:

(a) he or she has been adjudicated incompetent by an appropriate court; or,

(b) he or she lacks the physical or mental capacity to manage his or her financial affairs, as determined by my Executor or by a physician familiar with the individual.

7.6 "Executor." References in this Will to "my Executor" include co-Executors, an ancillary administrator, administrator *de bonis non,* or administrator with will annexed, as appropriate.

IN WITNESS WHEREOF, I have executed this Will on _____ ____, 20____, in the presence of these witnesses.

_____

NAME

This instrument was signed, declared, and published by NAME as his Will in our presence on DATE, and we sign here at his special insistence and request in his presence, and the presence of each other, as witnesses attesting to these facts.

_____ residing at _____

_____ residing at _____

DURABLE GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, _____ ("Principal"), of _____ County, Ohio, hereby revoke any previously dated Durable General Power of Attorney and subsequently make, constitute and appoint _____, my true and lawful Agent ("Agent") for me and in my name, place, and stead, and for my use and benefit as long as my Agent shall remain alive and competent.

SUCCESSOR AGENT: If the Agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve, I appoint _____, as my Successor Agent. A Successor Agent has the same authority as granted to the original Agent and may not act until a predecessor Agent has resigned, died, became incapacitated, is no longer qualified to serve or has declined to serve. A Successor Agent is not liable for the actions of the original Agent. A Successor Agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another Agent shall notify me, and if I am incapacitated, take any action reasonably appropriate to safeguard my best interest.

I. NOTICE TO THE AGENT: In accordance with Ohio Revised Code 1337.33 and 1337.34, once you accept designation as the Agent under this power of attorney or exercise authority granted to you by the Principal, a fiduciary relationship is created between you and the Principal. Your duties include the duty to do all of the following:

(1) Act in accordance with the Principal's reasonable expectations to the extent actually known by the Agent and, otherwise, in the Principal's best interest;

(2) Act in good faith;

(3) Act only within the scope of authority granted in the power of attorney;

(4) Attempt to preserve the Principal's estate plan to the extent actually known by the Agent if preserving the plan is consistent with the Principal's best interest based on all relevant factors, including all of the following:

(a) The value and nature of the Principal's property;

(b) The Principal's foreseeable obligations and need for maintenance;

(c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(d) Eligibility for a benefit, a program, or assistance under a statute or regulation.

(e) Act loyally for the Principal's benefit;

(5) Act so as not to create a conflict of interest that impairs the Agent's ability to act impartially in the Principal's best interest;

(6) Act with the care, competence, and diligence ordinarily exercised by Agents in similar circumstances;

(7) Keep a record of all receipts, disbursements, and transactions made on behalf of the Principal;

(8) Cooperate with a person that has authority to make health-care decisions for the Principal to carry out the Principal's reasonable expectations to the extent actually known by the Agent and, otherwise, act in the Principal's best interest.

In accordance with Ohio Revised Code 1333.37, if you violate the terms of this power of attorney or the fiduciary duties created by this relationship, you will be liable to the Principal or the Principal's successors in interest for the amount required to restore the value of the Principal's property to what it would have been had the violation not occurred as well as attorney's fees and costs paid. If there is anything about this power of attorney or your duties that you do not understand, you should obtain legal advice.

II. GRANT OF POWER: I, as Principal, hereby appoint the above named Agent(s) to act as my Agent(s) in any way I could act with respect to the following matters:

(1) **Real Property:** With respect to transactions concerning real property, I authorize my Agent to do all of the following:

(a) Demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(b) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(c) Pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the Principal or a debt guaranteed by the Principal;

(d) Release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property that exists or is asserted;

(e) Manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the Principal, including all of the following:

(1) Insure against liability or casualty or other loss;

(2) Obtain or regain possession of or protect the interest or right by litigation or otherwise;

(3) Pay, assess, compromise, or contest taxes or assessments or apply for and receive refunds in connection with taxes;

(4) Purchase supplies, hire assistance or labor, and make repairs or alterations to the real property.

(f) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the Principal has, or claims to have, an interest or right;

(g) Participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including all of the following:

(1) Sell or otherwise dispose of them;

(2) Exercise or sell an option, right of conversion, or similar right with respect to them;

(3) Exercise any voting rights in person or by proxy.

(h) Dedicate to public use, with or without consideration, easements or other real property in which the Principal has, or claims to have, an interest;

(2) **Personal Property:** With respect to transactions concerning tangible personal property, I authorize my Agent to do all of the following:

(a) Demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(b) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or otherwise dispose of tangible personal property or an interest in tangible personal property;

(c) Grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the Principal or a debt guaranteed by the Principal;

(d) Release, assign, satisfy, or enforce by litigation or otherwise a security

interest, lien, or other claim on behalf of the Principal with respect to tangible personal property or an interest in tangible personal property;

(e) Manage or conserve tangible personal property or an interest in tangible personal property on behalf of the Principal, including all of the following:

(1) Insure against liability or casualty or other loss;

(2) Obtain or regain possession of or protect the property or interest by litigation or otherwise;

(3) Pay, assess, compromise, or contest taxes or assessments or apply for and receive refunds in connection with taxes or assessments;

(4) Move the property from place to place;

(5) Store the property for hire or on a gratuitous bailment;

(6) Use and make repairs, alterations, or improvements to the property.

(f) Change the form of title of an interest in tangible personal property.

(3) **Stocks, Bonds and Mutual Funds:** With respect to transactions concerning stocks, bonds and mutual funds, I authorize my Agent to do the following:

(a) Buy, sell, and exchange stocks, bonds and mutual funds;

(b) Establish, continue, modify, or terminate an account with respect to stocks, bonds and mutual funds;

(c) Pledge stocks, bonds and mutual funds as security to borrow, pay, renew, or extend the time of payment of a debt of the Principal;

(d) Receive certificates and other evidences of ownership with respect to stocks, bonds and mutual funds;

(e) Exercise voting rights with respect to stocks, bonds and mutual funds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

(4) **Commodities and Options:** With respect to transactions concerning commodities and options, I authorize my Agent to do the following:

(a) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange;

(b) Establish, continue, modify, and terminate option accounts.

(5) **Banks and Other Financial Institutions:** With respect to transactions concerning banks and other financial institutions, I authorize my Agent to do all of the following:

(a) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the Principal;

(b) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the Agent;

(c) Contract for services available from a financial institution, including renting a safe deposit box or space in a vault, or closing a safe deposit box;

(d) Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the Principal deposited with or left in the custody of a financial institution;

(e) Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(f) Enter a safe deposit box or vault and withdraw or add to the contents;

(g) Borrow money and pledge as security personal property of the Principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the Principal or a debt guaranteed by the Principal;

(h) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the Principal or payable to the Principal or the Principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the Principal and pay it when due;

(i) Receive for the Principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(j) Apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit;

(k) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

(6) **Insurance and Annuities:** With respect to insurance and annuity transactions, I authorize my Agent to do all of the following:

(a) Continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the Principal that insures or provides an annuity to either the Principal or another person, whether or not the Principal is a beneficiary under the contract;

(b) Procure new, different, and additional contracts of insurance and annuities for the Principal and the Principal's spouse, children, and other dependents and select the amount, type of insurance or annuity, and mode of payment;

(c) Pay the premium or make a contribution on, modify, exchange, rescind,

release, or terminate a contract of insurance or annuity procured by the Agent;

(d) Apply for and receive a loan secured by a contract of insurance or annuity;

(e) Surrender and receive the cash surrender value on a contract of insurance or annuity;

(f) Exercise an election;

(g) Exercise investment powers available under a contract of insurance or annuity;

(h) Change the manner of paying premiums on a contract of insurance or annuity;

(i) Change or convert the type of insurance or annuity with respect to which the Principal has or claims to have authority described in this section;

(j) Apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the Principal;

(k) Collect, sell, assign, hypothecate, borrow against, or pledge the interest of the Principal in a contract of insurance or annuity;

(l) Select the form and timing of the payment of proceeds from a contract of insurance or annuity;

(m) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

(7) **Estates, Trusts, and other Beneficial Interests:**

(a) As used in this section, "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the Principal is, may become, or claims to be entitled to a share or payment.

(b) With respect to estates, trusts, and other beneficial interests, I authorize my Agent to do all of the following:

(1) Accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(2) Demand or obtain money or another thing of value to which the Principal is, may become, or claims to be entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) Exercise for the benefit of the Principal a presently exercisable general power of appointment held by the Principal;

(4) Initiate, participate in, submit to alternative dispute resolution,

settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the Principal;

(5) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(6) Conserve, invest, disburse, or use anything received for an authorized purpose;

(7) Transfer an interest of the Principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the Principal as settlor, provided, however, that once my property has been accepted by any trustee described in this sentence, my attorney shall not thereafter be responsible to inquire or account for the correctness or application of any property or amounts held and paid by the trustee described herein above under the terms of any trust described herein above, and shall be free from any accounting requirements in regard to any such property so transferred into trust;

(8) Reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest;

(8) **Claims and Litigation:** With respect to claims and litigation, I authorize my Agent to do all of the following:

(a) Assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the Principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(b) Bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(c) Seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(d) Make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the Principal in litigation;

(e) Submit to alternative dispute resolution, settle, and propose or accept a

compromise;

(f) Waive the issuance and service of process upon the Principal, accept service of process, appear for the Principal, designate persons upon which process directed to the Principal may be served, execute and file or deliver stipulations on the Principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(g) Act for the Principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the Principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee that affects an interest of the Principal in property or other thing of value;

(h) Pay a judgment, award, or order against the Principal or a settlement made in connection with a claim or litigation;

(i) Receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

(9) **Personal and Family Maintenance:** With respect to personal and family maintenance, I authorize my Agent to do all of the following:

(a) Perform the acts necessary to maintain the customary standard of living of the Principal, the Principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(1) Other individuals legally entitled to be supported by the Principal;

(2) The individuals whom the Principal has customarily supported or indicated the intent to support.

(b) Make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the Principal is a party;

(c) Provide living quarters for the individuals described in division (a)(1) of this section by doing either of the following:

(1) Purchasing, leasing, or otherwise contracting;

(2) Paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the Principal or occupied by those individuals.

(d) Provide normal domestic help, usual vacations and travel expenses, and

funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in division (a)(1) of this section;

(e) Pay expenses for necessary health care and custodial care on behalf of the individuals described in division (a)(1) of this section;

(f) Act as the Principal's personal representative pursuant to 42 U.S.C. 1320d to 1320d-9 and applicable regulations in making decisions related to the past, present, or future payment for the provision of health care consented to by the Principal or anyone authorized under the law of this state to consent to health care on behalf of the Principal;

(g) Continue any provision made by the Principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in division (a)(1) of this section;

(h) Maintain credit and debit accounts for the convenience of the individuals described in division (a)(1) of this section and open new accounts;

(i) Continue payments incidental to the membership or affiliation of the Principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(j) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an Agent may or may not have with respect to gifts under sections 1337.21 to1337.64 of the Revised Code.

(10) **Governmental Programs:** With respect to benefits from social security, Medicare, Medicaid, other governmental programs, or civil or military service, I authorize my Agent to do all of the following:

(a) Execute vouchers in the name of the Principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the Principal, including allowances and reimbursements for transportation of the individuals described in division (A)(1) of section 1337.54 of the Revised Code, and for shipment of their household effects;

(b) Take possession and order the removal and shipment of property of the Principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(c) Enroll in, apply for, select, reject, change, amend, or discontinue, on the Principal's behalf, a benefit or program;

(d) Prepare, file, and maintain a claim of the Principal for a benefit or assistance, financial or otherwise, to which the Principal may be entitled under a statute or regulation;

(e) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the Principal may be entitled to receive under a statute or regulation;

(f) Receive the financial proceeds of a claim described in Ohio Revised Code Section 1337.55(8)(4) and conserve, invest, disburse, or use for a lawful purpose anything so received;

(g) Appoint an "Authorized Representative" for purposes of filing for and receiving information about Medicaid benefits, including all notices going to the Authorized Representative's address.

(11) **Retirement Plans:**

(a) As used in this section, "retirement plan" means a plan or account created by an employer, the Principal, or another individual to provide retirement benefits or deferred compensation of which the Principal is a participant, beneficiary, or owner, including any of the following plans or accounts: An individual retirement account under section 408 of the Internal Revenue Code of 1986, 26 U.S.C. 408; A Roth individual retirement account under section 408A of the Internal Revenue Code of 1986, 26 U.S.C. 408A; A deemed individual retirement account under section 408(q) of the Internal Revenue Code of 1986, 26 U.S.C. 408(q); An annuity or mutual fund custodial account under section 403(b) of the Internal Revenue Code of 1986, 26 U.S.C. 403(b); A pension, profit-sharing, stock bonus, or other retirement plan qualified under section 401(a) of the Internal Revenue Code of 1986, 26 U.S.C. 401(a); A plan under section 457(b) of the Internal Revenue Code of 1986, 26 U.S.C. 457(b); A nonqualified deferred compensation plan under section 409A of the Internal Revenue Code of 1986, 26 U.S.C. 409A.

(b) With respect to retirement plans, I authorize my Agent to do all of the following:

(1) Select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) Make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) Establish a retirement plan in the Principal's name;

(4) Make contributions to a retirement plan;

(5) Exercise investment powers available under a retirement plan;

(6) Borrow from, sell assets to, or purchase assets from a retirement

plan;

(7) Terminate the Principal's membership in any public retirement system by withdrawing the Principal's accumulated employee contribution;

(12) **Tax Matters:** With respect to tax matters, I authorize my Agent to do all of the following:

(a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under section 2032A of the Internal Revenue Code of 1986, 26 U.S.C. 2032A, closing agreements, and any power of attorney required by the internal revenue service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following twenty- five tax years;

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the internal revenue service or other taxing authority;

(c) Exercise any election available to the Principal under federal, state, local, or foreign tax law;

(d) Act for the Principal in all tax matters for all periods before the internal revenue service, or other taxing authority.

(13) **Borrowing:** I authorize my Agent to borrow money; mortgage or pledge any real estate, tangible personal property or intangible personal property as security for any borrowing transactions, and sign, renew, extend, pay, and satisfy any notes or other forms of obligations.

(14) **Employment of Agents:** I authorize my Agent to employ attorneys, accountants, investment advisors, expert witnesses, realtors, or other professionals and pay them reasonable compensation.

(15) **Disclaim:** I authorize my Agent to renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts and to exercise any right to claim an elective share in any estate or under any will, taking into account such matters such as estate or inheritances taxes on my estate and the effect of such renunciation or disclaimer upon persons interest in my estate and persons who would receive the

renounced or disclaimed property.

(16) **Business Operations:** With respect to operating a business, I authorize my Agent to do all of the following:

(a) Operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(b) Perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the Principal has, may have, or claims to have;

(c) Enforce the terms of an ownership agreement;

(d) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the Principal is a party because of an ownership interest;

(e) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the Principal has or claims to have as the holder of stocks and bonds;

(f) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the Principal is a party concerning stocks and bonds;

(g) With respect to an entity or business owned solely by the Principal, do all of the following:

(1) Continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the Principal with respect to the entity or business before execution of the power of attorney;

(2) Determine all of the following:

(a) The location of its operation;

(b) The nature and extent of its business;

(c) The methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(d) The amount and types of insurance carried;

(e) The mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors.

(3) Change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business;

(4) Demand and receive money due or claimed by the Principal or on the Principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business.

(h) Put additional capital into an entity or business in which the Principal has an interest;

(i) Join in a plan of reorganization, consolidation, conversion, domestication,

or merger of the entity or business;

(j) Sell or liquidate all or part of an entity or business;

(k) Establish the value of an entity or business under a buy-out agreement to which the Principal is a party;

(l) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments;

(m) Pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the Principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

(17) **Beneficiaries:** The following persons or entities are exclusively eligible to be named as beneficiaries, transfer on death beneficiaries, payable on death beneficiaries, joint owners, or recipients of a gift authorized under this power of attorney and in accordance to ORC 1337.42 and those authorities listed in Paragraph (17) above:

(a) Children and lineal descendants of the Principal.

(18) **Digital Assets**: I hereby authorize my Agent to take any action with respect to any of my digital assets, including:

(a) My Agent shall be the authorized user for the purposes of computer fraud and unauthorized computer access laws;

(b) Have access to any catalogue of electronic communication received by me;

(c) Have access to any digital asset in which I have any right or interest;

(d) Have the right to access any of my tangible personal property capable of receiving, storing, or sending a digital asset;

(e) Have the authority to take any action concerning a digital asset to the extent of the account holder's authority;

(f) Have access to the content of electronic communications sent or received by me.

III. NOMINATION OF GUARDIAN: In the event it should become necessary for the appointment of a guardian of my person, estate, or both (hereinafter "guardian"), I nominate my _____, as guardian. In the event he/she fails to become or ceases to act as guardian, I nominate _____, as guardian.

IV. DURABILITY: This power of attorney shall not be affected by the disability, incapacity, or incompetency of the Principal or lapse of time.

V. COMMENCEMENT: The rights, powers, and authority of my Agent to exercise any and all of the rights and powers herein granted shall commence and be in full force and effect on the date signed and such rights, powers, and authority shall remain in full force and effect until revoked by destruction of this power of attorney or written notification of termination to my Agent.

VI. SELF-DEALING: My Agent may enter into transactions with me or on my behalf in which my Agent is personally interested so long as the terms of the transaction are fair to me, notwithstanding any law prohibiting acts of self-dealing.

VII. PERSONAL REPRESENTATIVE: My Agent shall be my "Personal Representative" for purposes of compliance with Federal HIPAA Laws and Regulations. I hereby allow my Agent to act in my place and stead to execute releases and waivers of notice of disclosure as well as revoke same related to disclosure and release of my protected health information (PHI) as defined by HIPAA regulations that govern disclosure and protection of records related to my health care or medical information. My Agent and Successor Agent shall have access to any and all medical records, medical history, including mental health records, billing and all other information related to my medical care and mental health. All third parties, including the Veterans Administration, Medicaid and Medicare agencies, insurance companies, physicians, pharmacists, healthcare facilities and mental health facilities, assisted living facilities, nursing homes, clinics, hospitals and all other providers of my medical care shall comply with my Agent's request for information and accept any waivers, releases and revocations executed by my Agent as though I myself executed same.

VIII. CONFLICTS OF INTEREST AND WAIVER OF CONFIDENTIALITY: I recognize that my Agent may be in a conflict-of-interest position either because of a business, professional, or other relationship my Agent has with me. Notwithstanding any potential conflict, I waive any right I may have to object to my Agent acting, because I believe my Agent will act in accordance with my desires. I recognize that the lawyer who represented me with regard to the preparation of this power of attorney and possible other matters (the "Lawyer") or one of his colleagues (a "Colleague") may be requested to represent my Agent in acting pursuant to this power of attorney. I acknowledge that the Lawyer or a Colleague, being familiar with me and my circumstances, may be an appropriate professional to represent my Agent in following the directions set forth in this power of attorney. In light of this possibility, I hereby authorize my Agent to retain the services of the Lawyer or a Colleague and I waive any conflicts of interest that may exist for the Lawyer or a Colleague in regard to the representation of my Agent. In addition, I authorize the Lawyer or a Colleague to reveal such confidential information as may be appropriate to assist my Agent in the performance of my Agent's duties under this power of attorney.

IX. EXONERATION OF AGENT(S): My Agent is released from any liability to me and my estate arising out of the acts or failures to act of my Agent, except for willful misconduct or gross negligence. I agree to indemnify and hold my Agent harmless against any liability or expense, including attorney's fees, that my Agent may incur as the result of acting or failing to act under this power of attorney, except for liability and expense resulting from my Agent's willful misconduct or gross negligence.

X. EXONERATION OF THIRD PARTIES: I agree that any third party who receives a copy of this power of attorney may act under it. Revocation of this power of attorney is not effective as to a third party until the third party learns of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

XI. GOVERNING LAW: This power of attorney shall be governed by Ohio law.

XII. COPIES: An executed duplicate of this power of attorney, or photostatic copy thereof, delivered by me or by the Lawyer or a Colleague to any third party will be conclusive against me and the Lawyer or a Colleague as to such third party that this power of attorney has not been terminated and will continue in effect until such third party is advised by written notice from me or from the Lawyer or a Colleague of such termination.

XIII. AMENDMENT AND REVOCATION: I may amend or revoke this power of attorney at any time by a signed instrument delivered to my Agent. If this power of attorney has been filed or recorded in public records, then any amendment or revocation also will be similarly filed or recorded, but a similar filing or recording of the amendment or revocation will not be necessary to effectuate the amendment or revocation with respect to my Agent and to all persons who have actual knowledge of the amendment or revocation.

XIV. RECOVERY OF DAMAGES: If any third party (including stock transfer agents, title insurance companies, financial institutions and brokerage) refuses to recognize my Agent's authority under this power of attorney, I authorize my Agent to sue for recovery for all damages, costs, and attorney's fees incurred because of such failure to recognize my lawfully appointed Agent. The costs and attorney's fees incurred shall be charged against my general assets to the extent they are not recovered. I expressly direct my Agent to move my assets from any brokerage, transfer agent or other entity that refuses to recognize the full extent of powers that I intend to convey by this power of attorney.

XV. COMPENSATION AND REIMBURSEMENT: My Agent is entitled to reasonable compensation for services rendered under this power of attorney as well as reimbursement of expenses reasonably incurred.

XVI. EXPRESS POWER OF THE AGENT: My Agent may do the following on my behalf:

_____ Exercise all fiduciary powers as Trustee of the _____ Trust Dated _____.

IN WITNESS WHEREOF, I have hereunto set my hand to this Durable General Power of Attorney this ___day of _____, 20___.

_____

PRINCIPAL

Signed in the presence of:

_____

_____

State of Ohio
County of _____

The foregoing Power of Attorney was acknowledged before me on _____ ___, 20___, by _____.

_____

Notary Public

4912-4100-3786

SPRINGING POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, _____ ("Principal"), of _____ County, Ohio, hereby revoke any previously dated Durable General Power of Attorney and subsequently make, constitute and appoint _____, my true and lawful Agent ("Agent") for me and in my name, place, and stead, and for my use and benefit as long as my Agent shall remain alive and competent.

This Springing Power of Attorney ("power of attorney") becomes effective when I am determined to be incapacitated. I authorize a licensed physician or psychologist to make the determination whether or not I am incapacitated based on an examination of me personally made by the licensed physician or psychologis

SUCCESSOR AGENT: If the Agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve, I appoint _____, as my Successor Agent. A Successor Agent has the same authority as granted to the original Agent and may not act until a predecessor Agent has resigned, died, became incapacitated, is no longer qualified to serve or has declined to serve. A Successor Agent is not liable for the actions of the original Agent. A Successor Agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another Agent shall notify me, and if I am incapacitated, take any action reasonably appropriate to safeguard my best interest.

I. NOTICE TO THE AGENT: In accordance with Ohio Revised Code 1337.33 and 1337.34, once you accept designation as the Agent under this power of attorney or exercise authority granted to you by the Principal, a fiduciary relationship is created between you and the Principal. Your duties include the duty to do all of the following:

(1) Act in accordance with the Principal's reasonable expectations to the extent actually known by the Agent and, otherwise, in the Principal's best interest;

(2) Act in good faith;

(3) Act only within the scope of authority granted in the power of attorney;

(4) Attempt to preserve the Principal's estate plan to the extent actually known by the Agent if preserving the plan is consistent with the Principal's best interest based on all relevant factors, including all of the following:

(a) The value and nature of the Principal's property;

(b) The Principal's foreseeable obligations and need for maintenance;

(c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(d) Eligibility for a benefit, a program, or assistance under a statute or regulation.

(e) Act loyally for the Principal's benefit;

(5) Act so as not to create a conflict of interest that impairs the Agent's ability to act impartially in the Principal's best interest;

(6) Act with the care, competence, and diligence ordinarily exercised by Agents in similar circumstances;

(7) Keep a record of all receipts, disbursements, and transactions made on behalf of the Principal;

(8) Cooperate with a person that has authority to make health-care decisions for the Principal to carry out the Principal's reasonable expectations to the extent actually known by the Agent and, otherwise, act in the Principal's best interest.

In accordance with Ohio Revised Code 1333.37, if you violate the terms of this power of attorney or the fiduciary duties created by this relationship, you will be liable to the Principal or the Principal's successors in interest for the amount required to restore the value of the Principal's property to what it would have been had the violation not occurred as well as attorney's fees and costs paid. If there is anything about this power of attorney or your duties that you do not understand, you should obtain legal advice.

II. GRANT OF POWER: I, as Principal, hereby appoint the above named Agent(s) to act as my Agent(s) in any way I could act with respect to the following matters:

(1) **Real Property:** With respect to transactions concerning real property, I authorize my Agent to do all of the following:

(a) Demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(b) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(c) Pledge or mortgage an interest in real property or right incident to real

property as security to borrow money or pay, renew, or extend the time of payment of a debt of the Principal or a debt guaranteed by the Principal;

(d) Release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property that exists or is asserted;

(e) Manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the Principal, including all of the following:

(1) Insure against liability or casualty or other loss;

(2) Obtain or regain possession of or protect the interest or right by litigation or otherwise;

(3) Pay, assess, compromise, or contest taxes or assessments or apply for and receive refunds in connection with taxes;

(4) Purchase supplies, hire assistance or labor, and make repairs or alterations to the real property.

(f) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the Principal has, or claims to have, an interest or right;

(g) Participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including all of the following:

(1) Sell or otherwise dispose of them;

(2) Exercise or sell an option, right of conversion, or similar right with respect to them;

(3) Exercise any voting rights in person or by proxy.

(h) Dedicate to public use, with or without consideration, easements or other real property in which the Principal has, or claims to have, an interest;

(2) **Personal Property:** With respect to transactions concerning tangible personal property, I authorize my Agent to do all of the following:

(a) Demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(b) Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or otherwise dispose of tangible personal property or an interest in tangible personal property;

(c) Grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the Principal or a debt guaranteed by the Principal;

(d) Release, assign, satisfy, or enforce by litigation or otherwise a security interest, lien, or other claim on behalf of the Principal with respect to tangible personal property or an interest in tangible personal property;

(e) Manage or conserve tangible personal property or an interest in tangible personal property on behalf of the Principal, including all of the following:

(1) Insure against liability or casualty or other loss;

(2) Obtain or regain possession of or protect the property or interest by litigation or otherwise;

(3) Pay, assess, compromise, or contest taxes or assessments or apply for and receive refunds in connection with taxes or assessments;

(4) Move the property from place to place;

(5) Store the property for hire or on a gratuitous bailment;

(6) Use and make repairs, alterations, or improvements to the property.

(f) Change the form of title of an interest in tangible personal property.

(3) **Stocks, Bonds and Mutual Funds:** With respect to transactions concerning stocks, bonds and mutual funds, I authorize my Agent to do the following:

(a) Buy, sell, and exchange stocks, bonds and mutual funds;

(b) Establish, continue, modify, or terminate an account with respect to stocks, bonds and mutual funds;

(c) Pledge stocks, bonds and mutual funds as security to borrow, pay, renew, or extend the time of payment of a debt of the Principal;

(d) Receive certificates and other evidences of ownership with respect to stocks, bonds and mutual funds;

(e) Exercise voting rights with respect to stocks, bonds and mutual funds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

(4) **Commodities and Options:** With respect to transactions concerning commodities and options, I authorize my Agent to do the following:

(a) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange;

(b) Establish, continue, modify, and terminate option accounts.

(5) **Banks and Other Financial Institutions:** With respect to transactions concerning banks and other financial institutions, I authorize my Agent to do all of the following:

(a) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the Principal;

(b) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the Agent;

(c) Contract for services available from a financial institution, including renting a safe deposit box or space in a vault, or closing a safe deposit box;

(d) Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the Principal deposited with or left in the custody of a financial institution;

(e) Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(f) Enter a safe deposit box or vault and withdraw or add to the contents;

(g) Borrow money and pledge as security personal property of the Principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the Principal or a debt guaranteed by the Principal;

(h) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the Principal or payable to the Principal or the Principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the Principal and pay it when due;

(i) Receive for the Principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(j) Apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit;

(k) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

(6) **Insurance and Annuities:** With respect to insurance and annuity transactions, I authorize my Agent to do all of the following:

(a) Continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the Principal that insures or provides an annuity to either the Principal or another person,

whether or not the Principal is a beneficiary under the contract;

(b) Procure new, different, and additional contracts of insurance and annuities for the Principal and the Principal's spouse, children, and other dependents and select the amount, type of insurance or annuity, and mode of payment;

(c) Pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the Agent;

(d) Apply for and receive a loan secured by a contract of insurance or annuity;

(e) Surrender and receive the cash surrender value on a contract of insurance or annuity;

(f) Exercise an election;

(g) Exercise investment powers available under a contract of insurance or annuity;

(h) Change the manner of paying premiums on a contract of insurance or annuity;

(i) Change or convert the type of insurance or annuity with respect to which the Principal has or claims to have authority described in this section;

(j) Apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the Principal;

(k) Collect, sell, assign, hypothecate, borrow against, or pledge the interest of the Principal in a contract of insurance or annuity;

(l) Select the form and timing of the payment of proceeds from a contract of insurance or annuity;

(m) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

(7) **Estates, Trusts, and other Beneficial Interests:**

(a) As used in this section, "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the Principal is, may become, or claims to be entitled to a share or payment.

(b) With respect to estates, trusts, and other beneficial interests, I authorize my Agent to do all of the following:

(1) Accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(2) Demand or obtain money or another thing of value to which the

Principal is, may become, or claims to be entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) Exercise for the benefit of the Principal a presently exercisable general power of appointment held by the Principal;

(4) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the Principal;

(5) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(6) Conserve, invest, disburse, or use anything received for an authorized purpose;

(7) Transfer an interest of the Principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the Principal as settlor, provided, however, that once my property has been accepted by any trustee described in this sentence, my attorney shall not thereafter be responsible to inquire or account for the correctness or application of any property or amounts held and paid by the trustee described herein above under the terms of any trust described herein above, and shall be free from any accounting requirements in regard to any such property so transferred into trust;

(8) Reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest;

(8) **Claims and Litigation:** With respect to claims and litigation, I authorize my Agent to do all of the following:

(a) Assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the Principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(b) Bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(c) Seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or

satisfy a judgment, order, or decree;

(d) Make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the Principal in litigation;

(e) Submit to alternative dispute resolution, settle, and propose or accept a compromise;

(f) Waive the issuance and service of process upon the Principal, accept service of process, appear for the Principal, designate persons upon which process directed to the Principal may be served, execute and file or deliver stipulations on the Principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(g) Act for the Principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the Principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee that affects an interest of the Principal in property or other thing of value;

(h) Pay a judgment, award, or order against the Principal or a settlement made in connection with a claim or litigation;

(i) Receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

(9) **Personal and Family Maintenance:** With respect to personal and family maintenance, I authorize my Agent to do all of the following:

(a) Perform the acts necessary to maintain the customary standard of living of the Principal, the Principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(1) Other individuals legally entitled to be supported by the Principal;

(2) The individuals whom the Principal has customarily supported or indicated the intent to support.

(b) Make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the Principal is a party;

(c) Provide living quarters for the individuals described in division (a)(1) of this section by doing either of the following:

(1) Purchasing, leasing, or otherwise contracting;

(2) Paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the Principal or occupied by those individuals.

(d) Provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in division (a)(1) of this section;

(e) Pay expenses for necessary health care and custodial care on behalf of the individuals described in division (a)(1) of this section;

(f) Act as the Principal's personal representative pursuant to 42 U.S.C. 1320d to 1320d-9 and applicable regulations in making decisions related to the past, present, or future payment for the provision of health care consented to by the Principal or anyone authorized under the law of this state to consent to health care on behalf of the Principal;

(g) Continue any provision made by the Principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in division (a)(1) of this section;

(h) Maintain credit and debit accounts for the convenience of the individuals described in division (a)(1) of this section and open new accounts;

(i) Continue payments incidental to the membership or affiliation of the Principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(j) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an Agent may or may not have with respect to gifts under sections 1337.21 to1337.64 of the Revised Code.

(10) **Governmental Programs:** With respect to benefits from social security, Medicare, Medicaid, other governmental programs, or civil or military service, I authorize my Agent to do all of the following:

(a) Execute vouchers in the name of the Principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the Principal, including allowances and reimbursements for transportation of the individuals described in division (A)(1) of section 1337.54 of the Revised Code, and for shipment of their household effects;

(b) Take possession and order the removal and shipment of property of the Principal from a post, warehouse, depot, dock, or other place of storage or

safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(c) Enroll in, apply for, select, reject, change, amend, or discontinue, on the Principal's behalf, a benefit or program;

(d) Prepare, file, and maintain a claim of the Principal for a benefit or assistance, financial or otherwise, to which the Principal may be entitled under a statute or regulation;

(e) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the Principal may be entitled to receive under a statute or regulation;

(f) Receive the financial proceeds of a claim described in Ohio Revised Code Section 1337.55(8)(4) and conserve, invest, disburse, or use for a lawful purpose anything so received;

(g) Appoint an "Authorized Representative" for purposes of filing for and receiving information about Medicaid benefits, including all notices going to the Authorized Representative's address.

(11) **Retirement Plans:**

(a) As used in this section, "retirement plan" means a plan or account created by an employer, the Principal, or another individual to provide retirement benefits or deferred compensation of which the Principal is a participant, beneficiary, or owner, including any of the following plans or accounts: An individual retirement account under section 408 of the Internal Revenue Code of 1986, 26 U.S.C. 408; A Roth individual retirement account under section 408A of the Internal Revenue Code of 1986, 26 U.S.C. 408A; A deemed individual retirement account under section 408(q) of the Internal Revenue Code of 1986, 26 U.S.C. 408(q); An annuity or mutual fund custodial account under section 403(b) of the Internal Revenue Code of 1986, 26 U.S.C. 403(b); A pension, profit-sharing, stock bonus, or other retirement plan qualified under section 401(a) of the Internal Revenue Code of 1986, 26 U.S.C. 401(a); A plan under section 457(b) of the Internal Revenue Code of 1986, 26 U.S.C. 457(b); A nonqualified deferred compensation plan under section 409A of the Internal Revenue Code of 1986, 26 U.S.C. 409A.

(b) With respect to retirement plans, I authorize my Agent to do all of the following:

(1) Select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) Make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;
(3) Establish a retirement plan in the Principal's name;
(4) Make contributions to a retirement plan;
(5) Exercise investment powers available under a retirement plan;
(6) Borrow from, sell assets to, or purchase assets from a retirement plan;
(7) Terminate the Principal's membership in any public retirement system by withdrawing the Principal's accumulated employee contribution;

(12) **Tax Matters:** With respect to tax matters, I authorize my Agent to do all of the following:

(a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under section 2032A of the Internal Revenue Code of 1986, 26 U.S.C. 2032A, closing agreements, and any power of attorney required by the internal revenue service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following twenty- five tax years;
(b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the internal revenue service or other taxing authority;
(c) Exercise any election available to the Principal under federal, state, local, or foreign tax law;
(d) Act for the Principal in all tax matters for all periods before the internal revenue service, or other taxing authority.

(13) **Borrowing:** I authorize my Agent to borrow money; mortgage or pledge any real estate, tangible personal property or intangible personal property as security for any borrowing transactions, and sign, renew, extend, pay, and satisfy any notes or other forms of obligations.

(14) **Employment of Agents:** I authorize my Agent to employ attorneys, accountants, investment advisors, expert witnesses, realtors, or other professionals and pay them reasonable compensation.

(15) **Disclaim:** I authorize my Agent to renounce and disclaim any property or interest

in property or powers to which for any reason and by any means I may become entitled; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts and to exercise any right to claim an elective share in any estate or under any will, taking into account such matters such as estate or inheritances taxes on my estate and the effect of such renunciation or disclaimer upon persons interest in my estate and persons who would receive the renounced or disclaimed property.

(16) **Business Operations:** With respect to operating a business, I authorize my Agent to do all of the following:

(a) Operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(b) Perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the Principal has, may have, or claims to have;

(c) Enforce the terms of an ownership agreement;

(d) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the Principal is a party because of an ownership interest;

(e) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the Principal has or claims to have as the holder of stocks and bonds;

(f) Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the Principal is a party concerning stocks and bonds;

(g) With respect to an entity or business owned solely by the Principal, do all of the following:

(1) Continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the Principal with respect to the entity or business before execution of the power of attorney;

(2) Determine all of the following:

(a) The location of its operation;

(b) The nature and extent of its business;

(c) The methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(d) The amount and types of insurance carried;

(e) The mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors.

(3) Change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business;

(4) Demand and receive money due or claimed by the Principal or on the Principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business.

(h) Put additional capital into an entity or business in which the Principal has an interest;

(i) Join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(j) Sell or liquidate all or part of an entity or business;

(k) Establish the value of an entity or business under a buy-out agreement to which the Principal is a party;

(l) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments;

(m) Pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the Principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

(17) **Beneficiaries:** The following persons or entities are exclusively eligible to be named as beneficiaries, transfer on death beneficiaries, payable on death beneficiaries, joint owners, or recipients of a gift authorized under this power of attorney and in accordance to ORC 1337.42 and those authorities listed in Paragraph (17) above:

(a) Children and lineal descendants of the Principal.

(18) **Digital Assets**: I hereby authorize my Agent to take any action with respect to any of my digital assets, including:

(a) My Agent shall be the authorized user for the purposes of computer fraud and unauthorized computer access laws;

(b) Have access to any catalogue of electronic communication received by me;

(c) Have access to any digital asset in which I have any right or interest;

(d) Have the right to access any of my tangible personal property capable of receiving, storing, or sending a digital asset;

(e) Have the authority to take any action concerning a digital asset to the extent of the account holder's authority;

(f) Have access to the content of electronic communications sent or received by me.

III. NOMINATION OF GUARDIAN: In the event it should become necessary for the appointment of a guardian of my person, estate, or both (hereinafter "guardian"), I nominate my _____, as guardian. In the event he/she fails to become or ceases to act as guardian, I nominate _____, as guardian.

IV. DURABILITY: This power of attorney shall not be affected by the disability, incapacity, or incompetency of the Principal or lapse of time.

V. COMMENCEMENT: The rights, powers, and authority of my Agent to exercise any and all of the rights and powers herein granted shall commence and be in full force and effect on the date signed and such rights, powers, and authority shall remain in full force and effect until revoked by destruction of this power of attorney or written notification of termination to my Agent.

VI. SELF-DEALING: My Agent may enter into transactions with me or on my behalf in which my Agent is personally interested so long as the terms of the transaction are fair to me, notwithstanding any law prohibiting acts of self-dealing.

VII. PERSONAL REPRESENTATIVE: My Agent shall be my "Personal Representative" for purposes of compliance with Federal HIPAA Laws and Regulations. I hereby allow my Agent to act in my place and stead to execute releases and waivers of notice of disclosure as well as revoke same related to disclosure and release of my protected health information (PHI) as defined by HIPAA regulations that govern disclosure and protection of records related to my health care or medical information. My Agent and Successor Agent shall have access to any and all medical records, medical history, including mental health records, billing and all other information related to my medical care and mental health. All third parties, including the Veterans Administration, Medicaid and Medicare agencies, insurance companies, physicians, pharmacists, healthcare facilities and mental health facilities, assisted living facilities, nursing homes, clinics, hospitals and all other providers of my medical care shall comply with my Agent's request for information and accept any waivers, releases and revocations executed by my Agent as though I myself executed same.

VIII. CONFLICTS OF INTEREST AND WAIVER OF CONFIDENTIALITY: I recognize that my Agent may be in a conflict-of-interest position either because of a business, professional, or other relationship my Agent has with me. Notwithstanding any potential conflict, I waive any right I may have to object to my Agent acting, because I believe my Agent will act in accordance with my desires. I recognize that the lawyer who represented me with regard to the preparation of this power of attorney and possible other matters (the "Lawyer") or one of his colleagues (a "Colleague") may be requested to represent my Agent in acting pursuant to this power of attorney. I acknowledge that the Lawyer or a Colleague, being familiar with me and my

circumstances, may be an appropriate professional to represent my Agent in following the directions set forth in this power of attorney. In light of this possibility, I hereby authorize my Agent to retain the services of the Lawyer or a Colleague and I waive any conflicts of interest that may exist for the Lawyer or a Colleague in regard to the representation of my Agent. In addition, I authorize the Lawyer or a Colleague to reveal such confidential information as may be appropriate to assist my Agent in the performance of my Agent's duties under this power of attorney.

IX. EXONERATION OF AGENT(S): My Agent is released from any liability to me and my estate arising out of the acts or failures to act of my Agent, except for willful misconduct or gross negligence. I agree to indemnify and hold my Agent harmless against any liability or expense, including attorney's fees, that my Agent may incur as the result of acting or failing to act under this power of attorney, except for liability and expense resulting from my Agent's willful misconduct or gross negligence.

X. EXONERATION OF THIRD PARTIES: I agree that any third party who receives a copy of this power of attorney may act under it. Revocation of this power of attorney is not effective as to a third party until the third party learns of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

XI. GOVERNING LAW: This power of attorney shall be governed by Ohio law.

XII. COPIES: An executed duplicate of this power of attorney, or photostatic copy thereof, delivered by me or by the Lawyer or a Colleague to any third party will be conclusive against me and the Lawyer or a Colleague as to such third party that this power of attorney has not been terminated and will continue in effect until such third party is advised by written notice from me or from the Lawyer or a Colleague of such termination.

XIII. AMENDMENT AND REVOCATION: I may amend or revoke this power of attorney at any time by a signed instrument delivered to my Agent. If this power of attorney has been filed or recorded in public records, then any amendment or revocation also will be similarly filed or recorded, but a similar filing or recording of the amendment or revocation will not be necessary to effectuate the amendment or revocation with respect to my Agent and to all persons who have actual knowledge of the amendment or revocation.

XIV. RECOVERY OF DAMAGES: If any third party (including stock transfer agents, title insurance companies, financial institutions and brokerage) refuses to recognize my Agent's authority under this power of attorney, I authorize my Agent to sue for recovery for all damages, costs, and attorney's fees incurred because of such failure to recognize my lawfully appointed Agent. The costs and attorney's fees incurred shall be charged against my general assets to the

extent they are not recovered. I expressly direct my Agent to move my assets from any brokerage, transfer agent or other entity that refuses to recognize the full extent of powers that I intend to convey by this power of attorney.

XV. COMPENSATION AND REIMBURSEMENT: My Agent is entitled to reasonable compensation for services rendered under this power of attorney as well as reimbursement of expenses reasonably incurred.

XVI. EXPRESS POWER OF THE AGENT: My Agent may do the following on my behalf:

_____ Exercise all fiduciary powers as Trustee of the _____ Trust Dated _____.

IN WITNESS WHEREOF, I have hereunto set my hand to this Durable General Power of Attorney this ___day of _____, 20___.

_____

PRINCIPAL

Signed in the presence of:

_____

_____

State of Ohio
County of _____

The foregoing Power of Attorney was acknowledged before me on _____ ___, 20___, by _____.

_____

4933-7358-3645 Notary Public

DURABLE POWER OF ATTORNEY FOR EXPRESS POWERS

KNOW ALL MEN BY THESE PRESENTS, that I, _____, "Principal," of _____ County, Ohio, make, constitute and appoint _____, "Agent" my true and lawful Agent for me and in my name, place, and stead, and for my use and benefit as long as my Agent shall remain alive and competent.

I. NOTICE TO THE AGENT: In accordance with Ohio Revised Code 1337.33 and 1337.34, once you accept designation as the Agent under this document or exercise authority granted to you by the Principal, a fiduciary relationship is created between you and the Principal. Your duties include the duty to do all of the following:

(1) Act in accordance with the principal's reasonable expectations to the extent actually known by the Agent and, otherwise, in the principal's best interest;

(2) Act in good faith;

(3) Act only within the scope of authority granted in the power of attorney for express powers;

(4) Attempt to preserve the principal's estate plan to the extent actually known by the Agent if preserving the plan is consistent with the principal's best interest based on all relevant factors, including all of the following:

(a) The value and nature of the principal's property;

(b) The principal's foreseeable obligations and need for maintenance;

(c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(d) Eligibility for a benefit, a program, or assistance under a statute or regulation.

(e) Act loyally for the principal's benefit;

(5) Act so as not to create a conflict of interest that impairs the Agent's ability to act impartially in the principal's best interest;

(6) Act with the care, competence, and diligence ordinarily exercised by Agents in similar circumstances;

(7) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(8) Cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the Agent and, otherwise, act in the principal's best interest.

In accordance with Ohio Revised Code 1333.37, if you violate the terms of this document or the fiduciary duties created by this relationship, you will be liable to the Principal or the Principal's successors in interest for the amount required to restore the value of the Principal's property to what it would have been had the violation not occurred as well as attorney's fees and costs paid. If there is anything about this document or your duties that you do not understand, you should obtain legal advice.

II. <u>EXPRESS POWERS OF THE AGENT</u> The Agent may do any of the following on my behalf or with my property:

___ Create a revocable or irrevocable trust in which the Principal is the settlor and name the Agent as Trustee of said trust;

___ Amend, revoke, or terminate an inter vivos trust created by the Principal, provided the trust allows for the amendment, revocation or termination by the Agent;

___ Gifts: To make, execute, deliver and complete unlimited gifts of money or other property, including gifts in excess of any annual individual federal gift tax exclusion, to one or more donees, charitable or non-charitable, selected by the Agent, including the Agent or the Agent's lineal descendants or heirs at law; to make and execute any and all gift tax returns, and pay any transfer taxes which may be due and owing;

____ Change the form of title and of an interest in or right incident to real property, including creating or changing the rights of survivorship and beneficiary designation under a Transfer of Death Designation Affidavit; change the form and title of interest in or right incident to bank, brokerage, and other financial institution account including creating or changing a POD (payable on death) or TOD (transfer on death) designation.

____ Delegate authority granted under a power of attorney to any person or persons whom the Agent selects;

____ Waive the Principal's right to be a beneficiary of a joint and survivor annuity including a survivor benefit under a retirement plan;

____ Exercise all fiduciary powers as Trustee of the _____ Trust Dated _____.

III. DUTY TO PRESERVE ESTATE PLAN: My Agent shall attempt to preserve my estate plan, to the extent known by my Agent, if it is consistent with my best interests based on (1) the value and nature of my property; (2) my foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; (4) eligibility for a benefit, a program, or assistance under a statute or regulation, including but not limited to Medicaid and Veterans Administration benefits; and (5) my personal history of making gifts, individually or jointly. An Agent that acts in good faith is not liable to any beneficiary of my estate plan for failure to preserve the plan.

IV. SELF-DEALING: My Agent may enter into transactions with me or on my behalf in which my Agent is personally interested so long as the terms of the transaction are fair to me, notwithstanding any law prohibiting acts of self-dealing.

V. EXONERATION OF AGENT(S): My Agent is released from any liability to me and my estate arising out of the acts or failures to act of my Agent, except for willful misconduct or gross negligence. I agree to indemnify and hold my Agent harmless against any liability or expense, including attorney's fees, that my Agent may incur as the result of acting or failing to act under this instrument, except for liability and expense resulting from willful misconduct or gross negligence.

VI. EXONERATION OF THIRD PARTIES: I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney for express powers is not effective as to a third party until the third party learns of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney for express powers.

VII. GOVERNING LAW: This power of attorney for express powers shall be governed by Ohio law.

VIII. COPIES: An executed duplicate of this power of attorney for express powers, or photostatic copy thereof, delivered by me or by said attorney to any third party will be conclusive against me and said attorney as to such third party that this power of attorney for express powers has not been terminated and will continue in effect until such third party is advised by written notice from me or from said attorney of such termination.

IX. AMENDMENT AND REVOCATION: I may amend or revoke this power of attorney for express powers at any time by a signed instrument delivered to my Agent. If this instrument has been filed or recorded in public records, then any amendment or revocation also will be similarly filed or recorded, but a similar filing or recording of the amendment or revocation will not be necessary to effectuate the amendment or revocation with respect to my Agent and to all persons who have actual knowledge of the amendment or revocation.

X. RECOVERY OF DAMAGES: If any third party (including stock transfer Agents, title insurance companies, financial institutions and brokerage) refuses to recognize my Agent's authority under this power of attorney for express powers, I authorize my Agent to sue for recovery for all damages, costs, and attorney's fees incurred because of such failure to recognize my lawfully appointed Agent. The costs and attorney's fees incurred shall be charged against my general assets to the extent they are not recovered. I expressly direct my Agent to move my assets from any brokerage, transfer Agent or other entity that refuses to recognize the full extent of the express powers granted by this instrument.

XI. COMPENSATION AND REIMBURSEMENT: My Agent is entitled to reasonable compensation for services rendered under this power of attorney for express powers as well as reimbursement of expenses reasonably incurred.

XII. DURABILITY: This power of attorney for express powers shall not be affected by the disability, incapacity, or incompetency of the principal or lapse of time

IN WITNESS WHEREOF, I have hereunto set my hand to this Power of Attorney for Express Powers this ___day of _____, 20__.

_____

PRINCIPAL

State of Ohio
County of _____

The foregoing Power of Attorney for Express Powers was acknowledged before me on _____ ____, 20__, in _____, Ohio.

_____

Notary Public

4887-8872-4642

POWER OF ATTORNEY FOR HEALTH CARE

FOR MINOR CHILDREN

1. We, **FATHER** and **MOTHER**, presently residing in _____, Ohio, (*herein the "Principals"*) intend to create a Power of Attorney for Health Care for our minor children, **NAMES**. Accordingly, we hereby designate and appoint **NAME OF AGENT,** presently residing at ADDRESS, or if unable to serve for any reason as attorney-in-fact, then **NAME OF SUCCESSOR AGENT**, presently residing at ADDRESS, as our attorney-in-fact who shall act as our agent to make health care decisions for said child or children.

2. We hereby grant to said agent full power and authority to make all health care decisions for said child or children to the same extent that we could make such decisions if we were available to make such decisions at any time during which we are not available to make health care decisions for said child or children. Such agent shall have the authority to give consent to the diagnosis or treatment of any physical or mental condition for said child or children as may be necessary and to the same and full extent as we could if we were available to make such decisions.

3. This Power of Attorney for Health Care for Minor Children shall not be affected by disability or by lapse of time and shall have no expiration date.

We understand the purpose and effect of this document and hereby sign our name to this Durable Power of Attorney on this ___ day of MONTH, YEAR, in _____, Ohio.

_____

FATHER, Principal

_____

MOTHER, Principal

We attest that the Principals signed or acknowledged this Power of Attorney for Health Care for Minor Children in our presence, that the Principals both appear to be of sound mind and not under or subject to duress, fraud, or undue influence. We further attest that we are not the agents designated in this document, nor related to the Principals by blood, marriage or adoption.

Signature: _____ Residence Address: _____

Print Name: _____ _____

Date: _____ _____

Signature: _____ Residence Address: _____

Print Name: _____ _____

Date: _____ _____

OR

ACKNOWLEDGMENT

State of Ohio)
) SS.
County of Summit)

On DATE before me, the undersigned Notary Public, personally appeared **FATHER** and **MOTHER** known to me or satisfactorily proven to be the persons whose names are subscribed to the above Durable Power of Attorney for Health Care as the Principals, and acknowledged that they executed the same for the purposes expressed therein. I attest that the Principals appear to be of sound mind and not under or subject to duress, fraud or undue influence.

_____

Notary Public

My Commission Expires _____

State of Ohio
Health Care Power of Attorney

[R.C. §1337]

_____
(Full Name)

_____
(Birth Date)

This is my Health Care Power of Attorney. I revoke all prior Health Care Powers of Attorney signed by me. I understand the nature and purpose of this document. If any provision is found to be invalid or unenforceable, it will not affect the rest of this document.

I understand that my agent can make health care decisions for me only whenever my attending physician has determined that I have lost the capacity to make informed health care decisions. However, this does not require or imply that a court must declare me incompetent.

Definitions

Adult means a person who is 18 years of age or older.

Agent or attorney-in-fact means a competent adult who a person (the "principal") can name in a Health Care Power of Attorney to make health care decisions for the principal.

Artificially or technologically supplied nutrition or hydration means food and fluids provided through intravenous or tube feedings. *[You can refuse or discontinue a feeding tube or authorize your Health Care Power of Attorney agent to refuse or discontinue artificial nutrition or hydration.]*

Bond means an insurance policy issued to protect the ward's assets from theft or loss caused by the Guardian of the Estate's failure to properly perform his or her duties.

Comfort care means any measure, medical or nursing procedure, treatment or intervention, including nutrition and/or hydration, that is taken to diminish a patient's pain or discomfort, but not to postpone death.

CPR means cardiopulmonary resuscitation, one of several ways to start a person's breathing or heartbeat once either has stopped. It does not include clearing a person's airway for a reason other than resuscitation.

Do Not Resuscitate or DNR Order means a physician's medical order that is written into a patient's record to indicate that the patient should not receive cardiopulmonary resuscitation.

LeadingAge Ohio · Ohio State Medical Association · Ohio Hospital Association · Ohio Osteopathic Association · Ohio State Bar Association

Guardian means the person appointed by a court through a legal procedure to make decisions for a ward. A **Guardianship** is established by such court appointment.

Health care means any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental health.

Health care decision means giving informed consent, refusing to give informed consent, or withdrawing informed consent to health care.

Health Care Power of Attorney means a legal document that lets the principal authorize an agent to make health care decisions for the principal in most health care situations when the principal can no longer make such decisions. Also, the principal can authorize the agent to gather protected health information for and on behalf of the principal immediately or at any other time. A Health Care Power of Attorney is NOT a financial power of attorney.

The Health Care Power of Attorney document also can be used to nominate person(s) to act as guardian of the principal's person or estate. Even if a court appoints a guardian for the principal, the Health Care Power of Attorney remains in effect unless the court rules otherwise.

Life-sustaining treatment means any medical procedure, treatment, intervention or other measure that, when administered to a patient, mainly prolongs the process of dying.

Living Will Declaration means a legal document that lets a competent adult ("declarant") specify what health care the declarant wants or does not want when he or she becomes terminally ill or permanently unconscious and can no longer make his or her wishes known. It is NOT and does not replace a will, which is used to appoint an executor to manage a person's estate after death.

Permanently unconscious state means an irreversible condition in which the patient is permanently unaware of himself or herself and surroundings. At least two physicians must examine the patient and agree that the patient has totally lost higher brain function and is unable to suffer or feel pain.

Principal means a competent adult who signs a Health Care Power of Attorney.

Terminal condition means an irreversible, incurable, and untreatable condition caused by disease, illness or injury from which, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by a principal's attending physician and one other physician who has examined the principal, both of the following apply: (1) there can be no recovery and (2) death is likely to occur within a relatively short time if life-sustaining treatment is not administered.

Ward means the person the court has determined to be incompetent. The ward's person, financial estate, or both, is protected by a guardian the court appoints and oversees.

Naming of My Agent. The person named below is my agent, who will make health care decisions for me as authorized in this document.

Agent's name and relationship: _____

Address: _____

Telephone number(s): _____

☐ **By placing my initials, signature, check or other mark in this box, I specifically authorize my agent to obtain my protected health care information immediately and at any future time.**

Guidance to Agent. My agent will make health care decisions for me based on my instructions in this document and my wishes otherwise known to my agent. If my agent believes that my wishes conflict with what is in this document, this document will take precedence. If there are no instructions and if my wishes are unclear or unknown for any particular situation, my agent will determine my best interests after considering the benefits, the burdens and the risks that might result from a given decision. If no agent is available, this document will guide decisions about my health care.

Naming of alternate agent(s). If my agent named above is not immediately available or is unwilling or unable to make decisions for me, then I name, in the following order of priority, the persons listed below as my alternate agents *[cross out any unused lines]*:

X out area if not used

First alternate agent's name and relationship: _____

Address: _____

Telephone number(s): _____

Second alternate agent's name and relationship: _____

Address: _____

Telephone number(s): _____

Any person can rely on a statement by any alternate agent named above that he or she is properly acting under this document and such person does not have to make any further investigation or inquiry.

Authority of Agent. Except for those items I have crossed out and subject to any choices I have made in this Health Care Power of Attorney, my agent has full and complete authority to make all health care decisions for me. This authority includes, but is not limited to, the following:

1. To consent to the administration of pain-relieving drugs or treatment or procedures (including surgery) that my agent, upon medical advice, believes may provide comfort to me, even though such drugs, treatment or procedures may hasten my death.

2. If I am in a terminal condition and I do not have a Living Will Declaration that addresses treatment for such condition, to make decisions regarding life-sustaining treatment, including artificially or technologically supplied nutrition or hydration.

3. To give, withdraw or refuse to give informed consent to any health care procedure, treatment, interventions or other measure.

4. To request, review and receive any information, verbal or written, regarding my physical or mental condition, including, but not limited to, all my medical and health care records.

5. To consent to further disclosure of information and to disclose medical and related information concerning my condition and treatment to other persons.

6. To execute for me any releases or other documents that may be required in order to obtain medical and related information.

7. To execute consents, waivers and releases of liability for me and for my estate to all persons who comply with my agent's instructions and decisions. To indemnify and hold harmless, at my expense, any person who acts while relying on this Health Care Power of Attorney. I will be bound by such indemnity entered into by my agent.

8. To select, employ and discharge health care personnel and services providing home health care and the like.

9. To select, contract for my admission to, transfer me to or authorize my discharge from any medical or health care facility, including, but not limited to, hospitals, nursing homes, assisted living facilities, hospices, adult homes and the like.

10. To transport me or arrange for my transportation to a place where this Health Care Power of Attorney is honored, if I am in a place where the terms of this document are not enforced.

11. To complete and sign for me the following:

- Consents to health care treatment, or to the issuing of Do Not Resuscitate (DNR) Orders or other similar orders; and
- Requests to be transferred to another facility, to be discharged against health care advice, or other similar requests; and
- Any other document desirable or necessary to implement health care decisions that my agent is authorized to make pursuant to this document.

Special Instructions. [These instructions apply only if I DO NOT have an active Living Will Declaration.]

☐ **By placing my initials, signature, check or other mark in this box, I specifically authorize my agent to refuse or, if treatment has started, to withdraw consent to, the provision of artificially or technologically supplied nutrition or hydration if I am in a permanently unconscious state AND my physician and at least one other physician who has examined me have determined, to a reasonable degree of medical certainty, that artificially or technologically supplied nutrition and hydration will not provide comfort to me or relieve my pain.** [R.C. §1337.13(E)(2)(a) and (b)]

Limitations of Agent's Authority. I understand there are limitations to the authority of my agent under Ohio law:

1. My agent does not have authority to refuse or withdraw informed consent to health care necessary to provide comfort care.

2. My agent does not have the authority to refuse or withdraw informed consent to health care if I am pregnant, if the refusal or withdrawal of the health care would terminate the pregnancy, unless the pregnancy or the health care would pose a substantial risk to my life, or unless my attending physician and at least one other physician to a reasonable degree of medical certainty determines that the fetus would not be born alive.

3. My agent cannot order the withdrawal of life-sustaining treatment, including artificially or technologically supplied nutrition or hydration, unless I am in a terminal condition or in a permanently unconscious state and two physicians have determined that life-sustaining treatment would not or would no longer provide comfort to me or alleviate my pain.

4. If I previously consented to any health care, my agent cannot withdraw that treatment unless my condition has significantly changed so that the health care is significantly less beneficial to me, or unless the health care is not achieving the purpose for which I chose the health care.

Additional Instructions or Limitations. I may give additional instructions or impose additional limitations on the authority of my agent. Below are my specific instructions or limitations:

[If the space below is not sufficient, you may attach additional pages. If you do not have any additional instructions or limitations, write "None" below.]

NOMINATION OF GUARDIAN

[R.C. §1337.28 (A) and R.C. §2111.121]

[You may, but are not required to, use this document to nominate a guardian, should guardianship proceedings be started, for your person or your estate.]

I understand that any person I nominate is not required to accept the duties of guardianship, and that the probate court maintains jurisdiction over any guardianship. [R.C. §2111.121(C)]

I understand that the court will honor my nominations except for good cause shown or disqualification. [R.C. §2111.121(B)]

I understand that, if a **guardian of the person** is appointed for me, such guardian's duties would include making day-to-day decisions of a personal nature on my behalf, such as food, clothing and living arrangements, but this or any subsequent Health Care Power of Attorney would remain in effect and control health care decisions for me, unless determined otherwise by the court. The court will determine limits, suspend or terminate this or any subsequent Health Care Power of Attorney, if they find that the limitation, suspension or termination is in my best interests. [R.C. §1337.28 (C)]

I intend that the authority given to my agent in my Health Care Power of Attorney will eliminate the need for any court to appoint a guardian of my person. However, should such proceedings start, I nominate the person(s) below in the order listed as **guardian of my person.**

☐ By writing my initials, signature, a check mark or other mark in this box, I nominate my agent and alternate agent(s), if any, to be **guardian of my person**, in the order named above.

If I do not choose my agent or an alternate agent to be the **guardian of my person**, I choose the following person(s), in this order *[cross out any unused lines]:*

X out area if not used

Guardian of my person's name and relationship: _____

Address: _____

Telephone number(s): _____

Alternate guardian of my person's name and relationship: _____

Address: _____

Telephone number(s): _____

Guardian of the estate means the person appointed by a court to make financial decisions on behalf of the ward, with the court's involvement. The guardian of the estate is required to be bonded, unless bond is waived in writing or the court finds it unnecessary.

☐ By placing my initials, signature, check or other mark in this box, I nominate my agent or alternate agent(s), if any, as **guardian of my estate**, in the order named above.

If I do not choose my agent or an alternate agent to be the **guardian of my estate**, I choose the following person(s), in this order *[cross out any unused lines]:*

X out area if not used

Guardian of my estate and relationship: _____

Address: _____

Telephone number(s): _____

Alternate guardian of my estate and relationship: _____

Address: _____

Telephone number(s): _____

☐ By placing my initials, signature, check or other mark in this box, I direct that bond be waived for the guardian or successor **guardian of my estate.** [R.C. §1337.28 (B)]

If I do **not** make any mark in this box, it means that I expect the guardian or successor guardian of my estate to be bonded. [R.C. §1337.28 (B)]

No Expiration Date. This Health Care Power of Attorney will have no expiration date and will not be affected by my disability or by the passage of time.

Enforcement by Agent. My agent may take for me, at my expense, any action my agent considers advisable to enforce my wishes under this document.

Release of Agent's Personal Liability. My agent will not be liable to me or any other person for any breach of duty unless such breach of duty was committed dishonestly, with an improper motive, or with reckless indifference to the purposes of this document or my best interests. [R.C. §1337.35]

Copies are the Same as Original. Any person may rely on a copy of this document. [R.C. §1337.26(D)]

Out of State Application. I intend that this document be honored in any jurisdiction to the extent allowed by law. [R.C. §1337.26(C)]

I have completed a **Living Will Declaration**: Yes ☐ No ☐

SIGNATURE of PRINCIPAL

I understand that I am responsible for telling members of my family and my physician, my lawyer, my religious advisor and others about this Health Care Power of Attorney. I understand I may give copies of this Health Care Power of Attorney to any person.

I understand that I may file a copy of this Health Care Power of Attorney with the probate court for safekeeping. [R.C. §1337.12(E)(3)]

I understand that I must sign this Health Care Power of Attorney and state the date of my signing, and that my signing either must be witnessed by two adults who are eligible to witness my signing OR the signing must be acknowledged before a notary public. [R.C. §1337.12]

I sign my name to this Health Care Power of Attorney

on _____ , at_____ , Ohio.

_____

Principal

[Choose Witnesses OR a Notary Acknowledgment.]

WITNESSES [R.C. §1337.12(B)]

[The following persons CANNOT serve as a witness to this Health Care Power of Attorney:

- *Your agent, if any;*
- *The guardian of your person or estate, if any;*
- *Any alternate or successor agent or guardian, if any;*
- *Anyone related to you by blood, marriage, or adoption (for example, your spouse and children);*
- *Your attending physician; and*
- *The administrator of any nursing home where you are receiving care.]*

I attest that the principal signed or acknowledged this Health Care Power of Attorney in my presence, and that the principal appears to be of sound mind and not under or subject to duress, fraud or undue influence.

_____/_____/_____

Witness One's Signature | Witness One's Printed Name | Date

_____

Witness One's Address

_____/_____/_____

Witness Two's Signature | Witness Two's Printed Name | Date

_____

Witness Two's Address

OR, if there are no witnesses:

NOTARY ACKNOWLEDGMENT [R.C. §1337.12]

State of Ohio
County of _____ ss.

On_____, before me, the undersigned notary public, personally appeared

_____, principal of the above Health Care Power of Attorney, and who has acknowledged that (s)he executed the same for the purposes expressed therein. I attest that the principal appears to be of sound mind and not under or subject to duress, fraud or undue influence.

_____

Notary Public

My Commission Expires: _____

My Commission is Permanent ☐

NOTICE TO ADULT EXECUTING THIS DOCUMENT

This is an important legal document. Before executing this document, you should know these facts:

This document gives the person you designate (the attorney in fact) the power to make MOST health care decisions for you if you lose the capacity to make informed health care decisions for yourself. This power is effective only when your attending physician determines that you have lost the capacity to make informed health care decisions for yourself and, notwithstanding this document, as long as you have the capacity to make informed health care decisions for yourself, you retain the right to make all medical and other health care decisions for yourself.

You may include specific limitations in this document on the authority of the attorney in fact to make health care decisions for you.

Subject to any specific limitations you include in this document, if your attending physician determines that you have lost the capacity to make an informed decision on a health care matter, the attorney in fact GENERALLY will be authorized by this document to make health care decisions for you to the same extent as you could make those decisions yourself, if you had the capacity to do so. The authority of the attorney in fact to make health care decisions for you GENERALLY will include the authority to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition.

HOWEVER, even if the attorney in fact has general authority to make health care decisions for you under this document, the attorney in fact NEVER will be authorized to do any of the following:

(1) Refuse or withdraw informed consent to life-sustaining treatment, unless your attending physician and one other physician who examines you determine, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that either of the following applies:

(a) You are suffering from an irreversible, incurable and untreatable condition caused by disease, illness, or injury from which

(i) there can be no recovery and

(ii) your death is likely to occur within a relatively short time if life-sustaining treatment is not administered, and your attending physician additionally determines, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that there is no reasonable possibility that you will regain the capacity to make informed health care decisions for yourself.

(b) You are in a state of permanent unconsciousness that is characterized by you being irreversibly unaware of yourself and your environment and by a total loss of cerebral cortical functioning, resulting in you having no capacity to experience pain or suffering, and your attending physician additionally determines, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that there is no reasonable possibility that you will regain the capacity to make informed health care decisions for yourself;

(2) Refuse or withdraw informed consent to health care necessary to provide you with comfort care (except that, if the attorney in fact is not prohibited from doing so under (4) below, the attorney in fact could refuse or withdraw informed consent to the provision of nutrition or hydration to you as described under (4) below). **(You should understand that comfort care is defined in Ohio law to mean artificially or technologically administered sustenance (nutrition) or fluids (hydration) when administered to diminish your pain or discomfort, not to postpone your death, and any other**

Notice as required by Ohio Revised Code §1337.17

medical or nursing procedure, treatment, intervention, or other measure that would be taken to diminish your pain or discomfort, not to postpone your death. Consequently, if your attending physician were to determine that a previously described medical or nursing procedure, treatment, intervention, or other measure will not or no longer will serve to provide comfort to you or alleviate your pain, then, subject to (4) below, your attorney in fact would be authorized to refuse or withdraw informed consent to the procedure, treatment, intervention, or other measure.);

(3) Refuse or withdraw informed consent to health care for you if you are pregnant and if the refusal or withdrawal would terminate the pregnancy (unless the pregnancy or health care would pose a substantial risk to your life, or unless your attending physician and at least one other physician who examines you determine, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that the fetus would not be born alive);

(4) Refuse or withdraw informed consent to the provision of artificially or technologically administered sustenance (nutrition) or fluids (hydration) to you, unless:

(a) You are in a terminal condition or in a permanently unconscious state.

(b) Your attending physician and at least one other physician who has examined you determine, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that nutrition or hydration will not or no longer will serve to provide comfort to you or alleviate your pain.

(c) If, but only if, you are in a permanently unconscious state, you authorize the attorney in fact to refuse or withdraw informed consent to the provision of nutrition or hydration to you by doing both of the following in this document:

(i) Including a statement in capital letters or other conspicuous type, including, but not limited to, a different font, bigger type, or boldface type, that the attorney in fact may refuse or withdraw informed consent to the provision of nutrition or hydration to you if you are in a permanently unconscious state and if the determination that nutrition or hydration will not or no longer will serve to provide comfort to you or alleviate your pain is made, or checking or otherwise marking a box or line (if any) that is adjacent to a similar statement on this document;

(ii) Placing your initials or signature underneath or adjacent to the statement, check, or other mark previously described.

(d) Your attending physician determines, in good faith, that you authorized the attorney in fact to refuse or withdraw informed consent to the provision of nutrition or hydration to you if you are in a permanently unconscious state by complying with the above requirements of (4)(c)(i) and (ii) above.

(5) Withdraw informed consent to any health care to which you previously consented, unless a change in your physical condition has significantly decreased the benefit of that health care to you, or unless the health care is not, or is no longer, significantly effective in achieving the purposes for which you consented to its use.

Additionally, when exercising authority to make health care decisions for you, the attorney in fact will have to act consistently with your desires or, if your desires are unknown, to act in your best interest. You may express your desires to the attorney in fact by including them in this document or by making them known to the attorney in fact in another manner.

When acting pursuant to this document, the attorney in fact GENERALLY will have the same rights that you have to receive information about proposed health care, to review health care records, and to consent to the disclosure of health care records. You can limit that right in this document if you so choose.

Notice as required by Ohio Revised Code §1337.17

Generally, you may designate any competent adult as the attorney in fact under this document. However, you CANNOT designate your attending physician or the administrator of any nursing home in which you are receiving care as the attorney in fact under this document. Additionally, you CANNOT designate an employee or agent of your attending physician, or an employee or agent of a health care facility at which you are being treated, as the attorney in fact under this document, unless either type of employee or agent is a competent adult and related to you by blood, marriage, or adoption, or unless either type of employee or agent is a competent adult and you and the employee or agent are members of the same religious order.

This document has no expiration date under Ohio law, but you may choose to specify a date upon which your durable power of attorney for health care will expire. However, if you specify an expiration date and then lack the capacity to make informed health care decisions for yourself on that date, the document and the power it grants to your attorney in fact will continue in effect until you regain the capacity to make informed health care decisions for yourself.

You have the right to revoke the designation of the attorney in fact and the right to revoke this entire document at any time and in any manner. Any such revocation generally will be effective when you express your intention to make the revocation. However, if you made your attending physician aware of this document, any such revocation will be effective only when you communicate it to your attending physician, or when a witness to the revocation or other health care personnel to whom the revocation is communicated by such a witness communicates it to your attending physician.

If you execute this document and create a valid durable power of attorney for health care with it, it will revoke any prior, valid durable power of attorney for health care that you created, unless you indicate otherwise in this document.

This document is not valid as a durable power of attorney for health care unless it is acknowledged before a notary public or is signed by at least two adult witnesses who are present when you sign or when you acknowledge your signature. No person who is related to you by blood, marriage, or adoption may be a witness. The attorney in fact, your attending physician, and the administrator of any nursing home in which you are receiving care also are ineligible to be witnesses. If there is anything in this document that you do not understand, you should ask your lawyer to explain it to you.

Notice as required by Ohio Revised Code §1337.17

ADDENDUM

This notice was not updated when certain provisions of the law regarding the Health Care Power of Attorney were changed in March 2014. Please be advised of the following changes:

You may, but are not required to, authorize your agent to get your health information, including information that is protected by law and otherwise not available to your agent. You can authorize your agent to have access to your health information immediately upon your signing of this document or at any later time, even though you are still able to make your own health care decisions.

You may also, but are not required to, use this document to name guardians for you or your estate should guardianship proceedings be started.

State of Ohio
Living Will Declaration
Notice to Declarant

The purpose of this Living Will Declaration is to document your wish that life-sustaining treatment, including artificially or technologically supplied nutrition and hydration, be withheld or withdrawn if you are unable to make informed medical decisions and are in a terminal condition or in a permanently unconscious state. This Living Will Declaration does not affect the responsibility of health care personnel to provide comfort care to you. Comfort care means any measure taken to diminish pain or discomfort, but not to postpone death.

If you would not choose to limit any or all forms of life-sustaining treatment, including CPR, you have the legal right to so choose and may wish to state your medical treatment preferences in writing in a different document.

Under Ohio law, a Living Will Declaration is applicable **only to individuals in a terminal condition or a permanently unconscious state.** If you wish to direct medical treatment in other circumstances, you should prepare a Health Care Power of Attorney. If you are in a terminal condition or a permanently unconscious state, this Living Will Declaration takes precedence over a Health Care Power of Attorney.

[You should consider completing a new Living Will Declaration if your medical condition changes or if you later decide to complete a Health Care Power of Attorney. If you have both a Living Will Declaration and a Health Care Power of Attorney, you should keep copies of these documents together. Bring your document(s) with you whenever you are a patient in a health care facility or when you update your medical records with your physician.]

Ohio
Living Will Declaration

[R.C. §2133]

_____

(Full Name)

_____

(Birth Date)

This is my Living Will Declaration. I revoke all prior Living Will Declarations signed by me. I understand the nature and purpose of this document. If any provision is found to be invalid or unenforceable, it will not affect the rest of this document.

I am of sound mind and not under or subject to duress, fraud or undue influence. I am a competent adult who understands and accepts the consequences of this action. I voluntarily declare my direction that my dying not be artificially prolonged. [R.C. §2133.02 (A)(1]]

I intend that this Living Will Declaration will be honored by my family and physicians as the final expression of my legal right to refuse certain health care. [R.C.§2133.03(B)(2)]

Definitions

Adult means a person who is 18 years of age or older.

Agent or attorney-in-fact means a competent adult who a person (the "principal") can name in a Health Care Power of Attorney to make health care decisions for the principal.

Anatomical gift means a donation of part or all of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research or education.

Artificially or technologically supplied nutrition or hydration means food and fluids provided through intravenous or tube feedings. *[You can refuse or discontinue a feeding tube, or authorize your Health Care Power of Attorney agent to refuse or discontinue artificial nutrition or hydration.]*

Comfort care means any measure, medical or nursing procedure, treatment or intervention, including nutrition and or hydration, that is taken to diminish a patient's pain or discomfort, but not to postpone death.

CPR means cardiopulmonary resuscitation, one of several ways to start a person's breathing or heartbeat once either has stopped. It does not include clearing a person's airway for a reason other than resuscitation.

Declarant means the person signing the Living Will Declaration.

Do Not Resuscitate or DNR Order means a physician's medical order that is written into a patient's record to indicate that the patient should not receive cardiopulmonary resuscitation.

Health care means any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental health.

Health care decision means giving informed consent, refusing to give informed consent, or withdrawing informed consent to health care.

Health Care Power of Attorney means a legal document that lets the principal authorize an agent to make health care decisions for the principal in most health care situations when the principal can no longer make such decisions. Also, the principal can authorize the agent to gather protected health information for and on behalf of the principal immediately or at any other time. A Health Care Power of Attorney is NOT a financial power of attorney.

The Health Care Power of Attorney document also can be used to nominate person(s) to act as guardian of the principal's person or estate. Even if a court appoints a guardian for the principal, the Health Care Power of Attorney remains in effect unless the court rules otherwise.

Life-sustaining treatment means any medical procedure, treatment, intervention or other measure that, when administered to a patient, mainly prolongs the process of dying.

Living Will Declaration means a legal document that lets a competent adult ("declarant") specify what health care the declarant wants or does not want when he or she becomes terminally ill or permanently unconscious and can no longer make his or her wishes known. It is NOT and does not replace a will, which is used to appoint an executor to manage a person's estate after death.

Permanently unconscious state means an irreversible condition in which the patient is permanently unaware of himself or herself and surroundings. At least two physicians must examine the patient and agree that the patient has totally lost higher brain function and is unable to suffer or feel pain.

Principal means a competent adult who signs a Health Care Power of Attorney.

Terminal condition means an irreversible, incurable and untreatable condition caused by disease, illness or injury from which, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by a declarant's attending physician and one other physician who has examined the declarant, both of the following apply: (1) there can be no recovery and (2) death is likely to occur within a relatively short time if life-sustaining treatment is not administered.

No Expiration Date. This Living Will Declaration will have no expiration date. However, I may revoke it at any time. [R.C. §2133.04(A)]

Copies the Same as Original. Any person may rely on a copy of this document. [R.C. §2133.02(C)]

Out of State Application. I intend that this document be honored in any jurisdiction to the extent allowed by law. [R.C. §2133.14]

I have completed a **Health Care Power of Attorney:** Yes ☐ No ☐

Notifications. *[Note: You do not need to name anyone. If no one is named, the law requires your attending physician to make a reasonable effort to notify one of the following persons in the order named: your guardian, your spouse, your adult children who are available, your parents, or a majority of your adult siblings who are available.]*

In the event my attending physician determines that life-sustaining treatment should be withheld or withdrawn, my physician shall make a reasonable effort to notify one of the persons named below, in the following order of priority *[cross out any unused lines]*: [R.C. §2133.05(2)(a)]

X out area if not used

First contact's name and relationship: _____

Address: _____

Telephone number(s): _____

Second contact's name and relationship: _____

Address: _____

Telephone number(s): _____

Third contact's name and relationship: _____

Address: _____

Telephone number(s): _____

If I am in a **TERMINAL CONDITION** and unable to make my own health care decisions, OR if I am in a **PERMANENTLY UNCONSCIOUS STATE** and there is no reasonable possibility that I will regain the capacity to make informed decisions, then I direct my physician to let me die naturally, providing me only with **comfort care**.

For the purpose of providing comfort care, I authorize my physician to:

1. Administer no life-sustaining treatment, including CPR;
2. Withhold or withdraw artificially or technologically supplied nutrition or hydration, provided that, if I am in a permanently unconscious state, I have authorized such withholding or withdrawal under **Special Instructions** below and the other conditions have been met;
3. Issue a DNR Order; and
4. Take no action to postpone my death, providing me with only the care necessary to make me comfortable and to relieve pain.

Special Instructions.

☐ **By placing my initials, signature, check or other mark in this box, I specifically authorize my physician to withhold, or if treatment has commenced, to withdraw consent to the provision of artificially or technologically supplied nutrition or hydration if I am in a permanently unconscious state AND my physician and at least one other physician who has examined me have determined, to a reasonable degree of medical certainty, that artificially or technologically supplied nutrition and hydration will not provide comfort to me or relieve my pain.** [R.C. §2133.02(A)(3) and R.C. §2133.08]

Additional instructions or limitations.

[If the space below is not sufficient, you may attach additional pages.
If you do not have any additional instructions or limitations, write "None" below.]

[The "anatomical gift" language provided below is required by ORC §2133.07(C). Donate Life Ohio recommends that you indicate your authorization to be an organ, tissue or cornea donor at the Ohio Bureau of Motor Vehicles when receiving a driver license or, if you wish to place restrictions on your donation, on a Donor Registry Enrollment Form (attached) sent to the Ohio Bureau of Motor Vehicles.]

[If you use this living will to declare your authorization, indicate the organs and/or tissues you wish to donate and cross out any purposes for which you do not authorize your donation to be used. Please see the attached Donor Registry Enrollment Form for help in this regard. In all cases, let your family know your declared wishes for donation.]

ANATOMICAL GIFT (optional)

In the hope that I may help others upon my death, I hereby give the following body parts for the following purposes: *[Complete both sections.]*

Section 1. Body Parts. Check "All organs, tissue and eyes" or all that apply below that box.

☐ All organs, tissue and eyes. If you check this box, do not check any other boxes in Section 1 and proceed to Section 2.

☐ Heart	☐ Lungs	☐ Liver (and associated vessels)	☐ Pancreas/Islet Cells
☐ Small Bowel	☐ Intestines	☐ Kidneys (and associated vessels)	☐ Eyes/Corneas
☐ Heart Valves	☐ Bone	☐ Tendons	☐ Ligaments
☐ Veins	☐ Fascia	☐ Skin	☐ Nerves

Section 2. Purposes. Check "All purposes" or all that apply below that box.

☐ All Purposes. If you check this box, do not check any boxes below.

☐ Transplantation ☐ Therapy ☐ Research ☐ Education

If I do not indicate a desire to donate all or some of my body parts by filling in the lines above, no presumption is created about my desire to make or refuse to make an anatomical gift.

SIGNATURE of DECLARANT

I understand that I am responsible for telling members of my family, the agent named in my Health Care Power of Attorney (if I have one), my physician, my lawyer, my religious advisor and others about this Living Will Declaration. I understand I may give copies of this Living Will Declaration to any person.

I understand that I must sign (or direct an individual to sign for me) this Living Will Declaration and state the date of the signing, and that the signing either must be witnessed by two adults who are eligible to witness the signing OR the signing must be acknowledged before a notary public. [R.C. §2133.02]

I sign my name to this Living Will Declaration

on_____, at _____, Ohio.

_____
Declarant

[Choose Witnesses OR a Notary Acknowledgment.]

WITNESSES [R.C. §2133.02(B)(1)]

[The following persons CANNOT serve as a witness to this Living Will Declaration:

- *Your agent in your Health Care Power of Attorney, if any;*
- *The guardian of your person or estate, if any;*

- *Any alternate agent or guardian, if any;*
- *Anyone related to you by blood, marriage or adoption (for example, your spouse and children);*
- *Your attending physician; and*
- *The administrator of the nursing home where you are receiving care.]*

I attest that the Declarant signed or acknowledged this Living Will Declaration in my presence, and that the Declarant appears to be of sound mind and not under or subject to duress, fraud or undue influence.

_____/_____/_____

Witness One's Signature | Witness One's Printed Name | Date

_____

Witness One's Address

_____/_____/_____

Witness Two's Signature | Witness Two's Printed Name | Date

_____

Witness Two's Address

OR, if there are no witnesses,

NOTARY ACKNOWLEDGMENT [R.C. §2133.02(B)(2)]

State of Ohio
County of _____ ss.

On _____, before me, the undersigned notary public, personally appeared _____, declarant of the above Living Will Declaration, and who has acknowledged that (s)he executed the same for the purposes expressed therein. I attest that the declarant appears to be of sound mind and not under or subject to duress, fraud or undue influence.

_____

Notary Public

My Commission Expires: _____

My Commission is Permanent: ☐

Trust Design Issues

February 25, 2026

Presented by:
Terrence L. Seeberger and
Lauren Kellett

Focus of Today's Presentation

- Because of the doubling of the federal estate tax exemption (at least through 2026) to $15,000,000 currently ($30,000,000 for couples), most of you will not have an occasion to design a trust with estate tax avoidance as a primary concern. This would have been true even if the estate tax exemption had not been doubled. Given the likelihood of extension of elevated exemption levels, this will continue to be true.

- This presentation will focus on the type of trust planning you are likely to need to engage in, which is drafting workable trusts for individuals and families with far less than $30 million.

Scene from the movie Rain Man

1. Was Charlie Babitt entitled to a copy of his father's trust?

2. Who in entitled to a copy of the trust?

3. What are the notice provisions under the Ohio Trust Code?

What is a Trust?

Relationship (not an entity) created by a **settlor** (donor or grantor) who transfers legal title to property (the **corpus**) to a **trustee**, who holds the corpus for the benefit of one or more **beneficiaries.**

Terms of the trust are usually contained in a **governing document** ("declaration of trust," "trust agreement," or "trust").

Trusts today are less a tax avoidance document, and much more a document to intelligently direct income and assets to the right beneficiaries, and protect those assets where needed.

Why are trusts relevant for settlors with less than $15 million?

As seniors age and approach death, the potential heirs begin lining up to collect and even engage in some unofficial "estate planning" of their own for vulnerable seniors.

1. bank and investment accounts into "joint and survivor," and
2. real property becoming subject to joint and survivorship deeds

A trust is a senior's chance to ensure that the senior's own testamentary scheme for all of the senior's assets is put in place – in clear language.

What Ohio law governs the Trust?

OHIO TRUST CODE

Effective date: January 1, 2007

Absent language to the contrary, a trust is presumed to be revocable.

The creator of a trust is known under the Code as “the Settlor.”

If three or more co-trustees are serving, majority rules, unless the trust instrument states otherwise.

Ohio Trust Code (Ohio Revised Code), Title 58

Ohio common law

Federal laws governing estate, gift, and income taxation

What are some common forms of trusts?

Revocable living (inter-vivos) trusts

Irrevocable inter-vivos trusts; including Ohio Legacy Trusts, (provided for in Chapter 5816 of the Ohio Revised Code)

Testamentary trusts (trust created in a will)

What about testamentary trusts? What is good/what is not so good about them?

Not good – subject to probate court jurisdiction throughout their duration.

Good – subject to probate court jurisdiction through their duration.

Why are trusts so popular?

Part of the reason is proliferation of “estate planning seminars” and “trust mills” (e.g., Newcomerstown trust mill, with price list for various type of trusts, with irrevocable lifetime trust being least expensive)

Trust mills often generate one size fits all trust agreements, or trust agreements that are a mere assembly of off the shelf provisions

Client desire to “avoid probate,” or “avoid all taxes.”

Is there a downside to avoiding probate?

Losing probate court oversight/ no fiduciary bond

What is the downside of a pre-packaged trust agreement?

-Potential for lack of clarity of purpose, internal inconsistency, unintended consequences, and expensive litigation

-Clients sign trust agreements they do not understand, that may cause results the clients never intended

-The trust could be creating a situation that is completely unnecessary for a client- if irrevocable, they are stuck

Cookie Cutter Trust

-Have you seen cookie-cutter trusts that are an assembly of “off the shelf” provisions?

-What’s wrong with those? What’s the risk?

What are the legal requirements to create a trust in Ohio?

Transfer of property to another person as trustee during the Settlor's lifetime or by will or other disposition effective at death

-Settlor has capacity

-Settlor is defined as a person

A "person" is a defined term

-Trust has a definite beneficiary

-Trustee has duties to perform

-Same person is not the sole trustee and the sole beneficiary

-A trust is valid regardless of the size of the corpus

ORC 5804.01; ORC 5804.02

Again, (to re-cap), what is a trust?

It is an expression of the client's (settlor's) intent, not the attorney's intent, nor the intent of any of the beneficiaries.

It is designed for the client's unique circumstances

It is a document signed by a settlor who understands and approves of its contents, and who understands what a trust can accomplish and what it cannot accomplish

What can an intervivos trust do?

-Maintain privacy, but requires reports to beneficiaries. ORC 5808.13

-Avoid probate administration and executor's commissions. ORC 2113.35

-Avoid ancillary (out-of-state) probate proceedings, such as for Florida real estate

-Protect the estate plan from the surviving spouse – assets in a trust are not part of the estate, and thus not subject to a right of a surviving spouse to elect against a will. *Dumas v Dumas Estate* (1994), 68 Ohio St. 3d 405

-Provide professional asset management

-Maximize tax savings for charitable contributions, such as through a charitable remainder trust

-Protect trust assets from creditors' claims against settlor's estate – *Schofield v Cleveland Trust* (1939), 135 Ohio St. 328

-Protect trust assets from creditors' claims against beneficiaries, such as through spend-thrift provisions.

-Control asset disposition

Since 2012 estate tax exemption portability may be preserved by election on a timely filed estate tax return for this first spouse to die

(American Taxpayer Relief Act of 2012) Must be done within nine months of death

Are there exceptions to the effectiveness of a trust to protect against a settlor's creditors?

Souers v *Luginbill* (3rd District), tort creditor that filed suit prior to settlor's death but obtained judgment after death, can reach trust assets

ORC 5805.06, during settlor's lifetime, creditors can access revocable trust assets

What **can't** a trust do?

-Avoid all taxes, expenses, or litigation, such as attacks on (a) validity, (b) funding, or (c) construction of trust terms.

-Protect trust assets from settlor's creditors while the settlor is living, cf ORC Chapter 1335 (fraudulent conveyances)

-Make settlor eligible for Medicaid without requiring settlor to "spend down" assets; read ORC 5111.151 (countable assets)

-Protect trust assets (either outright, or from being considered as a factor in asset allocation) in a divorce proceeding. Trust assets may be taken into consideration for overall distribution. *Vulgamore v Vulgamore*. May take into consideration marital property wrongfully conveyed into a trust, such as re-titling of property without a spouse's knowledge, or other fraudulent conveyance. **ORC Chapter 1335**

Would you recommend a joint trust to a married couple, or separate trusts?

Generally, recommend separate trusts, especially for spouses in second marriages, each with own children, who are likely to want different testamentary schemes.

In designing a trust, what information would you like to obtain from the clients?

Why?

-What assets do clients have, and what are they likely to accumulate before death?

-Prior marriages and children by prior marriages? Any separately held assets?

-Are assets held in survivorship form?

-Who are the client's intended beneficiaries?

-What potential beneficiaries do clients intend to wholly or partly exclude or limit?

-Is competency, maturity, or health a concern as to any potential beneficiary?

Are claims of potential creditors a concern?

Does the client want to provide for any charity, such as a church?

Most important – in a perfect world, what does the client want to do with the client's assets?

Who should attend a meeting to discuss a potential trust?

Who should not? (Any person who is a potential/ prospective beneficiary)

Why not? (Potential beneficiaries will have an interest in steering the client/settlor to detriment of other beneficiaries and perhaps the settlor's true interest. Attorney wants the client to be totally candid, free from influence or fear of upsetting a family member).

From whom may an attorney receive compensation?

Answer – See Rule of Professional Conduct 1.8(f) on issue of "accepting compensation from other than client".

Lawyers shall not accept compensation unless (a) informed consent from the client; (b) no interference with the lawyer's independent professional judgment, and (c) client confidences are protected.

Order of trust provisions

Logical order helps; and I suggest:

(a) initial provisions
(b) dispositive provisions
(c) trustee, successors, removal, replacement
(d) trustee duties
(e) administrative provisions
(f) miscellaneous provisions

As part of a trust's initial provisions, do you believe it important to identify family members and intended beneficiaries?

Why?

Provide that trust can accept poured-over assets from an estate, and administer as if always part of trust assets

In will, provide for alternative disposition of poured-over assets in case trust is revoked before death, or if settlor does not have a presently in force trust.

Will needs “pour-over” provision, especially to catch property that was never re-titled in the trust’s name, ORC Sec. 2107.63.

What provisions should a trust have in it for how it can be amended?

What provisions should a trust have for the potential incapacity of the settlor during the settlor's lifetime?

What about with respect to potential restoration to capacity?

Selecting a trustee

-One of the most important decisions a settlor will make

-encourage clients to put a lot of thought into this decision

-“Wrong” decision can lead to delay in trust distribution; feuding beneficiaries; litigation

Who is the trustee?

A. Settlor as own trustee- acts until death or incapacity

B. Third party

-surviving spouse

-adult child

-other family member/family friend

C. Corporate Trustee- typically named after death of surviving spouse

D. Attorney as Trustee

Adult child/children as trustee

Where can this go wrong?

A. The “ringleader” sibling as trustee

-think they know best

-others feel resentment

-bias against certain siblings

B. Making all children co-trustees

-don’t want to leave anyone out

-“too many cooks in the kitchen”

C. Don’t know what they are doing

-not familiar with ORC rules

-working with an estate planning attorney can mitigate this

Corporate trustee

Pros:

-“professional” trustee- knows the ORC and how to act as a fiduciary
-non-biased
-no emotion driven decisions
-intermediary between conflicting siblings
-prudent investor rule

Cons:

-cost
-may not know beneficiaries well

Should the drafting attorney or member of that attorney's firm be named as an initial or successor trustee?

Why not?

Attorney as Trustee

EC 5-6 formerly counseled against an attorney even trying to influence a client to name the attorney as trustee.

Rule 1.8, Comment 8 – an attorney may now seek such an appointment, but only with client's informed consent (presumably with disclosure of projected financial return to the attorney).

Issue – is this the equivalent of an attorney soliciting a substantial testamentary gift from a client? (discouraged by Rules, see **Rule 1.8(c)(2))**

Attorney as trustee, cont'd

Risk – A drafting attorney may be a necessary, but compromised witness in a trust contest action.

Risk – in whose interest is an attorney who seeks to be named trustee, or successor trustee, acting – his own or the clients?

Risk – if the appointment is effectively a testamentary gift, the attorney – client relationship may be deemed "confidential relationship", rendering the gift (or trustee/successor trustee designation) suspect, perhaps jeopardizing validity of the trust itself.

What are your thoughts on…

(a) co-trustees?

(b) Trust advisors? Should their advice be controlling or persuasive only?

(c) Trust protectors?

(d) The drafting attorney as a trust advisor or trust protector?

What provisions do you recommend for ability (by whom) to remove or replace a trustee?

Is there a default process for removal, such as in **ORC 5807.06?**

Should the trust provide for dealing with an illiquid estate?

How and why?

Authorize trustee, in trustee's discretion, to pay mandatory expense of estate (Must be discretionary, to protect trust from estate creditors).

Authorize trustee to purchase assets from estate – even if executor and trustee are same person – to provide a "market" for these assets and prevent them from being liquidated too cheaply.

What about trust administration provisions that are effective during settlor's lifetime?

Specify the method(s) by which trust may be amended

Trust presumed revocable during settlor's lifetime; is "grantor trust," no tax disadvantage to accumulating income in trust

Specify whether income shall be paid out or accumulated, or either. Same for settlor?

What is spendthrift clause and how does it work?

Answers

See ORC, Chapter 5805

-Such clauses typically give a trustee discretion as to beneficiary distribution, and may restrict a beneficiary's ability to pledge an interest in trust assets (such as by disinheritance).

-To be effective, a trustee must have absolute “discretion” (discretion to distribute implies discretion not to distribute).

-Spendthrift clauses, in a revocable living trust, are principally aimed to protect the settlor’s beneficiaries.

Can a spendthrift clause defeat a mandatory distribution provision or a beneficiary unconditional right to withdraw?

Answer

No – as to a mandatory distribution or a beneficiary's unconditional right to withdraw, to the extent of the distribution at issue. *Fahey Banking Co. v. Carpenter* (Tenth App. Dist.), 2019-Ohio-679, Para. 12

For married couples, what type of survivorship (common accident) provisions do you recommend?

Does Ohio have a default standard or rule?

How might survivorship affect beneficiaries, especially of a couple in second marriage?

What are your thoughts on use of *in terrorem* (no contest) clauses in a trust?

-Many wills and trust have "*in terrorem*" (no contest) clauses, that essentially disinherit any beneficiary that contests, by litigation or otherwise, the validity of an instrument – such as by treating the litigant as pre-deceasing the settlor.

-Judgment call – whether to save the cost of defending a spurious claim v. chilling a bona-fide attempt to ensure a trust agreement was not procured by over- reaching, or to seek a construction of trust terms or challenge the conduct of a trustee? (Exclude the last two from the effect of an "*in terrorem*" clause)

-The law abhors a forfeiture.
-In terrorem clause does not have effect of placing a trustee's conduct beyond the reach of probate court, including review of the disposal of trust assets. *Kasapis v High Point Furniture* (9th App. dist.) 2006-Ohio-255

Should you draft a provision for termination of a trust that becomes too small to be economically administered?

Does the Trust Code (ORC 5804.14) provide a default standard, and what is it?

Does the Trust code provide a default set of duties?

Trustee duties are governed by Ohio Trust Code, Chapter 5808

Sec. 5808.02 provides for duty of loyalty (transactions by trustee with conflict of interest may be voidable) voidable at discretion of beneficiary affected by transaction

Sec. 5808.03 provides for duty of impartiality, with respect to investing, managing, and distributing trust property, "giving due regard to the beneficiaries' respective interests."

Sec. 5808.04 provides for duty of prudent administration ("reasonable care, skill, and caution") (cf. Uniform Prudent Investor Act, Chapter 5809)

Where the settlor's principal asset is a privately held business, it is difficult to diversify, and this may also be counter to settlor's wishes. **ORC 5809.03** – to diversity or not, cf *Puhl v U.S. Bank* (12th Dist.), 2015-Ohio-2083, **ORC 5809.03** (duty to diversify) can be negated by express language in trust instrument

Does the Trust code provide a set of trustee powers?

Answer

ORC, Chapter 5808 – provides standard set of trustee powers that do not need to, but can, be re-stated in the trust agreement.

ORC 5808.15 – 5808.16 set forth, and these enumerated powers are impliedly in the trust unless excluded in trust instrument

What are your thoughts about a trustee power to (a) hold or divest undiversified or speculative assets? (b) hold a closely held business?

How do you square these answers with the default prudent investor sections in ORC 5808.04 and Chapter 5809?

What is the Ohio Principal and Income Act (ORC Chapter 5812) and how can it apply in designing a trust?

Answers

Allocating expenditures and receipts to principal or income is important because an income beneficiary's interest is different from that of a remainder beneficiary.

Where a trust provides that all income goes to a beneficiary (especially a spouse), a trustee may not, without express trust language authority, make adjustment that reduce income.

Why is the Ohio Principal and Income Act important to a fiduciary?

-The trustee must balance the interests of the income and principal beneficiaries.

-The trustee cannot pick and chose what bills to pay from where.

-Ohio P and I act gives the trustee guidance on this – (trust document always supersedes if specific guidance is given there)

What disbursements come from income (unless the trust document says otherwise)

-one-half trustee fees

-one-half accounting fees, judicial services

-All other ordinary expenses incurred in connections with administration, management, or preservation of trust property, (such as ordinary repairs and recurring insurance premiums).

What disbursements come from principal (unless the trust document says otherwise)

-The remaining one-half of trustee fees, accounting fees, judicial proceedings

-Trustee compensation related to the acceptance, distribution, termination and sale of property

-Expenses of a proceeding concerning primarily principal (proceedings to protect trust property)

-Estate, inheritance and other transfer taxes
Disbursements related to environmental matter

What other trustee powers ought to be included in a trust?

Permission to hire- attorneys, accountants, appraisers, etc

Trustee compensation- Stark County default rule 74.2 – 0.2% principal held, 6.5% trust income, 1.0% principal distributed (Cuyahoga County rule 74 - 0.12% - trust first million)

Trust advisors – what responsibility; how controlling over trustee?

Trust protectors – degree of control and discretion to remove trustees and select successor trustees

-Trustee power to elect payment method (lump sum or periodic) to beneficiaries.

-Discretion to delay or time beneficiary distributions, such as to avoid claims by (a) creditors, (b) a beneficiary's divorcing spouse.

-But, recall a trust itself does not completely prevent a court from allocating its assets in a divorce proceeding, or taking into account trust assets in otherwise dividing assets for a divorcing couple.

What is the standard for judicial review of trustee discretion under a trust?

Answer

Judicial review of trustee discretion under a trust

ORC, Sec. 5808.14 covers judicial review of trustee discretion under a trust, stating in relevant part "(A) *The judicial standard of review for discretionary trust is that the trustee shall exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except that with respect to distribution decisions a reasonableness standard shall not be applied to the exercise of discretion by the trustee of a wholly discretionary trust. The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it.*"

Potential distribution provision

"When there is no living child of mine under age twenty-two (22), the Trustee shall divide the trust into as many equal shares as there are children of mine either then living, or who have died but left issue then living. The Trustee shall distribute one such share to each living child of mine, and one such share, per stirpes, to the then living issue of a deceased child of mine outright and free of trust."

How does the drafter ensure that a trust agreement is entered into validly?

Answer

-ORC 5804.02 requires that settlor have capacity (sound mind)
-Trust drafter has duty to assure that settlor understands every term of trust agreement, is of sound mind, and that trust agreement is not product of undue influence.

-Understanding trust agreement terms includes assuring that settlor understand the potential consequences of every term of trust agreement. -Rules that apply to validity of a will aply to making of a trust; a trust that is the product of undue influence will be set aside. *Schultz v Tedrick* (8th App Dist.) 2016-Ohio -1218

What is the attorney's duty with respect to the confidentiality of a trust instrument?

Why?

Are there exceptions?

Answers

Rule 1.6 – The duty of confidentiality applies equally to planning practitioners.

Why – potential heirs (and others who hope to benefit) begin to feel a sense of entitlement, become curious to know the settlor's estate plan and may attempt to alter it to their liking.

Exceptions – protect a vulnerable client and estate, perhaps as a predicate to an ORC 2109.50 action; use of trust certifications.

What may be given to a third party (financial institution, escrow agent) to prove the trust exists?

Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish a "certification of trust."

Trust Certification shall contain:

-Execution date;
-Identity of settlor;
-Identity and address of the trustee;
-Powers of the trustee;
-State the trust has not been revoked, modified or amended.

Ohio Trust Code

What are the classes of beneficiaries and why are they important?

Three classes of beneficiaries:

Current:	On the date of date of qualification, a distributee or permissible distributee of income or principal
Qualified:	A current beneficiary, a distributee or permissible distributee when the interests of the current beneficiary terminated
Other:	Neither a current or qualified beneficiary; a contingent beneficiary

Ohio Trust Code

May a trustee resign if the trust instrument does not provide for the trustee to resign?

Resignation of the Trustee

-ORC 5807.05 Trustee may resign upon at least 30 days' notice to the qualified beneficiaries, the settlor (if living) and all trustees.

-ORC 5801.23 4/3/2023 Termination of an Irrevocable trust as a result of trustee resignation or removal

-serves written notice and statement on necessary parties
-allows them time to object
-bars claims against outgoing trustee once objection window passes

Ohio Trust Code

Is the Trustee required to provide an accounting?

Annual Trust Report

-Receipts

-Disbursements

-Amount of trustee's compensation and source of payment

-List of trust assets and respective market values at year end

Ohio Trust Code

What is the maximum protection for a trust beneficiary?

Wholly Discretionary Trusts

-ORC Section 5801.01(y)

-Trust must be irrevocable or becomes irrevocable.

-Distributions of income or principal are at the sole, absolute, uncontrolled discretion of the trustee

-No standards to guide the trustee in exercising its discretion Beneficiary is not the settlor, or trustee

Ohio Trust Code

What is the Trustee's liability for breach of trust?

Damages for Breach of Trust

Trustee is liable to the beneficiaries for the greater of:

1) Amount required to restore the trust property had the breach not occurred

2) Profit the trustee made by reason of the breach

Ohio Revised Code Section 5801.22 (trust termination)

-Trustee serves written notice to the trust distributees when the trust terminates with several defined "descriptions," one of which is to define a "distribution objection period."

-Bars claims against the trustee if objections are not received within the distribution objection period.

-Distributee may give written consent prior to the expiration of the objection period.

-Code section defines actions by the trustee if an objection is timely filed.

Designing the Trust

Terrence L. Seeberger
Stark & Knoll Co., LPA
Akron, Ohio

Table of Contents

REVOCABLE TRUST DESIGN

Terrence L. Seeberger
Stark & Knoll Co., LPA
Akron, Ohio

This presentation will give a brief overview of what a trust is, its general purposes and limitations. This presentation will concentrate primarily on inter-vivos (living) revocable trust. Thereafter, it will focus on several broad topics – trustee duties, beneficiary rights and flexibility for changing family circumstances, as well as tax considerations, and an overview of other revocable trusts design considerations.

This presentation is not intended to cover all aspects of trust design.

I. What Is a Trust?

A trust is a relationship (not an entity) created by a settlor (i.e., donor or grantor) who transfers legal title to property (corpus)) to a trustee, who holds the corpus for the benefit of one or more beneficiaries. The beneficiaries' rights are set forth in the terms of the trust, which are usually contained in a governing document, which may be called a "declaration of trust" or "trust agreement." In Ohio, trusts are governed by the common law, and by the Ohio Revised Code, principally Title 58 of the Revised Code, which is often referred to as the Ohio Trust Code, which came into being in 2007.

II. Types of Trusts

Several kinds of trusts are recognized in Ohio. One that is not recommended is the oral trust, provided for in Ohio Revised Code, Sec. 5804.07, which is an oral declaration by an owner of property that the owner holds that property as a trustee. The terms of such a trust must be established by clear and convincing evidence.

Another is a testamentary trust, or a trust created in a will, that does not become effective until the death of the testator, and then only pursuant to the terms of the will. Testamentary trusts are no longer common, as all of the assets at issue pass through the probate estate (and court), and the trustee may be subject to the jurisdiction of the probate court even after the estate is closed. In any event, courts do not condone testamentary trusts, as the law strongly favors the immediate vesting of estates. *Stevens v. Radey,* 117 Ohio St. 3rd 65, 2008-Ohio-291, para. 11.

A third kind of trust is an Ohio Legacy Trust, a form of irrevocable trust designed with life-time asset protection in mind, and specifically provided for in Chapter 5816 of the Ohio Revised Code (also called the Ohio Trust Code).

A fourth kind of trust is the irrevocable trust, of which an Ohio Legacy Trust is a variant. While prior to the effective date of the Ohio Trust Code (in 2007), trusts were deemed irrevocable unless expressly designated otherwise, the reverse is now true. Other than Ohio Legacy Trust, few irrevocable trusts are being created for the simple reason of their inflexibility to change. Commonly, however, revocable living trusts will become irrevocable upon the death of the settlor.

A fifth kind is the revocable living trust, which is the principal subject of this presentation. One type of revocable living trust is referred to as an A-B trust (for spouses) that is designed to capture the maximum benefit of both spouses' marital estate tax deductions, though that can be captured in at least one other way that does not require a trust. Otherwise, an infinite variety of revocable living trusts can be designed to meet the clients' needs, which more and more, are not tax avoidance. And, that infinite variety can include both joint and separate trusts (for spouses), both of which will be discussed in this presentation.

A sixth kind of trust is a spousal lifetime access trust (SLAT), which is a hybrid gift-trust, designed to lock in current estate tax exemption levels past 2025, and exempt from estate tax post trust (gift) asset appreciation, while retaining some settlor control over use and direction of the assets during the settlor's lifetime. However, this type of trust works similarly to an irrevocable trust, and the assets going into this type of trust cannot benefit the settlor. SLATs may be appropriate for very high wealth individuals, but not for most clients, given the current (and for now "permanent" estate tax exemption, currently $15 million).

III. What Trusts Can and Cannot Do for Your Estate Planning Clients.

With the proliferation of estate planning seminars and "trust mills," there has been so much public discussion of the use of revocable living trusts in estate planning that it is likely that most of your clients will have at least thought about establishing a living trust before they sit down with an estate planner or trust officer. Unfortunately, living trusts have been oversold in the popular imagination, endowed with magical tax-saving and creditor-stiffing properties they simply do not have. To help you give your clients a realistic appraisal of the living trust as an estate planning device, we will take a brief moment to review what a trust can and cannot do.

A. What a trust can do.

1. Maintain privacy.

Although a trust does not result in your client's affairs being totally "private," it is more private than probate administration at death, and more private than a long period of guardianship with its annual or biennial accountings. The living trust may be a multi-party document, but the nature of the document and its terms will assure an increased degree of privacy and comfort between the client and the trustee. [See Ohio Revised Code, Sec. 5808.13]

2. Avoid probate administration.

This is an overemphasized reason for establishing a living trust, as there are a number of other methods of avoiding probate if that is the sole purpose of the living trust. To name a couple, use of joint and survivor accounts and deeds and use of beneficiary designations (such as on life insurance policies) are ways to avoid probate administrations. Still, the desire to avoid probate administration is important to many clients. Avoiding executor commissions under Ohio Revised Code, Sec. 2113.35 is one such reason. Moreover, the living trust avoids probate (that is, guardianship) in the event of incompetency, as well as at death.

3. Avoid ancillary probate proceedings.

Avoid ancillary probate proceedings for real estate and other tangible property in a foreign jurisdiction. This is very important for "snowbirds" who spend the winter in Florida, and the summer in Ohio.

4. Protect the estate plan from the surviving spouse.

Assets in a revocable trust are not part of the probate estate, and are therefore not subject to the surviving spouse's statutory right to elect against the will. *E.g., Dumas v. Estate of Dumas*, 68 Ohio St. 3d 405 (1994). The use of a revocable living trust therefore reduces the opportunity for the surviving spouse to alter (i.e., disrupt) the estate plan post mortem. This can be of particular importance in "blended" families and second marriages.

5. Professional management of assets.

This purpose can be accomplished regardless of whether the management is needed for the settlor or the beneficiaries after the settlor's death.

6. Tax planning.

Several tax planning techniques are best implemented through a living trust, though the importance of this consideration has been much reduced as a result of tax law changes in the last several years. Further, trusts are no longer required in order to preserve the full benefit of marital estate tax deductions, as even with wills, a portability election can be used for that purpose. These issues are discussed later in this outline.

7. Maximize tax savings for charitable contributions.

Charitable remainder trusts and other charitable trusts can permit your client to make use of various income and estate tax deductions while receiving a lifetime income, and also make a distribution to charity upon the death of the settlor or another beneficiary.

8. Protect trust assets from creditors' claims against the settlor's estate.

Assets in a revocable trust are not part of the probate estate, and are therefore not subject to claims against the estate. *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, (1939); *see also Goldstein v. United States*, 92-2 USTC, 50616 (1992) (in which a federal court held that since the funded revocable trust becomes irrevocable on the settlor's death, the assets held in the trust were not available to satisfy the deceased settlor's income tax liability). However, a few Ohio courts have ruled that in certain circumstances particular types of creditors may access trust assets following the death of the settlor. *Sowers v. Luginbill*, 175 Ohio App. 3d 745, 2008-Ohio-1486 (Ohio App. 3d Dist.), para. 29, appeal not accepted by the Supreme Court of Ohio, 2008-Ohio-4487 (tort creditor that filed suit prior to settlor's death could collect against trust following judgment issued after death). See also *Watterson v. Burnard*, 986 N.E.2d 604, 2013-Ohio-316 (Ohio App. 6th Dist. 2013) (Court "disagrees with the *Sowers* court as to whether Watterson is a 'subsequent creditor,' we agree with that court's analysis of the purpose and policy behind the enactment of R.C. 5805.06 and the comments thereto. Clearly the Ohio legislature intended to allow even subsequent creditors of the settlor of a revocable trust to access the trusts' assets.") (para. 31 of decision)

Sample trust language

> *After my death, the Trustee may, but shall not be required to do so, upon the written direction of the Fiduciary of my estate, pay out as much of the Trust Property as the Fiduciary requests to pay any part or all of the debts and expenses of my estate. The Trustee shall not question any amounts so requested or see to their application (except as to Death Taxes attributable to the Trust Property) or seek reimbursement.*

9. Protect trust assets from creditors' claims against the beneficiaries.

Any trust can be "spend-thrifted," by including language which prohibits creditors of a beneficiary from collecting their claim out of the trust assets. (See Ohio Trust Code, Chapter 5805.)

10. Control the disposition of assets.

This is true of any trust. A settlor can make a gift in trust on whatever terms the settlor desires, and can thus retain a measure of control over property that is not possible without a trust. For instance, property passing outright to a minor under a will must be held by a guardian until the minor attains age 18, when the guardianship must terminate. A trust can delay outright distribution to a later age and impose behavioral conditions forbidden to guardians.

B. What a trust cannot do.

1. Avoid all taxes.

A trust, in and of itself, is not an estate tax, income tax or gift tax avoiding device. Simply placing property in trust does not place it out of the reach of the tax collector. However, and for the time being, estate taxes are probably not a consideration because of the very high thresholds, under recent tax reforms, at which estate taxes kick in.

2. Avoid all expenses.

Establishing a trust is almost always more expensive than preparing a will.

3. Avoid litigation.

Unfortunately, trusts have not avoided litigation similar to will contest litigation, as some beneficiaries are beginning to file litigation against the trust, attacking either the funding of the trust or the terms of the trust. In addition, the trust instrument may also be attacked based upon the incompetency of the settlor or undue influence exerted against the settlor.

4. Protect trust assets from the settlor's creditors while the settlor is living.

Any beneficial interest reserved to the settlor of a trust may be reached by its creditors. If the settlor reserves to himself the power of revocation, any creditor of the settlor may, by means of a lawsuit, force the revocation of the trust. Ohio Revised Code, Chapter 1335. A spendthrift clause does not prevent this in Ohio and most other states. However, a settlor that creates an irrevocable Ohio Legacy Trust may retain the right to distributions, but be relatively insulated from creditors' claims. Ohio Legacy Trusts are governed by Chapter 5816 of the Ohio Revised Code.

5. Make the settlor eligible for Medicaid without requiring her to "spend down" assets.

In the past, discretionary "Medicaid qualifying trusts" could be used as a planning technique because a discretionary trust interest was not considered a "resource." In August of 1993, the Medicaid eligibility rules changed, and this technique is no longer effective in many circumstances. The governing Ohio Revised Code law is contained in Sec. 5111.151(C); for a good discussion of when trust assets are / are not a "countable resource," see *Cook v. Ohio Dept. of Job and Family Servs.*, 2015-Ohio-4966 (Ohio App., 10th Dist.).

6. Prevent trust assets from being considered in divorce property division.

Simply because assets are held in trust form does not prevent them from being considered by a divorce court, when allocating property, Ohio Rev. Code, Sec. 5815.31 notwithstanding. Further, trust assets may, depending on their source, be considered marital property. *Vulgamore v. Vulgamore,* 2017-Ohio-4114 (Ohio App., 4th Dist.), para. 20-24.

One last thing to remember (though it is not really a "disadvantage" of trusts as such): a trust is not effective unless it is funded. Many clients have executed a valid trust document which sets forth their estate planning in great detail, but then neglected to transfer their assets to the trust. If they die before funding the trust, their property passes through probate anyway despite their having spent time and effort (and legal fees) to avoid probate.

IV. Factors Influencing Trust Design

A trust should be designed to fit a client's needs and objectives. There are many different types of trusts, and many estate plans use several different trusts, each of which is designed in a particular fashion to achieve a particular purpose. Our discussion under this heading will focus primarily on the revocable living trust, though much of what we discuss is applicable to other types of trusts.

A. Tax planning considerations.

For the vast majority of trusts, taxes other than income taxes are no longer a consideration, given the large size of the unified tax credit under the federal estate tax law, which, as a result of the 2017 tax reform, will in 2026 be $15 million per taxpayer (settlor).

1. Gift taxes.

Gift taxes are a consideration only insofar as gifts over the annual exemption amount reduce the estate tax exemption for the taxpayer (settlor). Currently, the annual exemption amount is $19,000 per done, a $1,000 increase over last year.

A revocable trust is not a completed gift when created because the settlor retains the right to revoke the trust and reacquire the trust corpus. An irrevocable trust is a completed gift, for gift tax purposes, to the beneficiaries of the trust. The amount of the gift and the availability of deductions or exclusions are affected by the provisions of the trust instrument.

a. If the beneficiary's interest in the trust is a future interest rather than a present interest—for example, if income accumulates for ten years in the trust and is then distributed to a grandchild—it does not qualify for the $19,000-per-donee "annual exclusion" from gift taxes. In order to qualify a gift to a trust which delays the beneficiary's enjoyment for the annual

exclusion, the beneficiary must have a "Crummey power"—a right to withdraw up to a specified amount (up to the full annual exclusion) from the trust whenever a contribution is made. The withdrawal right expires if it is not used within a set period of time (typically, thirty or sixty days) after the contribution is made and notice given to the beneficiary. This creates a present interest and qualifies the contribution for the annual exclusion. (A withdrawal right in excess of the greater of $5,000 or five percent (5%) of the trust principal may create federal estate or gift tax problems for the beneficiary.)

b. If the trust is for the benefit of the spouse of the settlor, then the trust must provide for the income to be paid to the spouse at least annually in order for the trust to qualify for the gift tax marital deduction.

c. If the settlor of the trust retains an interest in the trust for a specified term, it will affect the calculation of the value of the gift:

i. Traditionally, the gift to the remainder beneficiaries was the actuarial value of the right to receive the corpus of the trust at the termination of the settlor's interest. This reduces the value of the gift on which the gift tax is calculated.

ii. Under the special valuation rules of Chapter 14 of the Internal Revenue Code, enacted in 1990, if the remainder beneficiary is a member of the settlor's family, the retained interest must be a "qualified interest" (a fixed annuity or a "unitrust" percentage of the value of the corpus) or it is valued at zero for gift tax purposes and the remainder beneficiaries are deemed to have received a gift of the entire value of the corpus. (Chapter 14 and its regulations also permit a "qualified personal residence income trust." See Reg. 25.2702-5.)

iii. If the settlor creates a trust which gives its remainder interest to a charity following a term to the settlor or another individual, he will not receive a charitable deduction for income or transfer tax purposes unless the term interest is either an annuity or unitrust interest.

iv. If the settlor retains a term interest in the trust and then dies before the term expires, the entire value of the trust corpus is included in the settlor's gross estate. There is an adjustment for any gift tax paid (or unified credit expended) so that the trust corpus is not taxed twice.

2. Estate taxes.

Many of the most common estate tax planning techniques are best performed using either a living or a testamentary trust, though a spousal lifetime access trust (SLAT) is also an option (if Congress does not act this year to extend current exemption levels.

a. A living or testamentary trust can be used to achieve marital deduction planning or generation skipping estate tax planning.

b. An irrevocable living trust can be used to reduce the size of estate by virtue of being a completed gift (to extent of the $19,000 per donee exclusion and the appreciation on the assets transferred)—or it can be used to achieve marital deduction or generation skipping planning in which case it can be an irrevocable or a revocable trust.

c. An irrevocable trust can be used to hold life insurance so that the insured does not have any "incidents of ownership" in the policy which subject the proceeds to estate tax.

d. The concept of estate tax exemption "portability" means that the traditional A-B trust, or even a trust at all, is no longer required. Between spouses, at the death of the first spouse, the second must make a portability election on the Form 706, filed with the Internal Revenue Service. That permits the estate tax exemption of the first spouse to die to be transported to the date of death of the second spouse.

3. Income taxes.

A trust can either be a separate taxpaying entity which files a Form 1041 return, or a "grantor trust" (also, "settlor trust") which reports its income, losses, deductions and credits on the settlor's individual income tax return.

a. If the settlor retains the right to revoke the trust, then the trust will be a settlor trust. The creation and funding of a common revocable estate planning trust is, therefore, a non-event for income tax purposes.

b. Most of the time, an irrevocable trust will be a separate taxpayer and required to file a Form 1041. However, if the settlor:

i. Retains a power to amend,

ii. Retains any substantial measure of control over trust administration,

iii. Retains certain other powers over the composition of the trust corpus, or,

iv. If a beneficiary of the trust is the grantor of the trust, or the spouse of the grantor, or a beneficiary who the grantor is legally obligated to support, the trust will be a "grantor trust" and the settlor will be taxed on the trust's income. This is not necessarily a problem; some advanced planning techniques involve the use of an irrevocable grantor trust—often called in this context an "income tax defective" trust, even though the "defect" is deliberately selected.

B. Non-tax considerations.

Given the recent developments in tax law, and the extraordinarily high estate tax exemption amounts, non-tax considerations have definitely overtaken tax considerations, when it

comes to designing a trust, though this may change somewhat if Congress does not extend current exemption levels.

1. The settlor's needs.

The settlor may establish an inter vivos trust, either revocable or irrevocable, in order to:

a. Obtain management by competent advisors for the settlor's assets. (Most popular vehicle is bank trust department.)

b. Avoid the probate court, both at death (trust assets are not subject to probate administration) or an executor's commission, and in the event the settlor becomes incompetent (the trust assets can be administered without first appointing a guardian). Many clients are particularly interested in avoiding probate so as to keep the nature and value of their assets out of the public record.

2. The beneficiary's limitations.

The settlor may make the gift in trust in order to protect a beneficiary who lacks financial training, or is physically or mentally handicapped, from his or her own limitations.

3. The settlor's estate planning objectives.

The settlor may have a specific purpose which can only be achieved (or is best achieved) through a specific form of trust.

C. Issues unique to irrevocable trusts, including life insurance issues

Irrevocable trusts may not be amended or revoked once they are established. Because of this, there are many design and technical issues that need to be properly addressed in the drafting stage because there are no second chances. For example:

a. If the trust is to hold *life insurance*, the trust document should clearly authorize the trustee to invest all or part of the assets in life insurance. In addition, the trust should include a broad authorization for the trustee to invest in a variety of different life insurance products and grant the trustee the authority to exercise all ownership rights with respect to the policy.

i. The trustee of an irrevocable life insurance trust usually purchases the life insurance policy he is directed to by the settlor. If the insurance company later has financial difficulties, or the policy fails to perform as expected, the trustee's decisions to retain, terminate, or convert the policy, or fail to do any of these things, could be grounds for liability to the beneficiary. The trust should also exonerate the trustee from liability for purchasing and retaining life insurance and for the exercise or non-exercise of ownership rights with respect to the policy. The trust instrument should also permit the trustee to exchange, convert or cash-in the policy so that the trustee has authority to change to another policy if circumstances warrant.

ii. Some corporate trustees are requiring that the settlor of an irrevocable life insurance trust name a trust advisor whose sole role is to direct the trustee on the purchase of life insurance policies.

b. Consider a flexible distribution power during the life of the insured so that the trust could be terminated if changes in the tax laws or other circumstances make it no longer desirable to retain the life insurance in the trust. Neither of the powers should be exercisable by a trustee who is also a beneficiary.

c. It is common for an irrevocable insurance trust to contain a savings clause which applies if any policy proceeds are included in the insured's estate for federal estate tax purposes. In this case, the instrument provides that the proceeds will be payable to a marital deduction trust or will be distributed under the irrevocable trust through a QTIP sub-trust.

d. There are also gift tax issues if an existing policy is transferred to the irrevocable trust. A gift of life insurance is valued for gift tax purposes at its interpolated terminal reserve value on the date the gift is made.

e. The settlor of the trust may, with the spouse's consent, split any gifts (or premium payments) made to the trust so that the insured can treat gifts made to an irrevocable insurance trust as made one-half by the spouse. Therefore, the gift splitting permits better use of the spouse's unified credit and annual exclusions. If the spouse is one of the beneficiaries under the irrevocable trust, the gifts will not qualify for gift splitting unless the interests of the beneficiaries other than the spouse are ascertainable and separately identifiable at the time of the gift. Any interests that satisfy this standard will qualify for gift splitting.

f. If a *Crummey power* is being used to qualify premium payments for the annual exclusion, notice must be given whenever a contribution is made or the trust instrument otherwise directs. The Internal Revenue Service will examine the records of irrevocable life insurance trusts to determine whether the Crummey withdrawal notice was actually given. See TAM 9532001 (IRS determined that where grandchildren did not have current notice of withdrawal on an annual basis, grandchildren did not possess any rights of withdrawal. When the trust was created, the grandchildren had waived their right to receive notice of their right to withdraw future gifts made to the Trust. The IRS reasoned that the grandchildren waived their right to receive future gifts and there was no proof that any notices were actually given.)

g. The right of withdrawal given in a Crummey power trust may constitute a general power of appointment for federal tax purposes. If a general power of appointment is exercisable only for a limited period, its lapse is treated as a release of a general power to the extent that the amount subject to the lapse exceeds whichever is larger: (i) $5,000; or (ii) five percent (5 %) of the trust property subject to the power.

Such a release may result in a taxable gift by the beneficiary holding the power to the

other trust beneficiaries if the power to withdraw extends to the full $19,000 annual exclusion and is not limited to the "5-&-5" power described above. However, the beneficiary could also be granted a limited power of appointment over "excess contributions" (i.e., those greater than the "5-&-5" limit) to avoid the issue of the release of a general power of appointment.

h. The insured-settlor may retain the power to remove the trustee of an irrevocable insurance trust and designate a replacement trustee, so long as the new trustee is not the settlor or a person related or subordinate to the settlor. See Rev. Rul. 95-58.

i. Section 678(a)(1) of the Internal Revenue Code states that the right of a beneficiary to withdraw a portion of the trust property causes the beneficiary to be treated as the owner of that portion for income tax purposes. Therefore, during the Crummey withdrawal period, the beneficiary must include in his/her taxable income a pro rata share of the income of the trust during that period. When a Crummey power lapses, the property subject to it becomes a permanent part of the trust corpus, and the IRS has privately ruled that the Crummey power beneficiary will continue to be treated as the owner of that portion of the trust for income tax purposes under Internal Revenue Code, Section 678(a)(2). PLR 9034004. This is usually not an issue in practice, since the contributions to the trust are normally paid as premiums for the life insurance within a short time period of being contributed to the trust, and there is generally no income earned in this period.

D. <u>Some general considerations in selecting the trust form.</u>

a. Most high-net-worth clients will have a revocable living trust as their primary estate planning document.

b. Irrevocable trusts may be used, in addition to the revocable trust, for the following purposes:

To hold life insurance policies.

As a receptacle for lifetime gifts to minor, immature, or special-needs beneficiaries.

For remainder interest gifts to individuals or charities.

As a purchaser of family business interests (a planning technique unfortunately called a "defective trust sale").

Where the client wishes to place her assets outside of her own control because of lack of confidence in her ability to resist temptation.

As a "conduit" for retirement benefits payable to minor, immature, or special-needs beneficiaries.

If the trust was to be funded with tax-deferred retirement assets and the client wanted to use the beneficiary's life expectancy to determine minimum distributions, the Treasury Regulations accompanying section 401(a)(9) of the Internal Revenue Code used to require that the trust be irrevocable on the client's "required beginning date." While this rule was eliminated many years ago, you may still encounter clients who have irrevocable A-&-B trusts created under the old regulations.

c. The "testamentary trust," a trust which is established in and governed by a will, is rarely used anymore. Ohio law subjects testamentary trusts to the continuing jurisdiction of the probate court and imposes an obligation to file periodic accountings, which places all of the trust's affairs on the public record. Most clients do not want this.

V. Separate Trusts versus Joint Trust for Married Couple

One of the most frequent uses of trusts is for estate tax planning with high net worth married couples. Many times a married couple would prefer to transfer all of their wealth outright and free of trust to the surviving spouse to keep things simple. This simplicity comes at a cost! (Not to the surviving spouse who can inherit an unlimited amount of assets without estate taxation, but at a cost to the beneficiaries after the death of both spouses.) Further, with Congress making permanent the $5 million Applicable Exclusion Amount against the Federal Estate Tax, indexed for inflation for 2013 and beyond, and amended in 2017 (currently $15 million); many more married clients will want to keep their planning "simple" by foregoing a trust altogether, in favor of survivorship ownership and beneficiary designations.

Another equally important use of trusts, for both high net worth couples and for everyone else, is asset protection and the ability of a settlor to control the activity of the trustee and direct the assets' ultimate disposition and distribution.

Our job as estate planning attorneys is to advise clients of their options and make recommendations on reasonable planning alternatives, which many times will include recommending a trust for a married couple. Consequently, we should have several trust alternatives available to be able to meet our clients' needs (tax avoidance or otherwise) that can be reasonably implemented and administered by our clients themselves.

Upon convincing your clients about the advantages of using a trust with their estate planning, you may be faced with the decision on whether to recommend one revocable trust for both husband's and wife's assets together, or to recommend that each spouse create his or her own trust and keep the couple's assets segregated. If the clients were making the decision, most married couples would prefer a single joint revocable trust, especially married couples that are in their first marriage and currently hold most of their assets in joint and survivorship form.

A. Factors to consider.

However, there are many circumstances when a single joint revocable trust is not appropriate for a married couple. Generally, the existence of one or more of the following factors should lead one to recommend separate trusts for a married couple:

a. Combined asset values that exceed the federal estate tax exemption threshold,

b. Not the first marriage for one or more of the spouses,

c. Children from a prior marriage,

d. One spouse has inherited property and desires to keep those assets as "separate property" during the marriage, and/or

e. One spouse wishes to devise particular property to someone other than the surviving spouse.

B. Joint trust for married couple.

1. Probate avoidance—estate tax not a concern.

Many times a joint revocable trust, that can be amended by both spouses during their lifetimes and grants the surviving spouse full authority to amend and revoke the trust after the death of the first spouse, is the preferred trust for asset ownership. This type of trust may be appropriate for a young married couple with minor children, who desire to leave all of the retirement plan assets and life insurance outright and free of trust to the surviving spouse, but want a trust to protect the assets and administer them for the benefit of the children until they complete college. Another candidate for this fully revocable joint trust would be a married couple that has a combined net worth considerably less than the federal estate tax exemption ($13,990,000) with concerns for distributions to beneficiaries, or who own out-of-state real estate. In either case, the ability of the surviving spouse to fully amend and revoke the entire trust does affect the ability to reduce federal estate taxes in the unlikely event the surviving spouse's assets increase dramatically, or in the more likely event that Ohio restores the estate tax or Congress lowers the estate tax exemption or simply permits the current eight figure exemption to revert to a seven figure exemption after 2025.

Sample trust language:

> *The Settlors reserve the following rights, each of which may be exercised whenever and as often as the Settlors may wish during the lives of both Settlors or as the survivor may wish following the first death: the right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder; the right to remove any trustee and appoint substitute,*

additional or successor trustees; the right to approve the Trustees' investment decisions, and our approval shall bind all other beneficiaries; the right from time to time to approve of the Trustees' conduct (whether in connection with an accounting by the Trustees or without an accounting), and our approval shall bind all other beneficiaries; and all rights either Settlor may have as the owner of any insurance policies payable to the Trustees.

2. Estate tax considerations with a joint trust.

Many married clients will have a desire to reduce estate taxes due after both spouses have died; whether for the simple pleasure of keeping the assets away from the government, or to increase the wealth received by their children or other beneficiaries, or both.

Consequently, if a joint revocable trust is to accomplish the goal of using the federal estate tax exemption amount, then several provisions must be included in the trust agreement to ensure that such tax exemption is secured.

3. Ownership of trust assets.

First, there must be a method for determining which trust assets were "owned" by the deceased settlor. A surviving spouse may not volunteer her assets to be added to her deceased husband's credit-shelter trust. The trust agreement must distinguish which trust assets are owned by which spouse/settlor. This can be accomplished in many ways, but typically the trust agreement states that:

a. assets contributed solely by one spouse remain separate property of that spouse,

b. joint property contributed by both spouse is owned one-half by each spouse at a settlor's death, and

c. property transferred to the trust by virtue of the death of one settlor is treated as that contributing settlor's separate property.

All other trust assets are usually owned by the surviving settlor and not eligible for allocation to a deceased spouse's credit shelter sub-trust for estate tax avoidance purposes. (There can be exceptions; for example, when the deceased spouse possessed a general power of appointment over all trust assets and/or separate property of the surviving spouse.)

Sample trust Language

Property transferred to the Trustee by either or both of Husband and Wife (including property transferred at death by Will or other instrument) shall be held under this Agreement. The Settlors hereby certify as follows: all of the

property listed in Schedule A is jointly held property; all of the property listed in Schedule B is the Husband's separate property; and all of the property listed in Schedule C is the Wife's separate property. The transfer of any property to the Trustee may be accompanied or followed by a specification in writing signed by either or both spouses that it is the property of Husband or Wife. The Trustee may rely on such specifications without liability and without any duty to inquire further into the ownership of such property.

4. Allocation of trust assets.

Upon identifying which assets are owned by the deceased settlor (the first spouse to die), the trust must allocate those assets to an irrevocable sub-trust that will not be deemed to be owned by the surviving spouse at her death. This allocation is typically done by a funding formula that adjusts to changing tax laws, but could be accomplished by disclaimer.

5. Formula gift funding.

The funding formula can be a fractional share or a pecuniary amount, according to the preference of the drafting attorney. With married couples who own much less wealth than the federal estate tax exemption, the trust document may not need to convey all of the deceased spouse's interest in the joint trust to the irrevocable credit-shelter trust.

Sample trust language

Upon the death of the first Settlor, the Trustee shall distribute a fractional share of such deceased Settlor's property as determined after payment of transfer taxes, expenses and other pre-residuary gifts but before payment of any Formula Gift hereunder (the numerator of which shall be equal to the deceased Settlor's Estate Tax Exemption and the denominator of which shall be equal to the value, as finally determined for Federal estate tax purposes (or if there is no Federal estate tax in effect at the time of the deceased Settlor's death, as finally determined for death tax purposes under the law of the state of the deceased Settlor's domicile), of such deceased Settlor's Property as so determined) to the Trustee of the Family Trust under this Agreement, to be disposed of under the terms of that trust. The "Estate Tax Exemption" means the largest amount that can pass to the first deceased Settlor's Family Trust by formula gift upon such Settlor's death without increasing the such deceased Settlor's Federal estate tax due by reason of that Settlor's death, or if such Settlor dies when there is no Federal estate tax, then the term shall mean the entire estate of the first deceased Settlor, to the extent not effectively disposed of by the foregoing provisions of this document. This amount and the resulting formula gift shall be calculated using values as finally determined for the tax purposes for which the formula

gift is determined, and the calculations shall take account of all non-deductible items entering into the calculation of that Settlor's Federal estate tax, which include (for example) the Settlor's adjusted taxable gifts during life, non-deductible gifts under or outside this Agreement, state death taxes (to the extent any state death tax paid is not allowed in full as a credit against the Federal estate tax), and some administration expenses not allowed as estate tax deductions, as well as all deductible items, which include (for example) the Settlor's gifts under or outside this Agreement that qualify for the marital or charitable deduction, and some administration expenses allowed as estate tax deductions. The calculations shall take into account all available subtractions and credits against the Federal estate tax (other than a credit for previously taxed property that results from a death after the death of the Settlor in question), except that no credit shall be taken into account that does not reduce the Federal estate tax to zero or the lowest possible amount, and if the only credits that can do that are the unified credit and the credit for state death taxes, the credit for state death taxes shall not be taken into account if the state imposes only a tax equal to that credit. The calculations shall be made before giving effect to any disclaimer. The Settlors recognize that some of these amounts may be zero, may be affected by changes in the law before a Settlor's death and by a deceased Settlor's Executor or by the Trustee in exercising certain tax elections (for example, the selection of the valuation date and the deduction of some administration expenses) and will be affected by some items (for example, state death taxes and some administration expenses not allowed as estate tax deductions) even though such items may initially be payable generally from the first deceased Settlor's Property or the surviving Settlor's Property, as the case may be.

6. Disclaimer funding.

Often married clients would prefer to give the surviving spouse the option of whether to accept ownership of all of the trust assets, or whether to disclaim some amount or portion of the deceased settlor's trust assets to the irrevocable credit-shelter trust for the benefit of the surviving spouse. While this flexibility seems attractive to clients and estate plan drafters alike, caution should be exercised in relying on a disclaimer for estate tax savings. The disclaimer may not be made at all, or made incorrectly. Many surviving spouses will feel insecure without ownership of more and more assets, so the spouse may not disclaim. Many surviving spouses, who are also the trustee, may exercise too much control and use of the first deceased settlor's trust assets that would preclude the qualified disclaimer necessary for creating the tax-advantaged irrevocable credit-shelter trust. Further, the limitation on the ability of the surviving spouse to exercise a power of appointment over the disclaimed assets may reduce the likelihood of the disclaimer.

Sample Trust Language

The Trustee shall distribute the first deceased Settlor's Property to the

Trustee of the Surviving Spouse's Trust, which shall be owned by the Surviving spouse and fully revocable. However, if the Surviving Spouse delivers to the Trustee a written disclaimer within six (6) months following the death of the first deceased Settlor that disclaims some or all of the first deceased Settlor's Property, then the disclaimed property shall instead be distributed to the Trustee of the Family Trust, which is an irrevocable trust held for the benefit of the Surviving Spouse. During such period of time that the Surviving Spouse has the option to disclaim, the Trustee shall segregate the first deceased Settlor's Property from the Surviving Spouse's property and shall prohibit any use of the first deceased Settlor's Property until such disclaimer period has ended. If the Surviving Spouse is deemed to have used the first deceased Settlor's Property, then such use is in the form of a loan by the Surviving Spouse that must be repaid to the Family Trust for any disclaimed property. If the Surviving Spouse makes a disclaimer limited to his or her right to mandatory income payments from the Family Trust as to all or a portion of the income of the trust, the disclaimed net income shall be disposed of by the Trustee under terms identical to those that apply to distributions of principal above, and any income not so distributed shall from time to time be accumulated and added to principal. The Surviving Spouse shall have no testamentary power of appointment over or right to direct the beneficial enjoyment of any such accumulated income unless such right is limited by an ascertainable standard. Also, if the Family Trust is funded with property that was disclaimed by the Surviving Spouse, then the Surviving Spouse shall have no testamentary power of appointment over or right to direct the beneficial enjoyment of any such disclaimed property.

C. Administration of trust assets for surviving spouse.

After separate property of the deceased settlor is allocated to the irrevocable credit-shelter trust (Family Trust), the trust agreement must not permit the surviving spouse the right to amend or revoke that sub-trust or possess a general power of appointment that would result in the Family Trust *being included in the taxable estate* of the surviving settlor/spouse. Limiting the right to amend and revoke is simpler than avoiding an inadvertent general power of appointment.

1. Ascertainable standard.

If the surviving spouse is to be named as the successor trustee of the Family Trust, then that self-interested trustee must be limited in making principal distributions only with regards to an ascertainable standard ("health, education, maintenance and support"). While Ohio law contains a savings statute (Ohio Revised Code, Sec. 5808.14), there is no need to include language like "comfort" and "happiness" in the trust agreement, especially when the trustee is the surviving spouse, who can decide what distributions qualify as "support" or "maintenance." If desired, the trust agreement could include the ability for a disinterested trustee to distribute principal to the surviving spouse for reasons broader than merely the ascertainable standard.

This would involve the need for a non-family member trustee, which many clients seek to avoid causing the surviving spouse to have to ask for a distribution from.

2. Right of withdrawal.

Also, the surviving spouse must be limited in the right of withdrawal. An unlimited right for the surviving spouse to withdraw assets from the Family Trust will cause all of the assets to be included in the surviving spouse's taxable estate. The right of withdrawal can be limited to the greater of $5,000 or five percent (5 %) of the Family Trust. This right of withdrawal should be limited to the last day of the year and require an affirmative written request for the distribution. If the time period for exercising the withdrawal includes the surviving spouse's date of death, then five percent (5%) of the Family Trust should be included in the taxable estate of the surviving spouse, even if the right was not exercised.

3. Limited power of appointment.

Many irrevocable credit-shelter trusts for the benefit of the surviving spouse will include a provision allowing the surviving spouse to appoint the remaining trust property among a class of beneficiaries. If the class could include the surviving spouse, surviving spouse's creditors, surviving spouse's estate, or creditors of the surviving spouse's estate, then the remaining trust assets will be included in the surviving spouse's taxable estate, even if the surviving spouse does not exercise such general power of appointment. Typically, you will see a trust limit the class of permissible appointees to the descendants of the deceased settlor who created the credit-shelter trust, which includes the surviving spouse's children and grandchildren, when the married settlors share the same descendants. This limited power of appointment allows some flexibility to the surviving spouse who otherwise would have received the property outright and free of trust in the absence of the advice to establish a credit-shelter trust.

Sample Trust Language

> *Property that is to be held in the Family Trust shall be held under this Article, and all references to "Family Trust" shall be to the trust or trusts held under this Article.*
>
> *A. During the Surviving Spouse's Life. The following provisions shall apply during the Surviving Spouse's life.*
>
> *1. The Trustee shall distribute to the Surviving Spouse the net income of the trust, at least annually.*
>
> *2. The Trustee may distribute to the Surviving Spouse as much of the principal of the trust as the Trustee may at any time and from time to time determine, for the Surviving Spouse's health, education, maintenance and support, in his or her accustomed manner of living.*

3. The Trustee may distribute to the Surviving Spouse as much of the principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, for any purpose.

4. Each calendar year in which my Surviving Spouse is living on December 31 and so directs, the Trustee shall distribute to my Surviving Spouse up to the greater of that amount referred to in Code Sec. 2514(e)(1) (currently, Five Thousand Dollars ($5,000)) or that percentage referred to in Code Sec. 2514(e)(2) (currently, Five Percent (5%)) of the trust on that date. This right shall not accumulate from year to year, and the limitation determined with reference to Code Sec. 2514(e)(1) (currently Five Thousand Dollars ($5,000)) shall be reduced to any smaller limit that would result from taking into account first all other powers held by my Surviving Spouse that must, under Code Sec. 2514(e), be aggregated to determine the largest lapse that can occur without being treated as a release.

5. Without limiting the Trustee's discretion, the Settlors suggest that no distribution of principal be made to the Surviving Spouse until the principal of the Marital Trust is exhausted, unless there is a compelling reason to do so.

6. The Trustee may consider the needs of the Surviving Spouse as more important than the needs of the descendants of the Settlors or any other beneficiary.

B. Upon the Surviving Spouse's Death. Upon the death of the Surviving Spouse, the property then held in the Family Trust shall be:

1. distributed to one or more persons out of a class composed of the descendants of the first deceased Settlor on such terms as the Surviving Spouse may appoint by his or her Will specifically referring to this power of appointment; or, in default of appointment or insofar as an appointment is not effective, then

2. set aside and divided into per stirpital shares for the first deceased Settlor's then-living descendants, the share so set aside for a descendant to be distributed to the Trustee of the Descendants' Separate Trusts to be held as a separate trust to be disposed of under the terms of the Descendants' Separate Trusts under this Agreement, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

D. Separate trusts for married couple – considerations

A separate revocable trust for the Husband and a separate revocable trust for the Wife are commonly referred to as each client creating an A/B trust. Again, there are many reasons for creating separate trusts for each spouse, including the simplicity in keeping track of which spouse owns which assets.

1. Second marriage.

With the increasing rates of divorce and people living longer, there is a pretty good chance that one or both of your clients (Husband and Wife) have been married before the current marriage. Many clients will have conflicting concerns of taking care of the current spouse (who takes care of their health needs) countered against the desire to ensure that assets are distributed to the children from the first marriage. Certainly, a prenuptial agreement would have allowed your clients to set forth the terms of the division of assets at death before they were married, but many clients that would benefit from a pre-nup do not have the resolve to suggest or sign one prior to getting married. Also, many clients that did complete a pre-nup may now want to benefit a spouse in a manner that is more generous than is required by the pre-nup. The use of a separate revocable trust for each spouse allows each to maintain and control separate property without any commingling of assets that may subject such property to possible divorce claims. The trust allows assets to be used by the surviving spouse, but each client controls distribution of the remaining assets at the death of the surviving spouse. With different beneficiaries for each spouse, the order of death in a relatively short time span should not determine which spouse's children will inherit, as would be the case with joint ownership between spouses.

2. Income tax planning and Medicaid concerns.

If the credit-shelter trust is designed for the sole benefit of the surviving spouse for his or her "health, education, support and maintenance," then the long-term care costs of the surviving spouse (including nursing home bills) must be paid from that Family Trust. Many times the standard credit-shelter trust is designed for estate tax reasons, including the former Ohio marital deduction through a QTIP election. This deferred Ohio estate taxes until the second death (presently, not a concern), but at a cost of requiring all income to be paid to the surviving spouse. That mandatory income provision along with the inclusion of distributions of principal according to the ascertainable standard, may deplete the trust during the surviving spouse's life unnecessarily. Depending on the facts and circumstances, it may be better to include the ability of the trustee to "spray" distributions to both the surviving spouse and the deceased Settlor's descendants. Consequently, the distributions to the settlor's descendants carry-out the income tax liability of the income earned by the credit-shelter trust. However, if the spouse's health begins to decline and high long-term care costs are likely to greatly reduce the Family Trust assets, then the trustee distributions to the trust beneficiaries other than the spouse can be attributed to the surviving spouse as gifts that cause an improper transfer penalty.
Sample trust language

Property that is to be held in the Family Trust shall be held under this Article, and all references to "Family Trust" shall be to the trust or trusts held under this Article.

A. During the Surviving Spouse's Life. The following provisions shall apply during the Surviving Spouse's life.

1. The Trustee may distribute to one or more of the Settlor's surviving spouse and the Settlor's descendants as much of the net income and principal of the trust as the Trustee may at any time and from time to time determine, for their health, education, maintenance and support, in his or her accustomed manner of living.

2. The Trustee may consider the needs of the Settlor's descendants as more important than the needs of the Settlor's surviving spouse or any other beneficiary.

B. Upon the Surviving Spouse's Death. Upon the death of the Settlor's surviving spouse, the property then held in the Family Trust shall be set aside and divided into per stirpital shares for the first deceased Settlor's then-living descendants, the share so set aside for a descendant to be distributed to the Trustee of the Descendants' Separate Trusts to be held as a separate trust to be disposed of under the terms of the Descendants' Separate Trusts under this Agreement, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

3. Wholly discretionary trust option.

The Ohio Trust Code (Chapter 58 of the Ohio Revised Code) allows for the creation of a trust that requires no distributions to a beneficiary, and allows for maximum trustee discretion on when and how to make such distributions, if any. The inclusion of a Wholly Discretionary Trust for the credit-shelter trust would protect such trust assets from claims of creditors, including the claims for the health and support of the surviving spouse as beneficiary of such trust. Ohio Revised Code, Sec. 5801.01(Y) requires the wholly discretionary trust to be for the benefit of one or more beneficiaries, who may not be the settlor, trustee, or co-trustee, and the beneficiary may not contribute his or her own property to such trust.

Sample Trust Language

The Trustee may distribute to, or use for the benefit of, the Beneficiary such amounts of income and/or principal as the Trustee, using sole, absolute and uncontrolled discretion, may determine. The Trustee may choose to make no distributions whatsoever. The Trustee shall add to the principal of this trust the balance of net income not so distributed. It is my intent that the exercise

of the Trustee's discretion shall be final and conclusive on all parties, and that the exercise of the Trustee's discretion need not comply with any type of "reasonableness" standard, absent clear and convincing evidence that the Trustee acted in bad faith or dishonestly or that the Trustees abused the Trustee's discretion.

4. Tax considerations.

Certain income tax concerns and estate tax considerations must be considered when drafting a revocable trust that will include a separate credit-shelter trust for the benefit of the surviving spouse and possibly the settlor's descendants or other beneficiaries.

E. Qualified retirement plan and IRAs.

One major asset class that must be considered when drafting the trust is whether any qualified retirement plan benefits will be payable to the credit-shelter trust. Without the proper trust language for a "conduit trust" all of the deferred income taxes on those retirement assets may need to be paid more quickly than desired by either the deceased spouse or the surviving spouse. A conduit trust requires that there is only one possible beneficiary of the retirement assets during the trust term and that the trustee make all "required minimum distributions" (RMD) from the trust-owned retirement account based on the sole beneficiary's life expectancy and distribute such RMD to the trust beneficiary annually. (Question – how has this been changed by the 2019 SECURE Act, limiting delaying distributions past ten years after the retirement account owner's death?) Clearly, if the trust is unnecessary to avoid federal estate taxes at forty (40) percent, but the trust drafting results in income taxes that could have otherwise been deferred, then it may have been better to not use a trust and to name direct beneficiaries who would qualify for deferring the accrued non-taxable assets by owning an "inherited IRA." However, with the proper drafting, one should be able to accomplish both goals of trust protection and income tax deferral.

Sample Trust Language

Retirement Benefits

The following provisions concern Qualified Retirement Benefits that become distributable under this Agreement (whether directly or through my estate) by reason of my death. "Qualified Retirement Benefits" means amounts held in or payable pursuant to a plan (of whatever type) qualified under Code Sec. 401, an individual retirement arrangement under Code Secs. 408 or 408A or a tax-sheltered annuity under Code Sec. 403 or any other benefit subject to the distribution rules of Code Sec. 401(a)(9).

i). Property Interests in Other than Participant. If any person or entity (other than me) has an ownership interest in any Qualified Retirement Benefits payable to the Trustee hereunder at or by reason of my death, then the

fractional share thereof attributable to such interest shall be paid to such other person or entity (to the extent the share so attributable is not already payable to such other person or entity under the applicable beneficiary designation).

ii). Disposition of Participant's Interest. Subject to the foregoing provisions concerning interests in one other than the participant, the Qualified Retirement Benefits shall be allocated as follows:

(1). If my Surviving Spouse survives me, any benefit excluded for Federal estate tax purposes from my gross estate shall be added to (but shall not affect the size of) any Formula Gift that is not made to my Surviving Spouse or any Marital Trust for my Surviving Spouse, or if there is no such gift, to that portion of my residuary estate that is not left to my Surviving Spouse or any Marital Trust for my Surviving Spouse. No excluded benefit shall, however, be used to satisfy any obligation of my estate or any such trust.

(2). Subject to the foregoing, to the extent there is insufficient other property to satisfy the Formula Gift, a fractional share (and not a sum, even if the gift is stated as a sum) of the Qualified Retirement Benefits resulting in a value as finally determined for Federal estate tax purposes equal to the insufficiency (or as much of the insufficiency as possible) shall be allocated in satisfaction of such Formula Gift.

(3). The balance of the Qualified Retirement Benefits shall be disposed of in the same manner as the residue of the Trust Fund under this Agreement.

iii). Selection of "Payout Schedule". The Trustee may, in the exercise of absolute discretion, exercise any right to determine the manner and timing of payment of Qualified Retirement Benefits that is available to the recipient of the benefits, but the Trustee must exercise such rights in a manner consistent with the Federal income tax rules regarding required minimum distributions under Code Sec. 401(a)(9). However, if any Qualified Retirement Benefits are payable to my Surviving Spouse or to any Marital Trust (whether pursuant to a separate beneficiary designation or pursuant to this Article), my Surviving Spouse shall have the right in her individual capacity and in her absolute discretion, exercisable in all events, to withdraw from the plan, trust or account from which the benefits are payable, all the income of the plan, trust or account annually or at more frequent intervals. For this purpose, "income" means income as defined in Code Sec. 643(b) determined as if the plan, trust or account were a separate trust under this Agreement. This right of my Surviving Spouse shall take precedence over the right of the Trustee of any Marital Trust to such income and any exercise of the right shall take precedence over any different payout selected by the Trustee of any

Marital Trust. I direct the Trustee of any Marital Trust to take any steps necessary to enable my Surviving Spouse to exercise this right effectively.

iv). Conduit Trust Provisions for Family Trust. If the Beneficiary, as defined below, survives me, then the following provisions shall be applicable with respect to all of my interest in any Qualified Retirement Benefits which are payable (either directly or by reason of the provisions above) to the Trustee of the Family Trust:

(1). Each year, beginning with the year of my death, the Trustee of the Family Trust shall withdraw from any such Qualified Retirement Plan the Minimum Required Distribution for such Qualified Retirement Plan for such year, plus such additional amount or amounts as the Trustee deems advisable in its sole discretion. All amounts so withdrawn (net of expenses) shall be distributed to the Beneficiary (as defined below in this paragraph) free of trust, if the Beneficiary is then living. If the Beneficiary is not then living, the Trustee shall instead distribute the amount which would have been distributed to the Beneficiary had the Beneficiary been then living, in the manner provided for the distribution of the principal of the Family Trust upon the death of the Beneficiary.

(2). The following definitions shall apply in administering these provisions relating to the Family Trust. The Minimum Required Distribution for any year shall be, for each Qualified Retirement Plan: (a) the value of the Qualified Retirement Plan determined as of the preceding year end, divided by (b) the Applicable Distribution Period; or such greater amount (if any) as the Trustee shall be required to withdraw under the laws then applicable to such Qualified Retirement Plan to avoid penalty. If my death occurred before my "required beginning date" with respect to such benefit, the Applicable Distribution Period means the life expectancy of the Beneficiary. If my death occurred on or after my "required beginning date" with respect to such benefit, the Applicable Distribution Period means the life expectancy of the Beneficiary, or if longer, my remaining life expectancy.

(3). Notwithstanding the foregoing, if my death occurred on or after my "required beginning date" with respect to such benefit, the Minimum Required Distribution for the year of my death shall mean (a) the amount that was required to be distributed to me with respect to such benefit during such year, minus (b) amounts actually distributed to me with respect to such benefit during such year. Life expectancy, and the meaning of "required beginning date" and others terms in this paragraph, shall be determined in accordance with Code Sec. 401(a)(9).

(4). As used in this paragraph to define the person to whom amounts are to be distributed, the term "the Beneficiary" shall refer to my Surviving Spouse.

v). Exclusion of Qualified Retirement Benefits From Creditors. Anything to the contrary in this Agreement notwithstanding, any Qualified Retirement Benefits payable to the Trustee under this Agreement shall, however, never be or become part of my probate or testamentary estate hereunder, and nothing in this Agreement shall be deemed to subject those proceeds to payment of my debts or expenses.

vi).Benefits Excluded from Gross Estate. If my Surviving Spouse survives me, any benefit excluded for Federal estate tax purposes from my gross estate shall be added to (but shall not affect the size of) any Formula Gift that is not made to my Surviving Spouse or any marital trust for my Surviving Spouse or if there is no such gift to that portion of the residue of the Trust Fund that is not left to my Surviving Spouse or any marital trust for my Surviving Spouse. No excluded benefit shall, however, be used to satisfy any obligation of my estate or any such Trust."

F. Distributing taxable income.

When taxes on retirement plan assets are not an overriding issue, it may be best to allow for income to be distributed to trust beneficiaries at lower tax brackets (children and/or grandchildren) and make principal distributions to the surviving spouse. A credit-shelter trust that includes all of the deceased Settlor's descendants as permissible beneficiaries may allow the distribution of income to family members in the lowest of tax brackets.

VI. Initial Provisions of the Trust and other Preliminary Matters.

A. Trust property.

There is no functioning trust without a corpus. While the governing document need not recite the initial trust corpus, if any, or the transfer of title to the trustee, this must be documented in some fashion.

a. Ohio Revised Code, Secs. 5804.02(D) and 2107.63 have eliminated the common law requirement that a trust must have a corpus to be valid. Formerly, it was necessary to make a token contribution to the trust when executed in order to have a valid instrument, even if the trust was not to be funded until later. In reviewing older instruments, you will often see a recitation that one dollar, five or ten dollars had been contributed to the trust. (You may even find an old ten-dollar bill stapled to the back page!)

b. One method of identifying the corpus and reciting its delivery to the trustee is to list assets on an attached schedule which is incorporated into the trust instrument. However, merely listing an asset on "Exhibit A" of the trust does not result in the trust being funded with the asset, as the appropriate steps must be taken to transfer title to the trustee.

c. The designation of the trust as primary or contingent beneficiary of life insurance policies or other contractual interests which are payable at death is recommended in Ohio.

d. If insurance proceeds may be made payable to a trust, then a provision should be included in the trust authorizing the trustee to elect alternate modes of settlement of the proceeds; to compromise claims against the insurance companies (provided there is adequate indemnification to the trustee) releasing the insurance companies from any responsibility for the proceeds beyond their payment to the trustee. In an insurance trust, there will be more elaborate language which includes a provision releasing the trustee from any liability for the payment of the premiums on the policies.

B. Identification of family members.

This is not required by law, but is a good practice, if only to preclude spurious claims of illegitimacy.

C. Purpose clause.

The rule for interpretation of a trust instrument is to seek and effectuate the intent of the settlor. So why is it that we, as lawyers, have evolved a tradition of never expressly stating the settlor's intent? A clear statement of intent or overall objectives can be of immense help in interpretation.

D. Coordination with the settlor's will.

If the trust is to be accompanied by a "pour over" will which specifically leaves part or all of the settlor's estate to that trust, then you should keep in mind the following:

a. Include a provision in the trust agreement permitting assets to be bequeathed or devised to the trust and providing that any assets so transferred will be administered the same as if these assets were part of the initial corpus of the trust. See Article III of this outline.

b. By virtue of Ohio Revised Code, Sec. 2107.63, a will may "pour-over" into a trust even if the trust was executed or amended after the will. A few other states may still rely on the old doctrine of "incorporation by reference" and require that the settlor execute the trust prior to executing the will in order for the "pour-over" reference to be valid.

c. You may want to include a provision in the will which provides for an alternate disposition of the poured over assets in the event the trust is revoked prior to the death of the settlor. This is relatively rare.

VII. Provisions for Administration during the Life of the Settlor.

A. Reserved power to revoke or amend.

a. The retention of these powers by the settlor of the trust will not render the trust invalid. *Cleveland Trust Co. v. White*, 134 Ohio St. 1, 15 N.E.2d 627 (1938).

b. In Ohio prior to January 1, 2007, a trust was presumed to be irrevocable unless the settlor specifically retains the power to revoke the trust. On and after January 1, 2007, the Ohio Revised Code, Sec. 5806.02 reverses that presumption and a trust must state that it is irrevocable or the settlor may revoke or amend it. Thus, if the settlor is setting up an irrevocable trust, this must be stated clearly and early in the trust instrument. (As a general rule, a good draftsman will explicitly indicate that a trust is either revocable or irrevocable somewhere on the first page of the governing document.)

c. This clause should also indicate how the trust is to be amended. It is recommended that a written instrument be the only permitted method. The Ohio Trust Code now allows for an attorney-in-fact to be given the authority, which must be both in the trust document and in the power of attorney document, to amend a trust.

B. Administration of assets during the lifetime of the settlor.

a. The income which is earned from the trust assets can either be accumulated in the trust or distributed to the settlor; the simplest approach is to provide that income shall be paid or accumulated as the settlor shall from time to time direct the trustee.

b. The same approach can be used for the distribution of trust principal during the lifetime of the settlor.

c. The trustee should be authorized to apply income or principal of the trust for the benefit of the settlor and his dependents in the event the settlor becomes incapacitated for any reason. Your client may request that you draft a very specific definition of incapacity, especially if the trustee is not well known to the settlor, even to the extent of providing for an independent, third party determination of incapacity.

d. Since a revocable trust is a "grantor trust" for income tax purposes, there is no tax disadvantage to accumulating income inside the trust while the grantor is living.

e. If the settlor is not the trustee, but is living and able to act, the trustee will normally consult with the settlor on all matters pertaining to the investment, management and administration of the trust. The client may, however, feel more at ease if an express provision is included requiring the trustee to consult with the settlor on these matters. If such provisions are included, the document should set out the mechanics for consultation. Some corporate trustees are now requiring such language to be included in the trust document to avoid claims from future

remaindermen.

f. The settlor may request that other provisions be included to give the settlor control over the trustee on specific matters, such as voting proxies on shares of stock in the trust or managing various forms of real estate investments.

g. You should discuss with the client the powers conferred upon the trustee in the trust instrument to determine if the client wishes to restrict, expand or exercise some form of control over the trustee's powers during its lifetime.

h. Gifts by the settlor from the trust corpus present no special problems in drafting. The Taxpayer Relief Act of 1997 provides that any transfer from a grantor trust is treated as a transfer made directly by the settlor for purposes of Internal Revenue Code, Sections 2035 and 2038.

VIII. Provisions ensuring liquidity of the settlor's estate.

The law makes a decedent's probate estate responsible for death taxes, expenses of administration, funeral bills and final medical expenses. If the client is using trusts as his primary estate planning vehicle, there could well be no probate estate assets with which to pay them. The only liquid assets available may be in the revocable trust corpus, or life insurance proceeds in the irrevocable trust. The mechanics of making cash available to the personal representative of the estate in order to pay these expenses should be an important part of designing the trust instrument. There are various ways of accomplishing this, which may be used in combination:

a. Provide that the trustee may, in its discretion, pay all of these expenses, either by reimbursing the personal representative of the estate or making these payments directly (in either event only from assets of the trust estate which would otherwise be subject to estate taxes). The trustee should be specifically permitted to rely upon the accuracy of the amounts as they are reported to the trustee by the personal representative without the necessity of inquiring further.

b. Require the trustee (as opposed to leaving it to the trustee's discretion) to pay these amounts by either reimbursement or direct payment. If this approach is used, then life insurance proceeds payable to the trust may become subject to Ohio estate tax (when it comes back into effect) on the theory that it is subject to the claims of the estate. Ohio Revised Code, Sec. 5731.12.

d. No matter whether the trustee's power to pay estate expenses is discretionary or mandatory, the corresponding provision in the will should authorize, but not require, the executor to request funds from the revocable trust. If this provision is made mandatory, rather than discretionary, the assets of the trust could be subject to the estate's creditors' claims, even if the probate estate is insolvent.

e. Authorize the trustee to loan money to the estate or to purchase assets from the estate. If this type of provision is used, then the trust should permit the trustee to deal with the personal representative, even if they are the same person, in order to avoid any charge of self-dealing. Ohio Revised Code, Sec. 2109.44.

f. Certain U.S. treasury bonds purchased at a discount are redeemable at par value in payment of federal estate taxes—these bonds are colloquially referred to as "flower bonds." While flower bonds have not been issued for many years, your older clients may still have some in their portfolios.

IX. Dispositive provisions in a trust agreement.

From your client's perspective, *these are the most important part of the document.* Before drafting them, you should question the client concerning objectives for each generation of beneficiaries, in descending order, and then discuss with the client the alternative ways of meeting those objectives with the trust. A major issue in drafting any trust distribution provision is to determine whether distributions are purely discretionary, discretionary but limited by an ascertainable standard, or required to be made by the trustee.

A. The spouse.

1. Marital deduction trust

When designing the dispositive provisions of the trust which concern the spouse, it is important to consider estate tax planning for the use of the *marital deduction*:

Current federal and former Ohio law provide for an unlimited marital deduction. The rules for both are essentially identical.

A formula marital deduction clause will be affected by lifetime gifts to the spouse.

In estates over $15 million or the applicable credit amount then in effect (indexed for inflation), the marital deduction should be limited to take advantage of the unified credit available to the decedent. This is most typically done with an "A-B trust" arrangement:

The trust agreement is divided into two components pursuant to a formula contained in the governing document.

a. One component, traditionally referred to as "trust B" (commonly referred to in a trust as the "Family Trust"); it might also be called the "bypass" or "credit shelter" trust), is equal to the amount which can be sheltered from federal tax by the unified credit and other credits available to the decedent's estate.

b. The remaining property is allocated to what is traditionally called "trust A" (commonly referred to as the "Marital Trust;" it might also be called a "marital deduction trust"). "Trust A" qualifies for the unlimited marital deduction and although it is subject to estate taxes in the decedent's estate, there is an equal deduction against such taxes. This marital deduction is a deferral of estate taxes until the death of the spouse.

"Trust B" is subject to federal taxes, but those taxes are "paid" by the decedent's available credits. The estate therefore completely avoids federal estate taxation.

2. Methods that can achieve tax purpose of marital deduction trust, including QTIP and power of appointment trusts

Assuming the client wants to take advantage of the marital deduction, then the attorney must address the following:

There are four common methods of leaving property to a spouse which qualify for the marital deduction, all of which can be used as the "A" side of an "A-B" trust: an outright gift, a power of appointment trust, an estate trust, or a Qualifying Terminable Interest Property ("QTIP") Trust. Any one of these approaches will achieve the tax objective, but what about the client's non-tax objectives?

Many younger couples prefer *outright gifts* to the surviving spouse, though such have their potential drawbacks, such as

a. There could be duplicate probate administration of the assets if the spouses die in a common accident or close together in time.

b. The surviving spouse might also be incompetent, which would require a guardian to manage the assets.

c. Even if the surviving spouse is not incompetent, it may be in her best interests to leave the marital deduction property to a trustee who will be responsible for its financial management - a bank trust officer could address this concern.

A *power of appointment* trust (Internal Revenue Code, Section 2056(b)(5)) must, at a minimum, give the surviving spouse all current income from the trust annually and a general power to appoint the principal of the trust either during the spouse's lifetime or at death. In addition, a provision could be included for the spouse to withdraw limited portions of the principal or for the trustee to invade principal for the spouse's benefit, all depending upon the client's objectives concerning his spouse.

The *estate trust* accumulates its income during the life of the surviving spouse, and then the entire trust, including accumulated income, is paid to the estate of the spouse. This device is rarely used.

A *qualified terminable interest property* (QTIP) trust (Internal Revenue Code, Section 2056(b)(7)) must meet the following standards:

a. the surviving spouse must receive all of the income of the trust, at least annually, and hold a power to demand conversion of underproductive property to property which produces income, and no can direct property away from spouse, and

b. there must be no other beneficiary of the trust entitled to principal or income during the spouse's lifetime, and,

c. the executor, trustee, or administrator must make a QTIP election on the federal estate tax return (and, separately, on the Ohio estate tax return) that a portion or all of the trust qualifies for the marital deduction.

The unique feature of a QTIP is that a fractional interest in a trust (or other property) can be QTIP-ed. This makes QTIP more flexible than the traditional power of appointment trust, which is an all-or-nothing proposition.

A well written document will also provide that the fiduciary making the QTIP election has no liability for making the election, and shall make it taking into account all circumstances, including appropriate tax planning.

3. Use of Family Trust for spouse

It is common in an A-B arrangement to make provisions for the surviving spouse in the Family "B" Trust as well.

a. Should income earned by the "B" trust be automatically paid to the spouse, or should it be paid to the spouse only in the discretion of the trustee, or should the trustee have discretion to "sprinkle" the income among several beneficiaries, including the spouse, children and even grandchildren?

i. With a large federal estate tax exemption, it is possible that a requirement that all income be paid to the surviving spouse will only add more taxable income to a spouse that is already in the highest income tax bracket, while children or other descendants are in lower income tax brackets.

(a) If it is anticipated that the second spouse will die within a short time period after the first spouse to die, then it may not matter much that all income is required to be paid to the surviving spouse. Further, because the credit-shelter trust is not included in the surviving spouse's estate for estate tax purposes, the income tax basis of those assets do not adjust to the fair market value as of the date of the second spouse's death. (A bad result for the remainder beneficiaries if the assets increase in value, but a benefit to the beneficiaries if the assets decline in value—avoiding a step-down in income tax basis in a trust that did not harvest

capital losses before death of the second spouse.)

(b) However, if the surviving spouse expects to live for a number of years, then the clients should consider the future capital gains taxes to the remainder beneficiaries, assuming capital appreciation on the assets.

(c) If the trustee has discretion (or a duty) to make distributions to beneficiaries other than the spouse, remember that distributions "sprinkled" to beneficiaries in generations below the settlor's children will be "taxable distributions" that could be subject to generation skipping tax (GST, which is discussed hereinafter).

ii. Is the trustee given discretion to invade principal for the maintenance and support of the spouse?

(a) If such discretion is given:

(i) It should be a requirement that the "A" trust be exhausted before the "B" trust can be invaded. It is better planning to spend the "pre-tax" dollars from the "A" trust and preserve the "already taxed" dollars in the "B" trust for the next generation.

(ii) If the surviving spouse is trustee, and the trustee's discretion to invade principal is not limited by an ascertainable standard, it will be a general power of appointment. The standard language for limiting the trustee's discretion, "health, education, maintenance, or support," is an "ascertainable standard" under Section 2041 of the Internal Revenue Code and its accompanying regulations. Words such as "comfort," "welfare," or "happiness" are not ascertainable standards. Section 20.2041-1(c)(2) of the Treasury Regulations lists words that Internal Revenue Service regards as establishing ascertainable standards as well as words that do not establish such standards. Ohio law provides a statutory ascertainable standard which will prevent an inadvertent general power of appointment in a trustee who is also a beneficiary. In other jurisdictions case law may also declare certain combinations of words to be "ascertainable" standards.

(b) The trustee could also be given discretion to invade principal for children and grandchildren.

(iii) The client may also want the surviving spouse to have the right to withdraw principal amounts of up to $5,000 or five percent (5 %) of the market value of the "B" trust (whichever is greater) in any calendar year. This is a limited power of appointment (see Internal Revenue Code, Section 2041) and will not cause the "B" trust to be included in the taxable estate of the spouse at the spouse's death, although $5,000 or five percent (5 %), whichever is greater in the year of the spouse's death, would be included in the spouse's taxable estate unless that power of withdrawal is limited to a specific month or day of the year. Thus, the five percent (5 %) inclusion of an otherwise excluded trust would only occur if death happened during the shorter term for exercising such withdrawal power.

4. The spouse – taxes not a consideration

If the federal estate tax does not need to be considered (the couple's net worth is below the applicable exclusion amount, or the estate of the other spouse is larger than the estate of your client), you are then free to design the dispositive provisions of the trust for the spouse in whatever manner best meets the non-tax objectives of the client.

a. Should the income of the trust be required to be paid to the spouse, accumulated until paid out for the spouse in the discretion of the trustee, or paid to the spouse and children in the discretion of the trustee based upon the varying needs of the beneficiaries?

b. Should there be any provision for the trustee to invade principal for the spouse or children—as a general rule there should always be such a provision—and should the spouse have an unrestrained right to withdraw large or small amounts of principal from the trust?

c. Consider using a QTIP trust, even in an estate that is not federally taxable, so that a trustee may better balance the current needs of the surviving spouse and the remainder beneficiaries' desire for capital appreciation.

d. At the death of the surviving spouse, is the spouse to be given a power to appoint the balance of the trust? In most circumstances (other than a power-of-appointment trust), this will be a limited power which does not permit appointment to the spouse, his estate, or the creditors of either.

e. In a second marriage, the client will commonly want to have the entire "A" share held in trust, as opposed to distributed outright, with no power of appointment in the surviving spouse, so the decedent can control ("from beyond the grave") the ultimate disposition of assets after the death of the surviving spouse.

f. What about divorce after entering into a trust agreement? Consider a provision that divorce will cause the spouse to cease to be a beneficiary and to be treated as though having pre-deceased the settlor.

Sample trust language

> *If my marriage to my husband ends by divorce or annulment, my husband shall cease to be a beneficiary under this agreement and shall be treated for the purposes of this agreement as though my husband predeceased me, and if my husband is a trustee or successor trustee under this agreement, my husband shall cease to be a trustee or successor trustee under this agreement.*
>
> *The fact that my husband and I are executing our estate plans concurrently shall not be construed to create any contractual or reciprocal obligation*

between us.

B. Children and later descendants.

1. Tax considerations.

Distributions to any individual beneficiary other than a surviving spouse, are subject to estate taxes, of course. Distributions to grandchildren and later generations may also be subject to the tax imposed on generation skipping transfers ("the GST"). Every person who is reviewing or administering a trust should be familiar with the GST and the planning techniques used to avoid or minimize this tax.

The GST is imposed on transfers to "skip persons" (generally, grandchildren and later descendants of the donor, if the donor's child who is the parent of the donee is living). There are three such kinds of transfers: a "direct skip," a "taxable distribution," and a "taxable termination."

a. A "direct skip" is an outright gift to a skip person, or the creation of a trust with only skip persons as beneficiaries.

b. A "taxable distribution" is a payment to a skip person from a trust which has both skip- and non-skip persons as beneficiaries.

c. A "taxable termination" would occur when the interests of all the non-skip persons in a trust end, leaving only skip persons as beneficiaries. (The trust itself may or may not terminate at that time.)

Please note that a trust for the benefit of a child for life, with remainder to grandchildren—a very common distribution pattern—will have a "taxable termination" at the death of the life beneficiary for all GST Non-Exempt property, and is thus potentially subject to the GST unless the lifetime beneficiary is deemed to be the transferor for GST tax purposes (by giving that lifetime beneficiary a general power of appointment.)

Every individual has a *lifetime exemption* which may be used to shelter generation-skipping transfers from the GST ($15 million as of 2026). Under the 2013 tax act, the GST exemption will equal the "applicable exclusion amount" of $5.25 million beginning in 2013 (as of 2026, $15 million), and will thereafter increase whenever the applicable exclusion amount increases.

Before 2002, the GST exemption was much larger than the unified credit exclusion amount ($1 million versus $600,000 to $675,000). Even after 2003, if a client makes taxable gifts to her children, she will end up with a larger GST exemption than she has unified credit exclusion amount available. One common plan for making full use of the available GST exemption in these situations is the "A-B-C" trust. Imagine a normal "A-B" trust in which the

"A" component is a QTIP trust which is further subdivided into two parts, "A" and "C." The "C" trust equals the difference between the amount placed in the "B" trust and the decedent's available GST exemption; everything in excess of the GST exemption goes into the "A" trust. The executor makes a QTIP election for both the "A" and "C" trusts, and then makes an Internal Revenue Code, Section 2652(a)(3) "reverse QTIP" election for the "C" trust which allocates the decedent's GST exemption to the "C" trust. This allocation makes the "C" trust immune from GST at the second death, even though it is subject to estate taxes in the surviving spouse's estate.

If a child of the client has a large estate of his or her own, the client should consider not leaving any property outright and free of trust to that child (so that it avoids tax in that child's estate) and providing instead for that child in trust with an ascertainable standard for principal distributions or that child's issue or later generations, making proper use of the client's GST exemption to reduce taxes.

2. Non-tax considerations.

Property can be left to a beneficiary on whatever terms the client desires. The distribution scheme that takes effect at the death of the client or the surviving spouse should be chosen to fit the human situation of the beneficiary and the family.

Should the trust be divided into separate shares for each child upon the death of the client or spouse, or retained in a "*basket*" *trust* for the collective benefit of all the children?

a. Many clients will have a basket trust for younger children, with division into separate shares upon the youngest attaining a certain age.

b. A basket trust will usually give the trustee discretion to make distributions unequally to the beneficiaries, based on their varying needs, aptitudes, abilities and outside resources. The trustee's discretion may be channeled or limited by whatever standards the client may direct.

c. Where some or all of the beneficiaries are minors, the trust could include a provision authorizing the trustee to distribute funds to the guardian of the person of a minor child in order to provide a home for that child.

If the trust is to be divided among the children, either at the death of the surviving spouse or upon termination of a basket trust, the settlor has a number of *options* to consider:

a. Will the property be divided equally or unequally? (An equal division may or may not be a "fair" one.) Will certain individuals be excluded? Will certain assets be directed to certain individuals (e.g. family business stock to those offspring who are active in the business)?

b. Property could be distributed outright to the children. Facts to consider here are the ages of the children, the size of your client's estate and the estates of the children or whether

to grant the children a limited power of appointment.

c. The trust property could stay in a basket trust until the youngest surviving child reaches a specified age, such as age 22, then divide and be distributed in equal shares. Factors to consider here are the same as (b) above plus your client's desire for absolute equality of treatment for his children in bringing all children to a certain age using all of his assets.

d. Once the trust property divides into separate shares, each child's share could be held in trust and administered based upon its own particular dispositive rules. Often the settlor will provide that one child will receive outright distributions, while another child's share is held in trust.

e. There could be two standards of distribution from a child's trust: one for when the children are young which attempts to provide all their care and support; and one for when they have reached an educated maturity which does not attempt to provide for support but does permit distributions to "start a business or profession" or to "purchase a home" or "pay wedding expenses."

f. If children's shares are to be held in trust, the client must decide at what ages the children are to receive their share, assuming the trusts are not to continue for their lifetime, and whether they are to receive it in one sum or in staggered distributions—such as one-third at age 25, one-half at age 30 and the balance at age 35. Distributions need not be tied to age; there may be other conditions precedent.

g. Regardless of what ages and in what proportions the children are to receive their shares, the client may have decided that instead of providing outright distribution to the child at a certain age, they would be required to request their share or the applicable portion of their share and could also provide that the trustee must notify them of this right of withdrawal.

h. If a child is physically or mentally impaired, you should suggest a "special needs" trust which gives the trustee discretion to make distributions in a manner which takes their limitations into account and maintain eligibility for public assistance. Note that the sample trust language in your appendix includes its own "purpose" clause.

i. Should the children be given a power to withdraw principal without any limitations (the client may want such flexibility for the child after he or she reaches a certain age), remember that if this power exceeds $5,000 or five percent (5%) of the value of the trust it may create unnecessary estate tax problems for the child.

ii. Finally, what happens if a child dies while a trust is being administered for her benefit? Should the child's share be distributed to her issue, or redistributed among the other children of the client? In considering these alternatives, consider holding a share for the younger issue of a deceased child in trust, and be sure to remember the generation skipping tax issue. Any shares that are to be redistributed among the children of the client should be added to their trust if

there is a trust still in existence for them. If the client is undecided on how to approach these questions, consider the possibility of giving the child who dies before receiving her share of the trust a limited power of appointment (during her lifetime).

j. Identify in the trust whether the categories of "children" or "issue" include or exclude adopted children. Ohio law provides that adopted persons are treated as "child or issue" unless the document specifically excludes adoptees. Ohio Revised Code, Section 2107.34; *Solomon v. Central Trust Co.*, 63 Ohio St.3d 35 (1992).

3. Contingent or ultimate distribution of trust assets.

One issue often overlooked, but which is important to the trustee, is the ultimate distribution of the trust if the client's spouse, children and all issue die prior to the complete termination of the trust. This is referred to in your sample documents as the "contingent distribution." of the trust. The sample documents contain a "generic" clause distributing one-half of the trust property to the settlor's heirs at law and one half to the settlor's spouse's heirs at law. Other possible beneficiaries include parents of either the client or spouse (if an aged parent is not already an additional beneficiary of any trusts for the spouse and children), brothers and sisters, nieces and nephews, family friends, or charities.

X. Administrative Provisions Affecting Beneficial Interests.

All trusts contain certain "boilerplate" restrictions governing beneficial interests which address issues common to all trusts. These should always be reviewed with the client, and customized where the situation demands it.

A. Spendthrift clause.

Perhaps the most typical of these provisions is a clause prohibiting a beneficiary from anticipating or assigning its interest in the trust or preventing a creditor of the beneficiary from being able to reach the interest of the beneficiary in the trust in order to satisfy a debt. While most states have historically enforced these provisions, Ohio law was uncertain until, in *Scott v. Bank One Trust Co*., 62 Ohio St. 3d 39 (1991), and *Domo v. McCarthy*, 66 Ohio St. 3d 312 (1993), the Supreme Court of Ohio held that spendthrift trusts will be enforced in Ohio. See Ohio Revised Code, Chapter 5805.

a. Most clients want a spendthrift provision in the trust instrument, especially if young or otherwise immature beneficiaries are involved.

b. Some commentators are of the opinion that a spendthrift clause should not be made applicable to a marital deduction trust as it may be considered as a restriction on the surviving spouse and cause a loss of the marital deduction. (Many drafters take this position.) The Treasury Regulations would seem to specifically permit this, however. Treas. Reg.

20.2056(b)(5)(f) 7. See also Sec. 5815.22 (formerly Sec. 1339.411) of the Ohio Revised Code, which provides that a spendthrift provision in a trust shall not be construed as causing any forfeiture or postponement of any interest in property that qualifies for the Federal Estate Tax Marital Deduction, except in certain cases.

B. Interests distributable to minor or incompetent beneficiaries.

If trust property becomes distributable to a minor or incompetent beneficiary, the need for a guardianship can be avoided by including a provision that gives the trustee discretion to control how such distributions will be made.

C. Rule against perpetuities.

Effective March 22, 1999, under Ohio Revised Code, Sec. 2131.09, Ohio permits a trust to elect out of the Rule Against Perpetuities if

a. The trustee has an unlimited power to sell all trust assets or if one or more persons, including the trustee, have an unlimited power to terminate the entire trust; and

b. The trust document specifically provides that the Rule Against Perpetuities shall not apply.

Older documents will, of course, be subject to the Rule, as will documents from jurisdictions where the Rule is still in effect, so you will still need to be sensitive to the Rule in the course of administering some trusts. Since 1967, Ohio has had a perpetuities statute which measures the permissible time period in terms of actual rather than possible events, and it is therefore very difficult to violate the Rule. Also, keep in mind that in a revocable living trust, the starting date for measuring the period is the date that the trust becomes irrevocable rather than the date of the execution of the trust agreement.

D. Survivorship.

A provision should be included to deal with the disposition of the trust interest in the event of a common accident with the settlor where there is no evidence as to whether the beneficiary survived the settlor or the settlor survived the beneficiary—this is generally more of a question of survivorship between the settlor and the spouse, but it can also involve children.

a. There are two possible approaches—one is a presumption of survivorship clause which provides that if there is a common accident the beneficiary, or in the alternative, the settlor is deemed the survivor or the other approach is a survivorship period which provides that a beneficiary must survive the settlor by a certain period of time in order to become a beneficiary of the trust.

b. If you intend a trust to qualify for the federal estate tax marital deduction, then you should use a presumption of survivorship clause in favor of the spouse of the settlor—if you

prefer to use a survivorship period clause, then it cannot exceed six months after the death of the settlor or the marital deduction is lost. Treas. Reg. 20.2056(b)-5(h).

c. If no tax planning is involved, then a survivorship period provision is usually preferred, as it avoids having duplicate probate administration of the same trust interest if the settlor and beneficiary should die within a short time of each other.

d. The Ohio statutory default rule for survivorship is 120 hours.

E. Discretionary termination of trust.

The reason for this provision is that if the trust becomes too small, it is uneconomical to administer on the part of the trustee and difficult to invest in any reasonably productive manner. In that situation, it may as well be distributed to the beneficiaries, as there is little advantage to retaining it in trust.

a. However, the client may have purely emotional and sometimes logical reasons for wanting even that small an amount to be retained in trust rather than distributed outright to the beneficiaries.

b. The trust should be very specific as to which beneficiaries the trust property should be distributed at the time of its termination.

c. Ohio Revised Code, Sec. 5804.14 also provides for the termination a trust upon the Trustee's motion if all of the following apply:

i. It is no longer economically feasible to continue the trust;

ii. The termination of the trust is for the benefit of the beneficiaries;

iii. The termination of the trust is equitable and practical; and

(iv) The current value of the trust is less than $100,000;

d. If property is to be distributed from an estate being probated to a trust, the termination and distribution of the trust shall not clearly defeat the intent of the testator.

F. Consolidation and division of trusts.

The Trustee should have the power to consolidate, merge or divide the trust. The division of the trust may be important for generation skipping purposes (to fully utilize the first spouse's GST exemption) or to qualify the trust as a Subchapter S shareholder.

Ohio Revised Code, Sec. 5804.17 permits the trustee of an inter vivos or testamentary

trust to consolidate two or more trusts into a single trust or divide a single trust into two or more separate trusts. The consolidation or division must meet the following criteria:

a. It must not impair rights of any beneficiary.

b. It must not adversely affect achievement of the purposes of the trust.

The statute requires the trustee to notify the qualified beneficiaries (not the court) before the consolidation or division.

G. Power to amend administrative provisions.

This is a relatively new innovation in drafting which permits the trustee to amend the administrative provisions of the document to adapt to changes in tax and trust law or other later events which render parts of the trust obsolete. This flexibility is of particular importance in "dynasty" trusts and others which are exempt from the Rule Against Perpetuities. Alternatively, the document could give this power to a "trust protector" or "trust advisor," or the trustee can apply to a court to "reform" the trust by decree when needed.

XI. Trustee Powers.

With Chapter 5808 of the Ohio Trust Code (Ohio Revised Code), Ohio has a full statutory "standard set" of trustee powers. All of the trustee's authority to deal with the trust corpus may be spelled out in the governing document or reference may be made to the Ohio Trust Code authority. While trustee powers tend to be pretty standardized, like all such provisions they should be reviewed with the client, and customized as the situation demands.

A. Retention of certain assets.

If the client has a large preponderance of his estate in relatively few assets, i.e.,

a. the entrepreneurial client, whose main asset is a closely-held business

b. the client who has not diversified his holdings,

c. the client who owns assets which might be considered speculative in nature,

then the trust should have a provision giving the trustee the discretion and authority (and corresponding immunity from liability) to retain these assets in the trust regardless of their lack of diversification, speculative nature or limited marketability.

This power should be included even though Ohio Revised Code, Sec. 2109.38 seems to give such a power to a fiduciary. If the marital deduction is involved, this should be subject to

the consent of the spouse. If the trustee is to be a bank, then this power should extend to the retention of any shares of stock in the trustee bank which may become part of the trust. Provisions should also be included on how that stock is to be voted or if possible a beneficiary or co-trustee or advisor to the trustee should actually vote the stock.

B. Closely held business.

If the client has a closely held business interest which will continue to be held in the trust after her death, there are several issues that need to be addressed.

1. Retention.

Ohio law would probably not authorize retaining closely held business stock, so specific authorization to retain such should be in the document. If the client intends to pass the business to the next generation, the document might even include a specific directive (not just authority) to retain the business interest, such as the following:

Sample trust language

> *It is my wish, but I do not direct, that all Closely Held Business Interests (as defined [elsewhere in the document]) included in the Trust Property will be held by my Trustee to be distributed to the ultimate beneficiaries under this Trust.*
>
> *(1) The Trustee shall not dispose of Closely Held Business Interests for the sole purpose of diversification of investments, nor shall the Trustee be held liable for any loss sustained by reason of the retention of Closely Held Business Interests.*
>
> *(2) It is my wish, but I do not direct, that in case there shall be rights to subscribe for additional stock, partnership interests, membership units, or any other equity interest in any such entity, the Trustee will exercise such rights, using any other funds for the purpose of such investment or if necessary, selling rights in order to exercise other rights.*
>
> *The foregoing provisions shall not prevent the Trustee from disposing of all or part of the Closely Held Business Interests in case there shall be some compelling reason other than diversification for doing so.*

2. Voting.

The ability of a trustee to vote the shares of a closely held business, and any limitations thereon must be addressed in the trust instrument.

3. Compensation of the trustee for managing this asset.

Private businesses are not the usual form of trust investment, and accordingly, specific provisions should be made for the trustee to receive reasonable compensation for its services, especially if it has to actively manage the business.

4. Issues peculiar to the particular form of the business.

a. If it is a *sole proprietorship*, the document should give the trustee authority to continue the business, or to form an entity to continue the business.

b. If it is a *general partnership interest*, then specific provision may be desirable to provide for continuation of the partnership or orderly liquidation of the interest. Otherwise, the provisions of Ohio Revised Code, Sec. 1779.01, et seq., will apply.

c. If it is a *corporation*, and the client expects to use an Internal Revenue Code Section 303 redemption to pay estate taxes or deductible expenses, the trust should contain a clause that makes it clear that the trustee is bound to redeem the trust's interest in the stock.

d. If it is an *S corporation*, the trustee should have the power to do what is necessary to make or maintain the S election.

These are only a few of the questions that may arise if the trustee is to retain a closely held business interest, and therefore, it is important to fully discuss the disposition or retention of the business and if it is to be retained, the various administrative and management problems that may arise should be discussed with the client.

C. Real Estate.

There are four areas of concern with respect to real estate owned by the client.

a. If it is a *residence to be held for the use of beneficiaries*, then the document should address who is responsible for the maintenance and upkeep, the payment of taxes and the purchasing of insurance coverage, and should give the trustee specific authority to retain non income producing assets.

b. If it is *income producing rental property*, can the trustee hire an outside rental manager? How is the trustee to be compensated for managing this asset? The trust document should provide that the trustee has the power to lease trust property for any period of time commencing in the future or extending beyond the term of the trust.

c. If there is real estate located outside the State of Ohio, is there a problem in transferring title to the trustee (such as a corporate trustee not qualified to do business in that state)? There are administrative problems in managing real property from a distance. The trust

should permit the appointment of a "special trustee" solely to manage the out of state real estate.

d. Is there a possible environmental problem under CERCLA or RCRA and does the fiduciary qualify as an innocent purchaser? Ohio law attempts to assist a fiduciary in qualifying as an innocent purchaser under CERCLA or RCRA. However, this statutory provision may be of greater benefit to an outright heir or a testamentary trust rather than a living trust.

D. Borrowing.

The trustee should specifically be granted the power to borrow from any lender (including itself), extend or renew any existing indebtedness and mortgage or pledge any property in the trust. Often the trust document will provide the trustee the power to borrow, but does not specifically provide that the trustee has the power to mortgage or pledge property, which results in the trustee being required to file a declaratory judgment action requesting the court's permission to mortgage or pledge property.

E. Sale.

The power of sale is equally as important under a trust as it is under the will. The power should provide that the trustee has discretion to sell, at a public or private sale, and under the terms and conditions which the trustee deems appropriate.

F. Choses in action.

The power to contest, compromise and prosecute claims in favor or against the trust is as important under the trust document as it is under the will. This includes the power to collect proceeds of life insurance policies and exercise other rights involved in collecting the proceeds.

G. Dealing with other trusts and estates.

To purchase assets other than real estate from the fiduciary of any trust or the estate of the decedent as well as the family of the decedent. In addition, any of the trustees should be able to purchase or sell assets to any beneficiary of the trust. Finally, the trustee should also have the power to loan money to various individuals, such as the estate and trust beneficiaries.

H. Ohio Principal and Income Act.

Do you want the trust to be subject to the provisions of this Act or to waive its application? (Ohio Revised Code, Chapter 5812, to some extent provides a formula for fiduciaries in determining what is income and distributing income.)

I. Agents.

Every trust document should specifically permit the trustee to retain attorneys, agents and

other persons to whom their powers could be delegated in order to accomplish the trust purposes, and authorize the trust to pay their fees and expenses.

J. Compensation.

The trust should include a provision granting the power to pay a corporate trustee reasonable compensation. The power to pay the trustee should not be limited in any manner and should provide that the trustee could collect for extraordinary services.

K. Trust advisors.

A recent trend is to name advisors to the trustee, either for investment or administration purposes. If an advisor is utilized, what are her areas of responsibility? Whose decision is controlling—the trustee or the advisor? Be sure to name successor trust advisors, or at least provide for their selection.

L. Qualified Plan Proceeds.

If the trust may be the recipient of your client's pension, profit sharing or other plan benefits:

a. Be certain that the trust qualifies as a "designated beneficiary" under the Internal Revenue Code, Section 401(a)(9) regulations. The sample revocable trust you have in your materials meets this test. For a more detailed examination of the "trust rules" and how to comply with them, see chapter 6 of Natalie Choate, Life & Death Planning for Retirement Benefits (6th Ed. 2006), and the update posted online at the author's website (http://www.ataxplan.com/).

b. Consider including a clause allowing the trustee to elect the method of payment. The taxation of those assets, depending on whether they are received as a lump sum or in installments and whether the recipient elects to forego certain favorable income tax treatments. The effectiveness of this clause will depend upon the terms of the particular plan.

The above analysis of the issues which may arise in the management of the trust is by no means all inclusive, but it does point out the absolute necessity of reviewing every asset of the client with the client and then designing the powers of the trustee in order to properly administer those assets.

XII. Selection and Removal of Trustee.

The selection of the trustee, and the provisions you make for a line of succession, are an especially important part of the design of your trust.

A. Who is legally capable to serve as trustee?

a. Any natural person or corporation with trust powers which has legal capacity to hold property can serve as a trustee, although there is a possibility that corporations without trust powers can also be named as trustee.

i. There are no further limitations on who can serve as trustee of a living trust.

ii. Sec. 2109.21 of the Ohio Revised Code requires that a *testamentary* trustee be a resident of the State of Ohio.

b. The Ohio Revised Code provides that, in general, persons who wish to engage in a "trust business" must be corporations licensed by the state.

i. The "trust business" is defined as "accepting and executing trusts of property serving as a trustee, executor, administrator, guardian, receiver, conservator or other fiduciary and providing financial services as a business."

ii. There are several exceptions to the general rule. The following need not be licensed in order to serve as trustees:

(a) A natural person acting as a trustee, executor, administrator, guardian, receiver or conservator, who has not solicited the business or appointment by advertising or otherwise.

(b) A natural person serving as trustee who does not hold himself/herself out to the public as willing to act as trustee for hire. The solicitation or advertisement of legal or accounting services by a licensed professional shall not be considered as holding oneself out as willing to act as a trustee for hire.

(c) A charity, officer or employee of a charity or person affiliated with a charity serving as trustee of a charitable trust of which the charity, or another charity with a similar purpose, as a beneficiary.

B. Who should serve as the trustee?

Some of the issues which you should advise your client to consider in making this decision are:

1. Tax considerations.

The use of an independent trustee may be necessary to achieve the desired tax result. This is critical in an irrevocable life insurance trust.

2. The term of the trust.

The longer the trust is expected to run, the more need for the continuity of interest provided by corporate trustee.

3. The type of assets.

The assets involved may require some form of expertise on the part of the trustee.

4. The trustee's fee.

Commercial trustees will charge a fee. Friends or family members will often charge little or no fee to the trust.

5. Knowledge of the family situation.

If the client wants the trustee to have and act upon personal knowledge of his family's needs, he may prefer a close family friend or relative rather than a corporate trustee.

6. Expert management.

A corporate trustee will usually be better at portfolio management and technical trust administration than an individual.

7. Family tensions and emotional issues.

A corporate trustee is generally viewed as a neutral party in family conflicts.

8. "Tough love" for beneficiaries.

A corporate trustee may be the better choice if the client needs the trustee to be able to give a firm "no" to an immature or difficult beneficiary.

C. What about co-trustees and advisors?

To balance some of the concerns discussed above, it may be appropriate to use a combination of individual and corporate co-trustees, or a corporate trustee and an individual advisor. One common pattern is to have a corporate trustee for asset management and an individual co-trustee or trust advisor for distribution decisions. If co-trustees or a trustee-advisor arrangement will be used, there are some issues to be addressed in the drafting of the document:

a. If there will be co-trustees, the trust should state whether unanimity or majority rule is necessary. Co-trustees may be given authority to act alone when managing assets, but required to act collectively when making distributions.

b. If an advisor is being used, clearly specify the advisor's area of responsibility, and whether his advice is to be binding or persuasive.

D. How do you remove or replace the trustee?

The trust should address whether the beneficiaries of the trust have any power to remove the trustee, and should always provide a procedure for appointing a successor trustee if the designated line of succession runs out. (See Ohio Revised Code, Sec. 5804.11)

a. If a removal power is given, the mechanics of removal should be clearly spelled out.

b. Whether or not there is a removal power, a procedure for naming a successor should be provided, and it should be stated how that successor should assume any responsibilities the successor should have for the acts of the predecessor trustee. If the trust does not provide a procedure for appointing a successor trustee, then a court will have to be called upon to make an appointment—the probate court for the trustee of a testamentary trust, Ohio Revised Code, Sec. 2101.24(D), and a "court of equity jurisdiction" (either the general or probate divisions of the Court of Common Pleas) for the trustee of living trust; *National City Bank v. Schmoltz*, 1 Ohio Op. 163, 31 N.E.2d 44 (1934); see Ohio Revised Code, Sec. 5807.06.

c. In an irrevocable trust, there are some possible tax problems of permitting the spouse or even the children to change the trustee, even if it is just to change to a different corporate trustee. The power to remove and/or replace must often be severely limited.

There are other considerations in selecting a trustee, but the important point is that you should review the question with your client and offer guidance in selecting the trustee.

ETHICAL PRACTICAL CONSIDERATIONS AND CONCERNS IN PROBATE PRACTICE

Ohio has a great need for ethical probate practitioners. Probate practitioners can find applicable ethics guidelines in (a) Ohio Rules of Professional Conduct, (b) case law, (c) local probate court rules – as to fees, etc., in estates, and (d) common sense.

This presentation will focus on planning attorneys, but also on attorneys later representing fiduciaries, heirs, and claimants.

Presented by:
Terrence L. Seeberger
Stark-Knoll Co. LPA

1. What must all attorneys, generally, do to avoid ethical misconduct?

(a) always tell the truth, (b) put client's interests first at all times, (c) obey all laws and court orders, (d) avoid drug use, excessive drinking, and gambling, and (e) don't steal from clients.

These are 99 percent of being an ethical attorney. This presentation will focus on the other one percent.

(Avoid even the appearance of impropriety)

2. Why are good ethics so important for the planning attorney?

a) Vulnerable/elderly clients – who don't understand the rules of the game.

b) Substantial assets at stake

c) Many parties, other than clients, with a strong interest in the attorney's planning work, and hoping to profit from the client's attorney guided decisions.

3. The first question for the planning attorney - who is the client?

To answer, remember that for every estate plan, there are three categories of persons hoping to profit from an estate plan. (a) clients hoping to direct their assets and legacy after their passing, (b) potential heirs hoping to collect those assets after death, either through the estate plan or otherwise, and (c) attorneys, for planning fees and from post-death administration fees.

The answer to "who is the client?" – always the person that the attorney is assisting in post-death planning.

4. Conversely, who are not the planning attorney's clients?

(anyone other than the planning client)

5. The planning attorney as a fiduciary.

The planning attorney is relied upon, by a client, to (a) ascertain that the client's plan is the client's plan, and not that of another person, (b) the client understands the plan, and (c) the client is competent to make the plan, free from duress and undue influence.

This reliance makes the attorney a fiduciary – where special confidence and trust are reposed in the attorney, who is thus in a resulting position of influence. *Ryerson v. White* (describing the fiduciary relationship).

Attorneys are enormously influential in the estate/trust planning process.

6. Rule 1.7 – the rule governing conflict of interest with current clients.

Many estate planning clients are referrals; often from family members the attorney has represented or currently represents. Rule 1.7(a)(2) – a conflict may arise where "*there is a **substantial** risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interest*."

7. Ohio Supreme Court - the planning attorney's loyalty lies solely with the planning client. This concept is the underlying basis of the direct privity requirement in a legal malpractice claim against a planning attorney by the heirs.

Shoemaker v. Gindlesberger - "Neither the lawyer's personal interest, the interests of other clients, nor the desire of third persons should be permitted to dilute the lawyer's loyalty to the client." But, even if estate heirs can't sue a planning attorney, an estate fiduciary may be able to for a plan that doesn't mirror what the testator intended. (Make sure your plan is what your client said she intended). *White v. Sheridan*

8. Rule 1.9 - conflict with former client

Rule 1.9(A) bars representation in a same or substantially related matter where the planning client's interests are materially adverse to the interests of a former client. How might these interests be adverse?

(a) Differing views on what the former client is entitled to.
(b) Is former client a joint tenant or insurance beneficiary, where a change might be what planning client wants?
(c) Attorney knows something about a potential heir, which would (if disclosed) change the testator's view on distribution scheme.

How to know if something is same or substantially related? A – Err on side of extreme caution, cf. *Canon 9* – avoid even the appearance of impropriety.

Avoid even the appearance of a being a side switching attorney, especially if the former client is a potential beneficiary of the current planning client. *Kala v. Aluminum Smelting & Refining* said at the heart of every side-switching attorney case is **suspicion** that by switching sides, the attorney breached a duty of fidelity and loyalty to a former client who freely shared private information with expectation it would not be disclosed to anyone else.

Q – how might a conflict arise?

A – the referring family member will have a strong personal interest in the estate and assets of the planning client.

Examples

(1) Family member may be "convenience" co-tenant on a bank account, or a "convenience" joint and survivor on a deed; and may want to shield those assets from an estate plan.

(2) Family member may see herself as a future fiduciary, thinking this will give control over the estate or trust and over distributions.

(3) Family member may feel entitled to bigger distributions than others, for any of number of reasons, such as "I was the only one who was there for Mom."

Q – How does such a conflict affect the planning attorney who represents a family member or potential heir?

A – The attorney has an actual or potential conflict and can't start the planning process unless *"each affected client gives informed consent confirmed in writing."* Rule 1.7(b)(2)

Comment 31 – attorney generally is required to explain potential risks and consequences of representing both planning client and potential beneficiaries, including risk that the attorney's advice could be influenced by the wishes of various current and past clients.

Attorney needs, at minimum, to advise the planning client that he represents or has represented potential heirs. *Risk* -- client will consult another attorney

Cincinnati Bar Assn. v. Robertson

In *Robertson*, the attorney represented both the fiduciary (as executrix) and he represented her and her husband on objections filed by estate beneficiaries claiming the executrix and her husband had improperly withheld estate assets, and against an attempt by estate beneficiaries to have her removed as the estate fiduciary. The attorney did not explain his conflict to any party or attempt to obtain informed written waivers of conflict.

Supreme Court held that the attorney had engaged in dual representation "*to the extent the claims of the other family members implicated potential wrongdoing that would diminish the estate [the attorney] could not simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer.*"

As much as we talk about obtaining written waivers of conflict, doesn't *Robertson* illustrate a non-waivable conflict? Rule 1.7(c) – "*Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies: (1) the representation is prohibited by law; (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding*."

What are some examples of an attorney's conflict with a planning client's estate or trust? Lest we think this is of no value to us (because we're so ethical), remember, attorneys are getting disbarred or suspended almost weekly on things like this.

Ivancic v Enos

Estate attorney, unknown to estate fiduciary, had represented the decedent during the last few years of his life, as result of which he claimed entitlement to a $50,000 contingent fee (not evidenced by a written agreement), recorded a $50,000 lien against the decedent's home while the decedent was in a hospital recovering from a stroke, and actually received the $50,0000 directly from the title company when the home was sold during the probate administration.

The attorney didn't advise the fiduciary he was the estate's largest creditor or procure a signed conflict of interest waiver. When this was discovered by the probate court, the attorney was ordered to return the $50,000 on the ground that the attorney had not submitted a claim against the estate. The court also said this undisclosed claim created a conflict that should have been disclosed. In subsequent litigation, for this and other outrageous conduct, the estate attorney was disbarred by the Ohio Supreme Court.

9. Rule 1.6 on client confidentiality is the next rule to consider.

Rule 1.6(a) *A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney client privilege … unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or disclosure is otherwise permitted under the Rule.*

a) how does this apply to client meetings? [Client and attorney only, other than at client request with express informed consent. Remember – these are the most private of discussions.]

b) how does this apply to discussions about prospective wills and trusts? [It applies, to avoid potential heirs attempting to get involved or to massage the estate plan to their benefit (or begin hiding assets or putting them into non-probate form)]

c) how does this apply after will or trust is signed? [Still applies. Plan disclosure before the plan vests can cause hard feelings, and spur more beneficiary "estate planning," such as a new will or getting an asset into joint and survivor form.]

10. From whom can a planning attorney accept compensation? [Rules 1.8(f) and 5.4]

Rule 1.8(f) – "*A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) .... apply. (1) The client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; (3) information relating to representation of a client is protected as required by Rule 1.6 [which related to client confidentiality.]*"

Difficult to conceive of how an attorney can be paid by one person (potential beneficiary) yet completely independently represent the planning client.

Rule 5.4 – "*A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services*."

Being compensated by a relative or other potential beneficiary raises red flags, including concern that attorney is looking out for the interest of the fee payor over others, either directly or more subtly, such as by not investigating to discover nonprobate assets (bank accounts, life insurance?) on which the fee payor may have maneuvered self into being the surviving beneficiary.

11. Is attorney "self-dealing" a potential problem in estate planning?

It is given that an attorney is a fiduciary advising potentially vulnerable clients who will not understand all of the intricacies of how property passes at death.

Follow-up question – how can an attorney "self-deal" in drafting an estate plan? [Here, an estate plan is more than a mere will or trust, but a plan for all of the planning client's assets – however held.]

12. What about a planning attorney counseling clients to name the attorney as an executor or successor trustee?

Former Ethical Consideration 5.6 (Code of Professional Responsibility) – "*A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyers as such, care should be taken by the lawyer to avoid even the appearance of impropriety.*" Note –

EC-5 was approvingly cited by Ohio Supreme Court in *Krischbaum v. Dillon* (1991), 58 Ohio 58.

This has been modified in current Rules, as per Comment 8 to Rule 1.8 – "*This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position.* ***Nevertheless****, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a* ***significant*** *risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning* ***the nature and extent of the lawyer's financial interest in the appointment****, as well as the availability of alternative candidates for the position."*

So, an attorney can suggest himself as an executor or a successor trustee, but **pay attention** to what must be disclosed, and consider whether the ethical / potential conflict is too much to make the suggestion

Q - How might an attorney financially benefit from being named as an executor in a will or a successor trustee in a trust?

(a) Executor's commission under Ohio Rev. Code, Sec. 2113.35 – can be such substantial, easy money that an attorney's writing himself into a will as an executor or into a trust as a successor trustee (for the trustee's fee) may be viewed as soliciting a substantial testamentary gift from a client, which is strongly discouraged in Rule 1.8(c).

(b) Ability to hire members of his law firm to represent the fiduciaries in any will or trust litigation; a different fiduciary might hire a completely different attorney.

In re Testamentary Trust of Roe – attorney who was both successor trustee and represented the trust got fees reduced by a probate court for blurring the line between attorney work and fiduciary work and effectively charging attorney fees for non-attorney work. (Just an example of an attorney trying to work both ends).

13. Is there a concern over a planning attorney subsequently acting as an executor?

Yes – if there is a will contest!! Rule 3.7 – "*A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness … [unless] the disqualification of the lawyer would work substantial hardship on the client.*" So, the attorney-executor will have to hire a different attorney, subjecting the estate to additional legal fees. The problem with this is – it is entirely foreseeable for a drafting attorney that names the attorney as the executor, where because of the will's distribution scheme, is likely to be challenged.

Same goes for a trust naming an attorney as a successor trustee.

Whose interests will the attorney be serving – that of the heirs to the estate, or to the attorney's billable hours?

14. What about an attorney preparing an instrument having the attorney or the attorney's relatives as beneficiaries?

Rule 1.8(c) – "*A lawyer shall not solicit any substantial gift from a client. A lawyer shall not prepare on behalf of a client an instrument giving the lawyer … or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of division (c) of this rule: *** (2) "gift" includes a testamentary gift."*

Hard to believe this rule actually was violated and litigated to the Supreme Court, but in *Disciplinary Counsel v. Shaw*, the Court held that an attorney in preparing a trust that named the attorney's own children as beneficiaries violated the predecessor to Rule 1.8(c).

Comments 6 and 7 to Rule 1.8 help explain.

Comment 6 – "*In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client…*"

Comment 7 – *If the effectuation of a gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this rule is where the client is a relative of the donee.*"

So – no problem with an attorney preparing such documents for his own relatives, right?? Remember – the planning attorney is a fiduciary, and *any testamentary gift to the will or trust scrivener will be looked upon with some suspicion that undue influence may have been brought to bear on the donor by the donee. Ryerson v. White*. Thus, under Comment 6 to Rule 1.8, the client gift may be considered presumptively fraudulent and be subject to a strong will contest challenge.

Bottom line – even for your relatives, consider having the estate planning done by another attorney.

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15. Is there a concern over the planning attorney representing the estate or trust during probate?

Again, the drafting attorney, whether or not actually signing as a witness to an instrument, may be the best witness to testator competence, lack of undue influence, etc.

16. What goes into the attorney's duty of competent representation (Rule 1.1)?

Yes – competent representation is part of the Rules of Professional Conduct. Rule 1.1 – *An attorney shall provide competent representation to a client*. (Remember *Krischbaum v. Dillon*, describing how the Ohio Supreme Court places the utmost value on planning attorney competence.)

An attorney is both an evaluator and an advisor. Preamble 2 to Rules of Professional Conduct – "*As an evaluator, a lawyer examines a client's legal affairs and reports about them to the client. * * * As adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.*"

Q – what is the planning attorney's duty of competent representation?

A – (a) getting the complete picture.
(b) ensuring the plan is really the planning client's actual plan.

16. Duty of competent representation (continued)

Example – attorney failure to consider how testator assets are held, in order to effectuate testator's distribution scheme (e.g., equal division among children)

Example – attorney must ensure that a will or trust is the maker's intent, not the attorney's. The attorney must ascertain the client understands the provisions of a will and trust, and how they operate. CF – Rule 1.4(b) – *"A lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation."*

16. Duty of competent representation (continued)

The duty of competent representation includes the Rule 1.3 requirement of "reasonable diligence and promptness in representing a client." CF Rule 1.4(a)(3) – attorney duty to communicate in a timely and regular manner with clients.

Example – repeated failure to respond to client inquires regarding status of probate matter, and to advise that as a result of failure to file timely estate tax return, estate was subject to $2,454 tax penalty and $3,785 interest – part of misconduct leading to permanent disbarment. *Columbus Bar Assn v. Kiesling.*

Example – failure to file timely estate tax return and failure to inform client – indefinite suspension. *Disciplinary Counsel v. Nittskoff.*

16. Duty of competent representation (continued)

Example of attorney that managed to violate almost every rule of competent representation in a planning setting, *Disciplinary Counsel v. Jarvis (2022)*

"Jarvis, on the other hand, made no effort to establish or maintain a normal client-lawyer relationship with a client whose capacity was known to be diminished. Jarvis never met with Frank to assess his capacity or ascertain his wishes for his end-of-life care and the disposition of his estate before preparing the necessary documents. Instead, he drafted the documents pursuant to the instructions of Frank's family members. Jarvis directed his employee to obtain the client's signature on those documents outside of his presence and then fraudulently notarized them under jurats falsely stating that Frank had personally appeared before him and voluntarily signed the instrument. Jarvis further attested that Frank appeared to be of sound mind when he signed two of those documents – even though he was not present when those documents were signed and had no personal knowledge of "Frank's mental status. Jarvis' s multiple failures opened the door to allegations that Frank and Lenor had been unduly influenced or coerced to modify their estate plan, which led to another six years of estate litigation and more than ten years of malpractice litigation."

In the outline, I ask – an eight-five year old planning client in poor health tells her attorney that she has three children, whom she loves equally, and wants to provide for each of them equally. **What could go wrong?** What more is required than a simple (off the shelf) will?

The answer to my question is – **plenty**!!

What if the attorney fails to ascertain what the client's assets are and how they are held and misses that many of them are bank or investment accounts and a residence that are held in joint and survivor name with one of the children (as a convenience, and not with intent to convey). *How disastrous would a simple will dividing the estate three ways be for that client's testamentary scheme?*

Don't forget *White v. Sheridan* – an attorney is responsible to an estate fiduciary for failing to ensure that a testator's dispositive scheme in an instrument is as intended by the testator.

What about a duty to ensure that the testator is competent and not acting under duress? Explain the salient provisions of the will or trust and discuss non-probate assets and how those might affect the dispositive scheme. And, to extent possible, use plain English to increase the odds that the client (and any future fiduciary and judge) can understand the dispositive scheme. And, if you're concerned that someone else is pulling the testator's strings, look into it.

17. How does the ethical attorney bill for work? What is over the line?

[Governed by Rule 1.5, which prohibits a "clearly excessive fee," and lists a number of factors.]

Whatever you choose to bill, be aware of three things that courts will not tolerate, particularly in probate administration, and probably not in the planning process either -

a) Modern practice methods to reduce billable time required to complete services that used to take many hours, but thanks to technology can be quickly completed. Courts are placing the burden on attorneys who want to do probate practice to adopt such methods.

b) Paralegal/clerical work not billable as attorney time. (What more needs to be said, and unbelievably, this still happens?)

c) $34,050 for an estate of net value of $31,444 is too much. *Disciplinary Counsel v Estadt*

The Ohio Supreme Court has in the past explained why ethics are paramount in estate planning, in *Krischbaum v. Dillon*:

"A client's dependence upon, and trust in, his attorney's skill, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon and trust in, his attorney greater than when contemplating his own mortality, he seeks the attorney's advice, guidance, and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are often among the most private to take place between an attorney and his client. The client is dealing with his innermost thoughts and feelings, which he may not wish to share with his spouse, children, or other next of kin.

Because the decisions that go into the preparation of a will are so inherently private, and because, by definition, the testator will not be available after his death, when the will is offered for probate, to correct any errors that the attorney may have made, whether they are negligent errors or of a more sinister kind, a client is unusually dependent upon his attorney's professional advice and skill when he consults the attorney to have a will drawn. The client will have no opportunity to protect himself from the attorney's negligent or infamous conduct."

Ethical Practice Considerations and Concerns in Probate Practice

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I. The extraordinary need for ethical conduct by Ohio probate practitioners

The principal sources of ethical guidelines for Ohio probate practitioners are (a) the Ohio Rules of Professional Conduct, (b) case law, (c) local probate court rules, and (d) common sense. However, if a lawyer always tells the truth, puts the client's interests first, obeys all applicable laws and court orders, and avoids drug use, excessive drinking, and gambling, the odds are good that the attorney will not run afoul of the Ohio Rules of Professional Conduct or any ethical conduct rules. Attorneys who seek to avoid even the appearance of impropriety (an old Code of Canons concept) will also not run afoul of these rules.

There is a great need for attorney ethics in preparing estate plans (will, trust, etc.). The focus of this presentation will be both on attorneys preparing estate plans (will, trust, etc.) and on those attorneys representing fiduciaries, heirs, and claimants, as they are interrelated.

Reasons that ethics in probate practice are so essential include that clients are making some of the most important decisions of their lives, with little understanding of the rules of the game, and are extraordinarily reliant on attorney advisers, and there are numerous other persons who may be affected by and hope to profit from these attorney guided decisions. The urgency behind ethics in probate practice was explained long ago by the Ohio Supreme Court in *Krischbaum v. Dillon* (1991), 58 Ohio St. 3rd 58:

> *"A client's dependence upon, and trust in, his attorney's skill, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon and trust in, his attorney greater than when contemplating his own mortality, he seeks the attorney's advice, guidance, and drafting skill in the preparation of a will to dispose of his estate after death. These*

consultations are often among the most private to take place between an attorney and his client. The client is dealing with his innermost thoughts and feelings, which he may not wish to share with his spouse, children, or other next of kin.

Because the decisions that go into the preparation of a will are so inherently private, and because, by definition, the testator will not be available after his death, when the will is offered for probate, to correct any errors that the attorney may have made, whether they are negligent errors or of a more sinister kind, a client is unusually dependent upon his attorney's professional advice and skill when he consults the attorney to have a will drawn. The client will have no opportunity to protect himself from the attorney's negligent or infamous conduct."

For attorneys representing persons considering their final planning, the first critical question will always be "Who is the client?" In answering this question, attorneys need to recall that, with respect to estate planning, there are three categories of persons who can benefit from it – (a) clients who desire to direct their assets (and legacy) after they pass, (b) potential heirs who hope to collect from those assets, and (c) attorneys who will be compensated (often handsomely) for their work, including for post-death administration work.

The ethical planning attorney's answer to the question – who is the client? – will always be – the person for whom the attorney is preparing a plan.

II. Who is the client?

A. Applicable Rules of Professional Conduct

The most applicable Rules of Professional Conduct are 1.6, 1.7, 1.8, and 1.9, although they are not the only ones. All four broadly cover or include various conflict of interest issues.

An estate planning attorney has a specific duty to ascertain that the ultimate plan is that of the client (testator or settlor) and not that of another person, that the client understands the plan, and that the client is competent to make the plan free from duress or undue influence. Protecting client confidentiality is part of this duty. As the typical estate planning client has never drafted an estate plan, the attorney is effectively a fiduciary. A fiduciary relationship is one in which special confidence and trust are

reposed in the integrity of another [the attorney] and there is a resulting position of superiority or influence, acquired by virtue of this special trust. *Ryerson v. White* (8th Dist. App.), 2014-Ohio-3233, para. 18.

B. Rule 1.7 – conflict of interest; current clients

Estate planning clients typically come via referral. Many of those referrals are from family members that the attorney has represented or does currently represent. Here, Rule 1.7(a)(2) applies, as a conflict of interest may arise where "*there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests*." How might the conflict arise?

The problem is often that the referring family member probably has a strong interest in the content of the estate plan to be created. The family member may also be a "convenience" co-tenant on an account, such that the family member will have an interest in shielding that asset from an estate plan. The family member may also have a strong interest in being named as a fiduciary or successor fiduciary, thinking that such may give the family member power and authority to control distributions, etc. The family member's aforesaid interests may or may not coincide with what the putative testator/settlor may have in mind, or even with what is in the best interest of the putative testator/settlor or other potential beneficiaries of the putative testator/settlor. So, the attorney who represents or has represented the family member either has an actual conflict, or at least a potential conflict or an appearance of a conflict. In any of those situations, the attorney cannot undertake the planning unless "*each affected client gives informed consent, confirmed in writing.*" Rule 1.7(b)(2). See Comment 31 to Rule 1.7, requiring the attorney, in most instances, to explain the potential risks and consequences of representing both the planning client and potential beneficiaries, including the risk that the attorney's own advice could be influenced by potentially competing desires of the various clients. At a minimum, the attorney should advise the planning client, in writing, that (s)he represents potential heirs, one or more of whom have referred the attorney to

the client, and that this may give rise at least to the appearance of a conflict. If the planning client decides to go with a different attorney, that is okay; it's the client's right.

Though in the context of legal malpractice, the Ohio Supreme Court has repeatedly emphasized that a planning attorney's duty of loyalty lies solely with the planning client, and not to third parties such as beneficiaries. In *Shoemaker v. Gindlesberger*, 118 Ohio St. 3rd 226, 2008-Ohio-2012, the Ohio Supreme Court retained the direct privity requirement to prevent will beneficiaries from being able to sue a will's drafter, in part to ensure that a planning attorney not "have conflicting duties and divided loyalties during the estate planning process." Para. 14. In so holding, the Ohio Supreme Court quoted from Comment 1 to Rule 1.7, in relevant part – "Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client." Para. 16.

Lest any planning attorney assume (s)he has an absolute immunity from legal malpractice simply because a beneficiary can't sue, see *White v. Sheridan* (10th Dist. App.), 2022-Ohio-2418, holding that an estate fiduciary stands in the shoes of a testator and may assert legal malpractice against a planning attorney for that attorney's failure to ensure that the testator's dispositive scheme was carried out as intended by the testator.

C. Rule 1.9 – former clients

Rule 1.9 is important, because an attorney hoping to represent either a potential planning client or an estate fiduciary may have previously represented a party that is a potential beneficiary of or a potential claimant against the planning client or the estate that will be created. (This rule is related to Rule 1.7, involving present clients, as the boundary between present and former clients is not always a clear one). In such a case as previously described, Rule 1.9 may apply, and will require (in most instances, such as having represented the former client in a related matter where the former client's interest may be materially adverse to the interest of the planning client, or even perhaps to the interests of other beneficiaries after the passing of the testator/settlor) "an informed consent, confirmed in writing." Specifically, Rule 1.9(A) will bar representation in a same or substantially related matter, where the planning client's interests are (potentially) materially adverse to the interests of a former client.

How to know if a matter is the same or substantially related? While this may seem intuitive, it is best to err on the side of extreme caution, which brings to mind the old Canon Nine, to wit – avoiding even an appearance of impropriety. The reason for this old rule, avoidance of even an appearance of impropriety was that "(A)t the heart of every side-switching attorney case is the suspicion that by changing sides, the attorney breached a duty of fidelity and loyalty to a former client, a client who had freely shared with the attorney secrets and confidences with the expectation that they would be disclosed to no-one else." *Kala v. Aluminum Smelting & Refining Company, Inc.* (1998), 81 Ohio St. 3rd 1, which is cited in the notes to Rule 1.9.

An attorney considering representing a beneficiary of or a claimant against the estate, who has previously represented the testator/settlor of such estate plan, should understand that he will be prohibited under Rule 1.9(c) from using or revealing information relating to the prior representation for the benefit of the new client. This will apply also to an attorney, where another attorney in the attorney's firm formerly represented the decedent.

D. Rule 1.6 – client confidentiality

Given that planning clients are often referred to an attorney by a family member (who may or may not be the attorney's client), and given the expectations that a family member may have with respect to a potential estate plan, client confidentiality is interrelated with the question – who is the client?

Rule 1.6(a) provides the general rule of confidentiality, which should apply with equal force to probate and planning practitioners

> *"A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d) of this rule."*

There are solid reasons for this rule. The existence and contents of a will or trust, or even the client's desired distribution scheme should be maintained confidentially, other than to those to whom the client expressly wants a disclosure to be made. Part of the reason is that, especially for older testators and trust settlors, their potential heirs (and others who

hope to benefit) begin to feel a sense of entitlement, a curiosity about the developing or existing estate plans from they hope to benefit, and will attempt to alter (one way or another) such estate plan if it is not to their liking. Only by way of examples, potential beneficiaries may use their influence, etc. to transform a client's assets such through joint/survivor payable on death instruments, or through beneficiary designations (or to ensure that such assets are not made part of a probate or trust estate). *All of the foregoing are reasons that an attorney must endeavor to meet privately with a planning client, and not share the meeting discussion with family or other potential beneficiaries, other than with the client's express informed consent.*

An exception to this rule is Rule 1.6(b)(3) which provides that an attorney may reveal information relating to the representation without the client's informed consent "*to the extent the lawyer reasonably believes necessary … (3) to mitigate substantial injury to financial interests or property of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services*." Comment 6 to Rule 1.6 recognizes that this is a very limited exception to the general rule confidentiality, and the likelihood that it will exist in an estate planning context is probably negligible.

So, other than with the planning client's express informed consent, the planning client meeting must be private. What are some of the circumstances in which it would be fine to include a relative in such a meeting? Perhaps the client may insist on it, because of the client's confidence in the relative. However, the attorney can't simply acquiesce but should make an independent attempt to determine whether this insistence isn't actually the product of or evidence of undue influence.

When administering an estate, the attorney's duty of confidentiality will shift from the testator or settlor to the executor or administrator. The duty of confidentiality will apply with equal force, except that the attorney will then have simultaneous duties to the court and beneficiaries.

E. Rule 1.8(f) – accepting compensation from someone other than the client

Although it may not come up often, an attorney undertaking to represent a testator/settlor must not accept compensation from other than the testator/settlor (such as from a potential beneficiary or a relative). Rule 1.8(f) provides

> *"(f) A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) … apply:*
>
> *(1) The client gives informed consent;*
>
> *(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;*
>
> *(3) Information relating to representation of a client is protected as required by Rule 1.6 [which relates to client confidentiality]."*
> *(Bracketed language added).*

It is difficult to conceive of such an arrangement which would not violate Rule 1.8(f).

Rule 1.8(f) should be read in conjunction with Rule 5.4(c), which states

> *"A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."*

The point here is surely to prevent a conflict of interest. This relates back to the question "who is the client," especially in the context of a potential beneficiary who has a personal interest in the estate that may conflict with the interests of other beneficiaries or even with the best interests of the testator/settlor. If any part of the estate attorney's compensation is coming from a potential beneficiary or relative personally, a real red flag as to potential conflict of interest is raised. And that red flag includes a suggestion that the attorney is looking out for the interest of a fee payor over other family or potential beneficiaries, either directly or more subtly such as by not investigating the testator/settlor's existing circumstances to discover nonprobate assets (bank accounts and life insurance policies) on which the fee payor may have maneuvered into a position of being the surviving beneficiary.

III. Attorney self-dealing in planning process

While an attorney's failure to understand the identity of the client is an ethical issue in the planning process, it is not the only ethical issue facing planning attorneys. Potential self-dealing is also an issue. Given that an attorney is a fiduciary for the planning client, this is potentially a very important issue. How could an attorney possibly "self-deal" when drafting a will or trust? There are several ways, outlined below.

A. Attorneys naming themselves as fiduciaries in instruments they draft

Many attorneys counsel clients to name them as fiduciaries (executor, successor trustee, trust protector, etc.) In this regard, Ethical Consideration 5-6 of the former Code of Professional Responsibility previously said

> *"A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."*

This language has been modified in the Rules of Professional Conduct, as explained in Comment 8 to Rule 1.8,

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

This modification does not mean that the principle stated in EC 5-6 is no longer valid. It is valid. Even though under both EC 5-6 and Rule 1.8, an attorney writing himself into a will as an executor or into a trust as a successor trustee is not absolutely prohibited, the last sentence of Comment 8 to Rule 1.8 clearly states what an ethical attorney will do

before so writing himself into a will as an executor, or into a trust as a trustee or successor trustee. To do contrary is to risk sanctions.

Given how lucrative such appointments can be (as an example, an executor's commission under Ohio Revised Code, Sec. 2113.35), a fair argument can also be made that *an attorney's writing himself into a will as an executor, or into a trust as a trustee or successor trustee may be viewed as soliciting a substantial testamentary gift from a client*, which is substantially discouraged in Rule 1.8(c), as modified by Rule 1.8(c)(2). Solicited gifts from clients will be discussed later herein (Section III(C)).

A case illustrating both the temptation and danger of an attorney getting himself named as a successor trustee is *In re Testamentary Trust of Roe* (2nd Dist. App.), 2005-Ohio-4033, upholding an attorney fee reduction by a probate court, where the attorney was also a successor trustee, and blurred the line between work as successor trustee and work as attorney, resulting in charging attorney fees for non-attorney work, and simply spending too much time on what ought to have been simple tasks.

B. Attorneys serving as executors

One potential risk for an attorney drafting an instrument under which the attorney may serve as an executor involves will contests, where the attorney may be a critical witness in defense of the will. In such a case, Rule of Professional Conduct 3.7 may well apply; it provides in relevant part "A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies." Unfortunately, with the possible exception of "the disqualification of the lawyer would work substantial hardship on the client," the exceptions would not apply. This probably does not present a problem for the attorney/executor who was not the scrivener of the will. *It is an entirely foreseeable problem for the attorney who drafts a testamentary document that names the attorney as the executor, which because of its distribution scheme, is likely to be challenged.*

The same logic applies with equal force to trusts in which the attorney is named as and serves as a successor trustee. The validity of a trust can be challenged on the same grounds that a will can be challenged upon, and the attorney may be a critical defense witness.

Another risk of an attorney serving as an executor (or administrator) is lack of clarity regarding the duty of loyalty. Whose interest is the attorney serving – his own or the estate's? Does this conflict impact the fees that will be charged to the estate? Does it affect how aggressively estate issues might (or might not) be litigated? Has the attorney represented any of the beneficiaries in the past?

As for an attorney acting as a successor trustee, the attorney's conduct in administering the trust could be subject to challenge, raising all of the same issues that would face an attorney acting as an executor.

C. Attorney or Attorney's Relatives Named as Beneficiaries

Code of Professional Conduct Rule 1.8(c) says, in relevant part

> *"(c) A lawyer shall not solicit any substantial gift from a client. A lawyer shall not prepare on behalf of a client an instrument giving the lawyer ... or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of division (c) of this rule: * * * (2) "gift" includes a testamentary gift."*

This rule is essentially identical to the prior rule, cited in *Disciplinary Counsel v. Shaw*, 126 Ohio St. 3rd 494, 2010-Ohio-4412, Para. 5, holding that an attorney's conduct in preparing a trust document that named the attorney's own children as beneficiaries violated the predecessor to Rule 1.8(c).

Comment 6 to Rule 1.8 builds on this, stating in relevant part

> *"In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client ..."*

Comment 7 goes further, stating

> *"If effectuation of a gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this rule is where the client is a relative of the done."*

What if the attorney is preparing documents for his own relatives? Then, another common law rule will apply, this one involving a presumption arising out of the existence

of a "confidential relationship." Such a relationship "exists whenever trust and confidence is placed in the integrity and fidelity of another." In such an instance, a presumption of undue influence arises, and a transfer (such as a testamentary gift) is looked upon with some suspicion that undue influence may have been brought to bear on the donor by the donee. *Ryerson v. White*, *supra*., para. 17, 19. This is entirely in accord with language from Comment 6 to Rule 1.8 – "such a gift [substantial from client to attorney] may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent." The exceptions for attorney relatives are not a *carte blanche* permitting attorneys to write gifts to themselves into relatives' estate plans, simply because they are not absolutely prohibited.

Bottom line – testamentary gifts to an attorney or his relatives via an instrument prepared by the attorney, even if the donor is a relative of the attorney, are looked upon with suspicion. It is better practice to have another attorney do the drafting.

D. Planning attorney representing estate or trust during administration

Many planning attorneys undoubtedly count on becoming the attorney for the estate or the successor trustee, after death of the testator/trustee. This is true irrespective of whether the attorney has been successful in inserting himself into the instrument as an executor or successor trustee. Just as with attorneys becoming executors and successor trustees, the command of Rule of Professional Conduct 3.7 applies with equal force to planning attorneys representing the executor or successor trustee. If a will or trust contest is filed, the attorney becomes the prime witness as to competency and perhaps undue influence and coercion, and cannot be both witness and advocate. Thus, if there is even a hint of a possibility of a possible will or trust contest, the planning attorney should recommend that a different attorney represent the estate or trust.

IV. Attorney's duty of competent representation

Why is a duty of competent representation an ethical issue? Rule of Professional Conduct 1.1 says in relevant part – "*An attorney shall provide competent representation to a client*." And, as previously stated, the extraordinary reliance planning clients place in an attorney and the great potential for disastrous unintended consequences mandate the inter-relationship between competent practice and ethical conduct.

As an example, an eighty-five year old planning client in poor health tells her attorney that she has three children, whom she loves equally, and wants to provide for each of them equally from her estate. This sounds simple; *what could possibly go wrong?* A lot, especially if the attorney does not act in a competent manner. Here, competent representation involves the attorney as both an evaluator and an advisor. As regards these, the Preamble [2] to the Rules of Professional Conduct states, in relevant part: "*As an evaluator, a lawyer examines a client's legal affairs and reports about them to the client … * * * As adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications*."

The above example sounds like it might call only for a simple will, dividing the estate in thirds. But, in this example, the drafting attorney fails to ascertain what the testator's assets are and how they are held, and misses that many of them are bank or investment accounts and a residence that are held in joint and survivor name with one of the children (the testator may have done this as a convenience and not with any intent to convey). *In this case, how disastrous is the result for the testator's testamentary scheme?* A little work by the attorney could prevent this. *Don't assume* that assets are in joint and survivor form because the client wants that result upon her demise; *ask*.

What about the requirement of a competent testator? Is this requirement satisfied merely by an attorney asking the client what day it is, who the president is, and a handful of other questions?

Given that a will or trust is supposed to be an expression of the maker's intent, and not that of the attorney, at a minimum this means that an attorney must go further than merely ascertaining that the client is "competent;" it means ensuring that the client understands the contents of the will and trust, and how they will operate. This is the mandate of Rule 1.4(b), which states "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Give the client some advance time to read through the instrument(s), and at the time of signing, go through the instrument(s) with the client, and explain the most salient provisions. It isn't necessary that the client be able to pass a bar exam question before

signing, but it is necessary that the client understand the big picture of what he or she is signing. And that big picture will include the client understanding what non-probate assets are at issue and how they might affect the client's distribution scheme.

Also part of the duty of competent representation is Rule 1.3. Rule 1.3 is simple and to the point – "A lawyer shall act with reasonable diligence and promptness in representing a client." This includes Comment 2, which states "A lawyer must control the lawyer's work load so that each matter can be handled competently." This rule goes hand in hand with Rule 1.4(a)(3), which is a general rule that attorneys must communicate in a timely and regular manner with clients. Albeit in an administration setting, an attorney's repeated failure to respond to client inquiries regarding the status of a probate matter over a two year period, failing to advise a client that as a result of a failure to file a timely estate tax return, the estate was subject to a $2,454 tax penalty and $3,785 of interest, combined with other unrelated violations (including the attorney's literal abandonment of his practice and his client files) resulted in permanent disbarment. *Columbus Bar Assn. v. Kiesling*, 125 Ohio St. 3rd 36, 2010-Ohio-1555. A similar matter, involving a failure to file a timely estate tax return and a failure to inform, and resulting in an indefinite suspension, is *Disciplinary Counsel v. Nittskoff*, 130 Ohio St. 3rd 433, 2011-Ohio-5758.

But, more likely in a planning setting is that the planning process could be a race against the clock – either pending death or rapidly diminishing capacity.

Sometimes, an egregious example is needed to illustrate the need for ethics in planning and how far some attorneys will go to avoid the nuisance of complying with the rules of ethics. Such an example is *Disciplinary Counsel v. Jarvis*, 169 Ohio St. 3rd, 2022-Ohio-3936, as shown by an excerpt from that decision, Para. 39:

> *"Jarvis, on the other hand, made no effort to establish or maintain a normal client-lawyer relationship with a client whose capacity was known to be diminished. Jarvis never met with Frank to assess his capacity or ascertain his wishes for his end-of-life care and the disposition of his estate before preparing the necessary documents. Instead, he drafted the documents pursuant to the instructions of Frank's family members. Jarvis directed his employee to obtain the client's signature on those documents outside of his presence and then fraudulently notarized them under jurats falsely stating that Frank had personally appeared before him and voluntarily signed the instrument. Jarvis further attested that Frank*

appeared to be of sound mind when he signed two of those documents – even though he was not present when those documents were signed and had no personal knowledge of Frank's mental status. Jarvis's multiple failures opened the door to allegations that Frank and Lenor had been unduly influenced or coerced to modify their estate plan, which led to another six years of estate litigation and more than ten years of malpractice litigation."

Finally, if the scrivener does make a mistake, don't violate the Rules of Professional Conduct to fix it, like one attorney attempted to in *Warren Cty. Bar Assn. v. Clifton,* 147 Ohio St. 3rd 399, 2016-Ohio-5587, by altering a client's will after it was executed but before filing it with the probate court. In that case, the attorney realized that the name of one of the client's children had been omitted from the will, and he secretively corrected the mistake. Inasmuch as the correction did not affect any of the will's distributive or appointive provisions, the sanction was merely a public reprimand.

V. Attorney fees

A final issue in estate planning (and administration) is attorney fees. Estate plans probably should not be sold like assembly line, off the shelf, publications, each being sold at a price that implies that each estate plan is a unique creation. Yet, many attorneys do exactly that, quoting fixed fees for each type of instrument. The applicable Rule of Professional Conduct is Rule 1.5, which states in relevant part

*(a) A lawyer may shall not make an agreement for, charge, or collect [a] *** clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:*

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly,

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer,

(3) the fee customarily charged in the locality for similar legal services,

(4) the amount involved and the results obtained,

(5) The time limitations imposed by the client or by the circumstances,

(6) the nature and length of the professional relationship with the client,

(7) the experience, reputation, and ability of the lawyer or lawyers performing the service,

(8) whether the fee is fixed or contingent.

A recent case applying the reasonable fee rule to an estate administration, though not an ethics case, is *In re Estate of Fetters* (12th Dist. App.), 2016-Ohio-8232. In that case, a $21,000 fee (claimed to be less than the local county guideline fee of $29,675) was reduced by a probate court to $7,326, which reduction was affirmed on appeal, with the Court of Appeals stating (Para. 14)

> *"Many of the functions charged were found to be clerical in nature; thus, unreasonable when billed at Kiger's attorney rate of $275 an hour. Additionally, the probate court found several services unreasonable because they were unnecessary to complete the estate administration or provided no benefit to the estate – including but not limited to – Kiger personally attending the appraisal of the real estate and giving Fetters personal real estate and tax advice unrelated to the estate administration. Finally, the probate court found several services unreasonable because they were completed in a highly inefficient manor (sic). These services included, but were not limited to, billing seven hours to prepare an inventory for the estate where such inventory consisted of one bank account and a single piece of real estate as well as Kiger's choice to not employ automated modern practice methods to reduce the time needed to complete certain services. (Emphasis supplied by court)."*

Notice the last sentence; if an attorney does not use up to date practice methods to complete estate administration, a probate court may reduce the bill to what it might have been had the attorney used such up to date practice methods. Because courts seldom, if ever, have the opportunity to review planning fees, planning attorneys need to police this themselves.

In probate practice, there are often three rates – the highest for attorneys, lower for paralegals, and zero for clerical. If an attorney is performing what is more properly clerical or paralegal work, the attorney should not bill for the former and should bill at a reasonable paralegal rate for the latter. *The attorney definitely should not bill for work that is clearly clerical.* If the attorney does not have any or sufficient clerical or paralegal help, that should be the attorney's problem, not the estate's.

An example of what the Ohio Supreme Court found to be an excessive fee - $34,050 for an estate with a net worth of $31,444 (after expenses and a Medicaid lien), even though the attorney generously offered a courtesy discount to bring the bill down to $31,444. *Disciplinary Counsel v. Estadt*, 172 Ohio St. 3rd 391, 2023-Ohio-2347, para. 8.

The bottom line is that attorney fees in probate practice are a matter of ethics, as well as professionalism. While attorneys are entitled to reasonable compensation, the question will always be – who is benefitting from the representation? The attorney or the client?

VI. Attorney's own conflict with an estate and misconduct

This section illustrates another kind of conflict not dealt with in Section II – that between the attorney and the planning client (and ultimately the estate itself). The citations in this section largely arise out of estate administration and not planning, but are nevertheless helpful in understanding attorney conflicts, as every unrevoked estate plan will result in an administration at some point.

In *Ivancic v. Enos* (11th App. Dist.), 2012-Ohio-3639, an estate attorney, unknown to the estate administrator, had represented the decedent during the last few year of his life, as a result of which he claimed entitlement to a $50,000 contingent fee (not evidenced by a written agreement), recorded a $50,000 lien against the decedent's home as the decedent was in a hospital from a stroke, and actually received the $50,000 directly from the title company when the home was sold during administration. The estate attorney did not advise the administrator that he was the estate's largest creditor or procure a conflict of interest waiver. Later, when the estate was re-opened on other grounds, and the extent of this disloyalty was discovered, the probate court, with the appellate court's approval, ordered return of the $50,000 on the ground that the estate attorney had not made a proper claim against the estate under Ohio Revised Code, Sec.

2117.06(A). The probate court also determined that the undisclosed $50,000 claim was an "obvious conflict of interest" requiring either a waiver or new counsel for the estate. (Para. 22). For good measure, the appellate court affirmed an attorney fee award against the attorney – to an estate beneficiary.

This case was followed by permanent disbarment for the culpable attorney in *Lake Cty. Bar Assn. v. Davies*, 144 Ohio St. 3rd 558, 2015-Ohio-4904. The *Ivancic* decision is offered here only as an example of a conflict in a probate estate setting, and as evidence that courts will do what it takes to see that justice is done.

Some additional cases which relate to conflicts in an administration setting are nevertheless helpful in understanding that estate planning is rife with potential conflicts that an attorney has to consider and should be discussing with potential clients.

A classic case illustrating the question of "*who is the client?*" in an estate administration setting is *Cincinnati Bar Assn. v. Robertson*, 145 Ohio St. 3rd 302, 2016-Ohio-654. Attorney Robertson represented the executrix of an estate (in her fiduciary capacity) and represented her and her husband on objections filed by estate beneficiaries that claimed that the executrix and her husband had improperly withheld estate assets for themselves, and against an attempt by estate beneficiaries to have the executrix removed as the estate's fiduciary. Attorney Robertson failed to explain the potential conflict to the executrix and her husband and continued to represent them; he certainly did not obtain "informed consents, confirmed in writing" (Rule 1.7(b), assuming such consents would have resolved any conflict). The Ohio Supreme Court found that attorney Robertson engaged in a dual representation resulting in a conflict of interest, stating "to the extent the claims of the …. other family members implicated potential wrongdoing that would diminish the estate, [attorney Robertson] could not simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer." (Para. 3 of decision).

Question – was the *Robertson* conflict waivable under Rule 1.7(b)? The answer to that lies in the facts of the *Robertson* conflict and in Rule 1.7(c), the latter of which relates to non-waivable conflicts. Rule 1.7(c) states

> *"(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:*

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding."

Who did attorney Robertson represent? Or, to whom did he owe a duty of loyalty? As the Ohio Supreme Court stated, as counsel for the executrix, he owed a duty of loyalty to the estate. The exceptions to the inventory raised an issue of whether additional property belonged in the estate that was not reported and recognized as such by the executrix. To represent the executrix *personally* with respect to this claim was disloyal to the estate. Under Rule 1.7(c)(2), the *Robertson* conflict appears incapable of being waived.

Because of Ohio Revised Code, Sec. 5815.16, attorney Robertson's clients did not include the estate beneficiaries. That section provides, in relevant part

"Absent an express agreement to the contrary, an attorney who provides legal services for a fiduciary, by reason of the attorney providing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations."

This section does not mean that, ethically, no duty is owed to estate beneficiaries. The duty to the estate, recognized in *Robertson*, certainly benefits the estate's beneficiaries.

The *Robertson* decision should be compared to another recent decision, *Fried v. Abraitis* (8th Dist. App.), 2016-Ohio-934, decided fourteen days after the *Robertson* decision, wherein the Court of Appeals, purporting to follow Ohio Supreme Court precedent, *In re Deardoff* (1984), 10 Ohio St. 3rd 108, held that an attorney hired by an estate fiduciary to assist in the administration of an estate represents the fiduciary and not the estate. (Para. 15 of *Fried* decision). (However, *Deardoff* was not a conflict case, and the only issue was whether under the Ohio Revised Code, an estate fiduciary is compelled to hire counsel.) It is probable that the *Robertson* decision was not cited by the parties to or considered by the Eighth District Court of Appeals, and it is safe to assume that, irrespective of whether an estate attorney "represents" an estate, (s)he has a duty of undivided loyalty to such estate.

What if the motion in *Robertson* had merely been to remove the executrix? The statutory vehicles for such removal are Ohio Revised Code, Secs. 2109.24 and 2113.18. Many of the grounds stated in those two sections would, if supported, be based on conflicts between the estate's best interests and the fiduciary. Again the *real* client would be the estate, not the fiduciary (*Fried v. Abraitis* notwithstanding), and thus a Rule 1.7(c)(2) conflict might well exist, requiring separate counsel for the executrix. If the fiduciary the attorney represented was sued under Sec. 2109.50 (concealment action), the answer would be very clear (to me) – separate counsel for the fiduciary in the concealment proceeding would be needed, because the nature of such an action is the benefit of the estate to the detriment of the fiduciary.

VII. How low can a probate practitioner go??

For those who wonder how low a probate practitioner can go, even lower than attorneys Jarvis (Section IV) and Davies (Section VI), there is the now former (permanently disbarred) attorney Port, of Columbus, Ohio. On one estate, he wrote checks to himself, wire transfers to himself, and withdrew $40,000 in cash, and then fabricated bank records to conceal his misappropriation of estate funds. On a second estate, attorney Port as an estate administrator sold an estate property to a company owned by his wife for $21,600, which two months later resold the property for $195,000; and after that sale date, he moved the probate court to approve an appraisal of the property and to approve its sale. He billed a third client $4,420 ($325 an hour) to put $20,000 into a special needs trust even though the client didn't qualify for such a trust. He billed a fourth client $9,400 to create a Medicaid trust, and he neither created the trust nor refunded any portion of the fee. The Ohio Supreme Court found, in *Disciplinary Counsel v. Port*, 177 Ohio St. 3rd 418, 2024-Ohio-5566, that attorney Port had wrested the previous record for estate planning and administration self-dealing and fabrication from the former (permanently disbarred) attorney Magee.

VIII. Conclusion

The need for ethics and professionalism in estate planning (and administration) is especially great. Clients are often unsophisticated, nearing end of life, and are subject to potential influence (often considerable) by relatives. There is something about the impending passing of a person, especially one who is perceived to have a considerable

estate, that brings out the worst in their relatives. The burden is especially great on planning attorneys, when they assist a planning client, to ask – who is my work benefitting – my client, me, or certain relatives (who I may or not have represented in the past)? If the answer is – "my client," then the attorney is 99 percent of the way to ethical estate planning.

My expectation from this presentation is that this outline in the future will not contain the name of any person who has attended this OSBA wills and trusts program.

Chapter 5

Transfer of Assets to a Trust
“Funding the Trust”

Presented by:
Luann K. Snyder, J.D., CTFA, CRPS
Wealth Advisor
Vice President and Trust Officer
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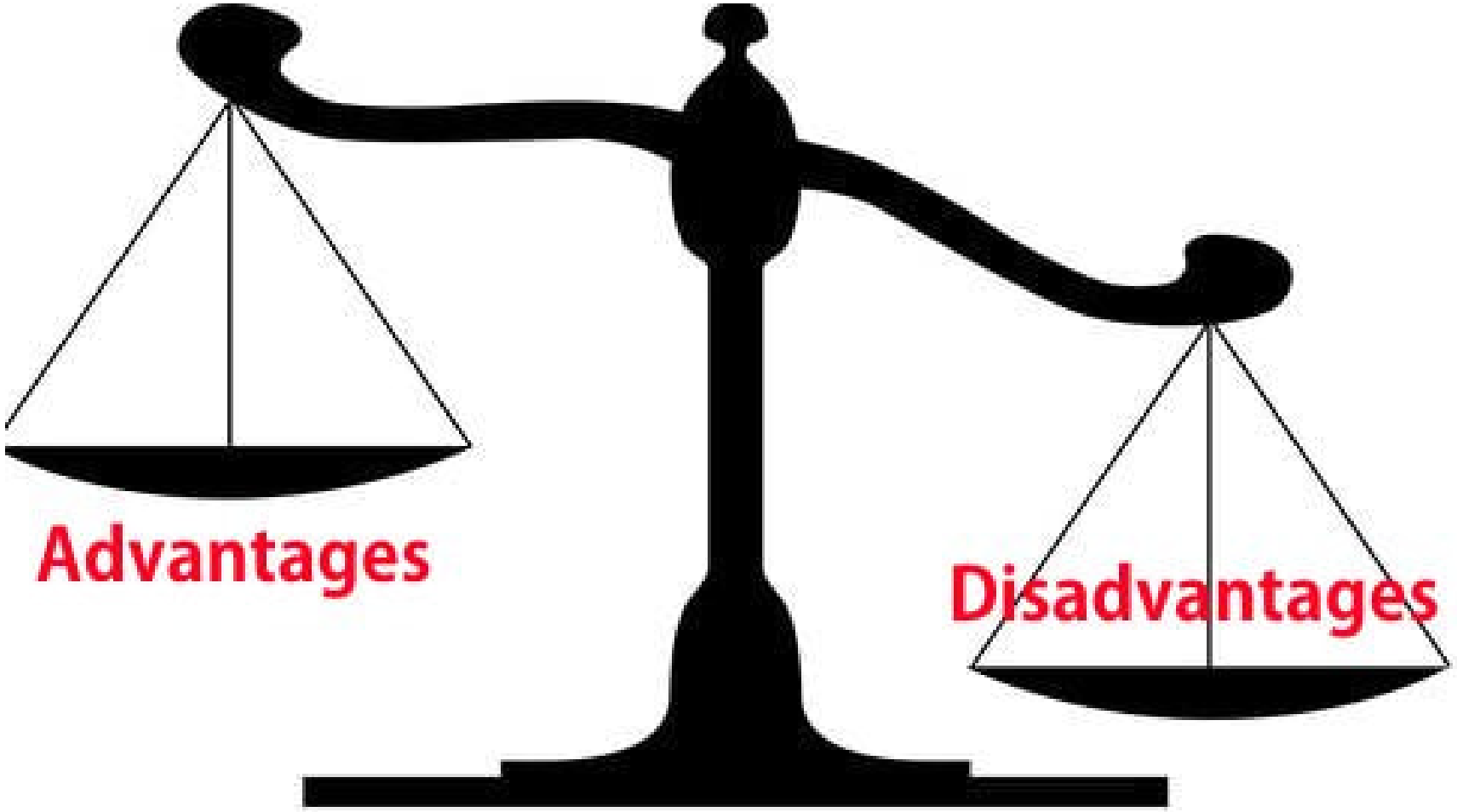
*Pexels Images/Google Images

Common Misconceptions of Trusts

- Creation = Funding
- Only for the “wealthy”
- Costly to Create
- Avoids Guardianship
- Creditor Protection
- Nursing home costs (Medicaid planning)
- Taxes


Advantages
Disadvantages


Advantages

Advantages of Revocable Trusts

- Management and investment of assets
- Avoidance of Guardianship of the estate
- Avoidance of ancillary probate administration
  - Assets in different jurisdictions
- Elimination of the probate process
- Confidentiality
  - Assets placed into a Trust during lifetime
  - A Trust as a designated beneficiary
  - Assets and the distribution pattern are not public record

Advantages of Revocable Trusts

- Creditor Protection at Death of Grantor
- Ease of Transfer Upon Death of Grantor
- Estate Tax Savings with A/B Trust Planning
  - 2026 federal estate tax exemption
  - $15,000,000/person or $30,000,000/married couple
- Less attorney and fiduciary fees compared to probate fee guidelines
- Avoidance of Spouse's Elective Share
  - Smyth v. Cleveland Trust Co., 172 Ohio St 489 (1961)
  - Dumas v. Estate of Dumas, 68 Ohio St. 3d 405 (1994)
- CONTROL, CONTROL, CONTROL.


DISADVANTAGE

Disadvantages of Revocable Trusts

- Higher drafting costs of a revocable trust compared to a will
- Certain assets are impractical/complex to place in trust
  - Business entities
  - Real estate
- Time consuming to retitle assets or complete new beneficiary designations.
- Insurability of assets in trusts
- Client diligence in retitling or beneficiary designations with after acquired assets wanes


Alternatives

Trust Alternatives

- Joint Ownership- Rights of Survivorship
- Beneficiary Designations-
  - Payable on Death/Transfer on Death
  - Real Estate
    - Transfer on Death Affidavit
    - Must be filed prior to death of the Grantor
    - R.C. 5302.22 and 5302.23
  - Titled Vehicles
    - Transfer on Death designation on the title

Trust Alternatives

- Use alternatives with CAUTION:
  - Diminishes the use of A/B trust planning
    - 2026 federal estate tax exemption amount $15,000,000/person or $30,000,000/married couple
  - Does not assist in avoiding guardianship of the estate proceedings
  - Does not necessarily avoid probate
  - As new assets are acquired, diligence in estate planning wanes

Trust Alternatives

- Use alternatives with CAUTION:
  - May result in illiquid probate, and
  - Does not allow for contingencies that may affect the beneficiary:
    - Disability
    - Beneficiary creditor issues
    - Outright distributions at age 18
    - Beneficiary divorce
    - Beneficiary addiction issues

What types of Assets can Fund a Trust?

Real Property

- Grantor retains $250,000/$500,000 exclusion from capital gains if property is sold from trust during grantor's lifetime
- Restrictions in the mortgage and loan agreements may require consent of the lender prior to transfer to a Trust.
- Title examiner or lending bank will require an Affidavit of Trustee
  - States trustee's powers regarding real estate
  - States that trust has not been revoked or terminated

Transfer Documents for Real Estate

A transfer of real property to a revocable trust requires execution of an appropriate deed.	Deed to trust can be a warranty or quitclaim	Include language in trust for handling real estate:
	• Warranty deed is preferable in case of environmental issues or other problems • Warranty deed is also preferable for resale value	• Power of the trustee to mortgage and pledge, • manage and lease, • employ appraisers and brokers at the expense of trust, • execute deeds, leases and other instruments, • and to refuse acceptance of real property.

Transfer Documents for Real Estate

- Memorandum of Trust may be recorded to provide notice R.C. 5301.255
  - Memorandum must be executed and acknowledged by the settlor and the trustee; and
  - Sets forth the names and addresses of the settlor and the trustee of the trust, the date of the execution of the trust, and the powers specified in the trust relative to the acquisition, sale, encumbrance, or conveyance of real property by the trustee.
  - Used to identify the revocable trust without divulging the substantive provisions of the trust.

- Note that a Memorandum of Trust will have the same margin requirements for recording with the county.

Real Property

- Medicaid issues-
- Effective September 1, 2017, the Ohio Department of Medicaid clarified the treatment of a primary residence owned in a Revocable Trust for Medicaid Eligibility. Ohio Admin. Code 5160:1-3-05.13(C)(1)(a)-(c)
- Policy now directs that an “exempt resource placed into an individual’s or an individual’s spouse’s revocable trust does not change the excludable nature of the resource.”

Real Property

- (C) The home lived in, owned by, and considered *the principal place of residence by the individual, the couple, or the parents with whom the eligible child is living is an excluded resource*, regardless of value.

  (1) For the value of the home to be excluded:

  (a) The home must be the individual's, the individual's spouse's, or the parents' with whom the eligible child is living principal place of residence; and

  (b) The deed to the home must be in the individual's, individual's spouse's, or the eligible child's parents' name; or

  (c) The *home must be deeded to a revocable trust so long as the principal of the trust remains a resource of the individual or the individual's spouse*.

Transfer Documents for Real Estate

Transferring out-of-state real property to a revocable trust can be an effective tool to avoid an ancillary probate administration.

A corporate trustee cannot hold title to real estate in a state where it does not have fiduciary powers.

Provide the power to hire a special co-trustee for out-of-state property.

You may also appoint another corporate trustee or individual.

Proper Notice for Real Estate

- It is insufficient to simply use words such as “trustee,” “as trustee,” “agent,” or similar words—absent other language establishing a trust or expressly limiting the grantee’s powers—to give notice to anyone dealing with the land:
  - that a trust or agency exists,
  - that there are beneficiaries other than the grantee and those persons disclosed,
  - or that there are limitations on the grantee’s powers with respect to the land.
- Therefore, all subsequent bona fide purchasers, mortgagees, lessees, and assignees for value will receive title free from the claims of undisclosed beneficiaries and free from obligation.

R.C. 5301.03

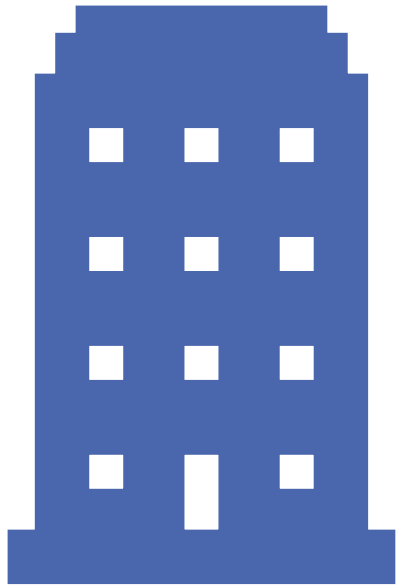
Proper Notice for Real Estate

- **Exception- Affidavit required to preserve dower rights**
  - Only Ohio, Arkansas and Kentucky maintain statutory dower rights

- R.C. 2103.021 provides:
- If “trustee”, “as trustee”, or “agent” follows the name of the grantee in the deed,
- and no other recorded instrument provides notice that a spouse has a dower interest,
- (a)n affidavit describing the land and setting forth the nature of the spouse’s interest is required for the spouse to claim dower rights.

Governing Statutes for Real Estate

- **Affidavit of Successor Trustee**
- R.C. 5302.171 -upon an event terminating the trustee of a trust that holds title to real property, the successor or co-trustee must file with the county auditor and recorder, as soon as practical, an affidavit stating the following:
  - Name of the preceding trustees and successor trustees.
  - Addresses of all trustees.
  - A reference to the deed or other instrument vesting title.
  - A legal description of the property.
- Exception: The affidavit is not required if the original trust that names trustees and successors, or if a memorandum of trust that complies with R.C. 5301.255, has been recorded.



Miscellaneous Issues with Real Estate

- **Insurance Coverage**
  - Transfer of real property to a revocable trust should not create a problem where the settlor, trustee and the beneficiary are all one and the same.
  - A new policy entitled “Robin S. Roberts, Trustee, or Robin S. Roberts or as their interests may appear.”
  - An issue of proper coverage *could* arise where the trustee is an individual/institution other than the grantor/beneficiary.
    - Does the trustee qualify for homeowner’s insurance since the trustee is not the homeowner?
    - Does the grantor need to obtain renter’s insurance and the trustee required to obtain different structural coverage?

Miscellaneous Issues with Real Estate

- Homestead Exemption
  - The homestead exemption is available to a home owned and occupied by an individual. R.C. 323.151.
  - This legislation expressly includes a “settlor of a revocable or irrevocable inter vivos trust holding the title to a homestead occupied by the settlor as of right under the trust” as an “owner.”
  - However, loss of the homestead exemption at death of settlor is possible, causing loss of real property tax exemption.

Miscellaneous Issues with Real Estate

- Homestead Exemption
  - Ensure that retaining the homestead exemption is addressed in the Trust.
  - The Ohio Department of Taxation Bulletin 23 provides as follows:
  - "(if) the individual who owns the home places it in a revocable or irrevocable inter vivos trust, or otherwise provides for the home being placed into such trust, ***and retains possession of it pursuant to the trust agreement***, then that individual is eligible for the homestead exemption…"

- **Conveyance Fees**
  - Generally, transfers of real property into and out of a trust will be exempt from a conveyance fee. R.C. 319.54(d)

Real Property-Liability Landmines

- Liability for Real Property under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).
- *City of Phoenix, Ariz. v. Garbage Services Co.*, 816 F. Supp. 564 (D. AZ. 1993), set forth general rules governing a trustee's liability as owner of contaminated property
- Trustee is held liable solely as the current owner of contaminated property.
- If a trustee did not have power to control the use of trust property, trustee's liability is limited to the extent trust assets are sufficient to indemnify him.
- If a trustee had power to control the use of trust property and knowingly allowed the property to be used for disposal of hazardous substances, trustee is liable to same extent that he would be liable if he held the property free of trust, i.e., personally liable.
- Add language in the trust to allow disclaimer of real estate so trustee is not in chain of title, in addition to power to clean up trust property and use trust assets to accomplish this cleanup.

Oil and Gas Interests

- Working Interests or Overriding Royalty Interests
  - Retitle an oil and gas working interest or overriding royalty interest into the name of the trustee
  - Execute an appropriate assignment, attested and recorded
  - Provide authority for Trustee to negotiate sales/leases of mineral rights
  - Prevents unnecessary probate proceedings if no beneficiary is named


5,970
1.720
539,137
1.710
1.720
0.314
48,100
0.314
0.316
233,167
1.190
83,788
1.180
1.190
778,186
0.332
10,000
0.332
0.338
68,000
0.460
0.479
158,294
350,000

Publicly Traded Securities- Certificated Securities

- For certificated securities, complete the transfer to the Trust on the backs of the certificates.
- Submit to the transfer agent to complete the transfer process.
- Medallion Stamp is generally required.

Publicly Traded Securities

May need to supply a copy of the trust agreement or an affidavit that the transfer from the individual to the trustee is permissible under the terms of the trust.

Medallion Stamp Guarantee will generally be required for retitling of publicly traded stocks to a trust and sometimes even needed for adding a beneficiary designation.

CAUTION: Every brokerage firm/financial institution is different, so call to ensure you are handling the retitling appropriately!

Publicly Traded Securities- Beneficiary Designations

Transfer on Death Designation

Ohio law provides securities may be registered with a beneficiary designation, including a per stirpes designation, under the Uniform Transfer On Death Security Registration Act

R. C. 1709.01-1709.11

A Trust can be a beneficiary under these provisions

Personal Property- Motor Vehicles and Boats

- Transfer a motor vehicles title to a Trust by completion of the transfer requirements on the certificate of title.
- Some casualty insurance companies will assign a business rating to motor vehicles held in Trust
- Could increase the premium, so this issue should be checked in advance with the carrier.
  - R.C. 4505.10, provides for joint and survivorship titles for automobiles and boats
  - Can be an option to consider if casualty insurance considerations make ownership of the automobile by the trust impractical.
  - Consider the liability implications to the Trust before retitling a motor vehicle.

Personal Property- Motor Vehicles and Boats

- R.C. 2131.13(B), (C)(1) and (D) also permits a sole owner of a motor vehicle, watercraft or outboard motor owner to designate a TOD beneficiary on the relevant certificate of title.
  - Such designation may be made by the words “transfer on death” or TOD after the owner’s name and is made on the certificate of title.
  - Titles for boats 14 feet and longer and/or with engines of 10 horsepower or higher are still required.
  - Boats under 14 feet or motors under 10 horsepower need not be transferred by a specific title and may be covered by an assignment document.
- The owner may cancel or change the TOD beneficiary designation at any time without the consent of the beneficiary.
  - TOD beneficiary forms can be obtained on the Ohio Bureau of Motor Vehicles website.

Personal Property

- Tangible personal property can be transferred by the execution of an Assignment and Bill of Sale R. C. 5804.01(A) and 5810.14(A).
  - Conveys title to tangible personal property to the trustee.
- Where the settlor or spouse is also the trustee and occupies the dwelling unit where tangible personal property is located, there should not be a concern about the validity of delivery to the trustee.
  - The legal effectiveness of such an assignment as to after acquired property can be a dilemma as it is an assignment of an expectancy interest
  - Be specific in drafting the Bill of Sale to include after acquired property.

**** Note the EPTPL Section of the OSBA is working on legislation.

Personal Property

- Dilemma with a trustee who is an individual outside of the home or a corporate trustee.
  - Did the trustee take “possession” of the tangible personal property?
- If the personal property is located in real estate owned by the trustee, there is less of a challenge to the trustee’s “possession” of the personal property.
  - Who is responsible for insuring/maintaining the personal property if the beneficiary resides in the real property?

Personal Property- Retail Banking Accounts

Trustee must be the signatory.

The full trust name may be on the account as well

Trustee will complete a Certification of Trust.

- The bank may ask to retain a copy of the trust agreement.

Personal Property- Retail Banking Accounts

- If the trust is for the benefit of someone other than grantor, adding the beneficiary as an ***owner*** allows payment to the beneficiary upon the death of the trustee without proof of existence of the trust. R.C. 1109.07(A).
  - However, this gives the beneficiary current access to the account.
- Distinguish a trust account from a payable on death (POD) contract which is a type of survivorship account. R.C. 1109.07(B).
  - Payable on death accounts avoid probate by having a specific beneficiary designation.

Personal Property-Safe Deposit Boxes

- Bank may require the trust agreement or an affidavit stating that the trust is current.
- Safe deposit boxes are no longer audited by a county auditor.
- If the contents of the box have been properly re-registered in the name of the trust, the assets should avoid probate.
  - Be sure that the ***CONTENTS*** of the box are re-registered in the name of the Trust.
  - Just because the Safe Deposit box is in the name of the Trust does NOT automatically mean the contents are “in” the Trust!


PLANNING

Business Assets

- S Corporation
  - If S corporation stock is held by a grantor trust, the grantor of the trust is treated as a shareholder.
  - If the trust will continue for the benefit of others after the death of the grantor, the trust will not be treated as a shareholder unless it is a qualified Subchapter S Trust (QSST).
  - The beneficiary of a QSST is treated as owner of the portion of the trust which consists of the S corporation stock and is considered a shareholder. I.R.C. § 1361(d).

Business Assets

- Requirements for a QSST:
  - Separate subtrusts for each beneficiary;
  - Beneficiaries must be citizens or residents of the United States;
  - Each beneficiary must receive the net income of his or her subtrust and any principal distributions;
  - Each beneficiary must elect QSST treatment.

- If the trust does not qualify as a QSST and holds S corporation stock as an asset, the company will lose its S corporation status.

Business Assets

- Closely Held Corporation
- Transfer of title may be accomplished in the same manner as provided for publicly traded stock.
  - However, there may be restrictions to transfer in closely held corporation agreements.
  - May require the transferor to obtain approval from the company or from other shareholders prior to the transfer of the shares.
  - Check with the appropriate corporate officials regarding transfer restrictions.

Business Assets

- Limited/General Partnership Interests
- The transfer of limited partnership interests can usually be accomplished by assignment.
- May be necessary to secure the permission of other partners prior to the transfer of interests in limited partnership.
  - The transfer of a general partnership interest would require permission from the other partners.
  - Would create a new partnership itself, since it would involve a new general partner.

Business Assets

- Limited Liability Company
- Ownership interest held in the name of a member will be normally subject to probate upon death of the member.
- Avoid probate:
  - Assign the ownership interest to a revocable trust of the member.
  - Gift the ownership interest to an irrevocable trust.

Business Assets

- There are no restrictions on the types of trusts that may be the assignee of an interest in an LLC.
  - This is much more liberal than an S corporation which is restricted to having Grantor Trusts, Qualified Subchapter S Trusts, and electing small business trusts as eligible shareholders. I.R.C. §§ 1361(c), (d) and (e).
- A trust may become a member of the LLC with the membership interest titled in the name of the trustee under the terms of the Operating Agreement.

Business Assets

- Professional Corporate Shares
- R.C. 1785.02 permits a professional to transfer his or her shares to a revocable trust, so long as the trustee is also a licensed professional.
- OAG No. 90-072.

Business Assets Issues

For closely held business interests, valuation becomes a dilemma for the trustee.

Evaluation of the appropriate discount to be applied to the assets -lack of marketability and restricted transfers.

Establishes a cost basis for beneficiaries and can have significant impact on the sale of the business.

Trustee has an ongoing need for financials from closely held businesses which may also pose a dilemma for a trustee.


INSURANCE

Life Insurance

- Reference the name of the Trust and date when changing ownership or beneficiary status to a Trust.
  - Avoids confusion if the Grantor has created multiple Trusts.
- Grantor may transfer ownership of life insurance to the trust.
- **HOWEVER,** the grantor must give up *all incidents of ownership* to avoid inclusion in the grantor's estate for federal estate tax purposes.
  - This is not possible if the trust remains revocable.
  - Transfer of ownership is done mostly with Irrevocable Life Insurance Trust (ILIT) or Crummey Trusts.
  - As additions are made to the Trust (i.e., premiums to be paid by the Trust) beneficiaries must be given Crummey notices and the right to withdraw.
    - *Crummey et al. v. Commissioner of Internal Revenue*, 397 F.2d 82, (9th Cir.1968)

Life Insurance

- **Life Insurance**
  - Grantor's power to change beneficiaries is lost.
    - Special powers of appointment may be granted to the spouse.
    - Be WARY of giving the spouse too many rights!
  - If the grantor or spouse is trustee, grantor may not have transferred his or her ownership because of the control of the trustee.
  - Use of a trust protector may be incorporated into trust instrument to avoid any incident of ownership by the grantor's spouse.
  - Or better yet, name a corporate trustee to ensure there is not question as to exclusion from the decedent's estate.

Life Insurance and Taxation

- **Life Insurance**
  - When the grantor retains ownership, policy proceeds are taxable in grantor's federal estate regardless of the named beneficiary.
  - Watch inclusion in the value of the gross estate for transfers of life insurance policies made within three years of death. I.R.C. § 2035.
  - Income tax considerations
    - Policy proceeds are not subject to income tax.
    - Insurance proceeds will be taxable if they are used to pay noncontractual claims or obligations of the grantor's estate.

Retirement Assets

Retirement Assets- Basic Definitions

- Retirement Assets- IRAs and Retirement Plans
  - For purposes of this discussion, pre-tax retirement accounts.
- Required Minimum Distribution (RMD)
  - Minimum amount which must be distributed to an individual from a retirement account. 26 USC Sec. 401(a)(9)
- Required Beginning Date (RBD)
  - Age at which an individual must begin taking Required Minimum Distributions. 26 USC Sec. 401(a)(9)(C)
- Life Expectancy
  - IRS tables for calculation of the Required Minimum Distribution based on the life expectancy of the owner and the 12/31 market value of the prior year. Treasury Regulation §1.401(a)(9)-9

Estate Planning for Retirement Assets

- Prior to 12/31/19:
  - **Individuals as Beneficiaries:**
    - Special rules for spousal beneficiaries
      - Rollover as an Inherited IRA
      - Treat as own IRA
    - Stretch IRA for non-spousal beneficiaries
      - RMD calculation takes into account life expectancy of beneficiary.
      - Advantageous for younger beneficiaries.
  - **Trusts as Beneficiaries:**
      - Review as a “See Through” Trust to determine distribution pattern.

Estate Planning for Retirement Assets

- **Entities and Non-Qualifying Trusts as Beneficiaries:**
  - If the decedent dies before their Required Beginning Date, the account must be distributed within 5 years.
  - If the decedent dies after their Required Beginning Date, the account must be distributed within the decedent's remaining life expectancy.

Retirement Assets
The SECURE Act and SECURE 2.0

Effective January 1, 2020, the Setting Every Community Up for Retirement Enhancement (SECURE) Act was passed to encourage retirement savings.

SECURE 2.0 signed 12/29/22, effective 1/1/23.

SECURE ACT extended the age, the Required Beginning Date or RBD, to begin taking Required Minimum Distributions or RMD's from 70 ½ to 72 years old.

SECURE 2.0 increases the age from 72 to 73 and it will be 75 starting 1/1/33.

Eliminates the maximum age limit for contributing to traditional IRA's and retirement plans

SECURE Act and SECURE 2.0

Creates a special class of beneficiary the “Eligible Designated Beneficiaries” or EDBs that are governed by special distribution rules

Generally, all other beneficiaries, “Designated Beneficiaries” are governed by the new 10 year distribution rule, thereby effectively eliminating the stretch.

Evaluating a Qualified Distribution under the SECURE Act

Determine

- Determine if the decedent passed before or after his/her Required Beginning Date (RBD)

Identify

- Identify the status of the beneficiary:
  - Designated Beneficiary,
  - Non-Designated Beneficiary,
  - Eligible Designated Beneficiary,
  - For Trusts, does it qualify as a Designated Beneficiary Trust.

Determine

- Determine the applicable Required Minimum Distribution (RMD)

Designated Beneficiaries

Designated Beneficiary or DBs:

- Defined as “any individual designated as a beneficiary by the employee.” 26 CFR Sec. 401(a)(9)(E)(I)

RMDs for DBs:

- DB’s generally are required to take distribution of their benefits **within 10 years** of the account owner’s death. 26 CFR Sec. 401(a)(9)(H)(i)

Designated Beneficiaries

- Effect of the 10-year rule.
  - Limits the tax-deferred growth and impacts the timing of taxable distributions.
  - This is a significant change in the use of Trust drafting and planning for retirement assets!
  - ***There are now*** Required Minimum Distributions during this ten-year time frame.
- The law does not impact Roth IRA or Roth plan assets.
  - Roth funds are not tax deductible or excluded on contribution and are not taxable income on withdrawal.
  - SECURE 2.0 does away with required distributions from Roth funds in a retirement plan.

Designated Beneficiaries

- For now, the 10-year rule applies, regardless of whether or not the decedent died before or after his/her RBD. IRC Sec.401(a)(9)(H)(i)
  - **EXCEPT…..**
  - Proposed Regulations seek to impose an *additional* RMD rule in cases where the decedent died after his/her RBD. IRC Sec. 401(a)(9)(B)(i)
  - The “At Least As Rapidly Rule” ALAR would require the DB to take RMDs during the 10-year timeframe “at least as rapidly” as the decedent’s distributions with a 100% distribution of the account by year 10.

Non-Designated Beneficiaries

Non-Designated Beneficiaries:

- Defined as a beneficiary that does not qualify as a Designated Beneficiary.

Examples:

- Participant's own estate, charities, and any Trust that does not qualify as a Designated Beneficiary Trust or DBT
- RMDs rules for NDBs are unchanged by the SECURE Act or the proposed regulations!

Non-Designated Beneficiaries

- **RMDs for NDBs:**
  - If the participant dies before his RBD, the 5-year rule applies.
    - No payments are required until the final payout year.
    - Practice tip: Ensure that your clients are updating beneficiary designations upon the death of a beneficiary to avoid this rule!

Non-Designated Beneficiaries

- **RMDs for NDBs:**
  - If the participant dies after his RBD, RMDs can be taken over the remainder of the participant's life expectancy ("ghost life expectancy.")
    - Note: Depending upon the age of the decedent, this ghost life expectancy may be longer than the 10-year timeframe for a DB!

Eligible Designated Beneficiaries or EDBs

- Surviving spouse
- Minor child of plan participant*
- Disabled beneficiary
- Chronically ill beneficiary
- Beneficiary less than 10 years younger than the plan participant
- *Except for minor children, the default rule for EDBs is a life expectancy payout
- IRC Sec. 401(a)(9)

EDB Surviving Spouse

- Surviving spouse
  - Life expectancy payout
  - Surviving spouse can treat account as a rollover or take as his/her own.
  - Participant dies before RBD
    - RMDs based on surviving spouse's life expectancy
  - Participant dies after RBD
    - RMDs based on the longer of the surviving spouse's life expectancy or the remainder of the decedent's life expectancy
  - IRC Sec. 401(a)(9)(B)(iv)

EDB
Minor Child of Decedent

- Minor child of plan participant
  - Life expectancy payout
  - Upon age of majority, subject to the 10-year rule. IRC Sec. 401(a)(9)(E)(ii)(II)
    - SECURE 2.0 now defines “majority” as age 21 without reference to state law definitions.
    - IRC Sec. 401(a)(9)(E)(ii)(I)

EDB Disabled Beneficiary

- Disabled beneficiary- defined:
  - IRC Sec. 401(a)(9)(E)(ii)(III)
    - 18 or older, unable to engage in any substantial gainful activity, by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration.
    - 18 or younger, has a medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration.
    - The beneficiary has already qualified for Social Security Disability or SSD benefits; no further evidence is needed.
  - Life expectancy payout

EDB Chronically Ill

- Chronically ill beneficiary- defined:
  - IRC Sec. 401(a)(9)(E)(ii)(IV)
  - Certification by a “licensed health care practitioner” that the individual is unable to perform at least two activities of daily living for an indefinite period of time
    - “Licensed health care practitioner”- physician, nurse, or a licensed social worker.
    - ADLs- Eating, Toileting, Transferring, Bathing, Dressing and Continence
  - Life expectancy payout

EDB
Less than 10 years Younger

- Beneficiary less than 10 years younger than the plan participant
  - IRC Sec. 401(a)(9)(E)(ii)(V)
  - Two requirements:
    - Does not fit into any other EDB category
    - Must be either older, the same age or not more than ten years younger than the participant
      - Determined by actual dates of parties' births, not year
      - Prop. Reg. Sec 1.401(a)(9)-4(e)(6)
  - Life expectancy payout

Trusts as Beneficiaries

Trusts as Beneficiaries are treated differently based on status as

"Non-Designated Beneficiary" or

"Designated Beneficiary"

See-Through Trusts

- ***Requirements for See-Through Trust status:***
  - Trust must be valid under state law.
  - Trust must have identifiable beneficiaries (i.e., by name or as members of a class.)
  - Trust must be irrevocable, or by its terms become irrevocable, on or before the plan participant's death.
  - A copy of the trust must be provided to the plan administrator by September 30th of the year following the grantor's death.
  - IRC Sec. 1.401(a)(9)-4(f)(1)(ii)(4)

Non-Designated Beneficiary Trusts

- Nonqualified Trusts; i.e., Trusts that do not qualify as See-Through Trusts
- Beneficiary is not an individual-charity or the decedent's estate
  - If before the decedent's RBD, the Trust must receive all distributions within 5 years of account holder's death. Prop. Reg. Sec 1.401(a)(9)-(3)(c)(2)
  - If after the decedent's RBD, the distribution may continue using the decedent's ghost life expectancy. Prop. Reg. Sec. 1.401(a)(9)-(5)(d)(1)(iii)

- Distribution Rules for Non-Designated Beneficiary Trusts remain the same under the SECURE Act!

Designated Beneficiary Trusts

- If the Trust is a “See-Through Trust” the IRS will disregard the trust and treat the individual beneficiaries of the trust as the decedent’s designated beneficiaries.
- To determine the RMD, examine if the beneficiaries are Designated Beneficiaries or Eligible Designated Beneficiaries
- 26 USC Sec. 1.401(a)(9)(E)(i)

Conduit Trusts

Conduit Trust

- A See-through Trust that requires all qualified distributions upon receipt by the Trust to be paid directly to, or for the benefit of, specified beneficiaries.
- 26 CFR Sec. 1.401(a)(9)-4(f)(ii)(A)

Considerations

- Distribution Period is the same as for the conduit beneficiaries
- Disabled beneficiaries
- Required payment of plan distributions to a disabled beneficiary may result in the loss of government benefits
- Less flexibility for the Trustee

Conduit Trusts and RMDs

For a Conduit Trust with only one primary beneficiary, the same RMD rules apply as if the beneficiary had been named individually.

- It is irrelevant if the decedent passed before or after his RBD.

For a Conduit Trust with multiple primary beneficiaries:

- If the decedent passed before his/her RBD:
  - If one beneficiary is an EDB, the annual distributions are over the life expectancy of the oldest countable beneficiary.
  - If there are no EDB's, only DB's, the 10-year rule applies with no annual distributions required.
  - 26 CFR Sec 1.401(1)(9)-5(f)(1)(i)

Conduit Trusts and RMDs

For a Conduit Trust with multiple primary beneficiaries:

- If the decedent passed after his/her RBD:
  - If there is an EDB's, annual distributions over the life expectancy of the oldest countable beneficiary or the ghost life expectancy of the decedent, whichever is longer
  - If there are no EDB's, only DB's, the 10-year rule applies.
  - 26 CFR Sec 1.401(1)(9)-5(f)(1)(ii)

Accumulation Trusts

Accumulation Trust

- Any See-through Trust that is not a Conduit Trust; i.e., the Trustee can accumulate qualified distributions upon receipt into the Trust and not be required to distribute to the beneficiaries.
- 26 CFR Sec. 1.401(a)(9)-4(f)(ii)(B)

Considerations

- May be used to preserve government benefits for a beneficiary.
- Tax implications to Trust for accumulating income.

Accumulation Trusts and RMDs

Beneficiaries are subject to the 10-year distribution rule

- Exception: EDBs who are disabled or chronically ill are still entitled to a life expectancy distributions.

Practice Tip:

- Be wary of tax implications for the Trust!
- If the Trustee takes an RMD but does not distribute to the beneficiaries, the withdrawal may be subject to a steep tax due to the compressed marginal tax brackets for Trusts.
- For 2026, 37% tax bracket for $16,001.00 in income for Trusts

Miscellaneous Issues

- Successor Trustees
- Multiple Trustees
- Power of Attorney v. Trustee
- Gifting Considerations

Additional Considerations for Trust Funding

- **Successor Trustee**
  - Upon the death of the trustee, the financial institution may require tax releases from the successor trustee before releasing certificates of deposit, checking or savings accounts.
  - If the trustee resigns or is removed, the successor trustee should have an amendment from grantor or court order showing appointment.
  - BE WARY of naming family members as Successor Trustees!
  - Inexperience and change in family dynamics can mean trouble!

Additional Considerations for Trust Funding

- **Multiple Trustees**
  - All must sign registration documents unless the trust states otherwise.
  - Daily operation of a trust usually only requires the signature of only one trustee.
    - Bank accounts should use “or” so signing authority is similar to joint with right of survivorship.
    - CAUTION: Regardless of who signs, all co-trustees are liable for the acts of other co-trustees (with some exceptions).

Additional Considerations for Trust Funding

- **Power of Attorney v. Trustee**
  - A power of attorney for an individual presented to access trusteed accounts will not be accepted.
  - It is preferable to retitle the account in the name of the Trust.

Gifts made from a Revocable Trust

- Any transfer from a decedent's revocable trust is treated as a transfer made directly by the decedent. I.R.C. 2035(e).
- Property gifted from trust within three years of grantor's death may be included in grantor's estate - even if it qualifies for the annual exclusion against gift tax, i.e., $19,000 from grantor for each donee.
- Caution: The Trustee must have specific powers delineated in the Trust to gift on grantor's behalf to ensure the gift will be deemed completed for purposes of the IRS.

Other Considerations for Trust Funding

Final Thoughts

- Funding of the Trust is not intuitive for your client.
  - Ensure that you are explaining that additional steps are necessary to “fund” the Trust.
- Discuss what assets the client owns.
  - Determine what mechanisms are available for transfer based on the asset type.
- Determine the most efficient way to transfer those assets into the Trust; i.e., retitling or beneficiary designations.
- Ensure follow-up with the client to accomplish the transfers or beneficiary designations.
- Continued contact with the client to address changes in circumstances.

Advanced Trusts

Nuts and Bolts of Wills and Trusts

February 25, 2026

Michael L. Wear, J.D., MBA, AEP®

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Disclosures

- The information contained herein is for information purposes only and should not be construed as providing investment, tax or legal advice.

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Specialized Trusts

- Irrevocable Life Insurance Trust (“ILIT”)
- Lifetime Gift Trust
- Charitable Remainder Trust (“CRT”)
- Charitable Lead Trust (“CLT”)
- Trust for Pets
- Ohio Legacy Trust

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Irrevocable Life Insurance Trust

- Irrevocable trust created primarily to hold life insurance policies on the life of the Grantor or Grantors.
- Purpose of the ILIT is to remove the insurance proceeds from the taxable estate of the Grantor(s).
- The Grantor(s) make annual exclusion gifts to the trust that are used to pay the insurance premiums.

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Irrevocable Life Insurance Trust (cont.)

- Beneficiaries must be given withdrawal rights over gifts to the trust to qualify for annual exclusion gift treatment.
  - The rights are often referred to as “Crummey” powers.
- Life insurance proceeds are payable to the trust upon Grantor(s) death.
- Trust agreement dictates how and when the insurance proceeds are to be distributed to the Beneficiaries.

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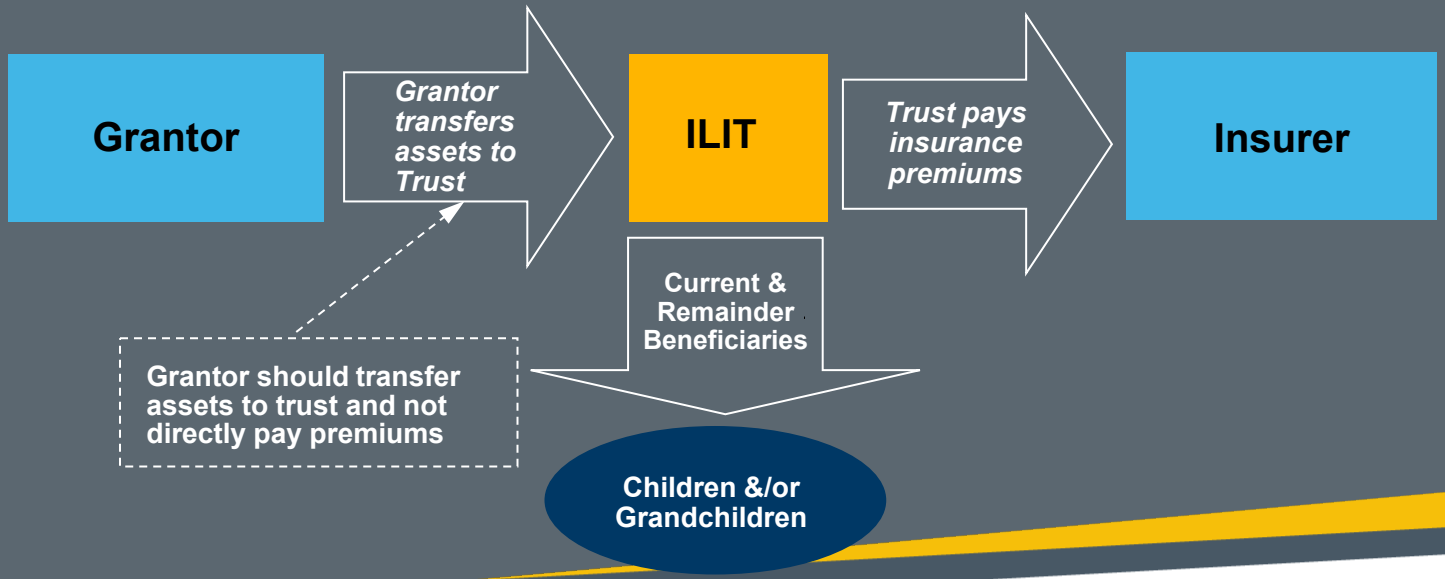
Irrevocable Life Insurance Trust



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Lifetime Gift Trust

- Irrevocable trust similar to an ILIT.
- Purpose of the trust is to remove assets from the taxable estate of the Grantor(s).
- The Grantor(s) make annual exclusion gifts to the trust.
- Beneficiaries must be given withdrawal rights over gifts to the trust to qualify for annual exclusion gift treatment.

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Lifetime Gift Trust (cont.)

- Trust agreement dictates how and when the trust assets are to be distributed to the Beneficiaries.
- Trust distribution may be during life of beneficiary(ies) or trust can be held for multiple generations as a dynasty trust

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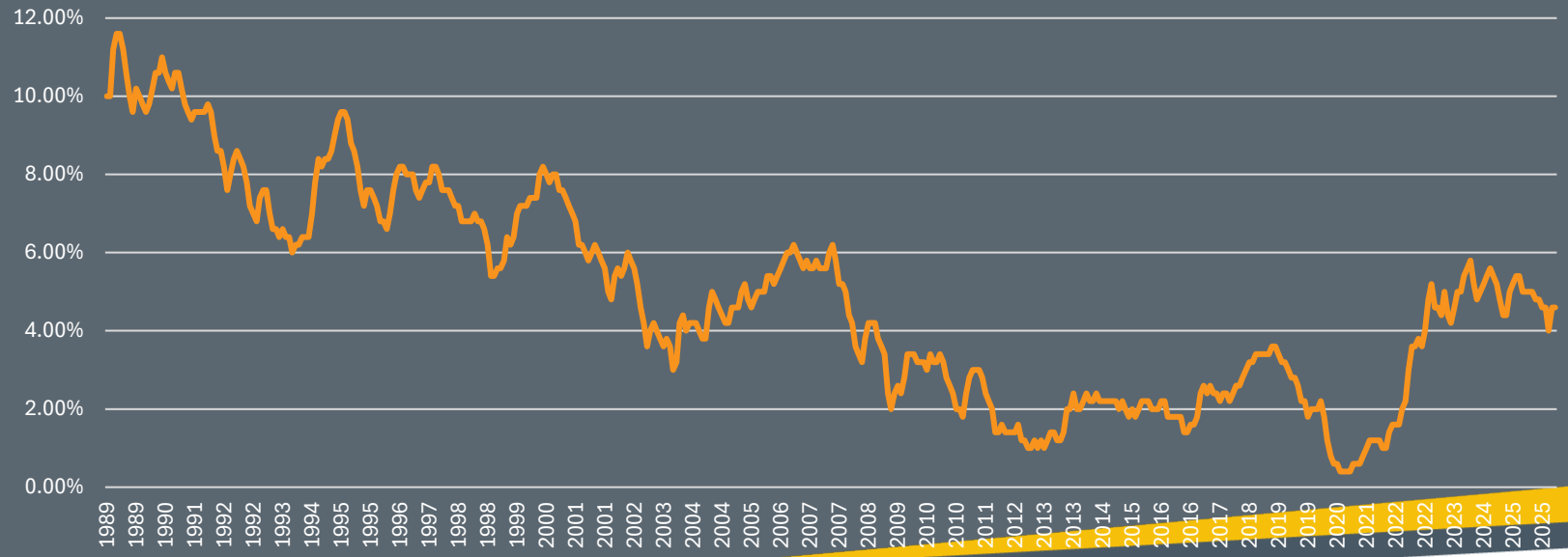
Historical Sec. 7520 Rates (January 1989-February 2026)*



*Based on IRS Data obtained from Leimberg, LeClair & Lackner, Inc.

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Charitable Remainder Trusts

- Irrevocable split-interest trust
  - Charitable and non-charitable beneficiaries
- Charitable intent is paramount to success of CRT
- Designed to provide payments to grantor and/or grantor's family for a term of years, a life or joint lives, then to fund charitable donations
- Transfers to CRT do not qualify for gift tax annual exclusion
- Only single initial funding permitted for any type of CRAT

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Charitable Remainder Trusts (cont.)

- CRAT, CRUT, NICRUT, NIMCRUT, Flip NIMCRUT
  - IRS issued updated CRAT forms in 2003 (Rev. Procs. 2003-53 to 2003-60)
  - IRS issued updated CRUT forms in 2005 (Rev. Procs. 2005-52 to 2005-59)
  - IRS issued sample qualified contingency clause for CRAT (Rev. Proc. 2016-42)
- Inter vivos or testamentary
- CRT is a tax exempt entity subject to prohibited transaction rules
- Value of remainder interest may qualify for income tax and/or gift or estate tax charitable deduction
- SECURE 2.0 permits one time QCD up to $50,000 to a CRT or CGA

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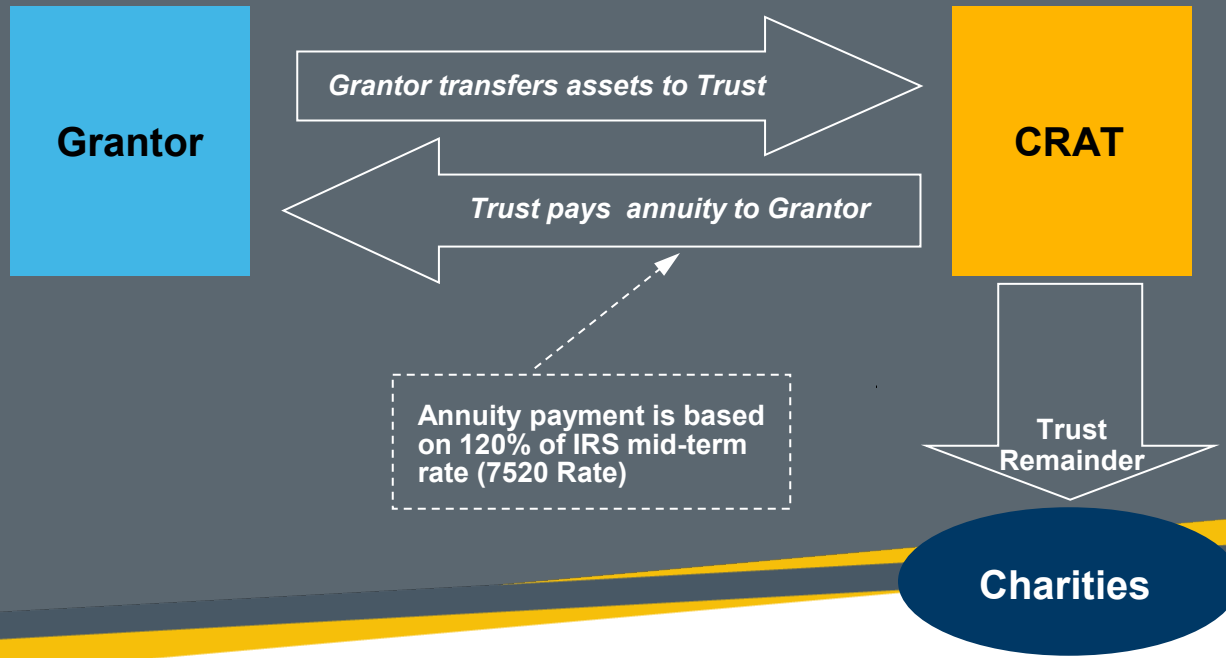
Charitable Remainder Annuity Trust



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Charitable Lead Trusts

- Irrevocable split-interest trust
  - Charitable and non-charitable beneficiaries
- Charitable intent is paramount to success of CLT
- Estate freeze technique
- Designed to pass wealth to future generation with minimal gift and/or estate taxes
- Transfers to CLT do not qualify for gift tax annual exclusion

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Charitable Lead Trusts

- CLAT or CLUT (with variations)
  - IRS issued sample CLAT forms in 2007 (Rev Procs. 2007-45 and 2007-46)
  - IRS issued sample CLUT forms in 2008 (Rev. Procs. 2008-45 and 2008-46)
- Inter vivos or testamentary
- Grantor or non-grantor trust for income tax purposes
- Value of lead interest (annuity or unitrust) may qualify for income tax and/or gift or estate tax charitable deductions

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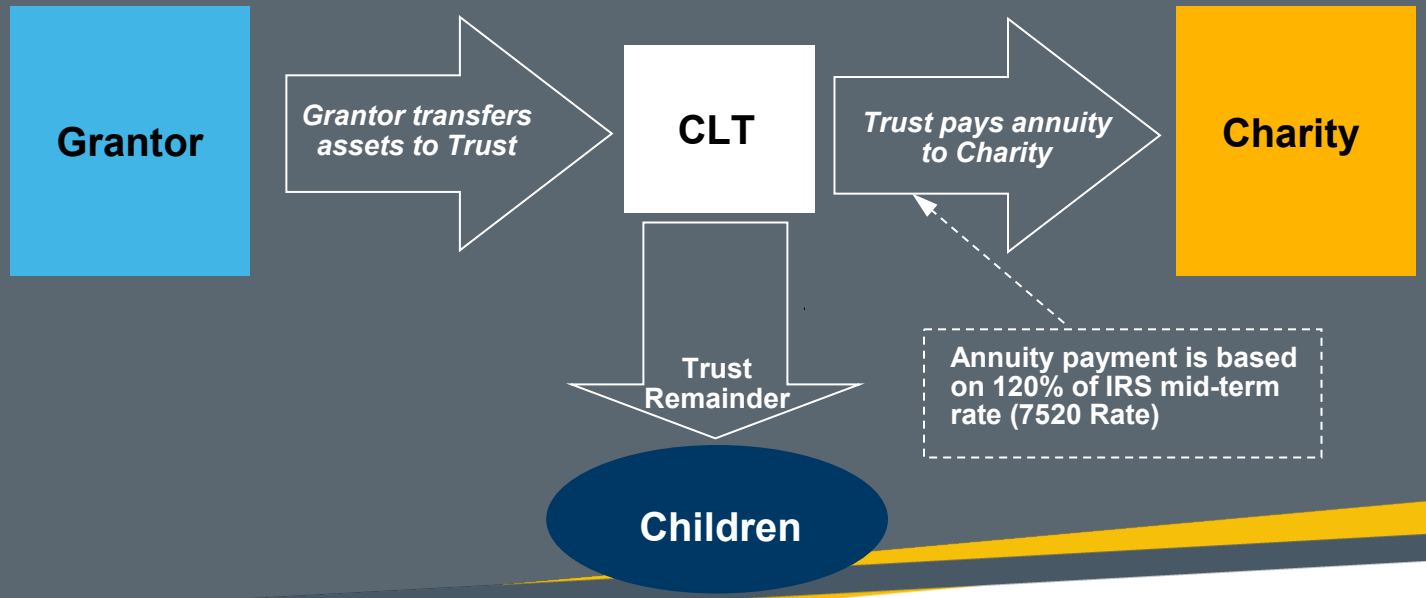
Charitable Lead Annuity Trust



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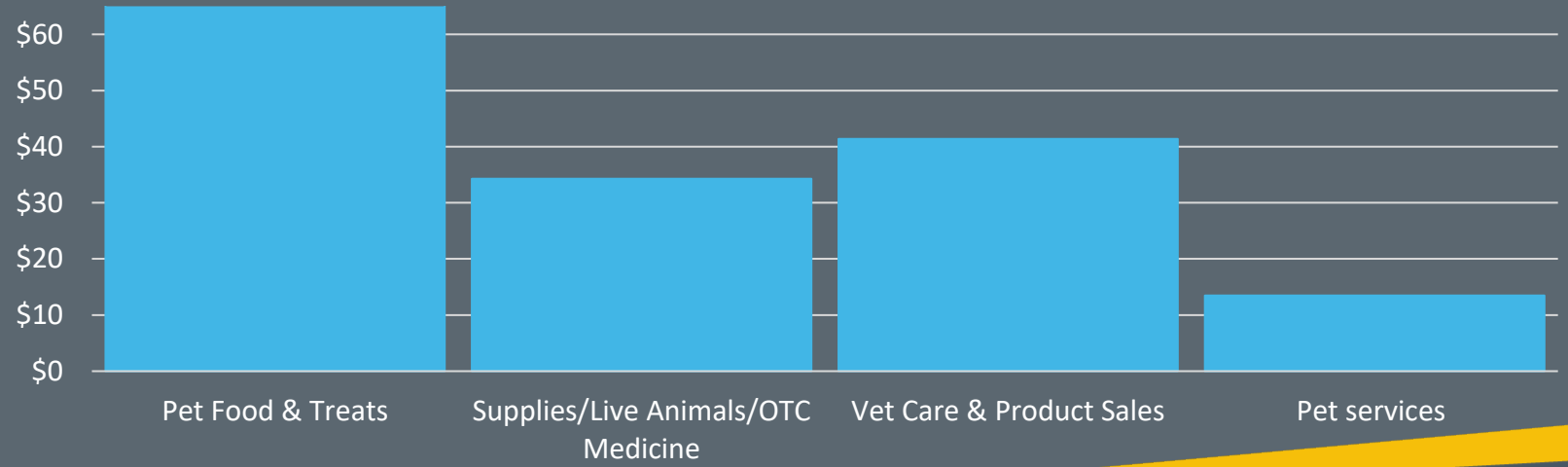
Trust for Pets

- Average life expectancy of a pet parrot can be 50 - 70 years
- Approximately 71.1% of American Households own a pet*

** Statistics obtained from American Pet Products Association ("APPA")*

Americans projected spending on pets for 2025 is $157 Billion*

in billions



** Statistics obtained from American Pet Products Association ("APPA")*

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Trust for Pets (cont.)

- Codified as part of the Ohio Trust Code – January 1, 2007.
- Permits settlors to create a trust for the care of one or more animals that are alive during the settlor's lifetime.
- Trust funding is limited to amount necessary to care for the animal.
- Trust must terminate at the death of the last surviving animal.
- Settlor can nominate a person to enforce the trust or the court can nominate an enforcer.
- Trust assets can only be used for the trust's intended use and any excess assets must be distributed as provided in the trust or to the settlor, if living, or to the settlor's successors in interest.
  - Consider naming animal related charitable organization as remainder beneficiary
- Important to consider how distributions for care will be made
  - To a person under a service agreement
  - Directly to veterinarian facility or pet housing facility
- Trustee selection is an important decision for settlor

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Ohio Legacy Trust

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Ohio Legacy Trust - Enacted March 27, 2013

- Ohio Domestic Asset Protection Trust
  - Permits use of self-settled, irrevocable spendthrift trusts to preserve assets
  - Potential clients include business owners, professionals, business officers and directors, professional athletes, lottery winners, wealthy individuals seeking to preserve premarital assets

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Ohio Legacy Trust (cont.) - Requirements

- Written trust agreement
- Qualified Trustee
- Ohio law must be governing law
- Trust must be irrevocable
- Spendthrift provision
- Limitations on transferor's authority and retained rights
- Qualified Affidavit (O.R.C. §5816.06)
  - Sworn oath as to solvency, no pending claims, and no bad intentions

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Ohio Legacy Trust (cont.) - Limitations

- Spendthrift provisions cannot be used to thwart claims for spousal support and/or child support
  - Applicable to spouse or former spouse at time of transfer to trust, not to future spouse
- Transferor is limited to permissible retained rights listed in O.R.C. §5816.05
- Transferor can serve as a Trust Advisor only as to investment decisions. O.R.C. §5816.11

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Ohio Legacy Trust (cont.) – Restrictions on creditor claims

- Creditor cannot attack the trust agreement
- Creditor can only attack transfers to the trust
  - Creditor must have been a creditor before the qualified disposition; and
  - Must bring the action within 18 months of the transfer to the trust or within 6 months after the transfer is or reasonably could have been discovered
- O.R.C. §5816.07(E) specifically limits claims against the Trustee, Trust Advisor or counselors to the same claims period above
- Each transfer is evaluated separately

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Closing Thoughts

- Trusts provide flexible options to address a multitude of estate planning and wealth preservation needs
- ILIT, Lifetime Gift Trust, CRT and CLT are useful planning techniques for wealthy clients
- Trusts for Pets provide a way to ensure continued care of pets following death of the owner
- The Ohio Legacy Trust provides a wealth preservation tool for asset protection planning in Ohio

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Thank you

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Chapter 6: Specialized Trusts

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Buckingham, Doolittle & Burroughs, LLC
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Table of Contents

Chapter 6:
Specialized Trusts

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Irrevocable Life Insurance Trust ("ILIT")

In General

An irrevocable life insurance trust ("ILIT") can be used when the individual has a large life insurance policy and other substantial assets to fund the credit shelter trust. In other words, the ILIT is a useful technique for clients with estates in excess of the Applicable Exclusion Amount. The ILIT is also a useful strategy in the business succession planning process to fund a buy-sell agreement.

The objective of an ILIT is to remove the proceeds of a life insurance policy from the grantor's gross estate. Under I.R.C. § 2042, the gross estate includes the proceeds of life insurance if the proceeds are payable to the Executor of the individual's estate or payable to any other person, if the individual had any "incidents of ownership" as to the life insurance policy. Incidents of ownership include the power, acting alone or with another, to change the beneficial ownership of the policy or its proceeds or the time and manner of enjoyment of the policy or proceeds. Treas. Regs. § 20.2042-1(c)(4). An ILIT is an irrevocable trust that is designed to hold the life insurance policy during the grantor's life and separate the incidents of ownership of the policy from the grantor to achieve the objective of removing the proceeds of the life insurance policy from the grantor's gross estate. This objective is best accomplished if the Trustee of the ILIT purchases the insurance policy. If the grantor transfers an existing life insurance policy to the ILIT, the proceeds of the ILIT will be subject to the three-year look back rule under I.R.C. § 2035(a). Even if an existing policy is transferred from the grantor to the ILIT, if the grantor survives the three-year look back period, the ILIT can successfully remove the proceeds of the policy from the grantor's gross estate.

Variations

As with most estate planning strategies, there are variations of ILITs. The ILIT may be structured to provide benefits for a surviving spouse for life, then children. It may be drafted as a spray trust for the benefit of the surviving spouse and children. An ILIT is intended to hold assets that will not be included in the grantor's gross estate, so it is not

necessary to draft it to qualify for the marital deduction. The ILIT should contain language dealing with what should happen in the event all or a portion of the trust is included in the grantor's gross estate. There should also be provisions included that permit the trustee of the ILIT to lend money to the grantor's estate or to purchase assets from the grantor's estate to provide liquidity to the grantor's estate, if necessary, to pay debts, expenses or taxes at the grantor's death. The ILIT may also be drafted to provide directly for children or grandchildren with no provisions for a surviving spouse. This particular form is useful to hold a survivorship policy that insures the joint lives of the grantor and the grantor's spouse. This may also be an attractive alternative for dealing with blended family issues in a second (or third or more) marriage situation.

Withdrawal Powers

In many instances, it will be necessary for the grantor to make additional contributions to the ILIT to pay the insurance premiums. In order to avoid using part of the grantor's gift tax Applicable Exclusion Amount, the ILIT should grant withdrawal rights to the beneficiaries. These rights are often referred to as Crummey withdrawal rights (named after the case in which they were first upheld). The purpose of a Crummey withdrawal right is to create a present interest gift that qualifies for the gift tax annual exclusion under I.R.C. § 2503(b). The beneficiary must be informed of this withdrawal right so the Trustee must send notices to the beneficiaries informing the beneficiary of his/her right of withdrawal and explaining how and when the right will lapse based on the terms of the ILIT. The withdrawal period should not be less than 30 days.

Suitability

Properly structured and administered, an ILIT is an effective tool for removing life insurance proceeds from the grantor's gross estate. An ILIT is an effective estate tax planning tool for clients who have already fully funded an A/B trust and need to do something more to minimize estate tax exposure.

Lifetime Gift Trust

In General

A lifetime gift trust is similar to an ILIT, except that instead of holding a life insurance policy, it holds other assets. Essentially, a lifetime gift trust is a trust designed to receive and hold annual exclusion gifts for the intended beneficiaries. Fully utilizing annual exclusion gifts can add up quickly and make a substantial cumulative impact on reducing the individual's gross estate. The lifetime gift trust provides a great alternative to outright gifts, particularly if the individual does not want the beneficiaries to spend the assets until sometime in the future.

Withdrawal Powers

Similar to the ILIT, a lifetime gift trust should contain Crummey withdrawal rights for the beneficiaries. These Crummey powers will permit the grantor to utilize annual exclusion gifts without using or depleting his/her gift tax Applicable Exclusion Amount. Note that the annual exclusion gift is per person and can only be doubled if the spouse makes an

identical gift to the same person or consents to gift splitting with his/her spouse. This creates an opportunity for using an ILIT or a lifetime gift trust. Contributing gifts to an ILIT reduces or forecloses the opportunity to make gifts to a lifetime gift trust and vice versa. If the assets to be contributed to the lifetime gift trust are expected to greatly appreciate in value, then it may be a good planning idea to utilize the gift tax Applicable Exclusion Amount to transfer assets to the trust without incurring any out of pocket gift taxes, but to remove the assets from the grantor's gross estate, and equally important to remove any future growth or appreciation in the assets from the grantor's gross estate, thus leveraging the use of the Applicable Exclusion Amount.

Terms

The terms of the lifetime gift trust are discretionary to the grantor. The trust may be administered until the beneficiary reaches a particular age or ages (if multiple principal distributions are desired) or the trust may be structured as a dynasty trust intended to run for two or more generations before final distribution or termination.

Charitable Remainder Trusts and Charitable Lead Trusts

Charitable remainder and charitable lead trusts are irrevocable split-interest trusts with noncharitable and charitable beneficiaries. These trusts can be created during life (inter vivos) or upon death (testamentary). The charitable remainder trust has noncharitable lead (lifetime or term of years) interests followed by remainder interests passing to or for the benefit of charitable organizations. The charitable lead trust has charitable lead (lifetime or term of years or both) interests followed by remainder interests passing to noncharitable beneficiaries. These charitable split-interest trusts are important planning techniques that can greatly assist clients in meeting dual objectives of taking care of their family while also making valuable contributions to charitable organizations. The client must have a charitable intent for these trusts to fulfill their estate planning objectives. Without a charitable intent, the client and/or the client's family are likely to be dissatisfied with the results. However, when the client is charitably inclined and when structured properly, these split-interest trusts can also provide valuable income, gift, and/or estate tax benefits.

Charitable Remainder Trusts

Overview

A charitable remainder trust ("CRT") is an irrevocable split-interest trust that provides a lead interest in the form of a term of years, a life interest, or a joint life interest for two lives, followed by a charitable remainder interest. In order to qualify as a CRT, the trust must meet all of the requirements under Internal Revenue Code ("I.R.C.") § 664, the regulations promulgated under that section and the Revenue Rulings and Revenue Procedures issued by the Internal Revenue Service ("IRS"). Failure to meet these requirements will result in the loss of the income, gift, and/or estate tax benefits of a CRT.

A CRT can be a useful planning technique when a grantor desires to provide for charitable interests, but also wants to retain a payment stream for the grantor, his or her spouse, and/or children. A CRT can also be useful when the grantor has low basis stock and wants to diversify an investment portfolio without incurring a substantial capital gain.

Types

A. Charitable Remainder Annuity Trust ("CRAT").

A CRAT is an irrevocable split-interest trust defined under I.R.C. § 664(d)(1). A CRAT can receive only a single contribution to fund the trust. From that initial contribution, a sum certain (not less than 5 percent of the initial fair market value ("FMV") of all property contributed to the trust) is to be paid not less than annually to one or more persons (at least one of which is not an organization described in I.R.C. § 170(c) and for individuals it must be an individual who is living at the time of the creation of the trust) for a term of years (not to exceed 20) or for the life or lives of the individual annuity beneficiaries. The annuity may be stated as a percentage of the initial FMV of the trust or as a fixed sum; however, the annuity payout cannot be changed or adjusted regardless of the performance of the trust assets. At the expiration of the annuity period, the remaining balance of the trust assets must be distributed to or held for the benefit of one or more qualified charities.

B. Charitable Remainder Unitrust ("CRUT").

A CRUT is an irrevocable split-interest trust defined in I.R.C. § 664(d)(2) that can receive multiple contributions. The trust is valued annually and a fixed percentage (not less than 5 percent) of the net FMV of the trust must be distributed not less than annually to one or more persons (at least one of which is not an organization escribed in I.R.C. § 170(c) and for individuals it must be an individual who is living at the time of the creation of the trust) for a term of years (not to exceed 20) or for the life or lives of the individual unitrust beneficiaries. The unitrust amount must be for a fixed percentage of the net FMV of the trust. The percentage remains fixed, but the amount of the beneficiary distributions will fluctuate each year as the net FMV of trust assets appreciate or decline in value. At the expiration of the unitrust period, the remaining balance of the trust assets must be distributed to or held for the benefit of one or more qualified beneficiaries.

The CRUT is used in some cases as a hedge against inflation. A CRAT provides a fixed payment to the noncharitable beneficiary and any appreciation to the trust assets accrues to the benefit of the charities. A CRUT allows the noncharitable beneficiary to participate in the appreciation of trust assets. On the downside, if the trust assets decline in value, the unitrust payment will likewise decline. A client seeking a fixed payment and minimal risk will want to use a CRAT. Someone more concerned about inflation eroding the purchasing power of the trust distributions may lean in favor of the CRUT.

C. Net Income Charitable Remainder Unitrust ("NICRUT").

A NICRUT is a variation of a CRUT, sometimes referred to as an exception CRUT because it is defined under I.R.C. § 664(d)(3)(A), entitled Exceptions. Under a standard CRUT, the trustee must pay out the unitrust amount (percentage of the net FMV) regardless of the income generated by the trust assets during the year. These payout requirements may cause a strain on the trust assets, forcing the trustee to sell or otherwise invade the trust principal in order to make the payments each year. A NICRUT is an alternative that provides flexibility in the administration of the CRUT. Under a NICRUT the unitrust (noncharitable) beneficiary will receive each year the lesser of: (1) the unitrust amount specified in the trust instrument (i.e., a fixed percentage of the value of the trust assets); or (2) the net income earned by the trust during the year. This variation of the CRUT is sometimes referred to as a net income or income only option. The term income as used in this case is defined under I.R.C. § 643(b) to mean the amount of income of the trust for the taxable year as determined under the terms governing instrument and applicable local (state) law.

D. Net Income with Makeup Provision Charitable Remainder Unitrust ("NIMCRUT").

A NIMCRUT is defined under I.R.C. § 664(d)(3)(B) and is also sometimes referred to as an exception CRUT. A NIMCRUT is another variation of a CRUT. It is similar to a NICRUT in that the unitrust beneficiary still receives the lesser of the unitrust amount (fixed percentage of the net FMV) or the net income from the trust. However, the NIMCRUT provides for the "makeup" payment to be made in the years where the net income is greater than the unitrust amount where the net income in prior years has been less than the unitrust amount. Conceptually, the makeup provision is in essence a makeup account that accrues in years in which the net income is less than the unitrust amount and is distributed in years in which the net income is greater than the unitrust amount. The NIMCRUT can be particularly useful in situations where the asset being contributed to the trust is likely to generate little or no income in the early years of the unitrust, but is expected to be sold or otherwise converted into income producing assets that will create greater amounts of income in later years of the unitrust period.

E. Flip Trust.

Another variation of a CRUT is referred to as a Flip Trust. The purpose of a Flip Trust, sometimes referred to as a Flip Unitrust or a Flip CRUT, is to combine the benefits of a NIMCRUT (income deferral) and the benefits of a standard CRUT (consistent percentage of asset distributions). Typically a Flip Trust will begin as a NIMCRUT and at some point in the future will change or "flip" to a standard CRUT. The flip occurs when the triggering event occurs. Based on the rules as they stand now, the triggering event cannot be within the control of the donor, the unitrust beneficiary, the trustee, or any other person. The most common triggering event is the sale of an unmarketable or illiquid asset (i.e., real estate). Other triggering events may include removal of restrictions on Rule 144 stock, a beneficiary attaining a certain age (i.e., 65), or the death of a particular

individual. A NIMCRUT or a NICRUT may flip only once and the flip must be from a NIMCRUT or a NICRUT to a standard CRUT. Reverse flips are not permitted. Upon the occurrence of the triggering event, the new payout method will begin on January 1 of the year following the year in which the triggering event occurred.

Qualifications and Requirements

A. The requirements for CRTs are found in I.R.C. § 664, the Treasury Regulations promulgated under that section, and in various IRS revenue and private letter rulings. In addition to those requirements, a CRT is subject to the prohibited transactions restrictions under the private foundation rules found in I.R.C. § 4947.

B. A CRAT must be created by a written instrument (i.e., trust agreement or will). There must be an annuity payment (a specific dollar amount) payable at least annually to one or more beneficiaries at least one of which is not a charitable organization for a life or term of years (not more than 20). The annuity amount must be at least 5 percent but not more than 50 percent of the initial FMV of the trust. There must also be an irrevocable remainder interest to be paid over to or held for the benefit of a charitable organization. While the specific charitable organization(s) may be changed after the trust is created, the trust from inception must require that the remainder interest be payable to or held for the benefit of one or more charitable organizations. The remainder interest must have a present value, as computed using the IRS tables, of at least 10 percent of the initial FMV of the trust. Finally, the actuarial probability that the charity will receive the remainder interest must exceed 5 percent. This "5 percent probability test" originated from a revenue ruling that pre-dated the 10 percent remainder interest requirement, but nevertheless has never been repealed, either by statute, ruling or case law. In September 2016, the IRS provided some relief from the 5 percent probability test. In Rev. Proc. 2016-42, the IRS provided a means to add a qualified contingency clause to the CRUT that would terminate the trust if the value of the trust assets decreased to an amount equal to 10 percent of the initial trust value. Any remaining trust assets must be distributed to the charitable remainder beneficiaries at the time of the termination. Rev. Proc. 2016-42. Rev. Proc. 2016-42 contains a simple qualified contingency clause. Lastly, for a CRAT, there can be no additional contributions after the initial trust funding.

C. The requirements of a CRUT are similar to those of a CRAT. However, a CRUT may permit additional contributions after the initial funding. Also, a CRUT must provide for the payment, at least annually, of a fixed percentage (at least 5 percent but no more than 50 percent) of the FMV of the trust calculated at the beginning of each year.

D. In 1989 and 1990 the IRS published model forms for 12 different types of charitable remainder trusts. See Rev. Procs. 90-32; 90-31; 90-30; 89-21; and 89-20. In 2003 and 2005, the IRS published updated model forms that superseded the prior model forms and added new model forms. See Sample Charitable Remainder Unitrusts Rev. Procs. 2005-59; 2005-58; 2005-57; 2005-56; 2005-55; 2005-54; 2005-53; and 2005-52. See Sample Charitable Remainder Annuity Trusts Rev. Procs. 2003-60; 2003-59; 2003-58; 2003-57; 2003-56; 2003-55; 2003-54; and 2003-53. In the Revenue Procedures publishing these model forms, the IRS stated that a trust that substantially follows one of the model forms will be recognized by the IRS as meeting the requirements of a CRAT or a CRUT, provided that the trust is administered in a manner consistent with the terms of the instrument creating the trust and provided that the trust is valid under local law (i.e., applicable state law).

Tax Benefits

A. In order to obtain any tax benefits from a CRT, the trust must be a qualified trust. A qualified trust is a CRAT, CRUT or pooled income fund, and is exempt from federal income tax unless it receives unrelated business income. The grantor may receive an income, gift, and/or estate tax deduction for the present value of the remainder interest that will pass to charity. The present value of the remainder interest is calculated based on eight factors: (1) the net FMV of the property transferred to the trust; (2) the annuity or unitrust format; (3) the annuity rate or payout rate; (4) the measuring term of the trust (term of years, life, joint lives or combination); (5) the payment frequency (annual, semi-annual, quarterly, monthly); (6) for a CRUT, the number of months between valuation date and first payment; (7) for a CRAT, whether the payment is at the beginning or end of the payment period; and (8) the Applicable Federal Mid-term Rate ("AFMR").

B. There is no limit on the gift or estate tax deduction available to the grantor. The entire net present value of the remainder interest may be deducted for gift or estate tax purposes so long as the CRT requirements are met. However, the deduction for income tax purposes is limited to a percentage of adjusted gross income ("AGI") and potentially by the grantor's cost basis in the asset contributed depending on the type of assets contributed to the trust and by the type of charity (either a 50 percent-type or 30 percent-type) that will receive the remainder interest. As a result of passage of the One Big Beautiful Bill Act ("OBBBA") in 2025, beginning in 2026, income tax deductions will be limited by the 0.5% of AGI floor and the 35% per dollar limit for taxpayers in the top tax bracket.

C. In order to determine the amount of the deduction for income, gift, and/or estate tax purposes, the net present value of the remainder interest must be

calculated. The net present value is calculated using the IRS standard mortality tables and applying the 7520 rate (120 percent of the AFMR). For charitable deduction purposes, the grantor has the option to use the 7520 rate for the month of the transfer to the trust or the 7520 rate for either of the two previous months. For instance, if the transfer to the trust occurs in February 2026, the grantor may use the 7520 rate for December 2025, January 2026, or February 2026. This lookback feature is unique to charitable deduction calculations and provides some flexibility in maximizing the charitable deduction in an environment of shifting interest rates.

D. Once the net present value of the remainder interest is determined, that amount is the available deduction for gift or estate tax purposes. For income tax purposes, the net present value is the starting point for determining the available income tax deduction. The net present value must be compared to the AGI limitations and to any cost basis limitations based on the type of assets contributed. In the event the net present value of the remainder interest exceeds the applicable income tax deductions in the year of transfer, the grantor may be able to carryover the excess for up to five years.

E. SECURE 2.0, signed into law on December 29, 2022, permits a one-time election to treat up to $50,000 (indexed for inflation) in distributions from an IRA to a charitable remainder trust or charitable gift annuity as if the distributions were made directly to a qualifying charity. This allows a participant a one-time election to use a portion of their qualified charitable distribution ("QCD") to fund a charitable remainder trust or a charitable gift annuity. Given the dollar limit of $50,000 (only once, not annually), it is likely this election will be used to fund charitable gift annuities, not to create a charitable remainder trust.

Variations

A. There are many variations available for CRTs. First, the grantor may use a CRAT or CRUT. As indicated above, a CRAT may be desired if the grantor desires a stable payout, whereas a CRUT may be more desirable if the grantor is concerned about hedging against inflation. Also discussed above were the Exception CRUTs. The NICRUT and the NIMCRUT are also variations of a CRUT that provide more flexibility in the payout options and can be used to avoid untimely liquidations of the underlying trust assets. The Flip Trust is another variation that provides some protection to the unitrust beneficiary and provides the protection against untimely liquidation of assets, but still allows the unitrust beneficiary to participate in the appreciation of the trust assets after the "flip" occurs.

B. Within each category of the various CRTs, there are also options regarding the payment frequency and timing of payments. For instance, payments can be annual, semi-annual, quarterly or monthly. Payments can also be set to occur at the beginning of the period or at the end of the payment period.

C. Another important variation to consider is the selection of Trustee. The Trustee can be the grantor, the charity, an individual, or a corporate trustee. There are pros and cons to each selection and it is an important decision that will have a major impact on the administration of the trust. For instance, while a corporate trustee may provide the benefit of professional money management skills and expertise in fiduciary matters, the fees for such services may range from 1 percent – 2 percent or more of the value of the trust assets. Further, using a corporate trustee may limit the types of assets held by the trust and the grantor will give up control over the investment mix for the trust assets. On the other hand, the grantor may not charge fees for acting as trustee, but the grantor may lack the expertise to properly manage the trust assets or undertake the fiduciary duties of a trustee.

D. Another variation for CRTs is whether to create the CRT during life or at death. An inter vivos CRT may be appropriate for a grantor seeking to make a charitable gift, but wanting or needing a stream of payments during life (or for a term of years) and wanting the income tax deduction arising from a lifetime gift. On the other hand, a testamentary CRT may be more appropriate for a grantor seeking to guarantee a gift to a charity and wanting to provide a payment stream for a spouse or other family members after the grantor's death.

Charitable Lead Trusts

Overview

Charitable Lead Trust ("CLT") is an irrevocable split-interest trust with charitable and non-charitable beneficiaries. A CLT can be created during life (inter vivos) or upon death (testamentary). The CLT has charitable lead (lifetime, term of years or both) interests followed by remainder interests passing to non-charitable beneficiaries. CLTs are important planning techniques that can greatly assist clients in meeting dual objectives of taking care of their family while also making valuable contributions to charitable organizations. However, the client must have a charitable intent for a CLT to fulfill the client's estate planning objectives. Without a charitable intent, the client and/or the client's family are likely to be dissatisfied with the outcome. When a client is charitably inclined and with the proper structure, though, a CLT can provide valuable income, gift and/or estate tax benefits.

The CLT can be an effective estate freeze technique and is sometimes used as an alternative to a Grantor Retained Annuity Trust ("GRAT"). The CLT may be appropriate when the grantor wishes to freeze the value of an asset for estate tax purposes and pass any future appreciation of that asset to the next generation and the grantor does not need the income from the asset. In addition to passing the future appreciation to the next generation, if created as a grantor trust under I.R.C. §§ 671-678, the grantor may realize substantial charitable income tax deductions during the term of the charitable lead interest.

Types

A. Charitable Lead Annuity Trust ("CLAT").

A CLAT is an irrevocable split-interest trust that provides a guaranteed annuity interest to one or more charitable organizations for a period of time measured by a life or lives of a permitted individual or individuals or for a term of years or a combination of the two. At the end of the annuity term the remainder interest reverts to the grantor or passes to non-charitable beneficiaries as designated by the terms of the trust agreement. A CLAT can be funded only with one initial contribution and no further additions to the trust are permitted. The annuity may be stated as a specific dollar amount or as a percentage of the initial fair market value of the trust.

B. Charitable Lead Unitrust ("CLUT").

A CLUT is an irrevocable split-interest trust that can receive multiple contributions. The trust is valued annually and a fixed percentage of the net fair market value ("FMV") of the trust must be distributed not less than annually to one or more charitable organizations for a term of years or for the life or lives of qualifying individuals or a combination thereof. At the expiration of the unitrust period, the remaining balance of the trust assets revert to the grantor or are held for the benefit of or distributed to the non-charitable beneficiaries designated by the grantor in the trust instrument.

Qualifications and Requirements

A. The requirements for a CLT are found in I.R.C. § 170(f)(2)(b), I.R.C. § 2055(e)(2)(B) and I.R.C. § 2522(c)(2)(B). These requirements must be satisfied in order to obtain the income, gift and/or estate tax benefits of a CLT.

B. In June 2007, the IRS issued sample CLAT forms (both grantor and non-grantor inter vivos forms and a testamentary form). See Rev. Proc. 2007-45, 2007-29 IRB 89 (6/22/07) and Rev. Proc. 2007-46, 2007-29 IRB 102 (6/22/07). A CLAT that is "substantially similar" to the IRS samples contained in Rev. Proc. 2007-45 or 2007-46 will be recognized by the IRS as a valid, qualifying CLAT. Trusts that contain additional substantive provisions not explicitly blessed in the IRS sample forms, or that omit provisions included in the IRS sample, are not necessarily disqualified. However, such trusts are not assured of qualification under the provisions of Rev. Proc. 2007-45 and Rev. Proc. 2007-46. In any event, the IRS generally will not issue a letter ruling on whether an inter vivos or testamentary CLAT qualifies for income, estate, and/or gift tax charitable deductions. See Rev. Proc. 2007-45, Section 3; Rev. Proc. 2007-46, Section 3.

C. In July 2008, the IRS issued sample CLUT forms (both grantor and non-grantor inter vivos forms and a testamentary form). See Rev. Proc. 2008-45, 2008-30 IRB 224 (7/28/08) and Rev. Proc. 2008-46, 2008-30 IRB 238 (7/28/08). A CLUT that is

"substantially similar" to the IRS sample forms contained in Rev. Proc. 2008-45 or 2008-46 will be recognized by the IRS as a valid, qualified CLUT. Trusts that contain additional substantive provisions not explicitly blessed in the IRS sample forms, or that omit provisions included in the IRS sample, are not necessarily disqualified. However, such trusts are not assured of qualification under the provisions of Rev. Proc. 2008-45 and Rev. Proc. 2008-46. In any event, the IRS generally will not issue a letter ruling on whether an inter vivos or testamentary CLUT qualifies for income, estate, and/or gift tax charitable deductions. See Rev. Proc. 2008-45, Section 3; Rev. Proc. 2008-46, Section 3.

D. The first requirement for a CLT is that the lead interest must be payable to a charitable organization and it must be in the form of a guaranteed annuity payment (a specific dollar amount), or a unitrust payment (a fixed percentage of the net FMV calculated annually) payable at least annually.

E. The guaranteed annuity amount must be an irrevocable contractual right of the charity to receive a sum certain payable not less than annually for the annuity term. The annuity may be stated as a fixed dollar amount, a fixed percentage of the initial net FMV of the trust assets as of the date of the transfer to the trust (or the date of death or alternate valuation date in the case of a testamentary lead trust), or expressed as a formula designed to achieve a desired level of tax savings. *See* PLR 199927031 where the annuity amount was determined by a formula that will produce a present value for the non-charitable remainder interest as close as possible to an amount specified in the Trust instrument. The critical factor for qualification of a guaranteed annuity is that the amount of the charitable lead interest must be a sum certain that is readily determinable at the creation of the trust.

F. The unitrust interest must be an irrevocable right for the charity to receive a payment at least annually of a fixed percentage of the net FMV of the trust assets determined on an annual basis. The unitrust term may be measured for a term of years or for the life or lives of one or more individuals, provided that each individual is living at the date when the trust is created (or at the date of death of the grantor in the case of a testamentary trust).

G. A CLT is not exempt from federal income tax. If the trust is a grantor trust under the grantor trust rules of I.R.C. §§ 671-678, then all of the income must be reported by the grantor. If the trust is not a grantor trust, then any income generated by the trust is reported on the fiduciary income tax return for the trust. Note that the grantor cannot take advantage of the income tax charitable deduction for the value of the lead interest unless the CLT is a grantor trust under I.R.C. §§ 671-678. If the grantor would like to take advantage of the potential income tax deductions by using a grantor trust, the income tax on the trust income can be avoided by directing in the trust instrument that any excess income above the annuity amount or unitrust amount, whichever is applicable, be distributed to the charitable lead beneficiary (or some other charitable organization). Subject to the limitations on income tax charitable deductions, the grantor of a grantor trust CLT may take a charitable income tax deduction for the amounts of excess income actually paid to the charity on an annual basis; however, the grantor will not receive any additional gift or estate tax deductions

for distributions of excess income because the value of such payments is not ascertainable at the time the CLT was created. For a non-grantor trust, I.R.C. § 642(c) permits the trust to obtain an income tax charitable deduction against trust income for amounts paid or permanently set aside for a charitable purpose. Note that if the grantor, for either a grantor or non-grantor trust CLT, desires to have the excess annual income paid to a non-charitable beneficiary, special care is required in drafting the trust agreement to ensure that the trust qualifies as a CLT. At the very least, the governing instrument should include language prohibiting transactions taxable under I.R.C. §§ 4943 and 4944 (the private foundation rules).

H. The remainder of a CLT may be payable to the grantor or the grantor's estate. Alternatively, the grantor may specify in the trust agreement that the remainder is payable to the grantor's children, grandchildren or other non-charitable beneficiaries designated by the grantor in the trust instrument.

I. While there is no limit to the time period for the lead interest of a CLT, careful consideration to state law is required to ensure compliance with the rule against perpetuities, if applicable. Under current Ohio law, the grantor may opt out of the rule against perpetuities (Ohio Rev. Code § 2131.09); however, there are still states that have some form of the rule against perpetuities.

Tax Benefits

A. In order to obtain any tax benefits from a CLT, the trust must meet the CLT requirements. If the trust meets those requirements, and the lead interest is in the form of either a guaranteed annuity amount or a unitrust payment, the grantor may receive an income, gift and/or estate tax deduction for the present value of the charitable lead interest. Note, the grantor cannot receive any income tax deductions if the trust is a non-grantor trust. In order to obtain any of the income tax deductions, the trust must be a grantor trust as described under I.R.C. §§ 671-678. As indicated above, this is a two-edged sword because if the trust is a grantor trust, the grantor is also liable for any income taxes incurred by the trust so long as it is a grantor trust. The income tax charitable deduction limitations under I.R.C. § 170 are applicable to the lead interest of a CLT.

B. The present value of the lead annuity interest or the lead unitrust interest for the charitable deduction is calculated using the Section 7520 rate (120% of the AFMR) taking into consideration the net fair market value of the property transferred to the trust, the annuity or the unitrust format, the annuity payout rate, the measuring term of the trust (term of years, life, joint lives or combination), the payment frequency and whether the payments fall at the beginning or end of the payment period.

C. There is no limit on the gift or estate tax deduction available to the grantor for transfers to a CLT. The entire net present value of the annuity or unitrust interest may deducted for gift or estate tax purposes so long as the CLT requirements are met. As indicated above, the deduction for income tax purposes is limited to a percentage of AGI and further limited based on the type of asset contributed and

the type of charity that will receive the lead interest. As indicated above, the grantor is entitled to an income tax deduction only if the trust in addition to being a qualified CLT is also a grantor trust for income tax purposes, subject to the recently added charitable deduction limitations under the OBBBA.

Variations

A. While there are few variations available for CLT's due to the limitation that the lead interest must be either a guaranteed annuity or a unitrust interest and hybrids are prohibited, there are still substantial alternatives to meet the various needs or desires of a charitably inclined client. First, if the grantor feels that inflation will be stable and growing during the lead term, then a CLAT may be desired to keep the payout to the charity stable and fixed, thereby capturing the appreciation for the grantor or the grantor's designated non-charitable beneficiaries. If the grantor thinks that inflation will be volatile and may increase or decrease over time during the lead interest period, then a CLUT may be more desirable.

B. Another significant alternative for the grantor is whether to establish the trust as a grantor trust or non-grantor trust for income tax purposes. The critical consideration in this decision is whether the grantor thinks the income tax deduction will outweigh the potential income tax liability in the future over the entire lead interest term.

C. Another important decision is whether it will be a reversionary CLT (the remainder interest will pass to the grantor or the grantor's estate) or a non-reversionary CLT (the remainder interest will pass to non-charitable beneficiaries designated by the grantor in the trust agreement). A reversionary lead trust will not create a taxable gift for the grantor since the assets will be includible in the grantor's taxable estate. However, a non-reversionary CLT may create a taxable gift to the grantor. To the extent that the transfers to a non-reversionary CLT are completed gifts, the net present value of the remainder interest (calculated in the same fashion as the remainder interest of a CRT) is a taxable gift to the grantor and to the extent it could be payable to skip persons, may create a generation skipping transfer ("GST") tax to the grantor as well.

D. A CLT provides several options regarding the payment frequency and timing of payments. For instance, payments can be annual, semi-annual, quarterly or monthly. Payments can also be set to occur at the beginning of the period or at the end of the payment period.

E. Another decision is whether to create the CRT during life (inter vivos) or at death (testamentary). For a CLT, the decision of whether to create a testamentary or inter vivos CLT hinges on when the grantor wishes to receive the remainder interest back or for the grantor's designated non-charitable beneficiaries to receive the remainder interest. It also depends on whether the grantor can utilize the income tax charitable deduction during the lead interest period.

Resources

A. Leimberg, Stephan R., et al., *The Tools & Techniques of Charitable Planning*, 1st edition (Cincinnati, OH: The National Underwriter Company 2001).

B. Teitell, Conrad, *Charitable Lead Trusts* (1999).

C. Toce, Joseph P., Jr. et al., *Tax Economics of Charitable Giving*, (Warren, Gorham & Lamont 2006).

D. Osteen, Carolyn M., et al., *The Harvard Manual on Tax Aspects of Charitable Giving*, 8th edition (Boston, MA: 1999).

E. Prince, Russ Alan, et al., *The Charitable Giving Handbook*, 1st edition (Cincinnati, OH: The National Underwriter Company, 1997).

F. *The Planned Giving Design Center*—www.pgdc.com.

G. There are various software programs designed for calculating the various interests under charitable remainder and charitable lead trusts. The following is a short list of some of those titles. This list is provided solely for informational purposes and is in no way an endorsement of any of these products. Only you can determine whether any of these programs is compatible with your system and/or useful to your practice.

1. Numbercruncher (see www.leimberg.com);
2. TigerTables (see www.tigertables.com);
3. Crescendo Pro (see www.crescendointeractive.com);
4. PGCalc Planned Giving Manager (see www.pgcalc.com);
5. Charitable Financial Planner (see www.brentmark.com).

Trusts for Pets

Overview

Trusts for pets were codified in Ohio as of January 1, 2007, when the Ohio Trust Code became effective. See Ohio Rev. Code § 5804.08. The statute provides a method for pet owners to provide care for their pets while living even after the pet owner's death. Importantly, the statute contains a mechanism for enforcement of the trust. See Ohio Rev. Code § 5804.08(B). Trusts for pets can provide peace of mind for pet owners and another tool for estate planners to provide comprehensive planning for their clients. As with other specialized trusts, the law is the starting point to make sure the trust is valid and enforceable. However, there are many other issues that must be resolved in order to draft a trust agreement that addresses the goals and objectives of your client.

Statutory Framework

Creation and Termination

The statute governing pet trusts in Ohio is entitled "Trust for care of animal." Ohio Rev. Code § 5804.08. The statute permits the creation of a trust for the care of an animal alive during the settlor's lifetime. Ohio Rev. Code § 5804.08(A). The trust can be created during the settlor's life (inter vivos) or at the settlor's death (under a trust agreement or testamentary under a Will). The trust can be for the care of more than one animal, but the trust must terminate upon the death of the last surviving animal. *Id*.

The statute is broad regarding types of animals that trusts can be created to benefit. It is not limited to cats or dogs, but can include farm animals, horses, snakes or any other types of animals owned by the settlor and alive during the settlor's lifetime. Although not stated in the statute, presumably this statute does not extend to creating a trust to care for an animal the settlor could not legally have owned or cared for himself (e.g., exotic animals, endangered species, etc.).

Enforcement

A person can be appointed under the terms of the trust to enforce a trust for pets. Ohio Rev. Code § 5804.08(B). If the trust fails to appoint someone to enforce the trust, a court may appoint someone to enforce the trust. *Id*. Also, someone having an interest in the welfare of an animal that is provided care from a trust may request the court to appoint someone to enforce the trust or to remove someone who was appointed to enforce the trust. *Id*.

This is an important part of the statute because it provides a mechanism to enforce the trust. This is a major difference between the common law and the Ohio Trust Code.

Funding and Use of Trust Assets

The trust may be funded with assets in an amount equal to or less than the amount required for the intended use (i.e., the care of the animal or animals). Ohio Rev. Code § 5804.08(C). All of the assets of the trust must be used for the intended use. *Id*. If the court determines that the trust estate exceeds the amount required for its intended use, any excess amount must be distributed as provided in the trust or "to the settlor if then living or to settlor's successors in interest." *Id*.

Without defining what amount is required for the care of an animal, this provision of the statute requires that any amount of trust assets determined by the trustee or by the court to exceed that required amount must be distributed. If the trust is silent on what happens to this excess amount, the assets must be distributed to the settlor if then living or to the settlor's successors in interest.

Some Drafting Issues

Trustee Selection

First, it is extremely important to select a trustee who will agree to administer the trust agreement and who has the ability to manage the assets and monitor the care of the animal(s). This is no small task. Given the uncertainty regarding the allowable funding for the trust, if it is a standalone trust, a corporate trustee may be unwilling to accept the trust. On the other hand, it may be difficult to find an individual who is willing and able to act as trustee. Consider drafting a succession of trusteeship clause that provides a method to appoint and/or replace successor trustees. It should be noted that the court can appoint a trustee under the Ohio Trust Code, if there is a failure in the lineup of trustees named in the trust.

Identify Animal or Animals

Next, it is important to identify the animal or animals that will be cared for by the trust. It is better to be as specific as possible to remove doubt or confusion as to which animal or animals will be covered by the trust. Also, specifically identifying the animals may help avoid litigation after the settlor's death. Ask your client if their animal(s) have implanted identification chips.

Appointment of Enforcer

Another important issue to resolve is who should be appointed to enforce the trust, if anyone. The settlor may not have anyone suitable to fill this role and may have to rely on the trustee to enforce the trust or for the court to appoint someone. The settlor should not appoint someone who will receive the trust assets after the trust terminates as that person would have a direct conflict of interest to overcome in the enforcement of the trust.

Distribution for care of animal(s)

Determine how the trust will make distributions for the care of the animal(s). The statute limits the use of the trust property to "its intended use." Ohio Rev. Code § 5804.08(C). So the trust property can only be used for the care of the animal(s) and the provisions of the trust should restrict distributions for that purpose. By necessity, the distributions must be to a person or entity because the animal, even though it is intended to benefit from the trust, cannot be a beneficiary under the Ohio Trust Code. See Ohio Rev. Code § 5801.01(C) and (N) (defining "beneficiary"). Given that limitation, there are still alternative ways to make trust distributions for the intended use. For instance, payments may be made directly to the veterinarian or animal hospital for care of the animal or to an individual or organization that is housing and/or caring for the animal(s). Also, distributions may be to an individual under a service contract to care for the animal. There are income tax implications for these alternative distributions that must be considered and addressed when drafting the distribution provisions. These income tax issues are beyond the scope of this seminar, but it is important to consider tax consequences when drafting a trust.

Remainder Beneficiaries

This trust will terminate at some point. It cannot continue for multiple generations of animals since the statute specifically limits the animals that can be cared for by the trust to those animals alive during the settlor's lifetime. Therefore, it is important to consider what to do with any excess or remaining funds of the trust after all of the animals are deceased.

The settlor may want the funds to be added to his/her inter vivos trust held for the settlor's surviving family members. Because the size of a pet trust is limited in Ohio, the settlor may consider naming a charitable organization as the remainder beneficiary. This would remove the temptation of surviving family members to challenge the trust because they would receive no benefit if the trust is terminated. It is up to the settlor to decide the ultimate use of the funds following the death of the animal(s), but it is a provision that should be included in the trust to avoid an intestate distribution.

Conclusion

The Ohio Trust Code codified trusts for the care of animals in Ohio as of January 1, 2007. This is not a completely settled area of trust law, but the statute provides a level of comfort for estate planners and their clients who desire to provide for the care of their pets during life and after the pet owner's death. It provides yet another tool for estate planners who want to provide comprehensive planning for their clients.

Ohio Legacy Trust
Ohio Domestic Asset Protection Trust

Introduction

Asset protection planning is wealth preservation through risk management. It is not for the faint of heart or those having a faulty moral compass. The goal of asset protection planning is to avoid future creditors' claims and preserve a substantial portion of the client's wealth. Asset protection planning is not concealment of assets, not tax evasion and not intended to defraud existing creditors. This type of planning is aimed at reducing exposure to the risks of future litigation. The objective is to put up road blocks and obstacles that will slow down potential judgment creditors and bring them to the negotiating table for fruitful settlement discussions. While some planners incorporate tax planning into the asset protection plan, the overriding goal is to preserve assets.

The Ohio Legacy Trust (OLT) is a domestic asset protection trust (DAPT) that was codified in Ohio as Ohio Rev. Code §§ 5816.01 to 5816.14 under H.B. 479, effective March 27, 2013. Technical corrections to the OLT were enacted under H.B. 7, effective August 17, 2021. The OLT is one asset protection strategy and not a comprehensive asset protection plan in and of itself. It is not a silver bullet or magic elixir. It is just one tool to utilize for the right circumstances for those rare clients who can benefit from this asset preservation strategy. Examples of potential clients who may want to consider an OLT are: business owners, professionals (accountants, architects, attorneys, doctors), officers and directors of privately held and/or publicly traded companies, professional athletes, recipients of lottery winnings or other large sums (i.e., personal injury

settlements or other litigation awards). Wealthy individuals contemplating marriage may seek to utilize an OLT to protect premarital assets without the financial disclosure requirements attendant to prenuptial agreements.

This material is intended to provide a brief overview of the OLT. The OSBA sponsors the annual Great Lakes Asset Protection Institute, which focuses covers this issue in more detail. For an in-depth review of the OLT, see the *First Annual Ohio Asset Protection and Legacy Trust Institute*, OSBA Reference Manual Volume No. 13-036, presented April 22, 2013, as well as the materials from the annual Great Lakes Asset Protection Institute.

The Ohio Legacy Trust (OLT)

The Ohio Legacy Trust (OLT) was enacted under H.B. 479 with an effective date of March 27, 2013. This makes Ohio the fifteenth state to enact a domestic assets protection trust (DAPT) statute.

A DAPT is an irrevocable, self-settled spendthrift trust. In general, the goal of the trust is to remove the assets of the trust from the claims of future creditors, while still providing some access to those assets for the settlor. Historically, courts have uniformly permitted the creditors of a settlor to reach assets transferred to revocable or irrevocable trusts created by the settlor if the settlor retained control or an interest in the assets of such trusts. Even today, most states prevent a settlor from benefitting from spendthrift provisions in trusts created or funded by that settlor. However, since 1997, various states have enacted statutes permitting such trusts, with Ohio being the latest state to permit DAPTs.

Requirements

The Ohio Legacy Trust is defined under Ohio Rev. Code § 5816.02(K)(1). The requirements are as follows:

1. The trust must be evidenced by a written trust instrument;
2. A Qualified Trustee must be named or appointed in connection with property subject to a qualified disposition;
3. Ohio law must be the governing law of the trust;
4. The trust must be irrevocable; and
5. The trust must contain a spendthrift provision applicable to the interests of any beneficiary in the trust property, including any interests of a transferor in the trust property.

Ohio Rev. Code § 5816.02(K)(2) provides that a trust can be an OLT, even if the trust instrument permits one or more nonqualified trustees to serve.

Under Ohio Rev. Code § 5816.02(S), a Qualified Trustee is defined as an Ohio resident, or a bank or trust company, including an Ohio family trust company, having authority to act as a trustee in Ohio and subject to the appropriate regulatory agencies. In addition, the trustee must arrange for custody of the trust assets in Ohio and be responsible or participate in the preparation and maintenance of trust records and of preparing and filing required income tax returns for the trust. The settlor cannot serve as a trustee of

an OLT. While the statute does not prohibit a spouse or other related individuals from serving as a Qualified Trustee, it is generally recommended that the Qualified Trustee be independent of the settlor. The easiest way to obtain an independent Qualified Trustee is to appoint a corporate trustee.

The spendthrift provision must comply with the statutory requirements, but it cannot prevent the claims a spouse or former spouse for spousal support or alimony or claims for child support. Ohio Rev. Code § 5816.03(C). This provision also permits governmental agencies that are designated by statute, rule or regulation as the payee of such child support, spousal support or alimony. *Id*.

The transferor's rights, powers and interests in the trust property must be limited as provided in Ohio Rev. Code § 5816.05. It is critical to advise any client considering an OLT that the client will have to relinquish dominion and control of the assets to the Trustee and will have limited access to those assets going forward. The settlor/transferor can serve as a Trust Advisor, but only for investment decisions. Ohio Rev. Code § 5816.11.

Under Ohio Rev. Code § 5816.05, the statute permits the settlor to retain the following powers or interests in an OLT:

1. Inclusion of a trigger (defined event) that terminates the settlor's right to mandatory income from the trust;
2. The power to veto distributions;
3. A limited testamentary power of appointment;
4. The right to receive income;
5. The right to receive distributions from a CRAT or CRUT, and the power to release the annuity or unitrust interest in favor of a charitable organization;
6. The power to invade up to 5 percent of the trust principal annually;
7. The right to receive discretionary distributions of income and principal;
8. The right to remove and replace a trustee or advisor/protector;
9. The right to use trust assets;
10. Inclusion of a provision permitting the trustee to reimburse the settlor for income taxes generated by OLT income;
11. The discretionary power, after the settlor's death, to pay the settlor's debts, estate administration expenses, and any related transfer taxes;
12. Inclusion of a provision that after the death of the settlor pours back all or part of the trust property to the settlor's estate; and
13. A power, acting in a nonfiduciary capacity, to substitute property of equivalent value for any OLT principal property.

Before or simultaneously with the qualified disposition (i.e., transfer to the OLT), the transferor must sign a qualified affidavit. Ohio Rev. Code § 5816.06(A). A qualified affidavit must be sworn under oath and contain the following statements:

1. The property being transferred to the trust was not derived from unlawful activities;
2. The transferor has the full right, title, and authority to transfer the property to the OLT;
3. The transferor will not be rendered insolvent immediately after the transfer of the property to the OLT;
4. The transferor does not intend to defraud any creditor by transferring the property to the OLT;
5. There are no pending or threatened court actions against the transferor, except that any court action identified by the affidavit or an attachment to the affidavit;
6. The transferor is not involved in any administrative proceeding, except for any proceeding identified by the affidavit or any attachment to the affidavit; and
7. The transferor does not contemplate at the time of the transfer the filing for relief under the Bankruptcy Code.

As the requirements of the qualified affidavit demonstrate, an OLT is not designed or intended to hold all of the assets of a settlor. It is intended to act as a rainy day fund or shield to protect a portion of the settlor's wealth. Also, the attorney drafting the OLT and/or the qualified affidavit must conduct some independent due diligence to confirm that the client meets all of the requirements for establishing an OLT. This is a Difficult undertaking and illustrates how asset protection can be a risky field in which to practice. The attorney must take adequate steps to make sure the attorney's malpractice insurance and/or personal assets do not replace the client's resources in satisfying the claims of the client's creditors.

Limitations

The spendthrift provisions of the trust cannot be used to thwart claims for spousal support, alimony or child support asserted by a spouse or former spouse pursuant to an agreement or court order. Ohio Rev. Code § 5816.03(C).

The transferor's rights, interests and powers are limited to the permissible rights, powers and interests under Ohio Rev. Code § 5816.05.

The transferor can serve as Trust Advisor only as to investment decisions. Ohio Rev. Code § 5816.11.

The OLT cannot be used to avoid creditor claims existing at the time of the transfer to the OLT.

Restrictions on Creditor Claims

A creditor cannot attack the validity of the trust agreement or of the provisions of the trust agreement, but a creditor can attack the transfers to the trust. Ohio Rev. Code

§§ 5816.07 and 5816.08. The creditor must bring a claim to avoid a qualified disposition within eighteen (18) months of the qualified disposition or within six months of the time the qualified disposition is or reasonably could have been discovered. Ohio Rev. Code § 5816.07(B). The statute puts the burden of proof on the creditor to prove its claim by clear and convincing evidence. Ohio Rev. Code § 5816.07(C). The statute also provides protections for Trustees, Trust Advisors and other persons providing counseling with respect to the OLT. Ohio Rev. Code § 5816.07(D). Claims against the Trustee, Trust Advisor or any person providing counseling with respect to the OLT regarding a qualified disposition must be brought within the same limitations periods listed above. Ohio Rev. Code § 5816.07(E). The statute further provides that each qualified disposition will be separately evaluated. Ohio Rev. Code § 5816.07(F)(1).

Conclusion

The Ohio Legacy Trust provides another tool for asset protection planning in Ohio. While it is not a magic elixir that will solve all problems, it is a strategy that should be considered for those rare clients who wish to create a rainy-day fund and to reduce their exposure to the risks of future litigation. Stay tuned for future seminars from the OSBA on this topic.

Private Settlement Agreements

Nuts and Bolts of Wills and Trusts

February 25, 2026

Michael L. Wear, J.D., MBA, AEP®

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Disclosures

- The information contained herein is for information purposes only and should not be construed as providing investment, tax or legal advice.
- Membership in the EPTPL Section of the OSBA has benefits, including access to latest edition of the Ohio Trust Code Manual and past issues of the Probate Law Journal of Ohio (not including latest 2 years)

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Private Settlement Agreement (PSA)

- O.R.C. §5801.10
- Requires at least 2 or more parties:
  - Settlor if living and no adverse tax consequences;
  - Beneficiaries
  - Currently serving trustees
  - Creditors if their interests will be affected by the agreement
  - Ohio Attorney General if the trust is a charitable trust
- May be used to construe or modify trust provisions
- May contain an enforceable mandatory arbitration clause
- May be presented to Court for approval

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Matters that may be resolved by a PSA

- Determining classes of creditors, beneficiaries, heirs, next of kin or other persons
- Resolving disputes over administration or distributions under the trust terms – construction of trust language
- Granting necessary or desirable powers to the Trustee
- Modifying the terms of trust – consistent with material purpose of trust
- Modifying trust terms to qualify for charitable estate or gift tax deduction or the QDOT marital deduction
- Construing or modifying trust terms referring to federal estate or Generation Skipping Transfer ("GST") taxes or Ohio estate taxes, or that contain a division of property based on the imposition or amount of those taxes, to give effect to the Settlor's intent
- Resolving any other matter arising under O.R.C. Chapters 5801 to 5811

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Matters that cannot be resolved by PSA

- Changing the rights of creditors without their consent
- Termination of the trust prior to date specified in trust
- Changing interests of beneficiaries, except as necessary to modify the trust to qualify for a charitable or marital deduction or to give effect to Settlor’s intent regarding estate and GST taxes

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Representation of Beneficiaries

- O.R.C. Chapter 5803
- Agent under power of attorney may represent Settlor
- Holder of a power of appointment may represent persons subject to that power
- Guardian may represent Ward
- Personal Representative of a decedent's estate may represent persons interested in the estate
- Parent may represent parent's minor and unborn children
- Person may represent someone having substantially identical interest in trust
- Court may appoint someone to represent unrepresented interest

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Trust Termination by Court Order

- O.R.C. §5804.11
- Court may terminate or modify a noncharitable trust
- Consent of settlor and all beneficiaries required for mandatory termination or modification – “court shall”
- Even without settlor’s consent, if all beneficiaries consent, court may still terminate trust if the court concludes continuation of trust is not necessary to achieve any material purpose of the trust
- Consent may be obtained by representation

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Other Options to Modify or Terminate a Trust

- Common Law Agreements
  - O.R.C. §5801.10(N) – PSA statute does not prohibit common law agreements
- Trust Decanting – O.R.C. §5808.18
  - Trustee's power to make distributions in further trust
- Judicial Actions
  - change of circumstances (5804.12), charitable purpose frustrated (5804.13), cost exceeds value (5804.14), modification to conform with settlor's tax objectives (5804.15)

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Closing Thoughts

- PSAs can be used to modify trusts to address changed circumstances, changes in the law, and to address beneficiary issues
- Common law settlement agreements can be used to modify or terminate irrevocable trusts
- Decanting may be an option to update trust provisions
- PSA statute does not prohibit or interfere with existing statutory methods of modifying or terminating irrevocable noncharitable trusts

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Thank you

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Chapter 7:
Private Settlement Agreements

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I. Private Settlement Agreements (PSA)

A. Private Settlement Agreements (PSAs) are governed by Ohio Rev. Code § 5801.10. PSAs may be used to construe or modify the terms of a trust.

B. Required Parties
   a. Settlor, if living and no adverse income or transfer tax results would arise from the settlor's participation;
   b. Beneficiaries;
   c. Currently serving Trustees;
   d. Creditors, if their interest is to be affected by the agreement;
   e. Ohio Attorney General, if a charitable organization is a beneficiary or the trust is a charitable trust.
   f. Only the settlor and any trustee are required for amendment of a revocable trust.

C. Must be in writing.

D. Matters that may be resolved by a PSA:
   a. Determining classes of creditors, beneficiaries, heirs, next of kin, or other persons;
   b. Resolving disputes arising out of the administration or distribution under the terms of the trust, including disputes over the construction of the language of the trust instrument or construction of the language of other writings that affect the terms of the trust;
   c. Granting to the trustee necessary or desirable powers not granted in the terms of the trust or otherwise provided by law, to the extent that those powers either are not inconsistent with the express provisions or purposes of the terms of the trust or, if inconsistent with the express provisions or purposes of the terms of the trust, are necessary for the due administration of the terms of the trust;
   d. Modifying the terms of the trust, if the modification is not inconsistent with any material purpose of the trust;
   e. Modifying the terms of the trust in the manner required to qualify the gift under the terms of the trust for the charitable estate or gift tax

deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by the Internal Revenue Code and regulations promulgated under it in any case in which the parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

f. Modifying the terms of the trust in the manner required to qualify any gift under the terms of the trust for the estate tax marital deduction available to noncitizen spouses, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the Internal Revenue Code and regulations promulgated under it in any case in which the parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

g. Construing or modifying the terms of a trust that refer to the federal estate tax, federal generation-skipping transfer tax, or Ohio estate tax, or that contain a division of property based on the imposition or amount of one or more of those taxes, to give effect to the intent of the settlor;

h. Resolving any other matter that arises under Chapters 5801. to 5811. of the Revised Code.

E. Matters that cannot be resolved by a PSA:

a. Termination of the trust before the date specified for the trust's termination in the terms of the trust;

b. Changes to the interests of the trust beneficiaries, except as necessary to effect a modification described in O.R.C. §5801.10(C)(5), (6), or (7) (modifications for tax reasons);

c. Agreements that include terms and conditions that could not property be approved by the Court under O.R.C. Chapters 5801. to 5811.

II. Representatives – O.R.C. Chapter 5803

A. The Ohio Trust Code provides for representation of another's interest.

B. Agent under a power of attorney may represent the Settlor.

C. Holder of a limited or general power of appointment may represent the persons subject to that power, unless there is a conflict of interest.

D. Guardian may represent the Ward, unless there is a conflict of interest.

E. Personal Representative of a decedent's estate may represent persons interested in the estate, unless there is a conflict of interest.

F. Parent may represent parent's minor or unborn children if no guardian has been appointed.

G. Person having a substantially identical interest may represent a minor, incapacitated individual, unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, but only to the extent there is no conflict of interest.

H. Court may appoint a representative if the court determines an interest is not adequately represented.

III. Trust Termination or Modification by Court Order

A. O.R.C. §5804.11
   a. Petition to court with consent of settlor and all beneficiaries, court shall enter an order approving the modification or termination of the trust, even if it is inconsistent with a material purpose of the trust.
   b. Without consent of settlor, but with consent of all beneficiaries, the court may terminate an irrevocable noncharitable trust if the court determines continuance of the trust is not necessary to achieve any material purpose of the trust.

B. O.R.C. §5804.12 – Judicial action due to unanticipated change of circumstances.
C. O.R.C. §5804.13 - Judicial action where charitable purpose frustrated.
D. O.R.C. §5804.14 – Termination or modification where costs exceed value.
E. O.R.C. §5804.15 – Reformation to conform to settlor's intention.
F. O.R.C. §5804.16 – Modification to achieve settlor's tax objectives.

IV. Common Law Settlement Agreements

A. O.R.C. §5801.10(N) – common law agreements not prohibited by the PSA statute
B. Governed by common law.
C. Important to have all interested persons, including all beneficiaries (individually or by representation) as parties to agreement.

V. Trust Decanting

A. O.R.C. §5808.18 – Trustee's power to make distributions in further trust.
B. Useful mechanism for updating old irrevocable trust to adapt to changes in family situations and changes in laws.

VI. Resources

A. Ohio Trust Code Manual 7th Edition – OSBA Reference Manual Vol. 23-400 (digital copy available as part of OSBA EPTPL Section membership)
B. Practical and Not-So-Practical Uses of Private Settlement Agreements, 18 Ohio Prob. L.J. 76, (November/December 2007), Sandra Brantley and Leon Weiss.
C. Agreements Among Parties to a Trust – Should You Use The Ohio Trust Code PSA Statute or Not?, 22 No. 3 Ohio Prob. L.J. NL 10, (January/February 2012), Joanne E. Hindel.
D. Fixing Broken Trusts by Agreement – From the Trustee's Perspective, 26 No. 6 Ohio Prob. L.J. NL 9 (July/August 2016), Lisa Babish Forbes.

Nuts and Bolts of Wills and Trusts
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