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ESTATE PLANNING & PROBATE OVERVIEW
FOR THE GEORGIA & ALABAMA NON-LAWYER:
JUST THE BASICS PLEASE! ©

The basics everyone needs to know,

AND

what you need to know before you meet with your attorney.

Including:

WILLS, POWER OF ATTORNEY, HEALTH DIRECTIVES
CUSTODIAL ACCOUNTS, MEDICAID PLANNING,
LIFE INSURANCE, GIFT & ESTATE TAXES, PROBATE,
GUARDIANSHIP AND SPECIAL NEEDS TRUSTS

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INTRODUCTION

There are numerous books available on "estate planning"; however, will you take the time to read those books? Many are hundreds of pages long, and while good resources, contain far too much technical language for the average person to understand.

As an estate planning and probate attorney, my experience has been that what most people want to understand are "just the basics". They want to have a general understanding of the estate planning or probate issues they will discuss with their attorney or financial advisor. They want to know what questions to ask and what information to bring with them in order to get the most out of their meeting with the attorney, as well as to minimize costs. They want an *understanding*, in clear and simple terms, of the basic estate planning documents and Estate administration process.

That is exactly what this book provides, and without overly technical language, or spending endless pages analyzing issues that may be largely irrelevant for the majority of persons in Georgia and Alabama.

This book is, however, "just the basics" and for the most part does not address advanced estate planning techniques or spend entire chapters on the acronyms of those techniques, such as IDGTs (Intentionally Defective Grantor Trusts), GRATS (Grantor

Retained Annuity Trusts), CRUTS, CLATs, ILITs, QPRTs, FLPs and many others. If you have a sizeable estate, you will want to discuss with your attorney or advisor some of these or other advanced planning techniques.

It is the author's sincere hope and belief that you will find the information contained herein helpful, understandable, and presented in such a way as to enable and empower you to make the most of the time you spend with your estate planning attorney or other financial advisor.

-- Bradley R. Coppedge, Esq.

CHAPTER 1: POWERS OF ATTORNEY

(POA, a/k/a: FPOA, GPOA, DPOA)

A. In General

A Power of Attorney, also known as a Financial Power of Attorney, General Power of Attorney or Durable Power of Attorney, is an instrument by which you authorize another person or persons to act on your behalf. This person is known as your "agent" or your "attorney in fact." This document allows your agent to make financial decisions on your behalf should you become incapacitated, without the need to have the Probate Court appoint a guardian or conservator, which is a time-consuming and expensive process.

A Power of Attorney ("POA") specifically grants your agent the power to handle all financial matters on your behalf. These financial matters include cashing checks, paying bills, selling stock or real estate, or generally any matter which you could do on your own.

A Power of Attorney is valid only during your life. It always terminates immediately upon your death, and is of no further benefit.

B. Selecting the Agent

The POA is a wonderful tool in the hands of a trusted agent, but can cause much heartache if it is given too freely. To whom, then, should this broad power be given? This choice of agent demands careful consideration. It is generally recommended that the power be given to your spouse, if married; if you are unmarried, you should consider a child or one of your siblings. In any event, it should be someone whom you trust completely and who is aware of your financial resources, as well as any estate or gifting program which you may have in place. Furthermore, in addition to naming the "primary" agent, you should name at least one individual to serve as an alternate in the event the primary agent is unable to serve due to the subsequent death or disability of that individual.

C. Other Issues

There are other issues of which you should be aware when executing a POA. These include:

1. Formal execution requirements. A POA should be executed by you in front of a witness and a Notary Public (and neither of whom should be your agent, spouse or close family member). The agent to whom you are granting the power may also sign, but is not required to do so. This sets forth a "specimen" signature and evidences that your agent has accepted his or her designation as your agent.

2. Effective Date & "Springing" Powers. If the POA does not recite a specific effective date, it is deemed to be effective immediately. However, POAs can and often are made to be "springing powers." A springing POA will not become effective until some future time or event. The future event that is usually chosen is your disability or incapacity. As such, a "springing Power of Attorney" grants no authority until your disability or incapacity. This is usually evidenced by a written statement from your primary care physician stating that he or she believes you to be disabled or incompetent to manage your own business and financial affairs. A POA that is not "springing" is effective immediately, and immediately grants your agent these powers. So long as you remain competent, it does not take away your own rights, but does allow those rights to be exercised by your agent on your behalf, with or without your knowledge. It is because of this that you must trust your agent. It is also the reason that many POAs are created as springing POAs.

3. Termination. A POA always terminates upon your death, and is of no further use thereafter. It will also terminate upon your express revocation of the POA. The most effective way to terminate a POA is by delivering written notice to the agent you named, stating that you revoke the POA. Ideally, this statement should also be witnessed and notarized. You may also record a

Revocation with the Clerk of Superior Court in your county of residence. The key issue is notice both to your agent, as well as to third parties. Where you revoke a POA, the most prudent course of action would be to deliver a Revocation to your former agent and any banks or other institutions or businesses your agent may have dealt with on your behalf, as well as record a written Revocation.

4. <u>Conveyance of Real Estate under a POA</u>. For a POA to be effective to convey real estate by the agent, the POA should specifically provide for this, and where possible, identify the particular parcel(s) of real estate. In order to make a conveyance of real property under a POA, the POA must be in recordable form and an original must be recorded with the deed. To be in 'recordable form', the POA must meet the same execution requirements as would a deed in the state the property is located. In Georgia, this means it must be signed, witnessed by at least one witness, and notarized. In Alabama, it need only be signed and notarized. (However, a typical Alabama power of attorney which is only notarized and not separately witnessed would not be valid to convey real property in Georgia, as Georgia deeds require both a witness and a notary.) It is not uncommon to also do a "Special" or "Limited" POA solely purposes of conveyance of specific parcels of property.

D. <u>Costs</u>.

While software or even internet forms are available for a Power of Attorney, it is generally advisable to have your POA professionally prepared. The costs will vary based upon any specific provisions that may be included, as well as the attorney you choose, but the costs of a professionally drafted POA often range from $200 - $500 depending upon complexity.

E. <u>Preparing to meet with your attorney</u>.

Prior to meeting with your attorney, you should consider the following questions:

1. Who will be your primary agent?
2. Will you have joint agents or a single agent?
3. If joint, must they act together, or may they act independently of each other?
4. Who will be your successor agent?
5. Do you want a "springing" POA or one that is effective immediately?
6. Do you own real property in other states?

CHAPTER 2: HEALTH DIRECTIVES

(Durable Power of Attorney for Health Care & Living Will)

(now known as an "Advance Directive for Health Care")

A. In General

In most states, including Georgia and Alabama, there are two legal documents that protect your right to refuse medical treatment, or to request specific medical treatment, in the event you lose the ability to make decisions for yourself. These documents were previously known as a Durable Power of Attorney for Health Care and a Living Will. In Georgia and Alabama, these documents have been combined into one form that is now simply called an Advance Directive for Health Care. A separate stand-alone Living Will is still permissible, but is generally not necessary.

B. Advance Directive for Health Care

The Advance Directive for Health Care ("ADHC") is itself a Power of Attorney, similar to the General POA discussed in the last chapter, but structured specifically for health and medical decisions. A regular POA will not authorize your agent to make health care decisions for you; rather, an ADHC must be executed to convey these powers.

1. Selecting an Agent. Just as with the General POA, your agent under an ADHC is a person whom you

appoint to make decisions about your medical care if you become unable to make those decisions yourself. This agent is often a family member or close friend whom you trust to make these serious decisions. The person you name as your agent should clearly understand your medical wishes and be willing to accept the responsibility of making potential life and death medical decisions for you. As with a General POA, you can and should also appoint a successor agent should your primary agent become unable to act. An ADHC does <u>not</u> revoke or limit your right to make your own health care decisions, and as long as you are able to express your own wishes, your wishes will control.

2. <u>Other issues</u>.

(a) <u>Execution</u>. In order to make your ADHC effective, you must sign the document or direct another to sign it in your presence and in the presence of two witnesses, both of whom must be at least 18 years of age (19 in Alabama), and neither of whom are the named agent, nor who will knowingly inherit from you.

(b) <u>Limitations on Agent</u>. An ADHC generally has a section where you can add personal instructions to, or limitations on, your agent. Normally it is recommended that such instructions or limitations not be added. One of the strongest reasons for naming an agent is to have someone who can respond flexibly as your medical situation changes and can deal with situations that you did not foresee, as well as with medical advances which were not available at the time of the execution of the ADHC. If you add specific instructions to this document you can unintentionally restrict your agent's power to act in your best interest.

(c) Revocation. As with a General POA, you may revoke your ADHC at any time by executing a new ADHC with a different agent. In addition, an ADHC may be revoked by you, *whether or not you are legally competent*, by any of the following methods:

(i) By obliterating, burning, tearing, or otherwise destroying or defacing the document.

(ii) By signing and dating a written revocation or directing another person to do so (but if done so while in a health care facility, notice must be provided to the attending physician).

(iii) Orally revoking your document in the presence of a witness who is at least 18 years of age (19 in Alabama) and notifying the attending physician if in a health care facility. You must subsequently sign and date a written confirmation of your revocation within thirty days. Note: In any event, notice to your former agent should be provided.

(d) Subsequent Marriage. Additionally, it is important to note that if you subsequently marry after completing an ADHC in which your spouse is not named as agent, your marriage automatically revokes the power of your agent, unless your ADHC specifically provides otherwise.

(e) Decisions by Legal Guardian. If a guardian of your person is subsequently appointed by the Court, your agent under your ADHC will still generally control your health care decisions.

(f) HIPAA. Health Insurance Portability and Accountability Act ("HIPAA"). Your ADHC should specifically recite that your agent is your "agent" and "personal representative" for HIPAA, which will insure your agent may have access to your confidential medical records.

(g) Treatment Preferences. There is a section of the ADHC form where you express your treatment preferences in certain events, such as permanent coma or terminal condition, and where you list your desires regarding life support procedures such as tube feeding and hydration, CPR, and the like. You are permitted under your ADHC to direct whether you wish these preferences to simply be a guide for your agent, or whether they are binding upon your agent.

C. Living Will

A Living Will is also a health care document similar to the ADHC. The difference between the two documents is relatively subtle. Most attorneys generally view a Living Will as an individual's "last requests" regarding medical care. The ADHC, on the other hand, is a document which can be used by your agent at any time throughout your life when you are unable to make medical decisions for yourself, such as when you are in a coma, under anesthesia during surgery, or any other time you are unable to speak or act for yourself. With the new ADHC forms, and as indicated previously, a separate Living Will is generally unnecessary. The most common use of a Living Will is for an elderly or unmarried individual who has no one he or she feels comfortable naming as agent under an ADHC.

D. Costs.

As with a regular POA, forms can be found online or through software. Georgia and Alabama both have statutory forms but many attorneys have their own forms, based upon the statutory forms, which have been modified or improved over the basic form.

The professional drafting and execution of an ADHC will generally cost between $200 and $400, though your attorney may provide a discount if he or she is preparing both a POA and an ADHC.

E. Preparing to meet with your attorney

Prior to meeting with your attorney to prepare your ADHC document, you should consider the following questions:

1. Who will be your primary agent?
2. Who will be your successor agent?
3. What are your preferences regarding life support, both in the event of a permanent coma and a terminal condition?
    (a) tube feeding
    (b) tube or intravenous hydration
    (c) CPR
    (d) ventilator
4. Do you have any specific medical procedures you would want to refuse, such as blood transfusion, chemotherapy, etc.?
5. Who would you want to serve as your court appointed Guardian if you become incompetent and require a Guardian of your person?

CHAPTER 3: WILLS

NOTE: See following chapter for Revocable Living Trusts

A. In General

Everyone needs a Will. This is really not an overstatement, whether you own very few assets or have assets worth tens of millions of dollars. Everyone needs a Will. Unfortunately, many do not have a Will, and more unfortunately, there are many misconceptions regarding how your property will pass without one (which are addressed at the end of this chapter).

A Will makes things easier upon your loved ones after your death. If you do not have a Will, someone must report to the Probate Court and qualify as "Administrator," post a bond, and report to the court at certain times throughout the administration. Your Administrator must also file an annual accounting with the court, file an inventory with the court, as well as obtain court permission to sell property or change investments of your estate. In addition, neither you, the Administrator of your estate, nor anyone else will have any discretion over how your property is distributed. It will instead be distributed, in strict accordance with the provisions of state law, to certain relatives in order of their degree of relationship. This is true even if the Administrator knows how you would have wanted your property to be distributed. NO Will equals NO control over the disposition of your own assets!

On the other hand, a Will avoids these problems. In executing a Will, you name or appoint the person whom you wish to act as "Executor" in the administration of your estate. Furthermore, a Will generally waives the requirements of your executor posting bond, filing inventory, and otherwise reporting to the court. Finally, you can distribute your property exactly as you want and to whom you wish, down to the smallest knick-knack.

B. Review of Probate and Non-Probate Property

Prior to the execution of a Will it is important to understand the differences between "probate" and "non-probate" property.

1. Probate property is property which is passed in accordance with the Will and through the probate procedure (or if no Will, then under state law provisions as part of the administration). This would include all of your personal items of tangible property, such as furniture, silver, china, clothes, cars, tools, jewelry, boats, etc. It may (but may not) also include land, stocks, and any home that you may own. These items will depend on how the deeds or stock certificates are titled. There are two common ways that these items may be titled and held.

(a) The first is as tenants in common ("TIC"). Most real estate deeds list the owners by names only. Where the deed does not specify, it is presumed to be held as tenants in common under state law, meaning each co-tenant owns an equal, but undivided, interest in the property. [For example, if a husband and wife own property as TIC, each owns a ½ undivided interest, which they may dispose of as they wish in life or at death]. Property interests held as a tenant in common may be passed under a Will. As such, property held as tenants in common is probate property.

(b) The second is as <u>joint tenants with right of survivorship</u> ("JTWROS"). This is how many stock certificates and bank accounts are held. Unlike with most real estate, joint bank accounts and stock certificates are normally titled this way unless you specifically request otherwise. Each co-tenant owns an undivided interest; however, unlike with tenants in common, the property vests in the surviving individual or individuals upon the death of the other co-tenant. [For example, a house owned by a husband and wife as JTWROS will fully vest in the survivor upon the death of the first; neither spouse may separately dispose of his or her "½" interest] under a Will. Property held this way is non-probate property, as it passes to the survivor without regard to any provision in a Will.

2. <u>Non-probate property</u> is property that passes outside of a Will or separate from the administration process. This property includes property held as joint tenants with right of survivorship, life insurance proceeds (if it lists a designated beneficiary), and retirement plan benefits (unless you name your estate as the beneficiary or have no named beneficiary); that is, the Will does not, and generally cannot, determine how or to whom such property passes. [For example, if you own a life insurance policy and designate John Doe as the beneficiary, but your Will provides "I leave my life insurance to Jane Doe", then John Doe still receives the insurance. The Will provision will have no effect].

C. <u>Execution requirements</u>

Wills must be executed in strict accordance with state law. First, the Will must be written, typed or printed. It must be signed by the person making the Will (known as the "Testator") or signed at the Testator's direction in his or her presence. Additionally, <u>two</u> witnesses must sign, neither of whom should be the Executor, an heir or beneficiary. Most importantly, the two witnesses must sign both in the presence of the Testator and in the presence of each other. Thus, all three should be in the room together throughout the signing. Finally, the Will should be notarized. The Notary will also be present throughout the signing process.

In addition, state law has provided for some time now for Wills to be "self-proved." A "self-proving" Will is a Will that contains special language at the end of the document that formally recites the execution requirements and that it was executed in front of a Notary Public. This allows a Will to be probated without the need to track down the witnesses to testify as to the execution of the Will as was required under older state laws. Finding these witnesses can be an expensive and time-consuming process, and it is a very important reason to have your Will professionally drafted to ensure that the self-proving provisions are contained therein.

As a general rule, no heir or beneficiary should be in the room at the time the Will is executed, in order to avoid or minimize the likelihood of any Will contest claiming undue influence was exercised over the maker of the Will.

D. Naming the Executor

The decision of whom should be your Executor is a very important decision. Generally, if you are married, you will name your spouse as Executor (termed "Executrix" for a female

Executor). However, you should always select at least one alternate in the event your first choice is unable or unwilling to serve or predeceases you. Where you have a large estate, or when conflict is expected among the heirs and beneficiaries, it may be a wise decision to name a corporate Executor, such as a bank or trust company. Additionally, if your Will sets up one or more trusts, you will need to appoint a Trustee, as well as a successor Trustee. Each of these persons is referred to as a "fiduciary" and has a legal responsibility to carry out the directions set forth in your Will. Bear in mind, however, that the person you name as the Executor has no power to act until <u>after</u> your Will has been probated.

E. <u>Types of Wills</u>

The types of Wills, and the provisions contained therein, are infinite. However, in a very brief summary, there are roughly four broad categories of Wills into which all Wills fall. These are as follows:

1. <u>"Simple" Will</u>. Most simple Wills will be from four to eight pages long. They generally bequeath all property to your spouse, if married, and/or adult children, although they may make specific bequests of items to certain individuals. They rarely have any provisions creating trusts. Simple Wills are generally used by individuals who have small estates, and no minor children.

2. <u>Single Trust [non-tax sensitive] Will</u>. These Wills are slightly more complex, and establish a single trust

to provide for minor children, or to provide a lifetime benefit to a spouse or second spouse with remainder upon death to children. Such a trust ensures a spouse has the benefit of the assets or any income for life, while also insuring the remainder eventually passes to children. This avoids a common concern with an outright bequest that a spouse (or second spouse) may inherit all of your property, then remarry and leave nothing to your own children.

3. <u>Single or Multi-Trust [tax sensitive] Will</u>. These Wills are generally used by those with a net worth of several million dollars or more. These Wills generally set up either or both a “Credit Shelter” or “By-Pass” Trust and “Marital Deduction” or “QTIP” Trust to take full advantage of the tax laws by sheltering as much property as possible from the estate tax. The Marital Deduction Trust may only be established if you are married at the time of your death. Between these two trusts, if one is married, your Wills can be structured so that there is no estate tax due upon the death of the first spouse, regardless of how large your estate may be.

4. <u>Generation-Skipping Will</u>. These Wills are only used by individuals with a high net worth (generally well over $3-$5 million), who may wish to leave significant sums to people who are two or more generations below them (i.e., grandchildren or great-grandchildren). In addition to frequently establishing By-Pass and Marital

Deduction Trusts, these Wills also establish a third trust, known as a Generation-Skipping Trust ("GST"). A GST trust "skips" a generation (e.g., children) by leaving property to your grandchildren or even great-grandchildren and avoids an additional imposition of estate tax that would have been due at the death of your child if the property had been left outright to the child.

F. Miscellaneous

1. Old Wills. What about a Will that was executed by you five, ten, or twenty years ago? Or what about a Will that was executed in another state? Are these Wills still valid? As to the validity of transferring your property, if the Will was properly executed in accordance with the laws in effect at the time of execution, it will still be valid. However, you should review your Will every several years to see if there are any changes which you wish to make. Another important reason to review older Wills is due to numerous tax law changes that have occurred and continue to occur, as well as changes in your own financial and family situation.

2. Changes to your Will. It is extremely important to note that you may **not** simply cross out language in a Will and write in new provisions. If this is done, the Will is still (or may still be) valid, but only valid as originally written. The changes will not be given effect.

If the changes you write in are significant enough, such changes may even cause the Will to be treated as having been revoked by you, resulting in your intestacy. Due to this, any changes to your Will should be professionally drafted by your attorney.

3. Costs. The cost for professional drafting and execution of a Will depends in large part on the complexity of the Will and the provisions contained therein. These costs may generally range anywhere from around $1,000 - $1,200 for a "simple" Will, $1,500 - $3,000 for a Will with one or more trusts, and $4,000-$6,000 or more for a complex GST Will, depending both upon complexity and the attorney. These costs are per person, though your attorney will frequently offer a meaningful discount if doing similar Wills for both spouses.

4. Divorce. Under Georgia law in effect prior to 1998, a divorce (or birth of a child, or remarriage, unless the Will was specifically made in contemplation of such an event) revoked a Will. The new Georgia law is much more flexible and provides that a divorce does not revoke a Will, but treats the ex-spouse as having predeceased. The same is true in Alabama. This is the rule only for divorce; it does not apply if there has only been a legal separation, in which case the Will stands as written.

G. <u>What if I don't have a Will? – Common misconceptions</u>

A common question is "what if I don't have a Will?". As noted previously, you *should*! However, if you do not, this does not mean that your property passes to the State. That scenario is extremely rare. Instead, it is distributed among your relatives in accordance with the state statutes, which is first to spouse and children, then parents, then siblings, then grandparents, and then to more remote heirs such as aunts, uncles and cousins. If you do not have a Will, this cannot be changed; your estate will pass to those entitled under the laws of the State of your domicile at death. Again, NO Will equals NO power to control the disposition of your estate!

Another common misconception is that many people wrongly believe "it's ok if I don't have a Will, because my spouse will inherit my estate". This is not necessarily true, at least where there are children. Without a Will, a spouse is entitled to an intestate share under state law, which in Georgia is an equal share with the children but not less than 1/3 of the estate if there are 2 or more children. (Alabama law is slightly more complex, and provides that the surviving spouse of an intestate decedent receives the first $100,000 of the estate and ½ of the balance of the estate if there are living parents of the decedent but no children; the first $50,000 of the estate and ½ of the balance of the estate if the decedent is survived by a spouse and children all of whom are the children of the spouse and decedent; and simply ½ of the estate if the decedent is survived by children of which 1 or more are not children of the decedent’s spouse.) These results can be particularly problematic where the house is the primary or only asset, especially where there are minor children, as the children will be vested with an undivided interest in the house. This would result in the surviving spouse not being able to sell the house without court approval, and even upon any such sale, the portion of the children’s proceeds will have to be either delivered to them if of legal age, or set aside in a custodial or other account for their benefit if they are minors. This is an even greater problem where the surviving spouse is not the natural parent of the children, as it can create the potential for significant conflict between your spouse and your children.

Another frequent misconception concerns real property. Many laypersons believe that if both spouses are on the deed, the survivor automatically inherits the real property. This is true <u>only if</u> it is jointly owned as joint tenants with rights of survivorship. It is <u>not</u> true if it is owned jointly as tenants in common.

Finally, another common misconception is that a person doesn't need a Will if they have appointed an agent under a Power of Attorney. As noted in a prior chapter, a Power of Attorney always terminates at death, and conveys no power, right or benefit thereafter.

H. Can't I do my Will myself or through an internet site?

Technically, yes, though it is ill advised. Self prepared or internet based Wills have a high likelihood of having errors or ambiguities, or failing to dispose of all property, or being executed improperly, or failing to grant powers or waive bond. When problems are encountered with Wills, 9 out of 10 times it is with Wills that were not professionally prepared. You will have much greater peace of mind, and reduce or eliminate the likelihood of problems, if you have your Will professionally prepared. The costs associated with a Will are a valid consideration; however, the costs pale in comparison to the costs that can be incurred by having an improperly drafted Will and inviting litigation in your estate.

I. Preparing to meet with your attorney

You will experience a more productive meeting, and likely save costs as well, if you are fully prepared to meet with your estate planning attorney. This includes the following:

1. A complete and accurate picture of your net worth, including how assets are titled. This would include a financial statement if you have one, or, if not, the following assets and their values, and any debt owed on the same:

(a) primary residence

(b) other real estate

(c) IRAs and retirement accounts

(d) stocks, bonds, mutual funds

(e) life insurance

(f) personal property, boats, automobiles

(g) any business you own

(h) any trust of which you are the beneficiary

(i) any significant collections (coins, art, stamps, etc.)

2. Your wishes for any specific bequests to certain individuals. For example, grandfather's pocket watch, jewelry, collectibles, family heirlooms, etc.

3. Whom you wish to serve as your Executor, along with at least one successor.

4. Whom you wish to appoint as guardian of any of your minor children in the event of your death while the children are still minors.

5. Whom you wish to serve as Trustee for any trusts that may be created.

6. Family information – full names and addresses of spouse and children, as well as the full names and addresses of any agents (Executor, Trustee (if any), Guardian for children) that you will designate in your Will.

7. Do you have any special circumstances such as special needs children? Are either you or your spouse a non-citizen?

Attached as **Appendix "A"** is a sample worksheet to compile information your attorney may request in preparing your Will.

CHAPTER 4: REVOCABLE LIVING TRUSTS

It would also be appropriate to devote a short chapter to Revocable Living Trusts. Most people have read about these trusts and there is a significant amount of commentary and recommendations on using these trusts along with a very simple Will known as a "pourover" Will. While they are very common in many parts of the country, Revocable Living Trusts and pourover Wills are not used as frequently in Georgia or Alabama. Most of the commentary on Revocable Living Trusts is from articles and books written by financial planners or attorneys outside of the Southeast. The primary purpose of a Revocable Living Trust in most states is largely to avoid probate. In other areas of the country, avoiding probate is, in fact, a very relevant concern due to the costs associated with probate, the time which a probate consumes, and the many hassles that are involved in the probate process in some states. However, probate is a relatively simple and inexpensive process in both Georgia and Alabama when you have a proper Will which names an Executor, waives bond and waives inventory.

Revocable Living Trusts ARE used in Georgia and Alabama from time to time for the following purposes:

i) planning for future disability to avoid guardianship;

ii) for those who are very sensitive to privacy issues and wish the beneficiaries of their estate to be confidential and not of public record;

iii) for those who own property in several different states;

iv) for those who fear a contest to their Will (if the Revocable Living Trust is used, and all assets transferred prior to death, there is no ‘estate’ to probate, and thus no Will to challenge); and

v) for those with significant estates.

The use of a Revocable Living Trust is generally more expensive than only doing a Will, as two legal documents are involved: the Revocable Living Trust, and the pourover Will to dispose of any assets that were not transferred to the trust during your lifetime, as well as additional attorney time to help facilitate the funding of the Revocable Living Trust.

The most common practical problem with using a Revocable Living Trust is that all assets are often not transferred during life, necessitating a probate in any event upon death, or creating confusion as to estate assets.

There is nothing “wrong” with an estate plan that utilizes a Revocable Living Trust. However, they are often not necessary, nor are they quite as common, in Georgia and Alabama as in other jurisdictions.

CHAPTER 5: PROBATE

A. In General.

As discussed in prior chapters, probate is generally a relatively simple process in Georgia and Alabama, if you have a valid Will. It is much less of a hassle to administer an estate under a Will, and your fiduciary (termed an "Executor" under a Will) has broad powers. Without a Will, the person who petitions the court to administer your estate (the "Administrator") will often have to post bond, file inventories and appraisals with the court, and formally petition the court to sell assets. A person who dies with a valid Will is termed to be "testate". A person who dies without a valid Will is termed to be "intestate". A testate estate is "probated"; an intestate estate is "administered".

It is very important to note that your Executor or Administrator has no power to act on behalf of your estate until the Will has been probated in Court or the Administration granted by the Court. Simply being named in the Will is not what gives your Executor power to act. It is the Court proceeding which accomplishes that.

There are numerous types of probate and administration procedures, but the most common is called a "Solemn Form Probate", in which the Will is offered for probate, the heirs are notified and Letters Testamentary granting broad powers are issued to the Executor to authorize the administration of the estate. Similar to this is a "Petition for Administration", used where there is no Will, which authorizes the Administrator to administer the estate and distribute it to the next of kin. An Administrator is issued "Letters of Administration" which are frequently more restrictive than Letters Testamentary. Another common probate proceeding is called a "Petition for Year's Support", and can be used where there is no Will, or where no bequest has been made to a surviving spouse, or where the estate is very small. State law allows a spouse to petition the Court for a minimum amount of support to maintain the spouse for 1 year from the date of death of the decedent. While there are numerous other "probate" procedures, these three are the most common.

There are several specific categories of "estate" assets that are worthy of elaboration, as follows:

1. IRAs and retirement accounts. If there is a beneficiary designation on file with the retirement plan sponsor or administrator, these assets are not probate property (meaning they do not pass under the Will) and instead pass in accordance with the beneficiary designation form, such that the Will has no control over the disposition of these assets. It is nearly always preferable to have a beneficiary designation in place, as without one, the assets must be paid out within 5 years of the decedent's death, accelerating the income tax on the funds, rather than allowing them

to be paid out over a longer term, such as the decedent's remaining life expectancy under IRS tables.

2. Life Insurance. Like retirement accounts and IRAs, if there is a beneficiary designation on file with the insurance company, this will control over any provision in the Will. Unlike IRAs, however, it is not uncommon to name your estate as a beneficiary. This can provide liquidity to the estate to pay bills or funeral costs, and enable the funding of trusts created under a Will. The only downside to naming your estate is that if the estate is the beneficiary, the life insurance proceeds become an asset of the estate, and as such, reachable by any creditors of the estate. An outright beneficiary designation generally protects the life insurance proceeds from creditors of the estate.

While life insurance proceeds are not taxable to the recipient, they are included in determining the total value of the estate if you own the policy and have a taxable estate for Federal Estate Tax purposes.

3. Pay on Death (POD) or Joint accounts. Under state law, these are almost always non-probate property, such that they are not included in the probate estate, and pass to the joint owner regardless of any Will provisions to the contrary. An example of such an account is a traditional joint checking account, or a CD with a POD beneficiary.

B. <u>Ancillary Probate or Administration</u>.

Where a decedent owns real property in more than one state, it is generally necessary to probate or administer the estate in each such additional state where property is owned. This procedure is known as an Ancillary Probate or Ancillary Administration. Oftentimes this will be a more expedient process than the original probate or administration as many states will accept a certified copy of the original proceedings.

C. <u>Prior to meeting with your attorney</u>.

To make maximum use of your time with an attorney, and to reduce unnecessary costs, you should have as much of the following information as possible available when you meet with the attorney regarding a probate or administration of a loved one's estate:

1. full name and address of decedent
2. date of death
3. copy of death certificate
4. copy (or original) of decedent's Last Will and Testament, and location of the original
5. the names and addresses of next of kin of the decedent:
    (a) spouse and children, along with ages of minor children, if any; if no spouse or children, then
    (b) parents, if alive, if not, then
    (c) siblings and children of any deceased siblings

6. The name and address of the named Executor, if a Will exists; if not, the name and address of the proposed Administrator

7. As much financial information on the decedent as is available, including:

(a) bank accounts
(b) real estate
(c) life insurance
(d) stocks, bonds, CDs, etc.
(e) automobiles
(f) retirement accounts (IRAs, 401(k), etc.)

D. Costs.

You may wonder whether the probate or administration process is an expensive process. It is generally not expensive in Georgia and Alabama, unlike some other jurisdictions. Depending on the complexity of the Will and the issues involved, the attorney fees for probate of a relatively simple Will for a nontaxable simple estate are frequently in the range of $1,500 to $3,500, plus costs such as filing fees, publication, and the like (collectively usually under $500). A fee estimate from your attorney would normally include initial meetings with the attorney, his or her preparation and filing of the probate or administration petition, the probate proceedings in Court, and services in connection with the transfers of assets, including the preparation of any deed for a house for example. Obviously, the more complex it becomes, the more costly it becomes.

Attached as **Appendix "C"** is a worksheet to compile information on a decedent, which will help insure you are prepared to meet with your attorney.

Attached as **Appendix "D"** is a summary of tips and guidelines for Executors and Administrators.

CHAPTER 6: LIFE INSURANCE

The decision to purchase life insurance over and above what may be provided through the military for service persons, or through a group policy through your employer, is purely an individual decision. However, term policies for individuals who are in moderately good health are generally not at all expensive. Term policies can generally be purchased as an annual policy or a 5, 10, 20, or even 30 year level term policy. The amount of coverage for a term policy may range from as little as $5,000 or $10,000 to millions of dollars.

How much insurance you need to protect your family is something only you can decide. A rule of thumb is to have enough life insurance in place, at the very minimum, to adequately provide necessary support for a spouse and any minor children upon the death of the first spouse. It is not simply an issue of whether the surviving spouse has employment; rather, what must be considered is both the loss of the decedent's income, and any additional costs the surviving spouse might incur being a single parent or having lower earning potential than the deceased spouse. This may include a greater need for child care, more difficulty in meeting basic needs (food, shelter, clothing) as a single working parent, more difficulty in meeting household expenses (rent or mortgage, utilities, medical bills, auto or home repairs), as well as more difficultly in paying for a child's first car, college education, or other expenses out of only one spouse's income. The decision to at minimum invest in a term policy that would help replace your income and cover these expenses until any minor children are of legal age is generally a very wise financial decision to make.

While this "income replacement" is the most common use of life insurance, there can be many other reasons, to include the following: payment of estate taxes, to provide flexibility, to provide estate liquidity to pay down debt, to contribute to charities, to fund buy-sell agreements in a business, and countless other uses.

A discussion of the types of policies (whole life, term, universal life, etc) is beyond the scope of these materials, and advice should be sought from a competent and reputable life insurance agent or your estate planning attorney.

To determine the needs of a spouse and/or children after your death, a detailed budget can be very helpful. **Appendix "B"** provides a sample budget for your use.

CHAPTER 7: GIFT AND ESTATE TAXES

After several changes to the federal gift and estate tax laws in the last 5-10 years, we again have some certainty. Our estate and gift tax system is a unified system, and tax on lifetime gifts and deathtime transfers only come into play after exceeding a certain threshold. For 2017, each individual may give or bequeath, during life or at death, up to $5,490,000, to individuals of his or her choosing. This is known as your "exemption amount" (formerly known as the "unified credit") and is indexed for inflation. In addition, you may at any time (in life or at death) give an unlimited amount to your spouse without tax consequences, assuming your spouse is a U.S. citizen, without reducing your exemption amount.

Further, you may give up to $14,000 per year per person to as many individuals as you choose, without reducing your exemption amount and without incurring gift tax. This is known as the annual gift tax exclusion or "annual exclusion". (In other words, for example, you can give $14,000 to your son, $14,000 to your daughter-in-law, and if you are married your spouse can do the same, for a total transfer, without tax consequences, of $56,000 per year to your son and daughter-in-law. This can be done each year, and the annual gift tax exclusion is also indexed for inflation). In addition to the annual exclusion amounts, you can always pay directly any educational or health care costs of another person or persons, without impacting your annual exclusion amount.

Amounts that are received by gift or inheritance are not subject to income tax by the recipient. Upon receipt, the only tax, if any, would be the gift or estate tax, which would be paid by the donor or from the estate of the decedent, if the gift amount exceeds the exemption amount.

Assets that are inherited at a person's death receive a step up in basis. Assets that are acquired by gift during the life of a donor receive a carry over basis. (See Chapter 12)

Currently, neither Georgia nor Alabama have a state death or inheritance tax.

CHAPTER 8: PLANNING WITH MEDICAID

Three brief points to address:

A. Long Term Care ("LTC") Insurance.

Is it right for you? A person's need for LTC insurance depends in part on total net worth, what you have available to spend on assisted living needs and what your wishes are to leave an inheritance. However, it is more often than not wasted money if purchased at too young of an age, and unaffordable if purchased too late in life. Most people who buy LTC insurance range in age from their late 40s to mid 60s. It is statistically documented that 1/3 – 1/2 of all people will spend some amount of time in a nursing home or assisted living facility, and the likelihood increases with age. Studies have also found that the average nursing home stay is 2.4 years, citing data from the CDC in Atlanta, Georgia. The national average for nursing home care for a private room is over $8,000 per month, or just over $100,000 per year. The average costs in Georgia and Alabama are approximately $5,500 - $6,000 per month. (See Lincoln Financial Group's "What Care Costs" study, available on-line) Several options exist to use LTC insurance as a planning component of your estate, and a LTC policy can be structured to provide a fixed amount for a year or five or longer. This is an issue which you should discuss with your insurance agent, financial advisor and estate planning attorney.

B. Medicaid.

Most people try to begin planning for Medicaid too late. A common scenario is as follows: “Mother has suddenly taken ill and has to have help we can’t provide.” In these instances, Mother often wishes to transfer assets to the children prior to going into a nursing home, in order to protect the assets from the state’s right of recovery laws and to avoid using those assets to pay nursing home costs.

Here arises the problem. Medicaid has a 5 year “look back” period for most transfers of property. Thus, if you were to transfer all of your assets today, these assets would continue to count against you for Medicaid nursing home eligibility for up to 5 years, making you ineligible for Medicaid paid nursing home benefits. There are some (limited) assets that are currently exempt.

The details of Medicaid planning are beyond the scope of these materials, but suffice it to say you must begin planning earlier rather than later. However, this is where a LTC policy, even one that pays for a few years, can be most helpful. This may allow you to make such transfers, then private pay your nursing home costs under the LTC policy for a shorter period of time, such that at the end of that time, you have successfully transferred your assets and qualify for Medicaid paid nursing home care.

C. Tax Warnings.

There are two particular factors to consider in transferring assets for Medicaid planning. If, for example, Mom transfers her house during life, the recipient receives a “carry over” basis rather than a “step up” in basis to current value as would be the case if inherited at death. In addition, a transfer will cause the loss of any property tax homestead exemption that may be on the house, and may otherwise result in a reassessment by the property taxing authorities, resulting in higher property taxes. These results may be better than the alternative of potentially losing the assets to the state, but these consequences should be considered so that they do not come as a surprise.

CHAPTER 9: GUARDIANSHIP AND CONSERVATORSHIP

A "guardianship" is control over an incompetent person's personal and medical affairs. A "conservatorship" is control over an incompetent person's financial affairs. They generally go together, but it is possible to have either a stand alone guardianship, or stand alone conservatorship. The incompetent individual is referred to as the "Ward".

Guardianships and conservatorships are an action of last measure to manage an incompetent or incapacitated person's personal and financial affairs. Generally, where a person has in place a valid Power of Attorney and Advance Directive for Health Care, a guardianship is not needed, because the agent has been empowered to act on the incompetent individual's behalf. Obviously, if the person has no such document, or has always been incompetent (e.g. a special needs child), a guardianship/conservatorship is the only option.

Guardianships/conservatorships are cumbersome because they require a court supervised process, which is also of public record. A guardian/conservator must petition the court, have a hearing to determine incompetency, post a bond and annually report to the court. A guardianship/conservatorship revokes all legal rights of the individual, either as to personal decisions in a guardianship, or over their financial affairs in a conservatorship.

Additionally, these proceedings can be relatively expensive, and frequently range in cost from $3,000 to $6,000, plus filing fees if uncontested and depending upon complexity, and can be significantly more expensive if contested by the proposed Ward or other family members.

CHAPTER 10: CUSTODIAL ACCOUNTS

The Uniform Transfers to Minors Act ("UTMA") of each state provides for the management, use and disposition of property gifted or otherwise transferred to a minor. The provisions of the Act apply to a transfer that makes reference to the Act as adopted by each state (e.g., the "Georgia Transfers to Minors Act") in the designation of the transfer. These accounts are commonly called "Custodial Accounts".

However, the UTMA of each state does not specifically apply to transfers to or for the benefit of a minor that do not recite the applicability of the Act under applicable state law. This distinction is relevant in that it is not uncommon for gifts to be made to minors with the parent or guardian informally "holding" the money or asset for the child's benefit. These types of transfers are not technically subject to the Act and are not true custodial accounts. However, for nearly any account that is opened for a minor at a bank or brokerage firm in the minor's name or social security number, the account documents will likely provide that it is a UTMA custodial account under state law.

Transfers under the UTMA are irrevocable and leave the donor with no legal or equitable rights in the property. Rather, title is registered in the name of a custodian for the benefit of the minor. The custodian has broad powers regarding the use of the funds for the minor and serves in a fiduciary capacity. The minor is legally entitled to all funds in the custodial account upon attaining age 21.

These accounts work well for small stock holdings or small amounts of cash, but should generally not be used for significant transfers or transfers that will significantly grow over time, as a young adult at age 21 may not be capable of responsibly handling large sums.

CHAPTER 11: SPECIAL NEEDS TRUSTS

Special care must be giving to planning for a special needs child or other beneficiary. "Special Needs", for our purposes, means an individual (whether an adult or minor) who at birth or subsequently thereafter is mentally, physically, emotionally or developmentally impaired or disabled to such degree as would enable the individual to be eligible, or potentially eligible, for means-tested public support or governmental benefits or assistance.

A. <u>Estate Planning to benefit a special needs individual.</u>

There are basically three (3) planning options in implementing an estate plan to benefit a special needs individual:

1. Effectively disinherit the individual and allow him or her to rely solely on public benefits. This is not as harsh as it may sound in that if the parents or benefactor's wealth is modest, the individual's needs great, this may be a reasonable approach. The danger here is that there is no "safety net" for the future.

2. Make an outright gift/bequest to the individual. This may be sufficient if the disability is not significant, the need for public benefits is small, and the

potential loss of benefits is not a concern. The downside of course is that any such gift or inheritance could negatively impact any public benefits the disabled individual is currently receiving, or potentially make the individual ineligible if public benefits were needed in the future.

3. Special Needs Trust ("SNT"). A SNT is nearly always the best option. The primary purpose of a SNT is to qualify the individual for public assistance and means-tested programs, and provide discretionary and supplemental benefits to enhance the individual's lifestyle. SNTs may be created in life or at death by a third party for the disabled or special needs individual, or may be "self-settled" trusts if created with the funds of the disabled or special needs person.

B. Types of Special Needs Trusts.

1. Third Party SNTs. Third party trusts require no enabling federal legislation, as they are trusts created for a disabled or special needs beneficiary with the funds of another party by way of a gratuitous transfer made in life or at death of the donor.

Third party SNTs may be created, or added to, by anyone. It is generally created by a parent, with the goal being to utilize the parent’s assets to enrich the life of a child with a disability or special needs, while still preserving the availability of important public benefits.

Unlike a self-settled trust, described below, there is no concern with existing Medicaid claims, there are no age limits and no pay-back provisions to state agencies. Such a trust will not count against the beneficiary who will then be available to receive means tested public support, with the trust funds utilized for educational and discretionary support and lifestyle improvement. However, like a self-settled trust, income should not be paid directly to the beneficiary as doing so may reduce or eliminate the public benefits the beneficiary could otherwise be eligible to receive.

* It is imperative that a third party SNT be properly drafted to be purely discretionary, supplemental and NOT provide Medicaid pay-back provisions!

* It is equally important that upon the death of the beneficiary, the assets are distributed to persons determined by the donor of the trust. At most, the beneficiary may have a limited power of appointment to appoint the residue at his or her death under his or her Will to others, but not his or her estate or creditors; otherwise, Medicaid could make recovery against it, defeating a key purpose of having established the third party trust.

2. Self-Settled SNTs. Federal law provides specific authority for self-settled SNTs (also known as "First Party SNTs").

A self-settled trust is established <u>with</u> the assets of a person with a disability. It is established <u>by</u> the parent or guardian, or under the direction and authority of a court, often in conjunction with the settlement of a lawsuit for personal injury.

The trust must only benefit the disabled person, must be irrevocable, must be for a person under 65 at the time of creation, and upon the death of the beneficiary, the assets remaining in the trust must first be used to repay any state Medicaid agency which provided benefits to the disabled person. In addition, even upon the creation of such a trust, any existing Medicaid liens must be dealt with. Once these issues have been addressed, the beneficiary will qualify for means tested public support, and the trust may be used for additional and discretionary support.

These types of trusts are most frequently used when a person who has sustained traumatic injuries receives money as the result of a lawsuit. As such, we will not go into further detail on these trusts.

C. <u>Discussion Issues</u>.

1. Means Tested Public Benefits. In both types of SNTs, the trust assets are used to supplement the beneficiary's lifestyle rather than to replace public benefits. Bear in mind the particular special needs or the degree of disability when considering either type of trust, however.

If the utilization of means tested pubic support programs are not anticipated to be needed during the beneficiary's lifetime, there is no need to create a SNT (as compared to a "regular" trust). But if there is any reasonable basis for believing such public benefits will be needed, a SNT should be utilized.

"Means Tested" public benefits include the following:

- SSI (supplemental security income) – provides monthly income to eligible individuals
- Medicaid – medical payment program for disabled individuals and ancillary services which may include housing, personal care, etc.
- Section 8 Housing
- Food Stamps
- Group Homes (generally Medicaid funded)
- Misc. other programs

The following are not means tested:

- SSDI
- Medicare
- Special Education

2. SNTs compared to other trusts. The key behind a SNT is that the assets are not "available" to the disabled or special needs beneficiary, thus qualifying the person for public benefit programs. This is why the drafting of a SNT must be handled carefully, to avoid the trust being able to make significant distributions directly to

the beneficiary, or otherwise having the trust treated as a general support trust. For example, a trust that provides the funds can be used for the "health, maintenance, support and education" of a beneficiary is generally a support trust if not otherwise limited. This standard is an "ascertainable" (or determinable) standard, on which distributions may be compelled to meet the standard. As such, the assets are "available" to the beneficiary and will jeopardize public benefits if not limited and carefully drafted.

Even a "purely discretionary" trust, in which the trustee has sole and absolute discretion regarding payments to or for the disabled or special needs beneficiary, or even a "discretionary support trust", can cause problems, as some state courts have held that the exercise of such discretion is rarely absolute and must be exercised in a reasonable manner, otherwise the purposes of the trust may be thwarted.

Due to this, it is essential, if it is your intent to create a third party SNT, that you have the trust document or your Will professionally drafted by a competent estate planning attorney familiar with the issues.

What if the proposed beneficiary is not currently receiving means-tested benefits such as SSI or Medicaid? A SNT may still be the best choice, especially if these benefits are contemplated as being needed later in life. In addition, a third party SNT will serve to protect the disabled or special needs child from his or her inabilities, disabilities, creditors and predators.

D. Distributions.

A SNT must be not only properly drafted, but distributions must be handled properly to not jeopardize public support. In general, this will mean disbursements should be made directly to third parties engaged, hired, or provided under the trustee's direction, and not at the direction of the beneficiary.

Any significant assets purchased by the trust for the beneficiary (house, car, etc.) should be titled in the name of the trust, and not in the name of the beneficiary.

E. Custodial Accounts – Use of UTMA accounts. Placing funds in a UTMA account for a minor beneficiary who has a disability or special needs is not an effective planning method if means-tested public support is or will be needed. Generally, the funds will not be treated as "available" prior to age 21, such that there is no immediate disqualification from public benefits. However, upon attaining age 21, the child is legally entitled to the funds. As such, they are "available" by age 21, and will jeopardize means-tested public benefits.

F. Costs. Special Needs Trusts are a specialized area of trust law. Costs will depend on the facts and complexity;

whether a self settled or third party trust; and if a third party trust, whether it is a stand alone trust or a trust created as part of a Last will and Testament. It is difficult to provide a general cost range, as it will depend not only on the attorney's expertise, but also the specific facts of the situation. As such, the costs may vary widely, from perhaps as low as $1,500 if created as a component of a new Last Will and Testament, $3,000 - $4,500 for most third party and self settled SNTs, and $5,000 - $8,000 or more if a trust created as part of a settlement in a traumatic personal injury case.

CHAPTER 12: BASIS IN ASSETS

"Basis" is defined by Black's Law Dictionary (6th ed.) as "The value assigned to an asset for the purpose of determining gain (or loss) on the sale or transfer or in determining value in the hands of a donee". Stated in layman's terms, your basis in an asset is the threshold for determining if any tax is due when the asset is subsequently sold.

The terms we will review to understand basis are Cost-Basis, Adjusted Basis, Carry-Over Basis and Stepped-Up Basis.
A person's basis in an asset is initially his "cost-basis" in a purchased asset, i.e., the amount that was paid for an asset. Assuming there has been no depreciation claimed on tax returns (which would reduce basis), nor any significant capital improvements to the asset (which would increase basis), a person's cost basis will remain as the basis until the asset is sold. (On the other hand, if the basis has been increased or decreased it is referred to as "Adjusted Basis".)

If an asset is gifted during life to a third party, the person receiving the gift (the "donee") takes what is known as a "carryover basis", such that the donee's basis is the same as that of the donor, whether that is the cost basis or adjusted basis. This is generally the rule for any asset gifted during life.

If an asset is instead inherited by a person upon another's death, the recipient receives a "stepped up basis" such that the recipient's basis becomes the value of the asset on the date of the decedent's death. As such, capital gains taxes are only due upon a subsequent sale to the extent the sales price exceeds the stepped-up basis.

A common area where problems arise with basis are when elderly parents decide that they want to start making gifts. Oftentimes, the thought the person has is "if I gift it now, we won't have as much to deal with at probate". First, as I've pointed out in several prior articles, "probate" is not something to worry yourself over, at least in Georgia and Alabama. It is not a burdensome process where you have a properly prepared Last Will and Testament. Second, making such a gift can result in taxes subsequently being paid that could have been avoided.

<u>Example</u>: Mom, a widow, had a house that she and her husband paid $70,000 back in the late 1970s. Due to market increases and its prime location, it is now worth $400,000. Mom's "basis" in the house is her original cost basis of $70,000 (with certain exceptions depending on when Dad died and what it was worth then). So if Mom gifts the house to her children prior to her death, the children take her carryover basis of $70,000. When they go to sell it after her death for $400,000, there is incurred $330,000 of capital gain, on which capital gain tax will be paid. If, on the

other hand, she had bequeathed the house to the children at her death, the children would have received a stepped-up basis of $400,000, resulting in no capital gain when the children subsequently sold it!

Always make sure to seek counsel of your tax or estate planning attorney or other financial adviser before making gifts of appreciated assets, in order to make sure you are aware of the tax consequences of the same, so that you do not end up with a tax surprise.

CHAPTER 13: PITFALLS IN BENEFICIARY DESIGNATIONS

Beneficiary designation forms seem easy, right? Fill out the form, send it in. These days it's often easier still—a few keystrokes online and you're done. In many cases, you accomplish exactly what you think you want. Unfortunately, these forms and how they are completed can have also have unintended, unanticipated, and unfortunate consequences. These risks are often exacerbated by the ease of making online changes, without having ever consulted with your estate planning attorney or financial adviser.

Let's start with a brief review. When a person dies, either with or without a Will, his or her estate must be administered. If property passes through the estate, it is generally termed "probate property", and is disposed of in accordance with the terms of the Will if one exists, or otherwise by provisions of state law. If such property instead passes by operation of law or pursuant to a beneficiary designation, it passes outside of the estate, and it is termed "non-probate property", and is not controlled by the Will or state law provisions. (For example, if I own a $100,000 life insurance policy and name John Doe as the beneficiary, but my Will states I leave my $100,000 insurance proceeds to Jane Smith, then John will take it. The Will <u>cannot</u> override the beneficiary designation).

Non-probate property includes real estate held as joint tenants with rights of survivorship, most joint checking and financial accounts, along with both life insurance and retirement plan benefits where a valid beneficiary designation has been filed naming a beneficiary.

So let's look at a few common problem areas:

A. <u>Listing a co-owner/beneficiary on a financial account</u>.

We'll start with this one, because it is the most common. Frequently I have clients who come in and are pleased to tell me that they named their son, daughter, or whomever as a co-owner of their account, or as the POD (pay on death) beneficiary. In the client's mind, they did this either because they thought it would make the probate process easier, or because they wanted someone to have access to pay their bills if they become incapacitated. Granted, that result can be accomplished by the change. But there are several potentially negative consequences. <u>First</u>, by doing this, the client has now converted the account to non-probate property. (*For example*, let's say you have a $100,000 CD. You name one child as a co-owner or POD beneficiary — in your mind, so they can access it for your benefit if you become incompetent or pay for your funeral. You have 2 children, and your Will provides each share in your estate equally. Unfortunately, since this CD will pass by operation of law to the survivor or POD beneficiary on the account at your death, your other child will not share in it, unless the named child willingly gifts half of it to the sibling). <u>Second</u>, you have potentially made this an asset that a creditor of your child can pursue, even while you are alive, if your child is a co-owner. Third, if it's a stock investment account, your action likely results in the child taking a lower basis at your death, meaning you have created the potential for capital gain tax where it would not have otherwise existed.

B. No beneficiary designation on file.

If a life insurance policy has no listed designated beneficiary, then it will pass as part of the probate estate. This is often not a problem—except where the estate is otherwise insolvent and/or has significant creditors. For life insurance (or at least term insurance), if the proceeds are payable pursuant to a beneficiary designation on file, it is not subject to claims of the creditors of the estate or of the decedent. If, on the other hand, there is no beneficiary designation on file, and it is paid to the estate, it is reachable by creditors.

The problem is compounded for qualified retirement plan benefits, as there are also tax consequences. If there is no designated beneficiary, or the beneficiary is the estate (unless very specific language is included in the Will), then all of the retirement accounts must be paid out within 5 years of the date of death, accelerating taxation. If, on the other hand, there is a valid beneficiary designation in place, the retirement assets can either be rolled over (if the spouse is the sole beneficiary), or continue to be paid out over a longer period, minimizing taxes and allowing for the accrued benefit to continue to grow tax deferred.

C. <u>Old or incorrect beneficiary designations</u>.

We see this most frequently in second marriage situations, but it also occurs in other scenarios. If you have an otherwise valid beneficiary designation on file with the insurance company or retirement plan sponsor naming your former spouse, your former spouse will receive the benefit and is completely within his or her legal right to take it. While a divorce legally separates the parties, and while state law treats a former spouse as having predeceased so that the ex-spouse does not benefit under your older Will, the divorce does absolutely nothing to cure this problem of beneficiary designation. The only way to cure this is with a new beneficiary designation.

D. <u>Beneficiary Designation is inconsistent with the Will and overall estate plan</u>.

This comes up most frequently with Wills that create trusts, but it can also occur in other situations. Let's say your Will creates a marital trust for your spouse. Let's further assume that a significant portion of the funding is intended to be though either your interest in your retirement plan or IRA, or a large insurance policy you own. Yet you failed to heed your attorney's advice, and the beneficiary designation still provides the spouse is the outright beneficiary. In that event, the asset is a non-probate asset, never passes through the estate, and thus cannot be used to fund the trust your Will intended to create.

Along those lines, a similar problem frequently occurs where minor children are named on the beneficiary designation form. Where you have minor children, your Will probably has (or certainly should have) contingent trust provisions that would create a trust for the minor children at your death. However, if your minor children are listed as the direct beneficiary, then the asset will not be a probate asset, and thus not available to fund the trust. Instead, it will pass to the children, though since they are minors, it will go into a conservatorship, and they will be entitled to the full amount at age 21, which is generally contrary to most estate planning clients' wishes.

E. <u>Beneficiary designations naming the estate</u>.

One might get the impression based on the above points that one should never name the estate as the beneficiary of a life insurance policy or retirement asset. This is not at all always the case; in fact, many times this will be exactly what needs to be done. However, it should be intentional and thought out, upon advise of your estate planning attorney or financial adviser, and never as a "default". Otherwise, you run the risk of unintended, unanticipated, and unfortunate consequences.

CHAPTER 14: BURIAL RIGHTS AND PRE-NEED FUNERAL PLANNING

Most often, a decedent's burial or cremation transpire without a problem. But not infrequently, issues do arise. For example, questions may include: who has the priority right to make the determination as between burial and cremation? What happens if family members disagree? Does the spouse automatically have priority? What if the closest next of kin cannot be located?

A. In Georgia, these answers are provided by the Official Code of Georgia Code (O.C.G.A.) at Section 31-21-7.

First, a person may certainly provide his or her own burial/cremation instructions, and if accomplished through a pre-need contract with a funeral home, these instructions will be followed. O.G.G.A. provides under paragraph (a) that a person over 18 years old "may direct the location, manner and condition for the disposition of his or her remains and for funeral services" by entering into a pre-need contract with a funeral home. In light of this, it is advisable to consider entering into a pre-need funeral contract, particularly if you have concerns that there could be arguments over the disposition of your remains at death, or if you do not have any immediate or close family members.

Where there is not a pre-need contract in place, Georgia law sets forth the procedure to determine how the decision is made. If the decedent does not have a pre-planned contract with a funeral home, the power to make the decision is vested in the following order:

1. The decedent's nominated health care agent under an Advance Directive for Health Care.
2. A person designated by the decedent pursuant to an affidavit executed in accordance with O.C.G.A. 31-21-7(b)(2)(B).
3. The surviving spouse.
4. The sole surviving child, or if more than one, the majority of the surviving children.
5. The surviving parent(s).
6. The surviving sibling, or if more than one, the majority of the surviving siblings.
7. The surviving grandparent, or if more than one, the majority of the surviving grandparents.
8. The guardian of the person under a legal guardianship.
9. The personal representative (Executor or Administrator) of the decedent's estate.

10. If none of the above exist or can be located, any person willing to assume responsibility after attesting that a good faith effort has been made to find any of the above persons.

Finally, note that there does exist a procedure to have the probate court award this authority pursuant to O.C.G.A. 31-21-7(d), but this can be time consuming and incurs legal fees that could have otherwise been avoided with adequate planning.

B. In Alabama, these questions are answered by Alabama Code § 34-13-11. Paragraph (a) of that section is virtually identical to the Georgia Code Section in providing for pre-need funeral home contracts to control.

Where there is not a pre-need contract in place, the Alabama Code provides the following priorities:

1. The person designated under any U.S. Department of Defense form if the decedent died while serving on active duty in any branch of the military.

2. The person designated by the decedent in an affidavit executed in accordance with Alabama Code 34-13-11(a)(2).

3. The surviving spouse, if any.

4. The sole surviving child, or if more than one, the majority of the surviving children.

5. The surviving parent(s).

6. The surviving sibling, or if more than one, the majority of the surviving siblings.

7. The surviving grandparent, or if more than one, the majority of the surviving grandparents.

8. The guardian of the person under a legal guardianship.

9. The personal representative (Executor or Administrator) of the decedent's estate.

10. The person in the classes of the next degree of kinship, in descendant order, under the laws of descent and distribution of Alabama.

11. The public officer, administrator or employee responsible for arranging the final disposition of remains if the same is or becomes the responsibility of the state.

12. If none of the above exist or can be located, any person willing to assume responsibility after attesting that a good faith effort has been made to find any of the above persons.

CHAPTER 15: ADVANCED PLANNING TECHNIQUES

As stated in the Introduction, a detailed discussion of advanced planning techniques is not the purpose of this book. However, for those who are interested, a short summary of some of the more common advanced techniques are briefly addressed below.

When are advanced planning techniques utilized? Generally in several situations: (i) for estate tax planning for those with potentially taxable estates; (ii) for income tax or basis planning for appreciated assets; (iii) for creditor protection planning; (iv) for charitable planning; (v) for significant gift planning; and (vi) for trust planning.

A. <u>GRATs (Grantor Retained Annuity Trusts)</u>

A Grantor Retained Annuity Trust ("GRAT"), is an irrevocable short term trust into which a person places cash, stocks, mutual funds, real estate, or other income producing property but retains the right to payments of a fixed amount (an "annuity") for a period of years. GRAT terms are most frequently 2 to 5 years. Effectively, they gift the ‘growth’ in an asset’s value, while allowing the grantor to retain the actual asset.

The Grantor receives large annual annuity payments, and at the end of the specified term, the assets remaining in the trust will pass to the trust's remainder beneficiaries, typically the Grantor's children or a trust for their benefit.

The transfer of assets to a GRAT is a taxable (or reportable) gift at the time the trust is established, on which either gift tax may be paid, or a portion of the grantor’s estate exclusion amount may be utilized. The taxable amount of the gift is determined at the trust’s creation, and is equal to the *deemed* value of the remainder interest after payment of the annuity to the Grantor during the term of the GRAT. Since the gift is calculated on what the IRS assumes the beneficiaries will receive, not what they actually receive at the termination of the GRAT, significant gift planning opportunities exist with GRATs when interest rates are low and the investments grow at a greater rate.

The lower the IRS interest rate, the lower the annuity payment which passes back to the Grantor each year, and thus the greater the amount that passes to the beneficiary. As of this writing, GRAT rates remain at historic lows, making them very effective and beneficial to pass on wealth to a child.

Example: If a two-year GRAT is established today with $2 million of stock, which yields a 1% dividend and grows at 7% per year, and with an IRS rate of 2%, the Grantor creating the trust will, by the end of the 2 year term, received back the full $2 million, plus $60,000 (basically, the 2% assumed IRS growth). The balance of $191,000 resulting from the actual yield and growth, will pass to the beneficiary with virtually <u>no</u> tax consequences. Thus, $191,000 will have been transferred without using any of the Grantor's estate tax exclusion or his annual per done exclusion. (This amount is effectively the growth in excess of the assumed 2%, and results in virtually a 'free' transfer to the beneficiary!).

B. <u>Charitable Trusts</u>

There are two main types of charitable trusts: Charitable Lead Trusts ("CLTs") and Charitable Remainder Trusts ("CRTs"). Lead trusts provide for payments to charity up front, with the remaining balance to spouse, children or other beneficiaries. Remainder trusts pay an annual amount to the Trust grantor, spouse or children for a term of years, with a remainder to charity. Both provide significant charitable deductions from either an income or estate tax perspective, while still benefitting loved ones. (A common use of a CRT is to create an income stream in retirement years, while still benefitting charity at the end of the trust term).

Example: a 10 year term CRT, at a 2% IRS rate, which earns 1% per year and grows at 7% per year, would result in an annual income stream that totals approximately $2.36 million over

10 years, would provide a charitable tax deduction of $200,000, and would pass $472,000 to charity at the end of the term.

Both CRTs and CLTs are subject to strict rules promulgated by the Internal Revenue Service ("IRS"). Both CRTs and CLTs must be irrevocable and unamendable, except for the reserved right to change the charitable beneficiary. Both must also pay the annual income amount in the form of an annuity (fixed dollar amount) or unitrust payment (percentage of assets). Finally, both must have calendar year fiscal years. CRTs and CLTs can be created in life, or through testamentary provisions in a Will. With both types of trusts, contributions of encumbered property are generally prohibited.

C. Family Partnerships

The creation of a family limited partnership accomplishes several goals. First, it can help provide liability protection for you in the event there is every any significant judgment against you. Perhaps more important are the estate planning benefits of such partnership. As the general partners, you would maintain a great measure of control over the partnership and, effectively, make all of the operational decisions. At some point, it is advisable to bring your children in as (general) partners, even if initially you maintained a controlling vote. Further down the road, it would be advisable to restructure so that you gradually relinquish control entirely to your children. The greater control that is eventually granted to your children will help to maximize valuation discounts which may be available in valuing the partnership for estate tax purposes. This is discussed in more detail below. As you gift partnership interests to children and perhaps, grandchildren, estate tax savings increase due to the reduction in your total estate value.

The method of gifting Partnership Units to your family in a FLP is very simple and convenient, especially when compared to the difficulty of transferring real estate or small stockholdings to family members each year. In order to gift Partnership Units in a FLP, you need only to sign a simple assignment reflecting the Partnership Units have been transferred.

Unlike trusts which require certain distributions to beneficiaries, the general partner of a FLP, subject to his or her fiduciary duty to the other partners, can retain control over distributions to partners, reinvesting within the partnership whatever cash is not distributed. This restricts the distribution to younger partners, thereby increasing the incentive of your descendants to obtain productive employment rather than relying upon required or anticipated distributions from a trust.

When Partnership Units of a FLP are gifted, there is no fractionalization of management of loss of control over the assets. Instead, the management of the FLP resides in you, the general partner, making the management of the assets much simpler than would be the case if fractional share interests in other assets, such as real estate, were gifted.

A FLP will help your family retain the ownership and control over the assets in the FLP, help provide creditor protection, and provide protection for descendants in the event of a divorce. When an outright gift is made or when a gift is made in trust and the Trustee distributes assets to the beneficiaries, the beneficiary is then free to use those distributions as he or she pleases. In a FLP, the general partner can control the distribution of assets. If a limited partner attempts to transfer his or her Partnership Units, the transferee becomes an assignee only, not a full partner. Under Georgia law, an assignee has fewer rights than a partner. As a general proposition, persons outside of your family would have little interest in acquiring ownership rights in your FLP, especially assignee rights. Although Partnership Units of a FLP are not exempt from the claims of creditors, creditors are generally not interested in attaching or claiming an interest in a FLP. If they do, they become assignees, not partners, and incur income tax on their proportionate share of partnership income, whether or not distributions are made. Partners are in a much better position to negotiate claims of creditors than they would be if the assets were in a trust where a distribution was required at some date in the future or if the debtor owned the asset as a result of direct gifts.

In addition to all of the business and non-tax reasons for creating the FLP described above, there are also tax reasons for forming a family partnership. For gift tax purposes, the valuation of the Units of the FLP is determined based upon the "fair market value" of those Units. The definition given by the IRS for fair market value is the price which a reasonable buyer would pay to a reasonable seller, both with full knowledge of all pertinent facts and neither under a compulsion to buy or sell. When the fair market value of a single Unit of the FLP is determined, it is determined on the basis of this hypothetical willing buyer/willing seller test, not upon the value which would be received by a partner in the event the partnership is liquidated. Therefore, the fair market value of a Unit is not determined based upon its pro rata ownership of the underlying assets in the partnership. Instead, it is determined based upon the IRS definition. This valuation, which is less than the pro rata value of the assets in the partnership, is often referred to as a "discount." The discounts often range from 15% to 35%, and sometimes are 40% or greater.

If gifting is anticipated, the appraisal of the individual partnership Units is a very important step in the overall process. An appraiser who is familiar with the function of FLPs and evaluation of the individual Units of FLPs should be retained by you. The individual Units should be entitled to a discount because of the lack of marketability, fractional share interests, "locked in" nature of partners and possibly other factors, all of which will be controlled by local law and the terms of the FLP. Georgia law is particularly favorable to the creation of FLPs and discounts of the individual Units.

As noted in the Introduction, there are many advanced planning techniques. "Advanced" does not necessarily mean overly complex, and there are frequently reasons for utilizing some of these techniques even when tax planning is not the primary concern. For example, there are quite a few personal and family planning reasons to utilize family partnerships, or to use a CRT for retirement income planning, or to create trusts to protect beneficiaries.

Glossary of Common Estate and Probate Terms

Adjusted Basis. Basis, as may be adjusted up or down for depreciation or capital improvements.

Administration. The handling and disposition of a Decedent's estate upon death. (see also Probate)

Administrator. A person appointed by the Court to administer the estate of an intestate Decedent.

Advance Directive for Health Care (or Health Directive). A document wherein you appoint an agent to act on your behalf in regards to health care decisions for you.

Agent. A person nominated by you to act on your behalf. An agent will generally have a legal fiduciary duty to you to act in your best interests.

Ancillary Administration. The administration of an intestate decedent's estate in another state after the initial Administration in the decedent's state of domicile.

Ancillary Probate. A probate conducted in another state after the initial probate of a Will in the decedent's state of domicile.

Annual Exclusion. The amount you may give away to other persons, other than your spouse, each year without any gift or estate tax consequences.

Basis. The value of any item of real or personal property in your hands for purposes of determining gain or loss upon its subsequent sale or other disposition by you.

Bequest. A gift or disposition of property, other than real property, under a Will. (see also Devise). The verb form of bequest is "bequeath".

Beneficiary. A person designated on a beneficiary designation form to receive property upon a decedent's death; or in probate proceedings, a person to whom property has been bequeathed under a Will, who may or may not be an Heir.

By-Pass Trust. A trust that utilizes a person's federal estate tax exemption amount, to shelter that value and growth from estate tax for as long as the law permits. Also known as a credit shelter trust.

Carryover Basis. The Basis of property in the hands of a Donee.

Caveat. A contest or objection to a Will, probate or administration proceeding filed in Probate Court.

Conservator. A person appointed by the Court to act on your behalf in your financial matters if you are incompetent. A Conservator is a fiduciary. (See also Guardian)

Conservatorship. A process in which you are determined by a court as being unable to manage your own financial affairs, in which a Conservator is appointed as your fiduciary to make such decisions for you. (See also Guardianship)

Credit Shelter Trust. See By-Pass Trust.

Custodial Account. An account for the benefit of the minor under the Uniform Transfers to Minors Act of a given state, in which the minor is entitled to the funds by the age of 21.

Decedent. A person who has died, whether with or without a valid Will.

Devise. A gift or disposition of real property under a Will. (see also Bequest)

Domicile. A decedent's legal state and county of residence at the time of death.

Donee. A person to whom property, whether real or personal, has been gifted.

Donor. A person who gifts property to another.

Estate. All property, real or personal, tangible or intangible, of a person.

Executor. A fiduciary appointed under your Will, and sworn in by the Probate Court, to carry out the terms of your Will.

Executrix. The feminine of "Executor".

Fiduciary. A person who acts on behalf of another and is subject to a legal standard, such as Executors, Trustees, Guardians and agents under Health Directives and Powers of Attorney.

Guardian. A person appointed by the Court to act on your behalf in your personal and health matters if you are incompetent. A Guardian is a fiduciary. (See also Conservator)

Guardianship. A process in which you are determined by a court as being unable to manage your own personal affairs, in which a Guardian is appointed as your fiduciary to make such decisions for you. (see also Conservatorship)

Heir. (also known as Heir At Law) A person who, under the laws of a given state, is entitled to a share of a decedent's estate where the decedent died intestate. This is generally a spouse and children if the decedent was married; if unmarried it is children, if any; if no spouse or children, it may include parents, siblings, and more remote relatives.

Intestate. A person who dies with no valid Will is termed to be intestate. (see also Testate)

Intestate share. The share determined by state law that a particular heir is entitled to where a decedent dies intestate.

<u>Joint Tenants with Rights of Survivorship</u>. A method in which property may be owned, in which each owner owns an undivided interest in property, but has no rights in the same upon death. (see also Tenants in Common)

<u>Letters of Administration</u>. A court document issued to an Administrator in an intestate estate, legally empowering the Administrator to administer the estate of a decedent in accordance with state law.

<u>Letters Testamentary</u>. A court document issued to an Executor under a Will, legally empowering the Executor to administer the estate of a testate decedent in accordance with the Will.

<u>Living Trust</u>. See Revocable Living Trust.

<u>Living Will</u>. A document which expresses your final wishes regarding the application or withdrawal of life sustaining treatment.

<u>Marital Trust</u>. See QTIP Trust.

<u>Non-probate Property</u>. Property which passes outside of a Will, without any regard to provisions in the Will.

<u>Per capita</u>. A legal term regarding the disposition of a decedent's assets whereby the assets are divided based upon the total number of legal heirs. For example, if you died with no living spouse, children or parents, but had 3 siblings, one of whom predeceased you leaving 2 children, a per capita distribution would create 4 equal shares, one for each heir.

<u>Per stirpes</u>. A legal term regarding the disposition of a decedent's assets whereby the assets are divided based upon the closed degree of relationship, with children of any deceased heir taking the share of such deceased heir before further division. A "per stirpes" division of property is more common, and generally considered fairer. For example, if you died with no living spouse, children or parents but had 3 siblings, one of whom predeceased you leaving 2

children, a per stirpes distribution would create 3 equal shares; one for each surviving sibling and one share divided between your deceased sibling's children.

Personal Representative. In probate or administration proceedings, your Executor or Administrator. In an Advance Directive for Health Care, your agent under HIPPA.

Petitioner. In Probate Court proceedings, a person who files a petition to probate a Will, administer an estate or initiate a guardianship or conservatorship.

Pourover Will. A generally very simple Will that disposes of the balance of one's estate to a Revocable Living Trust that was created during life.

Power of Attorney. (see also "Springing Power") A document executed by you appointing an agent to act on your behalf in all business and financial matters.

Probate. The process of presenting a Will to be administered, and the proceedings in Court to conduct the same, and eventual disposition of property under the terms of the Will.

Probate property. Property which is governed by and disposed of under a Will.

QTIP Trust. A trust that by law can benefit only the surviving spouse of a decedent for the lifetime of the surviving spouse.

Revocable Living Trust. An estate planning tool, also known as a Will substitute, in which you transfer your property during life to a trust, usually to avoid the probate process.

"Springing" Power of Attorney. A Power of Attorney that is not effective immediately upon execution and only becomes effective upon a later specified time or event.

Successor. A person whom you appoint to replace or succeed a fiduciary previously named; e.g., successor Trustee, successor Executor, etc.

Stepped-up Basis. An adjusted basis, generally the basis received in property when inherited at another's death.

Tenants in Common. A method in which property may be owned, in which each owner owns an undivided interest in property. (see also Joint Tenants with Rights of Survivorship)

Testate. A person who dies with a valid Will is termed to be testate. (see also Intestate)

Testator. A person who makes and executes a valid Will.

Testatrix. The feminine of "Testator".

Trust. A legal arrangement under which property or funds are held for the benefit of another and subject to certain standards or requirements.

Trustee. A person appointed under a Will that creates a Trust, or under a separate Trust document, who administers the terms of the trust in a fiduciary capacity.

Ward. An incompetent person subject to a guardianship or conservatorship.

Year's Support. A priority amount awarded to a surviving spouse and/or minor children as part of a probate or administration. Can be awarded in lieu of amounts passing under a Will or through intestacy.

Appendix 'A'

CONFIDENTIAL ESTATE PLANNING WORKSHEET

Date Completed:________________

Full Legal Name:___________________________________ Age:_____

Address__________________________________ County___________

____

Employer:_______________________________ Position:___________

Spouse's Full Legal Name (if married)__________________________

Spouse's Age or date of death if deceased ________________

Spouse's Employer:________________________ Position:___________

Phone Numbers- H _____________ W ___________ Cell ___________

Email addresses:____

Bank Affiliation(s)____

Safe Deposit Location (if any) __________________________________

Living Children: (Please note if from a prior marriage)

Full Name Age Spouse Address Children & Age

____

____

____

____

Do you (or your spouse) have any deceased children? Yes ___ No ___

If so, please list name, year of death and whether they were survived by children of their own.

Questions to Consider in Advance of Conference.

1. Do your children (or grandchildren) have any problems or handicaps which should be considered in devising your estate plan? (i.e., any "Special Needs" individuals?). If so, please elaborate.

2. Do you support anyone other than your spouse and children?

3. Do you wish to make any specific gifts of property or money to any charities, friends, or other relatives in your Will?

4. If you, your spouse, and all of your descendents (children, grandchildren, etc.) were killed in a plane crash, whom would you want to have your property? (Have your spouse answer this question separately.)

5. If you decide to name a guardian for your minor children (in case your spouse does not survive) whom would you name? (Think about a successor to the original guardian also.)

6. If you wanted an individual to serve as Executor or Trustee (with or without a Bank as Co-Executor or Co-Trustee), whom would you name? (Think about a successor also.)

7. Do you or your spouse expect to receive any gifts or inheritances in the future? Any idea as to size of same?

8. Have you or your spouse made any gifts in excess of $10,000 to any person in any one year? If so, was a gift tax return filed?

9. Are you a beneficiary or the holder of a power of appointment under any trust, or do you expect to become a beneficiary of any trust?

10. For your health care Power of Attorney and general power of attorney, whom do you want to serve as your agent? Who do you want to name as the successor agent?

11. Are both you and your spouse a U.S. citizen?

12. Have you or your spouse ever been divorced?

Estate Evaluation

Kind of Asset	Self	Spouse	Joint
1) Residence			
2) Other real property (Please list whether raw land, rental property or vacation homes. Use separate sheet if necessary)			
3) Publicly traded securities (Use separate sheet if necessary)			
4) Closely held and untraded securities (i.e. family business)			
5) Value of trusts of which you are a beneficiary			
6) Bank accounts and cash			
7) Vehicles, boats, planes			
8) Other personal property (jewelry, art, antiques, silver, guns, etc.)			
9) Face amount of Life Insurance			
10) Pension and profit sharing, IRA's			
Total Gross Estate			
Less: All debts and mortgages			
Total			

Other Information

a. Life Insurance.

Owner	Company	Face amount	Beneficiaries	Type

b. In case of your death or retirement, would any employer make payments to you or your spouse under any qualified pension or profit-sharing plan, deferred compensation plan, etc.? If so, please describe, with approximate amounts and designated beneficiary. Did you contribute to such plans (voluntary or otherwise)? Who is the death beneficiary of such rights?

c. Do you or your spouse own any interest in real or personal property located outside of the State of Georgia? If so, please describe property and ownership interest.

Appendix ‘B’

FAMILY BUDGET

each per month:

Mortgage (mortg, taxes, insurance) **OR** rent (rent + renters ins.)
Other installment loans (if any-equity line, etc)
Car payments
Car- gas (avg)
Car care- oil change/car care/maintenance (avg/month)
Car- insurance
Cell phones
Student loan payments (if any)
Electric Power (avg.)
Water/sewage/trash service (avg)
Phone/Cable/Internet (avg)
Natural Gas (avg)
Disability insurance
Life Insurance (on children—e.g. whole life)
Life insurance (on self/spouse)
Other insurance (umbrella policy, personal articles policy, etc)
Health Insurance coverage (vision, dental, health)
Monthly doctor co-pays (including children)
prescription eyewear (if any)
Pharmacy bills/prescriptions (including children)
Lunches…(@ $___/wk **x** 4 wks/month)
Domestic help (if applicable)
Groceries & household supplies
country club or health club dues
Civic organization dues (monthly or prorated monthly amount)
Magazine subscriptions, etc
Dry cleaners
Personal grooming -haircuts, makeup, nails, etc. (avg. per month)
Personal monthly clothing allowance
Children- clothing
Children- weekly allowance, lunch money, etc
Children- tutoring, speech or other expenses
Children- private school tuition (if any)
Children- misc (diapers, toys, presents, etc)
Children- activities: sports, camps, etc
Children- daycare/after school care
Children- monthly babysitting

Children- nanny (if applicable)
Misc.- charities & other donations (United Way, etc)
Church tithing/donations
Gifts (wedding/shower/baby/birthday etc)
Pre-tax qualified retirement plan savings: 401(k), ESOP
Credit card payments
Yard service (if any)
Alarm monitoring (if any)
Monthly pest control (if any)
Monthly home repairs avg. (plumbing, electrical, etc.)
Other misc (total and list any specific items not included above)
TOTAL FIXED EXPENSES/MO.

INCOME-after tax (b/f payroll deductions for insurance, 401k, child care etc)

SURPLUS/DEFICIT (income - expenses)

Appendix 'C'

PROBATE INFORMATION

Name of decedent_______________________________________
Date of death __________________
SSN of decedent ___________________

Address of decedent ___________________________ (domicile)
____
(residence) ___________________________
[if different] ___________________________

City and county of death_______________________________________

Will?_______ IF SO: Date Will executed ______________

Location of original Will ______________________________

Name of petitioner(s) _____________________________________
Named as Executor in Will? _______

Address of petitioner(s) _________________________________
____
____

Phone number of petitioner(s) (___)_____-_______

Was Decedent married at death? _________
If yes, name of spouse: ________________________

Heirs at law of decedent (spouse & children, if any; if none, discuss with attorney):

	Name	Relationship	Age	Address
1.				
2.				
3.				
4.				

Are there any persons who would be heirs but died before the decedent?
If so, please list:

____
____

If children, are there children from more than one marriage? __________

Do you expect any person to contest the Will? ___________

Self-proved Will?_____ If no, names/addresses of witnesses, if known:

_____________________ _____________________ ____________________
_____________________ _____________________ ____________________
_____________________ _____________________ ____________________

Other information____
____
____

Any out-of-state property? ____

Was decedent receiving Medicaid benefits in a nursing home? ______
(if so, must notify DCH/Medicaid within 30 days of date of death)

Attach *copy* of Will and death certificate

LIST ASSET INFORMATION

1.

2.

3.

4.

5.

6.

7.

Notes:

Appendix “D”
PROCEDURE FOR EXECUTORS OF ‘SMALL’ ESTATES

Assuming a small estate, that no returns or inventories are required and that the estate is solvent:

---

1. Keep accurate and separate records for all estate transactions. This means for bills, distributions, and anything else that is an estate expense. Almost anything you do that concerns the estate and incurs an expense is an estate expense. This includes bills, appraisals, attorney fees, long distance calls on behalf of the estate, etc. (These expenses take on special importance if an estate tax return is required.)

2. After probate of the Will, the court will issue Letters Testamentary to the executor (or “Letters of Administration” if there is no Will). If there is more than one executor, they must act unanimously unless the Will provides otherwise.

3. It may be necessary to apply for a Federal tax identification number using Form SS-4. (Will be done by the attorney, if required.) It will be necessary to open a bank account for the estate or change the decedent's account to include the words "Estate of" prior to his or her name. This can be done with a certified copy of the Letters Testamentary. This is not an absolute requirement for some very small estates but becomes more advisable the larger the estate is and the more beneficiaries there are. You should obtain multiple copies of the Letters Testamentary and the Death Certificate.

4. Collect the assets of the estate. This includes notes receivable, stocks, bonds, insurance, etc. You will need Letters Testamentary for many of these, such as closing brokerage or bank accounts. If there are assets in more than one brokerage account, you may cash in or consolidate to one account. The same is true for checking and savings accounts. They should be consolidated into the estate account. Make sure to check with each bank for any safety deposit boxes.

5. You should apply for payment of any life insurance benefits, even if the proceeds go to an individual recipient named on the policy and not the estate.

6. You may need/want to have real estate appraised. First, if it is to be sold, you don’t want to sell it below its fair value. Secondly, if property is to be distributed in kind, you will need to know how much

the beneficiary is receiving, unless there is only one beneficiary or all items are specific bequests. Even then, an appraisal will establish the new income tax basis for the property. This will be necessary to determine the tax consequences when the property is sold in the future. The same holds true for personal items such as jewelry, china, silver, etc. If it is to be distributed other than as a specific bequest, you will need to know its value. Third, you will need to know its value for commission purposes, if you are receiving executor's commission.

7. Pay the estate's bills. This may be done all along from the decedent's funds once you are appointed Executor or Administrator. If necessary, assets may be sold to generate cash to pay bills. This may require Court approval if there is no Will. Notice to creditors must be given within 60 days of being appointed as executor and should run in the local newspaper. (This will be done by the attorney.) Ongoing bills (power, gas, mortgage, car, etc) may be paid all along. If there are cash flow problems, creditors may be forced to wait at least 6 months from your appointment to be paid. However, barring cash flow problems, it is advisable to pay as bills come due.

8. A final individual income tax return (Form 1040) for the year of the decedent's death will need to be filed by April 15 of the following year. Additionally, any income received by the estate will need to be reported on an income tax return for the estate for each year the estate remains open. You should discuss this with your CPA. You should also ensure all prior personal returns have been filed, and that no back taxes are due.

9. As long as the total value of all assets in the estate (real property, personal property, stocks, bonds, cash, household items, etc.) is under the federal exemption ($5,490,000 for 2017), there will generally be no tax due and no estate tax return to file (assuming no exemption amount has previously been used, such as through large gifts to individuals in the past). To the extent the estate exceeds this threshold, or the exemption amount is not intact, tax <u>may</u> be due. PLEASE NOTE: Although life insurance is not taxed to the recipient, if the decedent owned the policy, it is <u>included</u> in determining the total estate value.

10. Distribute the assets. Generally, no distributions should be made until it is determined what the debts of the estate will be. After debts are determined and paid, if there are specific bequests, they may be distributed at your earliest convenience. If there are not specific

bequests, it may take longer to collect and possibly sell the assets. If there are several beneficiaries, and there are not specific bequests, it may be impractical to distribute the assets in kind to numerous beneficiaries, and as such, it may be better to sell the assets and distribute the proceeds. In such cases, it may take from a couple of months to a year or longer to make all distributions. Generally, in an estate in the $1,000,000 range or less, it will not take longer than 6 months to completely wrap up the estate. Distributions may be made in one lump sum, or amounts may be distributed pro rata to the beneficiaries as amounts are received. If the Will creates a trust, it is your responsibility to deliver the assets to the named Trustee.

11. If you are paying yourself a commission, as allowed under Georgia and Alabama law, be certain to keep up with the value of assets that are distributed in kind, as well as amounts of money and other property collected AND paid out. Generally, when the executor is a beneficiary under the Will, he or she will waive any commissions. This waiver should be in writing and executed within 9 months of the decedent's death.

12. Before distributing the residue of the estate, make certain all the estate's bills, as well as the commission (if any) has been paid. Once all distributions have finally been made, you may close bank accounts, etc. It is advisable to retain the records for at least 3 years.

13. If the estate is over the exemption amount, the procedures progressively increase in complexity and time consumption because estate tax returns are required. There are also likely to be other issues involved with a larger estate, including trusts, professional valuations, complicated returns, etc.

14. If the Will does create a Trust, it is very important to work with your attorney to make certain the trust is properly funded. Although this would seem simple, there can be many complexities in determining the proper amount and whether it includes certain income earned on the assets used to fund the trust.

ABOUT THE AUTHOR

Bradley R. Coppedge is a partner in the law firm of Hall Booth Smith, PC. He received his B.B.A. in Accounting from Mercer University in 1993, his J.D. degree from Mercer University School of Law in 1996, and his LL.M. (Masters of Law) in Taxation from the University of Miami School of Law in 1997. After receiving his LL.M. degree, Brad practiced with Hatcher Stubbs, one of Georgia's oldest law firms, becoming a partner in the Firm in 2002. In January of 2016, Brad joined the regional law firm of Hall Booth Smith, PC. He has been a member of the Georgia Bar since 1996 and the Alabama Bar since 1998 and is admitted to practice before the United States Tax Court.

Brad's practice is devoted to business, tax and personal planning, particularly in the areas of estate planning and probate, entity selection/formation, and tax controversies. Brad provides estate and tax planning advice for individuals, including the preparation of wills, trusts, family partnerships and various charitable planning techniques. His probate practice includes probate of wills, administration of estates, and guardianships. Brad also works with clients in the creation of Special Needs Trusts (SNTs), both for self-settled and third party donor created trusts, in Medicaid planning and planning for beneficiaries with disabilities. Brad also represents existing small and family-owned businesses, new start-up business and a number of physician groups. He advises these clients on the best form of entity from a tax, liability, and operational standpoint, entity formation, and continued representation on matters such as employment agreements, buy-sell agreements, contracts, leases, retirement plans and other matters related to the operation of a business. Brad also regularly represents both entity and individual clients in controversies with the IRS and the state Department of Revenue.

Brad has written numerous articles in local, state and national publications and often speaks locally and regionally at events sponsored by both private and public groups, on the topics of estate planning and choice of entity. Brad was recognized by Georgia Super Lawyers, Rising Stars in each of 2005 – 2010, and is rated AV© Preeminent by Martindale-Hubbell. You can view his professional profile at www.martindale.com/Bradley-R-Coppedge/8754240-lawyer.htm.

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About the Firm's Estate Planning and Probate Practice Group

Hall Booth Smith's estate planning attorneys offer comprehensive wealth preservation services, having expertise in income, gift, estate and generation-skipping taxation, employee benefit and retirement planning, charitable giving, and business succession planning. As part of our team approach to client service, attorneys in the Estate Planning and Probate and Administration Group frequently work with our clients' accountants, financial service professionals, and other trusted advisors.

Our estate planning services range from drafting simple wills to using more sophisticated planning techniques for the transfer of wealth in complex estates, such as family partnerships, grantor retained annuity trusts (GRATs), charitable trusts, irrevocable life insurance trusts (ILITs) and qualified personal residence trusts (QPRTs). Regardless of the tax complexity, we are sensitive to our clients' personal goals and the inherently delicate issues involved in estate planning. We aim to help individuals, families, and business owners accomplish these goals in a tax efficient manner.

Representation of family businesses is an important part of our estate planning practice. Our attorneys routinely advise clients in the formation and maintenance of family partnerships and limited liability companies. We also work with families and their advisors in creating business succession plans, be it to the next generation or to key shareholders.

Charitable giving is also an important aspect of our clients' estate planning needs. We work closely with our clients to maximize the personal and tax benefits of their planned giving strategies through charitable lead and remainder trusts, private foundations, donor-advised funds and other deferred giving arrangements.

Our attorneys are experienced in planning for clients with large IRAs and the many complex issues involved with planning for required minimum distributions, proper handling of beneficiary designations, and avoiding unnecessary taxation.

In addition to the planning aspect of our practice, we have a long history of providing estate administration and post-mortem planning services. We maintain an active probate practice and, in coordination with our Fiduciary Litigation Group, represent fiduciaries and beneficiaries in trust and estate administration. We also prepare and file federal estate and gift tax returns, as well as handle any representation before the IRS and Federal Courts in connection with gift and estate tax audits and litigation

Please visit our website for more information on the Firm and its attorneys:
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It's not just for the wealthy! Everyone should have at least basic estate planning documents, to include a Last Will and Testament, Power of Attorney, and Health Directive.

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In addition, you will find very helpful answers to common questions about the planning process and understandable definitions of terms that are frequently used in both the estate planning and probate process.

This book will give you an overview of what you need to know prior to meeting with your estate planning attorney, such that you will be able to maximize the use of your time with the attorney.