I. WHAT YOU NEED TO KNOW ABOUT WORKING WITH THE CLIENT

A. UNDERSTANDING THE CLIENT (MAKING SURE THEIR WISHES ARE IMPLEMENTED)

The key to a successful relationship with any client lies in the attorney's ability to understand and address the client's specific needs. Many of the clients with whom the attorney will provide legal services have experienced difficulties and problems that have prompted them to seek legal assistance. The attorney's role in planning the client's estate is also one of a counselor, and good counselor always listens to his clients first.

The client will bring various legal problems or other life experiences to share with the attorney. Everyone wants to tell their own personal story, and it is the job of the attorney to listen first and advise later. By actively listening to the client, the attorney can begin to understand the client's interests and disinterests on a broad range of topics. It is important to ask the client questions about their personal story to obtain clarification if necessary. These questions will assist the attorney's understanding, and will reinforce in the client's mind the importance that the attorney places on fully understanding the client's wishes.

A couple of years ago, the author met with a client for his initial consultation. The client explained that he had lost his wife, and for this purpose he had come to consult with an attorney. Prior to exploring the estate planning/administration issues, the author simply expressed his condolences on the passing of the client's wife, and asked him how he was doing. The client looked surprised at this question, and then his face clouded with emotion as he expressed his love for his deceased wife, how much he missed her, and his wish to honor her memory in their family. Not only did this simple question engender a relationship of trust between the client and the author, it helped the author understand the values that hisclient held, which were ultimately incorporated into his estate planning objectives.

B. INFORMATION TO GATHER AT THE INITIAL INTERVIEW

Due to the high volume of clients that an attorney may see each day, it is important to gather client information in a written or digital record for later reference. An intake questionnaire is the standard method for gathering pertinent information, however the author also meets individually with each client to design a specific estate plan for their needs and objectives.[1]

The intake questionnaire responses form the basic building blocks upon which the attorney will create an individualized estate plan. The intake questionnaire should, at a minimum, address biographic information, current status of existing estate planning documents, relationships between the parties, and the tax status of the client(s) involved in the estate plan.

[1] A sample intake questionaire is attached as Exhibit I-1.

C. Keeping the Client Involved Throughout the Process

Most clients want to be involved in the preparation of their estate plan. An important procedure utilized by the author that keeps clients engaged and involved in the preparation of their estate plan is the preparation of draft documents. The author provides a draft copy of all estate planning documents to the client for their review and approval prior to finalizing the final draft documents for execution. During this period of review and approval, the client is free to make any changes in the estate planning documents. Furthermore, it provides additional time for the client to list and identify any other assets on their trust schedules.

The process of providing initial drafts to the client may seem cumbersome, however the value of this practice outweighs any negative downside. This process allows each client to accept responsibility for their estate planning choices, and gives them a period to rethink and ponder their estate planning choices. It further reduces any potential claims against the attorney from a client that has a change of heart subsequent to the estate plan being executed. Billing disputes are reduced and may be reduced entirely, because the client has taken responsibility through the review and approval period for the work performed by the attorney on the estate plan.

II. WILLS AND TRUSTS

A. Will vs. Trust

A will is one of the most simple written forms by which an individual may dispose of his or her property at death. However, there are several drawbacks inherent in an estate plan that only includes a will.

Unlike a trust, a will generally will be subject to the formal probate process with its related expenses, legal fees, and time delays. A will generally sets forth the provisions of administration for an individual's estate that are wholly inoperative until the death of an individual, who is referred to as the testator/testatrix (hereinafter collectively as "testator").

Conversely, a trust becomes operative over the assets in the estate of an individual upon its funding. The advantages of a trust become readily apparent during periods of incapacity, when bills and mortgage payments must be paid. Furthermore, a trust may offer protection from the creditors of an individual's beneficiaries,[2] which a will generally does not provide.

[2] The term "beneficiaries" is used generically to represent devisees, legatees, or donees.

While a trust requires greater initial expense in its formation, this investment is usually only a fraction of the cost of most probate proceedings. [3] However, many clients still desire to form a will to dispose of their estate due to increased cost of forming a trust, and/or the fact that their estate is relatively small.

B. PRINCIPLES IN WILL EXECUTION

1. *Will.* In Nevada, the testator must be of sound mind and over the age of 18 years in order to execute a valid will.[4] With the exception of holograph and electronic will, a will must be in writing and signed by the testator or by an attending person at the testator's express direction,[5] and attested by at least two competent witnesses who subscribe their names to the will in the presence of the testator.[6] A notary public has also been deemed as the second competent attesting witness if the notary public signed in the presence of the testator.[7]

An attesting witness may sign a declaration under penalty of perjury or an affidavit before any person authorized to administer oaths in or out of the state of Nevada, stating such facts as the witness would be required to testify to in court to prove the will. The declaration or affidavit must be written on the will or, if impracticable, on some paper attached thereto.[8]

Any beneficiary that is designated to receive any devise[9] under a will, should not serve as an attesting witness, because the devise in favor of the beneficiary would be void unless there are two other competent subscribing witnesses to the will.[10]

2. *Holographic Will.* A holographic will is a will in which the signature, dated and the material provisions are written by the hand of the testator, whether or not it is witnessed or notarized. It is subject to no other form, and may be made in or out of this State. The testator must still be of sound mind and over the age of 18 years of age.[11] It is important to note that if a testator types the will and then signs and dates it by their hand, the will is not a validly executed holographic will. The material provisions of the will must be written by the hand of the testator.

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[3] For more information concerning the comparative benefits of a will versus a trust, please go to http://www.anthonybarney.com/pdf/Cost_Saving_Estate_Planning_Techniques.pdf.
[4] NRS 133.020.
[5] In re Gordon's Estate, 40 Nev. 300, 161 P. 717 (1916). (A signature to a last will and testament is not rendered invalid by reason of another having aided the hand of the testator; in order for this rule to apply, it must appear that the testator, at the time of requesting or receiving the aid in the signing of the instrument, had the present volition to affix the signature, and was aware and fully cognizant of the details of the instrument of will or testament to which he, by the aid of the other, was affixing his signature.
[6] NRS 133.040
[7] In re Estate of Friedman, 116 Nev. 682, 6 P.3d 473(2000).
[8] For an example of the sworn statement see NRS 133.050 or Appendix II-1.
[9] A devise in a will generally refers to property (usually real property), while legacy typically refers to personal property.
[10] NRS 133.060
[11] NRS 133.090.

3. *Electronic Will.*[12] An electronic will is a written will that is created and stored in an electronic record, and contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentic characteristic of the testator; and is created and stored in such a manner that only one authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will; any attempted alteration of the authoritative copy is readily identifiable; and each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.[13]

4. *Nuncupative or oral will.* A nuncupative or oral will is not valid in Nevada.[14]

C. ADMITTING THE WILL TO PROBATE

1. *Delivery of Will After Death.* Any person, including the personal representative or executor/executrix (hereinafter collectively as "personal representative") having possession of a will shall, within 30 days after knowledge of the death of the person who executed the will, deliver it to the clerk of the district court, which has jurisdiction of the case. If the person is not the personal representative, that person may deliver the will to the personal representative named in the will for filing with the clerk of the district court. If either an individual in possession of the will or the personal representative fail to file the will with the clerk of the district court without reasonable cause, they are liable to every person interested in the will including, but not limited to, the creditors and/or beneficiaries for the damages the interested person sustains by reason of their neglect.[15]

2. *Order To Produce Will.* If a person fails to provide the will to the clerk of the district court, the Court may issue and serve and order upon the person possessing the will to produce it to the district court. Any person who neglects or refuses to produce it in obedience to such an order, may by warrant of the court, be committed to county jail until they produce the will.[16]

3. *Proving the Will.* At the time the will is admitted to the probate and in the absence of a self-proving affidavit,[17] the Court will take testimony from the attesting witnesses.[18] If no person appears to contest the probate of the will, the court may admit the will upon testimony of only one of the subscribing witnesses.[19] However, if the attesting witness presents an *ex parte* affidavit showing the will was executed in all

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[12] For additional discussion of Electronic Wills, see Appendix II-2.
[13] NRS 133.085.
[14] NRS 133.100.
[15] NRS 136.050.
[16] NRS 136.060.
[17] NRS 136.130 It is important to note that note that no subpoenas to subscribing witnesses need be issued if they have provided a self-proving affidavit with a will that has been filed with the clerk of the district court. For an example of a self-proving affidavit see Appendix II-3.
[18] NRS 134.140.
[19] NRS 135.150.

particulars as required by law, and the testator was of sound mind and had attained the age of 18 years at the time of its execution, the affidavit must be received in evidence and have the same force and effect as if the witnesses were present and testified orally.[20]

The affidavit must be in substantially the same form as required in NRS 133.050.[21] In the event that only one witness may be found, the affidavit should also set forth the acknowledgement of the attesting witness concerning the fact that the individual (testator) or an attending person at the testator's express direction, signed the will in the presence of the other attending witness and that the other attending witness signed in the presence of the testator.[22]

If there are not any available attesting witnesses, the court may admit the will to probate upon the testimony in person, by deposition, or by affidavit of at least two credible disinterested persons that the signature to the will is genuine, or upon other sufficient proof that the signature is genuine.[23] A holographic and electronic will are provided by authentication satisfactory to the court.[24]

If a will cannot be produced for the probate in Nevada, a copy of the will may be admitted to probate in this State in lieu thereof and has the same force and effect as would be required if the original will were produced, and it will be proved in the same manner as required by law.[25]

If a will is lost by accident or destroyed by fraud without the knowledge of the testator, the court may take proof of the execution and validity of the will and establish it, after notice is given to all interested persons, as prescribed for proof of other wills in other cases.[26] If no copy is available to state or be accompanied by a written statement of, the testamentary words, or the substance thereof, the will must be proved as other wills under Nevada law.[27]

However, in addition, the lost or destroyed will must be proved to have been in existence at the death of the person whose will it is claimed to be, or is shown to have been fraudulently destroyed in the lifetime of that person,[28] or unless its provisions are clearly and distinctly proved by at least two credible witnesses. The testimony of each witness must be reduced to writing, signed by the witness and filed, and is admissible in evidence in any contest of the will if the witness has died or permanently moved from the

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[20] NRS 136.150.
[21] See Footnote 8.
[22] NRS 133.040, For an example of an affidavit of an attesting witness, where the other attesting witness cannot be found see Appendix II-4
[23] NRS 136.070.
[24] NRS 136.185 amd 136.190.
[25] NRS 136.180
[26] NRS 136.230
[27] NRS 136.230
[28] NRS 136.240 (5)(a) (The Nevada Legislature recently amended its lost wills statute to include a rebuttable presumption that a pour-over will (i.e. a will whose primary beneficiary is a nontestamentary trust) is considered be in existence and not revoked at the time of the testator's death)

state. If the will is established, its provisions must be set forth specifically in the order admitting it to probate or a copy of the will must be attached to the order.[29]

D. Principles in Will Drafting

In drafting a proper will, the draftsman should recognize the importance of clarity in his or her documents. A well organized will is generally divided into sections for purposes of clarity. A sample will is provided for purposes of this discussion.[30] The sections set forth in the sample will include the declarations, appointment of fiduciaries, dispositive provisions, and general provisions sections which will be discussed below.

1. *Declarations*. The declarations of the will are important to provide a clear statement of the testator's intent, and a clear description of their individual and family situation. This provides immediate acquaintance with the individuals named in the will. It also can avoid any claims of an after born or pretermitted unnamed child or grandchild.[31]

a. *After Born Children*. In Nevada, when a child is born after the testator has executed a will and no provision is made for the child in the will, the child is entitled to the same share in the estate of the testator as if the testator had died intestate, unless it is apparent from the will that it was the intention of the testator that no provision should be made for that child; or the testator provided for the omitted child by a transfer of property outside the will and it appears that the testator intended the transfer to be in lieu of a testamentary provision.[32] It is important that any intentional omission of a child or grand child be specifically set forth as a specific declaration in the will.[33]

b. *Pretermission [Omission of Children and/or Grandchildren*]. In Nevada, when a child or grandchild is omitted from the will of the testator, it is presumed that the omission was intentional. If the district court finds that the omission was unintentional, the child or grandchild is entitled to the same share in the estate of the testator as if the testator had died intestate.[34]

2. *Appointment of Fiduciaries*. The appointment of a fiduciary is extremely vital to the integrity of an testator's estate plan, because this individual(s) and/or institution will be tasked with administering the provisions of testator' will. The individual(s) and/or institution designated to serve as the fiduciary should be chosen based upon their honor sufficient to protect the rights of the beneficiaries.

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[29] NRS 136.240
[30] See Appendix II-5. Used by permission from Layne T. Rushforth, Esq.
[31] NRS 133.170
[32] NRS 133.160
[33] See Appendix II-6 (Intentional Omission Clause).
[34] NRS 133.170.

a. Personal Representative. A "personal representative" is defined as an executor/executrix, an administrator, a successor personal representative, a special administrator and persons who perform substantially the same function under the law governing the status of personal representatives. Prior to drafting a will, it is important that the testator have an understanding as to those individuals that could properly serve as a personal representative under their will. In Nevada, a personal representative, must be at least the age of majority and be a resident of Nevada if appointed as substitute executor.[35] The individual designated as the personal representative cannot be a felon, unless the court determines that his or her felony conviction should not disqualify him or her from serving in the position of an executor.[36] If the court determines that the individual designated as the personal representative has a conflict of interest, is a drunk, or is improvident or lacks integrity or understanding, the court can disqualify him or her from serving as the personal representative.[37] A bank not authorized to do business in Nevada must associate with a bank authorized to do business in Nevada in order to serve as a personal representative.[38]

b. Guardian of Person/Minor Children. In the event of incapacity, the testator should make provisions for a guardian for himself/herself and any minor children that they may have. In Nevada, a guardian is defined as a person who has qualified as the guardian of a minor or incapacitated person pursuant to testamentary or judicial appointment, but does not include a guardian ad litem.[39]

c. Bond. In Nevada, the requirement of a bond is discretionary, and is expressly required or waived only in a will.[40] However, a court may still require a bond if it feels that it is necessary to protect the testator' estate.[41] While the sample will provided herein waives the bond requirement, the testator should understand that having a bond or surety may be an indispensible protection if the chosen fiduciary is unknown to them.

3. Dispositive Provisions. The dispositive provisions of a will are of central importance to its administration, because these provisions direct the fiduciary's allocation and distribution of the estate to the chosen beneficiaries.

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[35] NRS 138.020(1)(a)(d); Many clients will ask what the legal age of majority is in the state of Nevada. Under NRS 129.010, all persons of the age of 18 years who are under no legal disability, and all persons who have been declared emancipated pursuant to NRS 129.080 to 129.140, inclusive, are capable of entering into any contract, and are, to all intents and purposes, held and considered to be of lawful age. Under NRS 129.080, any minor who is at least 16 years of age, who is married or living apart from his or her parents or legal guardian, and who is a resident of the county, my petition the juvenile court of that county for a decree of emancipation.
[36] NRS 138.020(1)(b).
[37] NRS 138.020 (c).
[38] NRS 138.020 (d).
[39] NRS 132.160.
[40] NRS 142.020(1).
[41] NRS 142.020(1)(a).

a. *Specific Bequests.* A bequest is the act of giving property, which is usually personal property, under a testator's will.[42] A specific bequest is a gift of a specific item. The importance of a specific bequest lies in the fact that these gifts take priority over other bequests, including residuary bequests. Therefore, if there are insufficient assets left in the estate after the payment of administration expenses, a specific bequest will be the last gift to be diminished in the allocation and distribution of the probate estate.

In Nevada, a testator may make gifts of tangible personal property in a separate written statement or list without having to make a formal change to his or her will if the list is referred to in the will.[43] This list can be used to designate beneficiaries for coin collections, jewelry, automobiles, china, silverware, musical instruments, photo albums, library, etc. However, this list cannot be used to designate beneficiaries for cash gifts, stock or other securities, contract rights, or any interest in real estate.[44] The testator must include on the list of tangible personal property: (i) the date of its execution, (ii) the title indicating its purpose, (iii) a reference to the will to which it relates, (iv) a reasonably certain description of the items to be disposed of and the names of the devisees, (v) and the testator's handwritten or electronic signature.[45]

The statement or list may be (i) referred to as a writing to be in existence at the time of the testator's death (ii) prepared before or after the execution of the will (iii) altered by the testator after its preparation (iv) a writing which has no significance apart from its effect upon the dispositions made by the will.[46] A sample tangible personal property list is provided for purposes of this discussion.[47]

b. *Specific Devise.* A specific devise is a gift of real property made by a testator in a last will and testament.[48]

c. *General Bequests.* A general bequest is a gift of personal property payable out of the personal property of the estate not otherwise specifically bequested.[49]

d.. *General Devise.* A general devise is a gift of real property payable out of the real property of the estate not otherwise specifically devised.

e.. *Residuary Bequests.* A residuary bequest is the act of giving the remainder of the testator's estate , after payment of the debts, legacies, general bequests

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[42] BLACK'S LAW DICTIONARY 152 (7TH Ed. 1999); See also In re ESTATE OF LEWIS, 39 Nev. 445, 452 (Nev. 1916). (The word "bequeath" is used to express a gift of personalty made in a last will or testament).
[43] NRS 133.045(1).
[44] NRS 133.045(1).
[45] NRS 133.045(2).
[46] NRS 133.045(3).
[47] See Appendix II-7.
[48] *In re ESTATE OF LEWIS*, 39 Nev. 445, 452 (Nev. 1916) (The word "devise" is a term used to express a gift of realty made by last will or testament.)
[49] BLACK'S LAW DICTIONARY 152 (7TH Ed. 1999).

and specific bequests.[50] A valid residuary clause is merely a clause which bequeaths the remainder of the estate after payment of debts, expenses of administration, and other legacies.[51]

f. Allocation vs. Distribution. The terms "allocation" and "distribution" are not synonymous. The word "allocate" means, "to set apart for a particular purpose; assign or allot."[52] The word "distribute" means, "to divide and give out in shares."[53] The distinction between these two words is extremely important in designating shares of the estate to a testamentary trust for minor children. In a final allocation clause, a testator may want to divide the estate equally or unequally between a group of individuals comprised of both adults and minors. In order to avoid creating a distribution to a minor that a minor is legally unable to receive and/or manage, a testamentary trust may be established in which to allocate a share of the estate without distributing it to the minor beneficiary immediately.

4. *Spendthrift Provision.* A spendthrift provision is one that "prohibits the beneficiary's interest from being assigned and also prevents a creditor from attaching that interest."[54] A testator may create a spendthrift trust by will for real and personal property.[55]

5. Nonprobate Transfers Provision. A provision dealing with the effect of the testator's will on other assets passing by contract or beneficiary designation will help to avoid potential confusion in the administration of the estate. There are specific assets that may pass outside the will as a "nonprobate transfer." These include but are not limited to asset transfers to a joint tenant with right of survivorship,[56] a community property spouse with right of survivorship,[57] a pay-on-death beneficiary, a survivor on a multiple-party account,[58] a beneficiary under a retirement plan,[59] and the beneficiary of a transfer-on-death deed.[60]

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[50] BLACK'S LAW DICTIONARY 152 (7TH Ed. 1999).

[51] Chong v. Chong (In re Estate of Chong), 111 Nev. 1404, 1408 (Nev. 1995) quoting 96 C.J.S. Wills § 1097 (1957); see also Breckenridge v. Andrews, 88 Nev. 520, 522, 501 P.2d 657, 658 (1972) (in which a valid residuary clause stated the residue estate was to include "all of the rest, residue and remainder of my estate and effects whatsoever").

[52] WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 56 (2nd Ed. 1996).

[53] WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 572 (2nd Ed. 1996).

[54] BLACK'S LAW DICTIONARY 1518 (7TH Ed. 1999).

[55] NRS 166.040.

[56] NRS 100.085 (joint tenancy with bank account); NRS 111.365 (joint tenancy with real property), NRS 111.560 (joint tenancy with securities registration); NRS 115.060 (joint tenancy with homestead);

[57] NRS 111.064 (2).

[58] NRS 678.600 1. A multiple-party account payable to two or more persons, jointly or severally, which does not expressly provide that there is not a right of survivorship, though there is no mention of survivorship or joint tenancy, is a survivorship account. The right of survivorship continues between survivors. 2. Where there are two or more survivors, their respective ownerships shall be in proportion to their previous net contributions augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his or her death, plus the proceeds of insurance on decedent's life paid to the account.

[59] NRS 132.050(3) (An instrument designating a beneficiary, includes a beneficiary of an insurance policy or annuity, of an account designated as payable on death, of a security registered as transferable on death or

6. *Fiduciary Powers and Administration Provisions.* The fiduciary powers of the personal representative and/or trustee are defined by the testator. In the absence of an express provision in the will, the powers will normally be defined by state law. It is important to acknowledge that property held by the testator may be subject to ancillary jurisdiction of another state, and therefore the settlor/trustor (hereinafter collectively as "settlor") should provide instructions for this potential situation.

a. *Statutory Powers Provision.* In Nevada, the statutory fiduciary powers can be incorporated by reference into a will by reference in the will to NRS 163.265 to 163.410.[61] Incorporation of these powers facilitates the properly delineation of the fiduciary's powers without lengthening the size of testator's will.

b. Tax Apportionment Provision. The tax apportionment provision is of vital importance in the proper administration of the estate. In this provision, it is important to designate the payment and responsibility for tax liabilities associated with the testators's death. If the testator is married and his or her spouse has a separate estate plan, it is important to coordinate the tax provisions between the two estate plans to avoid any confusion, especially if the beneficiary(ies) are not the same in both estate plans.

c. Expense Provision. This provision will typically allocate the costs associated with expenses of administration from specific assets or other financial resource pools within the probate estate.

7. *Survivorship Provision.* The provision establishes the length of time that a beneficiary must survive in order to inherit under the terms of the testator's will. In Nevada, where the distribution of property depends on the survivorship of an individual and there is insufficient evidence that the persons died otherwise than simultaneously, each person will be treated as if they survived the other.[62] A killer of the decedent will forfeit any right of survivorship in property that, at the time of the killing, was held by the decedent and the killer as community property with right of survivorship or as joint tenants with right of survivorship.[63]

8. No-Contest Clause Provision. A no-contest clause is designed to promote the orderly administration of the estate, and avoid unnecessary expenses of litigation and/or improper conduct of a beneficiary seeking to frustrate the intent of the testator. A no-contest must be enforced by the court against a beneficiary if the beneficiary institutes a legal action which is not in good faith or engages in conduct to frustrate or defeat the testator's intent as expressed in the will.[64]

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of a pension, profit-sharing, retirement or similar benefit plan or other nonprobate transfer at death.); (NRS 132.155 (The "governing instrument" of the retirement plan determines the beneficiary).

[60] NRS 111.109(1).

[61] NRS 163.260.

[62] NRS 135.020.

[63] NRS 41B.320 (1).

[64] NRS 137.005; See companion trust statute at NRS 163.00195.

9. Definitions. Due to the fact that many jurisdictions may use terms that are synonymous with one another, it is important to define any terms that may created ambiguity or vagueness in a will. All terms should be understandable in plain English, because a layperson will likely be required to interpret them.

E. REVOCABLE AND IRREVOCABLE TRUST FUNDING

One of the most commonly encountered problems upon the death of an individual who had established a revocable or irrevocable trust is the later discovery that their trust was never funded. Unfortunately, an unfunded trust results in many of the same probate expenses that the settlor initially sought to avoid by creating the trust. In order to understand the benefits of a properly funded trust, it is essential to understand the purpose of probate.

Probate is the judicial process whereby property that is titled in the name of the deceased is transferred into the name(s) of those who are living. One of the reasons that an individual establishes a trust is to avoid this costly process and accompanying oversight of transferring assets from the deceased to the living. If a trust is established, but no assets are transferred to it during the settlor's life, then asset transfers to the trust must necessarily occur at the settlor's death. This process usually requires the same judicial process, albeit abbreviated, that the settlor initially sought to avoid with the creation of his or her trust.

1. Funding the Trusts[65]. The most commonly neglected aspect in trust planning that our office encounters with new clients is their prior failure to properly fund a trust created prior to our legal engagement. Many of these clients don't realize that they must fund or transfer assets to a trust in order to avoid the cost of transfers at their death. We spend much of our time educating our clients on the effective use of their trusts. This course, while not exhaustive, is designed to provide a step by step instruction for funding different types of assets to a trust.

a. *Bank Accounts.* Existing bank accounts are typically transferred to a trust by the completion of a new signature card. The bank will usually want a copy of the "certification of trust" or will require the settlor to file a new certification of trust by affidavit. If the settlor's account is established under an irrevocable trust, the bank will usually require a separate tax identification number for the trust. A tax identification number can be obtained at http://www.irs.gov. If the trust is a grantor trust, the tax identification number will be the social security number of the settlor. Contact each bank or other financial institution to determine the procedure it requires.

b. Credit Unions. Although most credit unions permit a member account to be transferred into a revocable trust, some credit union charters do not. If the settlor is unable to transfer their account, they should designate the trustee of their trust as the death beneficiary of their account. While it is not required by most financial institutions,

[65] Portion of sections 1c-j used by permission from Layne T. Rushforth, Esq.

the settlor may change the name on their checks to denote the name of the trust, and thereby avoid any ambiguity as to the ownership of the account.

c. Certificates of Deposit. Typically, the certificate of deposit account can be changed without incurring an early withdrawal penalty. If an early withdrawal penalty applies, the settlor should consider waiting until the CD matures before transferring it to the trust.

d. Securities. Stocks and bonds (other than bearer bonds) can be transferred to a Trust by placing them into a securities account in the name of the Trustee. If actual certificates are preferred, the settlor should do the following:

(1) endorse each certificate or sign a separate stock power transferring the stock or bond to the Trustee. Each signature must be guaranteed (not notarized) by an officer of a commercial bank. Before doing this, the settlor should verify with the issuing company or its stock transfer agent the type of signature guarantee that is required. For example, if a Gold Medallion Signature Guarantee is required, the settlor will need to go to a bank or broker that is qualified to issue that type of signature guarantee,

(2) Send, by registered mail or by an insured carrier with tracking capability, the certificate and any related stock power to the stock transfer agent, which is usually named on the certificate itself.

e. Life Insurance Policies. The Trust should be designated as the primary beneficiary of any insurance policy (unless there is a separate irrevocable life insurance trust). The settlor should contact his or her life insurance agent to see that the change is formally made. Some companies require that the original policy be returned to have the change affixed to the policy itself. Comply with each company's requirements, since a beneficiary change is usually not effective until it is accepted by the insurance company. The trust should also be the owner of any policy having a cash value, and the settlor will need to obtain a "transfer-of-ownership" or "assignment" form for each policy from the settlor's agent(s).

f. Retirement Plans; Other Death Benefits. If the settlor wants the survivor to benefit from IRA's, 401(k)'s, 403(b)'s, KEOGH's, tax-deferred annuities, pension plans, simplified employee pension plans, and other retirement plans, the account holder's spouse is usually designated as the primary beneficiary, and the trust is named as contingent beneficiary; however, this may prematurely trigger income taxes after the survivor's death. For those who want the trust's beneficiaries (and not a spouse) to receive those benefits, the trust can be designated as the primary beneficiary of such benefits, but, again, this may not be the optimal income tax planning. If one or more qualified charities are designated as the beneficiary of retirement funds and tax-deferred annuities, such charities will receive the full amount, undiminished by federal income or estate taxes. The settlor needs to consult with an accountant or attorney to discuss all of those options. Each bank, broker, or other institution has its own beneficiary designation

forms, which the settlor should obtain, complete, and submit once the settlor decides how he or she wants to proceed.

g. *Real Property*. A deed must be prepared and recorded for each parcel of real property and for each trust deed secured by real property. The type of deed used to transfer title to the Trustee should be the same type of deed that was used to give the settlor title. In other words, if the property was transferred to the settlor by a "Warranty Deed" or "Grant, Bargain, Sale Deed," then the settlor should NOT use a "Quitclaim Deed."

h. *U.S. Savings Bonds*. Savings bonds are transferred by completing the appropriate form (currently Form PD 1851), which can be obtained from http://www.treasurydirect.gov/NC/FoRMSHome?site=indiv&FormType=sbf#Reissue Forms. Reissuance of U.S. Savings Bonds may not be transferred to some trusts without triggering income tax liability on the accrued income, do not transfer bonds without first talking to the settlor's/trustor's accountant. See Tax Liability Notice on Form PD 1851.

i. *Business Interests.* Business interests in closely held corporations, general and limited partnerships, and limited-liability companies are transferred subject to the provisions of the law and of all governing documents, such as articles of incorporation, partnership agreements, bylaws, articles of organization and operating agreements, management contracts, and buy-sell agreements. Closely held corporations are transferred by surrendering the existing stock certificate(s) and having one or more new certificates issued in the name of the Trust. Partnerships and other businesses owned solely by the Settlors usually only require an "assignment" of the interest, and sometimes the trust schedule is sufficient. In any event, all relevant business documents must be reviewed to make sure that all formal requirements are satisfied and that transfer restrictions are not violated. Write the company or company's representative in charge of ownership transfers and ask them to send to the settlor (1) the company's procedures and requirements for transferring the ownership to the trustee(s) of a trust and (2) any required change-of-ownership form that needs to be submitted. The assets of a business should belong to the business entity and not to the trust (except, perhaps, if the business is operated as a sole proprietorship in the name of an individual).

j. *Vehicles, Boats, Etc.* A written "assignment" may be sufficient for vehicles, boats, and mobile homes. The author's schedules are usually prepared in assignment form. To be sure the transfer is officially recognized, vehicles owned free of liens should be transferred by completing the reverse side of the certificate of title and by sending it with the appropriate fee to the department which issues title certificates for the type of vehicle involved. In Nevada, cars and trucks are registered through DMV, Registration Division, 555 Wright Way, Carson City, NV 89117 (www.dmvnv.com), boats are registered through the Department of Wildlife, and mobile homes are registered through the Department of Manufactured Housing. The settlor should consult each agency for their current policies regarding the documents and fees required to make an ownership transfer to a trust. For assets registered in states other than Nevada, the settlor should consult out-of-state counsel. Before the settlor officially changes the title to any

vehicle, boat, or mobile home, it is recommended that the settlor contact the insurance company that insures the property to determine how a transfer to the trust will affect the insurance policy.

2. *Using Irrevocable Trusts to Purchase Life Insurance.* A comprehensive estate plan will provide for the well being of the settlor and his or her spouse and dependents in the event of death or long-term incapacity or illness. With respect to life insurance, Section 2042(2) of the Internal Revenue Code provides that the decedent's gross estate shall include the full value of insurance proceeds on the life of the decedent if (1) the policy proceeds are payable to the estate of the insured or (2) the proceeds of the policy are paid to other beneficiaries and the decedent possessed any of the incidents of ownership on that policy.[66] Therefore, the estate taxation of life insurance is based upon ownership of the policy and to whom the proceeds will be paid.

For purposes of Section 2042, incidents of ownership means any right to the economic benefits of the policy, including "the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, or to pledge the policy for a loan."[67] A reversionary interest in a life insurance policy is also considered an incident of ownership.[68]

In addition, estate planners should recognize that the value of certain transfers made within three years of death will be included in the decedent's gross estate if the property would have been otherwise included in the gross estate.[69] Specifically, proceeds of life insurance, if transferred within three years from the decedent's date of death, will be included in the decedent's gross estate if they would have been included under Section 2042.[70]

Because of the substantial estate tax effects that could arise when dealing with life insurance, it is important to ensure that any life insurance professional consulted for estate planning purposes is familiar with estate tax issues. One area in which insurance professionals should be knowledgeable is the area of irrevocable life insurance trusts (ILIT). An ILIT provides an alternative means of maximizing the amount of proceeds payable under a life insurance policy. A properly formed ILIT can prevent inclusion of those proceeds in the gross estate of the settlor. ILITs can also provide the security of knowing that life insurance proceeds will not be distributed directly to a beneficiary upon a client's death, but that the funds will be placed in trust for the benefit of the decedent's beneficiaries.

As indicated above, due to the correlation between the ownership of insurance policies and their taxation, a properly formed ILIT can provide relief because the trustee of the ILIT is the owner of the life insurance policy, not the settlor. ILITs also provide

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[66] I.R.C. § 2042.
[67] Treas. Reg. § 20.2042-1(c)(2)
[68] *Id.* § 20.2042-1(c)(3)
[69] Treas. Reg. § 2035(a).
[70] I.R.C. § 2035(a).

clients with the ability to reduce the size of their taxable estate, while still maximizing the value of the death benefit under the insurance policy.

Specifically, the insured is able to make gifts each year to the trust, that fall under the annual gift tax exclusion, for the payment of premiums by the trustee of the ILIT.[71] By so doing, the insured is able to fund the trust while reducing his or her taxable estate.[72]

Of course, an ILIT is not immune from potential taxation pitfalls. For example, if the insured or the insured's spouse or other beneficiaries serve as trustee or co-trustee and retain a power of appointment over the policy, the proceeds may be subject to inclusion in the gross estate.[73] Furthermore, if a beneficiary holds a general power of appointment, such as granting for the removal of the trustee, the insurance proceeds may be included in the beneficiary's gross estate.[74]

Many attorneys and insurance agents mistakenly advise their clients that the proceeds from an ILIT are used to directly pay the settlor's/trustor's estate tax. Insurance proceeds may be used to purchase assets from the gross estate upon a settlor's death; which funds may then be used by the trustee or executor of the gross estate to pay the federal estate tax. If the trustee of the ILIT paid the estate tax directly to the IRS, the ILIT would likely be included in the gross estate of the settlor.

When selecting a consulting insurance agent, it is critical to choose an agent with knowledge of an ILIT. Additionally, whether an agent is independent or an employee of a particular agency may be important, as some agents may give their advice out of a desire or need to meet the sales goals of the agent's company. Selecting an independent agent, who is not tied to a particular company, or that company's goals, may help ensure that the agent provides sound advice and offers products uniquely crafted to fit specific needs of the client.

When selecting an agent, certifications may also help weed out agents lacking knowledge of taxation issues. Some insurance agent organizations require their members to obtain certifications, such as the Chartered Life Underwriter designation, which are usually granted after coursework and/or successful passage of examinations related to insurance information, economics, and accounting issues.[75]

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[71] WILLIAM W. BROWN, TRUSTS 7-18 (2004).
[72] *Id.*
[73] I.R.C. § 2041(2). If a spouse of other beneficiary serves as a trustee or co-trustee, any powers granted to the trustee must be limited to the ascertainable stands are set forth in the Treasury Regulations. Treas. Reg. §§ 25.2511-1(g)(2), 25.2514-1(c)(2), 20.2041-1(c)(2); SEBASTIAN V. GRASSI, JR., A PRACTICAL GUIDE TO DRAFTING IRREVOCABLE LIFE INSURANCE TRUSTS 90 (2d ed. 2007). This can be accomplished through using a clause limiting the powers of the trustee. SEBASTIAN V. GRASSI, JR., A PRACTICAL GUIDE TO DRAFTING IRREVOCABLE LIFE INSURANCE TRUSTS 90 (2d ed. 2007); *see* Upjohn v. United States, 72-2 U.S.T.C. ¶ 12,888 (W.D. Mich. 1972).
[74] I.R.C. § 2041(2).
[75] EDWARD F. KOREN, ESTATE AND PERSONAL FINANCIAL PLANNING 7-5 (West Group 1999).