

**ESTATE PLANNING GUIDE**

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## BASIC ESTATE PLANNING

### I. GOALS OF AN ESTATE PLAN

- A. **Lifetime Support.** To provide for yourself during the balance of your lifetime, especially during your retirement years.
- B. **Provide for Spouse.** To provide for the support and security of your surviving spouse/partner, if one.
- C. **Provide for Children.** To provide for the support and security of minor children, as well as protect them.
- D. **Provide for Disabled Beneficiary.** To provide for disabled minor beneficiary as well as legally incapacitated adult beneficiary.
- E. **Address Disposition in Blended Family Situations.** To provide for spouse and children or other beneficiaries from different relationships.
- F. **Education.** Education of children, grandchildren, or other beneficiaries.
- G. **Business Succession Plan.** To protect a family business or to plan for its succession.
- H. **Business Exit Strategy.** To minimize income taxes and maximize asset protection when selling a business.
- I. **Asset Disposition.** To assure that assets are distributed as you desire by protecting testamentary intent.
- J. **Philanthropy.** To make charitable gifts and to encourage family members to engage in philanthropy.
- K. **Minimize Death Taxes.** To minimize death taxes, including the federal estate tax, state estate tax (if any) and state inheritance taxes (if any). Estate taxes are governmental assessments on your right to pass ownership of your assets at death. Inheritance taxes are state level assessments on a beneficiary's acquisition of property upon the death of another.
- L. **Minimize Income Taxes.** Both income and death taxes affect estate planning. Estate plans can be structured to consider minimizing income taxes, as well as estate taxes, in conjunction with your objectives.
- M. **Minimize Administration Expenses.** To minimize or avoid administration ("probate") expenses.
- N. **Asset Protection.** To provide asset protection for self, spouse, and beneficiaries.
- O. **Coordinate with Family Values.** An estate plan can be structured to coordinate with family values by incorporating strategies that consider such values.
- P. **Probate Avoidance.** To minimize and avoid administration and probate expenses.

- Q. **Address Possible Incapacity.** To protect yourself and spouse, if you have one, from temporary or permanent incapacity.

## II. DETERRENDS TO ESTABLISHING AN EFFECTIVE ESTATE PLAN

- A. **Time Consumption.** Effective estate planning requires consumption of time.
- B. **Death, Family, Money, Taxes.** The elements of estate planning involve very personal issues that can be difficult to address.
- C. **Costs.** Estate planning is an investment.
- D. **Some Results Are Intangible.**
- E. **Choosing Guardian, Personal Representative and Trustee.** Making choices about who will care for your children and handle your finances when you are not here can be very difficult.

## III. WHAT HAPPENS WITHOUT AN ESTATE PLAN?

- A. Statutory Will.
1. If an individual owning property in his/her own name (including an interest in a tenancy in common) dies without a will, state statutes provide a will. For example, in Nebraska, if Harold dies without a will and is survived by a wife and two children, following the payment of all of the debts of Harold's estate, his wife gets \$100,000 plus one-half of the assets above \$100,000. In addition, the spouse would be allowed an additional \$7,500 from the homestead allowance, \$5,000 for exempt property and a "reasonable amount" during the administration of the estate to provide for the surviving spouse's maintenance during that period; the children divide the remaining balance.
  2. Statutory wills result in the court system, instead of you, taking care of such important functions as designating a personal representative for the estate, designating a guardian for minor children, protecting a family business, etc.
  3. Requiring a portion of the estate to pass to the children when a spouse is surviving can be extremely detrimental to the financial security of the spouse, especially if the estate is not large. What if the surviving spouse needs the children's share to support him or her? Alternatively, what if you and your spouse have agreed that more than the intestate share will pass to your children?
  4. A statutory will passes assets outright to minor children. A cumbersome and expensive conservatorship must be established to hold such assets. Sale of assets of the conservatorship, especially real estate, can be expensive and difficult. Children receive the assets outright at the age of 19.
- B. Lack of proper planning can result in assets being subject to creditors of beneficiaries in instances where such exposure could be avoided.

- C. Lack of proper planning can result in death taxes being payable at the first spouse's death in large estates because of failure to take advantage of the unlimited marital deduction.
- D. Estate settlement costs may eat up a significant portion of the estate.

#### IV. **WHEN TO REVIEW YOUR ESTATE PLAN**

- A. Upon a move to another state.
- B. A significant change in assets including receipt of an inheritance or significant appreciation or depreciation in the market value of your assets, including your residence.
- C. A change in family situation including marriage, divorce, birth of a child or death of a spouse or child.
- D. Retirement.
- E. Law changes.
- F. Diagnosis of a terminal illness or incurring an extended illness or disability of yourself or a beneficiary.
- G. Changes in your desired beneficiaries.
- H. At least every three years. On an annual basis, the basic structure and appointments should be considered.

#### V. **FORMS OF PROPERTY OWNERSHIP**

- A. Sole Ownership. Title to an asset is held in an individual's name only. Ownership is passed at death by will or statute through a probate proceeding.
- B. Joint Ownership. Title to an asset is held in the names of two or more persons as joint tenants with rights of survivorship (JTWROS). Each joint tenant, normally, owns an undivided interest in the whole asset. At the death of a joint tenant, ownership of the whole asset passes outright to the survivor(s).
- C. Tenancy-In-Common. Title to an asset is held in names of two or more persons who each hold an undivided interest without right of survivorship. When a co-owner dies, his or her interest in the asset must be passed by will or statute through a probate proceeding.
- D. Tenancy by the Entirety. This is a form of joint ownership by husband and wife available in some states whereby property rights cannot be modified by one spouse without the consent of the other.
- E. Contractual Designations. Economic benefits of an asset pass at death by virtue of owner's contractual rights to designate a beneficiary. Examples are: life insurance, annuities and retirement plan accounts providing for a designated beneficiary. These assets will pass to the beneficiary of record. When you name your estate as

the beneficiary of these assets, the asset will be subject to probate and detrimental tax consequences may result.

- F. Custodian for a Minor (UGMA or UTMA). An adult holds property in a restricted account for the benefit of a minor. When the minor reaches a certain statutory age, 21 in Nebraska, he or she is entitled to the assets that have been held for his or her benefit.
- G. Trust. A trustee of a trust holds legal title for the beneficiaries, who have equitable title. Assets held in trust are passed outside of probate.
- H. Payable on Death (POD) or Transferable on Death (TOD) Accounts. These accounts, are a hybrid of contractual designations and trust accounts. The account is titled in the name of the account owner with any assets remaining at the account owner's death payable to a named beneficiary.
- I. Transfer on Death (TOD). Some states allow owners of real estate to use a transfer on death designation in a deed whereby the interest in real property will pass upon death of the owner.
- J. Most Common Ownership Error. The most common error is the titling of assets in a manner that results in a tenancy in common rather than in a joint tenancy with rights of survivorship. This is common in home titling but also happens with other assets. Often, the owners are unaware of the error. Although the error is easily resolved if recognized prior to death, failure to recognize the error can result in costly probate proceedings to distribute the assets through will or statute.

## **VI. USE OF JOINT OWNERSHIP IN LIEU OF A WILL**

- A. Passing assets by joint tenancy results in a probate free transfer to the surviving joint tenant(s).
- B. Disadvantages.
  - 1. What happens when the surviving joint tenant dies? If he or she has no will, you're back to a statutory will situation. You have no control as to what ultimately happens to the asset. If the survivor has a will, a probate proceeding is still required. If the survivor remarries, the asset may be available to the new spouse.
  - 2. What happens if there is a simultaneous death? By statute, ½ of the joint assets will be probated and distributed through each decedent's estate as if the other died first. The result is the cost and inconvenience of two simultaneous probate proceedings.
  - 3. By placing assets in joint tenancy, you run the risk that the asset, or at least the joint tenant's interest in the asset, will become subject to the creditors of your joint tenant.
  - 4. Joint owner may predecease you leaving you with a probate asset with no clear beneficiary.

5. Joint tenancy can result in un-intended division if various beneficiary designations are used with respect to various heirs. For example, assume decedent owned four annuities during life and named one of each of her four children as a beneficiary of one annuity. At the time of designation, all annuities had the same value. At the time of death, two were smaller due to withdrawals taken during life.

C. Joint Ownership with Children and Non-spouses.

1. With limited exceptions, joint tenancies can be severed at any time by any joint tenant, or his or her creditors. This means each joint tenant gets his or her proportionate share of the asset, or a forced sale must occur.
2. Joint tenancy with your children can result in assets going to the joint tenant now, or being subject to the child's debts and liabilities.
3. Joint tenancy with children or others creates a question as to who is legally responsible for reporting the income from such property.

**VII. SIMPLE WILL**

- A. "Simple will" is a term for a will when no trusts are created or utilized in the estate plan.

- B. Simple wills suffice in small estates with no minor children or complications. (Estates under \$50,000 can be passed by affidavit and without probate.)

C. Basic Elements of a Will.

1. Identification of your heirs and beneficiaries.
2. Designation of a personal representative.
3. Designation of a guardian, and successors, for minor children.
4. Disposition of your assets to spouse, children, grandchildren, other relatives and friends and/or charity.
5. Special provisions regarding personal effects and home.

D. Legal Requirements for Execution of a Will.

1. Maker must be at least 18 years of age (if married can be younger than 18) and of sound mind.
2. Must be in writing and signed by maker (another individual may sign maker's name if in maker's presence and by maker's direction).
3. Must be signed by at least two witnesses who either see the maker sign or are told by the maker that the signature is his or hers. Witnesses should be independent and should not be a beneficiary under the will.

4. Can have a self-proving affidavit.
5. The above are requirements of the Nebraska statutes. Normally, if you comply with the requirements of the state in which the will is signed, it will be recognized by other states.
6. Holographic (handwritten wills) are legal in Nebraska. A handwritten will complying with the holographic wills is likely to be more effective than poor use of a computer form. However, other states, such as Iowa, do not recognize holographic wills meaning that if an Iowa resident executes a holographic will in Iowa, it will not be honored and the intestacy statutes will govern.
7. Electronic wills are being considered but are not currently available in any state.

E. Other Elements Involved In Making a Will.

1. Survivorship provisions. You may condition a bequest or devise on that person surviving you for a specific period of time - say six months. These clauses will delay the availability of assets to the heir. You can provide who shall be presumed the survivor in the event of a joint death, if you want something other than the presumption provided by statute, to prevent simultaneous estate administrations.
2. You can specify who bears the burden of death taxes.
3. If liquidity is a problem, you can specify the method you desire for your estate to raise funds to pay death taxes, claims and administration expenses.
4. You can specify administrative provisions for personal representatives.
5. You can eliminate the necessity of a bond for fiduciaries, including personal representatives, guardians and trustees.
6. Funeral and burial arrangements do not belong in your will. The will has no legal status until approved by your local county court and the appointment of a personal representative is completed. You will normally be buried before that is accomplished. Make your wishes known to your family.

F. Selecting a Personal Representative.

1. A personal representative takes possession of your assets, administers them, collects income, pays legal creditors and claims, pays taxes and administration expenses and distributes the balance of the estate as you specify in your will to your heirs and beneficiaries.
2. Being a personal representative can be time consuming and emotionally draining.
3. You should provide for successors in the event your first choice dies, declines or is refused by the court.

4. Possible Choices.

- a. A spouse. Do you want to designate a spouse? Is spouse that of first marriage and is the parent of your children? Is the spouse willing and able to take on the responsibility.
- b. One or more of your children. Does the child have the time or experience? Will it cause friction with the surviving spouse or between your children?
- c. Another individual, especially one experienced in business.
- d. Your attorney or accountant. Naming your attorney or accountant is generally a poor choice. There are inherent conflicts of interest and an absence of cross-checks.
- e. A bank trust department or other corporate trustee. A corporate trustee is a conservative choice, however, fees charged may be cost prohibitive. In addition, some corporate trustees limit investment options to “house” investments.
- f. One possibility is to name co Personal Representatives. You can name a trusted family member to act jointly with a professional personal representative.

G. Guardianship/Conservatorship for Minors.

1. Applies to unmarried persons under age 19 (in Nebraska).
2. Can separate guardian of person and guardian of property (commonly referred to as “conservator”).
3. A guardianship/conservatorship provision in your will is really only a nomination and it must be accepted and approved by the county court, which normally complies with the nomination. A minor who is age 14 or over does have a significant say in the selection process.
4. Guardianships should take into account geographic location, the child's religious upbringing, emotional needs and preferences and the guardian's willingness to act. Successors should be specified in the event of guardian's death, unwillingness to accept appointment, etc.
5. When naming a married couple as guardian, consider whether you are naming co-guardians. What if the couple divorces? Are you really intending to name one or the other as guardian rather than both as co-guardians.
6. Conservatorships are far less preferable to trust arrangements because:
  - a. They terminate at age 19 and all remaining assets are then distributed to the child. A trust allows holding the assets to a more mature age.

- b. The conservator is usually inexperienced at managing property.
- c. Assets are sometimes abused by financially pressed conservators. Always consider the possibility of life changes for a potential conservator. For example, consider the possibility of a substance abuse or gambling problem.
- d. Investment and usage of assets are regulated and restricted by statute and court.
- e. Conservatorship funds may be used for the minors "support". What does this mean? Can funds be used for college and other educational expenses?

## VIII. USING TRUSTS IN ESTATE PLANNING

### A. Trusts, Generally.

- 1. A trust is an arrangement whereby a party called a trustee holds, invests, administers and distributes property for the benefit of or to the creator of the trust (settlor), his or her spouse, his or her children and descendants, or other beneficiaries. The trustee can be a bank trust department, an individual, more than one individual or a combination.
- 2. Two Broad Types of Trusts:
  - a. A Testamentary Trust is one set up in your will. Your will specifies all the terms of the trust. It cannot come into existence until after your death. If your will fails, the testamentary trust fails. This type of trust requires supervision and approval by the county court and can be expensive.
  - b. An Inter Vivos Trust (between living persons) is established through a separate trust document. The trust comes into existence immediately and is created outside of the terms of your will.

### B. Some Applications of Living Trusts:

- 1. Trusts can be used for purposes of privacy.
- 2. Trusts can be used to help identify separate assets.
- 3. Trusts have the best potential to maximize use of estate tax exemptions and generation skipping tax exemptions.
- 4. A trust can be used to hold your assets during your lifetime to help protect your assets should you become disabled or mentally incompetent. It is highly preferable to a legal conservatorship. A revocable trust will not protect the settlor from his or her creditors, however, there has recently been significant attempts by various state legislatures to erode this limitations of the law in this area.

5. A trust is the best way to protect and conserve the estate for a surviving spouse, if one, and ultimately, for children or other heirs. A trust provides the spouse and/or children/other heirs with investment guidance and administrative assistance. The ultimate heirs are protected from mismanagement of the estate assets, from a new spouse for your surviving spouse, from creditors' claims (including personal injury type claimants), disability or incompetence, relatives, salesmen, additional marriages, etc.
6. Trusts are the best way of holding property for minor children. You can control the age or ages at which they receive the property outright. You can specify how the property is to be invested and how it is to be used for the minor. There is no expensive and restricted control by the courts and reports are available only to beneficiaries and their guardians. Trusts may establish criteria that children must meet to receive distributions such as the attainment of a college degree or other milestones that can be incentivized through distribution provisions.
7. Trusts can be used to protect other relatives or friends during their lives, with any remaining assets distributed as you wish. For example, if you want to protect your mother, you can set up a trust for her support, to the extent needed, for her entire life. When she dies, any assets remaining in the trust go to the persons you designate. If you give the assets outright to your mother, she will then control where they go at her death.
8. Trusts (revocable) are the best way to avoid probate.
9. Trusts are usually coupled with what is called a "pour over will". Such a will specifies that at your death a part or all of your assets pass to a trust set up by you during your lifetime.
10. Some types of trusts can be used for purposes of asset protection.

C. Avoiding Probate.

1. Probate is a legal procedure conducted through the county court (in Nebraska). One purpose of probate is to assure the orderly passage of title to assets that are subject to probate. A frequently cited reason for probate is that of assuring creditors' claims and death taxes get paid. Often, the cited purposes of probate can usually be accomplished without probate.
2. Disadvantages of Probate.
  - a. Cost.
  - b. Delay.
  - c. Public proceeding.
3. Methods to Avoid Probate.
  - a. Joint tenancy.

- b. Trusts.
- c. Beneficiary designations.

## IX. TAX PLANNING

### A. Reducing Estate Taxes.

1. Federal estate taxes are only a factor in estates larger than the exemption equivalent to the applicable credit. Currently, that amount is \$10,000,000 (adjusted for inflation) per individual (\$20,000,000 combined for a married couple). For many, the \$10,000,000 exemption creates flexibility to plan for desired asset disposition rather than structuring one's estate to avoid estate taxes. To the extent a decedent does not use the entirety of the decedent's exemption, unused exemption may be transferred to the surviving spouse. Many commentators have expressed that the "portable exemption" ends the need for credit shelter trust planning; however, that is shortsighted in that the transferred exemption only works if the spouse is ultimately able to use it, which will not be the case if the spouse remarries and the new spouse dies first. Additionally, many settlers want to ensure that assets will ultimately transfer to children or other beneficiaries. The ported exemption does not increase in value while assets held in a credit shelter trust can grow to any amount and avoid federal estate tax (which does have a possible trade-off with income tax basis).
2. Nebraska Estate Tax. Nebraska no longer imposes a state level estate tax; however, Nebraska does impose an inheritance tax. Various states have some types of death tax.
3. Determining Your Gross Estate for Federal Estate Tax Purposes.
  - a. Gross estate includes the fair market value of all assets owned by you as of the date of your death including the face value of life insurance if you retain sufficient incidents of ownership at your death.
  - b. Includes property you transferred during your life but in which you retained an interest. Exercise care in lifetime gifting to avoid assets being brought back into your estate via various "string provisions" contained in the Internal Revenue Code.
  - c. Retirement benefits.
  - d. Jointly held property.
  - e. Determination of your gross estate requires use of fair market value.
  - f. Most people underestimate the size of their estate. Be complete and realistic.

4. Federal Estate Tax Deductions.
  - a. 100% unlimited marital deduction for property passing outright to the spouse or in a specific type of trust for the benefit of the spouse for life.
  - b. The Applicable Credit results in exemption of property. A married couple has two exemptions, one for each spouse. Effective estate planning can currently pass \$22,800,000 of assets from a married couple to their children or other heirs, estate tax free. An unmarried person can pass \$11,400,000 estate tax free to his or her heirs.
  - c. The charitable deduction applies to gifts to charities, including public charities, private foundations or charitable remainder trusts and charitable lead trusts.
  - d. Claims, mortgages, and administrative expenses are deducted from your gross estate to determine your taxable estate.
5. An improperly planned estate can result in unnecessary estate tax and even assets being subject to estate taxes in both spouses' estates.
6. A properly planned estate protects from any sequence of deaths. Those with spouses should consider an asset structure and estate plan that uses the applicable credit of each spouse.

B. Income Tax Planning

1. A key consideration in planning around income taxes in estates is basis.
2. Basis is established by the amount paid for an asset plus any adjustments thereto. Example: Mickey Marsow purchases a share of Berkshire Hathaway B stock for \$3,000. If Mickey sells that stock for \$5,000, Mickey recognizes a taxable capital gain of \$2,000.
3. There are detailed rules that apply to basis planning as part of the estate planning process. Generally, it is important to know that when an individual transfers an asset by gift during life, the donee will have a "transferred basis". In the foregoing example, if Mickey transfers the Berkshire B stock to his daughter, Maria, during his life, she will have a basis of \$3,000.
4. Assets owned at the time of death get a stepped up basis. In the case of Mickey, when he transfers his Berkshire B stock during life, Maria receives the stock with a basis that is equal to what Mickey paid for the stock. If instead, Mickey transfers the stock to Maria upon death, Maria's basis will be equal to the value of the Berkshire B on the day of Mickey's death.
5. Other factors in tax planning related to estate plan include the current limitations on state and local tax deductions. Trusts and various other strategies can be used in a manner that results in improved deductibility of state and local taxes.

6. Another strategy to be considered is whether assets can be placed in trust with a situs in another state in a manner that will result in reducing or avoiding high state income taxes.

## X. **DISCLAIMER PLANNING**

- A. Disclaimer Planning is an estate planning method that has become due to the constantly changing estate tax structure of the past 15 years.
- B. A Disclaimer Plan is one that leaves much of the decision making to survivors after your death.
- C. One example of disclaimer planning is a plan whereby you designate a spouse or other as beneficiary of all your assets. A trust is named contingent beneficiary. After your death, if it makes sense, your spouse or other beneficiary can disclaim all or part of his or her inheritance, in which your trust is the beneficiary of your assets. The trust might provide for children, nieces and nephews, charity, etc.
- D. Unique considerations:
  1. Remarriage of a surviving spouse. Assets may become available to new spouse.
  2. Inherited assets.
  3. Family businesses.

## XI. **TYPES OF TRUSTS**

- A. Irrevocable Life Insurance Trust.
- B. Special Needs Trust.
- C. Qualified Terminal Interest Property (QTIP) Trust.
- D. Trust for Retirement Plan Benefits.
- E. Grantor Retained Annuity Trust – “GRAT”.
- F. Incentive Trusts.
- G. Dynasty Trusts.
- H. Spousal Access Trusts (SLATs).
- I. Asset Protection Trusts.
- J. Intentionally Defective Grantor Trusts (IDGT).
- K. Beneficiary Defective Inheritor Trust (BDIT)
- L. There are numerous other trust types and variations of those mentioned here.

## **XII. RETIREMENT PLANS**

- A. An estate plan should include a review of your retirement funds.
- B. Taxes on retirement plans include:
  - 1. Income taxes.
  - 2. Estate taxes.
  - 3. Penalty taxes - early withdrawal and failure to take minimum required distributions.
- C. Minimum distributions are required at age 72½. Distributions should be planned carefully. Failure to take required minimum distributions results in significant penalties on the amount that was not distributed.
- D. Beneficiaries of retirement funds are best directed to:
  - 1. Spouse and/or adult children.
  - 2. Charity.
  - 3. Trust Designed to be the beneficiary of qualified retirement plan or IRA.
- E. A spouse beneficiary may roll over account and treat as his/her own.
- F. The US Supreme Court has ruled that inherited IRAs do not have asset protection for beneficiaries other than spouses. Some states have passed laws providing protection to inherited IRAs for non-spouse heirs. In states not providing such protection, IRA trusts offer an opportunity to create asset protection for beneficiaries.

## **XIII. LIFE INSURANCE IN YOUR ESTATE PLAN**

- A. Face value of policies owned by decedent is included in estate for federal estate tax purposes.
- B. Life Insurance serves a variety of purposes.
  - 1. Pay taxes and expenses.
  - 2. Fund Buy-Sell Agreements for the purchase of a deceased's interest in a business.
  - 3. Estate liquidity.
  - 4. Fund trusts for survivors.
- C. Irrevocable Life Insurance Trusts move insurance proceeds outside of your estate.

- D. Life insurance *transferred* within 3 years of death is included in estate along with policies in which the decedent retained “incidents of ownership” including the right to name different beneficiaries, withdraw cash value etc.

#### **XIV. LIFETIME GIFTING**

- A. You can make gifts to any donee of up to \$15,000 per year. You can make “taxable” gifts of up to \$10,000,000 (adjusted for inflation) during your life that do not result in payment of tax because you can use your “unified” exemption equivalent during life rather than at death.
- B. There is an unlimited exclusion for certain tuition and medical payments made on behalf of another.
- C. 529 Plans. Nebraska has a state level tax deduction for contributions to a 529 education plan. To qualify, the owner must be the taxpayer.
- D. UGMA/UTMA accounts for minors. Kiddie tax (unearned income such as interest and investment income taxed at parents’ tax rate) to age 18 for dependents, 23 if dependent is a full-time student.
- E. ABLE accounts.
- F. In asset selection, consider reduction of estate now vs. step-up in basis of assets held at death.
- G. There are a wide variety of gifting strategies. Appropriate strategy depends on your asset structure and desires.
- H. “Leveraged” gifting can significantly reduce estate and resulting taxes.
- I. One technique to accomplish leveraged gifting is the use of trusts.
- J. Another approach to gifting is to set up a business entity to own property and transfer business interests to heirs. Valuation discounts are applied.
- K. Entities used for discounting are “C” Corps, “S” Corps, Family Limited Partnerships (FLPs) and Limited Liability Companies (LLCs). Each arrangement has its pros and cons. The correct tool for a particular situation is fact-dependent.
- L. Is gifting land in the path of development a good idea? No step-up in basis vs. estate tax cost of inclusion. Don’t assume. Do the math.

#### **XV. FAMILY LIMITED PARTNERSHIPS (FLPS) AND FAMILY LIMITED LIABILITY COMPANIES (FLLCS)**

- A. Settlor transfers asset to FLP or FLLC in exchange for general partnership and limited partnership interests. Limited partnership interests are gifted using valuation discounts discussed below.
- B. An uncertain area under current case law. The IRS has been successfully challenging FLPs and FLLCs.

- C. Discounting.
  - 1. Minority Interests (lack of control).
  - 2. Lack of Marketability.
  - 3. Blockage Discounts.
- D. Advantages.
  - 1. Control of assets.
  - 2. Valuation discount opportunities.
  - 3. Reduction of transfer taxes.
  - 4. Ease of transfers.
  - 5. Creditor protection.
- E. Disadvantages.
  - 1. Set up costs.
  - 2. IRS requirement of legitimate business purpose.
  - 3. Current target area for IRS.
  - 4. No step-up in basis of the partnership interest itself.
- F. Use FLPs and FLLCs effectively.
  - 1. Don't overfund the FLP or FLLC.
  - 2. Keep your FLP formal.
  - 3. Give up sufficient control.
  - 4. Do it now versus on death bed.

**XVI. IRREVOCABLE LIFE INSURANCE TRUST - "CRUMMEY TRUST"**

- A. Life insurance is held in an irrevocable trust.
- B. The trust owns an insurance policy on the life of settlor of trust.
- C. Premiums are paid by the trust from gifts made to trust by settlor. If all necessary requirements met, gifts to trust will qualify for the annual exclusion from gift tax.
- D. Insurance proceeds are not included in settlor's estate.
- E. Funds may be held in trust as long as settlor specifies.

## **XVII. INTENTIONALLY DEFECTIVE GRANTOR TRUST**

Completed gifts are made to an irrevocable trust that is intentionally drafted to be classified as a grantor trust for income tax purposes. The structure increases leverage of a gift because settlor pays all income taxes, but assets are out of settlor's estate for estate tax purposes.

## **XVIII. GENERATION SKIPPING TRANSFER TAX**

- A. Transfers to 3<sup>rd</sup> generation are subject to second, separate level of transfer tax.
- B. There is an exclusion from this tax (presently equal to the applicable credit), although regular gift or estate tax will continue to apply.
- C. Great flexibility concerning distributions from a GST trust.

## **XIX. SPECIAL NEEDS TRUST**

- A. This is a type of trust used to provide for a disabled individual eligible for governmental assistance.
- B. Such trusts are designed to avoid disqualifying the disabled individual from governmental assistance.

## **XX. CHARITABLE GIVING**

- A. During Life.
  - 1. A direct donation is the simplest and least expensive charitable gift.
  - 2. There are a wide variety of trust arrangements that can be used for charitable gifting. Assets can be transferred in a way that allows the donor or donor's relatives to receive income for a specified period of time with the remainder to charity, or vice versa. There are many alternatives to this type of planning.
  - 3. Charitable giving can save capital gains taxes by the transfer of appreciated property, which allows the donor a deduction for fair market value. Charitable giving during life also removes the gifted property from your gross estate subject to federal estate tax.
- B. At Death.
  - 1. A charitable gift may be made by a specific bequest in a will or trust. If there is no estate tax value to the gift, trust can provide that trustee can make charitable gifts out of income. For example, the trust can provide that ten percent (or a specific dollar amount) will be paid to charity for a period of years.
  - 2. A charitable gift may be made by a beneficiary designation.

3. A charitable gift taking effect at death is fully deductible from the decedent's estate. For charitably inclined individuals not subject to the estate tax under the current exemptions, charitable gifts from income may be a good approach.
- C. Consider current play between ordinary income tax rates and capital gains rates.

## **XXI. AGRICULTURAL ISSUES**

- A. Development potential – Gift now or own at death?
- B. Special Use Valuation.
1. Decedent was a U.S. Resident.
  2. Property passes to a qualified heir.
  3. Property used for a qualified use.
  4. Decedent materially participated in use for required period.
  5. Adjusted value of property is at least 50% of gross estate.
  6. At least 25% of the adjusted value of gross estate must be qualified real property.
- C. Special Use Valuation Farm Method.
- Average annual gross cash rental for comparable land used for farming purposes less average annual real estate taxes for comparable land divided by average annual effective interest rate for all new farm credit loans.
- D. Special Use Valuation Recapture.
1. Tax benefits are recaptured if sold or use discontinued within 10 years.
  2. If recapture applies, seller likely has the cash.
- E. Children Farming? Special Provisions.
- F. Installment payments of Estate Tax.
1. If more than 35% of adjusted gross estate is a farm, then election may be deferred for five years (paying interest only) and then in equal installments over 10 years.
  2. Disposition of the farm accelerates the payments.
- G. Agricultural – Miscellaneous.
1. Conveyance of development rights to property to city considered in valuation.

2. Maintenance of five beehives is not considered farm use.

## **XXII. POWERS OF ATTORNEY**

### **A. Generally.**

1. A power of attorney is a written document whereby the principal empowers another person to act as his or her attorney-in-fact.
2. A power of attorney can grant authority to the attorney-in-fact to do anything the principal can do except execute or revoke a will and execute a right to die will, also known as a "living will" or "advance directive".
3. A general power of attorney gives the attorney-in-fact all of the powers possessed by the principal.
4. A special power of attorney limits the powers to those powers specifically set forth in the document.
5. In most states, certain powers must be delineated. For example, in Nebraska, if the agent can change a beneficiary designation, that power must be specifically granted in the power of attorney document.

B. A durable power of attorney survives the principal's incompetency.

C. A springing power of attorney becomes effective only upon principal becoming incompetent.

D. Careful consideration should be given to who should be appointed as attorney-in-fact.

1. Consider naming a professional attorney-in-fact or co-attorneys-in-fact so that there is accountability.
2. Consider naming an attorney-in-fact who is not also acting as trustee of your trust.

E. Powers of attorney executed more than five years old may be invalid due to "staleness doctrine".

## **XXIII. ADVANCE DIRECTIVES**

### **A. Durable Power of Attorney for Health Care.**

1. You can appoint an attorney-in-fact to make health care decisions for you when you are "incapable" of making your own health care decisions.
  - a. "Health care decision" includes consent or refusal to consent to medical treatments and procedures to treat disease, injury or degenerative conditions.

- b. You are incapable of making your health care decisions when you cannot understand the nature and consequences of such decisions. Your attending physician must make this determination in writing. You may require confirmation by a second physician.
  2. Your attorney-in-fact will have the authority to consent to the withholding or withdrawing of a life-sustaining procedure or artificial nutrition and hydration only if:
    - a. Your power of attorney specifically grants that authority; AND
    - b. You are in a terminal condition or persistent vegetative state.
    - c. Rather than giving the attorney-in-fact the ability to consent, you can give the attorney-in-fact, the direction to withhold life sustaining procedures in the event that you are in a terminal condition or persistent vegetative state. This direction comes into effect when an attending physician and one additional physician make a determination that you are in a persistent vegetative state or terminal condition. Typically, the consulting physician should be chosen by your attorney-in-fact so that the attorney-in-fact remains active in the process but must ultimately concede to your directions. This balance provides protection.
  3. Your attorney-in-fact has the duty to act consistently with your desires as you state them in your power of attorney or otherwise make them known.
  4. You may revoke a power of attorney for health care at any time as long as you are competent and are able to communicate in any manner your intent to revoke.
  5. Physician End of Life Sustaining Orders are available in some states. To the extent the state in which you reside does not provide for these orders, you should create a list, review the same with your physician and discuss your desires with your attorney-in-fact. Don't assume your attorney-in-fact will know what you want.
  6. Choose an attorney-in-fact who will be a proactive advocate for you when you are ill.

B. Declaration or "Right to Die Will".

1. A declaration allows you to express your desires with regard to life support should you become terminally ill or in a persistent vegetative state and can no longer speak for yourself.
2. You can specify your desires concerning life sustaining treatment, artificial nutrition and hydration and relief from pain.
3. You may revoke your declaration at any time as long as you are competent and are able to communicate in any manner your intent to revoke.

- C. Your declaration may be incorporated into a power of attorney for health care, combining and consolidating the features of both documents.

#### **XXIV. MISCELLANEOUS**

- A. Coordinate your asset ownership and beneficiary arrangements with your will and trust. The most perfect wills and trusts can be defeated by failure to coordinate your assets with them. This is a frequently overlooked or ignored procedure.

##### Examples:

1. Al provides in his will that son A is to get an 80 acre parcel of farmland at Al's death, even if his wife survives him. However, Al and his wife own the 80 acres jointly. How will son A get the 80 acres? When?
  2. Stan sets up an estate tax avoidance trust for his wife. However, all assets are owned jointly and life insurance is payable to the wife. The trust is left dry.
- B. Consider preparing funeral instructions. These instructions can include where you would like your services held, who you would like to perform the services, what songs and scriptures you would like to have read. You can also state your wishes regarding burial and cremation.
  - C. Consider using a laundry list to dispose of personal effects, such as jewelry, furniture, clothing, antiques, china, tools and hunting and fishing equipment. Nebraska statutes provide that a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will. Such a list, to be valid and binding, must be dated, be in the handwriting of the maker of the will or signed by him or her and must describe the items and who is to get them with reasonable certainty. The writing may be prepared before or after the execution of the will and the maker may alter it as often as he desires. Using a laundry list can save you annual trips to your lawyer to amend your will and the accompanying expense.