Is That Your FINAL Estate Plan?

CLE Disguised in Game Show Format

Teresa Lancaster and Craig Hunter Wisnom

The presenters will cover a variety of legal and tax issues related to estate planning, through a game show format designed to keep you awake and finish on time.

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Topics of the Day in Estate Planning

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Famous Fiascos in Estates

$100

This comic icon, recently famous for his cameos in blockbuster movies, died in November 12, 2018, and one of the claims his estate holds is that his blood was wrongfully stolen and sold as a collectible?

Stan Lee.

His estate tax return will have to value such unique assets such as his likeness if it is used in future marvel films, where he has traditionally made cameos. This concept proved to be an issue with the IRA for Michael Jackson's estate. Fair market value for such things is difficult to determine. The accountants might have some work of it, especially since $1.4 million went missing earlier this year. There is even speculation that his mistrust for banks (child of the Depression) led him to stash millions around his property.

Prior to his passing, he had changed lawyers multiple times and signed a declaration that his daughter had no fiduciary capacity regarding any of his estate. In this declaration he mentions a trust for his daughter to provide for her after his passing. He also names three men influencing his daughter, one of them the former publicist who supposedly stole his blood. Not long after this declaration was signed, Lee dropped the drafting attorney. Soon Lee's household staff were let go and his assistant of over 20 years was limited to supervised visits. This drama indicates the likelihood of multiple, and possibly conflicting, estate planning documents being out there. Determining which has authority might require litigation.

Now nearly a month after his passing there are no reports of a will being filed in probate

Famous Fiascos in Estates

$200

In October, the spouse and child of this 84 year old comedian fought in a California Court over who should be his conservator. The daughter was NOT a spokesperson for our current president.

Answer:

Tim Conway.

His daughter Kelly, and his wife (Kelly's stepmother), Charlene, want sole conservatorship over Conway. A probate court judge in Los Angeles ruled against Kelly's request for temporary conservatorship after learning that Conway is recovering from brain surgery. Kim and his first wife stated that Tim is now almost totally unresponsive.

Daughter's request for conservatorship includes allegations that her stepmother will remove Tim from his current nursing facility to another residential facility. She claimed that she was prevented from visiting her father in the hospital.

Wife asked the court to reject Kelly's request and argued that she is taking care of Tim's needs. She also claimed that Tim executed power-of-attorney and healthcare directives designating her as his caregiver. They have been married for 34 years.

Famous Fiascos in Estates

$300

This musician, who played 27 different instruments, died in April 2016 with no Will, leaving an estate worth more than $200 million

Prince

Prince was not married at the time of his death (although he had been married twice in his life) and he had no living children or parents. His sister, Tyka Nelson, filed to open a probate case that would name herself as well as their five half-siblings as heirs. It has been two years since his passing in 2016 and as of April 2018 none of the heirs have seen a dime of his estate. However, the corporate Trustee acting as executor and lawyers had received $6 million to date.

princeestate.com

Famous Fiascos in Estates

$400

This Respected soul singer died in August 2018, leaving no Will behind.

Aretha Franklin

Aretha Franklin died August 16, 2018 at the age of 76. She was survived by four sons–Clarence, Edward, Kecalf, and Ted, Jr., one of which is incapacitated and represented by a guardian. It has been reported by several articles that her estate is estimated at $80 (eighty) million dollars, and even though she had counsel advising to draft a will, Aretha died intestate, (without a will).

Since her death, her niece Sabrina Owens was appointed, by Franklin's sons, as personal representative. Even though Sabrina has been appointed to designate the assets, they must first be determined before she can begin to disperse of them. This can lead to altercations and disputes between the family members in the years to come, because determining the estate value can take quite some time. Even though the laws in the state of Michigan pertaining to intestate succession fairly clearly state that her estate should be divided equally amongst her four sons, determining her estate–what she owned, what is rightfully hers (royalties) and the value of it all–could take years, and no heirs will receive anything until then.

Famous Fiascos in Estates

$500

This actor had a career that spanned 9 decades, but he was the victim of elder abuse, about which he talked, via computer video conference, at the ACTEC conference in Tucson in 2014, shortly before his death.

He died effectively penniless, but became a symbol for the problem of elder abuse, and testified to the Senate about his experience in 2011.

Mickey Rooney testified to the Senate about his experiences

What's the Number?

$100 $11.18 million ($10 million indexed for inflation since 2011)

This is the current effective unified gift and estate tax, and generation skipping transfer tax, exemption for the year 2018. Pursuant to 26 U.S. Code § 2010(c)(3)(C) for decedent's dying after December 31 2017 and before January 1, 2026, it is $10,000,000 indexed for inflation

What's the Number?

$200 $750

The monthly SSI benefit as of 2018.

Per the Social Security administration, Supplemental Security Income (SSI) is a Federal income supplement program funded by general tax revenues (not Social Security taxes). It is designed to help aged, blind, and disabled people, who have little or no income; and provides cash to meet basic needs for food, clothing, and shelter.

What's the Number?

$300

$5 million indexed from inflation starting with 2011.

This, absent any changes in the law, is what the unified gift and estate tax exemption, as well as the generation skipping transfer tax, will be for decedent's dying on or after January 1, 2026. 26 U.S. Code § 2010(c)(3)(A).

What's the Number?

$400 $2250 (Note, this is three times $750)

This is the income limit to qualify for ALTCS benefits under Arizona's AHCCCS Medicaid system. An individual must also be below the $2,000 asset/resource limit (which excludes certain assets like a home), and of course be medically eligible.

Despite this limit, there is an easy way around the income limit if that is only the problem, what is commonly referred to as a "Miller" Trust which diverts all the income, including the excess, towards the cost of care.

What's the Number?

$500 $75,000

The gift-tax excluded amount which one individual can gift in one year to a 529 plan for another individual.

The current annual exclusion for gifts is $15,000 in 2018, but 529 plans allow a donor to make an election to treat a lump sum as a five-year-averaged forward

Those who deal with estate tax issues regularly know that one of the primary means of reducing estate tax at death is to make gifts during lifetime which will remove or reduce the value of assets as they are taxed at death. There are of course many ways to do this, from simple outright gifts to complex arrangements for leveraged property, but the one general theme is that to gain this advantage, the donor must completely surrender control of the transferred assets, and, except in very limited situations, give up any rights or benefits from the gifted property. Thus, clients are constantly caught between their needs and desires for security and control, versus tax savings.

Section 529 plans go against this theme completely. When a donor establishes a 529 account, it qualifies for the $15,000 annual exclusion under §2503(b) (§529(c)(2)(A)), and in fact, there is a special provision which allows a donor to apply four years of future exclusions to a gift, so that a donor could transfer $75,000 to an account for a single beneficiary and have the entire amount qualify for the annual exclusion. §529(c)(2)(B). That election must be made on a 709 for the year of gift.

Moreover, the donor can act as the "Account Owner", meaning he or she has complete control of the account, including the ability to change beneficiaries and direct distributions, including the right to direct distributions to himself or herself, so that, in effect, this gift is completely revocable! And yet, despite that, under Section 529 it will not be included in a donor's estate at death. §529(c)(4)(A). The only inclusion will be if the donor does not survive the five year forward averaging of the annual exclusion, in which case, the estate will include the portion of the gift allocable to years after the death of the donor (but not the value of the account at death). §529(c)(4)(C).

One change this year is that, while in prior years the tax free distributions from 529 plans were only for college, now tax free distributions from 529 plans to cover qualifying expenses for private, public, and religious kindergarten through 12th grade,

Estate Issues in Film

$100

This 2011 George Clooney movie dealt with the ramifications of a family trust having to terminate and distribute out due to the rule against perpetuities.

The Descendants

The basis for this film is that Clooney plays a responsible and successful attorney who is Trustee over a large family Trust, but, it is set to expire under the Rule Against Perpetuities within a few years and distribute assets outright to a number of individuals who may have trouble managing them.

The traditional rule against perpetuities is a statute that requires that a Trust must "vest or fail" within 21 years of a life in being at the creation of the interest. It is an incredibly complex and confusing rule, and its end result can be terribly destructive. In a jurisdiction governed by the original rule, if someone can argue a Trust doesn't meet this standard under some arcane circumstances, the whole trust could be valid.

To guard against this, the old school way is to make sure every trust has a clause that prevents it from violating the rule. Something like:

"The Trustee shall terminate and forthwith distribute any trust created hereby, or by exercise of a power of appointment hereunder, and still held twenty-one (21) years after the death of the last to die of the Settlors and the beneficiaries in being at the death of the deceased Settlor. Distribution under this section shall be made to persons then entitled to receive or have the benefit of the income from the trust in the proportions in which they are entitled thereto or, if their interests are indefinite, then in equal shares."

This clause forces distribution and vesting at a certain point to make sure it doesn't violate this rule. But, this type of clause would force the distribution even if the state's rules have changed.

Arizona has a 500 year wait and see, law, among other exceptions, which means you'd have to wait 500 years before someone could find if the Trust actually violated the rule. So, at least for the first 500 years, as long as the Trust is drafted right, this would not be required under Arizona law.

Estate Issues in Film

$200

This animated movie featured a spry elderly estate planning attorney setting up a Will which established a lifetime trust for the testator's cats, and the remainder beneficiary was a nefarious butler.

The Aristocats

In addition to being one of the few representations of my job in a children's movie my kids knew, the Aristocats highlighted the issues involving care for your animals after you die.

a. Estate planning provisions for pets is a critical issue for many of your clients. Clients' needs in this regard are as diverse as our clients generally. Many people will have no pets, others will have them but not need any specific provisions in their documents. Others will come in with providing for their dogs or cats as the primary purpose of their estate plan. Especially in the middle of those extremes, it is of great value to your clients to raise the issue through your standard questionnaire and/or in your discussion. There are a great number of clients who will say, "Oh, that's a good idea. I hadn't thought of that, but I'd like Luna and Stella to go to....." Some clients may hold their animal companions in such high esteem that using the term "pets" is diminishing in their eyes.

b. There is obviously a broad spectrum as to what clients will want for their pets in this regard:

    i. The "Pharaoh" approach. While probably the rarest request you get from clients, there will be the occasional person who thinks their pets will be worse off without them and will want them euthanized upon their death. They feel that the animals will either be so saddened by the death of their owner, or that no one else will care for them appropriately, and so they are better off being dead. (Presumably, the pets themselves did not weigh in on this, they may have had a contrary opinion!)

    Depending on the health of the pets in question, this can create a moral dilemma for the planner, or, more likely, for the Personal Representative or Trustee asked to carry out the written wishes. Certain vets and organizations will refuse to euthanize a healthy animal, but there is usually someone who will. But if a PR or Trustee refuses to carry this out, it is also difficult to think of someone, including a court, who would force them to or penalize them for refusing this wish. If nothing else, it would be easy to justify that as a provision that is deemed contrary to public policy. A good discussion on this narrow topic can be found as part of an article by Suzette Daniels on:

http://www.animallaw.info/articles/arusdanielssuzette2004.htm
The author indicates that while there are cases cited where the courts prohibited euthanasia, there were none forcing the Personal Representatives to fulfill the terms of the Will requiring euthanasia.

ii. Do nothing. Obviously, many clients are satisfied without any specific reference to their pets, and will leave it up to the Personal Representative or Trustee to determine who gets them and how they are cared for.

iii. Name who gets them. The simplest approach beyond doing nothing is to specify under the Will or Trust who should get the pets. This may include alternates if the first person isn't able or willing to take the animals, as well as a method of the Personal Representative to find a home if everyone named fail. Not only can this be done under the document, but because pets are "chattel" under the law, it can be included on a separate tangible personal property list permissible as an incorporation to a will.

iv. Name who gets them with some indirect financial support. The next most common is to name who will get the pets, as set forth above, but also provide some cash amount to the recipient to offset the costs of feeding and caring for the animal, and any potential vet costs. We frequently see sums between $500 and $5,000 given to the person for these purposes. Of course, the person receiving the animal and the money is only morally bound, not legally required, to use the funds for those purposes so the client has to have a high level of trust in who they name, but they usually do or they wouldn't be naming them for this purpose.

Amounts of course vary based upon the animals. Generally, animals like horses may require a great deal more expense due to their size and the increasing costs of upkeep, as well as a much longer lifespan.

There are independent options for people who wish to provide this type of arrangement, but don't know any good candidates to take their animals. The Humane Society for Southern Arizona, for instance, has the "Guardian Angel" program. Details on this can be found on www.hssaz.org under "How to Help", and for gifts of $2,500 per pet certain minimum requirements to place the animal with a good family will be met, and for $10,000 that will additionally include monitoring by the Humane Society. For individuals who were planning on leaving an amount to the organization anyway, the care aspects become a freebie.

v. The Pet Trust. For those individuals for whom the above options are not sufficient to provide for their pets, including more legal certainty as to how their pets will be cared for and how their assets will be spent, there is the full blown "pet trust." These would usually be part of the client's

Revocable Trust if they have them, or Testamentary Trust provisions under their Will.

While the pet trust is at the more elaborate end of the spectrum, these arrangements themselves can vary widely, from a $100,000 set aside with general provisions to pet care, to the Leona Helmsley $12,000,000 arrangement. While the latter is extreme for most of our clients, there are far more willing to see all of their estate, even if $500,000 or more, set aside for their pets care. In addition to the amounts, the details in that type of arrangement can vary wildly.

(1) In the past, there was some controversy about whether a trust for a pet is valid, and A.R.S. 14-2907(B) codifies and authorizes this type of trust:

(a) "A trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent."

(b) "The intended use of the principal or income can be enforced by a person who is designated for that purpose in the trust instrument or, if none, by a person appointed by a court on application to it by any person." So, depending on who the Trustee is, the client could set forth in the Trust someone else to check in on Luna and Stella, and look over the Trustee's shoulder to make sure they are being properly cared for. While presumably the client would place a great deal of trust in whom they name as Trustee, keep in mind that they chose the more protective legal route of the trust to make sure their wishes get carried out, so this may very well be important to them. If there is no such provision, someone else could drag the Trust into court and get themselves appointed to watch over it.

(2) The substantive terms of a pet trust are typically more diverse or at least detailed than the type of trusts that are written for individuals, since it is a chance to provide benefit for something that, parrots aside, cannot speak for themselves. So the client is even more likely to want to add in their provisions about how their animals are to be cared for in more detail. Here are a number of

the provisions to think about, including the more mundane and the more unusual:

(a) Trustee-Probably the most important starting point, as always, the client will need to decide who should hold onto the assets held for the pet. In some situations, a close friend or trusted relative will be the client's choice, but in others, they will need someone independent and professional to fill the role. Based upon both size and nature, it is unlikely that many banks or corporate trustees would be willing to act on these types of trusts, which would lead to the option of an Arizona licensed fiduciary. Both the authors' qualify in that regard and have served in this role, and the clients can interview and consider other licensed fiduciaries.

Keep in mind that the client, as indicated above, can name someone to look over the shoulder of the Trustee to make sure they're carrying out the wishes and taking care of the pet in the appropriate manner. This could be styled as a "Trust Protector" under A.R.S. 14-10818, as well as the party referenced in A.R.S. 14-2907(C)(4), but as long as the powers and duty (or lack thereof) are clearly spelled out they will controlled. A client should be careful to make sure that such a party is not likely to be antagonistic to the Trustee, because court actions over what's in the best interest of the pets between contentious parties could mimic the internecine litigious waste between siblings in estate litigation or bitter divorces.

(b) Residual Beneficiary. While the statute provides for default beneficiaries upon the last living animal's death (the residuary beneficiaries under the Will, and if none, the heirs of the client), most will wish to specify who will receive the trust assets upon the death of the animal. Obviously, the client can choose from family members, friends, and charities (including animal oriented groups) for these purposes. Keep in mind that these residual beneficiaries will not only become "Qualified Beneficiaries" for purposes of Arizona law, A.R.S. §14-10103(14) and related references, but be the ONLY beneficiaries the trust has. This will be most important in making sure they receive the required notices to Trust beneficiaries under Arizona law, as modified by the terms of the trust (but subject to the minimum notice requirements of A.R.S. §14-10105(A)(8).)

(c) Substance and Details. The rest of the Trust, like any, boils down to the substance the clients wants to express, with sufficient details to carry out their intention, but with an appropriate level of flexibility to deal with the real world. For clients not interested in a tremendous of detail could include a provision like the following, very much mirroring a common trust for an individual:

The Trustee shall distribute Five Thousand Dollars ($5,000.00) to be held IN TRUST for any animal(s) I may own at the time of my death.

The Trustee shall distribute to the caretaker of my animal(s), or expend directly, so much of the income and/or principal of the trust as the Trustee in his or her sole discretion deems necessary or advisable for the health and maintenance of such animal(s) for their lifetimes.

I name ROBERT DOOLITTLE, MD as the Trustee of this honorary trust. If ROBERT DOOLITTLE, MD is unable to act, then MARY FIDUCIARY, shall serve as Trustee.

Upon the death of all such animal(s), the balance of the honorary trust shall be distributed to ________________________.

Here are other questions that can be answered in the trust details:

(i) Where will the animal live? Who will take care of the dog, and where will they live? Will they be paid, and how is the nature of compensation determined? If the client intends for the class to stay at home, are there sufficient resources to pay for the upkeep and expenses related to the home.

(ii) A client being able to provide the Trustee or estate planning attorney with information about the pets is extremely helpful, details about the animals' dietary preferences or needs, veterinarian and health issues, social issues like which pets must remain together in the same home, and a myriad of other issues that are important to the pet's owner. Both the pet trust statute, and the general considerations of the Trustee in this situation, would allow a Trustee to consider this type of extrinsic evidence, but by

including a reference to such a writing in the document you (a) remind the Trustee to look for such information ,and (b) you give the client the suggestion to prepare that.

(d) Practical Consideration. Beyond what's in the Trust or Will itself, the client should have some practical plan for what will happen to their animal in the event of an emergency. Some people will have friends, neighbors or family involved in their life so this will not be an issue. Others, who may be isolated and name an independent Trustee may not have that direct connection. First responders, medical caregivers, and the like need to know about the pet. We've seen situations where a person set their estate plan up to explicitly, and great expense, keep all their pets at home the rest of their lives. This was critical to the settlor's intention. However, when the individual died suddenly, and the paramedics showed up at his house and saw animals, they called animal control and those pets were sent to PACC (the pound), the last place in the world the settlor intended. Clear signs on the door and refrigerator about emergency contact for the Trustee may have helped avoid that trauma

Estate Issues in Film

$300 This 1981 steamy thriller featuring Kathleen Turner, involves an attorney INTENTIONALLY violating the Rule Against Perpetuities to invalidate his client's will and allow assets to pass to the widow who is having an affair with the attorney.

Body Heat. It also involved the idea that because the couple had a prenupt, the husband had to be murdered rather than divorced.

Estate Issues in Film

$400 Harry Potter and the Deathly Hallows

Question: In this film, tangible personal property is gifted by oral Will to minor children.

Discussion: Mom said I get the China! We all know that families will fight over tangible property. In Harry Potter, Dumbledore gifts three items to Harry, Hermione, and Ron via an oral Will. These items are the snitch from Harry's first Quidditch match (seemingly of little value since though it said "I open at the close" Harry's attempts to open it failed), the Tales of Beedle the Bard which detailed the story of three brothers who were gifted magical items, and Ron receives a Deluminator that is essentially a homing device–seemingly the only magical gift and the most valuable. Dumbledore's attorney presents the children with these items in Ron's family home. As it turns out, these gifts have significant underlying value and will be very important for each of them as they complete their mission to obliterate Voldemort–but it will take time for them to establish the value. Even the most esteemed wizards (Snape anyone?) have no clue about the value of the items Dumbledore has gifted. As it turns out, Harry's item opens on the advent of his death and contains the Resurrection Stone, which brings him back to life.

Had other wizards known what was conveyed to the children by this oral Will, there almost certainly would have been a fight over the items.

Unfortunately, Oral Wills are note recognized under Arizona law. However, if you can establish by clear and convincing evidence that an oral trust was established as well as proving the terms by a preponderance of the evidence you may have an argument under 14-10407. This rightly a high standard and difficult to prove.

Unlike Harry Potter, where the tangible item given can bring you back to life, most of the items fought over are of no monetary or life giving value. One case I was involved in this last year was a fight over Pokemon cards! As counsel, we should try to get families to work out these issues on their own, in order to avoid high costs.

So how do we resolve these fights? There is no easy answer after a person is deceased. Attorneys do have an obligation under Rule 10 (D) to encourage fiduciaries to take actions they can perform on their own without attorney involvement–which may include attempting to negotiate the disbursement of TPP with the beneficiaries on his or her own–before involving counsel. This is further emphasized under Rule 10.1 (A) which disucssed the prudent management of costs. When being asked by our clients to wade into these waters through Court action or other means within the administration, we all have to also consider ARS 14-1104 and 14-1105 and counsel our clients appropriately. Ask the question--Is the value of the TPP more than the cost to fight about it? (The well-known cost-benefit analysis.) Often it comes to the down to the person serving as Personal Representative or Trustee making difficult decisions.

In most cases, the TPP does not need to be appraised. If you have taxable estate or items of significant value, an appraisal may be helpful. While determining the fate of the TPP, it should

be secured and inventoried by photograph.

The best way to avoid the fight? Address it in the estate plan! Arizona makes the gifting of tangible personal property fairly simple. ARS 14-2513 provides that a Will can refer to a separate written list to dispose of TPP. Note that this is not for monetary assets. The statute provides that the list should be in the person's handwriting and signed by that person. It should also describe the assets in a way that the items can be identified with reasonable certainty. We also recommend that clients date this list so that in the event there are more than one, it can be determined which list controls. The statute also provides this list can be done before or after the date of the Will and altered over time.

Try to encourage your clients to skip the post-it notes on various items. They fall off and can be easily switched. When doing a Will or a Trust, make sure your documents reference that a separate signed list can be done by the Testator/Settlor.

Your documents should also flush out what happens if there is no list found. Consider giving the Personal Representative or Trustee broad authority to deal with the tangible personal property. This could include gifting to individual beneficiaries with no requirement for the division to be equal, selling the TPP, and gifting that property to charity.

Estate Issues in Film

$500 This 2002 movie with Samuel Jackson and Ben Affleck involves an attorney desperate to retrieve a Power of Appointment for a court filing?

Changing Lanes. The power of appointment involves a death bed signing of a huge estate over to the law firm as Trustees of a charitable trust.

Dear Teresa:

$100

Question:

"Dear Teresa:

My husband and I created an "A-B" Trust when we did our estate plan in 1998. We have about $2M in assets. I've been told we don't need this type of Trust anymore. Is that true?"

Answer:

It is true that with the estate tax exemption currently so high, even with potential swings you are unlikely to have an estate tax payable at any time. Additionally, the concepts of portability means that even those with a higher estate don't need the A-B arrangement as much for estate tax reduction. There are, however, some non-tax benefits of this arrangement.

The most prominent non-tax reason for a Bypass Trust gets back to the original goal of a trust in general, to benefit someone without giving them full ownership. This allows a married couple to know that the survivor will have access to the assets in the Bypass Trust for his or her lifetime benefit, but that what remains upon his or her death will pass to the decedent's children, or other chosen beneficiaries. As with any trust, it helps deal with the uncertainty of circumstances. If the survivor lives for 30 years, they can use and extinguish the trust for their needs. If, however, they survive 1 year, they can't simply leave all the assets to a new spouse.

The details of the Bypass Trust will determine how much flexibility there is, and note that in the extreme (for instance, where the survivor has a limited power of appointment which can effectively benefit anyone in the world) there may be no real limits as to what the survivor can do with the assets.

There is no right or wrong on this issue, but something a married couple must decide as to their wishes in a joint document, or a client must decide for himself or herself what happens for their surviving spouse if they are creating a separate trust.

Classic examples would be a second marriage where each spouse has separate assets. The surviving spouse would be able to benefit himself or herself, but when he or she dies, the remaining Bypass Trust assets will pass to the deceased spouse's children. Keep in mind all of these situations are rough justice, and not perfect, but at least provide some additional protection in the big picture.

Even some happily married and trusting couples, with the same children or other beneficiaries, feel more comfortable with the legal limitations of a Bypass Trust. For example, they might say they trust each other completely, but if one of them lives to 102, they could be worried that survivor will become diminished and some sweet young thing will marry them, and they like the

idea that the Bypass Trust is much more protected in those situations.

The other side of this is the survivor will have other beneficiaries in the trust with current legal rights, depending on the details, who can require an accounting of the trust, and, in the most extreme situation, could drag the survivor into court as to how he or she is administering the trust. This can become a momentous problem for families. Even without that, you have the additional formalities to deal with, such as separate titling, and the requirement of a separate (albeit simple) income tax return that is required each year. Widows who have survived their husband by 20 years in reality get quite weary with each year filing an income tax return every year for a $300,000 Bypass Trust.

It should also be noted that a Bypass Trust is also a fully protected spendthrift trust under Arizona law, and even where couples do not wish to substantively restrict each other each other at all, they might like the idea of the technical Bypass arrangement so that those assets will not be available if the survivor is sued.

Dear Teresa:

$200 Hammerman/ Kipnis

“Dear Teresa,

I am an attorney representing a Trustee of his mother’s trust. He and I get along famously, as we constantly joke in our e-mails about how awful his siblings are. The Trustee has done his job completely correctly and is very honest. However, his siblings are difficult and have hired an attorney to argue about the administration. That attorney is telling me I need to turn over copies of all my e-mails with the Trustee! Of course, that’s confidential and privileged, so I don’t have to do that! Do I?”

Answer:

Unfortunately, an Arizona case has required that SOME of the communication between an attorney and a Trustee is discoverable by the beneficiaries.

In re The Kipnis Section 3.4 Trust a.k.a. Hammerman v. Northern Trust, 235 Ariz. 153, 329 P.3d 1055 (2014), ruled that the prior corporate Trustee was required to turn over all its all attorney-client communications made in a fiduciary capacity on matters of trust administration, to the successor Trustee. The court carved out an exclusion that if the communication involved the Trustee’s corporate, nonfiduciary capacity on matters not of trust administration.

Opposing attorneys have already begun using this “Kipnis” request in litigation, forcing the Trustee and its attorney to determine what may or may not be subject to this duty.

While the exact scope of this case has ambiguity, there’s no question that attorneys and Trustee’s are going to be better off if all written and electronic conversation avoids any embarrassing comments or negative discussion about family members and beneficiaries.

It’s always been a good idea to never put into an e-mail what you wouldn’t want read aloud in court. This not only emphasizes that importance, but places an attorney in the situation where they are best if they WARN the Trustee to keep all written communications free of such personal comments, that may be harmless legally, but reading aloud that the Trustee thinks his brother-in-law is a “white-trash-freeloader” will not feel good. The client might want to know they should save that for a phone call.

Dear Teresa:

$300–Limited Guardianship

Dear Teresa, My Great Aunt Mertle needs a Guardian. However, her only entertainment is politics and she loves cable news. I would hate for her to lose her right to vote. Is there any way to preserve that right?

Discussion: Limited Guardianships are available under Arizona law. When requesting a limited guardianship under the statute, it provides that a person shall retain his or her voting rights. Though the statutory language is very specific as to what "Limited Guardianship" means, I would caution how we utilize this language in our Orders and Letters, as I believe it will be confusing to medical agencies reviewing the letters. My suggestion is to maintain the regular use of "Letters of Guardian" and add under the Letter restrictions that the incapacitated person shall maintain the right to vote.

Dear Teresa:

$400

Dear Teresa: I am a beneficiary of my brother's estate. My sister is the Personal Representative. My brother had a lot of Pokemon cards that I told my sister I wanted. She is not turning them over and I want to file suit against her. She can't sue me for the estates fees if I do so right?

Answer: Often times we focus on A.R.S. § 14-1104 that focuses on the fiduciary's obligation to do a cost benefit analysis, but forget to consider A.R.S. § 14-1105 when representing beneficiaries. It is important to keep in mind that under 14-1105 a beneficiary can be held accountable for fees and expenses by the Court if it determines conduct was unreasonable or due to unjustified court proceedings. We must make sure we advise beneficiaries of an estate against unreasonable conduct, which I think includes looking at a cost-benefit analysis. When representing a fiduciary, we should keep this remedy in mind when beneficiaries are causing mindless litigation.

Dear Teresa:

$500

Dear Teresa: My mom is on hospice, though still coherent. She lives in a home she purchased in 1970 for $200,000 and owns it in her own name. A neighbor came by yesterday and offered $1,000,000 for the property. Should I sell it while she can still sign to ease the burden of having to sell it after she dies?

Answer: If sold while mom is still alive, you have to use her basis for capital gains purposes. If you wait to sell until after she passes away, you get a step-up in basis to date of death value. In a property where the person has a low basis, waiting to sell could have a significant tax benefit. In the above case you could pay over $200,000 in capital gains taxes, dependent on various factors. If you wait until after she passes to sell, you would likely avoid capital gains taxes all together.

Dear Craig:

$100

“Dear Craig: I want to leave my daughter my guns under my Trust. Is there anything complicated I need to do?”

Answer: It depends - do you have ‘regular' or ‘restricted' firearms? In other words, did you just have to pass the background check or did you have to apply and obtain approval from Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) in order to purchase the firearm? This seemingly simple question makes all the difference and often .

For so-called ‘regular' firearms(think traditional handguns, rifles, shotguns without any modifications), they can be treated as any other tangible personal property item (of course, please keep safety in mind). As planning mechanism; however, a specific mention of the firearms should be included in your Will or Trust (via a list disposing of tangible personal property). particularly if you are going to benefit others under your estate plan. Whatever mechanism of distributing the firearms, those firearms should be listed by clear identifiers - manufacturers, model, and even serial numbers.

If you have ‘restricted' firearms (silencers/suppressers, short-barrel rifles/shotguns, or full automatic weapons), extra care should be taken when making estate planning decisions as the current regulations (which do change every once-in-awhile) include restrictions on ownership, possession, and transfers in estates. Keep this in mind especially if your daughter is a minor. Options include a specialized trust (often referred to as a "Gun Trust" or "National Firearm Act Trust") or transfer through an estate. If you decide to not create a Trust, just remember that your Personal Representative should be aware that you possess restricted firearms so that they don't unknowingly violate state or local law - something as innocuous as a distribution to a heir (who kept that felony a secret from the family) could subject your Personal Representative to personal liability and even jail time.

Dear Craig:

$200

Question:

"Dear Craig:

You might recall you set up this great generation skipping trust for me under my father's document. After my father died, I got divorced three times and sued 12 times, so I really appreciate the protection. You also said that it would skip estate tax at my death. That's a good thing, because I have over $50,000 in assets, and the Trust has about $500,000 still in it. I just wanted to make sure that when I die, that Trust gets a step-up in cost basis so my kids can sell all the highly appreciated stock. - Nancy"

Answer:

If this trust was drafted very carefully, to avoid estate taxes, it WILL NOT get a step-up in cost basis at death. But, we probably can modify it to get that result, because estate tax for you and the trust is no longer an issue.

Assets are stepped up for income tax purposes at death IF they are included in a decedent's estate for estate tax purposes. For those with less than $11.18 million, being included for estate tax purposes has no real downside, but it is still the relevant determination on whether assets are subject to estate tax.

One way to have a Trust included is to take whatever actions are necessary to terminate it and distribute it outright to the beneficiary. However, if the trust is left intact, giving the beneficiary a "general power of appointment" for tax purposes, specifically, the ability to appoint to the beneficiary or his or her estate or creditors, triggers estate tax inclusion, and the step-up in cost basis.

A Trust can be modified this way via decanting, family agreement, or, most formally, through a court proceeding. A.R.S. § 14-10412(A) the Arizona Trust Code provides that a Trustee can modify a trust on the following basis:

> *The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.*

Further, A.R.S. § 14-10416 provides as follows*:*

To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

With proper notice and court approval, this more formal arrangement would be much less subject to question by anyone, including the IRS or other beneficiaries.

Keep in mind, however, that you can obtain the tax benefits of a step-up in cost basis if you create a General Power of Appointment in favor of the beneficiary. If it's intended to keep the ability to make changes very limited, having a permissive power in favor of the creditors of the beneficiaries is a fairly restrictive way to still get that benefits. Therefore, if you feel a Trust proceeding is worth it, asking the court to modify a trust to give this limited power may be safer and better than a loose family agreement.

"The Trustee is requesting that the Trust be amended to add the following:

> Section 2.1: Nancy shall have the power to appoint the Trust to the creditors of her estate, by specifically referring to this power of appointment, exercisable only by her Will. To the extent this power of appointment is not effectively exercised, the Trust shall be distributed as set forth below."
>
> In addition, one can even try to avoid an issue where estate taxes could be an issue if the estate tax exemption surprisingly declines, so that there's no possible downside from a tax point of view to making the change.
>
> "Section 2.1: NANCY shall have the power to appoint any portion or all the Trust solely to the creditors of her estate by specifically referring to this power of appointment. However, that as to a fraction of the trust share denominated the "Limited Portion," she shall have no power of appointment over said portion.
>
> The General Portion shall be the largest fraction of her GST exempt share, if any, which if added to her "taxable estate" (determined initially as if no portion of this GST exempt share was included in her estate) under 2001(a) (or applicable successor thereto, however denominated) of the Code, would not increase the amount of Federal Estate Taxes incurred at her death. In determining the fraction, the Trustee shall consider the credit for state death taxes only to the extent those taxes are not thereby incurred or increased and shall assume that none of the trust share qualifies for a Federal estate tax deduction. The Limited Portion shall be the remaining fraction of her GST exempt trust share. "

Dear Craig:

$200

“Dear Craig: I have an Irrevocable Arizona trust set-up by my grandfather. I am the Trustee and can distribute for my health, education, maintenance and support. However, I don’t like that the successor trustee is my uncle who is known to drink more tequila than water. I was told I cannot change this. Is that true?”

Answer:

As a Trustee under an Arizona irrevocable trust, with discretion to make distributions, the Trustee has the authority to “decant”, to rewrite the terms of the Trust into a restatement or a new Trust Agreement, as long as the same basic beneficial interests remain. While the exact scope of this can be ambiguous, in terms of how much the terms of beneficial interests can be altered and still be held for the same beneficiaries, one of the clearest things you can do is to change the administrative provisions, including the successor Trustees.

“DECANTING”: Panacea or Pitfall

c. Decanting is the Power of a Trustee, as long as the Trustee has some distributive discretion to change the terms of the Trust, without changing the substance ***too much***, by either “pouring” the old trust assets into a new Trust, or, under Arizona’s statute, by restating the terms of the Trust.

d. Everything we know about this power is included in the operative statute, A.R.S. § 14-10819, which has been amended once already since its creation:

   i. **§ 14-10819. Trustee’s special power to appoint to other trust**

      (1) Unless the terms of the instrument expressly provide otherwise, ***a trustee who has the discretion under the terms of a testamentary instrument or irrevocable inter vivos agreement to make distributions***, regardless of whether a standard is provided in the instrument or agreement, for the benefit of a beneficiary of the trust may exercise without prior court approval the trustee's discretion ***by appointing part or all of the estate trust in favor of a trustee of another trust*** if the exercise of this discretion:

         (a) Does not reduce any fixed nondiscretionary income payment to a beneficiary.

         (b) Does not alter any nondiscretionary annuity or unitrust payment to a beneficiary.

         (c) ***Is in favor of the beneficiaries of the trust.***

         (d) Results in any ascertainable standard applicable for distributions from the trust being the same or more restrictive standard applicable for distributions from the recipient trust when the trustee exercising the power described in this subsection is a possible beneficiary under

the standard.

(e) Does not ***adversely affect the tax treatment of the trust***, the trustee, the settlor or the beneficiaries.

(f) Does not violate the limitations on validity under sections 14-2901 and 14-2905.

(g) This section applies to a trust governed by the laws of this state, including a trust whose governing jurisdiction is transferred to this state.

(h) The exercise of the power to invade the principal of a trust under subsection A of this section is considered to be the exercise of a special power of appointment.

(i) The trustee, in the trustee's sole discretion, before or after the exercise of the trustee's discretion under this section, may request the court to approve the exercise.

(j) The trustee may exercise the discretion to appoint all of the trust estate pursuant to this section by restating the trust.

e. An important consideration to keep in mind is that this is a Trustee's power. Therefore, it is always subject to the fiduciary duties of a Trustee, unlike a Trust Protector's power to make changes, or a beneficiary's power to appoint and change the provisions of the document. Therefore, even when the terms of the statute allow a Trustee to "decant," and the Trustee has the legal power, it does not always mean that it is appropriate for the Trustee to exercise that power, especially in certain ways.

f. For illustrative purposes, imagine the Trustee has complete discretion to distribute income or principal to Johnny and Janey until 2025, at which time the trust assets get distributed ½ to Johnny and ½ to Janey.

i. According to a literal reading of the statute, the Trustee ***could*** decant this Trust into terms that say, during the discretionary period, Johnny is the primary beneficiary and Janey is a secondary beneficiary, and in 2025, the assets pass 80% to Johnny and 20% to Janey. Now, depending on what the limitation of "for the beneficiaries" means, it could be argued that this is permissive under the authority of the decanting statute as a legal power. However, even if it is a legal power, it is probable the Trustee could be violating the Trustee's duty of impartiality to the beneficiaries by decanting it into a more lopsided arrangement.

ii. A very practical threshold to whether or not a Trust should be decanted is whether or not any of the original beneficiaries will be unhappy with the change. If so, the Trustee should be far more cautious as to whether or not it is really an appropriate action.

iii. Morever, there are times where all beneficiaries want this type of change to be made, and, in that event, even if you do not want the work of court approval, consider the beneficiaries signing off on the decanting so that the Trustee would not be held liable for a breach of Trust under Arizona

law.

g. Sample waiver/release for consenting beneficiary:

i. I, **SUSIE BENEFICIARY**, a beneficiary of the Generous Settlor Trust Dated October 29, 2001, and furthermore, as a parent of all children of mine (including any minor or unborn children) who may ever have a beneficial interest in the Trust, pursuant to A.R.S. 14-1406, do hereby represent and bind any and all such children as to their beneficial interest, do hereby specifically consent to the Exercise of Special Power of Appointment dated ________________, 2018, and the accompanying Restated Trust Agreement dated _________________, 2018. Furthermore, while the undersigned believes absolutely that the Exercise of Special Power of Appointment and Restated Trust Agreement are appropriate, the undersigned specifically consents (including on behalf of the undersigned's children) to the actions, thereby fully releasing the Trustee for any liability pursuant to A.R.S. 14-11009.

h. Given the nature of this power, one of the clearest changes permissible under a decanting power is to change the Trustees in essentially any manner. There are times when this is the only change needed in a Trust, and one that is smaller and likely uncontroversial, where one might even shortcut this whole process into a simple amendment, where the Exercise states something to the effect of, "I hereby exercise the Special Power of Appointment to Restate the document, by incorporating all current provisions of the Trust Agreement as they are, except for the following change of Trustee."

i. The "adverse tax treatment" limitation is interesting, because it is very much dependent on a person's situation. Not that long ago, a tax general power of appointment over a Bypass Trust would have been a disastrous change causing estate taxation where there was none before. However, currently, most clients who have that type of arrangement will probably have no estate tax anyway, and the general power usually gives them a step up for cost basis that will probably reduce income taxes.

j. When deciding to Restate or add to a new Trust, keep in mind whether you are trying to make it more or less likely that a person down the road could have a clear indication that there was a prior Trust.

k. Failure to Act? With attention to detail, it may be relatively easy to consider when exercising the power is an appropriate or safe use. What might be far more worrisome is the idea that, as a power granted to the Trustee, could the Trustee be liable for NOT decanting in a situation where it could be valuable. Given the typical analysis of a failure of fiduciary duties, a Trustee might be most vulnerable when he or she simply hadn't thought of decanting. If they've

considered it and documented why it's not a good idea, that is probably safer.

l. For instance, imagine a Trust where there would be an income tax benefit if there was a step up in cost basis when the beneficiary died. Could a Trustee be liable for not decanting in such a manner as to grant the beneficiary a general power of appointment? That's likely going to be a common issue with the increase in the estate tax limits.

m. Non Exhaustive Reasons for Decanting
    i. Grant or remove general power for estate tax or income tax benefits.
    ii. Change Trust to Grantor Trust, or FROM Grantor Trust.
    iii. Change allocation of capital gains and IRD to accounting income for income tax savings.
    iv. Extend terms of Trust for beneficiary, either for legal spendthrift protection or because beneficiary is ill suited to receive outright distribution.
    v. Create special needs trust.
    vi. Fix any tax problem, creditor problem, or benefits problem in existing trust.
    vii. Update administrative provisions, change situs, change choice of law.

Dear Craig:

$300 Post MRD Death

“Dear Craig,

My wife and I are both 75 years old. I want to leave my IRA for her in Trust, so that when she dies, it goes to my kids. My lawyer says I need these ‘conduit provisions’ that force all the MRD’s out to her.

Is there a big difference if I leave it in a “conduit” trust for her versus a plain old trust that I can make more restrictive?”

Answer:

In this situation, whether or not the Trust has conduit provisions, or otherwise qualifies to look through to the beneficiary’s life expectancy...doesn’t matter.

The reason is that, in broad strokes, the MRD schedule utilizing the surviving spouse’s life expectancy, which is what you can use if she is named as the beneficiary through a conduit trust, is the same as the MRD schedule you are left with if the client dies with no “qualifying beneficiary.” The “five-year” rule that most people are familiar with if you don’t have an individual beneficiary only applies if the owner/participant dies before his or her require beginning date. If the participant owner dies afer the required beginning date, the payments must be made, NOT over a five year period, but over the participant owner’s remaining single life expectancy. Since these people are the same age, there is no difference between using the decedent’s remaining life expectancy versus the spouse/beneficiary’s life expectancy.

Keep in mind that the payout schedule when the owner is alive is not a single life expectancy, but a joint life expectancy with an individual ten years longer. So, the post death single-life-expectancy is a shorter period than applied while the owner was alive. But the designated beneficiary life expectancy calculations are also single life.

Note that, if the spouse were named DIRECTLY as a beneficiary, she would have the ability to directly roll the account into her own IRA and use the longer, JOINT period that you get with your own IRA that doesn’t apply to an inherited IRA.

Also note that, even if you don’t need a conduit provision for minimum required distribution purposes, if the IRA distributions are kept within the Trust, they are “trapped” for income tax purposes and pay the compressed trust rate. So there still is an advantage to distributions being made out to the spouse.

The IRS publications on these issues are actually quite helpful.

https://www.irs.gov/retirement-plans/required-minimum-distributions-for-ira-beneficiaries

Dear Craig:

$400

“Dear Craig: I need to draft my EP. I have one son, a doctor who is constantly being sued, and a daughter, who is married to a horrible, controlling gambling addict. What should I do?”

Answer:

I would strongly recommend a “Lifetime Protection Trust” for each child’s inheritance. This type of trust also characterized as a Generation Skipping Trust, has become less about saving estate taxes for future generations, as the exemptions have increased, and more about providing asset protection. While it is very difficult to achieve legal protection with your own assets, Arizona law allows Trusts established by others to have significant creditor protection from lawsuits, even if a beneficiary is his or her own Trustee.

If the only concern is outside threats, a child can be his or her own Trustee and, as long as the Trust meets certain rules, still qualify for these protections. The child can be granted a power of appointment to determine where the assets pass at death. You may decide you want to limit the child’s authority, however, and if you’re worried about their decision making (especially if someone has influence over them), an independent Trustee will be more protective. It’s all about the arrangement the client wants.

Dear Craig:

$500

“Dear Craig:

I have two trusts set up from my mom when she died. One is called an ‘Exempt Trust’ and one is called a ‘Nonexempt Trust.’ They both have about $500,000 in them. I have about that much in my own assets. There’s not going to be any transfer tax on my death, is there?”

Answer:

Yes, in all likelihood there may be, depending on the terms of the Nonexempt Trust. If the titling is accurate, that represents an amount that was NOT exempt from Generation Skipping Transfer Tax after the mother’s death. If the terms of the trust do not automatically give the client a power of appointment, that Nonexempt Trust could be subject to Generation Skipping Transfer Tax (GST) on the client’s death, even though all these assets are well under the current estate tax....and generation skipping transfer tax limit.

GST is a transfer tax that applies to various transfers to grandchildren and more remote descendants. It is intended to prevent the wealthiest families from forever avoiding estate tax, after the first generation, through continuing dynasty trusts that continue forever and, without the GST, would never again pay an estate tax. It imposes a tax at times where assets drop down to grandchildren or more remote descendants

Currently, each individual has a GST exemption equal to the Estate Tax exemption of $11.18 million. Therefore, transfers in trust or directly to grandchildren up to that total generally won't incur this tax.

In the past, the GST exemption was only $1,000,000, and therefore there are "non-exempt" trusts out there far under the $11.18 million threshold with potential GST issues. It's easy to overlook this, but these are one of the landmines with a tax that could be avoided with some modification.

If the nonexempt share does NOT give the beneficiary a GENERAL power of appointment (which is a sort of release valve), then without any changes, when the client dies, that $500,000 non-exempt share will be subject to GST tax. The rate is the estate tax level, 40%, so $200,000 will be due upon client’s death from the non-exempt share.

If client had a "general" power of appointment under the tax code, which could be a power exercisable in favor of the creditors of her estate, the most limited general power, then it will be subject to tax at her estate. She will become the transferor for GST purposes, and there will be no GST when she dies.

In a case like that, the same strategies that work to get a step-up in cost basis, and the ways to “fix” the trust to do so, are all relevant.