CHAPTER 10A

ESTATE PLANNING

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(Updated 2014)

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INTRODUCTION

This Chapter addresses Rules of Professional Conduct (RPC) relating to estate planning, gathering information to prepare estate planning documents, and preparation of estate planning documents. Powers of attorney and trust instruments can avoid the need for a guardianship (See Chapter 10 regarding guardianships). Trust instruments may also avoid the need for a probate, although Washington State's relatively simple and inexpensive probate procedures (See Chapter 10 regarding probates) make probate a reasonable way of handling many issues in decedent's estates and avoiding probate is generally not a factor in determining the appropriate estate planning documents to be prepared for clients.

PART I: RULES OF PROFESSIONAL CONDUCT RELATING TO ESTATE PLANNING (RPC)

This section outlines the important ethical issues when practicing in the areas of estate planning, guardianship and probate.

A. (10A.1.1) CONFIDENTIALITY OF INFORMATION - RULE 1.6

The general rule is that lawyers should not reveal information related to the representation of a client. The exceptions to this rule include:

1. With the client's informed consent.[1]

2. Disclosure is implied in order to carry out the representation.

3. The following other exceptions:

(a) Lawyer MUST reveal information relating to representation of a client to prevent reasonably certain death or substantial bodily harm.

(b) Lawyer MAY "reveal information related to representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."

(c) Lawyer MAY reveal information to secure legal advice about a lawyer's compliance with these rules.

(d) Lawyer MAY reveal information:

(1) to prevent client from committing a crime;

(2) to establish a claim or defense on behalf of a lawyer in a controversy, or in defense of a criminal or civil charge;

(3) to inform a tribunal of a client's breach of fiduciary duty when representing a court-appointed fiduciary. *See* RPC 3.3.

[1] "Informed consent" is a relatively new term in the rules. The definition is an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e). Comment 7 to the rule explains that obtaining informed consent will usually require an affirmative response by the client or other person. Certain rules (1.7(b); 1.8(a); and 1.9(a)) require that informed consent be obtained in writing. See Comment 7 to Rule 1.0.

Understanding Rule 1.6 is critical when representing clients in the areas of estate planning. Sometimes a lawyer is made aware of unlawful actions of the client that have resulted or may result in substantial injury to a person or a person's financial or property interests (such as neglect, abuse or financial exploitation of a vulnerable adult). Guardians and personal representatives are court-appointed fiduciaries. Sometimes a lawyer may become aware of a breach of fiduciary duty and will need to decide whether to disclose to a tribunal. The issue of disclosing information is also relevant regarding conflict of interests in joint representation.

B. (10A.1.2) CONFLICT OF INTEREST – RULE 1.7

The general rule relating to conflicts of interest was left intact by the 2006 revisions to the RPCs. Notwithstanding a conflict, a lawyer may represent a client if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against another and each affected client gives informed consent, confirmed in writing. RPC 1.7.

The first important question to ask to determine whether there may be a conflict of interest is who is the client? This is critical because it is to the client or clients that the lawyer owes a duty of loyalty and a duty not to disclose information related to the representation.

The most common estate planning situation presenting potential conflicts of interest is when a couple engages the lawyer to prepare an estate plan for both of them. The potential conflicts may be obvious at the outset, which is less common in this situation, or they may become apparent in the course of the lawyer's work for the couple.

In estate planning the client is the person or persons for whom the lawyer is preparing estate planning documents. A problem arises when a lawyer takes on more than one client for common representation. The comment to rule 1.7 states that in considering whether to undertake common representation, one must analyze whether there is any antagonism or if contentious litigation or negotiations between them are imminent. RPC1.7. Comment 29.

If each member of the couple wants to leave their estate to the other, and have common contingent beneficiaries, possibly excepting specific gifts to third parties which they have already discussed between themselves, it is likely that the clients will not have an actual conflict of interest. In contrast, if either or both clients has substantial separate property and there are issues about whether it would be characterized as they think it should be and they want to leave only their community property to the other member of the couple, there is a present conflict of interest, and the lawyer should not try to represent both clients. Even if both are agreeable to the lawyer representing one of them, it may not be wise to do so.

When a lawyer represents both members of a couple for estate planning purposes, information shared by one spouse/partner is not privileged information as to the other, and thus can be shared. In fact, the Comment to RPC 1.7 states: the "prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates

between the clients, the privilege will not protect any such communications and the clients should be so advised." RPC 1.7 Comment 30.

In any case where dual representation is undertaken, each client should be "advised that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." RPC 1.7, Comment 31. This stems from the duty of loyalty that is owed to each client. Before withdrawal, a lawyer should encourage the disclosing client to tell the other client. If the disclosing client will not do so, the only alternative may be withdrawal. However, sudden withdrawal will alert the informed client a problem exists; uninformed clients might call the lawyer and demand an explanation. Unless the lawyer simultaneously decided to close their practice, they will be forced to explain the Rules of Professional Conduct. Thus, the explanation itself becomes a form of disclosure.

To prevent this situation from developing, if an attorney decides to represent both spouses/partners, she should inform them in writing of the possible conflict and get their written informed consent in advance to tell the nondisclosing partythe confidence. That consent should include (1) a simple, clear, detailed explanation of what conflicts might arise even using illustrative examples and (2) a waiver allowing the attorney to reveal confidences to the second spouse/partner, if the attorney feels it is relevant. However, ABA Formal Opinion 93-374 warns that a prospective waiver would not survive scrutiny if the nature of the matter and its potential effect on the client were not appreciated by the client at the time the prospective waiver was sought.

In addition to potential conflicts between husbands and wives, courts have held the attorney owes a duty to third parties. In *Stangland v. Brock*, 109 Wn 2d 675, 747 P.2d 464 (1987) the Court acknowledged the right of an estate beneficiary to bring a cause of action against an attorney for errors in drafting a will. However, in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), the court clarified that a nonclient has standing to sue an attorney only if the transaction was intended to benefit the nonclient. In *Trask*, the court held that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries. *Id*. at 845. The Court held that there is no such duty for three reasons: "(1) the estate and its beneficiaries are incidental, not intended, beneficiaries of the attorney-personal representative relationship; (2) the estate heirs may bring a direct cause of action against the personal representative for breach of fiduciary duty and (3) the unresolved conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate or the estate heirs unduly burdens the legal profession." *Id.* at 844. However, the court has come to a different conclusion in guardianship cases. *See In re Guardianship of Karan*, 110 Wn. App. 76, 78 38 P.3rd 396 (2002) (when representing guardian, lawyer owes duty to ward of guardianship); *Estate of Treadwell v. Wright*, 115 Wn. App. 238, 61 P.3rd 1214, *review denied*, 149 Wn.2d 1035 (2003)(guardian's attorney owes ward a duty to establish the guardianship consistent with the requirements of RCW 11.88.100 and .105); *seeinfra section 10.1.4*.

C. (10A.1.3) PLANNING FOR AGED, DISABLED, OR CLIENT WITH DIMINISHED CAPACITY – RULE 1.14

The test of capacity to make a will is well established. *E.g. In re Estate of Bottger*, 14 Wn.2d 676, 129 P.2d 518 (1942) ("sufficient mind and memory to understand the transaction in which he is then engaged, to comprehend generally the nature and extent of the property of which he is contemplating disposition, and to recollect the objects of his bounty"). The 2011 amendments to the Washington Trust Act (referred to as "the 2011 amendments" in this article) provide that the capacity required to create, amend, revoke, or add property to a revocable trust is the same as the capacity required to make a will. RCW 11.103.020.

Assuming that the legal tests for capacity are met, the attorney could find herself in a potential conflict with the client if the attorney believes the client has diminished capacity. To protect the attorney it is best to discuss this with the client (while competent) and obtain express authority to make disclosures and take actions that the attorney reasonably believes are in the client's best interest. This express authority can be included in the initial engagement letter and/or the durable power of attorney. The durable power of attorney could be drafted to include authorization for the attorney-in-fact to waive on behalf of the client the attorney-client and physician-patient duties of confidentiality in appropriate circumstances.

Rue 1.14 – Clients with Diminished Capacity.

(a) "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonable necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

When dealing with elderly clients, it is not uncommon that they will have diminished capacity. The question becomes when is the client's capacity diminished to such a degree that the lawyer is impliedly authorized to disclose information related to the representation. This must be analyzed on a case by case basis.

D. (10A.1.4) SAFEGUARDING PROPERTY – RULE 1.15A

An attorney is required to provide an annual written accounting to the client or third party if the lawyer is holding "property" of the client or third party. This is a new requirement in the revised rules. The comments clarify that "property"

includes original wills and deeds. RPC 1.15A, Comment 5. Lawyers are also required to retain records of the property for seven years after return of the property. Given this rule, lawyers should consider giving all original wills and other estate planning documents to their clients for safekeeping. In the event that it is necessary for a lawyer to retain an original document, the lawyer should: (1) send a notice to the client or third party when she receives the document; (2) provide an annual accounting of what the lawyer has in the office; and (3) retain a written record for seven years after returning the property.

E. (10A.1.5) DUTY TO INQUIRE AND BECOME INFORMED

Attorneys are not hired merely as scribes in preparing estate planning documents. Rather the attorney has the duty to inquire and become informed as to the client's relevant facts and circumstances. The attorney has to ask numerous sensitive questions in order to obtain all of the required information. For example (1) the attorney cannot assume all the named children are children of the marriage or that neither client has another child; (2) the attorney cannot accept a client's identification of property as separate or community; (3) the attorney cannot automatically assume both husband and wife are U.S. citizens.

Attorneys must ask a series of "what if" questions such as "if your daughter dies childless, do you want your son-in-law to inherit?" Attorneys must inquire beyond the plain meaning of words, such as: if the husband has two children from a previous marriage and the wife has four children from a previous marriage and they say they want the children to inherit equally—what do they mean? Each child receives one-sixth, or his children share one-half and her children share one-half?

ATTORNEYS MUST NOT MAKE ASSUMPTIONS ABOUT THE CLIENT'S ESTATE PLANS. BASIC QUESTIONS SHOULD BE ASKED, SUCH AS WHETHER THE CLIENTS WANT TO DEFER TAXES UNTIL THE SECOND SPOUSE DIES IN A TAXABLE ESTATE OR WHETHER THE CLIENTS WISH TO START GIFTING PROPERTY OUT OF THE ESTATE. THE ATTORNEY SHOULD ALSO TALK TO THE CLIENTS ABOUT THE CONSEQUENCES OF DOING NOTHING.

PART II: ESTATE PLANNING – BEFORE DRAFTING DOCUMENTS

A. (10A.2.1) INTRODUCTION

The basic building blocks of an estate plan include (1) Last Will and Testament; (2) Durable Power of Attorney for Financial Decisions; (3) Durable Power of Attorney for Health Care Decisions; and (4) Health Care Directive to Physicians, RCW 70.122.030. In addition, clients may want to complete a Gift List disposing of tangible personal property, RCW 11.12.260, and a Disposition of Remains Instructions, RCW 68.50.160(1).Beyond these documents, parties may choose to put certain assets into vehicles that remove the asset from passing under the will. This section will walk you through the development of a basic estate plan.

B. (10A.2.2) 2012 CHANGE OF LAW - MARRIAGE

In 2012 the Washington legislature amended RCW 26.04.010 to define marriage as a "civil contract between two persons who have each attained the age of eighteen years, and are otherwise capable[,]" thereby making it possible for couples of the same gender to marry. This change affects many of the estate planning documents lawyers will prepare. Note that couples who were registered domestic partners under Washington's registered domestic partnership statute will automatically become spouses as of June 30, 2014 unless the registered domestic partners have proceedings for dissolution, annulment, or legal separation pending on June 30, 2014.

One distinction between spouses and registered domestic partners may be relevant for estate planning purposes. Registered domestic partners acquire community property from the date of registration, RCW 26.16.030, so spouses who were formerly registered domestic partners may have community property the acquisition of which antedates their marriage.

C. (10A.2.3) OBTAINING THE NECESSARY INFORMATION

After the introductory consultation to determine the client's objectives and to determine if the attorney can represent both spouses/partners, an appointment for an in-depth review conference is scheduled. Clients should be given a questionnaire which lists all the information necessary for the conference and asks them who they want to leave their estates to, and who they want to hold fiduciary positions such as personal representative, trustee, and attorney-in-fact under a power of attorney. If the lawyer's firm has a website, the questionnaire can be made available through the website.

Clients should be encouraged not to delay their appointment if they cannot complete the form. There may be some questions, such as who they should choose as a fiduciary, which they do need to discuss with the lawyer. There may be some information that they cannot complete, or some documents they cannot locate, but they can complete most of the information. Some clients may simply have difficulty completing forms. It is possible for the lawyer to cost-effectively complete the form during the conference but doing so depends on the clients bringing the necessary information and answers to the conference.

Sometimes the client still has decisions to make after the conference. Often asking the client for the answer which comes most readily to mind during the

conference may get a direction, e.g. their cousin did a good job administering their mother's estate and would be a suitable personal representative for the client's estate. If that does not occur, the lawyer should try to get the client to agree to provide the answers or information within a specific period after the conference. The client should be told, if this is the case, that the documents cannot be drafted without the requested information.

D. (10A.2.4) THE NECESSARY INFORMATION

The following information will often be helpful in preparing estate planning document. Much of the information may be elicited on the questionnaire. Recognize that clients may not have all of the documents mentioned, but this list can help identify documents it is worthwhile for them to try to locate.

1. Copies of all previously executed wills, Durable Powers of Attorney, Health Care Directives, community property agreements, and trusts;

2. Approximate inventory of all assets presently owned or expected to be owned in the future, valued at cost or other basis and at market. Includes but is not limited to:

    (1) Expectancies, such as potential inheritances from client's parents;

    (2) List of bank and other financial institution accounts—identified by bank and account number;

    (3) Stocks and bonds, and if held in certificate form, how the ownership appears on the certificate, together with their values;

    (4) Life insurance and copy of beneficiary designation and cash value, if any;

    (5) Qualified pensions and IRAs and copies of beneficiary designations;

    (6) Deeds to real property (how the ownership appears on the deed) and any information on present fair market value;

    (7) Joint tenancy agreements and tenancy in common agreements, the latter being more commonly found where unrelated parties own real estate together;

    (8) Pre- or post- Nuptial agreements, certificates of state registered domestic partnerships, and divorce decrees and Property settlements. Look in particular for support obligations for children, maintenance provisions for the former spouse or partner, whether those obligations survive death of the obligated party, and whether life insurance or other security must be maintained in order to fulfill those obligations; and

    (9) Trust agreements of which the client or client's spouse/partner is a grantor or a beneficiary. Particular attention should be paid in determining whether the trusts grant the client a power to appoint property held in trust upon their death, how such a power of appointment should

be exercised to be effective, and in whose favor it may be exercised.

Additional financial information may be desirable in particular circumstances, particularly where the client has or may have a taxable estate or where the client has interests in a business or real estate jointly owned with others.

(1) Financial statements and asset lists, either prepared by the client or by third parties.

(2) Gift tax returns filed by clients.

(3) Schedule of client's past gifts and projection of future gifts.

(4) If the client is in business, partnership agreements, buy-sell agreements, operating agreements for limited liability company agreements, and bylaws of corporations, together with at least representative income tax returns for the entity, and K-1s reporting the client's share of business income.

(5) Federal and state estate tax returns of estates of parties from whom the client has inherited property.

With regard to the business documents, particular attention should be paid to whether the agreements define what happens when an owner dies, whether some transfers upon death are not permitted (family business entities often do not allow spouses to succeed to ownership interests), and whether the deceased owner's successors in interest become or can become voting owners or only receive the deceased owner's right to distributions.

E. (10A.2.5) THE EXISTING PLAN

The information provided by the clients may indicate they do not have a taxable estate and are not likely to have a taxable estate. In nontaxable estates, the existing plan may have problems of which the clients are aware and the client's awareness of those problems may have triggered the contact with the lawyer. Among these problems are: guardians for minor children may need to be updated; children may have become more or less responsible than their parents expected when the prior documents were drafted so that trusts for their benefit are unncessary or trust terms need to be extended; parents or older persons named as fiducaries may no longer be able to act; named fidicuiaries may have suffered reversals in their own lives which indicate they should not make decisions for others, and beneficiaries have become eligible for resource/ income-based governmental assistance and their inheritances should be left in trusts which do not render them ineligible for such assistance.

Where the information provided by the clients indicates that they have, or may have a taxable estate, the effect of the existing documents should be analyzed and explained to the clients. The new documents should not, compared to the existing documents, increase the cleint's estate tax liability without the client being aware of, and approving, that result.

Matters the lawyer may need to consider in reviewing the existing documetns are: (a) whether income distributions are mandatory; (b) whether life insurance is integrated with the wills: (c) whether property acquired other than by purchase is carried at stepped-up basis and there is documentation to support it; (d) whether existing trust powers and estate tax provisions are consistent with disposition of

community property; (e) whether personal representatives have explicit tax election powers; (f) whether the surviving spouse/partner will have power to recapture property in a trust, to invade corpus, to make selective income allocations among beneficiaries—generally whether the existing plan works as a functional whole.

A few more things to look out for, in light of changes in the tax laws, are: (g) whether the client's buy-sell agreement directs an automatic or non-elective sale; (h) whether her trustee or representative will have authority to accept distributions from qualified plans in other than lump sum form; (i) whether the existing marital deduction trust is overfunded, considered in light of marital deduction estate tax provisions and applicable unified tax credits; (j) whether the client has either a present interest or expectancy under a generation-skipping trust more consequential than the mere passive right to receive income; (k) whether the client's executor has an election to value closely-held and farming real property at current use value; and (l) whether the will provides expressly against lapse in case of exercise of a qualified disclaimer.

It is possible that a review of the existing documents will indicate they still meet the client needs, and in that case, only some or no new estate planning documents need be prepared.

F. (10A.2.6) THE CONFERENCE

If the client has provided the information called for in the questionnaire, and any additional documentation needed to prepare the estate plan, there need be no more than one in-depth conference. Subsequent conferences may be called for if the client has questions about the draft estate planning documents or wants to make significant changes to the drafts. It the client prefers, it may be possible to discuss these matters by telephone conference or in an e-mail exchange.

Particularly for estate tax issues, more complex divisions of estate assets, and coordinating dispositions of probate assets and nonprobate assets, diagrams are often helpful to show the client the effects of their current estate planning documents and how those matters would be addressed in the new estate planning documents.

After the plan is roughed out with the clients, if estate tax issues are present, the tax impacts can be approximated and necessary adjustments noted on the worksheets that will be used in the formulation process. A good organizing memo to use in this analysis is IRS Form 706, together with Schedules C, D, and E to IRS Form 1040. At the review conference, as well as later at the documentation stage, counsel will want to impress upon the client the premium the law places on careful record keeping. The special valuation provisions for closely held businesses and farms and other amendments—the unified tax credit system itself—make paper saving and list making the order of the day: no backup documents, no tax relief. There are a number of other tax planning devices that can assist to reduce the overall assets of the estate in order to reduce tax liability. Before utilizing such devices, you should consult with an expert in the field, or if the estate is complex, you should consider referring the client to an attorney who is an expert in the field. If these devices are not drafted properly, they will not serve to effectuate the desired outcome.

G. (10A.2.7) CHOOSING FIDUCIARIES

The conference is the point at which client questions about fiduciaries should be addressed and as much as possible, the fiduciaries identified. Selecting the fiduciaries to carry out the provisions of an estate plan is one of the most difficult tasks involved in the estate planning process.

It is impossible for the client to choose a personal representative, trustee, attorney-in-fact or guardian of minor children unless the client understands what each does. Clients may not, for example, understand that attorneys-in-fact under powers of attorney cannot act after the principal is deceased, they may not understand that the personal representative has no authority to act until appointed by the court after the testator's death, and they may not understand that a testamentary trustee has no role until assets are distributed to the trustee from the probate estate. There may also be confusion about the different roles of a trustee who would manage and control a child's inheritance and the child's guardian of the estate, who might receive periodic distributions of modest amounts for the benefit of the child.

Clients may be tempted to scatter roles among a number of people so "no one feels left out" but it is better to choose fiduciaries with regard to their capacity to do particular jobs even if this means that one fiduciary is given multiple jobs. Clients should be advised to confirm that their chosen fiduciaries are willing to serve.

Sometimes clients want their children's shares of an estate held in trust but want to name their children to fiduciary roles such as personal representative or attorney-in-fact under a financial durable power of attorney. Although the documents can be drafted in that way, it is illogical to name someone who is not thought able to manage their inheritance to a position where they manage the principal's or the principal's estate's finances.

Clients sometimes want to name a beneficiary's sibling as their trustee. This may be appropriate where there is the beneficiary is disabled and their sibling has a close relationship with them, or where the sibling will be the guardian for a minor beneficiary. But in other situations, the trustee-beneficiary role should not be superimposed on what might already be a troubled sibling relationship. Naming an independent professional fiduciary as trustee may be the best choice in that circumstance.

Clients should name at least one alternate for each fiduciary position, or, in a will or trust agreement, approve a method by which an alternate fiduciary can be chosen. The client should not choose a fiduciary to deal with money or property if they have reservations about the fiduciary's ability to manage property and financial matters.

PART III: DRAFTING BASIC DOCUMENTS AND RELATED ISSUES

Each of the documents needed to create a sound estate plan will be discussed below.

A. (10A.3.1) LAST WILL AND TESTAMENT

The foundation of every estate plan is the will. Even if the client is creating a living trust and plans for all assets to pass outside the will in accordance with the trust, a will should be drawn in case something goes awry. Although wills can vary enormously in their length and complexity, their typical format is (1) an identification of the testator, (2) identification of the testator's family, particularly spouses, partners, and children who could take a statutory share if not named or provided for in the will under RCW 11.12.091 or 11.12.095, (3) appointment of a personal representative, (4) disposition of specific gifts, and (5) disposition of the residuary estate. In addition, the will should nominate guardians for minor children and trustees for beneficiaries' shares which will be left to them in trust.

1. (10A.3.2) Family Members - Children

Under RCW 11.12.091 a child who is born or adopted after the execution of the will takes an intestate share if the will does not "name or provide" for the child. A provision for, or a disinheritance of, a particular child or children of a class, is sufficient to avoid the application of the statute. If the will does not meet this standard, application of the statute could be avoided if there is "clear and convincing evidence" that the failure to name or provide for the child was intentional.

The will can define "child" and "children" to include stepchildren and foster children if the client wants to treat them equally with their children.

RCW 11.12.091 does not require the testator to name or provide for descendants of a child or for other relatives. However, if the client has reason to think that such a person might want to make a claim to their estate, language expressly disinheriting them can be included.

It is possible that a descendant of a child may be "adopted out" of the testator's family. Although an adopted out child is not treated as "issue" for purposes of the intestate successions statutes, RCW 11.04.085, the question in connection with a will providing for "issue" of a deceased child who has been "adopted out" of the testator's family is whether the testator intended to include or exclude the child. *In re Shaw's Estate*, 69 Wn.2d 238, 417 P.2d 942 (1966).

2. (10A.3.3) Family Members - Spouses and Registered Domestic Partners

Under RCW 11.12.095 a spouse who is married after the execution of the will and a registered domestic partner who becomes a registered domestic partner after the execution of the will takes an intestate share if the will does not "name or provide for them." As with RCW 11.12.091, application of the statute can be avoided if there is "clear and convincing

evidence" that the failure to name or provide for the spouse or registered domestic partner was intentional.

If the clients share their lives other than as spouses or registered domestic partners, consider providing in the will that the other partner will receive no other or different share if they marry.

3. (10A.3.4) Appointment of Personal Representative

In choosing a personal representative, clients are faced with the threshold question of using an independent professional fiduciary or an individual. Conflicts or potential conflicts among beneficiaries, a large estate, and a lack of obvious choices among family and friends are factors favoring an independent professional fiduciary. Entities who can serve as personal representatives are identified in RCW 11.36.010. A 2013 amendment to the probate statutes, RCW 11.36.010 (4), allows nonprofit corporations to serve as personal representatives, if the corporation's articles or bylaws permit them to serve in that capacity.

Individuals chosen as personal representative should be honest. Competence in financial matters and ability to keep records, or at least willingness to engage good advisors to do so, is highly desirable. Personal representatives must be of legal age, and whether a particular person is too old to serve in that capacity should be considered. Unlike some states, Washington allows nonresidents to serve as personal representative, although a nonresident personal representative will be required to appoint a resident agent to qualify. Consider whether expenses associated with travel or otherwise due to the personal representative not being a resident outweigh the benefits of their selection. Although the issue does not often arise, note that persons convicted of felonies and misdemeanors "involving moral turpitude" are disqualified from serving as personal representative, even if named in a will. RCW 11.36.010.

Clients should bear in mind that if they are not naming their spouse or registered domestic partner as personal representative, spouses and registered domestic partners have a statutory right to serve as administrators of the couple's community property. RCW 11.28.030. This right may be waived by failing to apply for letters of administration within 40 days of the decedent's death, and may be waived in the parties' prenuptial or postnuptial agreement.

It is less common to include detailed recitals of personal representative powers than it is to include detailed recitals of trustee powers. Note that a personal representative with nonintervention powers has all of the powers of a trustee, RCW 11.68.090(1), so RCW 11.98.070 can be consulted in deciding if a client has concerns about whether their personal representative could undertake particular actions in administering their estate.

4. (10A.3.5) Appointment of Trustee or Custodian

If a beneficiary of the will is a minor, or is of legal age but believed to be too young or otherwise incapable of wisely managing their inheritance, or is receiving governmental assistance dependent upon their income or

resources, the client will want to name a trustee or other fiduciary to manage the beneficiary's share of the estate.

This can be done by naming an individual person, naming an independent professional fiduciary [RCW 11.36.021(1) identifies entities who can serve as trustee], identifying a person by relationship, *e.g.* the beneficiary's surviving parent, or identifying a method by which a trustee is chosen, *e.g.* by the personal representative. *See* RCW 11.98.039(1)(b) (referencing procedures for choosing a trustee in the governing instrument.) The job description for a trustee is very similar to the job description for a personal representative. A person who would be a suitable personal representative would also likely be a suitable trustee, bearing in mind that the trustee's role may extend decades into the future.

The 2013 amendments to Washington's trust statutes removed some of the additional requirements imposed on trustees in the 2011 amendments. However, clients should consider carefully whether an honest and well-meaning, but inexperienced, trustee is the correct choice. Potential tax consequences must be considered because in some circumstances, tax consequences will vary widely according to whether the grantor, grantor's spouse, the beneficiaries or an independent trustee is named as trustee. Also, consider whether the trustee should reside in the same jurisdiction as the beneficiaries, particularly if there are minor children involved.

Where smaller amounts of money are being left to minors, consider leaving the money to a custodian under the Uniform Transfers to Minors Act, RCW Chapter 11.114. The custodianship may be continued until the beneficiary reaches the age of 25 if the will so provides. RCW 11.114.200(2).

The will should either name an alternate trustee to serve if the first-named trustee is unable or unwilling to serve or specify a procedure for choosing a successor trustee, since the trust may continue for a considerable period of time after the client's death. Having the trustee appoint a successor, or having the beneficiaries choose a successor (often subject to a provision that the trustee must be a professional fiduciary), are common provisions.

5. (10A.3.6) Appointment of Guardian for Minor Children

For many clients, the guardian of the minor children is the most important decision in the estate planning processing. Clients should be encouraged to examine the qualities and traits they think are most important in parenting and then choose a friend or relative with those traits who is willing to accept the responsibility. Ordinarily, the same person is nominated as guardian of the minor's person and guardian of the minor's estate. Since the guardian will usually handle relatively small amounts of money, such as allowances distributed to them from the trust for the minor's benefit, financial management skills are less critical than for personal representatives and trustees.

Draft the trust documents to reflect the client's wishes about the added financial burden on the guardian of caring for the minor children. For example, the client may want to provide authority for the trustee to use trust funds to purchase larger housing, pay for private schooling, pay for household help and day care, or other provisions consistent with the client's preferences. Make clear that the trustee can exercise such authority, without creating a conflict of interest, if the trustee is also to be the guardian.

6. (10A.3.7) Specific Gifts – Tangible Personal Property

Tangible personal proeprty is most conveniently dealt with by means of a "gift list," which has the dual advantages that it can be executed after the will and executed without the formalities required for execution of a will. The will should include language referring to a gift list for tangible personal property even if it is to be executed in the future. RCW 11.12.260.

The gift list must describe the items and the beneficiaries "with reasonable certainty." Describing items with an overly broad category, *e.g.* "art," or by reference to a history which may not be familiar to anyone else, *e.g.* "Aunt Rose's wedding ring," or by reference to their present location, *e.g.* "in the basement," carries a high risk that they items will not be described "with reasonable certainty." Pay attention to the definition of "tangible personal property" in RCW 11.12.260(4): it does not include cash gifts, pets, and stock, even if held in certificate form. If the client wants to complete the gift list themselves at a later date, explain the rules to them and encourage them to share a draft before they sign it.If the Will or a gift list provides that tangible personal property not disposed of by the list passes to multiple beneficiaries, a method should be provided to dispose of items if the beneficiaries cannot agree.

7. (10A.3.8) Specific Gifts from Couple

If a couple wishes to make specific cash gifts to individuals or charities, determine if the gifts are to be made only if there is no surviving spouse or regardless of whether there is a surviving spouse. If both spouses want to make gifts to the same beneficiary, determine if that amount is to be paid twice, once from each estate, or the amount is to be paid only once. If the it is to be paid only once, include language which provides that half of the gift is paid from each estate if the spouses die within the survivorship period specified in the will.

8. (10A.3.9) Caps on Specific Gifts

It is a good idea to cap specific cash gifts of any significant amount as a percentage of the estate, in case the estate turns out to be considerably smaller at the time of the testatrix's death than at the time the will is drafted. Otherwise, the estate plan may be distorted by having a large share of the estate go to the beneficiaries of specific gifts.

9. (10A.3.10) Foregiveness of Debt

The client may want to forgive debts owed to them by children or others. Determine if the forgiveness applies to all debts or to specific debts, *e.g.* a specific promissory note. Also, determine if forgiveness applies to debts in existence as of the execution of the will or applies to future indebtedness as well. Forgiving as yet unknown debt carries the risk that the estate plan may be substantially distorted if large amounts are loaned in the future. However, if a client has already made substantial loans to a particular person, it is not unlikely they will continue to do so in the future.

10. (10A.3.11) Gifts to Caregivers

The client may want to leave a share of their estate, or a large specific gift, to a relative or someone else who is providing care for them. Even if the contract governing the caretaker-client retlationship does not prohibit accpetance of gifts and no financial exploitation is involved, the compensation arrangements for the caregiver may be somewhat informal and the caregiver may not have been fairly compensated. Consider whether the caregiver could receive payment on a creditor's claim for their services in addition to the gift under the will, or whether the gift under the will should be reduced by the amount paid on any creditor's claim.

11. (10A.3.12) Specific Gifts of Real Estate

The client may want to make a specific gift of a particular parcel of real estate. Consider what should happen if the property is sold during the client's lifetime, but proceeds of sale are payable to the client at the time of death. This circumstance can occur with seller financing through a real estate contract and note and deed of trust, or if the client enters into a binding purchase and sale agreement but dies before receiving the sale proceeds. Should the proceeds and the financing documents go to the beneficiary of the specific gift or to the residuary beneficiary? In the absence of a specific direction, the general rule is that the proceeds pass to the beneficiary of the specific gift, *See* RCW 11.12.060, but it is best to address the question if the client has a preference.

12. (10A.3.13) Specific Gifts of Financial Accounts

Sometimes clients want to leave specific gifts of bank accounts. Since bank mergers are common and account numbers may change, and clients may transfer the funds to other accounts, it is difficult to assure such a gift can be carried out. A better solution would be to hold the account as a "pay on death" or "transfer on death" account and not reference it in the will.

13. (10A.3.14) Disposition of Residuary Estate

The will should dispose of the estate remaining after any specific gifts. Typically, this is done by allocating the entire estate to particular beneficiaries, and the simplest division is to use fractions or percentages if there is more than one beneficiary. Some clients may find the residuary estate concept confusing because they expect the will to identify specific items of property they own.

Address who should inherit if the named beneficiaries predcease the client. Often, the issue of a deceased beneficiary take their share. Another common allocation is to divide the deceased beneficiaries's share among the other residuary beneficiaries. In that case, consider whether the remaining residuary beneficiaries share the deceased beneficiaries equally or pro-rata. If charities are included among the residuary beneficiaries, consider whether they share a deceased beneficiary's share in the same manner as the deceased indivdiual beneficiaries. Bear in mind that a clause allocating the deceased beneficiary's share among "surviving" beneficiaries which include charitable beneficiaries is somewhat ambiguous because it could be argued that charitable beneficiaries do not "survive."

14. (10A.3.15) "Indefinite Beneficiaries" and the 2011 Amendments

Prior to the 2011 amendments to Washington's trust statutes, the validity of trusts for "indefinite beneficiaries," *i.e.* those not identified in the instrument creating the trust, was in doubt. In contrast, the validity of a gift for charitable purposes coupled with a power given to the personal representative to select the beneficiaries has long been recognized in Washington. *In re Planck's Estate*, 150 Wash. 301, 272 P. 972 (1928). RCW 11.98.011 now provides that a trust granting the trustee a power to select a beneficiary from an indefinite class is valid, so long as it is not exercised in favor of the trustee. Another 2011-adopted statute, RCW 11.98.015(1), provides that "a trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee."

15. (10A.3.16) Trustee Powers – Specific Issues

A trustee is given extensive powers under RCW 11.98.070. A typical will provision provides that the trustee "shall have all of the power, authority, and discretion given a trustee under the laws of the State of Washington. These include those given a trustee under the provisions of RCW 11.98 of the Revised Code of Washington." Review the statute to see if there are any additional powers which should be given to trustees.

Two additional powers the lawyer may want to include are the authority to make distributions to pay reasonable costs for disposition of a beneficiary's remains and funeral or memorial expenses, and to distribute the amount which the beneficiary is required to receive under the minimum distribution rules for any individual retirement accounts included in the trust estate.

The will typically provides the trust will terminate upon the occurrence of a specific event. Although the authority to wind up the trust can be reasonably implied from the trustee's other powers, consider providing in the will that following the occurrence of the terminating event, the trustee's powers will continue for a reasonable period to facilitate disribution the trust estate to the beneficiaries and any sales of trust assets which may be necessary or appropriate to make such distributions.

The 2011 amendments adding RCW 11.98.070(38) regarding powers to wind up trusts and RCW 11.98.070(39) regarding powers to electmodes

of payments from employee benefit or retirement plans, annuities, and life insurance payable to the trustee may be helpful in deciding what powers to include. Note that RCW 11.98.070(39) probably does not apply to individual retirement accounts.

The 2011 amendments to RCW 11.98.070(16) gives trustees more alternatives in making distributions to beneficiaries under a legal disability and may be more useful than clauses lawyers are accustomed to using.

16. (10A.3.17) Trustee Notice Responsibilities

RCW 11.97.010 allows trustors to modify trust powers and duties provided by statute, excepting only that the trustee could not be relieved of the duty to act in good faith and honest judgment.

The "good faith and honest judgment" rule was supplemented, particularly in the area of trustees' duties to provide information about trusts, in the 2011 amendments which were extensively revised again in 2013. The lawyer should carefully review both RCW 11.97.010, which identifies the statutory duties which may be waived in the trust document, and RCW 11.98.072, which sets out the duties trustees owe to beneficiaries. The 2013 amendments add a new term, "qualified beneficiary," which is defined in 11.98.004(2).

Under RCW 11.98.072(1), trustees must keep all qualified beneficiaries of the trust "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." "Unless unreasonable under the circumstances" a trustee must promptly respond to beneficiary requests for information about the trust. A trustee satisfies the duty to respond to beneficiary requests for information about the terms of the trust by providing a copy of the entire trust instrument. The trustee's duties under RCW 11.98.072 (1) cannot be waived in the trust instrument.

The other provisions of RCW 11.98.072, including a duty to provide notice of the existence of the trust within 60 days after it becomes effective, can be waived in the trust instrument.

Even if the drafting lawyer chooses to waive all notice requirements other than those provided in RCW 11.98.072(1), note that a trustee's provision of information in RCW 11.103.050 can shorten the time frame for beneficiaries to file proceedings to contest the trust, RCW 11.103.050. Contests to testamentary trusts would continue to be governed by the will contest statute, RCW 11.24.010.

Even if compliance with the Trustees' Accounting Act, RCW Chapter 11.106, is waived, the lawyer may want to include language requiring trustees to provide basic financial information about the trust on a regular basis, particularly when the trustee is not a professional fiduciary, as a way of reminding the trustee of the duty to provide information sufficient to allow beneficiaries to protect their interests. Requiring an annual statement as described in RCW 11.106.020 may be appropriate.

17. (10A.3.18) Allocation and Payment of Estate Tax

If estate tax will be due, there should be a statement concerning the source of funds to pay the estate taxes. That is, should the estate tax come out of the residuary estate or should it be paid pro rata by all the beneficiaries? Although clauses calling for payment of estate taxes from the residuary estate are often seen, those provisions always present a risk that of unintended consequences if the client has signficant nonprobate assets, life insurance, or retirement accounts passing outside the will and the beneficiaries of those assets differ from the residuary beneficiaries.

RCW 83.110.A.030 provides a default scheme if a will, irrevocable trust or other qualifying instrument does not specify. In general,under RCW 83.110A each asset includable in decedent's estate or the person receiving such interest bears its pro-rata share of the tax after considering any deduction or exemption inuring to persons benefiting thereby. Usual practice is to exempt gifts of tangible personal property and specific gifts from the application of RCW Chapter 83.110A, since otherwise those beneiciaries are required to pay estate tax order to receive their gifts.

Insurance to pay estate taxes may be considered. RCW 83.110A.030 should be consulted to determine rules applicable to certain specific types of interests, such as interests generating a generation skipping estate tax and interests arising out of property included in the gross estate because of IRC § 2044 or a similar provision. A court has the discretion to deviate from the rules set forth in RCW 83.110.A.030 if, due to special circumstances, following the rules would result in inequitable distributionof estate tax responsibility.

There are hundreds of formbooks, tax services, and encyclopedias containing model wills and will clauses. As with all forms, use with caution. They are, at best, rough guides, and an attorney should never copy blindly.

Be especially careful about copying marital deduction formula clauses. Make sure you understand what type of marital deduction formula is being used (pecuniary vs. fractional) and the consequences of the chosen formula.

18. (10A.3.19) Will Repository

A Will Repository was created in 2004. The relevant statute is RCW 11.12.265. This is a service now provided by the courts to hold original wills after they are signed. The purpose of the repository is to hold the wills in a safe place. Its use is not required. The will is deposited with the clerk of the court and is a sealed document until the person dies. Before death the testator or testatrix may withdraw the will with proper identification. Others, such as an attorney, a guardian, or an attorney-in-fact may withdraw the original will only upon court order. If a certified copy of a death certificate is presented to the court, the will may become part of the public record. Forms to file an original will in King County and a Motion/Declaration to Withdraw Will from Repository are included in the Probate Section of this Manual.

B. (10A.3.20) DURABLE POWERS OF ATTORNEY (DPOA).

This device is a crucial way for a person avoid a guardianship in the event of disability. A guardianship will, generally speaking, not be imposed if there is a less restrictive alternative like a DPOA in place. If one appoints an attorney-in-fact while competent, one can usually avoid the need for a guardianship in the event of disability or incompetence. An appointment of a principal's spouse or state registered domestic partner as attorney in fact is revoked upon entry of a decree of dissolution or termination of the state registered domestic partnership, unless the power of attorney specifically provides otherwise. RCW 11.94.080(1).

1. (10A.3.21) Financial Durable Powers of Attorney

RCW Chapter 11.94 provides the statutory framework for creating a durable power of attorney. What makes a "durable" power of attorney different from general agency power is that the agent's authority continues upon the disability of the principal. In order for this to be effective, the document must clearly state that the power of attorney is not affected by disability. RCW 11.94.010. The statute permits the agent to perform any act authorized in the instrument.

RCW 11.94.050(1) lists powers which an attorney-in-fact does not have unless specifically provided for. Most of those are powers to make or amend the principal's estate planning documents. One of the powers which must be specifically provided for is the authority to make gifts of the principal's property.

Although under RCW 11.94.050(2), transfers for the purpose of qualifying the principal for Medicaid assistance need not be specifically provided for, better practice is to include a specific provision which at least identifies the persons to whom transfers are permitted. The principal may prefer to have their assets expended on their cost of care, and in such case, the power of attorney should specifically exclude the authority to make Medicaid-qualification transfers.

Under RCW 11.94.070, the attorney-in-fact is subject to the same limitations on exercising their authority for their own benefit as apply to a trustee under RCW 11.95.100 through 11.95.150. The intent of these provisions is to avoid the attorney-in-fact's being deemed to have a general power of appointment under IRC §2041.

The principal may nominate the guardian of her person and estate in a DPOA. The court will respect this choice unless it finds good cause not to or the person is disqualified to become a guardian. RCW 11.94.010(1).

The job description for an attorney-in-fact for financial matters is similar to the role of personal representative and trustee. In choosing an attorney-in-fact, care must be given to the choose someone who is trustworthy. The attorney-in-fact will have complete control over the client's assets, with no automatic court oversight as in guardianship matters.

The potentially dangerous consequences of giving such powers should be discussed with the client. Great care should be taken in naming an agent

with these powers. The durable power of attorney should be carefully crafted to accomplish the specific goals of the principal. Form durable powers of attorney are not good practice because one size cannot fit all clients. An attorney can draft a durable power of attorney only at the instruction of the principal, and never on the instruction of the proposed attorney-in-fact.

When discussing the power of attorney with the client, consider its effective date. Many people choose to make the DPOA effective upon their disability (referred to as a "springing power"). Disability is usually evidenced by a letter from a treating physician. However, the Health Insurance Portability and Accountability Act (HIPAA), makes this type of DPOA more difficult to navigate. Under HIPAA, medical providers are not allowed to provide private patient information without the patient's (or their designated agent's) authorization. Once a person becomes incompetent, they are no longer able to provide the needed authorization. Consequently if the DPOA includes springing powers of attorney, effective upon the principal's disability, the designated attorney-in-fact may have trouble obtaining the needed letters. Because of this problem, some attorneys advise their clients to make their DPOAs effective immediately. Ultimately, when the power becomes effective is the client's choice.

Advantages of a DPOA are that it can be used to avoid a guardianship, and its cost is minimal compared to revocable living trust or a guardianship. Disadvantages are that the holder might ignore their fiduciary duties and impoverish the principal, and in general there is no court supervision of the attorney-in-fact, absent a petition under RCW 11.94.090, and consequently no requirement of an annual accounting. In addition, if the client has executed a series of powers of attorney naming whoever is most influential in their life at that point, guardianship may become the only way to sort through the dueling powers of attorney and settle who should manage the client's affairs.

If the client has concerns about a particularly meddlesome relative or friend making difficulties for the attorney-in-fact, the client can, in the power of attorney, exclude that person from being able to file a petition under RCW 11.94.090 to have the court determine issues relating to the exercise of the power of attorney. The requirements for such an exclusion are in RCW 11.94.100(2).

Banks and other third parties refusing to recognize the authority of an attorney-in-fact under a power of attorney they consider to be "old" or "stale" is a continuing problem, despite RCW 11.94.040 which allows the attorney-in-fact to execute an affidavit as proof of their authority to third parties. The best course is to periodically update the powers of attorney so that the disputes over "old" or "stale" powers of attorney are reserved for documents where the client no longer has the capacity to execute an updated power of attorney.

2. (10A.3.22) Medical Durable Powers of Attorney

RCW 7.70.060 permits a patient's legal representative to consent to medical treatment if the principal is not competent. RCW 11.94.010(3)

provides that a principal may grant a power of attorney for health care decisions authorizing an attorney-in-fact to provide informed consent for health care decisions on the principal's behalf, which under RCW 7.70.060 would be effective only when the principal is not competent. The Health Care Power of Attorney cannot anticipate every situation in advance and medical procedures and tests evolve over time. Thus it is important for the Health Care Power of Attorney to be broad enough to include new tests and treatment options.

The role of attorney-in-fact for medical decisions should be given to someone with similar views to the principal on health care matters, since the attorney-in-fact is charged with exercising "substituted judgment" to make the decision the principal would have made had they been able to act for themself. This may militate against naming a kind and loving family member who nevertheless could not be depended upon to exercise substituted judgment. Clients should be encouraged, while fully competent, to realistically address problems that may arise if they become disabled with their family and non-family members who will be asked to act as attorney-in-fact.

Often medical powers of attorney name someone to make health care decisions when the principal is unable to act, and also nominate a guardian of the person. Usually the same person is named as both attorney-in-fact and nominated to serve as guardian. Since the guardianship is likely a long-term role, whereas making emergency health care decisions is not necessarily so, there may be circumstances, especially when non-family members are named as attorney-in-fact, when a different person should be nominated to serve as guardian.

3. (10A.3.23) Durable Powers of Attorney for Minor Children

In 2005, the Legislature authorized parents and guardians to execute powers of attorney appointing an attorney-in-fact to make health care decisions for their minor children, or the minor children for whom they are guardian, to be effective "if there is no other parent or legal representative readily available and authorized to give such consent." RCW 11.94.010(4). The power of attorney may also nominate a guardian of the person or estate, or both, for their minor children to serve during the disability of the principal. RCW 11.94.010(5). Usual practice is to name the persons nominated as guardian for the children in the parent's wills as attorney-in-fact for the children.

C. (10A.3.24) HEALTH CARE DIRECTIVES

Attorneys often use the exact language of the health care directive (popularly known as a "living will") contained in RCW 70.122.030. Some attorneys also include language about allowing hydration to make the patient more comfortable and facilitate provision of pain medications. Attorneys should also advise the client to talk to family and friends so the client's wishes are known.

Clients may have confusion about the relative roles of the power of attorney for medical decisions and the health care directive. The health care directive applies in relatively narrow circumstances, where the signer has a terminal condition or is in a permanent unconscious condition and "application of life-sustaining

treatment would serve only to artificially prolong the process of . . . dying." RCW 70.122.030(1). In other circumstances, if the principal cannot act, the attorney-in-fact will decide.

Further, the statute provides that the principal makes a "request" that the holder of a power of attorney be guided by the directive but does not obligate the principal to do so. So even where the health care directive applies, the client should be sure to select an attorney-in-fact who is willing to be guided by the health care directive.

D. (10A.3.25) REMAINS, ANATOMICAL GIFTS, POLST, DEATH WITH DIGNITY, AND LONG TERM CARE INSURANCE

Clients can execute instructions for disposition of their remains and making of anatomical gifts. The POLST form and death with dignity may impact choices made in other estate planning documents, and the presence or absence of long-term care insurance may affect end-of-life financial planning.

1. (10A.3.26) Disposition of Remains Instructions

   RCW 68.50.160(1) provides that a person has the right to control the disposition of their remains, and that a "valid written document expressing the decedent's wishes regarding the place or method of disposition of his or her remains, signed by the decedent in the presence of a witness, is sufficient legal authorization for the procedures to be accomplished."

   In addition to identifying the procedures to be followed, the Instructions can designate another person to act as the decedent's representative in making such decisions if the decedent has not made prearrangements with a licensed funeral establishment or cemetery authority. RCW 68.50.160(2), (3)(e).

   In the absence of written direction from the decedent, surviving family members are forced to make decisions while still coping with the death of their loved one. Clients should be encouraged to provide instructions to reduce the burden on their families and friends, and prearrangements can be encouraged to the same end.

2. (10A.3.27) Anatomical Gifts

   RCW 68.50.530 and following statutes allow individuals to make anatomical gifts by executing a "document" of gift. Often prospective recipients of anatomical gifts have their own documents to carry out donor wishes, and it is best for the client to contact the prospective recipients.

   If the client is making an anatomical gift, the gift should be referenced in the Disposition of Remains Instructions so that the instructions apply only to the remains to be disposed of after the anatomical gift.

3. (10A.3.28) POLST Form

   Another mechanism to ensure that the client's wishes regarding end of life are carried out is to have the client complete a POLST Form (Physician Orders For Life-Saving Treatment). These are bright green forms that are in effect, physician's order. They state what type of

resuscitation method, if any, the client would like. Most people put these on their refrigerator or some other obvious location in the home. In the event that emergency medical personnel are called to the client's home, they will be directed by the POLST form. Without a POLST form, the EMT personnel will resuscitate the individual if possible and take them to the hospital for further treatment. For clients with a critical medical condition, or facing the loss of the ability to give directions themselves, an original form must be obtained from their physician. This is not an attorney-prepared document.

4. (10A.3.29) Death with Dignity

The Washington Death with Dignity Act, RCW Chapter 70.245, was adopted by initiative in 2008 and is modeled after Oregon's Death with Dignity Act. The basic terms of the Initiative permit terminally ill, competent, adult Washington residents, who are medically predicted to have six months or less to live, to request and self-administer lethal medication prescribed by a physician.

5. (10A.3.30) Long Term Nursing Insurance

A large number of insurers write long-term care insurance. There are differences in the coverage periods, whether benefits are adjusted for inflation, and whether care is available in-home or only in a care facility. Long-term care insurance reduces the need to draw down one's own resources or seek to qualify for Medicaid assistance under increasingly restrictive rules and for that reason can be worth mentioning to clients. Depending on client ages and condition of health, coverage may not be available or may be more costly than they can afford.

PART IV: DISPOSITION OF ASSETS OUTSIDE WILLS

A. (10A.4.1) NONPROBATE ASSETS GENERALLY

A substantial portion of clients' potential estates may be comprised of assets which will pass by beneficiary designation rather than under their wills. These assets may be "nonprobate assets" as defined in RCW 11.02.005(10) (which includes individual retirement accounts) as well as other types of assets which function like nonprobate assets but are excluded from the statutory definition of "nonprobate assets" such as payable-on-death provisions of life insurance policies and employee benefit programs.

If the clients contemplate changes in the mix of nonprobate and probate assets in the near future, such as allowing a life insurance policy to lapse, provisions made under the will for particular beneficiaries can be adjusted depending upon the amount they receive in nonprobate assets. Such provisions do not require a "super will" as authorized under RCW Chapter 11.11, since they do not purport to change the beneficiary designations on nonprobate assets, and thereby do not entail any reduction in the amount the beneficiary would receive from nonprobate assets. But the provisions are complex. Counsel may find it helpful to test draft language using mathematical scenarios and include a mathematical example in the will to better document the testator's intent.

There may also be advantages to shifting control of the disposition of certain assets away from the will, on a revocable or irrevocable basis. The motivating factor should be the client's objectives, not tax consequences or probate avoidance. One scenario where such planning makes sense is a couple in a second marriage with children from prior marriages. A nonprobate asset can be used to provide for children of the prior marriage, while leaving probate assets (and their administration during the probate) solely in the hands of a surviving spouse.

Frequently, the lawyer will find that the clients have designated their children as the beneficiaries of their nonprobate assets. This causes the asset to become distributable directly to the children rather than to the trust established for their benefit under the Will. If the children are minors, the court will have to appoint a guardian or custodian under the Uniform Transfers to Minors Act for the assets. Even if the child is of legal age, the amount may be larger than the parents want the child to receive free of trust. The trust for the children under the will can be designated as the beneficiary of a nonprobate asset, RCW 11.98.170, and the trust beneficiaries will receive the same protection from creditor claims against life insurance proceeds, RCW 48.18.410, and retirement accounts, RCW 6.15.020, as individuals named as beneficiaries of such assets.

Any beneficiary designation changes must be made on forms and in a manner acceptable to the insurance company, administrator of the retirement account, or financial institution where the asset is maintained. The client may need assistance from the lawyer in making the changes to these beneficiary designations. Not infrequently, the forms do not provide clear guidance for a client who wishes to name a testamentary trust as a beneficiary or contingent beneficiary of the asset.

B. (10A.4.2) TESTAMENTARY DISPOSITIONS OF NONPROBATE ASSETS

For decedents dying after July 1, 1999, testators can control by will the disposition of certain nonprobate assets that pass outside of their wills under RCW Chapter 11.11. The popular term for such a will is a "super will." The statute does not apply to all assets. Assets which can be controlled by the will include joint tenancies in bank accounts or other personal property, payable upon death or trust bank accounts, transfer on death securities, revocable trusts and notes, or other contracts the payment or performance of which is affected by the death of the person.

RCW Chapter 11.11 is an **elect in** statute; it is not automatic. It allows the testator to supersede a pre-existing beneficiary designation on the asset. It does not apply to nonprobate assets acquired after the date of the will or to changes made in the beneficiary designation after the date of the will.

To elect in to such treatment, the testator can either make a specific reference in the will to the nonprobate asset or can make a general reference to "all nonprobate assets" or a category of nonprobate assets. The statute also applies to nonprobate assets created before July 1, 1999 and to wills executed before that date which comply with the statute.

After the testator's death, the testamentary beneficiary of the nonprobate asset or the personal representative will send or deliver a statutory form of notice to the financial institution or third party holding the nonprobate assets. The financial institution or other third party has no liability if it has already paid (without notice) the nonprobate asset to the individual shown on its records as being the beneficiary. The testamentary beneficiary would have a claim against the nonprobate beneficiary if he makes the claim within the earlier of six months from the date of admission of the will to probate or one year after the date of decedent's death.

A recent case involving application of RCW Chapter 11.11 is *Manary v. Anderson*, 176 Wn.2d 342, 292 P.3d 96 (2013).

C. (10A.4.3) JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

Upon the death of one joint tenant, the surviving joint tenant becomes the full owner of the asset as a matter of law.

The advantage of joint tenancy is that probate can be avoided. Disadvantages for married couples and registered domestic partners include that if all property passes in this manner to a surviving spouse/partner, decedent's unified credit is lost. Another disadvantage is in the event that one of the couple is in a nursing home and receives Medicaid benefits and the well spouse/partner dies first, all the assets will automatically pass to the institutionalized spouse/partner and disqualify him or her for Medicaid benefits (Medicaid recipients may not have more than $2,000 in non-exempt assets). Disadvantages for unmarried joint tenants include: (1) the entire value of the joint tenancy property will be included in the estate of the first joint tenant to die, except to the extent the surviving joint tenant can prove he or she made a contribution to the purchase or improvement of the property; (2) the creation of a joint tenancy represents a gift to the noncontributing joint tenant.

D. (10A.4.4) COMMUNITY PROPERTY AGREEMENTS (CPA)

CPAs are intended to provide the marital community or domestic partnership with a simple and certain means of disposing of their property upon the death of either spouse/partner. *See Bosone v. Bosone*, 53 Wn. App. 614, 768 P.2d 1022 (1989) (citing *Neely v. Lockton*, 63 Wn. 2d 929, 389 P.2d 909 (1964)). A typical "three-pronged" community property agreement provides that all the property the couple has at the time of the agreement is community property; all property either of them of acquires in the future is community property; and upon the death of the first spouse or registered domestic partner to die, all of their property passes to the surviving spouse or registered domestic partner.

Variations of the "three-pronged" agreement are possible. For example, the parties might agree only that all of their existing property is community property, or agree also that all of their after-acquired property will become community property. Or, in a case where probate would be unnecessary and one spouse has a terminal illness, one might want to adopt the first two prongs, and provide that the property of only the terminally ill spouse passes to the surviving spouse.

Advantages of three-pronged CPAs include the avoidance of probate and no estate tax is due on first spouse's death.

Disadvantages of three-pronged CPAs include (1) loss of the unified credit if all property passes in this manner as discussed under joint tenancies with right of survivorship; (2) a CPA prevails over an inconsistent will; (3) in the event of simultaneous death, if there is no back up will, property will pass by intestate succession; (4) the CPA avoids probate of the estate of the first spouse/partner to die, but not the second; (5) filing for dissolution does not automatically abrogate the agreement (*See Marriage of Pilant*, 42 Wn. App. 173, 703 P.2d 1241 (1985)); (6) the possibility of a spouse in a nursing home becoming disqualified from receiving Medicaid benefits, as discussed under joint tenancies with right of survivorship; and (7) the CPA is not unilaterally revocable because it is a contract between two parties. This could cause problems if one of the spouses/partners becomes incompetent or disappears. *See Estate of Brown*, 29 Wn.2d 20, 185 P.2d 125 (1947). For an example of conflict and confusion related to a CPA, an illustrative case is *See v. Hennigar*, 151 Wn. App. 669, 213 P.3d 941 (2009), in which a spouse transferred her separate life estate interest in a piece of real property to the community through a CPA, and after she died her spouse claimed a continuing interest in the property. The Court of Appeals ruled that any interest the surviving spouse had was extinguished at the spouse's death.

It is also possible to deal with some of the disadvantages by particularized drafting. The CPA may provide that, with regard to the provision for transfer upon death of the predeceasing spouse, each spouse has the authority to unilaterally revoke that direction, or that the direction is automatically revoked upon filing of a petition for dissolution of marriage or legal separation, or entry of a decree of legal separation or dissolution of marriage. Note a decree of legal separation does not terminate the couple's marriage, *Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999), so legal separation should be specifically mentioned. Couples' powers of attorney frequently grant the attorney-in-fact authority to revoke community property agreements to make Medicaid-qualification transfers.

Because CPAs can have unpredictable consequences, and special and more complex drafting may be required to make use of a CPA, a standard "three-pronged" CPA should not be regarded as a routine part of a couple's estate planning documents.

E. (10A.4.5) REVOCABLE LIVING TRUSTS (RLT)

A revocable living trust is sometimes used as alternative to a will. Under a revocable living trust, property is placed in trust to be managed and distributed later by a Trustee. The trustors, or either of them, can serve as Trustee.

In recognizing that today many used an RLT as a Will substitute, the 2011 amendments provide that the capacity to sign an RLT is the same as is needed to sign a will. The amendments enacting RCW 11.103.030 also provide that a trustor cannot revoke or amend the trust unless the trust clearly provide that it is revocable, and also specify how a revocable trust executed by more than one trustor which apply "unless the trust agreement provides otherwise." Insofar as the trust estate is comprised of community property, either spouse or registered domestic partner can revoke the trust, but the joint action of both is required to amend the trust. Insofar as the trust estate is comprised of property which is not community property, each trustee can revoke or amend the trust with regard to the portion of the trust property they contributed.

Advantages of a revocable living trust include: (1) the trust can avoid a guardianship in the event of incapacity; (2) protection of a vulnerable spouse can be provided if the well spouse dies first, (3) ease of administration if property is located in a second jurisdiction; (4) probate may be avoided on the death of both spouses; and (5) some greater degree of privacy as neither the trust nor an inventory is filed with the court upon the trustor's death.

In some states, such as California, residents often hold their property in trust because probate is more costly or complicated than it is in Washington. Washington residents owning real property in such states should consider following the locals' example and holding title to such real estate in a trust. It would be prudent for the Washington lawyer to refer the client to local counsel to prepare the trust and conveyance documents.

Disadvantages of a revocable living trust include: (1) the cost of preparing the trust is frequently more expensive than the cost of drafting a will; (2) the trust must hold title to all assets, both initially and thereafter; and (3) title insurance to real property may lapse upon transfer to trust.

It is not uncommon to find that, even if all the trustors' assets were initially transferred into the trust name, later acquired assets are not held in trust name. Depending on the nature and value of these assets, a probate may be necessary. Consequently, a "pour over" Will which directs that any property outside the trust be held an administered in accordance with the RLT should always be used in conjunction with the RLT.

Note that privacy considerations are affected by the 2011and 2013 amendments to the Trust Act. Under RCW 11.98.072(1)), the trustee of a formerly revocable trust which becomes revocable upon the trustor's death or otherwise must give notice to persons interested in the trust to the extent necessary to enforce their rights under the trust.

A traditional reason for using trusts was the absence of express statutory authorization to contest the validity of a trust. However, the 2011 amendments provide, in RCW 11.103.050, for filing of judicial proceedings to contest the validity of trusts which were revocable at the time of the trustor's death. Contests can be filed within 24 months after the trustor's death unless the trustee gives notice to the beneficiaries in accordance with RCW 11.103.050, in which case the deadline is 4 months after the transmittal of the notice.

F. (10A.4.6) IRREVOCABLE TRUSTS AND INTERVIVOS TRANSFERS

Although irrevocable trusts are generally not favored, there are limited circumstances where their use may be appropriate.

1. (10A.4.7) Irrevocable Trusts for Vulnerable Clients

   An irrevocable trust may be used if the client is presently competent, but there is reason to expect that they will become incompetent in the future and that they will be vulnerable to financial exploitation. Although the trust keeps the client's assets away from the people who might take advantage of the client, the trust may not be adequate to cover all future contingencies. In addition, the client will be deemed to have transferred the IRS-determined value of the remainder interest in the trust assets to the remainder beneficiaries and will have to file a federal gift tax return. Even with an irrevocable trust, the trust should provide that the trust could be amended by the court in a nonjudicial dispute resolution proceeding under RCW Chapter 11.96A.

2. (10A.4.8) Special Needs Trusts

   An "Irrevocable Trust" or "Special Needs Trust," is a complicated mechanism for supporting a person with a disability without impacting their eligibility for important public benefits like Medicaid. Inter vivos transfers are essentially gifts made of property prior to death.

   Advantages include: the ability to provide for the special and supplemental needs of a disabled child or grandchild by placing funds or assets in a properly drafted irrevocable special needs trust for that person's benefit during the disabled person's lifetime, while ultimately distributing any unutilized assets to the ultimate beneficiaries of the trustor's choice. This planning device is authorized in a frequently changing maze of federal Medicaid statutes and regulations. An attorney without specialized skill in this area of law would be wise to consult with an attorney who is knowledgeable in this area of law. Clients should be advised of this, and the attorney should obtain authority to consult if the circumstances reveal a special need and the client is interested in this planning opportunity. Disadvantages include: (1) loss of control; and (2) the risk the beneficiary may die and leave the donor destitute.

G. (10A.4.9) RETIREMENT PLANS AND IRAS

It is not uncommon for retirement benefits and IRAs to constitute the most significant class of assets in an employee's estate. Beneficiary designations can cause this asset to pass outside of the will unless the decedent designated his estate as the beneficiary of the plan or policy. Election of distributions is also a factor to be considered for tax planning. This is an evolving area of estate

planning and practitioners who are not familiar with this area of law would be wise to consult with an attorney who is familiar with it. The practitioner must determine if the retirement plan is protected by ERISA. If the plan is protected by ERISA, then ERISA preempts any effective disposition of the account by the non-employee spouse. *See Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138 L.Ed.2d 45 (1997). At the same time, *Boggs*did not deny the community property interest of the non-employee spouse. On the other hand, if the retirement plan is not protected by ERISA, RCW 6.15.020(6) confirms that a non-employee spouse has the authority to transfer his community property interest in an IRA by will or intestate succession.

H. (10A.4.10) PRIVATE ANNUITY CONTRACTS

A private annuity contract consists of the transfer of property in return for the buyer's unsecured promise to pay the seller (transferor/annuitant) increments of income over a period of time which is usually the transferor's life.

Advantages include: (1) transfers appreciated and appreciating assets out of the estate of the transferor free of gift, inheritance, estate and, to a large extent, income tax consequences; (2) annuitant gets to recognize gain over a number of years; (3) buyer gets the asset at a temporarily stepped-up basis based on transferor's life expectancy which is adjusted at transferor's death to amount actually paid; and (4) annuitant can transform non-income producing property into income producing property. Disadvantages include: (1) annuitant bears the risk that the buyer will waste the assets and be unable to continue payments (because a private annuity must be unsecured); (2) large annual payments are made to the annuitant based on the IRS actuarial tables of annuitant's life expectancy; and (3) buyer must continue to make payments if annuitant outlives his life expectancy.

I. (10A.4.11) GRANTOR RETAINED INTERESTS (GRIT, GRAT, GRUT, QPRT).

In all four types of trusts, the grantor is essentially making a current gift of the right to trust assets to the remainder persons to be effective at a specified date in the future. Gift taxes are based on the value of the gift to the donee and the gift (and therefore the gift tax) must be "discounted" by the cost of the waiting period. The longer the donee must wait, the lower the gift tax value of the asset placed in trust and therefore the lower the cost of the gift. If the grantor survives the term selected, none of the trust's assets should be included in the grantor's estate.

Advantages include: (1) removes appreciating assets out of the estate; (2) serves to transfer ownership in a manner that avoids ancillary administration; and (3) protects assets from a will contest, public scrutiny, or an election against the will if the grantor survives the trust terms. Disadvantages include: (1) there is no step up in basis, with the remainder persons each receiving a portion of the grantor's basis; (2) gift of a future interest, thus the annual exclusion is not available; (3) the gift is irrevocable; and (4) if the grantor dies during the specified term, his executor may be liable for tax on the included assets but the property itself might not be available to pay that tax.

J. (10A.4.13) QUALIFIED DISCLAIMERS

This is essentially a method of readjusting a testator's or donor's dispositive plan to the advantage of the donee and/or the donee's family having knowledge of specific facts and circumstances at time of testator's death. Valid election depends on strict compliance both with state law (RCW 11.86.031) and with the technical provisions of I.R.C. §§ 2518 and 2045. Most important, the disclaimer must be delivered within nine months of testator's death and prior to the beneficiary's acceptance of any benefits.

The acceptance of benefits rules are somewhat technical. If the estate planning documents contemplate that the surviving spouse may disclaim property passing to them from the predeceasing spouse, counsel should advise the clients to communicate as soon as possible with probate counsel and provide some explanation of the rules to reduce the chances that assets will inadvertently be made unavailable for disclaimer.

K. (10A.4.14) VALUATION PLANNING

Valuation planning describes any technique used to affect the valuation of property. Because the basis for valuation of assets for these purposes is fair market value, defined in regulations as "what a willing buyer would pay a willing seller," it may be possible to undertake planning which can actually reduce the value of the property and thus reduce federal transfer taxes. Each discount is computed separately and discounts can be stacked.

Unless an asset is cash or publicly traded stock, arguments can be made for a discount for lack of marketability. Discounts for lack of marketability have been allowed by courts to reflect that stock in a closely held business enterprise is less attractive and more difficult to market than a publicly traded stock.

Lack of marketability applies to majority as well as minority interests. For majority interests, courts have allowed 25% to 40% discount. For minority interests, this discount is available any time stock being transferred cannot control a corporation. It may also be available when the real property is owned by two or more co-tenants.

In community property states, the value of interest owned can be further reduced. In *Estate of Bright*, 658 F.2d 999 (5th Cir. 1981), husband and wife owned 55% of the stock of a corporation. On the death of the first spouse, there was only 27-1/2% in the estate and the court allowed a discount. In *Propstra v. U.S.*, 680 F.2d 1248 (9th Cir. 1982), a 15% discount was allowed for a decedent's 50% interest in property which he owned as community property, based on the rationale that neither 50% community property interest could control the asset.

Furthermore, in Revenue Ruling 93-12, the IRS considered a situation in which a person gave all of his stock in a closely held corporation to his five children (20% each) and held that each interest transferred was entitled to a minority interest discount. Thus, the sum of the parts did not equal the whole.

A third technique to reduce valuation is to create new entities which depress value. This can be accomplished by creating (1) family limited partnerships and gifting away part of the business; (2) creating holding companies; (3) recapitalization into voting and non-voting stock; (4) for married couples, giving away just 2% so each spouse only has 49% in his/her estate.

L. (10A.4.15) SPECIAL PROBLEM AREAS

In addition to removing assets from the general estate for tax or expense-saving purposes, special attention may be given to providing for such situations as (a) collateral disposition of out-of-state property, particularly real estate; (b) continuing the client's business; (c) directing the trustee or personal representative as to renewal of Subchapter S status; (d) replacement of trustees and committee review; (e) handling the client's investments; and (f) other developing situations that may later emerge as demands upon the estate and which can distort the estate plan.

PART V: AFTER DOCUMENTS ARE EXECUTED

A. (10A.5.1) DOCUMENTATION

After a thorough discussion of revisions with the client, the plan will be ready for execution by the client.

At the time of execution of instruments, safe-keeping instructions can be reviewed and incorporated in the client's letter of directions to family, counsel, and executor to be effective upon death. Often this is handled with a letter sending the client copies of the executed documents.

Prompt recording of any deeds, deeds of trust, or other documents presently affecting title to property should follow their execution.

Practice varies as to whether financial durable powers of attorney should be recorded promptly after execution. They must be recorded if the attorney-in-fact intends to use their authority to buy, sell, or mortgage real estate for the principal. However, if there is no immediate plan to engage in a real estate transaction and the client's age and condition of health make it likely they will execute updated powers of attorney in the future, unnecessary recording of a power of attorney will simply trigger a need to record future documents revoking the power of attorney.

Some practitioners maintain a separate trust safe deposit box for holding client estate plan packages with receipt to be kept (a) at client's residence and (b) in his safe deposit with letters of direction. This service should be only at the client's request, not at the insistence of counsel. If counsel agrees to retain original estate planning documents, she must comply with RPC 1.15A and provide an annual accounting of the documents in her possession and must retain records of such holdings for seven years after the documents are delivered to the client or the personal representative of the estate after the client's death. *See supra* at 10A.1.4.

Retaining a complete client file after the documents are executed has its advantages. This would include copies working papers and drafts, client memoranda, notes of conferences and correspondence, and copies of client documents relevant to important features of the plan. This allows use of the file materials to further review and modify the plan, assist in the defense of a will contest, action to construe documents, or other attack on the plan.

On the other hand, lawyers, especially in smaller firms, may want to destroy client files consistent with a file retention policy as communicated to the clients. They may also want to contact the clients to invite them to receive their old files, which can also be a useful reminder to clients to update their estate planning documents.

B. (10A.5.2) REVIEW AND ONGOING CLIENT CONTACTS

The client will already have been advised at the first conference that the passage of time can gradually distort their estate plan, and many of the questions clients are asked can be explained by the need to address different contingencies. Clients should be advised to periodically review their documents in light of changes in

their circumstances and to contact the attorney when circumstances change or their wishes change.

In some cases, the attorney and client may agree to continue an attorney-client relationship for estate planning matters.

As long as one has an attorney-client relationship, the attorney has an ongoing responsibility to review the client's estate plan and advise them if any changes are necessary.

It is more common for attorneys to complete an estate planning project for their clients, choose to terminate the attorney-client relationship and close the file, thanking the clients and advising them that the attorney-client relationship is now concluded, but telling the clients they are welcome to contact the attorney in the future with questions about their estate plan. In this way, the attorney is not obligated to review the client's estate plan vis-à-vis current changes in the law or to initiate inquiries regarding changed client circumstances. The client may return and initiate the attorney-client relationship at a later date for a review of their estate plan or a specific change that he or she would like to make.

Many attorneys periodically issue a newsletter to their clients advising them of changes in the law or other developments. Clients may want to contact the attorney after reviewing the newsletter for advice regarding how the newsletter items may affect their individual estate plans.

CONCLUSION

This chapter reviews the rules of professional conduct relating to estate planning and reviews various options and steps to assist a client in developing a sound estate plan. The Washington State Bar Association and the King County Bar Association have volumes of CLE materials on all of these topics. If you wish to gather more information, those resources are excellent.