

**SANDRA L. CLAPP & ASSOCIATES, P.A.**

**BASICS OF ESTATE PLANNING**

The following are common documents, techniques or considerations reviewed in the estate planning process:

**A. Living Will and Durable Power of Attorney For Health Care**

Effective on July 1, 2007, the Idaho legislature adopted a revised living will and health care power of attorney act. The living will and general power of attorney for health care are combined into one (1) document integrated document. Prior to 2005, the living will and the power of attorney for health care were contained in two (2) separate and distinct documents. The current law does not require witnesses or a notary to be present when the document is signed, making it easier to execute the document in emergency situations. The Living Will may also incorporate a Physician Orders for Scope of Treatment form (otherwise known as a "POST") which more specifically incorporates your wishes through an order entered in conjunction with your doctor. The POST form is meant to be compatible with your Living Will which directs a physician and other health care professionals as to the maker's wishes in the event they are in a persistent vegetative state or have an incurable injury, disease or illness. The Living Will is generally associated with the removal of life support systems, but also extends to the administration of nutrition and hydration. If not diagnosed as being in a persistent vegetative state, one (1) physician must certify that (a) an injury, disease, illness or condition is terminal, (b) the application of artificial life-sustaining procedures would serve only to prolong artificially life, and (c) death is imminent, whether or not artificial life-sustaining procedures are utilized. Once executed, a copy of the Living Will or registration information (discussed below) should be provided to all treating physicians and to the agent named in the Living Will.

A Living Will must operate in conjunction with a power of attorney for health care. The "Durable Power of Attorney for Health Care" portion of this document includes provisions that incorporate the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA protects your rights regarding the use and disclosure of your individually identifiable health information or other medical records. The agent may encounter difficulty in accessing medical records or information without HIPAA compliance. The term "durable" means that the power of attorney continues to operate even though the maker becomes incapacitated. The Durable Power of Attorney for Health Care names an agent, who is a person you designate to make health care related decisions and to carry out the wishes of your Living Will. The agent is generally a family member or close friend. In the Durable Power of Attorney for Health Care, you can authorize alternate agents to act in the event the person named as your primary agent is unavailable or unable to act to make health related decisions for you. The agent can also be authorized to make funeral and burial arrangements for you after death or to carry out directives on these matters.

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**B. Registration of Living Will and Durable Power of Attorney for Health Care**

Beginning January 1, 2007, you may choose to register your Living Will and Durable Power of Attorney for Health Care with the Idaho Secretary of State. This service is free of charge and is designed to confirm your health care wishes to medical personnel in case you become medically incapacitated. In order to register your Living Will and Durable Power of Attorney for Health Care, it will be necessary to submit a letter to the Idaho Secretary of State along with your original document where it will be scanned into their computer system. The Secretary of State will then return your original document to you along with a card that has a personal code which will make your Living Will and Durable Power of Attorney for Health Care accessible from an Internet connected computer to anyone who has your code. The Secretary of State's office advises that it is wise to keep the card in your purse or wallet in case you become hospitalized and the medical staff need to gain access to your health care wishes. It is also advisable to give a copy of this code to your health care agent and physician so that they may gain access to your health care wishes in case you are unable to communicate your desires to the medical staff. In utilizing this new health care directive registry, you are creating a way to voice your health care wishes no matter where you are at the time they are needed.

**C. General Power of Attorney.**

A General Power of Attorney is generally executed during the estate planning process. The General Power of Attorney should be "durable" so that the authorization and powers extend beyond the incapacity or incompetence of its maker. The Power of Attorney designates an agent, who is an individual or person identified to make decisions and act on behalf of the maker (known as the "principal"). Generally, the Power of Attorney is broad in scope and authorizes any action the principal could take personally.

Effective July 1, 2008, the Idaho legislature adopted the Uniform Power of Attorney Act. The provisions of this new law will govern all powers of attorney executed after July 1, 2008. Under the new law, all powers of attorney that substantially follow the statutory form will be valid. The statutory form contains defined provisions to interpret the powers and duties of the named agent. In executing the statutory power of attorney, the principal will select the powers that will be granted to the agent. Once selected, the statutory definitions and guidelines will refine and set forth the power and duties of the agent in detail. The maker is also able to add additional powers, restrict or modify the powers, or incorporate conditions for exercise. Powers of attorney executed prior to July 1, 2008, will remain valid. However, to avoid difficulty in utilizing the power of attorney in the future, any power of attorney executed prior to July 1, 2008, should be updated to the new statutory form.

#### **D. Estate Tax Considerations.**

Part of the estate planning process is devoted to minimizing transfer taxes, including state and federal estate tax (applicable to taxable estates of a decedent), gift tax (applicable to certain lifetime transfers), and generation skipping transfer tax (applicable to some transfers that directly skip a generation).

Effective January 1, 2010, the federal estate tax and generation skipping transfer (GST) tax are temporarily "repealed." The temporary repeal is the result of changes adopted by congress in the 2001 tax act. It is anticipated that further changes may be enacted by congress in 2010, possibly even retroactively to January 1, 2010, but until such time the federal estate tax and GST as we have known it will have no application to an estate of a decedent dying in 2010. Each state may have a separate estate or inheritance tax law that will apply even if there is no federal estate tax. Presently Idaho does not have a separate estate or inheritance tax. The federal gift tax will continue in 2010 (as discussed more fully below).

Under the current status of the estate tax "repeal," for an individual dying in 2010, the assets in the estate will be subject to "carryover" basis under complex basis allocation provisions. Under prior law, the assets in a decedent's estate received a "step up" in basis to date of death fair market value. Under the basis carryover provisions in 2010, the fiduciary of the estate will have the authority to allocate up to \$1,300,000 to increase the basis of assets in the estate and up to \$3,000,000 to increase the basis of assets passing to a surviving spouse or a qualified marital trust. It will be important for individuals who have tax planning provisions in their testamentary documents to have those clauses reviewed under the current law. Many of these documents or clauses rely upon or reference provisions of the federal law that are no longer in existence during 2010. This temporary repeal of the estate tax provisions may cause uncertainty in the interpretation of the estate planning documents for a decedent who dies during the temporary estate tax repeal. The issue may be resolved through a simple amendment that confirms the intent of the individual or may require more expansive revisions as recommended by your attorney. In addition, for all testamentary documents, it will be important to consider and address in the testamentary documents the fiduciary authority for allocating the basis carryover for assets in the estate. There is the possibility that Idaho will adopt a law in early 2010 that will clarify the interpretation of testamentary documents that are based upon the federal estate tax provisions.

In the year 2011, unless congress enacts further changes, the federal estate tax will provide for an "exemption" or credit shelter amount of \$1,000,000 per individual, which is significantly reduced from the \$3,500,000 that was available in 2009. In addition, the top rate of 55% will apply to decedent's estate in 2011 under current law.

The federal gift tax will remain in effect during 2010. Each individual can currently transfer \$13,000 per gift recipient each calendar year which is excluded from gift tax. Thus, for a

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married couple, they can together transfer \$26,000 in property value, per recipient, each calendar year. These excluded lifetime transfers are useful to gradually reduce the total value of a gross estate without incurring gift tax consequences. The gift tax exemption for lifetime transfers is presently \$1,000,000 per individual. Any taxable gift is subject to a lower 35% rate in 2010. The amount of any lifetime exemption that is utilized through gifts will reduce the total amount of the exemption available at the time of death, if any.

The repeal of the estate and GST taxes has created an opportunity to make larger transfers to children and grandchildren potentially at lower cost. Any taxable gifts (those in excess of the \$1,000,000 lifetime exemption) will be subject to gift tax at the current rate of 35% in 2010. There would presently be no limit on transfers to grandchildren or trusts for grandchildren or other descendants because as of this writing there is no GST tax (other than standard gift tax as described above). Although there is no certainty that the gift tax rate will remain at 35% or that congress will not attempt to retroactively impose a GST tax, individuals interested in such transfers should make gifts as early in 2010 as possible to take advantage of the current lower gift tax rate and the repeal of the GST tax. The donor may desire to make such gifts conditioned or contingent upon the current estate tax repeal and rules remaining in effect as to the particular gift.

Because of the complexity of the current estate tax laws, before taking any action on the above matters, it is important that you consult with your legal and financial advisors to consider your particular testamentary documents and planning circumstances.

#### **E. Wills.**

A Will is a written instrument providing for distribution of a person's property upon their death. Any natural person 18 or more years of age, who is of sound mind, may make a Will. To make a valid Will, the statute requires compliance with various formalities. A Will must be in writing, signed by the person making the Will, and signed by at least two other people who witnessed either the signing of the Will or received an acknowledgement by the person executing the Will that it is his or her signature on the document. A self-proved will is one in which the person making the Will and both of the witnesses acknowledge their signatures before a notary public. A self-proved Will eliminates the necessity of having the witnesses testify as to the execution of the Will for admission of the Will to probate. A Will is valid until it is revoked or changed by codicil. A Will may be registered with the Idaho Secretary of State that enables interested persons to learn the date the Will was signed and where it may be located.

Idaho recognizes a "holographic will," whether it is witnessed or not. A holographic will is one which does not comply with the statutory formalities. The holographic will must contain a signature and the material provisions of the document in the handwriting of the testator or testatrix to be valid.

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A will or testamentary instrument is necessary or useful to (1) achieve unequal distributions of property, (2) plan for a disabled or incompetent child or parent, (3) establish trusts for the benefit of a surviving spouse, issue or other persons, (4) nominate guardian, conservators, and/or custodians for minor children, (5) appoint a personal representative of the decedent's estate, (6) distribute property from the estate into trust, (7) plan for distribution of property to minor beneficiaries or heirs, (8) make specific bequests of property to specific persons, (9) provide for charitable, educational, religious, or other gifts to entities, (10) forgive debt, (11) confirm the nature of joint accounts, (12) coordinate distribution of property which will pass outside of the probate estate (such as life insurance, pension plans, individual retirement accounts), (13) minimize estate taxes, (14) plan for business succession, and (15) alter the survivorship requirements (generally 120 hour survivorship required).

#### **F. Trusts.**

A trust is an entity created by a person (often called the settlor or grantor) which results from the transfer of property to another person or institution (called the trustee) with instructions regarding the management and distribution of the property. The trustee is conveyed legal title to the property placed in trust and has power to deal with the property as though the trustee were the owner.

A trust can be created either by an individual's will (known as a testamentary trust) or through a form of contract entered into during the lifetime of the grantor (known as an inter vivos trust). A trust can be revocable (subject to termination) or irrevocable (the settlor gives up future control over the property transferred into the trust). Furthermore, an inter vivos trust may be funded or unfunded, meaning that assets may (funded) or may not (unfunded) have been transferred to the trustee in trust.

Revocable trusts have no tax advantages in that the income of the trust is taxed to the grantor during his life and the principal of the trust is taxed as part of the grantor's estate upon his death. A revocable trust is useful to provide for organization and management of property during the life of the settlor. In addition, a revocable trust may be used to avoid the necessity of commencing a probate proceeding in all states in which real property is located (known as ancillary probate). A revocable trust may also be utilized to provide management of assets in the event of incompetency. In order to avoid probate, it is generally necessary that all assets owned by the grantor be placed in the trust. A revocable trust is not always the best estate planning option. The appropriateness of a trust is determined by the particular circumstances.

#### **G. Probate.**

Probate is a process authorized by statute to clear title to the decedent's property, to pay the decedent's creditors, and to distribute to the beneficiaries the property of the decedent. In

Idaho, the Idaho Uniform Probate Code authorizes a simplified probate, among other processes called informal probate. Through informal probate, there is generally no need to be involved in any court hearings and all pleadings are sent directly to the court. Because of the informal probate proceeding, a probate in Idaho is generally uncomplicated and provides a forum to determine creditors claims and any potential disputes. The desire to avoid probate is a consideration in the estate planning process, but should not be the sole driving force to create a revocable trust.

#### **H. Intestacy.**

Without a valid will or other testamentary instrument, property of a deceased person will be distributed according to the intestacy statutes of the applicable state. Under the general Idaho intestacy statutes, a surviving spouse will receive all of the decedent's one-half interest in the couple's community property. In addition, the surviving spouse is also favored in the distribution of the decedent's separate property, receiving no less than one-half of the decedent's separate property.

**Note: This document is provided for informational purposes only. While every effort has been made to ensure its accuracy, it should not be relied upon as legal advice in individual situations. Please consult your legal advisor for personalized information.**