
**WHAT DEAD
CELEBRITIES
CAN TEACH US
ABOUT ESTATE
PLANNING**

**Estate Planning
Council of Central
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What Dead Celebrities Can Teach Us About Estate Planning

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*"Life is pleasant. Death is peaceful.
It's the Transition that's Troublesome."*

Jimi Hendrix

EXECUTIVE SUMMARY:

It is interesting how the common estate planning mistakes of average clients are so often replicated and exaggerated in celebrity situations. This article will discuss some of the things we can learn from high profile celebrity estates, recognizing that our typical clients receive less media attention and, often enough, have a few less zeros on their estate values.

Generally when a celebrity dies and the planning is done properly, there is virtually no media scrutiny. However, the nature of celebrity status can exaggerate the issues that are created by common mistakes (e.g., the recent speculative media attention paid to Prince's dying without a Will or the Sumner Redstone conflicts over his competence). These exaggerations and the voyeurism of our culture make celebrities a helpful tool in discussing estate planning issues.

PRELIMINARY COMMENTS:

Celebrities get attention. Their deaths magnify that attention. The public's interest in the details of a celebrity's personal life and death are reflected in the number of websites on the topic. See for example:

- <http://www.celebritynetworth.com>
- <http://www.therichest.com/celebnetworth/>
- <http://www.probatelawyerblog.com/celebrities/>
- <http://trialandheirs.com/>
- <https://www.livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous.html>
- <http://wills.about.com/od/celebrityestates/qt/Famous-Wills-And-Celebrity-Estates-Actors-Actresses-And-Musicians.htm>
- http://www.viralpiranha.com/right-before-they-died-they-had-one-last-thing-to-say/?utm_campaign=dcq-dt-us-160505-vp&utm_medium=cpc&utm_term=5385393-Their+Awe-Inspiring+Final+Words+Before+They+Died-

DonKnottsGun_5ffbc56337af5f99cff3a0f213f7da4f.jpg&utm_source=ob&utm_content=1b1dd0-59344822

Numerous books provide salacious details of celebrity deaths and subsequent family fights over assets, including:

- Russell J. Fishkind, Probate Wars of the Rich and Famous, John Wiley & Sons (2011).
- Andrew and Danielle Mayoras, Trial and Heirs- Famous Fortune Rights – What You Can Learn from Celebrity Errors, Wise Circle Books (2009).
- Herbert E. Nass, Wills of the Rich and Famous: A Fascinating Glimpse at the Legacies of Celebrities, Gramercy (2000).
- Joseph J. Dadich, Celebrity Estate Plans Gone Bad: Secrets Every Woman Needs to Prevent Emotion and Financial Turmoil When a Loved One Dies, Create Space Publishing, 2011.

In the author's opinion, one of the most discerning articles on the often bizarre aspects of death and inheritance was written about Howard Hughes by David Margolick in the New York Times on October 5, 1997.¹ Below is a portion of the article:

"Howard Hughes... didn't like anybody very much. He hated doctors. He fought with lawyers. He despised his relatives. And most of all, he loathed tax collectors. And yet these were the folks who laid their hands on his vast estate -- in part because no one could ever find a bona fide Hughes will directing the money somewhere else. ... But who could have anticipated just how protracted, and how populated, the fight would be? It lasted 10 years, involved over a thousand players, generated countless headlines, a movie and millions in legal fees. It also brought forth a host of long-lost spouses, children and other relatives, plus assorted freeloaders and charlatans. And there were the tax men, from California and Texas and Washington, ravenous for what Hughes had cheated them of while alive. ... Determining the domicile of a man who'd lived his life in hotels was not easy; ... Theirs was a multi-front war, proceeding in Nevada, Texas, California, Utah and Delaware; ... a Los Angeles legal secretary found another purported will, which just happened to leave one-fifth of the fortune to a dormant corporation she just happened to own. Large numbers of heretofore unknown Hughes children showed up. ...And there were various "wives." Most were fruitcakes; ... Where the money ultimately went is something of an anticlimax. Happily, most ended with the Medical Institute Howard Hughes's power to do something worthwhile with his billions had somehow survived the lawyers, the relatives, the leeches, the fakers and Hughes himself. "Howard Hughes, whatever he may have been, has left something of value to all American people," the Attorney General of Delaware ... declared after the divvying up. "But I just don't think that was ever his intention."

¹ An unabridged version of this New York Times article can be found at <https://www.nytimes.com/books/97/10/05/reviews/971005.05margolt.html> (last visited April 30, 2016).

In 1983 (7 years after his death), the Howard Hughes estate passed roughly \$2.5 billion to 22 cousins after a rather hefty estate tax payment. In the course of the estate administration, the courts ruled that Hughes Aircraft (probably Hughes' most valuable asset) was owned by a charity, Howard Hughes Medical Institute. The court's ruling effectively eliminated state and federal claims for significant death taxes on the value of Hughes Aircraft. In 1985, Hughes Aircraft was sold by the charity to General Motors for \$5.2 billion.

Authors Comments: First, I have not represented any of the celebrities or their families who are discussed in this article. All of the information about the celebrities' planning has been obtained from internet sources and other non-privileged sources. Interestingly, the values given for celebrity estates, family dispositions, taxes, conflicts and settlement costs can vary widely, depending upon the source.

Second, as used in this article, a "celebrity" will be defined as anyone who has significant current notoriety or had past notoriety. We will also throw into the material a few decedents of non-existent notoriety and some celebrities who are still alive, when they have interesting stories that add to the themes.

Third, this article contains a plethora of facts and laws that can change rapidly. To the best of my knowledge, the facts and law that are referenced are accurate as of May 31, 2016. Prior to relying upon information provided in the article, I strongly recommend that you do your own research. I have tried to provide multiple additional research sources to aid that process.

Last, I have not tried to replicate all of the standard discussions of celebrity estate planning mistakes or cover every conceivable estate planning issue. Instead, the principal focus is on examples of unexpected consequences and potential traps and opportunities that may surprise both advisors and their clients.

LESSONS FROM CELEBRITIES

DYING WITHOUT A WILL

"I will continue to continue to pretend that my life will never end..."²

Paul Simon

DYING WITHOUT A WILL DOESN'T DAMAGE THE DECEASED, BUT IT SURE MAKES IT HARD ON THE SURVIVORS

Celebrities: Howard Hughes was certainly not the first or the last celebrity to die without a Will. Among the many deceased, recalcitrant Will-makers are:

- *Abraham Lincoln* was shot on April 14, 1865. He died the next morning without a Will despite being a skilled and successful attorney.³ He left an estate of \$110,296.80 (the equivalent of several million dollars today). The intestate estate was administered by Supreme Court Justice David Davis, a close family friend.⁴
- *Prince* died without a Will on April 21, 2016. His estate has been estimated to be worth \$300 million.⁵
- *Sony Bono* died while skiing⁶ in 1998 with an estate estimated to be worth between \$1 million to 15 million, but without a Will. Cher promptly submitted a claim against the estate for unpaid alimony,⁷ despite Cher having an estate estimated to be as much as \$300 million.
- *Pablo Picasso* died in 1973 at the age of 91, leaving behind a substantial estate that included artwork (roughly 45,000 pieces), five homes, gold and bonds. However because he did not have a will, it took 6 years to settle his estate at a cost of \$30 million.⁸
- *James Dean* died in 1955 at age 24 without a Will. Like most single 24 year olds without children, the consequences of his death were probably not a central focus of his thoughts.
- *Martin Luther King, Jr.* was assassinated in 1968 and died without a Will. Once becoming adults, his children have continually fought over the control and benefits of his legacy and assets.⁹

² From the song "*Flowers Never Bend with the Rainfall.*"

³ According to Legal Zoom, the only four Presidents to die without a Will were Abraham Lincoln, Andrew Johnson, Ulysses S. Grant and James A. Garfield.

⁴ Andy Mayoras and Danielle Mayoras, *Are You Better Prepared Than Abraham Lincoln Was?*, FORBES (Dec. 2, 2012, 9:01 AM), <http://www.forbes.com/sites/trialandheirs/2012/12/04/are-you-better-prepared-than-abraham-lincoln-was/#515a87b53278>.

⁵ See Kelley Holland, *Prince's apparent lack of planning may cost his estate*, CNBC (Apr. 26, 2016, 4:09 PM), <http://www.cnbc.com/2016/04/26/princes-apparent-lack-of-planning-may-cost-his-estate.html>

⁶ He died when he hit a tree, but contrary to news reports, his autopsy revealed that he was not on drugs or alcohol when he died. See William Claiborne, *Sonny Bono Is Killed in Ski Crash*, WASHINGTON POST, Jan. 7, 1998, at A01, available at <http://www.washingtonpost.com/wp-srv/politics/campaigns/junkie/links/bono.htm>.

⁷ Andrea Mandell and Lorena Blas, *6 Legendary Stars Who Died without Wills*, USA TODAY, (Apr. 26, 2016, 9:59 PM), <http://www.usatoday.com/story/life/people/2016/04/26/6-legendary-stars-who-died-without-wills/83550424/>.

⁸ Heleigh Bostwick, *10 Famous People Who Died Without a Will*, LEGALZOOM (Feb. 2011), <https://www.legalzoom.com/articles/10-famous-people-who-died-without-a-will>.

⁹ See Jenny Jarvie, *Legal battles of Martin Luther King Jr.'s Children Threaten his Legacy*, LOS ANGELES, TIMES, Jan. 19, 2015, available at <http://www.latimes.com/nation/la-na-mlk-family-20150119-story.html>; *MLK estate*

Data & Demographics: Unfortunately, there remains a significant number of Americans who seem to be following Paul Simon’s perspective from his 1965 song *Flowers Never Bend with the Rainfall*: “*So I’ll continue to pretend that my life will never end.*”

- A 1996 Merrill Lynch study reported that those over age 65 are twice as likely to avoid estate planning than those under age 65.¹⁰
- According to the AARP, only 17% of Americans over age 50 have a current will and durable power of attorney.¹¹
- A Lawyers.com study noted that in 2009 only 35% of Americans had a Will.¹²
- A Rocket Lawyer survey in 2014 showed that 64% of Americans do not have Wills.¹³

What causes this broad based resistance to signing a Will? In the author’s view after almost 40 years of practice, it comes from a variety of factors, including:

- For many people, the fear of addressing their personal mortality may lie at the heart of this problem. Perhaps part of the problem is caused by legal professionals who focus the client’s attention on their death, their spouse’s death, their children’s death, their divorce, their economic disaster and other unpleasant subjects that the client would prefer to ignore – as opposed to focusing the client on the legacy they are leaving behind.
- The sense that “*death is not going to knock on my door anytime soon – I have plenty of time.*”
- The inability of the attorney to communicate with the client in a way the client can comfortably understand with regard to the necessity, purpose and impact of proposed documents.
- A sense that “only the rich” need to have a Will. A relatively small portion of the population believes they are rich, including most “Millionaires Next Door.”
- A reluctance to incur the cost of the process.
- A natural reluctance to deal with difficult family and financial questions (e.g., dealing with estate dispositions when there are multiple marriages and children of those relationships).
- A continued inability to decide on who should act as decision makers in the event of the client’s incapacity or death (e.g., a desire not to burden friends, while having an adverse reaction to appointing family members) or how to most appropriately pass assets (e.g., what to do when a child has had a history of bad personal and financial decisions).
- A laissez faire attitude that “*I’ll let my family work it out.*”

drops licensing lawsuit against King Center, USA TODAY, Jan. 22, 2015, available at <http://www.usatoday.com/story/news/nation/2015/01/22/mlk-estate-king-center-lawsuit/22190471/>.

¹⁰ The Second Annual Merrill Lynch Estate Planning Survey (1996).

¹¹ Where there is a will...Legal Documents Among the 50+ Population: Findings From an AARP Survey (April 2000), <http://assets.aarp.org/rgcenter/econ/will.pdf>.

¹² *Lawyers.com Survey Reveals Drop in Estate Planning By Americans in 2009; Ailing Economy Likely Reason*, , LAWYERS.COM, <http://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1268676534119836>

¹³ *Rocket Lawyer Delivers No Excuses Estate Planning for April “Make-A-Will Month”*, ROCKET LAWYER, <https://www.rocketlawyer.com/news/article-Make-a-Will-Month-2014.aspx>.

One of the rarely mentioned, but core issues for clients intending to plan for their estate is their expectation of when the planning will culminate.¹⁴ Wondering about life expectancy? Try these websites (but do not expect them to agree on life expectancy):

- www.deathclock.com
- <http://gosset.wharton.upenn.edu/mortality/perl/CalcForm.html>
- <http://www.socialsecurity.gov/OACT/population/longevity.html>
- <http://media.nmfn.com/tnetwork/lifespan/>

Lessons and the Law: Estate planning sounds as if it is for the wealthy when, in fact, it applies to everyone, at every adult age. The tragedy of failing to properly plan is not visited upon the dead. It is the living that suffer its unexpected and unforgiving consequences. By failing to properly plan, clients are creating problems for their loved ones that do not need to occur. Dying without a Will can result in significant problems, including, for example:

Intestacy. In many states, each child and the surviving spouse will inherit an equal percentage (with the surviving spouse inheriting some minimum amount). For example, in Georgia a deceased husband with no Will and two children from a prior marriage may only convey 33.3% of his intestate estate to his surviving wife.¹⁵

- *Steve McNair* (an NFL quarterback) was murdered by a girlfriend in 2009 and left his family with a \$20 million estate, but no Will. He had a wife and four children. His surviving spouse received a portion of the estate, with the balance being paid to the couple's two children and two other children McNair had out outside of marriage.¹⁶ The surviving wife had to make a decision whether to receive a 33% intestate share under Tennessee law¹⁷ or file for a 40% spousal elective share (which was reduced by other assets she received outside the probate estate). She chose the 40% elective share.
- ***Non-Celebrity Example:*** The client was an engineer and perhaps that training gave him a perfectionist attitude toward most parts of his life. We had redrafted his estate planning documents six times over three years, but he wanted to make a few more minor changes and have a few more thoughts before the final signing. I pointed out that some Will, however imperfect, was better than no Will, but his own mortality was not a pressing issue. His wife found him dead on the floor one morning and the family went through considerable expense and headache that might have been prevented with even an imperfect document. For example, the business that was supposed to have passed to his children from a prior marriage was instead sold with the proceeds divided among the entire family.

¹⁴Stephan Leimberg, *Life Expectancy Analysis: Estate Planning Tool of the Future Is Here Now*, EST.PLAN. J., Sep. 2008.

¹⁵ GA. CODE ANN. §53-2-1 (2016).

¹⁶ *Steve McNair's sons get trust money*, ESPN (Jan. 7, 2011), <http://espn.go.com/nfl/news/story?id=6000217>.

¹⁷ TENN. CODE ANN. §31-2-104 (2016).

It is better to get something in place than to wait for the nirvana of a perfect document. With current computer systems, it is relatively easy to make changes that move the document towards what the client would consider perfect.

- ***Non-Celebrity Example:*** Mr. Jones had two daughters whose mother died in a car crash when they were very young. He remarried and the new wife brought the two children up like they were her own, but never legally adopted them. Mr. Jones revised his Will before he died of cancer, but refused to use a marital trust to hold the assets passing to Mrs. Jones, because she “*would do the right thing.*” Several years later she remarried. Unfortunately she died before she ever got around to doing a new Will and her new husband was her only intestate heir. Because the children were not her heirs at law, her new husband inherited the entire multi-million dollar estate she had received from her deceased husband. Her step-children received nothing.

Trusting a spouse to “do the right thing” is not the issue. Planning for the unexpected is a pivotal part of any plan. A marital trust would have given Mrs. Jones the benefit of the assets, while assuring that Mr. Jones’ children received an inheritance. Moreover, it would have protected Mrs. Jones from creditors, including potentially losing assets in a divorce from her second husband. If there exists concern about the need to change the manner assets flow to the children (e.g., because of bad marriages or spendthrift ways), the spouse can be given a limited power of appointment to reconfigure how the children will receive the assets (e.g., retaining them in trust).

Unexpected Heirs. The failure to have a Will means that the client has not designated who his heirs should be. It also makes sense to specifically provide that an unknown heir will not inherit.

- *Prince* died without a Will and his sister and five half-siblings initially appeared to be his only intestate heirs,¹⁸ until Carlin Q. Williams, a 39 year old convicted felon, who is being held in a maximum security prison claimed to be the love child of Prince from a one-night-stand in 1976 when Prince was still a teenager.¹⁹ If DNA tests had proven his relationship to Prince²⁰ and no one else comes forward with a proven case of being Prince’s descendant, then Carlin Williams could have inherited 100% of Prince’s intestate estate.²¹

Because the love-child’s claims were proven false, then Prince’s estate will pass to his sister and five half-siblings, including a half-sister who once filed a copyright infringement against Prince and a half-brother who Prince once had a restraining order

¹⁸ Prince had a son with his former wife, but the child passed away in 1996.

¹⁹ Sara Snider, *Prince estate: Colorado inmate says he is singer’s son, sole heir*, CNN (May 11, 2016, 5:49 PM), <http://www.cnn.com/2016/05/10/entertainment/prince-paternity-claim/>.

²⁰ Apparently the DNA test did not support the paternity claim. See: AP Source: *DNA test shows Colorado inmate not Prince’s son*, Associated Press, June 22, 2016.

²¹ Minn. Stat. §524.2-103 (2016).

placed on.²²

- *James Dean* died without a Will and most of his assets passed to his estranged father.
- *Jim Morrison's* assets and control of his music eventually ended up in the hands of his former wife/girlfriend's father, who voiced little appreciation of his music or character before Morrison died.²³
- *Terry Moore* was an acknowledged former girlfriend of Howard Hughes (who died in 1976). In 1984, she filed a claim against his estate based upon the assertion that she and Hughes were married in 1949 on a yacht in international waters off the coast of Mexico. They were never divorced, so she claimed a portion (potentially all) of the Hughes estate. The Hughes' administrators paid a reported \$380,000 to eliminate her suit.²⁴ She later wrote a book called *Beauty and the Billionaire*, which became a best-seller.
- **Legal Example:** While the general rule is that step-children (or other blood relatives of a deceased spouse) cannot statutorily inherit from a step-parent, a number of states²⁵ permit such an inheritance by intestacy if the decedent's remaining statutory intestate heirs are more remote. For example, the language of the Florida statute provides, "*If there is no kindred of either part [i.e., lineal descendants of the blood line of the maternal and paternal grandparents of the deceased], the whole of the property shall go to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate entitled to the estate.*"²⁶ Note that the use of the word "kindred" would appear to include all intestate heirs of the pre-deceased spouse, not just the spouse's lineal descendants.

Wills should always have a "common disaster" provision that dictates how the assets will pass if none of the expected heirs survive the disposition. However, in states with the foregoing statutes, a final passage "*to my intestate heirs*" could potentially result in the kindred of a deceased spouse inheriting. Clients should consider adding a Will provision that overrides the local intestate inheritance law. For example, "*Notwithstanding applicable state law, under no condition shall my deceased spouse's blood family members be considered to be my intestate heirs.*"

²² Zach Seemayer, "Prince's Heirs: Meet the Late Singer's Family Members," ET ONLINE (Apr. 27, 2016, 7:52 PM), http://www.etonline.com/news/187646_prince_heirs_meet_the_late_singer_family_members/.

²³ See Pamela Courson Family, *Her Death And The Jim Morrison Estate*, FOREVER 27, <http://forever-27.com/jim-morrison/pamela-courson-family-her-death-and-the-jim-morrison-estate/> (last visited June 9, 2016).

²⁴ Mike Leary, *A Lawsuit Marks 10th Anniversary of Hughes' Death*, THE INQUIRER, Apr. 06, 1986, available at http://articles.philly.com/1986-04-06/news/26080047_1_hughes-heirs-filing-howard-r-hughes.

²⁵ FLA. STAT. §732.103(5) (2016); CAL. PROB. CODE § 6454 (2016); MD. CODE ANN. EST. & TRUSTS §3-104(e) (2016); and OHIO REV. CODE ANN. § 2105.06(J) (2016).

²⁶ FLA. STAT. §732.103(5) (2016) (emphasis added).

Research: Jeffery A. Schoenblum, “Family, Kinship, Descent, and Distribution,” 858-1st TAX MGMT. (BNA) EST., GIFTS, & TRUSTS, at III.F (June 6, 2016) (discussing stepchildren).

Funds to Young Heirs. If a trust is not established by a Will, a minor child may be entitled to receive assets by age 18 - before they may be mature enough to handle the money. Ex-spouses may have control of the inheritance until the children reach adulthood.

- In 1994, *Kurt Cobain* shot himself at the age of 27. Cobain left behind a detailed suicide note, but had not signed a Will. Cobain’s wife, Courtney Love, and daughter were his only intestate heirs. In 2010, control of Cobain’s Right of Publicity (see later discussion of this right) was passed to his daughter on the day she reached age 18. In 2010, the daughter took ownership of most of her trust fund,²⁷ and in 2011, the daughter purchased a \$1.8 million home in Hollywood.²⁸

Assets to Second Spouse. Many clients do not intend to pass significant assets to a second or third spouse. However, there are multiple ways that assets can pass to a subsequent spouse. Multiple marriages with children that are yours, mine and ours are not unusual in celebrity or common client situations. See the later discussion in this article on the topic.

Order of Death Changes Asset Disposition. Intestacy can create messy dispositions based upon the order of death. For example, in most states, if a married couple with no descendants was injured in the same accident and one spouse survived the other by five seconds and then died, the surviving spouse’s relatives could inherit all of the couple’s joint estate with the other spouse’s family receiving no assets.²⁹

- *Chris Benoit* (then a WWE wrestler) murdered his wife and son and then killed himself in 2007. In subsequent probate hearings, the order of death became the pivotal issue for the disposition of assets.³⁰ Under Georgia law, Christ Benoit was considered to have predeceased both his wife and son.³¹ If Chris Benoit killed his wife first, then for the

²⁷ Sean Michaels, *Courtney Love loses rights to Kurt Cobain’s image*, THE GUARDIAN (May 3, 2010, 6:20 AM), <https://www.theguardian.com/music/2012/may/03/courtney-love-kurt-cobain>.

²⁸ *Frances Bean Cobain Purchases %1.8 Million L.A. Home*, Pret-a-Reporter (Oct. 5, 2011), <http://www.hollywoodreporter.com/news/frances-bean-cobain-buys-house-244577>.

²⁹ A number of states (e.g., Alaska, California, Kentucky, Texas, Wisconsin), require that a potential heir must survive the decedent by at least 120 hours in order to inherit. For example, CAL. PROB. CODE §6403(a) reads, “A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the heirs are determined accordingly.”

³⁰ *Fight over Wrestler Chris Benoit’s Estate Hinges on the Order of Death*, FOX NEWS (Aug. 15, 2007), <http://www.foxnews.com/story/2007/08/15/fight-over-wrestler-chris-benoit-estate-hinges-on-order-deaths.html>.

³¹ Georgia Code § 53-1-5 reads: “(a) An individual who feloniously and intentionally kills or conspires to kill or procures the killing of another individual forfeits the right to take an interest from the decedent’s estate . . . (b) An individual who forfeits the right to take an interest from a decedent’s estate by virtue of this Code section forfeits the right to take any interest such individual would otherwise take at the decedent’s death by intestacy, year’s support, will, deed, power of appointment, or by any other conveyance duly executed during life by the decedent and is treated as having predeceased the decedent for purposes of determining the distribution of the decedent’s property

short time his seven year old son was alive, he would have inherited his mother's and father's assets, which would pass by intestacy at his death to Chris Benoit's two children from a prior marriage (i.e., as the closest living relatives of the deceased son). But if the son was murdered first, then the wife's closest relatives (i.e., her mother) would have inherited her assets.³² Apparently the two families reached an out of court settlement in 2008.³³

Guardian of Minors. The courts will have no insight into the client's choice of guardians for minor children. In the absence of a declaration, the courts will have to make an independent judgment, based upon the family members who request guardianship. Do you really want to your children raised in the home of your alcoholic brother-in-law?

Management of Assets. The courts will have to decide on the person(s) to manage your assets for any minor children. Do you really want that sister who has been bankrupt twice managing the funds? If you do not leave a Will making such a designation, she could be given control. Unlike the Lincolns, most people do not have a Supreme Court Justice to serve as estate administrator.

- *Martin Luther King, Jr.* was assassinated in 1968 and died without a Will. Particularly since the passing of his widow, Coretta Scott King, their children have continually fought over the control and benefits of his legacy and assets.³⁴
- *B.B. King*, after a period of incapacity, died in 2015 with 11 surviving children. Apparently, he did not trust any of his children to manage his legacy and instead appointed his manager of thirty-nine years as holder of his power of attorney and as executor. Some of B.B. King's children have been fighting for control of his assets for years, making claims of theft and even poisoning by the long term manager.³⁵ The children's claims have been repeatedly dismissed by the courts.³⁶
- ***Non-Celebrity Example:*** The elderly client was referred to us by his financial advisor. Unfortunately, he was too busy to get in to see us. Three years later, he went in for "simple surgery." In the waiting area, he told his advisor what he wanted to happen if he died and signed the hand written notes of the advisor. He died on the operating table. The

and of appointing personal representatives or trustees." (emphasis added). GA. CODE ANN. § 53-1-5 (a), (b) (2016).

³² For more information on slayer statutes, see Jeffrey A. Baskies, *Barber and Benoit - State Slayer Statutes Making Headlines*, STEVE LEIMBERG'S EST. PLAN. NEWSL. # 1168, Sep. 6, 2007 and Jeff Baskies, "*Fiel v. Hoffman: Soap Opera/Probate Litigation Highlights the Limits of State Slayer Statutes and Poses Questions Regarding Public Policy Issues Which Should Be Explored in Many States*," LISI EST. PLAN. NEWSL. no. 2389, Feb. 8, 2016.

³³ Harry R. Weber, "*Verbal agreement over Chris Benoit estate nearly reached*," Associated Press (Jan. 2, 2008).

³⁴ Jarvie, *supra* note 9.

³⁵ Alex Johnson, *Autopsy Finds B.B. King Died of Natural Causes, Not Foul Play*, NBC NEWS (July 14, 2015, 10:00 AM), available at <http://www.nbcnews.com/pop-culture/music/autopsy-finds-b-b-king-died-natural-causes-not-foul-n391526>.

³⁶ *Judge leaves BB King's estate in hands of longtime business manager*, THE GUARDIAN (June 25, 2015, 8:37 PM), available at <https://www.theguardian.com/music/2015/jun/26/judge-leaves-bb-kings-estate-in-hands-of-longtime-business-manager>.

document was not legally sufficient to constitute a will under Georgia law. Unfortunately, his failure to have a Will meant that his sole heir was his wife, who had dementia and lived in an upper-end nursing home. Her nieces and nephews demanded control (as legal guardians for their aunt) of her estate and assets that passed to her. The nieces and nephews refused to continue the support of the deceased husband's sister who resided in the same upper-end nursing home, resulting in her being moved to a Medicaid facility.

Failure to have an enforceable Will means that you lose control of choosing your decision makers. A Will could have provided:

- Continued support for the sister,
- Named Executors that the client wanted in control, and
- Made sure that the client's assets passed how he wanted, not by intestacy to remote heirs of his incapacitated wife.

Increased Taxes. The failure to have a Will can significantly increase both the income taxes and estate taxes payable by your family. The ability to reduce estate and income taxes by charitable bequests is eliminated. The deferral of estate taxes by passing assets to a spouse or a marital trust may be eliminated.

- *Steve McNair* (an NFL quarterback) died in 2009 with a \$20 million estate, but no Will. Unfortunately, his lack of planning (e.g., use of the marital deduction) also created a federal and Tennessee estate tax liability of \$3.7 million.³⁷

Increased Costs. Bonding fees, legal fees, family conflicts and increased expenses are often the result of not having a Will.

- *Jimi Hendrix* died in 1970 at the age of 27 without a Will. Because Jimi Hendrix had no children, state law provided that his father, Al Hendrix, received his entire estate. When Al Hendrix died in 2002, the value of the Jimi Hendrix legacy was estimated to be worth \$80 million. Al Hendrix disinherited his son, Leon Hendrix, and passed the entire estate to Janie Hendrix, an adopted daughter from Al Hendrix's later marriage. Leon Hendrix contested Al's Will and lost the contest in 2007. In May 2015, a settlement was finally reached between Janie Hendrix and Leon Hendrix – 45 years after Jimi Hendrix's passing.³⁸
- *Bob Marley* died in 1981 after being diagnosed with malignant melanoma in 1977. His \$30 million estate³⁹ passed without a Will because his Rastafarian view of death precluded

³⁷ *Mechelle McNair Asks Probate Court for Over \$3.7 Million to Pay Estate Tax Bills*, found at <https://theestateplanningsource.com/mechelle-mcnair-asks-probate-court-for-over-3-7-million-to-pay-estate-tax-bills/> (last visited June 7, 2016).

³⁸ Michelle Fabio, *The Battle Over the Jimi Hendrix Estate*, Legal Zoom (Dec. 2009), <https://www.legalzoom.com/articles/the-battle-over-the-jimi-hendrix-estate>; see also Andrea Mandell and Lorena Blas, *6 Legendary Stars Who Died without Wills*, *supra* note 7.

³⁹ In 2009 it was estimated that Bob Marley's music catalogue was worth \$100 million. See Michelle Fabio, *Administrating the Bob Marley Estate: Are the Marleys Waiting in Vain?* LEGAL ZOOM (Dec. 2009), <https://www.legalzoom.com/articles/administrating-the-bob-marley-estate-are-the-marleys-waiting-in-vain>.

signing a Will. Legal claims against the estate have been initiated in Jamaica, New York, and London by his 11 to 13 children (there were lots of paternity conflicts) and their mothers, his widow, various grandchildren, assorted long lost relatives, band members, and business associates. The fights continued in England until 2014 – 33 years after Bob Marley’s death.

Estate Representation. In the event of an intestate estate or the failure of all named Personal Representatives to serve, the surviving spouse generally has a priority right to be the Executor/Personal Representative of the deceased spouse’s estate, even if there are children from a prior relationship. For example, the state of Washington provides that the “[a]dministration of an estate if the decedent died intestate or if the personal representative or representatives named in the will declined or were unable to serve shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:(1) The surviving spouse or state registered domestic partner, or such person as he or she may request to have appointed. (2) The next of kin in the following order: (a) Child or children; (b) father or mother; (c) brothers or sisters; (d) grandchildren; (e) nephews or nieces.”⁴⁰

What happens when the surviving spouse is estranged from the rest of the intestate heirs? What happens when there are four surviving siblings, each of whom wants to represent the estate—and receive the statutory fees for doing so?

Note that the appointment is by relationship, not competence – do you really want that brother who has been bankrupt twice running the estate for your minor children? *Prince*’s death without a Will created an environment in which the six equal intestate heirs control his vast music empire and the release of previously unreleased songs. None of the siblings have the experience of handling either his business interests or his significant estate. In February 2017, the Wall Street Journal reported that conflicts were beginning to emerge among the six intestate heirs over the management of the estate.⁴¹ Luckily, at least for now, Comerica Bank & Trust is handling the administration of the estate.

Tax Apportionment. In some states, the estate taxes are an expense of the probate estate. However, if assets flow outside the probate estate, the taxes on those assets may still be due from the probate estate - in effect one set of heirs may receive the assets (e.g., beneficiaries of a life insurance policy or retirement plan), while the probate heirs pay their estate taxes. A Will can dictate how taxes are apportioned and paid and reduce the intra-family conflict over who pays the taxes.

Family Assets. Many clients provide some level of support for their parents and occasionally

⁴⁰ WASH. REV. CODE § 11.28.120 (2016) (emphasis added).

⁴¹ Hannah Karp, “*Lawyers Battle for Control of Late Pop Star Prince’s Estate*” Wall Street Journal, February 11, 2017, copy available at <https://www.wsj.com/articles/lawyers-battle-for-control-of-late-pop-star-princes-estate-1486821625>.

siblings or other family members. When the client dies intestate, the surviving spouse and/or children of the deceased generally have first priority rights to the assets. Thus, other family members who may have expected to receive continued support lose it.

- *Steve McNair* purchased a million dollar home for his mother to live in, but retained title to the residence and failed to create a Will passing the house to his mother. When he died, his wife received the house and demanded that his mother pay \$3,000 per month in rent. The mother moved out because she could not afford the rent. After she moved out, the estate billed her \$53,363 for appliances and other items she took out of the house.⁴²

⁴² “*McNair's mom, wife in dispute on death anniversary*,” WSMV (Aug. 1, 2011, 4:06 PM), <http://www.wsmv.com/story/15022632/wife-mother-dispute-over-money-two-years-after-steve-mcnairs-death#ixzz48Wa732po>.

DYING WITHOUT A CURRENT WILL

“[Mortality] never prevented the majority of human beings from behaving as though death were no more than an unfounded rumor.”

Aldous Huxley

SIGNING YOUR FIRST ESTATE PLANNING DOCUMENTS IS NOT THE END OF THE PROCESS, IT IS THE BEGINNING OF A PROCESS THAT CULMINATES WHEN YOU PASS

Celebrities:

- *Heath Ledger* died in 2008 at the age of 28 with an estate of \$16 million. Unfortunately, his Will was not revised when his daughter Matilda Rose was born out of his relationship with Michelle Williams. Under the terms of his Will his entire estate passed to his parents and his sister. However, it appears from news reports that his family used some creative planning to pass all of the assets to his young daughter.⁴³
- *Philip Seymour Hoffman* reportedly had broken up in the fall of 2013⁴⁴ with his companion of 15 years, Mimi O’Donnell, (the mother of his three children). He had not changed his Will when he died in February 2014 at the age of 46. Whether he intended it or not, Mimi O’Donnell inherited his entire estate.⁴⁵
- *Anna Nicole Smith’s* Will left her entire \$5.0 million estate to her son. Unfortunately, she died after her son and after giving birth to a daughter, without revising her Will to provide for bequests to the daughter or establish the daughter’s guardianship.⁴⁶ Resulting legal conflicts made the news for years after her death.
- *Michael Crichton* died from cancer with an estate estimated to be \$175 million. When he died, his fifth wife was pregnant with a son. Michael Crichton’s post-mortem child was not provided for in his Will, but would have been entitled to a portion of the estate as an omitted child.⁴⁷ When his surviving spouse sued to include the new-born son as a “child” under the dispositive documents (i.e. not as an intestate heir), Michael Crichton’s daughter (his only other child) from his fourth marriage opposed the inclusion. While the court eventually ruled

⁴³ “*Heath Ledger’s Daughter to Inherit All of His Estate*,” Associated Press (Sep. 29, 2008).

⁴⁴ *Who is Mimi O’Donnell? Philip Seymour Hoffman ‘Split’ With Long-Term Girlfriend Before Death*, INT’L BUS. TIMES (Feb. 3, 2014), <http://www.ibtimes.co.uk/who-mimi-odonnell-philip-seymour-hoffman-split-long-term-girlfriend-before-death-1434867>.

⁴⁵ Interestingly, if they had been married and gotten a divorce, governing law might have automatically terminated Mimi O’Donnell’s right of inheritance under Hoffman’s Will.

⁴⁶ See Michelle Fabio, *The Future of Anna Nicole’s Family and Fortune*, LEGALZOOM (Dec. 2009), <https://www.legalzoom.com/articles/the-future-of-anna-nicoles-family-and-fortune>.

⁴⁷ CAL. PROB. CODE §21620 reads, “*Except as provided in Section 21621, if a decedent fails to provide in a testamentary instrument for a child of decedent born or adopted after the execution of all of the decedent’s testamentary instruments, the omitted child shall receive a share in the decedent’s estate equal in value to that which the child would have received if the decedent had died without having executed any testamentary instrument.*”

in favor of the son, significant legal fees and irreconcilable differences were probably created by the conflict.⁴⁸ The specific reasons and results of the conflict are interesting:

- As an after-born, omitted child, the new born son would have been entitled to 30% of the estate,⁴⁹ but as one of only two heirs under the Will and Revocable Trust, the percentage could have increased to 50%.
 - The omitted child election could have resulted in the son obtaining his portion of the estate when he reached adulthood, while it is reasonable to expect that Michael Crichton's disposition documents may have held the assets in trust for some period of time after he reached majority. During his childhood, the expected guardian of his assets would have been his mother.
 - The fifth wife had signed a prenuptial that was referenced in the Will and, as guardian of her son's assets, she could have indirectly participated in the benefits of Michael Crichton's assets in a manner not anticipated in the prenuptial agreement.
- *Barry White* died in 2003 after being separated for several years (but not divorced) from his second wife. Because they remain married, his wife was both an inheritor of his \$20 million estate and was named to handle administration of his estate. His live-in girlfriend of several years received nothing from the estate.⁵⁰

Data & Demographics:

- In 2012, 20% of adults age 25 and older (estimated to be 42 million people) had never been married – an historic high.⁵¹
- In 2015, there were 8,318,000 opposite sex unmarried couples living together,⁵² with the greatest proportion being in the South.

Why don't clients update their dispositive documents? A number of factors may drive this hesitancy, including:

- The inability of some elderly clients to fully understand proposed changes to their planning. The thought process appears to be: "*I don't fully grasp what they want me to do, but I know I liked what I did before, so why should I change?*"
- The reluctance to go back through the process of again focusing on the client's incapacity and mortality, with all of the potential conflicts and emotions it creates.

⁴⁸ See David Ng, *Michael Crichton's daughter speaks up about sale of her father's art collection*, LOS ANGELES TIMES (Mar. 17, 2010), <http://latimesblogs.latimes.com/culturemonster/2010/03/michael-crichtons-daughter-addresses-sale-of-her-fathers-art-collection.html>.

⁴⁹ CAL. PROB. CODE §6401(c)(3).

⁵⁰ Steven Williams, *The Late Barry White's Wife and Girlfriend are in Conflict Over His Estate*, CONTACTMUSIC, (Dec. 2003), <http://www.contactmusic.com/barry-white/news/barry-white.s-widow-and-girlfriend-in-court-battle>.

⁵¹ Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CENTER (Sep. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/>.

⁵² U.S. Census Bureau, *information available at* <http://www.census.gov/hhes/families/data/cps2015UC.html>

- A reluctance to incur the economic cost of the process, possibly fueled by the thought that the cost of the prior work should not be so lightly re-incurred.
- Being too busy with other issues to focus on the out of date documents.

Lessons:

- Every Will should have provisions that contemplate the birth of future children, including those born after the testator’s death. Even if the client does not have any existing children, the possibility of children being born should be discussed. Given the proclivity of clients failing to update their documents when children are born, contemplating potential births in their documents is good planning. Moreover, any potential children should be protected from acquiring assets before they have the requisite maturity to appropriately handle them.
- According to the Census Bureau, an increasing number of Americans are following the example of *Goldie Hawn* and *Kurt Russell*⁵⁴ and are living together rather than tying the knot. A live-in partner generally does not have the legal standing of inheriting assets or being able to be a decision maker upon the other partner’s incapacity or death. Effectively, clients have to consider when is the appropriate time to include their partners in their inheritance scheme and be a decision maker and when they need to be taken off documents (e.g., when the relationship is broken). The reality is that few clients are going to make that effort, creating another potential source of conflict.

<p><u>Age to Sign a Will</u></p> <p>In Georgia, fourteen year olds can sign Wills.⁵³ It appears that every other state requires the testator to be an adult under state law.</p>
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⁵³ GA. CODE ANN. §53-4-10 (2016).

⁵⁴ Who have been together since 1983 and have been reported to be engaged.

SIMPLICITY VERSUS DETAIL

“Everything should be made as Simple as Possible, but not Simpler.”

Albert Einstein

SIMPLICITY LOOKS GREAT ON PAPER, IT’S THE IMPLEMENTATION THAT IS SO OFTEN A DISASTER

Celebrity: *Warren Burger*, former Chief Justice of the Supreme Court, died in 1995 with an estate estimated to be \$1.8 million. He, apparently liked simplicity – not an uncommon approach of many estate planning clients.

The operative sixty-six words⁵⁵ of his Will read:

I hereby make and declare the following to be my last will and testament.

- 1. My executors [sic] will first pay all claims against my estate;*⁵⁶
- 2. The remainder of my estate will be distributed as follows: one-third to my daughter, Margaret Elizabeth Burger Rose and two-thirds to my son, Wade A. Burger;*
- 3. I designate and appoint as executors of this will, Wade A. Burger and J. Michael Luttig.*

The simplicity of the Will was roundly criticized by legal experts. It was widely reported that his simple Will had created a significant estate tax liability that could have been avoided. However, Paul L. Caron, a Pepperdine law school Professor wrote a detailed article refuting the tax argument.⁵⁷ Others questioned the thoroughness of the document.⁵⁸ As noted in a 2008 article, *“It may be that the Chief Justice was familiar with the statutes of the applicable jurisdiction and found the default rules regarding payment of taxes and the authority granted to the executors perfectly acceptable.”*⁵⁹

Lesson: Simplicity for its own sake can be a disaster, but in the right circumstances, a simple dispositional document can work. Justice’s Burger’s approach would not work effectively in an estate in which flexibility or unexpected events (e.g., upon the death of either child, how were their bequests expected to pass?) are critical components.

⁵⁵ The entire Will consisted of 176 words – a majority being the witness portion of the instrument.

⁵⁶ Unfortunately, the late Chief Justice misspelled the word “executor” in his will.

⁵⁷ Paul L. Caron, *A Better Tax Lawyer Than His Critics*, 69 TAX NOTES 1020, 1020, (1995).

⁵⁸ See, e.g. Ellen Warren, *Warren Burger’s Will A Fool for A Lawyer*, CHICAGO TRIBUNE, Nov. 5, 1995, available at http://articles.chicagotribune.com/1995-11-05/news/9511050250_1_chief-justice-warren-burger-watchful-supreme-court.

⁵⁹ Jason S. Ornduff and Lauren J. Wolven, *Lessons That Planners Can Learn From Celebrity Estate Battles*, 35 Est. Plan. J. 10 (2008).

FAILURE TO ANTICIPATE THE UNEXPECTED

“There is only one kind of shock worse than the totally unexpected: the expected for which one has refused to prepare.”

Mary Renault

AN EXCEPTIONAL ESTATE PLANNING ATTORNEY SHOULD BE A CREATIVE “PAID PARANOID”

Celebrities: It is impossible to anticipate every possible scenario in an estate. Many clients don't want the drafting complexity that comes with flexibility, but the failure to contemplate the unexpected can create tremendous miscarriages of the client's probable intentions.

- *Jim Morrison* died in 1971 of a heroin overdose. His Will passed his entire estate to his girlfriend (and possibly common law wife), Pamela Courson. Pamela Courson died in 1974 of a heroin overdose. Her parents, who had an intense dislike of Jim Morrison, inherited his estate's assets from her intestate estate. Unusually, after winning a probate fight with Jim Morrison's parents over control of the Morrison estate, the Coursons' apparently voluntarily agreed to split the estate's income equally with Jim Morrison's parents.⁶⁰
- *Jimi Hendrix* estate passed entirely to his father who later passed it to his adopted daughter, disinheriting Jimi Hendrix's full blood brother.⁶¹

Lessons and the Law:

- *Jacqueline Kennedy Onassis's* planning demonstrates how parents who have faith in their children's judgment (however misplaced it might be), can create flexibility and control in the children. Jacqueline died in 1994 and her Will⁶² provided flexibility in her estate plan by providing that the residue of her estate (valued between \$43.7 million and over \$100 million in news reports) would either pass to her children, or, to the extent they signed a disclaimer, the assets would pass to a 24 year Charitable Lead Trust (“CLT”) for her grandchildren. According to the New York Times, the CLT was never formed. Apparently her two children chose to pay the estate taxes rather than pass the assets to the grandchildren.⁶³

The key point is that she provided that the heirs would make the decision, giving them greater control and flexibility and potentially reducing the conflict that could have occurred. Interestingly, President John F. Kennedy's Will⁶⁴ created two residuary trusts of half of his assets (before estate taxes) for his two children, with the trust assets passing outright to the child's descendants, if any, and if none to the other sibling. Upon John F. Kennedy, Jr.'s death without any children, his trust passed directly to his sister, Caroline. In 2013, financial

⁶⁰ See *supra* note 23.

⁶¹ Fabio, *The Battle Over the Jimi Hendrix Estate*, *supra* note 38.

⁶² A copy is available at <https://www.livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-jacqueline-kennedy-onassis.html>.

⁶³ David Cay Johnston, *Mrs. Onassis's Estate Worth Less Than Estimated*, N. Y. TIMES, Dec. 21, 1996, available at <http://www.nytimes.com/1996/12/21/nyregion/mrs-onassis-s-estate-worth-less-than-estimated.html>

⁶⁴ See a copy at <http://www.rongolini.com/jfk.htm>.

reports she supplied to serve as US-Japanese Ambassador indicated that Caroline Kennedy's estate was worth as much as \$278 million,⁶⁵ substantially coming from inheritances from trusts created by her father and inheritances from her wealthy grandparents (on both sides of her family), mother, and brother.

- *Ben Novack Jr.*, a Fontainebleau hotel heir, married Nancy Novack in 1991. She had previously worked as a stripper. Ben Novack was beaten to death in 2009, and three months after his mother was murdered. Eventually, his wife was sentenced to life in prison for arranging the two murders by hit men. Nancy Novack's defense was that her own daughter had orchestrated the murders so that she could inherit the estates. Ben Novack's Will provided that the bulk of his assets would pass to Nancy Novack's daughter and grandchildren if she predeceased him, but at least six other Ben Novack family members, including a possible illegitimate sister, have made claims against his estate. The primary arguments for the claims have been that Novack was unduly influenced in passing assets to Nancy Novack's descendants and that the Florida slayer statute's denial of inheritance rights to the murderer should extend to her descendants.⁶⁶ In 2015, Florida's Fourth District Court of Appeal ruled that Florida's slayer statute did not permit a disinheritance of Nancy Novack's descendants.⁶⁷ The Court also reversed the trial court's ruling dismissing the claim of undue influence – effectively sending that claim back to the trial court. It has been reported that the estate has dwindled to \$4.0 million from its original \$10 million value before the conflict.⁶⁸

The Florida slayer statute⁶⁹ is purposely designed to eliminate direct inheritance benefits to a murderer, but does not address the inheritance by the descendants of the murderer. Most clients are not going to contemplate how their assets will pass if a family member participates in their murder.

- ***Non-Celebrity Example:*** A woman went through a rough period in her life and got pregnant by a high-end drug dealer. The child's birth put her life straight, while the drug dealer went to prison. She went back to school and was responsibly raising her child. The drug dealer had never provided any support, but was listed on the son's birth certificate. She executed a Will that said: "*When I die all of my assets shall pass to my son.*" She died when an eighteen wheel tractor-trailer ran over her small Honda. The son died 11 hours later. The only intestate heir of the son was the drug dealer father. He inherited \$2.4 million from the wrongful death claims for both the mother and her son.

⁶⁵ Jonathan D. Salant and Kathleen Hunter, *Caroline Kennedy Worth Up to \$278 Million, Records Show*, BLOOMBERG, (Aug. 20, 2013), available at <http://www.bloomberg.com/news/articles/2013-08-19/caroline-kennedy-worth-up-to-278-million-records-show>.

⁶⁶ Julia K. Brown, "*As family fight continues, Ben Novack Jr. fortunes shrink*" MIAMI HERALD, Feb. 24, 2014, available at <http://www.miamiherald.com/news/local/community/miami-dade/article1960727.html>.

⁶⁷ *Fiel v. Hoffman*, 169 So.3d 1274 (Fla. 4th Dist. Ct. App. 2015).

⁶⁸ *Id.*

⁶⁹ FLA. STAT. § 732.802 (2016).

Ideally, the mother's will should have placed the assets in a trust for the benefit of her son until a designated age (e.g., age 25). If the son died before the trust was terminated, the assets could have then passed to the mother's family, not to the drug dealer who had never even seen, yet alone supported, his son.

- ***Non-Celebrity Example:*** Assume a daughter owns 30% of the family business and dies without a child, passing all of her assets by Will or intestacy to her husband. As men are prone to do, the husband remarries a few years later. He then dies and the family business interest passes to his new spouse. The family approved of the son-in-law inheriting a part of the family business, but the new wife is probably not someone they wanted to own a part of the business.

Alternatively, placing "call" options in the business's operative documents (e.g., operating agreement or corporate buy-sell agreement) when a child owns an interest in the business could reduce this concern.

Creative Attacks. Where there is a dissatisfied heir, significant assets at stake, and a creative attorney, conflicts will continue to occur even when diligent efforts have been made to avoid the conflict.

- *Ray Charles* died in June 2004 with twelve children from 10 different mothers. In December 2002, he met with ten of the children and told them he was dying with a terminal cancer. He noted that he had set up trusts for each child with \$500,000 in each trust.⁷⁰ The remainder of his estate was going to a foundation that he created, originally called the Robinson Foundation for Hearing Disorders.⁷¹ Each of his children signed an agreement indicating that they would not challenge his estate disposition.⁷² Apparently neither his Trusts nor his Will mentioned his Right of Publicity (ROP) and multiple conflicts have erupted between the children and the Foundation managers over the control of his ROP. In 2012 a new avenue in the conflict arose.⁷³ Under a provision of the Copyright Act of 1976, children of an artist can elect to terminate a copyright 35 years after it was granted.⁷⁴ When seven of Charles' children elected to terminate the copyright on 51 of his songs under California law, the

⁷⁰ Michael A. Hiltzik, *Ray Charles Children Battle over his Legacy*, LOS ANGELES TIMES, Apr. 20, 2008, available at <http://www.latimes.com/business/la-fi-raycharles20apr20-story.html>.

⁷¹ Later renamed, the Ray Charles Foundation. See *The Ray Charles Foundation*, http://www.theraycharlesfoundation.org/RCF_AboutTheFoundation.html.

⁷² David H. Lonok, *Ray Charles' Foundation and Children Rekindle Copyright Fight* WEALTHMANAGEMENT.COM (Aug. 7, 2015), <http://wealthmanagement.com/high-net-worth/ray-charles-foundation-and-children-rekindle-copyright-fight>.

⁷³ *Id.*

⁷⁴ 17 U.S.C. § 203(a)(2)(B) (2016).

Foundation filed suit.⁷⁵ After the United States Court of Appeals for the Ninth Circuit reversed the lower court's decision barring the Foundation's claims,⁷⁶ the legal battle is still ongoing.⁷⁷

- **Legal Example:** Divorce can throw a wrench into estate planning expectations, particularly the pre-divorce creation of inflexibly drafted irrevocable trusts. However, there can be creative opportunities. For example, in Goodman v. Goodman,⁷⁸ a Florida resident and creator of a 1991 irrevocable trust for the benefit of “my children” adopted his 42-year-old girlfriend so she could gain access to a portion of the \$300 million in trust funds. The ex-wife, as legal guardian of the two current trust beneficiaries, objected. The court terminated the adoption on a procedural basis (i.e., lack of notice to the other trust beneficiaries), but did not rule on the core issue of whether the adoption was legal and entitled the girlfriend to benefit from the trust. It is not clear what Mr. Goodman did next.

Florida's laws like many states, specifically permits the adoption of adults. Florida statute § 63.042(1) provides: “*Any person, a minor or an adult, may be adopted.*” The core issue is whether public policy should override a state statute because of the illegal incestuous relationship that such an adoption creates. Authorities differ in their perspectives.⁷⁹

If the trust had limited inheritance rights to individuals who were adopted while they were minors or provided that only blood relatives would inherit from the trust, this case would have never come to court.

⁷⁵ Apparently, the children's intention was that upon the termination of the copyright, the songs would proportionately revert to Ray Charles' heirs.

⁷⁶ The Ray Charles Found. v. Robinson, 795 F.3d 1109 (9th Cir. 2015)

⁷⁷ A similar argument has been made by James Brown's heirs after an unsuccessful challenge of his Will. See: Anna Sulkin, *James Brown's Estate: Not Much Progress 11 Years On*, Wealth Management.com (February 14, 2018)

⁷⁸ 126 So. 3d 310 (Fla. 4th Dist. Ct. App. 2013).

⁷⁹ For a more detailed analysis of this issue, see Jeff Baskies, *Goodman v. Goodman: Florida's 3rd District Court of Appeal Addresses Intriguing Adult Adoption Case, Was the Adoption of Goodman's Girlfriend a Bright Idea or Bad Public Policy?* LISI EST. PLAN. NEWSL. no. 2089 (Apr. 16, 2013); In re Robert Paul P., 63 N.Y. 2d 233, 236 (1984); *Adult Adoption Law in the United States*, ADOPTING BACK, <http://adoptingback.com/adopting-back/united-states-adult-adoption-law/> (last visited June 9, 2016).

NOT PLANNING FOR TAXES

“...but in this world nothing can be said to be certain, except death and taxes.”

Benjamin Franklin

BEN FRANKLIN WAS RIGHT ABOUT DEATH AND TAXES, HE JUST DID NOT EXPLAIN HOW INTIMATELY LINKED THEY WERE GOING TO BE

Celebrities: As George Harrison noted in his 1966 song *Taxman* (written when he realized that his revenue was subject to a 95% super-tax), the government will always find a way to collect its “fair share”:

*Should five percent appear too small
Be thankful I don't take it all
'cause I'm the taxman
Yeah, I'm the taxman
If you drive a car car, I'll tax the street
If you try to sit sit, I'll tax your seat
If you get too cold cold, I'll tax the heat
If you take a walk walk, I'll tax your feet*

- *Michael Jackson's* estate and the IRS are reported to have significant disagreements over the value of his estate. The estate estimated that the total taxable estate was around \$7 million, while the IRS came up with an estimate of \$1.0 to 1.3 billion.⁸⁰ The difference creates a gigantic liquidity problem for the estate.
- *Joe Robbie* died in 1990 owning 85% of the Miami Dolphins and 50% of their home stadium. The Dolphins were a family business that he had created in 1966 as an AFL expansion team. He clearly intended the business to remain in the family. His wife died twenty-two months later owning 30% of the family business.⁸² Because of family feuds after Joe Robbie's death, his wife essentially disinherited 4 of her 9 surviving children. Continuing family feuds and an estate tax liability eventually caused the estates to sell their ownership in the Dolphins and the stadium in 1994 for \$109 million with \$43 million immediately going to pay estate taxes. Fifteen years later,

NFL & Trusts

Until 2015, the NFL did not permit trusts to own any part of an NFL franchise,⁸¹ effectively increasing both the owner's estate taxes and often assuring that the ownership would have to be sold to pay estate taxes on the illiquid, but often appreciating asset.

⁸⁰ Richard Rubin, “*What Is Prince's Legacy Worth? The Tax Man Wants to Know*,” WALL ST. J., (Apr. 27, 2016), <http://www.wsj.com/articles/what-is-princes-legacy-worth-the-tax-man-wants-to-know-1461784686>; Hannah Karp, “*Michael Jackson's Estate Faces Demand for Big Tax Payment*,” WALL ST. J., (February 5, 2017).

⁸¹ Daniel Kaplan, “*NFL votes to allow trust ownership of teams*,” Sports Bus. J. (May 25, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/05/25/Leagues-and-Governing-Bodies/NFL-trust.aspx>.

⁸² In lieu of taking under Joe Robbie's Will and Trust, Mrs. Robbie elected to take a 30% spousal elective share pursuant to Florida Statute § 732.201.

the team and stadium were sold for \$1.0 billion. One of the Robbie children noted, “[t]his whole thing has destroyed [our] family.”⁸³

- *Philip and Helen Wrigley* also lost their sports franchise to estate taxes. The Wrigleys were the owners of both the Chicago Cubs baseball team and the Wrigley Company that produced Wrigley chewing gum. Both of them died in 1977. In December 1980, their estates reached a settlement with the IRS and the states of California, Illinois, and Wisconsin on the value of the assets of their estates and the taxes that would be due – a total tax of approximately \$40 million.⁸⁴ Without the requisite liquidity to pay off the tax debt, the family sold the Chicago Cubs to the Tribune Company in June 1981 for \$20.5 million.⁸⁵ According to Forbes,⁸⁶ the 2015 value of the Chicago Cubs was \$1.8 billion.
- *George Steinbrenner* beat the odds by dying in 2010 during a one year hiatus in federal estate taxes. The Wall Street Journal estimated that his timely 2010 death saved his family over \$600 million in federal estate taxes,⁸⁷ albeit at the loss of a step up in basis for most of his assets. It was not a bad trade.
- *Tom Clancy* died in October 2013 with an estate valued at \$86 million. He left behind five children from a prior marriage and a second wife. The children from the prior marriage and the attorney who drafted the Will and served as personal representative wanted the trust that benefitted the step-mother to pay a pro-rata part of the \$11.8 million tax bill from her portion of the estate. Payment of the estate taxes from the wife’s trust (for which an estate tax marital deduction was allocated) would have increased the estate taxes by approximately \$3.9 million.⁸⁸ Instead, the Court ruled that the children’s inheritance of approximately \$28.5 million would bear the entire transfer tax bill.⁸⁹
- *Eleanor Close Barzin* died at age 96 in 2006, leaving behind an estate valued at \$74 million. The problem was that she left conflicting documents disposing of her estate. A French Will provided for special bequests of \$9.0 million to charities and favored individuals, with the

⁸³ Michael Rosenberg, *The Super Bowl that tore a family apart, forever changed stadium deals*, Sports Illustrated, (Nov. 24, 2015), <http://www.si.com/nfl/2015/11/24/miami-dolphins-super-bowl-joe-robbie-stadium>.

⁸⁴ Bill Barnhart, *\$40 million estate taxes led Wrigley to sell*, Chicago Tribune, Jun, 17, 1981, at Section 1, page 14, available at <http://archives.chicagotribune.com/1981/06/17/page/14/article/40-million-estate-taxes-led-wrigley-to-sell>.

⁸⁵ *Id.*

⁸⁶ *See Chicago Cubs – In Photos*, FORBES, <http://www.forbes.com/pictures/mlm45fkhjm/5-chicago-cubs/>.

⁸⁷ *How Steinbrenner Saved His Heirs a \$600 Million Tax Bill*, WALL ST. J. (July 13, 2010, 2:11 PM), <http://blogs.wsj.com/metropolis/2010/07/13/how-steinbrenner-saved-his-heirs-a-600-million-tax-bill/>.

⁸⁸ Scott Calvert, “*Tom Clancy’s Widow Wins Legal Battle Over Taxes on \$86 Million Estate*,” WALL ST. J. (Aug. 24, 2015), <http://www.wsj.com/articles/tom-clancys-widow-wins-legal-battle-over-taxes-on-86-million-estate-1440438903>. Approximately \$65 million of the estate was his 12% interest in the Baltimore Orioles. *Id.*

⁸⁹ *Id.* For more details, see Bruce Steiner: *Lessons from Tom Clancy’s Will*” LISI EST. PLAN. NEWSL. no. 2250, (Oct. 13, 2014). This ruling was affirmed by the Court of Appeals of Maryland on August 24, 2016.

balance split equally between her only child and her only grandchild (i.e., the daughter of her son). There was a US based trust that held \$32 million and made similar special bequests and passed the balance 25% of the residue to her son, with the balance passing to her granddaughter. Finally, there was a US Will that provided that the residue went entirely to her son.⁹⁰ Apparently, the three sets of documents were intended to co-exist with each other and simplify the passage of the diversely located assets in the US and Europe. Instead, it precipitated a prolonged fight between the decedent's son and his daughter. Conflicting lawsuits and probate filings were created in Washington, D.C., Baltimore, New York, Paris, and Switzerland. One of the core conflicts was over how the significant estate taxes due to France and the United States were to be apportioned among the beneficiaries and whether that apportionment would substantially reduce the \$9.0 million in special bequests.

- *Ileana Sonnabend* was a legendary modern art dealer and collector when she died in 2007. Her estate paid \$331 million in federal estate taxes and \$140 million in New York estate taxes.⁹¹ Included in her collection is a collage called “Canyon” which contains a stuffed bald eagle. Under federal law, it is a criminal act to sell a bald eagle.⁹² As a result, three art appraisers indicated that the value of Canyon was zero (i.e., there could be not be a willing seller who would like to serve prison time for the sale).⁹³ The IRS disagreed and indicated that the art was worth \$65 million, resulting in \$29 million in additional estate taxes and \$11.7 million in understatement penalties.⁹⁴ In 2012, the IRS agreed that Canyon had no marketable value (and therefore incurred no estate taxes) when the heirs donated it to Museum of Modern Art.⁹⁵
- *Philip Seymour Hoffman's* Will passed his entire \$35 million estate to Mimi O'Donnell, the mother of his three children. They were not married. While clients often refuse to make life decisions based upon tax results⁹⁶ (much to the chagrin of tax advisors), estimates are that the lack of marriage cost his estate up to \$15 million in immediate estate taxes when he died.⁹⁷

⁹⁰ William P. Barrett, “*Lawsuits Nibble Away At Famous Fortune*,” FORBES (Oct. 1, 2009), <http://www.forbes.com/forbes/2009/1019/forbes-400-rich-list-09-marjorie-post-estates-old-money.html>.

⁹¹ Janet Novack, *The IRS Invents a Chinese Billionaire*, FORBES (Feb. 22, 2012), <http://www.forbes.com/sites/janetnovack/2012/02/22/the-irs-invents-a-chinese-billionaire/#b30c3dd4cefd>.

⁹² See The Bald and Golden Eagle Protection Act, 16 U.S.C. §668 (2016); The Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2016).

⁹³ Janet Novak, “*Even Rich Heirs Deserve a Fair Shake from the IRS*,” FORBES (Feb. 23, 2012), <http://www.forbes.com/sites/janetnovack/2012/02/23/even-rich-heirs-deserve-a-fair-shake-from-the-irs/#2a800ea54793>.

⁹⁴ *Id.*

⁹⁵ Joseph C. Mahon, *Sonnabend Case Settles*, WEALTHMANAGEMENT.COM (Nov. 29, 2012), <http://wealthmanagement.com/taxes/sonnabend-case-settles>.

⁹⁶ For a more thorough review of the tax provisions of Mr. Hoffman's Will, see Bruce Steiner, “*Lessons from Philip Seymour Hoffman's Will*,” LISI EST. PLAN. NEWSL. no. 2206 (Mar. 25, 2014).

⁹⁷ Robert W. Wood, “*New Clues In Philip Seymour Hoffman's Costly Estate Plan*,” FORBES (July 22, 2014), <http://www.forbes.com/sites/robertwood/2014/07/22/new-clues-in-philip-seymour-hoffmans-costly-estate-plan/#735b5a001dd8>.

But given that he had recently separated from Mimi O'Donnell, he may have thought that the estate taxes paid after he was dead were more palatable than the loss of assets from a divorce settlement he would have entered into during his life.

Data & Demographics:

- For the fiscal year ending September 30, 2012, the IRS reported that the effective audit rate for estates over \$10 million was 116%. Overall, 30% of all estate tax returns were audited.⁹⁸
- The 2013 IRS Data Book (covering the period from October 1, 2012 to September 30, 2013) noted that, on an overall basis, individuals and small businesses had roughly a 1% chance of audit.⁹⁹
- If you are curious about the common IRS income tax audit triggers, please read Joy Taylor's *15 Reasons You Might Get Audited*.¹⁰⁰
- In 2012, the IRS reported a 93% conviction rate on criminal tax fraud cases.¹⁰¹
- A Congressional Research Service report estimated that approximately 0.2% of all estates would be subject to an estate tax in 2013.¹⁰² As a result, the tax component of estate planning has largely shifted to income tax planning and tax basis planning.

Lessons and the Law:

Higher Taxes. For decades, the tax component of estate planning has been largely dominated by techniques designed to minimize a confiscatory federal estate tax. However, the permanent transfer tax exemption levels enacted by the American Taxpayer Relief Act of 2012 ("ATRA") on January 2, 2013 have reduced the number of US residents who will be subject to a federal transfer tax. It was expected that in 2013 roughly 3,000 estates will be subject to a federal estate tax out of 2.5 million US residents who will pass away.¹⁰³ The tax planning component of estate planning for most US residents is shifting from a focus on federal transfer tax avoidance to a focus on state and federal income tax avoidance and state death tax minimization in those states which still impose a death tax. The combined state and federal income tax rates for estates and trusts can quickly reach over 50%. The income tax has become the new confiscation tax for most estates.

Apportionment of taxes, expenses and liabilities, together with a liquidity analysis are an often critical but overlooked part of estate planning. Apportioning non-deductible expenses and taxes

⁹⁸ DEPARTMENT OF THE TREASURE INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE DATA BOOK, 2012 (2012).

⁹⁹ DEPARTMENT OF THE TREASURE INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE DATA BOOK, 2013 (2013)

¹⁰⁰ Joy Taylor, *15 Reasons You Might Get Audited*, KIPLINGER (Mar. 2016), <http://m.kiplinger.com/slideshow/taxes/T056-S011-irs-audit-red-flags/index.html>.

¹⁰¹ INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION, FISCAL YEAR 2012 NATIONAL OPERATIONS ANNUAL BUSINESS REPORT (2012).

¹⁰² JANE G. GRAVELLE, CONG. RESEARCH SERV., R42959, THE ESTATE AND GIFT TAX PROVISIONS OF THE AMERICAN TAXPAYER RELIEF ACT OF 2012, 5 (2013).

¹⁰³ *Id.*

to the marital share or charitable share of an estate can create a tax spiral in which each dollar of tax (that exceeds the applicable exemptions) or expense, creates more estate taxes.

Gifts in Contemplation of Death. Connecticut is the only state with a state gift tax.¹⁰⁴ For clients facing a tax gap between the state and federal death tax exemptions, making lifetime gifts may be a way to reduce the state death tax.¹⁰⁵ Making gifts of assets proximate to the donor's passing can also potentially eliminate the spousal elective share of a surviving spouse. However, the Uniform Probate Code provides that the spousal elective share is only eliminated if the donor survives the gift by two years.¹⁰⁶

Some states have rules that provide that certain "gifts in contemplation of death" remain subject to a state death tax. As of December 2015, these states include Iowa, Kentucky, Maryland, Nebraska, New Jersey, and Pennsylvania.¹⁰⁷ The rules vary widely (e.g., the period of "contemplation") and in some cases are rebuttable. There are a number of other states that had contemplation of death inclusions, but the repeal of their state death taxes effectively eliminated the issue. These states include Indiana,¹⁰⁸ Ohio,¹⁰⁹ North Carolina,¹¹⁰ and Tennessee.¹¹¹

If a gift is taxable for state death tax purposes after the donor's death, then a number of issues can arise, including:

- The client has not eliminated the state death tax on the gifted assets, but for federal tax purposes, they may have lost the potential for a step-up in basis of the gifted assets.
- Does the inclusion of the gift result in an estate becoming taxable for state tax purposes?
- Does the donee have the funds to pay any state death tax? Is the state death tax allocable to the residuary of the estate versus the donee?
- What fiduciary responsibilities does the estate administrator have for determining the gifts that were made and reporting them to the state Department of Revenue?
- Are exceptions made for annual exclusion gifts?

¹⁰⁴ CONN. GEN. STAT. § 12-640 (2016).

¹⁰⁵ For a more detailed analysis of this issue, see Debra L. Stetter, *Deathbed Gifts: A Savings Opportunity for Residents of Decoupled States*, 30 EST. PLAN. J. 270 (June 2004).

¹⁰⁶ UNIF. PROBATE CODE § 2-205-(3)(C) (amended 2010). Note that a number of states that have adopted the UPC have not adopted this two-year rule.

¹⁰⁷ JOEL MICHAEL, RES. DEP'T, MINN. HOUSE OF REPRESENTATIVES, SURVEY OF STATE ESTATE, INHERITANCE AND GIFT TAXES 12 (2015).

¹⁰⁸ Indiana repealed its inheritance tax effective as of January 1, 2013.

¹⁰⁹ Ohio repealed its state estate tax and inheritance tax effective as of January 1, 2013.

¹¹⁰ North Carolina repealed its estate tax effective as of January 1, 2013.

¹¹¹ Effective January 1, 2016, Tennessee's inheritance tax was eliminated.

LEAVING FAMILY MEMBERS NOTHING

*Federal law does not permit an estate to file for bankruptcy*¹¹²

Celebrities: Sometimes celebrities leave nothing to their heirs because they have nothing.

- *Thomas Jefferson* died on July 4, 1826 with an insolvent estate¹¹³ forcing his heirs to sell most of his assets to cover the indebtedness.¹¹⁴ As noted on the Monticello website, “Jefferson lived perpetually beyond his means, spending large amounts of money on building projects, furnishings, wine, etc.”¹¹⁵ Because of his status, most creditors did not pursue collection from him. His heirs inherited the debt and sold Monticello, its 500 acres and 140 slaves to cover part of Jefferson’s debt.¹¹⁶ Not only did Jefferson’s family not inherit assets, they were forced to pay his debts. Jefferson’s grandson, Jeff Randolph Jefferson, paid on the debt most of his life.¹¹⁷
- *Alexander Hamilton* died so poor that mourners at his funeral passed the hat to pay for the cost of his burial.¹¹⁸
- *Sammy Davis, Jr.* died with a mountain of debt, including \$5.2 to \$7.5 million owed to the IRS. It has been reported that Mr. Davis had some life insurance policies that paid significant funds to his wife and children, but his home and most of his personal assets were sold at an IRS auction to pay his tax debt.¹¹⁹
- *Mickey Rooney* died in April 2014 with meager estate of \$18,000, a \$2.8 million settlement,¹²⁰ and a cache of Hollywood memorabilia. Most of the estate was left to a stepson, Mark Aber, with none of his biological children receiving any assets.¹²¹ Despite the

¹¹² A decedent’s estate does not meet the definition of an “individual” as defined in 11 U.S.C. §109.

¹¹³ Jeff Nissan, *The Debt and Death of Thomas Jefferson*, SATURDAY EVENING POST (July 2, 2015), <http://www.saturdayeveningpost.com/2015/07/02/history/post-perspective/the-debt-and-death-of-thomas-jefferson-2.html>.

¹¹⁴ SLOAN, HERBERT. PRINCIPLE AND INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT (1995).

¹¹⁵ *Debt*, THOMAS JEFFERSON MONTICELLO, <https://www.monticello.org/site/research-and-collections/debt> (last visited June 9, 2016). On an interesting historical note, when the British burned the US Capitol and the Library of Congress, Jefferson owned the largest personal collection of books in the United States. He sold his 6,487 volume library to Congress in 1815 for \$23,950. Two thirds of the collection was later destroyed in an 1851 Christmas Eve fire. *Jefferson’s Library – Thomas Jefferson*, Library of Congress, <https://www.loc.gov/exhibits/jefferson/jefflib.html> (last visited June 6, 2016).

¹¹⁶ Voluntary bankruptcy was not permitted in the United States until the law was changed in 1841.

¹¹⁷ Nissan, *supra* note 112.

¹¹⁸ *Id.*

¹¹⁹ Sam Kashner, *The Color of Love*, VANITY FAIR (Sep. 3, 2013), <http://www.vanityfair.com/style/1999/03/sammy-davis-kim-novak-dating>

¹²⁰ The settlement was the result of a lawsuit on financial mismanagement and elder abuse by the stepson and his wife, both of whom were apparently insolvent.

¹²¹ *After 80-year career, Mickey Rooney estate: \$18K*, USA TODAY (Apr. 9, 2014), <http://www.usatoday.com/story/life/people/2014/04/08/rooney-estate-stepson/7486121/>.

meager funds, a number of his eight surviving biological children and his estranged wife contested the Will and battled over where he would be buried.

- *Jerry Lewis* died at age 91 in September 2017 with an estimated estate of \$50 million. His Will specifically disinherited his six sons from his first marriage (and their descendants) and passed the entire estate to his second wife and their adopted daughter.

Data & Demographics: Americans are living longer than ever before. This longer life expectancy is creating other issues. According to a 2012 article in the *Wall Street Journal*¹²² the average 65 year old man has a 60% chance of living to age 80 and a 40% chance of reaching age 85. An average 65 year old woman has a 71% chance of living to age 80 and a 53% chance of reaching age 85. The problem is that many of these folks never expected to live that long and do not have the financial resources to secure their retirement. These destitute elderly will create more work for elder law attorneys and more support pressure on their descendants and the government. According to a study by Allianz Life Insurance Company of North America,¹²³ 82% of married respondents (ages 40-49) with children have a greater fear of outliving their assets than they did of dying.

There is at least one beneficial side to clients working longer than they expected. A 2016 report in the *Journal of Epidemiology & Community Health*¹²⁴ showed that the longer you delay retirement, the greater your life expectancy. For example, people who worked to age 70 had a 38% lower risk of dying than their peers who retired at age 65. The ultimate conclusion of the study: “Early retirement may be a risk factor for mortality and prolonged working life may provide survival benefits among US adults.”¹²⁵

One result of the financial, mental and physical stresses on the elderly is the number of elderly who are moving in with their children. The US Census Bureau reported that in 2000, roughly 2.2 million older parents lived with their children. By 2010, the number was 3.9 million and growing. This demographic raises the potential of conflict among siblings over the care, financial contributions to the resident household and decision making. It is an issue that advisors need to directly address in the planning for these elderly individuals.

Social Security Benefits

“Social Security’s combined reserves likely will be fully depleted by 2034.”¹²⁶

¹²² Anne Tergesen, *Counting on an Inheritance? Count Again*, WALL ST. J. (June 11, 2012), <http://www.wsj.com/articles/SB10001424052702303990604577370001234970954>.

¹²³ Available at <https://www.allianzlife.com/retirement-and-planning-tools/reclaiming-the-future/white-paper-findings>.

¹²⁴ Chenkai Wu, Michelle C Odden, Gwenith G Fisher, Robert S Stawski, *Association of retirement age with mortality: a population-based longitudinal study among older adults in the USA*, J. OF EPIDEMIOLOGY & COMMUNITY HEALTH, March 2016.

¹²⁵ *Id.*

¹²⁶ Drew DeSilver, *5 facts about Social Security*, PEW RES. CENTER (Aug. 18, 2015), <http://www.pewresearch.org/fact-tank/2015/08/18/5-facts-about-social-security/>.

On the opposite end of the spectrum are elderly who do not live with their descendants and have the financial resources to support themselves. According to a Pew Report¹²⁷ in 1900 57% of adults over the age of 65 lived in a multi-generation household. By 1990 the percentage was only 17%, growing to 20% in 2010. Preserving their independence is often a strong issue for many elderly and they are willing to pay the cost of maintaining that independence, such as obtaining in home nursing care to stay in their home as long as possible.

Lessons and the Law: The unfortunate reality is that like “regular” people many celebrities do not know how to properly handle their finances or trust the wrong people to manage them and leave nothing but debt when they die. Others will survive their assets. Others decide that they would prefer that charity receive the bulk of their assets. While many clients talk about spending their final dollar the day they die, most want to leave some legacy for their children.

Filial Support Laws. According to the Statute of Frauds, one generally cannot be held liable for the debts of another without agreeing to such liability. However, as many as 28 states¹²⁸ have adopted filial support statutes in which family members can be held legally liable for the support obligations of parents and other family members, particularly for health care and long term care costs, even if the family member has not signed a document guaranteeing those liabilities or received any assets from the needy family member.¹²⁹ According to a 2014 article in Forbes,¹³⁰ the following states and territories have adopted such statutes:

Paying for Support
 If your state of residency has a strong Filial Support statute, consider obtaining a Long Term Care policy to insure that cost of care for a parent or spouse.

Alaska	Kentucky	New Jersey	Tennessee
Arkansas	Louisiana	North Carolina	Utah
California	Maryland	North Dakota	Vermont
Connecticut	Massachusetts	Ohio	Virginia
Delaware	Mississippi	Oregon	West Virginia
Georgia	Montana	Pennsylvania	

¹²⁷ *The Return of the Multi-Generation Family*, PEW RES. CENTER (Mar. 18, 2010), <http://www.pewsocialtrends.org/2010/03/18/the-return-of-the-multi-generational-family-household/>.

¹²⁸ Ben Matlin, *Providers Pursue Kids For Parents’ LTC Costs*, FIN. ADVISOR (Aug. 4, 2014), <http://www.famag.com/news/providers-pursue-kids-for-parents--ltc-costs-18763.html>.

¹²⁹ For more detailed information of this issue, see Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Legally Enforced?* 36 FAM. L.Q. 501 (2002).

¹³⁰ Northwestern Mutual Voice Team, “*Who Will Pay for Mom's or Dad's Nursing Home Bill?*” *Filial Support Laws and Long-Term Care*, FORBES (Feb. 3, 2014, 8:45 AM), <http://www.forbes.com/sites/northwesternmutual/2014/02/03/who-will-pay-for-moms-or-dads-nursing-home-bill-filial-support-laws-and-long-term-care/>.

Indiana	Nevada	Rhode Island	Puerto Rico
Iowa	New Hampshire	South Dakota	

Recent studies show that most baby boomers have not saved enough money to plan for their retirement. The increased life expectancy of Americans and their lack of adequate preparation for their long term care will cause increased enforcement of filial support laws against family members. In Health Care & Ret. Corp. of Am. v. Pittas,¹³¹ the Pennsylvania Supreme Court required a son to pay a \$93,000 nursing home bill of his mother, even though there was no fraudulent conveyance to the son and he was not accused of hiding assets of his mother.

¹³¹ 46 A.3d 719, 723 (Pa. Super. Ct. 2012).

DISPROPORTIONATE FAVORITISM

*"I Don't Believe In Dynastic Wealth," Warren Buffett Has Been Quoted, Calling Those Who Grow Up In Wealthy Circumstances "Members of The Lucky Sperm Club."*¹³²

PLAYING FAVORITES (HOWEVER WELL INTENTIONED) CREATES CONFLICTS. IF YOU TAKE THAT ROUTE MAKE SURE TO CREATE STRUCTURES THAT MINIMIZE THE COST AND POSSIBLE SUCCESS OF THE RESULTING FIGHT.

Celebrities. Particularly when there are lots of former spouses and lots of children, certain heirs tend to be favored over others. Such favoritism is often the root cause of estate conflicts.

- *William Shakespeare* passed his “*second best bed*” to his surviving wife, with most of the remainder of his estate passing to his daughter Susanna. Apparently, there was some bad blood with his wife.
- *Benjamin Franklin’s* son, William Franklin, supported the British before and during the Revolutionary War.¹³³ William moved to England in 1782, never to return to America. Both actions resulted in Franklin substantially disinheriting his only living son.¹³⁴ His Will¹³⁵ provided, “*To my son, William Franklin, late Governor of the Jerseys, I give and devise all the lands I hold or have a right to, in the province of Nova Scotia, to hold to him, his heirs, and assigns forever. I also give to him all my books and papers, which he has in his possession, and all debts standing against him on my account books, willing that no payment for, nor restitution of, the same be required of him, by my executors. The part he acted against me in the late war, which is of public notoriety, will account for my leaving him no more of an estate he endeavored to deprive me of.*”
- *Leona Helmsley’s* Will provided, “*I have not made any provisions in this Will for my grandson CRAIG PANZIRER or my granddaughter MEEGAN PANZIRER for reasons which are known to them.*” The two grandchildren contested the Will and the court awarded them a total of \$6.0 million.¹³⁶
- *Joan Crawford* died in 1977 with five adopted children.¹³⁷ Her Will cut out two of her children from any inheritance and passed \$77,500 to each of the other two children. When

¹³² Landon Thomas, *a \$31 Billion Gift Between Friends*, N. Y. TIMES (June 27, 2006), http://www.nytimes.com/2006/06/27/business/27friends.html?_r=0.

¹³³ In 1762, Franklin’s son was appointed Royal Governor of New Jersey.

¹³⁴ Ben Franklin also had a son who died of smallpox at the age of 4 and a daughter named Sarah. Sarah inherited Franklin’s printing press and 408 diamonds.

¹³⁵ See a copy of the entire Will at <http://www.constitution.org/primarysources/lastwill.html> (last visited June 9, 2016).

¹³⁶ Jeffrey Toobin, *Rich Bitch*, THE NEW YORKER (Sept, 29, 2008), <http://www.newyorker.com/magazine/2008/09/29/rich-bitch>.

¹³⁷ One of the five was returned to the birth mother after a year, when the birth mother revoked the adoption.

Joan was asked why she cut her son Christopher and daughter Christina out of her Will, she said: “*for reasons that should be well known to them.*” The two children challenged the Will and were eventually awarded \$27,500 each. Christina subsequently wrote the scathing book, Mommie Dearest about her mother. Many reviewers considered the book an act of revenge against her mother.

- *Marlon Brando* died in 2004 with a \$21.6 million estate. He had 11 children, two of whom predeceased him. His Will disinherited his adopted daughter, Petra Brando-Corval, and his grandson Tuki Brando, who was the son of his daughter Cheyenne (who committed suicide in 1995).
- *Anthony D. Marshall* was *Brooke Astor’s* only child. In 2009, he was convicted of theft from his mother’s \$185 million estate, conspiracy with regard to her new Will and elder abuse. One of the key witnesses against Anthony Marshall was his own son, Phillip Marshall.¹³⁸ When Anthony D. Marshall died in 2014, he disinherited his own children in favor of his second wife and her children. Given the previous family fights, his children decided not to contest his Will.¹³⁹
- *Huguette Clark* died in May 2011 at the age of 104 with a \$300 million estate. She was a copper and railroad heiress. On March 7, 2005, at age 98, she signed a new Will that passed most of her estate to distant relatives and her nurse. She then signed a second Will 42 days later that disinherited those family members in favor of other beneficiaries.¹⁴⁰ At her age, without appropriate precautions in place (e.g., videotaping the signing and statements from her doctors), the close proximity of two significantly different Wills, begged the excluded heirs to start a Will contest. Her relatives challenged the second Will and an eventual settlement provided them \$34.5 million from the estate and \$1.0 million for the lawyer’s malpractice insurance carrier. Ms. Clark’s long-time accountant and attorney gave up their benefits from the Will and only received a payment of their attorney fees.¹⁴¹
- *Conrad Hilton* died in 1979 with an estate valued at \$200 million, including controlling interest in Hilton Hotel chain. His Will provided for \$100,000 to his daughter, *Francesca Hilton* (whose mother was *Zsa Zsa Gabor*), with a majority of his estate passing to

¹³⁸ Robert D. McFadden, *Anthony D. Marshall, Astor son who was Convicted in Swindle, dies at 90*, N.Y. TIMES (Dec. 1, 2014), http://www.nytimes.com/2014/12/02/nyregion/anthony-d-marshall-son-of-brooke-astor-convicted-in-swindle-dies-at-90.html?_r=0.

¹³⁹ Barbara Ross, *Anthony Marshall leaves sons out of his Will; millions will to second wife and her children*, NEW YORK DAILY NEWS (June 10, 2015), <http://www.nydailynews.com/new-york/anthony-marshall-disinherits-sons-accused-abuse-article-1.2253289>.

¹⁴⁰ Bill Dedman, *No Charge in Heiress Huguette Clark’s \$300 Million Fortune*, NBC NEWS (Sep. 12, 2014), <http://www.nbcnews.com/storyline/huguette-clark/no-charges-heiress-huguette-clarks-300-million-fortune-n86951>.

¹⁴¹ Jonathan Allen, *Heirs of wealthy, reclusive N.Y. heiress settle battle over will*, Reuters (Sep. 24, 2013), <http://www.reuters.com/article/us-usa-heiress-copper-idUSBRE98N16T20130924>.

charity. The daughter and her half-brother, *Barron Hilton*, both challenged the Will. The daughter lost her fight, while the half-brother obtained control of the Hilton Hotel chain and most of the Hilton Hotel stock. Barron Hilton has increased the value of his estate to \$2.3 billion and also intends to pass the vast majority of the estate to charity, with his celebrity daughter, Paris Hilton, receiving a relatively small inheritance.¹⁴²

- *John Lennon* was shot on December 8, 1980 outside his Dakota residence. He died a resident of New York. His Will made no mention of his first son, Julian Lennon, from his first marriage. The vast majority of his assets passed solely to Yoko Ono Lennon outright or in trust for her benefit. Julian Lennon filed suit and in 1996, sixteen years after John Lennon's death, he settled for a reported £20 million (at today's exchange rate, roughly \$29 million).

Lessons and the Law: As a result of the combination of poorly drafted documents, dysfunctional families, incompetent fiduciaries, greedy heirs, inadequate planning and poorly prepared fiduciaries, estate litigation has been booming in the last few decades. This growth will continue.

Because of the this increase in litigation, there will be an increased effort by both individual and institutional fiduciaries to make sure estate and trust instruments provide for strong fiduciary protection. We should anticipate more protective provisions in fiduciary instruments, including broader indemnity provisions for fiduciaries, modifications of the normal fiduciary standards and investment policies, broader use of no contest clauses, limited liability for delegated powers and limits (or increases) on disclosures to beneficiaries. However, these changes will increase the need to create counter-balancing powers designed to protect beneficiaries (e.g., a wider use of trust protectors and fiduciary removal powers). As a result, there will be longer discussions with clients and the complexity of the documents will increase to balance both of these concerns.

Information to Fiduciaries. Many individual fiduciaries agree to serve without fully understanding the potential liabilities and conflict they may be inserting themselves into. This begs the question of whether attorneys should provide written materials (perhaps signed by the client and the fiduciary) detailing the responsibility of the fiduciary, the risk of conflict and the means by which the drafter has tried to minimize those exposures. Should attorneys more thoroughly advise their clients on the necessary skill sets needed by their fiduciaries instead of just accepting the client's choices at face value?

Marital Rights. It's one thing not to have any assets. It's a different ball game when there is an intentional disinheritance of heirs, particularly when the disinherited heir is a surviving spouse.¹⁴³ Every state except Georgia has a statutory spousal share election available to a

¹⁴²Danielle Mayoras and Andy Mayoras, *The Tragedy of Francesca Hilton, Daughter of Zsa Zsa Gabor and Hilton Founder*, FORBES (Jan. 13, 2015), <http://www.forbes.com/sites/trialandheirs/2015/01/13/the-tragedy-of-francesca-hilton-daughter-of-zsa-zsa-gabor-and-hilton-founder/#42e7752e5197>.

¹⁴³ See John J. Scroggin, *Tax, Estate and Practical Issues in Divorce and Remarriage*, LISI EST. PLAN. NEWSL. no.2329 (Aug. 3, 2015), available at <http://www.leimbergservices.com>.

surviving spouse or a community property right in a spouse.¹⁴⁴ Some states provide that the elective share may be made only against the probate estate of a deceased spouse. In other states, the assets subject to the claim can be “augmented” to include some or all of the non-probate assets of the decedent. Generally, the elective share is in lieu of any inheritance under the deceased spouse’s Will. There is little commonality between the various state laws, and the local nuances can create an easy trap for the uninformed advisor and client¹⁴⁵

¹⁴⁴ Tax Management Portfolio, *Spouse's Elective Share*, No. 841 T.M. Georgia has a concept called “Years Support” which provides for support to a surviving spouse while the estate remains open. *See* GA. CODE ANN. § 53-3-1 et seq (2016).

¹⁴⁵ For example, in North Carolina, the spousal elective share increases the longer the marriage lasts. For marriages that last less than 5 years, the spouse’s claim is 15% of the estate, while spouses of marriages that last longer than 15 years have a 50% claim against the decedent’s estate . N.C. GEN. STAT. § 30-3.1 (2015); H. Chalk Broughton Jr., *Recent Changes To North Carolina’s Elective Share Statute – A Trap For The Unwary Estate Planner*, POYNER SPRUILL (Apr. 07, 2014), <http://www.poynerspruill.com/publications/Pages/RecentChangesNCElectiveShareStatuteTrapForUnwaryEstatePlanner.aspx>.

LEGACY PLANNING

“The perfect inheritance is enough money so that they feel they could do anything, but not so much that they could do nothing.”

Warren Buffett

PERHAPS THE TWO GREATEST LEGACIES SOMEONE CAN LEAVE BEHIND ARE RESPONSIBLE CHILDREN AND A CONFLICT-FREE ESTATE

Celebrities: The issue of legacy lies at the heart of much of the planning we do for all of our clients. While the wealthy celebrity may have more to give away, even clients of moderate means have an abiding desire to provide a Legacy that positively impacts their family.

- *Andrew Carnegie* at the age of 65 (in 1900) sold most of his business interests to J.P. Morgan for \$480 million and spent the remainder of his life giving away his wealth. During his life, Carnegie gave \$60 million to fund 1,689 public libraries.¹⁴⁶ In 1900, he created the predecessor to Carnegie Mellon University. In 1891, he opened Carnegie Hall in New York, and in 1901, he founded the predecessor of TIAA-CREF to provide pensions for his employees.¹⁴⁷ Carnegie wrote the Gospel of Wealth in June 1889.¹⁴⁸ The article provided his insights to the accumulation and passage of wealth by those of immense wealth. Towards the end of the article, he summarizes his conclusions saying, *“This, then, is held to be the duty of the man of Wealth: First, to set an example of modest, unostentatious living, shunning display or extravagance; to provide moderately for the legitimate wants of those dependent upon him; and after doing so to consider all surplus revenues which come to him simply as trust funds, which he is called upon to administer, and strictly bound as a matter of duty to administer in the manner which, in his judgment, is best calculated to produce the most beneficial results for the community--the man of wealth thus becoming the mere agent and trustee for his poorer brethren, bringing to their service his superior wisdom, experience and ability to administer, doing for them better than they would or could do for themselves.”*

Among Andrew Carnegie’s other memorable quotes about wealth:

- *“Surplus wealth is a sacred trust which its possessor is bound to administer in his lifetime for the good of the community.”*
- *“There is no class so pitifully wretched as that which possesses money and nothing else.”*
- *“The man who dies rich, dies disgraced.”*
- *“The parent who leaves his son enormous wealth generally deadens the talents and energies of the son and tempts him to lead a less useful and less worthy life than he otherwise would.”*

¹⁴⁶ Susan Stamberg, *How Andrew Carnegie Turned His Fortune Into a Library Legacy*, NPR. (Aug. 1, 2013), <http://www.npr.org/2013/08/01/207272849/how-andrew-carnegie-turned-his-fortune-into-a-library-legacy>.

¹⁴⁷ A complete list of the institutions Carnegie created can be found at <http://library.columbia.edu/locations/rbml/units/carnegie/andrew.html>.

¹⁴⁸ Copy available at <https://www.carnegie.org/search/?q=gospel+of+wealth>

- *Alfred Nobel* was the Swedish inventor of dynamite. He never married and had no children. He was profoundly impacted by a premature obituary that called him “a merchant of death.” In response, he redrafted his Will giving the vast majority of his estate to fund five (now six) Nobel prizes. Nobel clearly agreed with Andrew Carnegie when Nobel wrote, *"I regard large inherited wealth as a misfortune, which merely serves to dull men's faculties. A man who possesses great wealth should, therefore, allow only a small portion to descend to his relatives. Even if he has children, I consider it a mistake to hand over to them considerable sums of money beyond what is necessary for their education. To do so merely encourages laziness and impedes the healthy development of the individual's capacity to make an independent position for himself."*
- *Ben Franklin* made two 1,000 British pound sterling bequests to two 200-year trusts for the cities of Boston and Philadelphia and their respective states.¹⁴⁹ The funds came from his salary as Governor of Pennsylvania from 1785 to 1788 because Franklin believed that public servants should not be paid. When the trusts finally matured in 1990, there was \$4.5 million in the Boston trust and \$2.0 million in the Philadelphia trust. The Boston trust appears to have been invested more wisely. Philadelphia used its bequest to fund scholarships for local high school students. Boston used its bequest to fund a trade school.

The perspectives of Alfred Nobel and Andrew Carnegie are found in many of today’s billionaire entrepreneurs. In June 2010, Warren Buffett and Bill Gates reported their intent to give away most of their wealth to charitable causes. Warren Buffett declared that most of his wealth would pass to the Bill and Melinda Gates Foundation. They challenged other billionaires to meet a challenge stating, *“The Giving Pledge is a commitment by the world's wealthiest individuals and families to dedicate the majority of their wealth to philanthropy.”*¹⁵⁰

Living celebrities who have indicated that their children will receive little to nothing as an inheritance include (with an estimate of their current estate value):

- Bill Gates (\$85.6B)
- Jackie Chan (\$130M)
- Sting (\$300M)
- Simon Cowell (\$550M)
- Warren Buffett (\$66.6B)
- George Lucas (\$5.5B)
- Mark Zuckerberg (\$51.3B)

Data & Demographics: A 2012 study conducted by US Trust shows that 76% of the affluent respondents from age 18-46 believed that leaving an inheritance was an important financial goal, while only 55% of the Baby Boomers had that view. The study provides in-depth analysis of the

¹⁴⁹ See: Fox Butterfield, “From Ben Franklin, a Gift That's Worth Two Fights,” New York Times, April 21, 1990.

¹⁵⁰ A list of wealthy individuals who have met the challenge can be found at <http://givingpledge.org/>.

ways that different generations view estate planning and philanthropy.

In 2016, US Trust Study published a survey noting that:

- Only 10% of wealthy Americans inherited their wealth.
- Millennials were twice as likely to have obtained their wealth by inheritance.
- 75% of wealthy Americans grew up middle class or poor.¹⁵¹

In 1999 and 2003, researchers at Boston College projected that the largest intergenerational wealth transfer in history would occur by the year 2052, with a total transfer of approximately \$41 trillion.¹⁵² The passage of this wealth may not be as large as predicted for a number of reasons. Most notably, the health care and long term care cost of clients who are living longer is going to deplete the funds available for inheritance. Also, many elderly clients are living an expansive lifestyle (e.g., living in expensive “active adult” communities, traveling, and making significant charitable gifts).

Some clients seem to have taken Jimmy Buffett’s 1989 song, *Carnival World* to heart: “*Spend it while you can. Money's contraband .You can't take it with you when you go. Spend it while you can. Before it's taken from your hand .There's no free ride in this carnival world.*” The Wall Street Journal noted in a 2012 article that rather than inheriting significant sums, Baby Boomers may actually have to go out of pocket to support their parents who are living longer than expected and running out of assets.¹⁵³ The AARP and others have also raised issues on whether the inheritance will be anywhere close to the Boston College predictions.¹⁵⁴

Legacy planning often involves some degree of charitable giving. A few statistics highlight the depth of charitable involvement and its impact on estate planning:

Private Inurnment

Making contributions for the benefit of a deceased police officer’s family or providing financial aid to a neighbor is a common practice in most communities. Churches and other charities often set up funds for that particular purpose. But the earmarking of a charitable gift to a

¹⁵¹ View copies of the US Trust reports at <http://www.ustrust.com/ust/pages/insights-on-wealth-and-worth-2016.aspx>

¹⁵² Paul Schervish and John Havens, *Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for the Golden Age of Philanthropy*, SOCIAL WELFARE RES. INST. (1999), available at http://www.bc.edu/bc_org/avp/gsas/swri/. For an updated report, see John Havens and Paul Schervish, *Why the \$41 Trillion Wealth Transfer Estimate is Still Valid*, J. of Gift Plan., Jan. 2003.

¹⁵³ Tergesen, *supra* note 121.

¹⁵⁴ *In Their Dreams: What Will Boomers Inherit?* , AARP Public Policy Institute, May 2006.

- 65% of Americans households give to charity.¹⁵⁶
- Americans gave \$258.38 billion to charities in 2014, a 7.1% increase over 2013.¹⁵⁷
- In 2013 there were 217,367 donor advised funds that held \$53.74 billion.¹⁵⁸
- According to the IRS, for the fiscal year ending September 30, 2012, there were:
 - 91,244 Charitable Remainder Unitrusts with total assets of \$85.2 billion.
 - 14,616 Charitable Remainder Annuity Trusts with total assets of \$6.4 billion.
 - 6,498 Charitable Lead Trusts with total assets of \$23.7 billion.
 - 1,324 Pooled Income Funds with total assets of \$1.25 billion.¹⁵⁹

particular person is not generally entitled to a charitable deduction and in fact may be a taxable gift (though it is generally covered by the gift tax annual exclusion).¹⁵⁵

Not only are charitable transfers increasing, but wealthier Americans are getting more involved in philanthropy themselves. According to a 2003 study, 83% of affluent Americans did volunteer work. The increased involvement of affluent Americans in charitable work also seems to be increasing their lifetime charitable gifting. Wealthy Americans are also encouraging their heirs to become involved in charitable work. In a 1998 US Trust study, 82% of affluent parents encouraged their children to be involved in charitable work.

These wealthy taxpayers are not just giving to charity. They are making sure the gifts are handled in ways they approve. As a consequence of the scandals in numerous charities and the increasing “hands-on” management style of many donors, clients increasingly want to retain in themselves and/or their family the future direction of charitable transfers. Clients want to provide for charitable transfers that will leave a legacy for society and a legacy that will impact their heirs. Joel Breitstein noted the common bond between today’s donor and the 20th century philanthropists “...is the desire to transmit family values and social responsibility to successive generations...” This dual goal has resulted in not only a dramatic growth in charitable donations, but the development of “retained control” charitable giving approaches.

The reduction in estate taxes from the ATRA should increase charitable transfers by affluent Americans as they transfer this money to their favorite charities rather than heirs.

Clients are increasingly concerned about how their families will handle their wealth. According to the Wealth Counsel 6th Annual Industry Trends Survey, 35% of clients want to protect their

¹⁵⁵ I.R.S. Info. Ltr. 20120042 (June 29, 2012); Rev. Rul. 62-113, 1962-2 C.B. 10; *see also* Tripp v. Comm’r, 337 F.2d 432 (7th Cir. 1964); Peace v. Comm’r, 43 T.C. 1 (1964).

¹⁵⁶ Center on Philanthropy at Indiana University at <http://www.philanthropy.iupui.edu/>.

¹⁵⁷ Giving USA 2014.

¹⁵⁸ National Philanthropic Trust - Donor Advised Fund Market Report 2014.

¹⁵⁹ *SOI Tax Stats: Split-Interest Tax Statistics*, Internal Revenue Service, <https://www.irs.gov/uac/soi-tax-stats-split-interest-trust-statistics>.

heirs from mismanaging their inheritance. According to an article in the Wall Street Journal¹⁶⁰ 70% of inherited wealth of affluent US residents was gone by the end of the second generation and 90% disappeared by the end of the third generation. The primary reason for lost wealth was not taxes or poor investments. Instead, 60% of the time it was caused by "*a trust and communication breakdown among family members.*" Twenty-five percent of the time it was due to the failure of parents to prepare their heirs for a windfall inheritance. Affluent clients increasingly recognize these problems and are trying to adopt strategies and structures designed to foster future communication and prepare heirs for large inheritances.

Lessons:

Legacy for the Living. Benjamin Franklin said, "*but in this world nothing can be said to be certain, except death and taxes.*" Unfortunately, estate planners have often taken that quote to heart and acted as though estate planning is fundamentally about death and the avoidance of a resulting death tax. To the contrary, the fundamental purpose of estate planning is to leave a **Legacy For the Living.** It is not that death and taxes are unimportant, they just pale in significance to the legacy you leave behind.

The tax-driven goal subtly suggests that protecting the family assets is the primary goal of an estate plan. Clients and planners have begun to recognize that this is a misplaced emphasis which focuses attention on assets rather than family, on structure rather than perspective, on tax savings over family need. When "*protecting and preserving the assets*" is the (often unstated) primary goal, the emphasis is on structures which preserve the assets from taxes and/or family misuse. When "*protecting and preserving the family*" becomes the beginning point, the planning must deal with difficult family issues which might have been ignored - to the ultimate detriment of the client's family. This new perspective was captured most succinctly by Warren Buffett in 1886 *Fortune* article, "*[The perfect inheritance is] enough money so that they feel they could do anything, but not so much that they could do nothing.*"

In order to understand why these differing approaches are so important, there are some basic perspectives which the planner must understand. First, while children with debilitating mental or physical disabilities are often treated differently in the estate plan (e.g., assets held in a supplemental needs trust), healthy children are generally treated as equals in most estate plans. Clients and planners have not delved into the personalities of heirs, their spending habits, the stability of their marriages, their relationships with other family members, or any possible health, drug or alcohol problems. These largely psychological issues have often been perceived to be outside the normal purview of an attorney's drafting responsibility. However, unpleasant experiences by clients or their friends are increasingly bringing such evaluations into the planning process. In many cases, a psychologist may be a part of the planning. The larger the potential inheritance, the greater the need to address these issues.

¹⁶⁰ Missy Sullivan, *Lost Inheritance*, WALL STREET J., Mar. 8, 2013, available at <http://www.wsj.com/articles/SB10001424127887324662404578334663271139552>.

Second, one of the basic laws of science is that change is never neutral. Every change creates a reaction. So too does an inheritance. Any inheritance will change behavior. The central question which must be addressed is how to encourage the change to be positive rather than negative. It is simplistic, and potentially damaging, to think that the best approach to this problem is to simply ignore the impact.

Third, inherent in this new perspective is that values count. Any discussion of protecting family leads naturally to the issue of values and character. Phrases such as “*drafting to influence behavior*” or even “*values based planning*” recognize that values are at the core of this new perspective, but unfortunately provide critics of values an easy target. While values lie at the heart of this type of planning, the goal of the client should not to preserve his or her values, but to preserve the family - the two are not identical. For example, a plan which punitively demands today’s societal values 100 years from now will probably prove destructive to the family. Just as the US Constitution was intended to be a living document to preserve the Union, this planning must include enough flexibility to adapt and change to new concerns and trends over time.

Contrary to some critics of this perspective, influencing the behavior of heirs has always been a part of the estate planning process. For example, placing assets marital assets in a QTIP trust by its nature will influence the behavior of both a surviving spouse and the remainder beneficiaries of the trust. Placing assets in a trust for children to delay their ownership of the funds beyond age 21 will influence the life decisions of the children.

Values based planning is not a single planning device or tool. Instead, it devises a plan designed to protect and preserve the family as the first priority of the plan. The concept does not focus on taxes; the tax structure is built around the family’s intentions. It is not that the two ideas are in conflict. Rather, the priority of asset preservation, must come second to protecting the family. “Protecting the family” must by its nature take into account the unique personalities and family situation (e.g., multiple marriages) of each family. Because no two families are identical, the plans tend to be unique for each family. Moreover, the planning process does not necessarily begin at death. Having a family member or friend mentor an heir in financial responsibility should begin in the early years of the heir’s development, not when the heir reaches age 21.

Last, at its core, this type of planning deals with a major psychological issue: how do we define ourselves as people? As Solomon said thousands of years ago: “*Whoever loves money never has money enough; whoever loves wealth is never satisfied with his income. This too is meaningless. As goods increase, so do those who consume them. And what benefit are they to the owner, except to feast his eyes on them?*”¹⁶¹ Katherine Gibson of the Inheritance Project has said, “*The guilt and shame of inheriting wealth increases with each generation. The farther a generation is from the initial creation of wealth, the greater the guilt and shame become.*”¹⁶²

¹⁶¹ Ecclesiastes 5:10-11.

¹⁶² Katherine Gibson, Presentation at Family Wealth Counselors Meeting, Chicago May 1998.

Research: John J. Scroggin, *Protecting and Preserving the Family - the True Goal of Estate Planning (2 parts)*, ABA REAL PROPERTY, PROB. & TRUST J. (Spring & Summer 2002).

Conflicts Abide. Desiring to give away a majority of your estate to worthwhile causes will often be challenged by those who would prefer to receive the wealth.

- *James Brown* died in 2006 with an estate estimated to be \$50-100 million. The vast majority of his estate passed by his Will to charities designed to provide educational opportunities for South Carolina and Georgia disadvantaged youth. His wife/girlfriend, Tomi Rae Hynie,¹⁶³ received nothing and his upwards of 9 children¹⁶⁴ received very little. Tomi Rae Hynie and the children contested the Will. After numerous lawsuits and challenges to the actions and fees of fiduciaries, the South Carolina Attorney General inserted himself into the process, and in 2009, the Attorney General announced a settlement in which the Tomi Rae Hynie and children received half of the estate with the balance passing to the designated charities.¹⁶⁵

In 2013, the South Carolina Supreme Court voided the state's settlement due to "*the government's unprecedented encroachment into estate administration...*" and remanded the case to the Aiken County Circuit Court, with the apparent direction to abide by the terms of the original Will. After the Aiken County Circuit Court ruled that Tomi Rae Hynie was James Brown legitimate wife, on February 19, 2015,¹⁶⁶ the South Carolina Supreme Court stayed all further actions of the Circuit Court while the Supreme Court evaluated the case. The stay was lifted a few months later. A partial settlement was announced by four of the children in January 2016,¹⁶⁷ but Tomi Rae Hynie was not a part of the settlement. Despite the payment of millions of dollars in legal fees and fiduciary fees, ten years after his death, James Brown's stated desire to provide opportunities for disadvantaged youth still remains unfulfilled.

- See the prior discussion of *Ray Charles'* Foundation and fights with the family over his intellectual property rights.

Websites:

- See the various studies available the Boston College Center on Wealth and Philanthropy available at <http://www.bc.edu/content/bc/research/cwp/publications/by-topic/wealthphil.html>.

¹⁶³ Apparently Tomi Rae Hynie was married to someone else when she married James Brown, which effectively voided the marriage and eliminated any spousal claims she might have had against the Brown estate.

¹⁶⁴ There were some questions about his paternity of all the claimants.

¹⁶⁵ The settlement also indicated that the South Carolina Attorney General would appoint the fiduciary to serve the Estate, with the fiduciary serving as the Attorney General pleasure.

¹⁶⁶ That determination was appealed and currently rests in the South Carolina Appeals Court, which is also determining if a prenuptial agreement is enforceable.

¹⁶⁷ The additional funds they received in the settlement was \$147,000 in total.

- Center on Philanthropy at Indiana University at <http://www.philanthropy.iupui.edu>.
- See the Chronicle of Philanthropy at <http://philanthropy.com>.
- See information about Community Foundations at <http://www.communityfoundations.net/>.
- Sources for detailed information about charitable organizations:
 - www.justgive.org
 - www.guidestar.com
 - www.give.org
 - www.charitywatch.org

DISPOSITIONS OF THE DECEASED'S BODY

"Oh wow. Oh wow. Oh wow"

The last words of Steven Jobs

IF FAMILY WILL FIGHT OVER THE BODY, THEY WILL FIGHT OVER THE LESSER THINGS

CELEBRITIES:

- *Ted Williams*, the Baseball Hall of Fame inductee, provided in his Will, that he wanted to be cremated. However, two of his youngest children apparently found a note indicating that Mr. Williams wanted to be placed in bio stasis after his death, with his head being removed from his body. The tabloids reveled in the continuing conflicts between his oldest daughter and other family members about the disposition of his body and his head. This was one of the more macabre celebrity-family conflicts that have occurred in recent years.
- *Gene Roddenberry* asked that his ashes be scattered in space. The request was fulfilled on April 21, 1997 when his ashes and the ashes of 24 other people, including Timothy Leary's ashes, were launched into orbit on a Pegasus rocket provided by Celestis, Inc.
- *Mark Gruenwald* asked that his ashes be mixed with the ink used in the production of certain Marvel comic books (where he was an Executive Editor). The wish was fulfilled.
- *Fredric Baur*, the inventor of the Pringles can, asked that his body be cremated and his ashes buried in a Pringles can. His family fulfilled his wishes.
- *Sandra West*, an oil heiress was buried in "*my lace nightgown...in my Ferrari with the seat slanted comfortably.*"
- *Mickey Rooney* died in 2014 virtually penniless, but with eight ex-wives and nine children. The family battled over where he would be buried.¹⁶⁸
- *Anna Nicole Smith's* final burial spot was contested after she died. Her mother and the guardian of her sole surviving heir, an infant daughter, fought over where she would be buried. In one conference call with a Broward County, Florida judge (she died in Broward County) an estimated 16 attorneys from California, Texas, Florida, and the Bahamas were fighting over where she should be buried.¹⁶⁹ Ultimately, she was buried in the Bahamas next to her son.

¹⁶⁸ Victoria Kim and Harriet Ryan, Mickey Rooney's body goes unclaimed as family feuds over burial site, LOS ANGELES TIMES (April 8, 2014), <http://articles.latimes.com/2014/apr/08/local/la-me-mickey-rooney-20140409>.

¹⁶⁹ Abby Goodnough, *Parties Face Off Over Burial Site for Anna Nicole Smith*, N.Y. TIMES (Feb. 21, 2007), <http://www.nytimes.com/2007/02/21/us/21smith.html>.

- *Leona Helmsley* provided \$3.0 million to a family cemetery trust to maintain the final resting places of a number of her family members and directed that the Trustees “... *arrange for the Mausoleums to be acid washed or steam cleaned at least once a year.*” Her Will further states, “*I also direct that anything bearing the Helmsley name must be maintained in “mint” condition and in the manner that it has been accustomed to, maintaining the outstanding Helmsley reputation.*”

Data & Demographics:

- In 1958, the US cremation rate was 3.6%. By 2013, it had increased to 45.4%.¹⁷⁰
- The average funeral service and burial costs in 2016 has been estimated to range from \$8-10,000.¹⁷¹

Lesson and the Law: In most states, the surviving spouse, in the absence of documentation to the contrary, has control of the decisions on how a body is disposed of. As the Casey Kasem example (see the discussion later in this article) illustrates, this can easily create conflicts between a surviving spouse and estranged step-children. For example, the children may want their father buried next to their deceased mother, while the new wife wants the cremation urn to sit on her mantel place.

Clients, particularly those with blended families, need to deal with how they want their body to be handled after their death. The more details they can provide before they pass, the less likely that the family will dissolve into conflicts. If the client does not want a second or third spouse handling funeral arrangements and/or disposal of the body, legally enforceable documents need to be signed.

Research:

- Jeffrey A. Baskies, *Anna Nicole Smith - Guidance for Burial Disputes*, STEVE LEIMBERG'S EST. PLAN. NEWSL. no. 1087 (Feb. 16, 2007).
- Amy F. Altman, “*The Morbid Litigation Lessons of Ted Williams, Mickey Rooney and Anna Nicole Smith,*” *Wealth Management* (February 17, 2017).

¹⁷⁰ 2015 NFDA Cremation and Burial Report. According to the report, cremations were expected to exceed burials in 2015.

¹⁷¹ See *How Much Does the Average Funeral Cost?*, PARTING, <https://www.parting.com/blog/how-much-does-the-average-funeral-cost/>.

RULING FROM THE GRAVE

“Misers are no fun to live with, but they make great ancestors”

Tom Synder

**THE DEAD SHOULD NEVER ATTEMPT TO CONTROL HOW THE LIVING LIVE,
BUT THAT DOES NOT REDUCE THE CHARGE TO LEAVE A RESPONSIBLE
LEGACY. THE TRICK IS THREADING THE FINE LINE BETWEEN THE TWO.**

Celebrities:

- *Harry Houdini’s Will* provided that a séance should be held on each anniversary after his death, with his surviving spouse having a secret 10 word code that Houdini hoped to use to prove that afterlife exists. Apparently, the experiment failed.
- *Wellington Burt* made millions as a lumber baron in Michigan. When he died in 1919, his Will provided that the largest portion of his estate be held in trust until “21 years after [the death of] my last surviving grandchild [who was alive] at the time of my death.”¹⁷² Burt's last grandchild, Marion Lansill died in 1989¹⁷³ and the 21-year countdown ended in November 2010. The \$110 million fortune was distributed to twelve descendants in May 2011. Thirty of his descendants had died in the intervening 91 years. The living descendants’ ages ranged from 19 to 94 and distributions were weighted by the recipient’s age. Multiple challenges were made to the Will terms in the 91 years the trust existed, with moderate success. However, the bulk of the trust funds remained in the trust until May 2011.¹⁷⁴
- *Leona Helmsley* died in 2007 with an estate of approximately \$4.0 billion, leaving \$12 million in trust for her poodle named “Trouble.”¹⁷⁵ She also disinherited two of her four grandchildren. But there was actually a more interesting set of provisions in her July 15, 2005 Will. The Will created a 5% Charitable Unitrust for two of her grandsons. What was unusual in the Will was a provision that provided “notwithstanding any provision of this Will to the contrary, my grandchildren David Panzirer and Walter Panzirer shall not be entitled to any distributions from any trust established for such beneficiaries benefit under this Will unless such beneficiary visits the grave of my late son J. Panzirer, at least once each calendar year, preferably on the anniversary of my said son’s death (March 31, 1982)(except that this provision shall not apply during any period that the beneficiaries are unable to comply therewith by reason on physical or mental disability as determined by my Trustees in their sole and absolute discretion). If David or Walter fails to visit the grave during any

¹⁷² This would appear to be the maximum period the trust could exist under the Michigan Rule against Perpetuities that applied when he died.

¹⁷³ Burt had seven children from two marriages.

¹⁷⁴ See Scott Stump, *After 92 years, millionaire miser’s heirs finally split \$100M*, TODAY (May 27, 2011), http://www.today.com/id/43098220/ns/today-today_news/t/after-years-millionaire-misers-heirs-finally-split-m/#.V1skTvkrK00.

¹⁷⁵ Trouble died on December 13, 2010.

calendar year, his or her interest in the separate trust established for his or her benefit shall be terminated at the end of such calendar year and the principal of such trust, together with all accrued and undistributed net income shall be distributed as if such beneficiary had then died.”

”My Trustee shall have placed in the Helmsley Mausoleum a register to be signed by each visitor and shall rely upon it in determining if the provisions of this paragraph have been complied with, and my Trustee shall have no duty to make, and shall be prohibited from making, any further inquiries after determining whether or not such beneficiary signs such register. At the end of any calendar year, my Trustee shall have the right to presume that the Trustee have not visited the grave during the calendar year if his or her signature does not appear on the register for such calendar year.”

Lessons and the Law:

CRT Contingencies. Prior to the enactment of the Tax Reform Act of 1984¹⁷⁷ contingency fees on income interest in a charitable remainder uni-trust or a charitable remainder annuity trust could cause the CRT to be disqualified. Effective for transfers after December 31, 1978, Code section 664 (f) provides:

CRTs & UBTI
Tax Code § 664(c)(2) provides for a 100% excise tax on the Unrelated Business Taxable Income (UBTI) of a Charitable Remainder Trust (CRT).¹⁷⁶

(1) General Rule. If a trust would, but for a qualified contingency, meet the requirements of paragraph (1)(A) or (2)(A) of subsection (d), such trust shall be treated as meeting such requirements.

(2) Value Determined Without Regard To Qualified Contingency. For purposes of determining the amount of any charitable contribution (or the actuarial value of any interest), a qualified contingency shall not be taken into account.

(3) Qualified Contingency. For purposes of this subsection, the term “qualified contingency” means any provision of a trust which provides that, upon the happening of a contingency, the payments described in paragraph (1)(A) or (2)(A) of subsection (d) (as the case may be) will terminate not later than such payments would otherwise terminate under the trust.

There are two key elements to the application of CRT contingencies. First, it is whether the contingency fits into the exception carved out by section 664(f)(3) and, second, whether or not the contingency is permitted by state law. Although section 664(f) section does not reference state law enforceability as with any estate planning document, it must meet the requirements of state law to be enforceable. For example:

¹⁷⁶ For a more detailed analysis of this issue, see Byrle Abbin, *The 100% Excise Tax on UBTI of a CRT — How It Is Computed and Its Economic Impact*, 32 EST., GIFTS & TR. J. 245 (2007); Howard M. Zaritsky, *New Law Changes Taxation of Charitable Remainder Trusts With Unrelated Business Taxable*, 34 EST. PLAN. J. 48 (March 2007).

¹⁷⁷ P.L. 98-369.

- Florida¹⁷⁸ and Indiana¹⁷⁹ are the only two states that specifically prohibit No Contest Clauses. As a result, a CRT contingency which provided for termination of the CRT upon a contest of a will by the beneficiary or the beneficiaries family members, would appear to be void and unenforceable in those states and therefore potentially void if included in the CRT instrument.
- A contingency that is against public policy would also appear to be unenforceable in most states. For example, a provision indicating that if a CRT beneficiary marries outside of a particular race or religion, the restriction would probably be void.

Short of these kinds of exceptions and as illustrated by the Leona Helmsley Will, it appears that a charitable remainder trust can contain fairly broad controlling powers in the decedent over the lives of the beneficiaries, if the beneficiaries desire to continue to receive benefits from the CRT.

Other possible contingencies for descendants might include:

- The failure of a child to go to college within a defined period,
- The child having a drug or an alcohol addiction and refusing treatment and/or drug testing.

Normally, the existence of a contingency on a direct or trust bequest to a surviving spouse would void any estate tax marital deduction.¹⁸⁰ However, Code section 2056(b)(8)¹⁸¹ provides a trust exception for CTRs *“If the surviving spouse of the decedent is the only beneficiary of a qualified charitable remainder trust who is not a charitable beneficiary nor an ESOP beneficiary...”* The CRT for the spouse can contain a provision that terminates the CRT upon the remarriage of the spouse,¹⁸² a contest of the Will or upon other contingencies. The contingency is not taken into account in calculating the value of the charitable remainder interest and the resulting charitable deduction.¹⁸³

As illustrated by the Leona Helmsley Will, a related question is the degree of due diligence required of the Trustees of the CRT to enforce these qualified contingencies. Leona Helmsley’s Will took away from the Trustees even the right to investigate the reasons that there was not a signature on the register book at the family mausoleum. The greater the subjective nature of the qualified contingency and the greater the mandate on the Trustees effectively is, the greater the potential for conflict between the Trustees and one or more beneficiaries. Because of this, the use of qualified contingencies should probably also have protections built in for the Trustees in the good faith exercise of their responsibilities, including the payment of costs related to investigations. The trust might even provide for coverage of insurance cost for those duties.

¹⁷⁸ FL. STAT. § 732.517 (2016).

¹⁷⁹ IND. CODE § 29-1-6-2 (2016).

¹⁸⁰ I.R.C. § 2056(b)(1) and (b)(7).

¹⁸¹ I.R.C. § 2523(g) contains similar language for lifetime transfers to a charitable remainder trust.

¹⁸² See Priv. Ltr. Rul. 9829017.

¹⁸³ For more information, see Marc D. Hoffman, *Helmsley Will - Interesting Qualified Contingency and Other Provisions*, STEVE LEIMBERG’S CHARITABLE PLAN. NEWSL. no 128 (Sep. 18, 2007).

Research: Marc D. Hoffman, *Helmsley Will - Interesting Qualified Contingency and Other Provisions*, STEVE LEIMBERG'S CHARITABLE PLAN. NEWSL. no 128 (Sep. 18, 2007).

POST-MORTEM TREATMENT OF PETS

"DOGS NEVER BITE ME. JUST HUMANS."

MARILYN MONROE

MANY CLIENTS HAVE MORE AFFECTION FOR THEIR ANIMALS THEN THEY DO FOR THEIR DESCENDANTS. THE ANIMALS HAVE OFTEN TREATED THEM BETTER.

Celebrities: Like many clients, *Leona Helmsley* wanted to make sure her pet was properly taken care of after her death – giving \$12 million in trust for her beloved poodle.¹⁸⁴ The arrangements can run from elaborate pet trusts and costly processes,¹⁸⁵ to a simple passing of the pet to an heir, with a directly related bequest.

Ms. Helmsley was not alone in the unusual ways her pets were to be taken care of after her death:

- *Doris Duke* passed \$100 million in trust for her dogs. After years of litigation, the bequest was reduced to \$20,000 and paid to her former servants who had taken care of the dogs.
- *Eleanor Ritchey* (heiress to a refining fortune) gave \$14 million to take care of 150 stray dogs, with the remaining funds going to Auburn University when the last dog died.
- *Thomas Shewbridge* passed corporate stock in his estate to his two dogs who regularly attended board and shareholder meetings.

Lessons and the Law: Pets for many clients are more important than their descendants.

- As of April 28, 2016, every state except Minnesota permits the use of a “pet trust” to provide for pets when their owner’s pass away.¹⁸⁶
- Examples of simpler approaches include *Lauren Bacall’s* Will which provided \$10,000 to her son, Sam Robards, to take care of her dog Sophie.

Research Sources:

- Robert E. Kass, *Common Mistakes in Estate Planning for Pet Owners*, LISI Estate Planning Newsletter #1821 (June 16, 2011).
- Joseph Pozzuolo, Jeffrey Pozzuolo & Florence Simonis, *Estate Planning for Pet Owners*, Practical Tax Strategies, May 2011.
- Arthur Kroll, *Useful Estate Planning Techniques for Pet Owners*, EST. PLAN., (Aug. 2006).
- Jeffrey Baskies, *Drafting a Pet Trust*, LISI EST. PLAN. NEWSL. no. 992 (July 13, 2006).

¹⁸⁴ A New York judge reduced the bequest to \$2.0 million.

¹⁸⁵ The annual upkeep for Trouble totaled \$190,000, including \$100,000 for a security team (the poor dog had received death threats) and a \$60,000 guardian fee. See Cara Buckley, *Cosseted Life and Secret End of a Millionaire Maltese*, N.Y. TIMES, June 9, 2011, <http://www.nytimes.com/2011/06/10/nyregion/leona-helmsleys-millionaire-dog-trouble-is-dead.html>.

¹⁸⁶ “How Many States Allow “Pet Trusts” as Part of an Estate Plan?” www.Wealthmanagement.com (April 29, 2016).

INCAPACITY PLANNING

“The fastest-growing segment of the total population is ... those 80 and over. Their growth rate is twice that of those 65 and over and almost 4-times that for the total population. In the United States, this group ... will more than triple from 5.7 million in 2010 to over 19 million by 2050.”¹⁸⁷

EVERY ADULT OF EVERY AGE SHOULD EXECUTE A MEDICAL DIRECTIVE, AND A GENERAL POWER OF ATTORNEY

Celebrities:

- *Sumner Redstone* is one of the wealthiest people in America, with an estate estimated to be over \$42 billion.¹⁸⁸ On September 3, 2015, Mr. Redstone named his long-time companion, Manuela Herzer, as his health care decision maker under a health care power of attorney.¹⁸⁹ In October 2015, he had a falling out with Ms. Herzer and on October 16, 2015 he eliminated her from his Will (which would have passed \$70 million to her) and his health care power of attorney (replacing her with his daughter, Shari Redstone). In reaction, Ms. Herzer claimed that he was not competent and asked a Los Angeles court to place her in charge of his health care decisions. If successful, her health care challenge would probably have led to a challenge of the Will changes. Ms. Herzer’s case was dismissed on May 9, 2016 after one day of testimony with the judge ruling that Ms. Herzer had not proven her case, but without the judge ruling that Redstone was competent.

Within minutes of the dismissal, Ms. Herzer filed a \$100 million lawsuit against Mr. Redstone’s daughter, her sons, a number of his health care providers and employees, claiming invasion of privacy, intentional interference with an expected inheritance,¹⁹⁰ and breach of contract. Her attorneys indicated that they would also appeal the trial judge’s dismissal. Meanwhile, Redstone’s attorney indicated he was preparing a \$150 million lawsuit against Ms. Herzer and a former lover who had been kicked out of the Redstone residence in August 2015, claiming the women were guilty of elder abuse and taking financial advantage of Redstone.¹⁹¹ As of September 2016, these conflicts are continuing.

¹⁸⁷ *The Demographics of Aging*, TRANSGENERATIONAL DESIGN MATTERS, <http://transgenerational.org/aging/demographics.htm#ixzz3T4Djeghm> (last visited June 9, 2016).

¹⁸⁸ Emily Steel, *Sumner Redstone Competency Case Abruptly Dismissed by Judge*, N.Y. TIMES (May 9, 2016), <http://www.nytimes.com/2016/05/10/business/media/sumner-redstone-competency-lawsuit.html>.

¹⁸⁹ For the events leading up to this decision see William D. Cohan, *Inside the Raging Legal Battle over Sumner Redstone’s Final Days*, VANITY FAIR (Apr. 2016), <http://www.vanityfair.com/news/2016/03/sumner-redstone-legal-battle-final-days>.

¹⁹⁰ See the later discussion in this article of this tort action.

¹⁹¹ Meg James, *Judge dismisses mental competency case against Sumner Redstone*, LOS ANGELES TIMES (May 9, 2016), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-sumner-redstone-trial-ruling-20160506-snap-story.html>.

On May 20, 2016, the CEO of Viacom and another Viacom Board Member were removed as two of the seven Trustees of two Trusts that own the controlling interest in Viacom and CBS. The removed Trustees' verbal response was: "*These steps are invalid and illegal. As court proceedings and other facts have demonstrated, Sumner Redstone now lacks the capacity to have taken these steps.*"¹⁹² On May 23, 2016, the two removed Trustees filed suit against Shari Redstone arguing that she was manipulating her father and exercising undue influence on his decisions. In August a settlement was announced between the Trustee/Directors and Sumner Redstone and Share Redstone.

But the Redstone family struggles over his fortune will probably continue. Sumner Redstone's granddaughter said that her aunt Shari Redstone and her three adult children had "*succeeded in reversing decades of my grandfather's careful estate planning and are poised to seize control of Viacom and CBS.*"¹⁹³

- *Casey Kasem* was incapacitated in his 80s with Lewy Body disease, a disease similar to Parkinson's disease. A fight ensued between his wife of over 30 years and his three children from his first marriage over both access to Mr. Kasem and dueling powers of attorney. In 2013, the wife's power of attorney was declared the governing instrument and some members of the family entered into a confidential settlement agreement on visitation rights. However, the fight was not over. In May 2014, Kerri Kasem was appointed as temporary conservator for her father by a California court. Apparently, his wife moved Mr. Kasem out of California to Nevada and then to Washington to avoid the California court order. After Mr. Kasem died on June 15, 2014 in Washington, members of the Kasem family asked a California District Attorney to prosecute their step-mother for elder abuse, but the prosecutor declined based upon a lack of evidence. Six months after he died, his wife buried him in a Norwegian cemetery (apparently in an unmarked grave) without providing any notice to his children. The children accused her of hiding the body to eliminate any evidence of elder abuse.¹⁹⁴
- *Peter Falk* developed Alzheimer's in his early 80s. His second wife and daughter from his first marriage fought over his conservatorship and the daughter's visitation rights. The wife was eventually named conservator, and the daughter became an activist for legal visitation rights for children of incapacitated parents.
- *Zsa Zsa Gabor's* husband, Frédéric Prinz von Anhalt, and, Francesca Hilton, her daughter from her marriage to Conrad Hilton battled for years over control of Zsa Zsa Gabor's

¹⁹² Keith Hagey, *Battle Ensues Over Control of Sumner Redstone's Trust*, WALL STREET J. (May 21, 2016), <http://www.wsj.com/articles/viacom-ceo-says-he-has-been-removed-from-sumner-redstones-trust-1463802091>.

¹⁹³ Emily Steel, "*Sumner Redstone's Granddaughter Sides With Viacom Directors*," New York Times, June 1, 2016.

¹⁹⁴ See Amy Wallace, *The Long, Strange Purgatory of Casey Kasem*, GQ (Jan. 27, 2015), <http://www.gq.com/story/last-days-of-casey-kasem>.

medical care, visitation rights, and management of her assets, eventually settling out of court. The settlement included monthly reporting to the daughter's attorney and one-hour weekly visits for the daughter. Gabor was reported to have lost over \$10 million from investments in Bernie Madoff's company.¹⁹⁵

- *Glenn Campbell* announced in 2011 that he had been diagnosed with Alzheimer's. In 2015, two of his eight children filed suit in Nashville alleging that his fourth wife (married since 1982) was refusing to let them visit their father or let them participate in his health care. It was reported that Travis Campbell stated, "*We have turned over information to authorities, the FBI and district attorney in two different states to prove that she's mismanaging his finances. We need to find out some things about what she's doing with the cash.*"¹⁹⁶
- *Groucho Marx's* companion of seven years (Erin Fleming) and his children fought for years over control of his medical decisions and assets before he died in 1977. After Groucho's death, his executor sued Ms. Fleming for assets she had received during his life, plus \$500,000 in punitive damages.¹⁹⁷ She was eventually ordered to pay the Marx estate \$472,000.
- *Etta James* was a renowned blues singer who had dementia and leukemia late in her life. In 2010, her husband petitioned a California court to have three of her accounts with a value of \$1.0 million declared to be community property, ostensibly so that he could pay for her care (at a reported \$30,000 per month). Her son from a prior relationship, who held a power of attorney, objected to the petition and asked for an independent administrator. The husband argued that Etta Jones was not competent when she signed the power of attorney in 2008, but her sons pointed out that she was touring at the time she signed the power of attorney.¹⁹⁸
- *Brooke Astor's* only child, Anthony D. Marshall (a former Marine, CIA officer and Ambassador), was convicted in 2009 of theft from his mother's \$185 million estate, conspiracy with regard to her new Will (to eliminate a \$60 million charitable bequest) and elder abuse. One of the key witnesses against Anthony Marshall was his own son, Phillip Marshall. Anthony Marshall was sentenced to one to three years in prison, but was released

¹⁹⁵ "Gabor's Husband Says They Lost \$10 Million Due to Madoff," THE TIMES ONLINE (Jan. 26, 2009).

¹⁹⁶ *FBI Probe: Glen Campbell's Raging Family At Center Of Elder Abuse Investigation*, Radar, (Mar. 2, 2016), <http://radaronline.com/celebrity-news/glen-campbell-alzheimers-disease-family-feud/>.

¹⁹⁷ Judith Cummings, "Bank And Ex-Actress Battle Over Groucho Marx Gifts To Her," N.Y. TIMES (Feb. 6, 1983), available at <http://www.nytimes.com/1983/02/06/us/bank-and-ex-actress-battle-over-groucho-marx-gifts-to-her.html>.

¹⁹⁸ Phil Willon, "Etta James' husband, sons battle over money for her care," LOS ANGELES TIMES (Jan. 15, 2011) <http://articles.latimes.com/2011/jan/15/local/la-me-etta-20110115>.

early because of poor health.¹⁹⁹ When Anthony D. Marshall died in 2014, he disinherited his own children in favor of his third wife and her children.²⁰⁰

Data & Demographics: Only 33% of adult Americans have executed a medical directive.²⁰¹ In 2000, the AARP reported that only 45% of Americans over the age of 50 have executed a durable general power of attorney.²⁰² A Lawyers.com study reported that in 2009 only 29% of Americans had either a medical directive or a general power of attorney.²⁰³

Even while more US residents are passing away, the remaining ones are living longer. The current average life expectancy is around age 79. The report "*65+ in the United States, Current Population Reports*," (issued December 2005) provided the following projections on the number of Americans over age 65:

<u>Year</u>	<u>Total Age 65 or Over</u>
2000	35.0 million
2010	40.2 million
2020	54.6 million
2030	71.5 million
2050	80.0 million
2050	86.7 million

Seventy-nine million baby boomers are quickly moving into retirement and old age – despite however much baby boomers may declare that their age of 60 is equivalent to their parents’ age of 40. According to the Census Bureau, Americans 85 and older are the fastest growing demographic group. Increasingly, planning needs to address the potential incapacity of the client, including issues such as long term care insurance, living wills, revocable living trusts, beneficiary designations, medical directives and powers of attorney and assisted care facilities.

This aging population is also getting less competent. According to a February 14, 2013 report from Alzheimer’s Association, by 2050 the number of Americans subject to Alzheimer’s and

¹⁹⁹ Robert D. McFadden, *Anthony D. Marshall, Astor son who was Convicted in Swindle, dies at 90*, N.Y. TIMES (Dec. 1, 2014), http://www.nytimes.com/2014/12/02/nyregion/anthony-d-marshall-son-of-brooke-astor-convicted-in-swindle-dies-at-90.html?_r=0.

²⁰⁰ Barbara Ross, “*Brooke Astor heir Anthony Marshall leaves sons out of his will; millions will go to second wife and her children*,” New York Daily News, June 10, 2015.

²⁰¹ See MYTHS AND FACTS ABOUT HEALTH CARE ADVANCE DIRECTIVES, AM. B. ASS’N, (2013). A January 2014 article in the American Journal of Preventive Medicine reported that only 26.3% of respondents had a medical directive.

²⁰² *Where There is a Will...Legal Documents Among the 50+ Population: Findings from an AARP Survey*, AARP (Apr. 2000), available at <http://www.aarp.org/money/estate-planning/info-2000/aresearch-import-424.html>.

²⁰³ *Lawyers.com Survey Reveals Drop in Estate Planning By Americans in 2009; Ailing Economy Likely Reason*, <http://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1268676534119836> (last visited June 9, 2016).

other types of dementia will increase by 300% to 13.8 million, with costs increasing by 500% to \$1.1 trillion.

A 1992 study in the Archives of Internal Medicine reported that having a living will or medical power of attorney saved almost \$65,000 per patient in the final stay in the hospital.²⁰⁴

A January 26, 2015 article in the New York Times noted that it has become “routine” for nursing homes to attempt to gain guardianship over residents and to use that power to pay bills to the nursing home.²⁰⁵

Younger clients also need to deal with the possibility of incapacity. According to the Social Security Administration, today’s 20 year olds have a 1 in 4 chance of becoming disabled before they die. In 2012, 20% of adults age 25 and older (estimated to be 42 million people) had never been married – an historic high.²⁰⁶ Unmarried clients are especially vulnerable to the issue of who will make medical and property decisions for them if they become incapacitated.

End of life decision making is probably one of the most horrific processes that all families go through. One of the often ignored issues in end of life decision making is the individual’s religious perspectives on withdrawal of life support and related end of life issues. The Pew Foundation has created a detailed review of various religions views on these issues.²⁰⁷

Lessons and the Law: Every adult of every age should execute a general power of attorney and medical directive.

General Powers of Attorney: Clients and their advisors need to spend more time discussing the terms of their General Power of Attorney (a “GPOA”). Among the terms clients should consider in their GPOA are:

- The GPOA should permit the advancement of personal and charitable bequests if the remaining assets are sufficient to support the maker. The document may require an acknowledgement/waiver from the recipient that the distribution is in lieu of comparable bequests under the client’s dispositive documents. This advancement power can create a

²⁰⁴ C.V. Chambers, J.J. Diamond, R.L. Perkel and L.A. Lasch, *Relationship of Advance Directives to Hospital Charges in a Medicare Population*, Archives of Internal Medical, March 1994, Volume 154. See also, P.A. Singer and F.H. Lowy, *Rationing, Patient Preferences and Cost of Care at the End of Life*, Archives of Internal Medical, Mar. 1992.

²⁰⁵ Nina Bernstein, *To Collect Debts, Nursing Homes Are Seizing Control over Patients*, N.Y. TIMES (Jan. 26, 2015), <http://www.nytimes.com/2015/01/26/nyregion/to-collect-debts-nursing-home-seizing-control-over-patients.html>.

²⁰⁶ Wendy Wang and Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CENTER, (Sep. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/>.

²⁰⁷ The report can be found at <http://www.pewforum.org/2013/11/21/religious-groups-views-on-end-of-life-issues/>.

lifetime charitable deduction for a charitable bequest and allow transfers to heirs to be made that use the client's annual exclusion or which provide tax basis planning opportunities.²⁰⁸

- The IRS takes the position that an annual exclusion gift cannot be made unless the GPOA or state law specifically allowing such gifts.²⁰⁹ Only a few states have statutes or case law permitting such gifting.²¹⁰ The authority to make annual exclusion gifts almost always makes sense and the power could be restricted to require that the gifts do not reduce the estate below the taxpayer's remaining applicable exemptions (i.e., the tax benefit of annual exclusion gifts cease if there is no taxable estate). The maker may also want to place other conditions on gift giving, particularly with regard to the agent. For example, require that gifts to the agent and/or family members must be made by an independent agent.
- Even if the state statute provides that the GPOA survives incapacity of the principal (i.e., it is "durable"), place survival language in the document so that there is no question of enforceability in those states which require durable language in GPOAs.²¹¹
- To ensure that the death of the named power holder does not force the grantor's family into guardianship, name one or more successor power holders (i.e., do not have spouses as the sole power holders for each other).
- Provide the power holder specific authority to open any safe deposit box.
- Provide the power holder specific authority to sign and file any state or federal tax returns on behalf of the maker, listing years which can be signed.
- It is generally better to appoint only one power holder at a time. If multiple power holders are appointed, it may lead to confusion (e.g., must all power holders agree, or is a majority sufficient? Can one power holder act without approval of the others?) and conflict (e.g., a child wants to make annual exclusion gifts to reduce the taxable estate of the parent, but the third wife wants to retain assets in the estate to fund a qualified terminal interest property (QTIP) at death).
- Serving as the power holder of an incapacitated person can be very time consuming. Consider providing specific language in the GPOA on how the holder is compensated and reasonable expenses are documented and paid.
- As the celebrity fights at the beginning of this section illustrate, clients and their advisors do not spend enough time discussing the best choices for agents to act under the GPOA and potentially creating mechanisms for agents to be removed.

In today's litigious environment, signing a single page GPOA that says "*I give all power to act on my behalf to [my agent]*" is insufficient and may even create unintended problems. The more detailed and specific the powers are enumerated, the greater the likelihood that conflicts over the

²⁰⁸ For more detail on this topic, see John J. Scroggin, *Income Tax Planning for Clients with Shorter Life Expectancies*, WG&L/RIA Practical Tax Strategies (May 2014).

²⁰⁹ Est. of Goldman v. Comm'r, 71 T.C.M. (CCH) 1896 (1996); *but see* Est. of Ridenour v. Comm'r, 65 T.C.M. (CCH) 1850 (1993); Est. of Casey v. Comm'r, 58 T.C.M. (CCH) 176 (1989), *rev'd*, 948 F.2d 895 (4th Cir. 1991).

²¹⁰ C.f., N.C. GEN. STAT. §32A-14.1 (2016).

²¹¹ C.f., Fla. Stat. §709.2104.

GPOA's reach will be reduced. **But** practitioners should be careful about how broadly they draft the grant of power to the agent of a GPOA. If the agent has the ability to make unfettered gifts to herself or to satisfy her obligations, then the GPOA may constitute a General Power of Appointment.²¹² Moreover, the GPOA should provide that the power holder has no powers over any life insurance on the agent's life (not insurance on the client who signed the GPOA) to avoid having the policy included in the agent's estate pursuant to IRC § 2042.²¹³ Give that power to a different power holder who is not the insured.

State laws governing GPOAs vary widely, creating a potential trap for clients who change residency or own real property or other assets in other states. For example:

- In some states, appointment of a guardian revokes or limits the powers of the agent holding the GPOA (e.g., Florida,²¹⁴ Virginia,²¹⁵ and Washington²¹⁶). Other family members may attempt to gain custody of an incapacitated person if they disagree with the actions of the person holding the general power of attorney. To minimize this risk, provide in the GPOA the identity of the person who should be named as guardian over the person and assets of the maker of the document.
- Under Florida's power of attorney statute, an agent may only exercise authority specifically granted to the agent in the document. General provisions purporting to give the agent authority to do "all acts" don't grant any authority to the agent.²¹⁷ Further, to prevent a potential abuse of power by the agent, there are certain abilities that can only be granted if the principal signs or initials next to each specific enumeration of authority, such as:
 - creating an inter vivos trust;
 - amending, modifying, or revoking a trust created by or on behalf of the principal;
 - making a gift;
 - creating or changing rights of survivorship;
 - creating or changing beneficiary designation;
 - waiving the principal's right to be a beneficiary of a joint or survivor annuity or retirement plan; and
 - disclaiming property and powers of appointment.²¹⁸
- Some states do not require a witness to a GPOA (but a notary may be required), while other states requires two witnesses and a notary. As a consequence, attorneys should be proactive in the manner that they draft their powers of attorney in case they needed to be used in other

²¹² For more detailed analysis of this issue, see Andrew H. Hook, *Durable Powers of Attorney*, 859-3rd TAX MGMT. (BNA), at Art. XIII.C.2.a; Peter B. Tiernan, *Agent's Powers in a Durable Power of Attorney Can Result in Unexpected Tax*, 32 EST. PLAN. J. 34 (Dec. 2005).

²¹³ See Rev. Rul. 84-179, 1984-2 C.B. 195.

²¹⁴ FLA. STAT. § 709.2109(1)(c) (2016).

²¹⁵ VA. CODE ANN. § 64.2-1606 (2016).

²¹⁶ WASH. REV. CODE. § 11.94.010(1) (2016) (previous laws for GPOAs in Washington); 2016 Wash. Sess. Laws 209 (effective January 1, 2017).

²¹⁷ FLA. STAT. § 709.2201 (2016).

²¹⁸ FLA. STAT. § 709.2202 (2016).

states. Even in states which require a lower number of witnesses, use two witnesses and a separate notary to make sure the GPOA is enforceable in other states. None of the witnesses or the notary should be related to the maker or agent (i.e., to avoid an argument of conflict of interest) of the GPOA or be named as the agent under the GPOA.

In many cases, the client is uncomfortable about giving someone the ability to act on the client's behalf before incapacity occurs. In such a case, if permitted by state law (e.g., Georgia, Oregon), the Power of Attorney may be a "springing" Power of Attorney—becoming operative only upon the client's incapacity. The manner in which incapacity is determined should be defined in the document. Be aware that some states do not recognize springing powers of attorney. For example, Florida does not permit springing powers of attorney that were executed after October 1, 2011.²¹⁹

As if the state issues were not complicated enough, there are vast differences in the foreign rules governing the use of powers of attorney and Medical Directives of Americans living overseas. Always have clients who are moving overseas execute Medical Directives and GPOAs, and tell them to consult with local counsel in their new country of domicile. Executing GPOAs (and other notarized documents) overseas can be a problem because of the absence of a US licensed notary. While embassies may have notaries on staff, there may not be any embassies that are close to the client's location. However, federal law provides a process by which non-notaries can authenticate documents signed by military personal and those working with the military while serving overseas.²²⁰

Medical Directives. The three major cases dealing with medical decision making for disabled individuals were all young woman in their twenties and thirties: Karen Ann Quinlan, Nancy Cruzan, and Terri Schiavo. Parents should consider having their children sign Medical Directives when they reach majority.

The complexity of this area is aggravated by the significant state differences in the rules governing General Powers of Attorney and Medical Directives. For example, Alabama²²¹ and Nebraska²²² require that witnesses to a Medical Directive must be at least 19 years of age. Additionally, there vast differences in foreign rules governing the use of medical directives of Americans living overseas.

Marriage and divorce can change who is in charge of medical decisions. For example:

²¹⁹ FLA. STAT. §709.2108(3) (2016).

²²⁰ 10 U.S.C.A. §1044(a) (2016), *See also* U.S. DEP'T OF ARMY, REG. 27-55, LEGAL SERVICES: NOTARIAL SERVICES (2003).

²²¹ ALA. CODE §22-8A-4(c)(4).

²²² NEB. REV. STAT. § 20-403(1) (2016).

- Georgia law provides, “*Unless an advance directive for health care expressly provides otherwise, if after executing an advance directive for health care, the declarant marries, such marriage shall revoke the designation of a person other than the declarant's spouse as the declarant's health care agent....*”²²³
- Alabama law provides, “*Unless otherwise provided in the proxy designation or in an order of divorce, dissolution, or annulment of marriage or legal separation, the divorce, dissolution, or annulment of marriage of the declarant revokes the designation of the declarant's former spouse as health care proxy.*”²²⁴

Impact of Divorce. In most states, a divorce automatically revokes incapacity documents to the extent the former spouse was named, but the effective date of the revocation for incapacity documents varies from state to state. For example:

- In Florida, an agent’s authority under a Power of Attorney terminates when “*an action is filed for dissolution or annulment of the agent’s marriage to the principal or their legal separation, unless the Power of Attorney otherwise provides*” and dissolution or annulment of the marriage of the principal revokes the designation of the principals former spouse as a surrogate.²²⁵
- Georgia law provides: “*... if, after executing an advance directive for health care, the declarant's marriage is dissolved or annulled, such dissolution or annulment shall revoke the designation of the declarant's former spouse as the declarant's health care agent.*”²²⁶

Clients should consider whether to provide that their Medical Directives and Powers of Attorney are terminated immediately upon the filing of a divorce complaint, rather than having the termination be effective as of the date of the final divorce decree. Most clients would prefer not to have an ex-spouse decide what pain medicine they should receive.

Access to the Incapacitated Client. In the majority of states, the person holding guardianship, the power of attorney or medical directive controls access to the incapacitated patient.²²⁷ Particularly in second and third marriages, this often results in the spouse having control over access and if the children from prior marriages are estranged from the spouse, access may be denied.²²⁸ Incapacity documents should specifically provide for such access by other family members, if that is the client’s intent.

²²³ GA. CODE Ann. §31-32-6(b) (2016).

²²⁴ ALA. CODE §22-8A-4(b)(3) (2016).

²²⁵ Fla. Stat. §709.2109(2)(b) (2016) (emphasis added)

²²⁶ GA. CODE ANN. §31-32-6(b) (2016). (emphasis added)

²²⁷ See Danielle and Andy Mayoras, *Casey Kasem's Daughter Fights For New Guardianship Visitation Laws*, FORBES (June 3, 2015), <http://www.forbes.com/sites/trilandheirs/2015/06/03/casey-kasems-daughter-fights-for-new-guardianship-visitation-laws/#314a76362fbc>.

²²⁸ California, Texas, and Iowa have laws allowing access and information to family members of incapacitated relatives. Other states are considering similar legislation.

Undue Influence. Even with all of the foregoing documents in place, conflicts can still arise. Particularly for a person facing diminished capacity, changes in dispositions and decision makers will create the perception or reality that the person is not in control of their decisions and another person is asserting undue influence over their choices. Consider the example of Sumner Redstone. According to his daughter's opponents, despite years of developing an elaborate estate plan, the plan has been upended when the daughter reinserted herself in his life when he had diminished capacity.²²⁹

Research:

- Timothy W. Kirk, PhD and George R. Luck, MD, *Dying Tax Free: The Modern Advance Directive and Patients' Financial Values*, J. OF PAIN & SYMPTOM MANAG., Vol. 39, No. 3 (Mar. 2010).
- Jeff Baskies & George Luck, *Taking a Closer Look at Our Living Wills and Advance Directives*, LISI EST. PLAN. NEWSL. no. 1913 (Jan. 4, 2012).
- For information on how European countries deal with Medical Directives, see SUSANNE BRAUER, UNIVERSITY OF ZURICH, COUNTRY REPORTS ON ADVANCE DIRECTIVES (2008), available at http://www.ethik.uzh.ch/ibme/newsarchiv/advance-directives/Country_Reports_AD.pdf.
- Andrew H. Hook, *Durable Powers of Attorney*, 859-2nd TAX MGMT. (BNA).
- Robert B. Fleming & Rebecca C. Morgan, *Planning for Disability*, 816-2nd TAX MGMT. (BNA).

Websites On Aging And Critical Care Issues (last visited June 1, 2016):

- www.critical-conditions.org
- www.abanet.org/aging/toolkit/
- www.ama-assn.org/public/booklets/livgwill.htm
- www.help4srs.com
- www.mag.org/content
- www.nolo.com
- www.Medicaldirective.org
- www.caregiver.org

²²⁹ For more information on undue influence, see Sandra D. Glazier, Thomas M. Dixon, and Thomas F. Sweeney, *What Every Estate Planner Should Know About Undue Influence: Recognizing It, Insulating/Planning Against It ... and Litigating It*, 40 Estates, Gifts and Trusts Journal 175 (July 9, 2015).

Checklists:

- Cornellius J. O'Reilly, Erica J. Goldberg, & Jay E. Rivlin, *The Estate Planner's Checklist for Planning for Incapacity*, 39 EST. PLAN. J. 17 (2012).
- Robert B. Fleming & Rebecca C. Morgan, *Planning for Disability*, 816-2nd TAX MGMT. (BNA), at Worksheet 1: Checklist for Planning and Disability, Worksheet 4: Nursing Home Checklist.

NOT ANTICIPATING CONFLICTS, CONTESTS, AND OTHER CHALLENGES

“Say not you know another entirely till you have divided an inheritance with him.”

Johann Kaspar Lavater

IF CONFLICT IS SUCH A NORMAL PART OF EXISTENCE, WHY DO WE SO CAVALIERLY IGNORE ITS POTENTIAL DEMANDS IN ESTATE PLANNING?

Celebrities: As the stories in this article indicate, conflict is a natural and reoccurring element of a significant portion of estates. Not being a celebrity probably does not decrease your chances for a conflict, but there are ways to minimize the potential for conflict.

- *Jimi Hendrix’s* estate was still in conflict 45 years after his death.²³⁰
- *Marlon Brando* died in 2004 estimated to be worth \$21.6 million. By 2009 it was reported that there had been 24 lawsuits among the heirs and other claimants to his fortune.²³¹ The last of the conflicts were finally settled in 2013.
- *Leona Helmsley’s* Will is a classic example of the third party challenges that can occur when heirs are disinherited or the document contains unusual terms:
 - The \$12 million bequest for her pet’s trust was challenged by the New York Attorney General and several descendants. The court eventually reduced it to \$2.0 million.
 - The Court awarded two disinherited grandchildren attorney fees and \$6.0 million each.
 - Several animal rights groups (including the Humane Society of the United States) bonded together to demand the Helmsley charitable trust provide greater funds to animal rights.
- *Jerry Garcia* of the Grateful Dead died on August 9, 1995 in a drug rehab center. Even though he had a Will that passed assets to his widow, his four children and his brother, multiple claims from his pre-mortem relationships complicated the probate process. Total claims were \$38 million²³² to \$50 million²³³ for an estate estimated to have a value of \$6.0 million to \$15 million.
 - A former wife, Mountain Girl, demanded \$4.6 million pursuant to a 1993 one paragraph divorce settlement. After years of litigation she eventually won her claim, but then settled for \$1.2 million during an appeal of the decision.
 - Jerry Garcia’s former housekeeper, Nora Sage, demanded \$11.5 million from his estate for the estate’s failure to help her in merchandising art, ties, suspenders and other

²³⁰ See *Fabio supra* footnote 38.

²³¹ Paul Watcher, *Why You Shouldn't Mess With Brando's Estate*, ESQUIRE (Jan. 22, 2013), <http://www.esquire.com/entertainment/movies/a18274/marlon-brando-estate-lawsuits-15008372/>.

²³² Tim Golden, *It Is Money Battles Like These that Make The Dead Truly Grateful*, N.Y. TIMES, Feb. 2, 1997, available at <http://www.nytimes.com/1997/02/02/weekinreview/it-is-money-battles-like-these-that-make-the-dead-truly-grateful.html?pagewanted=all>.

²³³ Charles Ticker, *The Litigious Legacy of Jerry Garcia*, THE SIBLING FIGHT (May 11, 2015), <http://blog.tickerlaw.com/the-litigious-legacy-of-jerry-garcia/>.

- materials that Mr. Garcia had allowed her to produce under his name.²³⁴
- The mother of Garcia’s youngest child demanded child support, despite the fact that the child inherited from Mr. Garcia’s estate.
 - A settlement was made between the Grateful Dead band members and the Garcia Estate in December 2011 – 16 years after Jerry Garcia died.
- *Kirk Kerkorian* died on June 15, 2015 with an estimated estate of more than \$2.0-4.0 billion and a Will dated in July 2013. His death was followed by a series of conflicts, including:²³⁵
 - Una Davis who married Kirk Kerkorian on March 30, 2014 has filed suit indicating that she was forced to sign a pre-nuptial by Mr. Kerkorian’s advisors “under duress” and that she should be entitled to one-third of the estate as an omitted spousal share for the 441 days she was married to him. Assuming an estate of \$3.0 billion, her claim would be equivalent to \$2,267,574 per day of marriage.
 - Kira Kerkorian was born to Lisa Bonder Kerkorian on March 9, 1998 ostensibly as a result of a long relationship between Lisa and Kirk that ultimately resulted in a 28 day marriage in 1999. Lisa filed suit in 2001 asking for \$320,000 in monthly child support for Kira. Lisa Kerkorian subsequently acknowledged that she faked a paternity test and that Kira was on Kirk Kerkorian’s daughter. Mr. Kerkorian still provided an inheritance of \$8.5 million in his Will to Kira. Kira turned age 18 on March 9, 2016 and promptly contested a settlement that has been approved by her guardian on March 1st.
 - The estate’s executor has made a claim of \$7.0 million for his fees.
 - An ex-girlfriend of Mr. Kerkorian has made a \$20 million claim against the estate based upon what she says were assurances of support from Mr. Kerkorian.

Data & Demographics:

- Estimates are that 0.5% to 3% of all probated estates are contested,²³⁶ with the average Will contest costing each side \$10-50,000.²³⁷
- Less than 1% of all Will contests are successful.²³⁸
- According to the Wealth Counsel 6th Annual Industry Trends Survey, the top motivation for doing estate planning was to avoid the chaos and conflict among the client’s heirs.

Lessons and the Law:

No Contest Clauses: Given today’s litigious environment and the existence of so many dysfunctional families, adopting techniques designed to reduce potential conflicts are well advised. Chief among the tools is the use of a “No Contest Clause” (also called an “In Terrorem

²³⁴ Tim Golden, *supra* note 229.

²³⁵ Mike Heuer, Family Fights Over Kirk Kerkorian's Estate, Courthouse News Service (May 31, 2016).

²³⁶ Margaret Ryznar and Angeliqve Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1 (2014).

²³⁷ *How to contest a will: Do you think you were cheated out of an inheritance? You might be able to challenge the will*, CONSUMER REPORTS, March 2012, available at <http://www.consumerreports.org/cro/2012/03/how-to-contest-a-will/index.htm>.

²³⁸ ROBERT K. MILLER, INHERITANCE AND WEALTH IN AMERICA 188 (1998).

Clause”). Such clauses are basically a provision in the dispositive documents that disinherits a family member who contests the terms of the document or even of another document.²³⁹ Florida²⁴⁰ and Indiana²⁴¹ are the only two states that specifically prohibit No Contest Clauses.

The law generally presumes that a Will is an enforceable representation of the decedent’s final wishes and places the burden of proof on a challenger to provide otherwise. That burden is a hard one to meet in many situations and the disincentive to start the fight is strengthened by having a No Contest Clause in the document.

- *Robin Williams’* Living Trust contains a rather elaborate no-contest clause, designed to reduce challenges to his dispositive terms.²⁴²
- *John Lennon’s* Will did not mention his first son Julian Lennon, but did provide the following clause: “**EIGHTH** If any legatee or beneficiary under this will or the trust agreement between myself as Grantor and YOKO ONO LENNON and ELI GARBER as Trustees, dated November 12, 1979 shall interpose objections to the probate of this Will, or institute or prosecute or be in any way interested or instrumental in the institution or prosecution of any action or proceeding for the purpose of setting aside or invalidating this Will, then and in each such case, I direct that such legatee or beneficiary shall receive nothing whatsoever under this Will or the aforementioned Trust.”²⁴³

When you totally disinherit an expected heir, threatening them with a No Contest clause is rather worthless. Better to pass some portion of the estate to the named heir to create a disincentive to initiating a Will contest.

Testamentary Capacity. The standard for having the capacity to make a Will can be relatively low. In some states, a person who lacks the capacity to enter into a valid contract may still have the ability to sign a Will.²⁴⁴ With the presumption that the testator was competent and with a low standard for determining competence, it is generally hard to succeed in such a challenge. Some interesting cases have come to similar conclusions:

- The Michigan Supreme Court ruled in 1879, “[a] man may believe himself to be the supreme ruler of the universe and nevertheless make a perfectly sensible disposition of his property, and the courts will sustain it when it appears that his mania did not dictate its provisions.”²⁴⁵
- The Supreme Court of Nebraska stated in 1936, “gross eccentricity, slovenliness in dress,

²³⁹ For a summary of state laws on No Contest Clauses, see T. Jack Challis & Howard Zaritsky, *State Laws: No Contest Clauses* found at http://www.actec.org/assets/1/6/State_Laws_No_Contest_Clauses_-_Chart.pdf.

²⁴⁰ Fl. Stat. §732.517 (2016).

²⁴¹ Ind. Code §29-1-6-2 (2016).

²⁴² Eriq Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, THE HOLLYWOOD REPORTER (Mar. 30, 2015), <http://www.hollywoodreporter.com/thr-esq/robin-williams-restricted-exploitation-his-785292>. A copy of the trust is included in the on-line version of the article.

²⁴³ Copy of John Lennon’s Will available at <http://www.rockmine.com/Reaper/LennWill.html>.

²⁴⁴ C.f., GA. CODE ANN. §53-4-11(b) (2016).

²⁴⁵ *Fraser v. Jennison*, 3 N.W. 882, 900 (1879).

peculiarities of speech and manner or ill health are not facts sufficient to disqualify a person from making a will."²⁴⁶

- The California Court of Appeals ruled, "*Appellant produced evidence of forgetfulness, erratic, unstable and emotional behavior, and of suspicion, probably delusional at times, on the part of the testatrix. This is of no avail unless it were shown, as it was not, that it had direct influence on the testamentary act.*"²⁴⁷

Unexpected Claims. When someone dies, family members, business partners and sundry strangers can come up with creative ways to try to obtain assets from the estate. A few examples:

- *Gary Coleman* (the actor from *Different Strokes*) died owning a mortgaged home and some small royalties from his acting days. His Will provided that all of his assets went to his third spouse, but before he died, he divorced her. Under Utah law, a divorced spouse cannot inherit under a Will.²⁴⁸ She sued arguing that subsequent to the divorce they had a common law marriage. The court ruled against the ex-wife, with the meager assets all passing to Coleman's business partner. If Gary Coleman had restored a relationship with the ex-spouse, he should have executed a post-divorce Will naming her his heir.
- *Rock Hudson* died in 1985. His lover, Marc Christian McGinnis, sued the Hudson estate and was awarded \$21.75 million, which was later reduced to \$5.5 million. His claim was not that Rock Hudson had given him AIDS, but that by lying to him about not having AIDS, Hudson had caused "*intentional infliction of emotional distress.*"
- *Marc Christian McGinnis* died in 2009 without a Will. McGinnis's only intestate heir was his sister. Brent Beckwith, McGinnis's partner of almost 10 years, was not an intestate heir. Beckwith sued the sister, arguing that she has tortuously interfered with his expectation of an inheritance.²⁴⁹

The California Fourth Circuit Court of Appeals ruled that a claim for tortious interference with an inheritance was a valid tort claim under California law.²⁵⁰ The court noted, "[t]wenty-five of the forty-two states that have considered it have validated it. (Klein, "*Go West, Disappointed Heir*": Tortious Interference with Expectations of Inheritance—A Survey with Analysis of State Approaches, in the *Pacific States* (2009) 13 *Lewis & Clark L.Rev.* 209, 226....The United States Supreme Court called the tort "widely

²⁴⁶ In re Estate of Frazier, 267 N.W. 181, 187 (1936).

²⁴⁷ In re Goetz' Estate, 253 Cal.App.2d 107, 113 (Cal. Dist. Ct. App. 1st 1967).

²⁴⁸ UTAH CODE ANN. §75-2-804 (West 2016).

²⁴⁹ Hani Sarji, *California Joins Majority Of States In Recognizing Tort -- Intentional Interference With Expected Inheritance*, FORBES (June 30, 2012), <http://www.forbes.com/sites/hanisarji/2012/06/30/california-joins-majority-of-states-in-recognizing-tort-intentional-interference-with-expected-inheritance/#2b84996c492d>.

²⁵⁰ Beckwith v. Dahl, 205 Cal.App.4th 1039 (Cal. Ct. App. 4th 2012).

recognized. (*Marshall v. Marshall* (2006) 547 U.S. 293, 312, 126 S.Ct. 1735, 164 L.Ed.2d 480.) In addition, IIEI is outlined in section 774B of the Restatement Second of Torts. (Rest.2d Torts, § 774B [“One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift”].)”

The court further noted, “In general, most states recognizing the tort adopt it with the following elements: (1) an expectation of receiving an inheritance; (2) intentional interference with that expectancy by a third party; (3) the interference was independently wrongful or tortious; (4) there was a reasonable certainty that, but for the interference, the plaintiff would have received the inheritance; and (5) damages. (See, e.g., *Fell v. Rambo* (Tenn.Ct.App.2000) 36 S.W.3d 837, 849.) Most states prohibit an interference action when the plaintiff already has an adequate probate remedy. (See, e.g., *Minton v. Sackett* (Ind.Ct.App.1996) 671 N.E.2d 160, 162–163(Minton).)”

Research: Goldberg and Sitkoff, “Torts and Estates, remedying Wrongful Interference with Inheritance,” Harvard College of Law, John M. Olin Center for Law, Economics, And Business, Discussion Paper No. 72 (July 2012).

- *Jerry Garcia*’s former housekeeper, Nora Sage, demanded \$11.5 million from his estate for the estate’s failure to help her in merchandising art, ties, suspenders and other materials that Mr. Garcia had allowed her to produce under his name.²⁵¹
- *Barry White* died in 2003 with one ex-wife, one wife he was separated from for several years, five children and a current girlfriend who gave birth a four weeks before his death. The girlfriend claimed that the child’s father was Barry White, but a paternity test proved the child was not his. Her lawsuit claimed a \$2.0 million house and support for life, but in the end she got nothing.
- *Marlon Brandon*’s last caregiver sued his Executors seeking over \$2.0 million in damages for fraud, deceit and a broken oral contract. She settled with the Executors for \$125,000.²⁵²

Even charities can get into fights. *Hector Guy Di Stefano* was the classic low key, millionaire next door who surprised his neighbors when he died in 2006 with an estate valued at \$264 million. His Will provided that the estate be divided among eight separate charities, including the Salvation Army and Greenpeace. The Will stated that \$33 million passed to Greenpeace

²⁵¹ Tim Golden, *supra* note 229.

²⁵² *Executors of Estate of Marlon Brando Agree to Settle Lawsuit With Former Aide for \$125,000*, ASSOCIATED PRESS (Jan.4, 2007).

International, but that entity disbanded in 2005 and its assets were absorbed into another Greenpeace charity. Salvation Army sued saying that the named charity did not exist and as a result of the invalid bequest that it should receive a larger portion of the bequest. Eventually, a settlement was reached.²⁵³

Unknown Heirs. As reflected in the recent issues with *Prince's* estate, unknown heirs can easily pop up during the estate administration. Eliminating such potential heirs may be possible by appropriate drafting in a will – although the lawsuits will probably still be filed, particularly if a DNA test proves paternity.

- *Rock Hudson's* Will specifically disinherited all of his potential heirs in favor of the persons he named in his documents. The Will directed that anyone attempting to contest the Will would only receive "*\$1 only in lieu of any other share or interest in my estate.*"²⁵⁴
- *Robin Williams* provided in his Living Trust: "*Except as otherwise provided in this Agreement, Settlor has intentionally and with full knowledge omitted to provide for any of his heirs who may be living at the time of his death.*"
- *Sony Bono* died in 1998 without a Will. A "love-child" surfaced after Sony's death, but the claimant withdrew his claims when a DNA test was required.

Choosing the Right Decision Makers. The choice of decision makers under their incapacity and dispositive documents is one of the most important decisions a client can make. Specifically, the choice of the right fiduciary can either minimize or create conflict. In selecting the persons who will act for the estate, the client should focus not only on the fiduciary's competence, but also on the potential for conflict (e.g., appointing a child who other children perceive as a control freak). It is the advisor's responsibility to focus the client's attention on avoiding a process that breeds conflict. For example, appointing an estranged step-son to act as Trustee for a step-mother is probably not a good idea. The step-son may be the remainder beneficiary of the trust, creating an inherent conflict of interest. Moreover, he may be less disposed to adequately provide for someone who is not his blood parent.

Ambiguity Breeds Conflict. The less precise the dispositional language of a decedent's documents, the greater the likelihood that conflicts will arise.

- *Sharon Disney Lund* was the youngest of Walt Disney's three children. She died in 1993 leaving behind three adult children and a large estate. Her Will created trusts for the children with staggered principal distributions as they became older. A critical, subjective and

²⁵³ Tomas Alex Tizon, *Salvation Army, Greenpeace call off fight over bequest*, LOS ANGELES TIMES (May 14, 2007), <http://articles.latimes.com/2007/may/14/nation/na-charityfight14>.

²⁵⁴ Dorothy Townsend, *Rock Hudson Will Filed; Everything Put in Trust*, LOS ANGELES TIMES, Nov. 7, 1985, available at http://articles.latimes.com/1985-11-07/news/mn-3118_1_actor-rock-hudson.

ambiguous phrase has caused extensive litigation, provided that distributions (including principal distributions) could be withheld by the three Co-Trustees if the children do not show “*maturity and financial ability to manage and utilize such funds in a prudent and responsible manner.*” When the Co-Trustees exercised their discretion in ways the beneficiaries did not appreciate, a flurry of criminal and civil litigation ensued.²⁵⁵

Using a subjective and/or ambiguous standard for distributions allows a beneficiary to create an easier challenge by arguing that the standard was incorrectly applied. A better approach might have been to have distributions by the Co-Trustees be determined in “*their sole, absolute and unfettered discretion, without any requirement of any nature that all beneficiaries be treated in the same or a similar manner.*”

Research:

- Jonathan G. Blattmachr, “*Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration,*” ACTEC L. J. (Winter 2010), copy available at the NAEPC Journal at <http://www.naepc.org/journal>.
- Paul Fisher “*The Power Tools of Estate Conflict Management: Recharging the Culture of Estate Conflicts,*” ABA Probate and Property (May/June 2010 & July/August 2010), copy available at www.fishermediation.com.
- John J. Scroggin, “*The Changing Nature of Estate Planning (Part 3) - Divorce & Conflict,*” CCH PRACTICAL EST. PLAN., (Mar. 2004); Republished in CCH’s Estate and Financial Planning.
- Adam R. Gaslowitz and Jennifer A. Ringsmuth, “*Will Contest, Probate, And Fiduciary Litigation Trends: A Bird’s Eye View*” ALI-ABA Estate Planning Course Materials Journal, October 2011. A copy can be found at <http://www.gaslowitzfrankel.com>.
- Lauren J. Wolven and Stavros S. Giannoulas, “*Tips for Minimizing the Risk of Fiduciary Litigation,*” 39 EST. PLAN. J. 8 (Aug. 2012).

²⁵⁵ Eriq Gardner, *Walt Disney Family Feud: Inside His Grandkids' Weird, Sad Battle Over a \$400 Million Fortune*, THE HOLLYWOOD REPORTER (May 21, 2014), <http://www.hollywoodreporter.com/news/walt-disney-family-feud-inside-706029>.

CONSEQUENCES OF REMARRIAGE ON ESTATE PLANNING

“Marriage Is Often Due to Lack of Judgment, Divorce to Lack of Patience and Remarriage to Lack of Memory.”

CHILDREN FROM PRIOR MARRIAGES HAVE MORE TO FEAR FROM A PARENT’S REMARRIAGE THAN THEY DO FROM THE TAX COLLECTOR

Celebrities: Divorce and remarriage are probably no more common with celebrities than the average American, but the process gets a whole lot more attention. Among the deceased celebrities with multiple marriages:

- *Zsa Zsa Gabor* was married nine times and had one child.
- *Elizabeth Taylor* was married eight times, including twice to Richard Burton. She had three children.
- *Mickey Rooney* was married eight times and had nine children.
- *Lana Turner* was married eight times, including twice to the same man. She had one child.
- *Richard Pryor* was married seven times, including twice to the same woman. He had four children.
- *King Henry VIII* of England had six wives. He divorced two wives, one died during the marriage, two were executed and the last wife survived the King.
- *Tony Curtis* was married six times and had six children.
- *Stan Laurel* was married six times and had two children.
- *Boris Karloff* was married five times and had one child.
- *George C. Scott* was married five times, including twice to the same woman and had six children.
- *Clark Gable* was married five times and had two children.
- *Henry Fonda* was married five times and had three children.
- *Michael Crichton* was married five times and had two children, one of whom was born after Crichton’s death.
- *Rita Hayworth* was married five times and had one child.
- *Dennis Hooper* was married five times had four children. He was married to Michelle Phillips for 8 days in 1970. He was in the middle of his fifth divorce when he died in 2010.
- US Supreme Court Justice *William O. Douglas* was married four times.
- *Charlie Chaplin* was married four times and had 11 children.
- *Andy Griffith* was married three times and had two adopted children from his first marriage.
- *Ray Charles* was married twice and had 12 children by 10 different women.

Data & Demographics:

- A 2016 US Trust study showed that 86% of wealthy Americans were married, with 75%

being married to their first spouse.²⁵⁶

- In 2013, 40% of new marriages included a partner who had been previously married. Among previously married men, 65% would like to remarry, while only 43% of the women have the same desire.²⁵⁷
- The Census Bureau reports that over 10 times as many widowers as widows over age 65 remarry.²⁵⁸
- According to a 1996 University of California study,²⁵⁹ 61% of widowers are engaged in a new romantic relationship within 25 months of their wife's death, while only 19% of the widows have a new relationship. 16% of newly remarried couples include a husband who is at least 10 years older than the wife.²⁶⁰
- According to an AARP report,²⁶¹ at age 70, men are twice as likely to have a current or recent sexual partner as women of the same age.

Significant age differences between celebrities and their spouses are not particularly unusual. For example:

- In 2012, *Hugh Hefner* (age 86) married Crystal Harris (age 26) – a 60 year age difference. Hefner had previously married Kimberly Conrad in 1989 when the two of them had a 36 year age difference.
- In 2012, *Dick Van Dyke* (age 86) married Arlene Silver (age 40) – a 46-year difference.
- In 2011, *Doug Hutchinson* (age 51) married 16-year-old Alexis Stodden – a 35-year age difference.
- In 2005, *Demi Moore* (age 42) married *Ashton Kutcher* who was 15 years her junior. They divorced in 2013.
- In 2000, *Michael Douglas* and *Catherine Zeta-Jones* married, with an age difference of 44 years.
- In 1963, Supreme Court Justice *William O. Douglas* (then age 65) married 23-year-old Joan Martin, but they divorced in 1966. In 1966 he married 22 year old Cathleen Douglas Stone and they remained married until his death in 1980.
- In 1957, *Jerry Lee Lewis* was 22 years of age when he married his 13-year-old first cousin, Myra Gale Brown. They divorced in 1970.

Lessons and the Law:

Marrying the “Pool Girl.” Having watched their friends' experiences, wives are increasingly raising the issue of how to prevent their husband's new spouse from obtaining the family assets

²⁵⁶ See the 2016 US Trust report at <http://www.ustrust.com/ust/pages/insights-on-wealth-and-worth-2016.aspx>.

²⁵⁷ Gretchen Livingston, “*Four-in-Ten Couples are Saying “I Do,” Again,*” PEW RES. CENTER (Nov. 14, 2014), <http://www.pewsocialtrends.org/2014/11/14/four-in-ten-couples-are-saying-i-do-again/>.

²⁵⁸ The Census Bureau reports that the highest percentage of widowers and widows are in the South.

²⁵⁹ Danielle S. Schneider, *Dating and Remarriage over the First Two Years of Widowhood*, ANN. CLIN. PSYCHIATRY 51-7, (June 8, 1996).

²⁶⁰ Livingston, *supra* note 254.

²⁶¹ LINDA L. FISHER, AARP, SEX, ROMANCE AND RELATIONSHIPS (2010). This 92-page report describes the issue in detail.

if the first wife predeceases the husband. Moreover, dad's marriage to a woman 20 years his junior has created intense heartburn for many children who have been anticipating a larger and quicker inheritance. The children may attempt to aggressively insert themselves into their parent's estate planning process, creating new ethical and legal complexities for estate planning advisors.

- *Anna Nicole Smith* was 24 and employed as a stripper in a Houston strip club called Gigi's Cabaret where (in 1991) she delivered a lap dance to 87 year old oil tycoon J. Howard Marshall. Marriage between the two quickly ensued, despite their 63 year age gap. Marshall died 13 months later. Despite the new marriage, Marshall's Will did not pass any assets to Mrs. Smith.²⁶² So she went to court demanding a portion of his \$1.6 billion estate on multiple grounds, including tortious interference with an expected inheritance by Mr. Marshall's son. The litigation was substantial and contradictory and the cases included:
 - The Bankruptcy Court awarded Ms. Smith \$474 million.
 - The Federal District Court vacated the Bankruptcy Court decision and ruled that she was entitled to \$88 million.
 - Subsequently, the Texas Probate Court ruled that Ms. Smith was entitled to nothing.
 - The 9th Circuit Court of Appeals vacated the Federal District Court decision, declaring that only the Texas Probate Court had jurisdiction.
 - The US Supreme Court was involved in the case twice. In Marshall v. Marshall,²⁶³ Mrs. Smith prevailed by unanimous decision in the argument that federal courts had jurisdiction over her claim. But in Stern v. Marshall,²⁶⁴ the Supreme Court effectively ruled that she was not entitled to the court recoveries that had been previously awarded to her by a lower court (in a 5 to 4 decision).
 - A ruling in July 2015 by the Court of Appeals for the First District in Houston may have ended the chance for any recovery by Mrs. Smith's estate after two decades of contentious litigation.²⁶⁵

Anna died in 2007 of a drug overdose at age 39 before she could see the end of the conflicting claims.

- *John Seward Johnson I* was one of the sons of the founder of Johnson & Johnson. In 1971 he married his third wife, Barbara Piasecka, who had previously been his maid. The age difference between the new spouses was 42 years. When he died in 1983 with a \$400 million estate, a majority of his estate passed to his third wife. Not to be unexpected, his six children challenged the Will arguing undue influence and incompetency of their father. Ultimately the

²⁶² Marshall apparently had set up a revocable trust 12 years before he married Ms. Smith, effectively eliminating any spousal rights under Texas law.

²⁶³ 547 U.S. 293 (2006).

²⁶⁴ 564 U.S. 462 (2011).

²⁶⁵ Daniel Fisher, *Court Ruling Likely Ends Anna Nicole Smith Estate's Fight For Marshall Family Millions*, FORBES (July 14, 2015), <http://www.forbes.com/sites/danielfisher/2015/07/14/texas-appeals-court-reverses-sanctions-against-anna-nicole-smith-estate/#dcb5f3342e9f>.

children received \$6.0 million each (plus family trusts that passed millions more).²⁶⁶ When *Barbara Piasecka Johnson* died in 2013, she had an estate reported to be worth \$3.6 billion and was ranked the number 376th richest person in the world by Forbes.²⁶⁷

- *Dennis Hooper* married Victoria Duffy in 1996 when he was 60 and she was 28. Duffy was six years younger than Hooper's oldest daughter. In 2010, he was dying of prostate cancer and initiated a death-bed divorce. Apparently under the terms of their pre-nuptial agreement, Duffy would receive one-quarter of his estate, but only if they were still living together and remain married. What ensued was a protracted series of pre-mortem and post-mortem fights, including a restraining order against Duffy by Hooper (when she lived in their Malibu home), a \$45 million claim by Duffy, and claims against Duffy for missing art by Hooper's estate. He died before the divorce was finalized and Duffy received 17% of the estate, while their daughter Galen received roughly 23% of the estate in trust.²⁶⁸
- Zsa Zsa Gabor died in December 2016. During her 99 years and nine marriages, she left an estate estimated to be \$40 million and two memorable quotes about remarriage and divorce:
 - “*He taught me housekeeping – when I divorce, I keep the house.*”
 - “*I never hated a man enough to give him his diamonds back.*”

Marriage and Existing Wills. How a marriage affects existing estate planning documents varies widely from state to state, with all sorts of exceptions and limitations. A few examples may give a sense of the issues.

- In Oregon, marriage can revoke all previous Wills which were not drafted in contemplation of marriage.²⁶⁹ In Kansas, the Will is only revoked if a child is born of the marriage.²⁷⁰
- In Kentucky, a marriage has no impact on the Will and if the Will does not mention the new spouse, they have no right of inheritance under the Will.²⁷¹
- Generally, in community property states, a spouse is entitled to half of the community property assets, but the other spouse has a right to convey their half of the community property assets and their separate assets as they see fit.
- In most states, the Will is not revoked, but the new omitted surviving spouse may be entitled

²⁶⁶ By one report, each child received as much as \$110 million from these trust funds. See Cheryl Lavin, *When Band-Aid heir J. Seward Johnson Sr. died in 1983, he...* CHICAGO TRIBUNE, July 4, 1993, available at http://articles.chicagotribune.com/1993-07-04/features/9307040326_1_johnson-lawyers-third-wife.

²⁶⁷ Edwin Durgy, *Johnson & Johnson Billionaire Barbara Piasecka Johnson Dies At 76*, FORBES (April 3, 2013), <http://www.forbes.com/sites/edwindurgy/2013/04/03/johnson-johnson-billionaire-barbara-piasecka-johnson-dies-at-76/#4860b06b5f15>.

²⁶⁸ *Dennis Hopper Art Fetches More than \$10 million at Auction*, N.Y. POST, (Nov. 14, 2010).

²⁶⁹ OR. REV. STAT. §112.305 (2016), which provides that the existence of a pre-nuptial agreement can result in the Will not being revoked at marriage.

²⁷⁰ KAN. STAT. ANN. §59-610 (2016) provides, “*If after making a will the testator marries and has a child, by birth or adoption, the will is thereby revoked.*” (emphasis added)

²⁷¹ KY. REV. STAT ANN. § 394.090. However, the spouse may still have a spousal elective share.

to an intestate share of the decedent's estate (referred to as "pretermitted spouse statutes").²⁷² Particularly in marriages in which there are children from a prior marriage, the pretermitted rights of the second or third spouse can create dispositions that neither spouse intended.

Claims of Surviving Spouses. Clients get divorced and remarry. There are at least four ways that a surviving spouse can obtain a share of a deceased spouse's estate, even if the surviving spouse is not listed in the Will.²⁷³

- First, if a married client dies without a Will (or similar dispositive documents), then the surviving spouse is entitled to a share of the estate, generally limited to the intestate estate (e.g., excluding jointly held bank accounts that pass to the co-owner, IRAs pass to the named beneficiary, etc.).²⁷⁴ If the decedent leaves no descendants (or in many states, no surviving parent²⁷⁵), then the surviving spouse will normally receive 100% of the intestate estate.²⁷⁶ In some states, the surviving spouse receives at least a minimum dollar amount or minimum percentage of the intestate estate even if there are surviving descendants or surviving parents.²⁷⁷
- Second, in most states, if the decedent's Will existed before a marriage and was not made in contemplation of the marriage, the new spouse is entitled to an intestate share of the estate.²⁷⁸ For example, Michigan's statute provides, "*if a testator's surviving spouse marries the testator after the testator executes his or her will, the surviving spouse is entitled to receive, as an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any...*" [excluding certain transfers for the decedent's descendants].²⁷⁹ Assume the decedent dies with no surviving descendants or parents. Michigan's statute provides, "*The intestate share of a decedent's surviving spouse is ... (a) The entire intestate estate if no descendant or parent of the decedent survives the decedent.*"²⁸⁰

²⁷² C.f.: Georgia: GA. CODE ANN. § 53-4-48(c) (2016); Massachusetts: MASS. GEN. LAWS § 2-301 (2016); New York: N.Y. EST. POWERS & TRUSTS LAW § 5-1.3 (2016).

²⁷³ See Jeff J. Scroggin, *Spousal Rights Upon Remarriage*, Estate Planning Magazine, February 2016.

²⁷⁴ For more information on state intestacy laws, see JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING, tbl.7, *Intestate Succession* (CCH 2016).

²⁷⁵ C.f., ALA. CODE §43-8-41 (2016) which provides that "[i]f there is no surviving issue but the decedent is survived by a parent or parents, the first \$100,000.00 in value, plus one-half of the balance of the intestate estate" passes to the surviving spouse with the parents equally taking the remainder of the estate. See also MICH. COMP. LAWS § 700.2102 (2016); MD CODE EST. & TRUSTS §3-102 (2016).

²⁷⁶ C.f., FLA. STAT. §732.102(1) (2016) and GA. CODE ANN. §53-2-1(c) (2016). But see ARK. CODE ANN. 28-9-214 (2016) (providing that the spousal intestate share is reduced to 50% of the estate if the marriage has not been in existence for three years before the decedent's death).

²⁷⁷ C.f., Hawaii grants a surviving spouse the first \$200,000 of assets of an intestate estate and 75% of the balance of the estate if the decedent is only survived by a parent. HAW. REV. STAT. § 560:2-102(2) (2016).

²⁷⁸ C.f., ME. REV. STAT. tit. 18-A, §2-301 (2016).

²⁷⁹ MICH. COMP. LAWS §700.2301(1) (2016). This rule is limited by certain exceptions in paragraph (2) of the statute. (emphasis added).

²⁸⁰ MICH. COMP. LAWS §700.2102(1)(a) (2016) (emphasis added).

Tax Code §71(b)(1)(D) provides that if there is any obligation to make an alimony payment (or a substitute payment) after the recipient's death, all such payments, including those paid before death, are not treated as deductible alimony.²⁸¹

- Third, state statutes in every state, except Georgia,²⁸² provide a surviving spouse with certain elective or community property rights against the decedent's estate. "Spousal share" or "spousal elective share"²⁸³ refers to a legal claim that a surviving spouse has against a portion of the assets of a deceased spouse, even if the deceased spouse disinherited the survivor.²⁸⁴ There can be significant variations between state laws, and the local nuances can create an easy trap for the uninitiated advisor and their clients. While some states provide that the elective share may only be made against the probate estate of a deceased spouse,²⁸⁵ in most states, the assets used in calculating the spousal elective share are "augmented" to include some or all of the non-probate assets of the decedent (e.g., revocable living trusts, life insurance and IRAs that passed by beneficiary designation or jointly owned financial accounts that automatically passed to a joint owner). The elective share base calculation may be reduced by debts (but normally not death taxes), assets passing outside of the intestate estate (e.g., jointly held assets) and expenses of the estate (e.g., funeral expenses, administrative expenses). In addition to spousal elective shares, a surviving spouse generally may have rights to the decedent's ERISA plan, personal property and homestead.
- Fourth, even if the decedent spouse executed a new Will, there is at least one other route by which a surviving spouse could inherit. If all of the named heirs should predecease the decedent or if a trust was created and all of the trust beneficiaries die before the termination of the trust, the surviving spouse might have a right to inherit as a surviving intestate heir – with a priority of intestate inheritance in front of more remote family members.

Research: For detailed information on how to defeat spousal rights, see:

- Jeffery Pennell, *Minimizing the Surviving Spouse's Elective Share*, ALI Estate Planning in Depth (2014).
- Christopher P. Cline, *Spouse's Elective Share*, 841 TAX MGMT. § VI.
- Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1127.
- Terry L. Turnipseed, *Community Property v. The Elective Share*, 72 LA. L. REV. (2011), available at <http://digitalcommons.law.lsu.edu/lalrev/vol72/iss1/8>.
- John J. Scroggin, *Eliminating Spousal Rights*, EST. PLAN. MAGAZINE, (Apr. 2016).

Eliminate the Marriage. In a number of states, marriages can be automatically void or voidable

²⁸¹ See *Okerson v. Comm'r*, 123 T.C. 258 (2004).

²⁸² Georgia has a right called "Years Support" which provides for limited support to a surviving spouse. See GA. CODE ANN. §53-3-1 et seq.

²⁸³ The right is also referred to as "widow's share," "statutory share," "election against the will," and "forced share."

²⁸⁴ For a list of state spousal election rights, see JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING, tbl.6, *Rights of a Spouse*, (CCH 2015) and *Can a spouse elect against a will in this state?*, LAWCHERK, <http://www.lawchek.com/Library1/books/probate/qanda/spouse.htm> (last viewed June 9, 2016).

²⁸⁵ C.f., CONN. GEN. STAT. §45a-436(a) (2016); N.H. REV. STAT. ANN. § 560:10 (2016); OHIO REV. CODE ANN. § 2106.01(C) (2016); WYO. STAT. ANN. § 2-5-101 (2016).

after the marriage. For example:

- In a recent Wisconsin Supreme Court decision the court ruled that a marriage could be voided after the death of a spouse if it was found that the decedent lacked sufficient capacity to enter into the marriage.²⁸⁶
- Wisconsin is not alone in permitting annulment of marriages after the death of a spouse. Some states (e.g., Florida,²⁸⁷ Texas²⁸⁸ and New York²⁸⁹) have statutes that allow the voiding of a marriage after a spouse's death.
- In many states, the death of either of the spouses can effectively close the right of heirs to claim that the marriage be voided or annulled.²⁹⁰
- Lack of mental capacity is not the only basis for voiding or annulling a marriage. Other grounds for voiding a marriage can include:
 - a spouse being impotent,²⁹¹
 - a “want of understanding” by one of the spouses,²⁹²
 - a spouse having a venereal disease,²⁹³
 - a spouse having been convicted of a felony before the marriage,²⁹⁴
 - prior to the marriage, either party had been with a prostitute, without the knowledge of the other party,²⁹⁵
 - the wife, without the knowledge of the husband, was with child by some person other than the husband,²⁹⁶
 - the husband, without knowledge of the wife, had fathered a child born to a woman other than the wife within ten months after the date of the solemnization of the marriage,²⁹⁸
 - the marriage was entered into as a result of fraud,²⁹⁹
 - a spouse being underage and married without any required parental consent,³⁰⁰

Annulment & Alimony

Alaska, Connecticut, New Hampshire, New Mexico (underage marriages only), New York, Oregon, Virginia, and Washington provide that alimony may be paid even if the marriage has been annulled.²⁹⁷

²⁸⁶ In re Estate of Laubenheimer, 833 N.W.2d 735 (2013).

²⁸⁷ FLA. STAT. § 732.805(3) (2016).

²⁸⁸ TEX. EST. CODE §123.102 (2016).

²⁸⁹ N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(1) (2016).

²⁹⁰ C.f., California Statute §2211(c) which provides that death of either spouse terminates any right of heirs to challenge the validity of the marriage.

²⁹¹ C.f., TEX FAM. CODE ANN. §6.106 (2015).

²⁹² C.f., NEV. REV. STAT. §125.330 (2016).

²⁹³ Christensen v. Christensen, 14 N.W.2d 613 (1944). Generally, the other spouse must not have had knowledge of the disease when the marriage occurred.

²⁹⁴ C.f., VA. CODE ANN. §20-89.1(b)(2016) - and the other spouse had no knowledge of the felony at the time or marriage.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ See SOC. SEC. ADMIN. PROGRAM OPERATIONS MANUAL SYS., GN 00305.130 *Voidable Marriages*.

²⁹⁸ *Id.*

²⁹⁹ C.f., NEV REV. STAT. §125.340 (2016).

- a spouse being under the influence of drugs or alcohol at the time of the marriage, or
- on the grounds of incest or bigamy.³⁰¹

Advisors need to recognize that some marriages are automatically void and treated as a nullity from the time they were created (e.g., because of bigamy or incest). Other marriages are voidable only after a judicial hearing has made a determination of the relevant facts. The central question from an estate perspective is who can challenge a voidable marriage and what is the result of the death of one of the spouses? The rules vary widely from state to state.

Research Sources:

- Hon. C. Raymond Radigan and Jennifer F. Hillman, *'Til Death Do Us Part: Post-Death Annulment of Marriage and the Right of Election*, 42 NYSBA Trusts and Estates Law Section Newsletter No.4 (Winter 2009).
- Stephanie Rapkin, *In re Estate of Laubenheimer: Does Probate Court Have Authority to Invalidate Marriage Based on Decedent's Lack of Mental Capacity at Time of Marriage?*, LISI Estate Planning Newsletter no. 2150 (October 2, 2013).

ERISA Benefits. The Employee Retirement Income Security Act of 1974 (ERISA)³⁰² governs qualified retirement plans. Upon marriage a spouse normally and automatically becomes the primary beneficiary of the other spouse's ERISA defined contribution account.³⁰³ In a defined benefit or money purchase plan, unless both spouses choose otherwise, the form of payment must be a qualified joint and survivor annuity, providing payments over the participant's lifetime and then a surviving spouse's lifetime.³⁰⁴

In addition, changes in beneficiary designations of an ERISA retirement plan generally require written approval of a spouse if the participant is married.³⁰⁵

IRAs do not have similar mandatory spousal rights or spousal approval requirements in changing the IRA beneficiary.³⁰⁶

- **Legal Example:** Changes in beneficiary designations of an ERISA retirement plan generally require written approval of a spouse if the participant is married.³⁰⁷ However, IRAs do not

³⁰⁰ Underage varies widely from state to state. For example, in Alabama the minimum age to marry is 14, while in South Carolina it is 14 for a female and 16 for a male. In Kansas, it is 15, unless a court allows marriage at a younger age. In Mississippi, potential spouses under the age of 21 must obtain parental consent in order to marry.

³⁰¹ C.f., NEV. REV. STAT. § 125.290 (2016).

³⁰² Pub. L. No. 93-406, 88 Stat. 829 [hereinafter ERISA].

³⁰³ I.R.C. § 401(a)(11)(B)(iii) (2016). I.R.C. § 401(a)(11)(D) (2016) permits a retirement plan to require that the marriage must meet a one year requirement, but, in the author's experience, most plans have not adopted this exception.

³⁰⁴ I.R.C. §401(a)(11) (2016).

³⁰⁵ 29 U.S.C. §1055(c)(2)(A) (2016).

³⁰⁶ 29 U.S.C. §§ 1051–1061 (2016).

³⁰⁷ 29 U.S.C.A. §1055(c)(2)(A) (2016).

have a similar requirement.³⁰⁸ In *Charles Schwab v. Debickero*,³⁰⁹ a husband rolled a 401(k) into an IRA after retirement. The husband named his children from a prior marriage as the IRA beneficiaries. When the IRA owner passed away, his wife argued that because her husband had rolled his 401(k) into the IRA, she should receive the same protections that his ERISA qualified retirement plan had provided to her. The Ninth Circuit disagreed, stating, “Thus, under both § 401(a) and the accompanying regulations, there is no basis for imposing on the Schwab IRA the automatic survivor annuity requirements of § 401(a)(11) and overriding the beneficiary designations rightfully made by Wilson in establishing the account.”³¹⁰

Clients should consider rolling their retirement assets out of an ERISA plan if they want to limit their surviving spouse’s control over and/or benefit from the funds. Make sure to examine the elective share rules in the couple’s domicile state to make sure there are no direct or indirect statutory rights to the IRA that are given to the surviving spouse.³¹¹ If such potential claims exist, have the spouse waive the spouse’s rights, but make sure the waiver is in total compliance with any statutory requirements. For example, the state may require “fair disclosure” of the impact of the waiver.

In a series of decisions, the federal courts have ruled that a spouse’s right to an ERISA retirement plan cannot be waived prior to the marriage of the parties.³¹² Thus, if the parties intend for such a waiver, a renunciation of rights should be signed after the marriage occurs. A waiver before marriage may be void. However, although the pre-marriage waiver may not be effective upon the death of the plan participant, it might be effective upon the divorce of the parties.³¹³ Because the ERISA rules do not apply to IRA accounts,³¹⁴ any spousal elective rights that might include an IRA account can be waived before the marriage, if permitted by state law.

Largely because of continual mistakes by divorced residents, at least 23 states have adopted statutes which provide that divorce automatically results in a deemed elimination of beneficiary designations for the benefit of the former spouse.³¹⁵ For example, Florida provides that a former

³⁰⁸ 29 U.S.C.A. §§ 1051-1061 (2016).

³⁰⁹ 593 F.3d 916 (9th Cir. 2010). See also Brad Dewan, “*Charles Schwab & Company v. Chandler – Surviving Spouse Benefits & IRAs*,” EMP. BENEFITS & RET. PLAN. NEWSL. no. 519, Mar. 17, 2010.

³¹⁰ *Id.*

³¹¹ See FLA. STAT. §732.2035(7) (2016).

³¹² See *Hagwood v. Newton*, 282 F.3d 285 (4th Cir. 2002); *Nat’l Autos. Dealers & Assoc. Ret. Tr. v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996); *Howard v. Branham & Baker Coal Co.*, 968 F.2d 1214 (6th Cir. 1992); *Hurwitz v. Sher*, 982 F.2d 778 (2nd Cir. 1992); see also 26 U.S.C. §§ 417(a), 1055 (2016); Treas. Reg. § 1.401(a)-20 Q&A 28 (2016). But see *Strong v. Dubin*, 75 A.D.3d 66 (N.Y. Sup. Ct. 2010).

³¹³ See *In re Rahn*, 914 P.2d 463 (Colo Ct. App. 1995)

³¹⁴ 29 C.F.R. § 2510.3-2(d) (2016); I.R.C. § 417 (2016).

³¹⁵ See the excellent article by Leslie A. Shaner, *When Clients Fail to Change Beneficiary Designations*, FAM. L. MAG. (Dec. 10, 2013), <http://www.familylawyer magazine.com/articles/beneficiary-designations>. See also UNIF. PROB. CODE §2-804 (UNIF. LAW COMM’N 2014)

spouse is treated as predeceasing the decedent when a divorce occurs.³¹⁶ A number of Supreme Court decisions³¹⁷ have indicated that state statutes that automatically rescind rights upon divorce do not apply to ERISA retirement plans and other federally provided benefits because federal law preempts state law with regard to such rights.³¹⁸ Therefore, clients are well advised to promptly review and modify all beneficiary designations as a part of their marriage or divorce.

Planning for Divorce. Clients should consider creating planning documents that proactively anticipate their divorce and the divorce of their heirs. For example:

- Trusts should be drafted in contemplation of the possibility that one or more of the beneficiaries will get divorced. For example, assume a husband creates an irrevocable life insurance trust and names his wife as a beneficiary and co-trustee. The trust instrument could provide that all benefits, rights and powers of the wife, including serving as co-trustee, immediately terminate upon either legal separation or divorce. Few clients want an ex-spouse to financially benefit from their death or be able to control the inheritance of assets.
- Planning should contemplate that a surviving spouse may remarry. For example, assume a widower remarries and then dies. There could be claims against the deceased husband's estate by the surviving widow. State statutes may permit the widow to claim support from the deceased's estate, or assets may have been placed in joint name, with the widow taking survivorship rights. If assets of the first wife are held in unified credit and/or marital trusts, the surviving second wife can be denied property rights in the trust assets. Such trusts not only protect against the claims of a surviving widow, they also protect against claims of a divorcing spouse from a subsequent marriage.
- Clients should consider the possibility that one or more heirs will become divorced. Clients should consider inheritance vehicles which restrict the ability of an heir's ex-spouse to obtain part of the family's assets. For example, the last thing most family businesses want or need is an ex-spouse attempting to gain some control over the family business. Placing family assets in spendthrift trusts and drafting buy-sell agreements in contemplation of this possibility can reduce the ability of a divorcing spouse to benefit from family assets.
- Any trust which limits the rights of an heir's former spouse should also contemplate child custody issues. For example, if a descendant is divorced and the non-descendant parent has custody of minor descendants, the trust should provide for how the ex-spouse is treated and what degree of control he or she retains over the children's trust benefits. If the trust requires that the trustees provide funds for the minor, it may open the trustees up to demands from the ex-spouse for greater benefits than the family intended. It may be better to give the trustees

³¹⁶ FLA. STAT. § 732.703 (2016); See Jeff Baskies, *New Florida Statute Clarifies Impact of Divorce on Non-Probate Assets*, LISI EST. PLAN. NEWSL., no. 1990, (July 23, 2012).

³¹⁷ *Hillman v. Maretta*, 133 S.Ct. 1943 (2013); *Kennedy v. DuPont Savings and Investment Plan*, 555 U.S. 285 (2009); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Ridgeway v. Ridgeway* 454 U.S. 46 (1981); *Wissner v. Wissner*, 338 U.S. 655 (1950). A number of state courts have issued similar rulings (see, e.g., *In re Estate of Sauer*, 32 A.3d 1241 (2011)).

³¹⁸ ERISA §514(a) (codified at 29 U.S.C. §1144(a) (2012)) provides that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA] employee benefit plan.”

broad discretion in the amount to be paid for a minor heir and allow trustees to make payments directly to third parties for the benefit of the minor, rather than being required to make the payments through the child's custodial parent.

“Orphaned Fathers.” 8% of newly married adults have been married three times or more.³¹⁹ One unexpected consequence of this high divorce rate is an increased number of divorced men who are entering their elder years without a family support structure - the "Orphaned Fathers." The dysfunctional families created by high divorce rates occasionally mean that the children and step-children are unwilling to take on the burden of aiding elderly fathers or step-fathers in their later years (e.g., declining to serve as decision makers on Medical Directives or Powers of Attorney). Interestingly, the studies report that step-children are often more willing to take care of a step-mother than a father or step-father.

Checklist: Practical Checklist for Divorce, copy found at www.scrogginlaw.com.

³¹⁹ Gretchen Livingston, *Four-in-Ten Couples are Saying “I Do,” Again*, PEW RES. CENTER (Nov. 14, 2014), <http://www.pewsocialtrends.org/2014/11/14/four-in-ten-couples-are-saying-i-do-again/>.

PERSONAL PROPERTY – THE GREATEST SOURCE OF FAMILY CONFLICT?

“The nice thing about being a celebrity is that, if you bore people, they think it's their fault.”

Henry A. Kissinger

WHEN A CLIENT DIES, THE FIRST PRIORITY MAY BE TO CHANGE THE LOCKS TO THE HOUSE

Celebrities: Conflicts over dispositions of personal property are not reserved to the families of deceased celebrities. It appears to be endemic to all levels of wealth.

- *Robin Williams* did an excellent job of planning his estate, but the front page of the Arts section of the February 3, 2015 New York Times reported that his widow and his three children from his two prior marriages were in conflict over the issue of how his “*cherished belongings that include his clothing, collections and personal photographs*” should be passed.³²⁰
- *Marilyn Monroe* died in 1962. Her Will left all of her personal property and clothes to her acting coach Lee Strasberg.³²¹ The will provided, “*I give and bequeath all of my personal effects and clothing to Lee Strasberg, or if he should predecease me, then to my Executor hereinafter named, it being my desire that he distribute these, in his sole discretion, among my friends, colleagues and those who whom I am devoted.*” Lee Strasberg did not pass on most of her property, but instead stored it in a temperature controlled warehouse. When Lee Strasberg died in 1982, he passed all of the items to his widow and in 1999 his widow sold all of the belongings in auction for \$13.4 million, with the dress Marilyn wore when she sang “Happy Birthday” to President Kennedy going for \$1,267,500.³²²
- *Princess Diana* left a “letter of wishes” on transferring certain personal property to her godchildren. The Executors petitioned the court to determine if the letter was enforceable and the court ruled that it was not. The godchildren received nothing.
- *Paul Walker* died in a car crash in 2013. In June 2015, his Estate filed suit alleging that his friends and acquaintances had stolen a number of cars from his car collection immediately after his death.³²³

Lessons and the Law: Disposing of tangible personal property seems to be the most forgotten part of the average client’s estate plan. It is the author’s experience that that single greatest

³²⁰ Dave Itzkoff, *Robin Williams’s Widow and Children Tangle Over Estate*, N.Y. TIMES (Feb. 2, 2015), http://www.nytimes.com/2015/02/03/movies/robin-williamss-widow-and-children-tangle-over-estate.html?_r=0.

³²¹ A copy of her Will can be found at <http://www.lovingmarilyn.com/thewill.html> (last checked April 30, 2016).

³²² Sam Kashner, *The Things She Left Behind*, VANITY FAIR (Oct. 2008), <http://www.vanityfair.com/news/2008/10/marilyn200810>.

³²³ Ron Dicker, *Paul Walker’s Acquaintance Sued For Allegedly Stealing Actor’s Cars After His Death*, HUFFINGTON POST (June 17, 2015), http://www.huffingtonpost.com/2015/06/17/friend-paul-walker-cars_n_7603300.html.

source of conflict among surviving family members is over the decedent's tangible personal property. The conflict is often exacerbated by the trauma of a loved one's death, sibling and/or in-law issues, and the emotional attachment to a loved one's intimate assets (there is not much intimacy tied to a stock certificate). In many cases, disputes over the disposition of personal property begin early in the administration process³²⁴ and can severely taint future dealings between the disputing parties on other estate issues.

There are often conflicting expectations on who gets a particular asset. For example:

- The parents may have inadvertently created the family conflicts by telling different family members that they will receive the same asset. Always document the intention in a written document that is signed and notarized.
- Immediate family members (and sometimes in-laws, other remote family members and occasionally neighbors) may start taking things out of the home long before there has been an appraisal or even an understanding of what assets are in the home. The explanation is often something similar to: "*When I was ten, your dad said I could have his shotgun.*" Often there is no evidence of such intent. In most cases any oral declarations are also legally unenforceable.
- Clients who have children from a prior marriage will sometimes say that they are not concerned about giving all personal property to the surviving spouse, because the surviving spouse will "*do the right thing*" and pass their personal property to the client's heirs. But what happens if things do not go as planned? For example: the wife died and the husband received all of her personal property, including a number of her family heirlooms. The widower remarried a few years later and under local law, his Will was revoked by his new marriage. He had no living descendants. After his death, the surviving spouse received all of his and his former wife's assets in intestacy. She sold off a significant portion of the personal property (including the family heirlooms from both families) on eBay.

We have had multiple situations in which children and/or step-children held keys to the deceased decedent's residence. They have gone into the house without talking to the surviving spouse or looking at the dispositive documents because "*I know mom wanted me to have all of her jewelry,*" or some similar justification. These takings can constitute criminal theft. Moreover, it can create ill will with the surviving spouse who wanted time to grieve and handle the transfer. As soon as the client becomes disabled, or immediately upon death, we typically advise the Personal Representative (perhaps even before an appointment) to immediately change the locks on any residence or other location holding personal property so that the Personal Representative is in control of the property. If there is a security system, the company should be notified and all codes changed as soon as possible

- ***Non-Celebrity Example:*** Years ago we had a client who was heavily drugged because of her

³²⁴ C.f. The New York Times article noted that the conflicts began "*days after Mr. Williams untimely death.*"

terminal cancer. Right before her death, her daughter had her sign a statement indicating that all of her silver, china, and jewelry were to be bequeathed solely to the daughter. This created a huge conflict with the other children. Luckily for the rest of the family, the document was unenforceable in Georgia. The children are still not talking.

Drafting & Planning. There are a number of drafting and planning considerations that are somewhat unique to personal property, including the following:

- A frequent issue in dealing with personal property is whether the decedent intended to restrict a bequest of “*all my personal property*” to tangible personal property, or whether the expression was also meant to cover intangible personal property. It can be particularly dangerous when the dispositive document is ambiguous. For example, “*I give all my personal property to X.*” X may have an incentive to argue that personal property includes intangible personal property like copyrights, personal images, stocks and bonds.

The interpretation will often turn on the context of the bequest, such as “*my residence and all of the personal property located therein.*” However, the careful drafter should clearly define what is intended by the phrase “personal property” and/or clarify the types of assets being bequeathed (e.g., *all my furniture in my personal residence*).

- Especially in second marriages with children from prior marriages, consider having the each spouse irrevocably waive any current or potential claim (e.g., spousal share) to the other spouse’s personal property with a detailed list of the personal property attached to the waiver.

Non-Celebrity Example: Both spouses had children from a prior marriage. The husband died in the car accident and the wife died the next morning. His Will passed all the tangible personal property and family heirlooms to the wife if she survived him - on the assumption she would return his family’s heirlooms to his children. Her Will passed all of her tangible personal property to her husband if he survived her and, if not, to her children. Unfortunately, her children insisted that his personal property assets were their property because it belonged to their mother for the 12 hours she survived her husband.

- Clients should consider bequeathing valuable tangible personal property by a specific special bequest rather than leaving it to the residue. First, if the property is specifically bequeathed, it may not be responsible for a portion of any state or federal death tax.³²⁵ If an estate tax were imposed on the transfer, the donee would either have to sell the asset or find other sources to pay the tax. Second, if a special bequest is not made, the asset may fall into the residue of the estate where family squabbles over its possession can devastate the family’s harmony. Finally, if such an asset passes into the residue and is subsequently passed to an heir, the heir

³²⁵ The client should also consider having a provision in the dispositive documents which indicates whether and how the special bequest is intended to be charged a portion of any death taxes which may be due.

may have income tax liability to the extent that the estate or trust had distributable net income (DNI). Had the asset passed pursuant to a special bequest, no income tax liability would normally be allocated to the recipient.³²⁶

- Even when the estate has no death tax liability, dispositive documents should provide that the Personal Representative obtain an appraisal of valuable personal property (i.e., to establish the step-up in basis and confirm the values for heirs) from a qualified appraisal expert who is not related to the client by business or family relations. The IRS has provided information on the type of information that should be contained in an appraisal.³²⁷ The dispositive documents should provide for who is responsible for the payment of the appraisal cost (i.e., the recipient heir or the residuary of the estate).
- The dispositive documents should direct who pays for the transport, security, insurance and any other costs related to the personal property (e.g., automobile ad valorem tax).
- To the extent the personal property is subject to state or federal death taxes, the client's documents need to deal with how the death tax on the property is apportioned. In many Wills (and in some state statutes), special bequests do not pay death taxes, effectively resulting in residuary heirs assuming the state and/or federal death tax cost for the special bequests of personal property. In the case of valuable personal property (e.g., a valuable piece of art), this can create a significant reduction in the assets of the residuary estate.
- Even when the transfer of personal property is not taxable because of federal transfer tax exemptions, state transfer taxes may still apply. Given the increasing tax aggression of state revenue departments, clients may want to discuss how their residency will impact the state death taxes on valuable personal property.³²⁸ For example, assume a client owns a painting worth \$5.0 million. Having the painting in a domicile state with no death tax versus a state with a 16% death tax might save up to \$800,000 in state inheritance taxes.
- When a client stores his personal property in a bank's safe deposit box or a home safe, access to the vault can become an important issue.
 - The client should name a third party (in addition to any spouse) as joint box owner, not just someone with signature authority. Some banks will deem signature authority to be void after the box owner's death. Legal counsel needs to review applicable state law to determine if placing someone else's name on the safe deposit box acts as a transfer of ownership of the contents of the box or just means they are considered a co-lessee of the

³²⁶ I.R.C. §663(a)(1) (2016).

³²⁷ Rev. Proc. 66-49, 1966-2 CB 1257; Revenue Procedure 96-15, 1996-1 CB 627; Treas. Reg. §301.6501(c)-1(f)(3) (2016).

³²⁸ See Charlie Douglas, *On Death and Domicile – No Joking Matter: Will New York Try to Take a Death-Tax-Bite from the Estate of Joan Rivers*, LISI EST. PLAN. NEWSL. no.2280 (Jan. 27, 2015).

box.

- For home safes make sure that someone (besides the house occupants) knows the location of the safe (many are hidden), the security code and the location of any keys to the safe.
- Clients should be strongly encouraged to talk to their adult children about which assets they want to receive upon the parents' death. These desires should be documented. This may bring to the fore any dispositional conflicts that may exist prior to the parents' death. Because the parents may resolve the conflict, any long-term damage in the children's relationships may be minimized.

Spousal Personal Property Rights. A number of states provide that a surviving spouse has a priority claim to some of the tangible personal property of a deceased spouse. The property is often referred to as "Exempt Property." In many cases, personal property right is in addition to any other benefits the surviving spouse might receive upon the decedent passing.³²⁹

The right may be to particular tangible personal property or may be expressed in monetary value. For example, the Uniform Probate Code provides: "*In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding \$15,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects.*"³³⁰

The right may be expressed in terms of the particular property. For example, Oklahoma³³¹ provides: "... *the following property must be immediately delivered by the executor or administrator to such surviving wife or husband, and child or children, and is not to be deemed assets, namely:*

1. *All family pictures.*
2. *A pew or other sitting in any house of worship.*
3. *A lot or lots in any burial ground.*
4. *The family Bible and all school books used by the family, and all other books used as part of the family library, not exceeding in value of One Hundred Dollars (\$100.00).*
5. *All wearing apparel and clothing of the decedent and his family.*
6. *The provisions for the family necessary for one (1) year's supply, either provided or growing, or both; and fuel necessary for one (1) year.*
7. *All household and kitchen furniture, including stoves, beds, bedsteads and bedding"*

³²⁹ C.f., FLA. STAT. §732-402(4) (2016) provides that "[e]xempt property shall be in addition to protected homestead, statutory entitlements, and property passing under the decedent's will or by intestate succession."

³³⁰ UNIF. PROB. CODE §2-403 (UNIF. LAW COMM'N 2014).

³³¹ 58 OKLA. STAT. § 58-311 (2016) (emphasis added). Similarly see: FLA. STAT. § 732.402 (2016); N.Y. EST. POWERS & TRUST LAW § 5-3.1 (2016); MO. REV. STAT. §474-0250 (2016).

In second and third marriages, family heirlooms may be lost to the surviving spouse's family, particularly if the surviving spouse can designate the personal property they want to receive. To avoid this problem, clients should either create personal property lists designating how important family personal property is to pass (and reference those lists in their Wills) or provide for such passage in their Wills.³³²

Research:

- John J. Scroggin & Michael C. Burns, *Tangible Personal Property Is the Most Forgotten Part of an Estate Plan*, LISI Estate Planning Newsletter no. 2283, (Feb. 19, 2015).
- Allen L. Venet, *From the Bazaar to the Bizarre: Planning for and Administering Unusual Assets in Estates and Trusts*, Heckerling Institute on Estate Planning, 2013.
- *Disposition of Tangible Personal Property: Estate Planning Considerations*, ABA Joint Fall Tax & RPTE Meeting, September 24-26, 2009.

Value Added Schedule: Go to www.scrogginlaw.com to obtain copies of personal property disposition lists for married and single clients.

³³² For example, FLA. STAT. §732-402(5) (2016) provides, “*Property specifically or demonstratively devised by the decedent’s will to any devisee shall not be included in exempt property.*”

WHY DOMICILE MATTERS

“Joan Rivers definitively set forth in her will that she was a resident of New York, but her state of domicile was in California”³³³

Charlie Douglas

THE DIFFERENCE BETWEEN DOMICILE & RESIDENCE CAN BE A LARGE TAX BILL OR UNEXPECTED LEGAL PROBLEMS.

Celebrities:

- *Joan Rivers* died in 2014 with a Will that declared her domicile as California (where she lived in one bedroom of her daughter’s house), while she maintained a large penthouse in New York City.³³⁴ Her estate has been estimated to be worth up to \$150 million. Whether her declaration of domicile will be challenged by the state of New York remains to be seen.
- *Marilyn Monroe’s* estate declared her state of residence at the time of her death as New York, not California, in order to reduce taxes and defeat an inheritance claim of an alleged daughter. In 2012, the Ninth Circuit Court of Appeals ruled that the Estate of Marilyn Monroe could not stop others from using her image and likeness because she was a resident of New York, which terminates any publicity rights at death.³³⁵
- *Dr. John T. Dorrance* died in 1930 with an estate valued at \$115 million. He was the founder of Campbell’s Soup Company. The estate said that it was subject to the New Jersey inheritance tax (\$12 million), but Pennsylvania imposed a \$17 million inheritance tax, arguing that the deceased was a Pennsylvania resident. The US Supreme Court refused to intervene³³⁶ and the estate ultimately paid both states an inheritance tax.

Data & Demographics: A Census Bureau report issued on December 10, 2012, noted

- The average American moves 11.7 times in a lifetime.
- *"Between 2005 and 2010, the South was the only region to report a significant net gain of 1.1 million due to migration."*
- In 2011, 1,011,000 US residents age 18 and older moved to another state and 915,000 moved abroad.
- The mobility of US residents has been decreasing since the late 1980s.

³³³ Charlie Douglas, *Death and Domicile-No Joking Matter: Will New York Try to Take a Death-Tax-Bite From the Estate of Joan Rivers?*, LISI EST. PLAN. NEWSL. no. 2280 (Jan. 27, 2015).

³³⁴ *Id.* See also Bruce Steiner, *Lessons from Joan Rivers’ Will*, LISI EST. PLAN. NEWSL. no. 2279 (Jan. 26, 2015).

³³⁵ Milton H. Green Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983 (9th Cir. 2012); see also Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F.Supp.2d 309 (S.D.N.Y., 2007); Oren J. Warshavsky, *She Belongs to the Public: Court Rules That Marilyn Monroe Estate Has No Rights of Publicity*, IP INTELLIGENCE (Sep. 4, 2012), <http://www.ipintelligencereport.com/2012/09/04/she-belongs-to-the-public-court-rules-that-marilyn-monroe-estate-has-no-rights-of-publicity/>.

³³⁶ See *In re Dorrance’s Estate*, 163 A. 303 (1932), cert. denied, 288 U.S. 617 (1933); *In re Estate of Dorrance*, 170 A. 601 (1934).

- Wondering where to retire? There are numerous studies on the best retirement states.³³⁷

Home ownership is an interesting component of this issue in several ways. First, vacation homes have become a growing asset of US residents. According to the US Census, in 1980 roughly 1.7 million US residents had a second home. By 2000, the number was 3.6 million. In 2009, the National Association of Homebuilders estimated that there were 6.9 million homes that qualify as non-rental second homes. Many US residents have second and third homes that may allow them to choose the most tax appropriate state of residence. These clients need to deal with planning around ancillary probate and state death taxes for those properties.

Second, there is a potential negative demographic impacting home ownership. In January 2008, the Journal of the American Planning Association published an article by Dowell Myers and SungHo Ryu entitled “*Aging Baby Boomers and the Generational Housing Bubble.*”³³⁸ The article noted that Baby Boomers have significantly increased the size and value of US housing over the last three decades. Not only have they driven up the value of their primary residences, but many boomers own second homes that have also increased in value.

Portable Residence

The Tax Court has ruled that a long-haul trucker who did not have a personal residence (he used a friend’s guest room when he was not on the road) was not entitled to deduct his costs on the road, because his permanent home was the back of his cab.¹

The looming retirement of 79 million Baby Boomers could reverse this trend. The article notes, “*We also expect that this change will make many more homes available for sale than there are buyers for them*” As Baby Boomers retire, down-size, move to their second homes or into long term care facilities, they are expected to drop more homes on the market than there are buyers. The resulting oversupply could drive down the price of housing and potentially create blighted areas of unsold housing in areas with large boomer populations. The article notes that this trend has already started in Connecticut, Hawaii, New York, North Dakota, Pennsylvania, and West Virginia, with other states following in the years to come. According to the article, Arizona, Florida and Nevada will be the last to be impacted by this demographic bubble.

According to “*Lost Inheritance*” published on March 7, 2013 in the Wall Street Journal, the homes of US households age 65 and older on average constituted 33.1% of their net wealth. Estate and financial advisors need to encourage their clients to consider the impact on both their retirement and their estate if the value of their homes drops over the next several decades.

In 2006, it was estimated that 6.0 million Americans were living abroad, up from 70,000 in 1966.

³³⁷ See, e.g., Diana Britton, *The 10 Best and Worst States for Retirement in 2016*, WEALTHMANAGEMENT.COM (Jan. 26, 2016), http://wealthmanagement.com/retirement-planning/10-best-states-retire-2016#slide-0-field_images-1089431.

³³⁸ A copy of the article is available at <http://www.scag.ca.gov/housing/pdfs>.

According to a Congressional report,³³⁹ from 2000 through 2009, 2,802,000 people emigrated from the United States. The tax complexities increase when affluent US citizens and resident aliens emigrate to other countries.³⁴⁰ Interestingly, according to one report, of the roughly 6.0 million Americans living abroad, only about 2.0 million are filing a 1040.

Lessons and the Law:

Domicile versus Residence. As Joan River's Will illustrates, there is a significant difference between domicile and residency.³⁴¹ You can only have one state of domicile, but you may have multiple residences.³⁴² Choosing the right state to for your domicile is a critical, but often overlooked part of estate planning. Your domicile is the state that you intend to be your permanent home for tax and legal purposes.

The choice of domicile can generate significant property rights, tax savings and administrative savings. For example:

- State and local income taxes
- State estate and/or inheritance taxes
- Unique issues with regard to estate administration and costs of administration
- Particular spousal benefits to a surviving spouse³⁴³
- The Right of Publicity rights of the deceased (see later discussion)

Americans' constant mobility will require the review and revision of existing client documents, examination of multi-jurisdictional legal and tax issues, and planning for the best domicile for clients to live and die in.

Retirees are increasing as a percentage of our population. The tax burden and cost of living for retirees varies widely from state to state. For example, some states tax social security benefits while other states offer special tax breaks for retirees, such as excluding all or part of social security, IRA and/or retirement plan income. With limited disposable income in retirement, will retiring clients start moving to states in which their after-tax income increases – especially states that offer warmer winters? Recognizing such retirement mobility, a number of states have started

³³⁹ LAURA B. SHRESTHA AND ELAYNE J. HEISLER, CONG. RES. SER., RL 32701, THE CHANGING DEMOGRAPHIC PROFILE OF THE UNITED STATES (2011).

³⁴⁰ For more information, see Peter Spero, Asset Protection: Legal Planning Strategies, and Forms (WG&L), section 7.05A; Non-Citizens - Estate, Gift and Generation Skipping Taxation, BNA Portfolio 837-3rd; Weller, "Estate Tax Trap for Expatriating Grantors," LISI EST. PLAN. NEWSL. no.2067 (Feb. 20, 2013).

³⁴¹ For more information, see the discussion on this topic at <http://domicile.uslegal.com/distinctions-between-domicile-and-residence/>.

³⁴² C.f., *de la Rosa v. Dep't of Rev.*, 832 P.2d 1228 (1992); *Estate of Newcomb*, 192 NY 238 (1908); *Smith v. Smith*, 389 A.2d 756 (1978); *Whittell v. Franchise Tax Board*, 231 Cal. App. 2d 278, (1964).

³⁴³ For example, assume a couple had four adult children and the husband, who does not have a Will, is dying. In Georgia, the wife would receive 33% of the intestate estate (GA. CODE ANN. §53-2-1(b)(1) (2016)). In Florida, the wife would receive 100% of the intestate estate (FLA. STAT. §732.102(2) (2016)). The Florida statute provides, "If the decedent is survived by one or more descendants, all of whom are also descendants of the surviving spouse, and the surviving spouse has no other descendant, the entire intestate estate [passes to the surviving spouse]." Does this create an incentive for the wife to move the incapacitated husband to Florida?

offering special tax breaks for retiree residents. According to Kiplinger's website³⁴⁴ the top tax friendly retirement states in 2015 were: Alaska, Arizona, Florida, Georgia, Louisiana, Mississippi, Nevada, South Dakota, and Wyoming.

Becoming a US Resident Alien. The United States taxes the worldwide income and assets of its resident aliens, so defining a "resident alien" is a critical definition.³⁴⁵ For income tax purposes, a "resident alien" is defined in fairly objective terms.³⁴⁶ However, for transfer tax purposes, Treasury Regulations provide, "*A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.*"³⁴⁷ How exactly do you prove your "present intent" of not planning to leave the US? A person who resides in the United States illegally may still be considered a resident alien for purposes of federal transfer taxes.³⁴⁸

Declaring your Domicile. States are getting more aggressive in seeking revenue from decedent estates and clients need to proactively address this issue, especially when any of the potential domicile states have either a high income tax rate on trusts and estates or is one of the 19 states with an estate or inheritance tax.

A self-serving declaration of domicile by a client has some impact on the legal determination of domicile. However, the final determination is fact-specific and state revenue departments have a propensity of disagreeing with taxpayers. The more facts the client has marshalled to their selected state of domicile, the greater the likelihood of successfully blunting the attack by other state revenue departments.

For clients with multiple residences, the starting point of planning for domicile is to examine the tax laws, state statutes and case law in each state where the client owns a residence and proactively develop a plan designed to avoid possible tax claims from other states or claims from heirs and other parties that a different state's laws govern critical issues in the estate (e.g. an inheritable Right of Publicity).

Among the facts (and the more facts on the client's side, the better their case) that the client can create to support a legal determination of domicile are:

- Stay outside of any non-domicile state for more than 183 full days in a calendar year (i.e., over half the year). Particularly if you are changing your domicile state, keep a calendar and try and attach one receipt per day showing where you were for that day as evidence of being

³⁴⁴ <http://www.kiplinger.com>

³⁴⁵ Michael A. Heimos, *Non-Citizens – Estate, Gift, and Generation-Skipping Taxation*, 837-3rd TAX MGMT. (BNA) (2014).

³⁴⁶ I.R.C. §7701(b)(1)(A) (2016).

³⁴⁷ Treas. Reg. §§20.0-1(b)(1), 25.2501-1(b) (2016).

³⁴⁸ Rev. Rul. 80-209, 1980-2 C.B. 248.

outside of the state for 183 days. You generally do not have to be in your domicile state for 183 days, just be outside any other state for more than 183 days.

- Buy (preferably) or rent a residence in your domicile state and furnish it with furniture – empty residences don't work well.
- Declare a real estate homestead exemption in your domicile state & terminate any former homestead exemption
- If possible, sell or transfer any real estate in your former domicile state to family or other entities (e.g., an LLP).
- If permitted by state law in your domicile state (e.g., Florida), go to the local court and make a "Declaration Domicile" or similar statement in the court records of the county of your new domicile.
- If possible, have no salary or other earned income in any non-domicile state
- Change your driver's license to your domicile state and surrender your old license. Do the same with any other local licenses (e.g., concealed weapons permit).
- Move all bank accounts to the domicile state and do not retain any bank accounts in the other states. If that is not possible, keep small balances in accounts in other states.
- Move any safety deposit box to the domicile state.
- Change vehicle registration(s) and insurance to the domicile state.
- Obtain a library card in the domicile state.
- Change social clubs and service clubs to the domicile state (e.g., Rotary, Kiwanis, golf club).
- Serve on local charitable boards.
- Change voter registration to the domicile state and terminate any former voter registration
- Execute Wills, medical directives and powers of attorney under the domicile state laws.
- Engage a local doctor, dentist and/or chiropractor; have medical records moved to your local doctor.
- Move your religious affiliation and membership to a local group in the domicile state.
- Make local charitable contributions.
- Have your federal tax returns use an address in the domicile state. Never have tax returns have a return address that is an out of domicile state address! The states and federal government share this information.
- Have any social security checks go to your domicile address.
- Have credit cards, brokerage statements and other financial related mail go to the domicile state address.
- Have any minor children attend schools in the domicile state.
- If you own an interest in any S corporations, Partnerships or LLCs that allocates you income that is taxable in the another state, determine if the state's tax laws permit the entity to pay local based taxes for all non-residents and eliminate the requirement that the owners file a local non-resident return.
- Have your social security and retirement checks go to your domicile address or domicile

bank.

- Focus your social, economic and other activities in the domicile state.

Research Sources:

- Francis B. Brogan and Brandon A. S. Ross, “*Changing State of Domicile Is Easier Said Than Done,*” EST. PLAN. (July 2012).
- Tax Management Portfolio, *The Mobile Client: Tax, Community Property, and Other Considerations*, No. 803-3rd.
- Charlie Douglas: “*Death and Domicile-No Joking Matter: Will New York Try to Take a Death-Tax-Bite From the Estate of Joan Rivers?*” LISI EST. PLAN. NEWSL. no. 2280 (Jan. 27, 2015).

Checklists:

- For a Moving Notification Checklist, see www.MoversUSA.com.
- Fidelity Investments: Retirement Planning Checklist available at http://personal.fidelity.com/myfidelity/InsideFidelity/NewsCenter/mediadocs/couples_retirement_checklist.pdf.

LESSONS FOR CELEBRITIES

THE RIGHT OF PUBLICITY

*“Prince’s estate-tax attorneys must attempt to put a financial value on something no one could comprehend during his life – his name, image and likeness.”*³⁴⁹

Richard Rubin

CELEBRITIES ARE ALLOCATED MORE THAN 15 MINUTES OF MEDIA ATTENTION, WITH MUCH OF IT COLLECTED AFTER THEY DIE

Celebrities: During their life, individuals generally have a right to control their publicity, personal image, and persona (commonly called a ‘Right of Publicity’ or ‘ROP’).³⁵⁰ By either case law or statute, state law governs whether an ROP extends beyond the individual’s death and is inheritable.³⁵¹ California was one of the earliest states to adopt a statute making an ROP an inheritable right.³⁵² Among the leading cases on ROP are the following:

- *Bella Lugosi* (the actor who played a wicked Dracula) died in 1956. When Universal Pictures started selling merchandising for his 1931 role as Dracula, his heirs sued and argued that his post-death ROP was an inheritable right of the heirs. However, in 1979 the California Supreme Court ruled that Bella Lugosi’s ROP rights terminated with his death and were not inheritable under California law.³⁵³

The Supreme Court decision caused the California legislature to adopt a statute permitting the inheritable ROP right. The new statute was called the ‘Astaire Celebrity Image Protection Act.’ The Act provided that it retroactively applied to persons who died fifty years before January 1, 1985. In 1999, it was extended to 70 years before January 1, 1985.

- *James Dean* starred in only three films but after dying at age 24 in 1955, his estate is one of the top earning celebrity estates, taking in \$8.5 million in 2015. In 1991, Warner Brothers sued the James Dean Foundation trust arguing that the language of the actor contracts that James Dean signed gave the studio exclusive control of his name, image, and likeness. After a protracted fight, a California federal district court ruled that the contracts only gave the studio the ability to market James Dean movies.³⁵⁴ This ruling effectively protected the estate of other deceased actors and actresses by allowing them to retain control of the celebrity’s ROP.

³⁴⁹ Rubin, *supra* note 79.

³⁵⁰ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

³⁵¹ For a list of states with inheritable rights of publicity, see Oren J. Warshavsky, *Time is Relative: California Court Determines That Einstein’s Right of Publicity Expires in 2005*, IP INTELLIGENCE (Oct. 18, 2012), <http://www.ipintelligencereport.com/2012/10/18/time-is-relative-california-court-determines-that-einsteins-right-of-publicity-expired-in-2005/>; Personality Rights, Wikipedia, found at https://en.wikipedia.org/wiki/Personality_rights#U.S._states_that_recognize_rights_of_publicity (last visited May 1, 2016); RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes>.

³⁵² CAL. COM. CODE §3344.1 (2016).

³⁵³ *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979).

³⁵⁴ *Warner Bros. Inc., v. Curtis Management Group, Inc.*, 1995 WL 420043 (C.D. CAL. March 31, 1993).

Fights over a deceased celebrity's likeness have been frequent in recent years, including:

- *Marlon Brando's* estate sued Madonna for using his likeness in her concerts. The suit was settled out of court. Similar suits were initiated against Madonna for using the likenesses of James Dean, Ginger Rogers, and Jean Harlow.³⁵⁵ The Brando estate has also recovered funds from Harley-Davidson Motor Company over a line of boots called "The Brando"³⁵⁶ and recovered \$356,000 from Ashley Furniture for encroachment on his ROP.³⁵⁷
- In 2012, the Ninth Circuit Court of Appeals ruled that the Estate of *Marilyn Monroe* could not stop others from using her image and likeness because she was a resident of New York, which terminated any publicity rights at death.³⁵⁸ Her other potential state of residence, California, has a statute that provides for the inheritance of publicity rights. However, the estate had argued for years that Marilyn Monroe was not a resident of California in order to reduce taxes and defeat an inheritance claim of an alleged daughter. According to the recent Forbes magazine article, in 2015 Marilyn Monroe's estate was the sixth highest annual income earner among deceased celebrities, earning \$17 million.³⁵⁹
- *John Wayne's* estate attempted in 2013 to trademark the name "Duke" for the sale of bourbon and some other liquor products. Duke University objected to the trademark application on the grounds that trademark would create confusion with its registered trademark. A federal lawsuit in California by the Estate against Duke University was dismissed for lack of jurisdiction and improper venue in 2014.
- The Estate of *John Dillinger* (the famous bank robber of the Depression Era) sued Electronic Arts for using the name "Dillinger" to describe weapons used in a Godfather video game. The US District Court for the Southern District of Indiana noted: "*In 1994, about sixty years after John Dillinger died, the Indiana General Assembly enacted the right-of-publicity statute... Indiana's right-of-publicity statute doesn't apply to personalities who died before its enactment.*"³⁶⁰ The court did permit the plaintiff to continue its claim that Electronic Arts

³⁵⁵ Eriq Gardner, *Madonna, Marlon Brando Estate Settle Lawsuit Over 'Vogue'*, THE HOLLYWOOD REPORTER (Jan. 21, 2013), <http://www.hollywoodreporter.com/thr-esq/madonna-marlon-brando-estate-settle-414097>.

³⁵⁶ Watcher, *supra* note 228.

³⁵⁷ Eriq Gardner, *Marlon Brando Estate Gets \$356,000 to End Lawsuit Over Furniture Dispute*, THE HOLLYWOOD REPORTER (Feb. 6, 2012), <http://www.hollywoodreporter.com/thr-esq/marlon-brando-ashley-furniture-lawsuit-couch-humphry-bogart-287389>.

³⁵⁸ Milton H. Green Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983 (9th Cir. 2012); *see also* Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F.Supp.2d 309 (S.D.N.Y., 2007); Oren J. Warshavsky, *She Belongs to the Public: Court Rules That Marilyn Monroe Estate Has No Rights of Publicity*, IP INTELLIGENCE (Sep. 4, 2012), <http://www.ipintelligencereport.com/2012/09/04/she-belongs-to-the-public-court-rules-that-marilyn-monroe-estate-has-no-rights-of-publicity/>.

³⁵⁹ Zach O. Greenburg, *The 13 Top-Earning Dead Celebrities Of 2015*, Forbes (Oct. 27, 2015), <http://www.forbes.com/sites/zackomalleygreenburg/2015/10/27/the-13-top-earning-dead-celebrities-of-2015/#bc79c7944f62>.

³⁶⁰ *Dillinger, LLC v. Electronic Arts Inc.*, 795 F.Supp.2d 829 (S.D. In. 2011).

infringed upon the federal trademarks for “John Dillinger” that were owned by the plaintiff.³⁶¹ Who would have expected the heirs of a celebrity bank robber would claim a Right of Publicity or trademark his name?³⁶²

- *Princess Diana's* estate sued the Franklin Mint in the US District Court for the Central District of California in 1998 for selling merchandise bearing her likeness and name.³⁶³ The plaintiff's primary arguments were a violation of the Princess's ROP and a trademark infringement. On October 16, 1998, the judge dismissed the ROP argument by noting that the proper venue for determining the estate's ROP rights was Great Britain, not California, and Great Britain did not recognize inheritable ROP rights. On June 27, 2000, the Court issued a summary judgment in favor of the Franklin Mint.³⁶⁴ In the ruling, the court noted that the name and image of Princess Diana was so widespread that the value of the trademark was negligible. Franklin Mint countersued Diana's estate's lawyers for "malicious prosecution of trademark." In 2011 the Ninth Circuit Court of Appeals confirmed the District Court's opinion and awarded Franklin Mint \$2.3 million in legal fees.³⁶⁵ In 2011 it was reported that the estate's legal counsel, Manatt Phelps & Phillips LLP, paid \$25 million to the former owners of the Franklin Mint for their “malicious prosecution” of the case.³⁶⁶

Lessons and the Law: Because of variations in state law and national law, determining the residency of the decedent is critical to whether the celebrity's heirs can inherit their ROP and how long that right will last. For example:

- California allows a right of publicity to extend 70 years. In a recent decision regarding *Albert Einstein's* ROP, a federal court ruled that the New Jersey based rights held by Hebrew University of Jerusalem should reasonably expire after 50 years.³⁶⁷
- Minnesota's legislature discussed enacting a retroactive ROP statute, with the result that would add significant value to *Prince's* estate.³⁶⁸ The bill was called the Personal Rights in Names Can Endure” (or “PRINCE Act”). It appears that the bill is now dead. The legislation does raise an interesting issue. Assuming a state did not have an inheritable ROP, but passed legislation after a celebrity's death to retroactively permit an inheritable ROP, what value would have been included in the celebrity's taxable estate?

³⁶¹ Trademark registration numbers 2809305, 2944205 and 4022992.

³⁶² Federally registered trademarks also exist for Al Capone.

³⁶³ See Jeffrey L. Eichen, *Too famous to trademark: Diana case proves point*, The Nat' Law J. (Oct. 16, 2003).

³⁶⁴ Cairns v. Franklin Mint Co., 24 F. Supp.2d 1013 (C.D. Cal. 1998).

³⁶⁵ Cairns v. Franklin Mint Co., 292 F.3d 1139 (9th Cir. 2002).

³⁶⁶ Evan Weinberger, *Manatt, Franklin Mint Settle Princess Di Suit For \$25M*, LAW360 (Jan. 21, 2011), <http://www.law360.com/articles/221328/manatt-franklin-mint-settle-princess-di-suit-for-25m>.

³⁶⁷ Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 903 F. Supp. 2d 932, 933 (C.D. Cal. 2012). The parties recently settled outside of court and the aforementioned decision was vacated. See Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 2015 WL 9653154 (C.D. Cal. 2015).

³⁶⁸ *Prince death sparks Minnesota bill to clarify artist rights*, CHICAGO TRIBUNE (May 10, 2016), <http://www.chicagotribune.com/entertainment/music/ct-prince-minnesota-bill-artist-rights-20160510-story.html>.

Sometimes, the deceased celebrity will restrict the use of the ROP after their passing.

- *Adam Yauch's* (of the Beastie Boys) dispositive documents have been reported to have provisions that bar advertisers from using his music, likeness or other intellectual property to promote products. According to Rolling Stone, his Will provides that: “*Notwithstanding anything to the contrary, in no event may my image or name or any music or any artistic property created by me be used for advertising purposes.*” The phrase “*or any music or any artistic property created by me*” was reportedly added in handwriting.³⁶⁹
- *Robin Williams* Living Trust transferred: “*All ownership interest in the right to Settlor's name, voice, signature, photograph, likeness and right of privacy/publicity (sometimes referred to as “right of publicity”) to the Windfall Foundation, a California Nonprofit corporation (“THE WINDFALL CORPORATION”) subject to the restriction that such right of publicity shall not be exploited for a twenty-five year period commencing on the date of the Settlor's death.*”³⁷⁰ These terms demonstrate both a desire that his ROP be limited³⁷¹ after his death and potentially eliminates the type of speculative ROP estate tax value that have plagued Michael Jackson's estate. Moreover, by moving his ROP to a charity he substantially reduces the potential future family conflicts over his ROP.

Research:

- Laurie Henderson, *Protecting a Celebrity's Legacy: Living in California or New York Becomes the Deciding Factor*, 3 J. BUS. ENTREPRENEURSHIP & L. 165 (2009).
- See www.IpIntelligence.com
- *Brief History of RoP*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited June 9, 2016).

³⁶⁹ RJ Cubarrubia, *Adam Yauch's Will Prohibits Use of His Music in Ads*, ROLLING STONE, August 9, 2012, available at <http://www.rollingstone.com/music/news/adam-yauchs-will-prohibits-use-of-his-music-in-ads-20120809>.

³⁷⁰ Gardner, *supra* note 239.

³⁷¹ Although the meaning of “exploited” may create future definitional conflicts.

CURRENT ESTATE TAXES ON FUTURE EXPECTATIONS

"It's tough to make predictions, especially about the future."

YOGI BERRA

Celebrities: Andy Warhol famously commented that *"In the future, everyone will be world-famous for 15 minutes."* Celebrity fame often lingers well beyond death. The continuing post-mortem income for the estate (even in the absence of an inheritable ROP) may create a ready source of income, assets, taxes, and conflict. For example:

- *Michael Jackson's* estate and the IRS were reported to have significant disagreements in the deemed value of his ROP. The Estate filed a return with a value of \$2,105, while the IRS thought the value was closer to \$434 million.³⁷² During the conflict, the IRS reduced the estimated value to \$161 million.³⁷³ The Estate estimated that the total taxable estate was around \$7 million, while the IRS came up with an estimate of \$1.0 to 1.3 billion.³⁷⁴
- *Virginia C. Andrews* was an internationally known, best-selling author when she died in 1986. Her name was used on ghost-written books and the IRS concluded that the author's name had an estate tax value of \$1,240,000. In *Estate of Andrews v. United States*,³⁷⁵ the Court reduced the value by the expenses of the venture and provided a 33% discount for the inherent risks of the publication.
- *Prince* is reported to have potentially thousands of unpublished recordings in the "vault" at his Minneapolis residence. The value of his iconic image, his music catalogue (which he retained significant control over) and these unreleased recordings will create a significant valuation dispute with the IRS.³⁷⁶
- In the three days after *Prince's* death, Nielsen Music indicated that 579,000 albums were sold, compared to 1,400 albums in the 3 days before his death.³⁷⁷
- After his death, *B.B. King's* Spotify streams increased almost 10,000%.³⁷⁸
- It is not just the ROP that adds value to a deceased celebrity's estate. Personal property associated with celebrities (particularly deceased celebrities) can obtain premium values

³⁷² Novack, *supra* note 90.

³⁷³ Karp, *supra* note 79.

³⁷⁴ Rubin and Karp, *supra* note 79.

³⁷⁵ 850 F. Supp. 1279 (E.D. Va. 1994).

³⁷⁶ See Charlie Douglas, *When Heirs Cry: Princes Post-Mortem Right of Publicity*, TRUSTS AND EST., April 2016.

³⁷⁷ *Id.*

³⁷⁸ Hugh McIntyre, *Since His Death, B.B. King's Streams Have Gone Up Almost 10,000% On Spotify*, FORBES (May 19, 2015), <http://www.forbes.com/sites/hughmcintyre/2015/05/19/since-he-died-b-b-kings-streams-have-gone-up-almost-10000-on-spotify/#5399aa88b130>.

when sold. For example, the assets of *Elizabeth Taylor* sold for substantially more than was expected.³⁷⁹ Steve McQueen's (who died in 1980) 100 year old Cyclone Board Track Racer motorcycle sold for \$775,000 in 2015.³⁸⁰ Personal property associated with deceased celebrities can obtain premium values that arguably need to be reflected in their estate tax returns.

Lessons:

- The failure to plan for the state and federal taxes by any client can create severe liquidity problems for their families, but it is particularly problematic when the imprecise value of future revenue lies at the heart of any determination of value. For example, if the IRS wins in its valuation argument with the Estate of *Michael Jackson*, the estate will owe estate taxes of up to \$500 million, and penalties of \$200 million, substantially depleting the liquidity of his estate.³⁸¹
- *Prince's* estate will need substantial liquidity to cover taxes and expenses and, as a result, may be forced to relinquish ownership and/or control of the music and image Prince so jealously protected.³⁸²
- Questionable values are often found in estate conflicts. For example, *James Brown's* fiduciary filed documents with the IRS indicating that Brown's music empire was valued at about \$4.7 million, even though previous fiduciaries valued it at \$85-100 million. One of the Brown trustees indicated there was a \$100 million offer in 2007 to purchase the music empire.
- But it is not just the estate tax liability that celebrities should be concerned about. The future income stream for the estate is also subject to federal and state income taxes. If the celebrity's income remains in the estate or a trust, the combined effective state and federal ordinary income tax bracket can quickly exceed 50%.³⁸³

³⁷⁹ Anthony DeMarco, *Elizabeth Taylor Auction Shatters Records, Fetches Nearly \$116 Million*, FORBES (Dec. 14, 2011, 3:23 AM), <http://www.forbes.com/sites/anthonydemarco/2011/12/14/elizabeth-taylor-auction-shatters-records-fetches-nearly-116-million/>.

³⁸⁰ Chris Isidore, *Steve McQueen's old motorcycle goes for \$775,000*, CCN MONEY (March 23, 2015), <http://money.cnn.com/2015/03/23/luxury/mcqueen-motorcycle/>.

³⁸¹ Karp, *supra* note 79.

³⁸² Prince was famous for initiating litigation to protect his intellectual property. See a listing of some of the litigation at Wikipedia at [https://en.wikipedia.org/wiki/Prince_\(musician\)#Copyright_issues](https://en.wikipedia.org/wiki/Prince_(musician)#Copyright_issues).

³⁸³ For example, in 2016, the top federal income tax bracket of 39.6% is reached when the trust or estate's income tax bracket hits \$12,400, plus the 3.8% Affordable Care tax, plus state and local income taxes.

CELEBRITY SECRETY

"It's not me who can't keep a secret. It's the people I tell that can't."

Abraham Lincoln

THE INTERNET SEES ALL, REVEALS ALL AND PROVIDES LITTLE PRIVACY FOR THE AVERAGE CELEBRITY. BE GLAD YOUR PERSONAL SECRETS ARE LESS INTERESTING AND, AS A CONSEQUENCE, MORE PROTECTED

Celebrities: Prince was a notoriously private person. His failure to make basic estate planning decisions has resulted in his personal affairs, financial affairs and lack of planning being discussed in just about every media source in the Western World. While average Americans are not concerned about curious journalists and neighbors pulling up copies of their Wills to see how they passed their assets, any privacy-concerned celebrity should have that unease.

Among the celebrities who passed all or a significant portion of their estates to previously established trusts, which were not in the public domain, include:

Michael Jackson

Johnny Cash³⁸⁴

Michael Crichton

Robin Williams³⁸⁵

John Lennon

Elvis Presley

Babe Ruth

Joan Rivers

Joe DiMaggio

John F. Kennedy

Elizabeth Taylor

John F. Kennedy, Jr.

Steven Jobs³⁸⁶

Linda McCartney

Rock Hudson³⁸⁷

Lesson: The expectation of privacy from using a trust in lieu of a Will does not always work. For example, *Robin Williams* created a very well drafted Living Trust that was exposed to the public when his third wife and his children from prior marriages had fought over his estate.

Research: Jeff Baskies, *Why Do Celebrities Still Use Wills: Advisors Please Convince Celebrity Clients to Draft the Dispositive Aspects of their Estate Plans in Revocable Trusts*, LISI EST. PLAN. NEWSL. no.2124 (Aug. 1, 201

³⁸⁴ See <http://www.cmt.com/news/1479751/johnny-cashes-will-filed/>.

³⁸⁵ Gardner, *supra* note 239. A copy of the trust is included in the on-line version of the article.

³⁸⁶ Danielle and Andy Mayoras, *Steve Jobs Appears To Have Protected His Estate With Living Trusts*, FORBES (Oct. 7, 2011), <http://www.forbes.com/sites/trialandheirs/2011/10/07/steve-jobs-appears-to-have-protected-his-estate-with-living-trusts/#1e0fa5851540>.

³⁸⁷ Townsend, *supra* note 251.

OTHER ISSUES AND STORIES

A FEW INTERESTING ESTATE PLANNING ISSUES

“A lawyer is a gentleman who rescues your estate from your enemies and keeps it for himself.”
Lord Brougham

Executor Fees: *Leona Helmsley* died in 2007 with an estate estimated to be over \$4.78 billion. In 2015 her four Executors³⁸⁸ requested a preliminary fiduciary fee of \$100 million. The New York Attorney General intervened, objected to an hourly billing rate of \$6,437 and noted that: “By any definition, this hourly rate is exorbitant, unreasonable and improper.”³⁸⁹ Mrs. Helmsley’s Will eliminated the New York statutory fiduciary fee which could have given up to \$200 million in fees to the executors,³⁹⁰ but failed to provide for an alternative method of compensation.

Fiduciary Fees and Taxes. Executor/Personal Representative fees vary widely from state to state. Some states provide a statutory schedule, generally based upon the value of the estate. Some states permit adjustments of the fees that are fixed by statute. Other states leave it up to the court to decide on proper fees. In most cases, the testator has the right to change the fees payable to the administrators, including waiving any statutory limits on fees.

Social Security Taxes on Fiduciary Income

When a fiduciary receives a payment for performing fiduciary functions, the income is taxable at ordinary income tax rates. However, unless the fiduciary is in the trade or business of serving as a fiduciary, the income is not generally subject to self-employment or payroll taxes.³⁹¹

This option raises an interesting tax planning opportunity based upon the relative tax rates of the ways that heirs may take funds from an estate. The heirs who are executors may take from the estate in accordance with the testator’s Will and waive any fiduciary fees or take the fees, which are an expense of the estate, if it reduces the overall effective tax rate.

- *Lauren Bacall* (clearly on advice of counsel) named her three children as executors of her New York based estate, effectively allowing them to use this planning technique.

A Gift Tax Audit 41 Years Later. *Sumner Redstone* made gifts of business interests in 1972 to two family trusts. In 2013, the IRS decided the gifts were grossly undervalued and imposed

³⁸⁸ For example, two of her grandchildren (who were each limited to a \$12 million bequest), her attorney and her business advisor.

³⁸⁹ See David H. Lenock, *Helmsley Estate Still Nothing but Trouble*, WEALTHMANAGEMENT.COM (Jan. 22, 2016), <http://wealthmanagement.com/high-net-worth/helmsley-estate-still-nothing-trouble>; Peter Grant, *New York Attorney General Seeks Reduction of Leona Helmsley Estate Executors’ Fees*, WALL STREET J. (Jan. 21, 2016), <http://www.wsj.com/articles/new-york-attorney-general-seeks-reduction-of-leona-helmsley-estate-executors-fees-1453411246>.

³⁹⁰ *Id.*

³⁹¹ Rev. Rul. 58-5, 1958-1 C.B. 322; *McDowell v. Ribicoff*, 292 F.2d 174 (3d Cir. 1961). *But see* I.R.S. P.L.R. 9107009 (Feb. 15, 1991) (finding fiduciary fees paid to an attorney who served as a fiduciary for 12 trusts were considered to be self-employment income).

additional taxes. In a 2015 decision the Tax Court ruled, “[t]he notice of deficiency, though issued 41 years after the transfer, was thus timely.”³⁹² Interestingly, the court refused to impose any penalties on Mr. Redstone.

Safe Deposit Box. Assume a client, who is in his second marriage, dies with a Will that indicates that all of his personal property should pass to his surviving spouse. The Personal Representative finds a safety deposit box in the husband’s name that contains his deceased former wife’s jewelry. The husband’s daughter (who has joint ownership of the box) says that her father always intended that her mother’s jewelry go to her (and had gifted the items in the box to her), but she has no written evidence of that gift. The surviving spouse demands the jewelry and argues that the daughter was just a co-lessee of the safe deposit box, not an owner of its contents.³⁹³ In the absence of strong evidence of the decedent’s intent, the Personal Representative could be in a difficult conflict.

Digital Ownership and Transfers. Estates are increasingly dealing with how digital assets (e.g., websites and stored documents) are disposed of. Facebook recently provided for a process for the treatment of accounts of deceased customers.³⁹⁴ To the extent an intangible digital asset has tangible or sentimental value, the estate plan should deal with how it will pass.³⁹⁵

Research:

- James D. Lamm, *Digital Death: What to Do When Your Client Is Six Feet Under but His Data Is in the Cloud*,” 47th ANNUAL UNIV. OF MIAMI HECKERLING INST. ON ESTATE PLANNING, January 2013.
- *Estate Administration in the Digital Era*, US TRUST, <http://www.ustrust.com/ust/pages/thinking.aspx>.
- Rachel Emma Silverman, *When You Die, Who Can Read Your Email?*, WALL STREET J. (Feb. 1, 2015), <http://www.wsj.com/articles/when-you-die-who-can-read-your-email-1422849600>.
- Jennifer Wioncek & Michael Melrose, *Florida Goes Digital - The Passage of the Florida Fiduciary Access to Digital Assets Act*, LISI EST. PLAN. NEWSL. no. 2413 (May 10, 2016).
- For a list of state laws governing the treatment of digital accounts after death, see Maeve Duggan, *Proposed law would clarify who gets access to a deceased person’s digital*

³⁹² Redstone v. Commissioner, T.C. Memo 2015-237 (2015).

³⁹³ Cf. Longstreet v Decker, 717 S.E.2d 513 (Ga. Ct. App. 2011), where the Appeals court awarded the contents of the box to the decedent’s estate, rather than a niece who was joint owner of the safe deposit box.

³⁹⁴ See *What is a Legacy Contact?*, FACEBOOK, <https://www.facebook.com/help/1568013990080948> (last visited June 2, 2015).

³⁹⁵ For a more detailed analysis of this issue James D. Lamm, *Digital Death: What to Do When Your Client Is Six Feet Under but His Data Is in the Cloud*,” GPM LAW, <http://www.gpmlaw.com/portalresource/lookup/wosid/cp-base-4-14880/media.name=/James%20Lamm%20-%20Digital%20Death%201172013.pdf>; Rachel Emma Silverman, *When You Die, Who Can Read Your Email?*, WALL ST. J., (Feb. 1, 2015), <http://www.wsj.com/articles/when-you-die-who-can-read-your-email-1422849600>.

accounts, PEW RES. FOUND. (May 6, 2014), <http://www.pewresearch.org/fact-tank/2014/05/06/proposed-law-would-clarify-who-gets-access-to-a-deceased-persons-digital-accounts/>.

Reproductive Assets. A recent article in the New York Times indicated that there are approximately 1.0 million fertilized human eggs in storage, along with unknown numbers of unfertilized eggs and sperm.³⁹⁶ Given the modern post-death reproductive possibilities (to say nothing of the post-marriage reproductive possibilities) with frozen eggs and sperm, clients who have stored their reproductive personal property should specifically provide for how the reproductive assets are to pass at their death, incapacity or divorce (e.g., they pass to family members, to science, to charity or are destroyed). Equally interesting is how the government and courts are handling children conceived by assisted reproductive procedures after a parent is dead.³⁹⁷

Research:

- Jeff Pennell, *The Supreme Court Decision in Caputo: An Update on the New Biology*, LISI EST. PLAN. NEWSL., no. 1966, May 22, 2012;
- Stephanie Rapkin: *Genetic Material and the Estate Plan Part 2 - Disposition of Gametes by the Donor at Death*, LISI EST. PLAN. NEWSL., no. 2228, May 27, 2014.
- Sharon L. Klein, *The Issue With Issue: Rights of Posthumously Conceived Children*, 41 EST. PLAN. J. 14 (Nov. 2014).

Beneficiary Designations. Improper beneficiary designations changes have created huge problems for estates, particularly when a divorce has occurred. For example:

- In Merchant v. Corder,³⁹⁸ the Fourth Circuit Court of Appeals ruled that a change in beneficiary designation to a retirement plan prior to the issuance of a final judgment of divorce was invalid. Because the ex-spouse had not agreed to the relinquishment of her rights to the plan at the time of the change and there was not a qualified domestic relations order, when the former husband died the ex-spouse received the entire retirement fund.
- In Hendon v. E.I. Dupont De Nemours & Co.,³⁹⁹ the Sixth Circuit Court of Appeals ruled that even where a divorce decree and martial dissolution agreement provided that a divorced spouse waived rights to a ERISA retirement plan, the ex-spouse was still entitled to the qualified plan assets upon the death of the account participant. The court ruled that the waiver was not in compliance with the requirements of ERISA.
- In Schultz v. Schultz,⁴⁰⁰ an Iowa court ruled that when a divorce decree did not include any

³⁹⁶ Tamar Lewin, *Leftover Embryos, and Painful Choices*, N.Y. TIMES, June 18, 2015, available at <http://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html>.

³⁹⁷ See JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING, tbl.11 (CCH 2015).

³⁹⁸ No. 98-2128, 1999 WL 486590 (4th Cir. July 12, 1999) (unpublished opinion).

³⁹⁹ No. 96-6233, 1998 WL 199824 (6th Cir. Apr. 13, 1998) (unpublished opinion).

⁴⁰⁰ 591 N.W.2d 212 (1999).

waiver of a spouse's IRA account and the spouse never removed the ex-spouse as a named beneficiary, the ex-spouse was entitled to the IRA assets upon the death of the account owner, even when the account holder had remarried.

- In Egelhoff v. Egelhoff,⁴⁰¹ the U.S. Supreme Court ruled that a Washington statute that purported to terminate a divorced spouse's rights in a retirement plan did not apply to ERISA plans. The state statute was not allowed to preempt the federal rules.

The solution? There are a number of actions that clients and their advisors should take, including:

- Clients should make sure to obtain properly drafted qualified domestic relations orders when plan assets are to be passed to an ex-spouse. These orders should be completed by lawyers with a working knowledge of the related tax issues and statutory requirements.
- New beneficiary designation should be prepared and filed with the plan administrator immediately after the divorce decree becomes final. If the soon-to-be ex-spouse will agree to sign a waiver, the change can be made prior to the divorce being finalized.

Contraband. Illegal contraband (e.g. drugs, stolen items, etc.) presents a multitude of issues including whether the items should be immediately reported to authorities, destroyed, etc. If the illegal items are within the residence, what type of duty does the Personal Representative have to avoid confiscation? If there is a taxable estate, how should the contraband be appraised? If an attorney is acting as Personal Representative of the estate, how does he or she handle attorney-client privilege. These are issues that need to be examined on case-by-case basis.

Furthermore, as marijuana is legalized in states such as Colorado, the planner and client enter an area where the law is unsettled and constantly changing. If the Personal Representative distributes the property, he or she risks violating federal law. If the Personal Representative destroys the marijuana, is the Personal Representative violating his or her fiduciary duty? Maybe not, but as the law evolves, the Personal Representative will need to conduct his or her due diligence.

Despite the criminal charges that may be associated with the sale of contraband, the IRS has argued that its fair market value may be the value it could obtain on the black market.⁴⁰² See the discussion in this article on sale of the art work "Canyon."

Research:

- Janet Novak, *Even Rich Heirs Deserve a Fair Shake from the IRS*, FORBES (Feb. 23, 2012), <http://www.forbes.com/sites/janetnovack/2012/02/23/even-rich-heirs-deserve-a->

⁴⁰¹ 532 U.S. 141 (2001).

⁴⁰² See PLR 9152005 (Aug. 30, 1991), which noted that "*the fact that a market is illicit does not obviate the existence of that market for estate tax valuation purposes.*"

fair-shake-from-the-irs/#13cf95b34793.

- William J. Turnier, *The Pink Panther Meets the Grim Reaper: The Estate Taxation of the Fruits of Crime*, 72 N. C. L. REV. 163 (1993).
- Charlotte Melbinger, *The Sonnabend Estate and Fair Market Valuation Of Canyon*, 163 U. PA. L. REV. 239 (2015).

UNUSUAL WILL PROVISIONS

“We pay for the mistakes of our ancestors, and it seems only fair that they should leave us the money to pay with.”

Don Marquis

Unusual dispositive provisions make interesting reading, including:

- *William Shakespeare* passed his “*second best bed*” to his surviving wife, with most of the remainder of his estate passing to his daughter Susanna. Apparently, there was some bad blood with his wife.
- *Napoleon Bonaparte* (deceased in 1821) provided that the hair from his deceased head be shaved and given to close friends. It was this hair that was analyzed in 2008 and was found to contain large amounts of arsenic, raising the issue of whether the British poisoned him over time. Was Napoleon thinking ahead of his rivals once again, with the expectation that science would one day show that he had been poisoned?
- *Heinrich Heine*, a German poet, gave his entire estate to his wife on the condition that she remarry so that “*there will be at least one man to regret my death.*”
- *Jack Benny* (deceased in 1974) gave a bequest to his florist, with the requirement that the florist deliver one long stem red rose to his wife each day of her life. Before she passed in 1983, she had received over 3,000 roses.
- *Janis Joplin* died in 1970 with a unexpectedly elaborate Will that included this provision: “*If my Executor shall so elect, he shall be authorized, at the expense of my estate, but not to exceed Two Thousand Five Hundred (\$2,500.00) Dollars, to cause a gathering of my friends and acquaintances at a suitable location as a final gesture of appreciation and farewell to such friends and acquaintances.*”⁴⁰³
- *Luis Carlos de Noronha Cabral da Camara* was a well-to-do Portuguese aristocrat who was a bachelor and had no children when he passed away at age 42. In lieu of having remote statutory heirs or Portugal receive his assets, he chose 70 people at random out of the local phonebook to equally inherit his assets, choosing the people in front of two witnesses.⁴⁰⁴
- *George Bernard Shaw* left £367,233 to fund the creation of a new phonemic English alphabet. When the British Public Trustee challenged his Will, a settlement reduced the bequest to £8,600 and the new alphabet was never established.

⁴⁰³ See http://www.truetrust.com/Famous_Wills_and_Trusts/Janis_Joplin_Will.pdf

⁴⁰⁴ Patrick Jackson, “*Where there's a will there's a whim,*” BBC NEWS (Jan. 17, 2007), <http://news.bbc.co.uk/2/hi/europe/6268015.stm>.

- *John Bowman* was a wealthy tanner who died in 1891. His will provided for a \$50,000 trust fund to cover the costs of his servants maintaining his 21 room mansion and preparing a daily meal in case he or any of his previously deceased family returned from the dead. The trust fund finally ran out of money in 1950.
- *T.M. Zink*, was an Iowa attorney who died in 1930. His Will disinherited both his wife and daughter. The Will provided that a certain sum would be invested for 75 years. At the end of that time he expected the sum would have grown to \$4.0 million. At that time, the funds were to be used to create a library that would exclude all works by female authors or artists, and would deny all females access to the grounds. His Will included the statement: “*My intense hatred of women is not of recent origin or development nor based upon any personal differences I ever had with them but is the result of my experiences with women, observations of them, and study of all literatures and philosophical works within my limited knowledge relating thereto.*” His daughter challenged the Will on the ground that her father was not of sound mind and ultimately received his entire estate.
- *Samuel Bratt* loved to smoke cigars, but his wife prohibited it. When he died in 1960 his Will passed £330,000 to his wife on the condition she smoked 5 cigars a day for the rest of her life.
- *Osama Bin Laden* left a Will directly that most of his \$29 million of his assets (reportedly held in Sudan) be used for the continuing jihad. In a previously released “Will” he directed his children not to join al-Qaeda,⁴⁰⁵ but there is some question about the legitimacy of the earlier document.

⁴⁰⁵ Joe Weisenthal, *Bin Laden's will says his children must not join al-Qaida*, BUSINESS INSIDER (May 3, 2011), <http://www.businessinsider.com/bin-ladens-will-2011-5>.

CONCLUSIONS:

So what are the ultimate take-aways from this examination of celebrity decision making? For most advisors, people who appear in People magazine each week are not their clients, but there are a few recommendations and issues that we should bring to the attention of every client, including (at a minimum):

- Having a Will or Will substitute like a Revocable Living Trust.
- Having a Medical Directive, along with making sure there are Medical Directives for each adult child and living ancestor (e.g., that 96 year old great-grandmother).
- Having a General Power of Attorney, along with making sure they have Powers of Attorney for each adult child and living ancestor.
- Having proper beneficiaries of retirement plans and IRAs, naming both appropriate primary and contingent beneficiaries.
- Discussing how jointly-held assets or pay-on-death designations will impact the heirs and the estate plan.
- Discussing how to minimize the costs and conflicts of passing their assets to their heirs.
- Having a schedule for disposing of personal property and, in the case of a second or third marriage, declaring which of the spouses owns any assets that are to pass to children from prior relationships.
- Discussing with clients the rights and benefits of the surviving spouse, particularly in second and third marriages where there are children from prior marriages.
- Discussing in detail how to select the best possible decision makers in their documents, along with the appointment of successors – and the process for the removal of decision makers.
- Providing decision makers with basic information, such as security codes and passwords, current financial statements, and a list of insurance information.
- Make sure a trusted person has signature authority on any safe deposit box and that the ownership of the assets located in the safe deposit box is clear.

However much we plan for our clients, the inextricable truth is that life happens in ways that can never be fully anticipated – often to the long term detriment of family members and their relationships with each other. However meticulously we may have planned things, events confound our expectations. Unintended consequences occur, often from good intentions. It is not that celebrity estates are more confounding than your average client’s estate. It’s that most celebrities have been allotted more than 15 minutes of media time, with much of it collected after they die.

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CELEBRITIES MENTIONED IN THE ARTICLE

(In No Particular Order)

Actors, Actresses & Entertainers

Marilyn Monroe
Heath Ledger
Zsa Zsa Gabor
Groucho Marx
Philip Seymour Hoffman
Gary Coleman
Dennis Hopper
Bella Lugosi
Paul Walker
Rock Hudson
Peter Falk
Lana Turner
John Wayne
Robin Williams
Mickey Rooney
James Dean
Lauren Bacall
Marlon Brando
Dick Van Dyke
Elizabeth Taylor
Richard Pryor
Steve McQueen
Harry Houdini
Jack Benny
Tony Curtis
George C. Scott
Andy Griffith
Clark Gable
Charlie Chaplin
Henry Fonda
Rita Hayworth
Stan Laurel
Boris Karloff
Sammy Davis, Jr.
Joan Crawford
Joan Rivers
Casey Kasem
Jerry Lewis

Artists & Authors

William Shakespeare
Pablo Picasso
Tom Clancy
Terry Moore
Virginia C. Andrews
Michael Crichton
Heinrich Heine (German Poet)
George Bernard Shaw
Gene Roddenberry
Mark Gruenwald (Marvel comics)

Athletes

Babe Ruth
Joe DiMaggio
Steve McNair
Ted Williams
Chris Benoit

Business Leaders

Howard Hughes
Andrew Carnegie
Alfred Nobel
Philip & Helen Wrigley
Steven Jobs
Conrad Hilton
Joe Robbie
George Steinbrenner
John Bowman
Wellington Burt
Sumner Redstone
Thomas Shewbridge
Dr. John T. Dorrance
Kirk Kerkorian
Hugh Hefner

Heirs & Heiresses

Eleanor Ritchey
Leona Helmsley
Jacqueline Kennedy Onassis
Ben Novack, Jr.
John Seward Johnson I
Barbara Piasecka Johnson
Sharon Disney Lund
Doris Duke
Sandra West
Brooke Astor
Anthony D. Marshall
Eleanor Close Barzin
Huguette Clark

Lawyers and Judges

Chief Justice Warren Burger
John F. Kennedy, Jr.
Justice William O. Douglas
T.M. Zink

Musicians

Prince
Bob Marley
Jimi Hendrix
Barry White
Michael Jackson
John Lennon
George Harrison
Etta Jones
Janis Joplin
Sony Bono
Jim Morrison
Kurt Cobain
James Brown
Elvis Presley
Johnny Cash
Ray Charles
Adam Yauch
Jerry Garcia
BB King

Politicians

Benjamin Franklin
Henry VIII
Napoleon Bonaparte
John F. Kennedy
Thomas Jefferson
Abraham Lincoln
Alexander Hamilton
James Garfield
Andrew Johnson
Ulysses S. Grant

Other Celebrities and a Few Unknowns

Martin Luther King, Jr.
Princess Diana
Albert Einstein
Linda McCartney (Paul McCartney's first wife)
Anna Nicole Smith
Hector Guy Di Stefano
Fredric Baur (inventor of the Pringles can)
Marc Christian McGinnis
John Dillinger (Bank Robber)
Al Capone
Samuel Bratt
Luis Carlos de Noronha Cabral da Camara
Ileana Sonnabend
Osama Bin Laden

Other Celebrities Quoted

Paul Simon
Andy Warhol
Yogi Berra
Bill Gates
Warren Buffet
Jimmy Buffett

Living Celebrities

Bill Gates
Jackie Chan
Sting
Simon Cowell
Warren Buffett
George Lucas
Caroline Kennedy
Jerry Lee Lewis
Glen Campbell
Demi Moore
Catherine Zeta-Jones
Michael Douglas
Doug Hutchinson
Alexis Stodden
Goldie Hawn
Kurt Russell
Barron Hilton

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