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Estate Planning for Modern Families

By Kim Kamin, Esq.[*]

Modern families take many forms, and estate planning professionals must advise them all. This article describes some of the distinct issues faced by a modern family. Given the wide range of configurations of the modern family, there may be more considerations than one may realize.

Under the 2017 tax act (Pub. L. No. 115-97), federal gift, estate and generation-skipping transfer tax exemptions almost doubled in 2018. Prior to these increased exemptions, only approximately 0.2% of decedents' estates were subject to estate tax.[1] With the exemptions increasing to $11.4 million in 2019 and indexed for inflation, along with split gifts and portability, so that couples who engage in appropriate planning can double that amount, we expect fewer than 0.1% of estates to be in a position to be concerned about federal transfer taxes.[2]

Regardless of the changes in the transfer tax laws, much estate planning will not be impacted. There is a plethora of reasons why estate planning is still necessary such as:

1. **Loss of Capacity**. Without a plan, if a client becomes incapacitated and unable to manage his or her affairs, a court will select the person to manage the client's finances and medical decisions. With a plan, the party who fills that role has already been identified and authorized so that involvement can be avoided.
2. **Minor Children**. Without a plan, a court must determine who will raise minor children if neither parent is alive. With a plan, the surviving parent can nominate the guardian(s) of his or her choice to take care of and handle the finances for minor children.
3. **Avoiding Intestacy**. Without a plan, assets pass to heirs according to state laws of intestacy. Intestacy rules vary by state and are the default for those who die without a plan. Family members (and perhaps not the ones the client would choose) receive a deceased client's assets outright, without benefit of trust protection. With a plan, the client – not the state – makes decisions concerning who inherits which assets, along with how and when the designated recipients receive those assets.

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[1] Chye-Ching Huang & Chloe Cho, *Ten Facts You Should Know About the Federal Estate Tax,* Ctr. On Budget and Pol'y Priorities (Oct. 30, 2017).

[2] Howard Gleckman, *Only 1,700 Estates Would Owe Estate Tax in 2018 Under the TCJA*, Tax Pol'y Ctr. (Dec. 6, 2017).

4. **Blended Families**. Without a plan, children from multiple relationships may not be treated as intended and the interests of surviving spouses may be in direct conflict with those children. With a plan, the creator of the estate plan determines what goes to the current spouse, if any, and what goes to any children from current and prior relationships.

5. **Special Needs Planning**. Without a plan, recipients with special needs risk being disqualified from receiving Medicaid or SSI benefits and may have to use an inheritance to pay for care. With a plan, a trust can be created that should enable recipients to remain eligible for government benefits while using the trust assets to pay for non-covered expenses.

6. **Keeping Assets in the Family**. Without a plan, upon an adult child's death, that adult child's surviving spouse could receive the child's inherited assets if the child predeceases that spouse. If the child divorces the current spouse, a significant portion of the inherited assets could go to the spouse. With a plan, a trust can be created to help ensure that assets will stay in the family and, for example, pass to grandchildren or more remote descendants instead.

7. **Retirement Accounts**. Without a plan, the beneficiary of any IRAs, or other retirement account funds, may not reflect the client's current wishes and may result in burdensome tax consequences for the heirs, particularly if the probate estate is the default beneficiary. With a plan, a designated beneficiary reflecting the client's wishes can be selected.

8. **Digital Information and Assets**. Without a plan, the family may not be able to access the decedent's online photo albums, music files, email accounts, financial accounts, social media accounts, websites, blogs, online subscriptions, online memberships and domain names. With a plan, the governing instrument can specify who is to manage or inherit such assets, or alternatively, direct that such assets be deleted, terminated, or closed after death.

9. **Business Ownership**. Without a plan, a business owner may not be able to control who runs the business at the owner's death, thus risking both a reduction in value and loss of control of the business for the family. With a plan, the business owner chooses who will own and control the business after the owner dies.

10. **Minimizing Family Discord**. Without a plan, there is a greater risk that the client's wishes will not be well documented and that survivors will have conflict over the administration of the estate and remaining assets. With a well-conceived, well-communicated, and well-executed plan, a client can manage expectations, reduce legal conflicts, and put in place mechanisms for dispute resolution prior to litigation.

11. **Creditor Protection**. Without a plan, assets have no protection from creditors. With a plan, it is possible to engage in asset protection, avoid probate, and take other reasonable steps to prevent creditors (including frivolous claims and/or divorcing spouses) from taking assets that could be retained instead in carefully structured trusts for the original owner or intended beneficiaries.

12. **Philanthropy**. State intestacy statutes do not include charitable beneficiaries. With a plan, clients can choose to support the causes they care about at death.[3]

As indicated by the considerations above, planning is still essential regardless of the tax considerations. Moreover, all such planning must account for the changing nature and composition of families in the 21st century, and developments in the laws, social norms, and science and technology..

At a minimum, the following situational variables and issues should be considered in planning for modern families in particular: (1) single clients; (2) divorce; (3) blended families; (4) same-sex married couples; (5) multinational couples; (6) unmarried couples; (7) polyamorous relationships; (8) special needs; (9) transgender clients and family members; (10) adoption; (11) nonmarital children; (12) assisted reproductive technologies; (13) longer lifespans in retirement; (14) longer lifespans and fading capacity; (15) cryonics and cloning; (16) digital assets and cryptocurrencies; (17) intellectual property; (18) pets; and, (19) modern philanthropy. Each of these topics will be considered at a high level below to flag a few of the basic considerations.

SINGLE CLIENTS

Years of declining marriage rates and changes in family structure have created a new subset within American society—the never married or single by choice. In 1950, 22% of American adults were single,

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[3] The above list of non-tax considerations is drawn from Wendy S. Goffe, Kim Kamin & Stephan R. Leimberg, *The Tools & Techniques of Estate Planning for Modern Families*, Ch. 1 (3d ed. forthcoming 2019).

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while in 2012 that number was almost 50 percent.[4] Approximately one in seven adults lives alone. Single persons may be widowed, divorced, cohabiting, against the institution of marriage, or simply still searching. There are roughly 109 million unmarried adults in America.[5] Traditional nuclear families with two married heterosexual parents have now become the minority in American modern families.[6]

According to the Pew Research Center, 20% of adults over 25 years old in 2012 had never been married, a figure that had risen from 9% in 1960. Multiple factors have contributed to the rising number of unmarried people. Adults are generally marrying later in life, and many choose to cohabit and raise children outside of a formal marriage. Shifting public attitudes, the struggling economy, and changing demographic patterns have also influenced the rise in the number of never-married adults.[7]

The number of single parents by choice is also a ''booming'' phenomenon, especially single mothers who have chosen to adopt or utilize donor sperm. The rise of single motherhood is the driving and largest influence on this trend.[8] These patterns vary by socioeconomic class. The nonmarital birth rate for Caucasian college-educated women is under 10%. By contrast, nearly 70% of children born to parents with a high-school education or less live in a single-parent household.[9]

Although estate planning often focuses on married couples, given the trends described above, there is understandably an increasing need to plan for single clients and focus on their distinct needs. For married couples, there is an expectation that the surviving partner will receive and manage assets if something happens to one of them. But unless there is planning, it is not clear whom a single client would choose as an estate administrator. In the absence of planning, a single person's estate will pass to children (if any), otherwise to any living parents or siblings, otherwise to more distant relatives through traditional rules of intestacy.

For single clients, it is imperative to ensure that the client has designated the appropriate beneficiaries for 401(k) accounts and life insurance policies. Events such as marriage or divorce, death of a named beneficiary, or birth of a child/children, merit revising any such retirement plans. This applies to single clients who are divorced even when their state has in place revocation upon divorce statutes that would remove a former spouse.[10] In addition, state statutes do not affect beneficiary designations under retirement accounts that are subject to the Employee Retirement Income Security Act (ERISA).[11]

Lawyers, accountants, bank trust officers, and other advisors are equipped to handle legal and financial tasks, but sensitive medical decisions are typically best reserved for relatives or close friends. If relatives live far away, single clients may want to consider using advance medical directives to give powers to trusted friends who live nearby.

Although single clients cannot take advantage of interspousal tax-free transfers or gift-splitting, many tax planning strategies are available. Single clients can take advantage of the lifetime estate and gift tax exemption and the gift tax annual exclusion, and they can make unlimited gifts for education and medical expenses. Single persons often use the gift tax annual exclusion to benefit their significant other, children, nieces, nephews, and other relatives. The lifetime gift tax exemption can also help single clients who want to transfer assets during their lifetimes in order to exclude the appreciation on those assets from their estates at death.[12]

Because single client plans often have less stability in naming fiduciaries and beneficiaries, single clients—particularly those who do not have children—should consider reviewing their decisions and estate planning documents much more frequently than their coupled peers.

DIVORCE

Divorce is an inevitable aspect of the estate planner's work in planning for the modern family. Studies show that 40% to 50% of first marriages in the United States end in divorce.

Accordingly, estate planners should help clients plan for the contingency of divorce and ensure that divorced clients understand their options. Although couples in second marriages may consider a prenuptial agreement, an increasing number of couples in

[4] *See* Eric Klinenberg, *Going Solo: The Extraordinary Rise and Surprising Appeal of Living Alone,* 5 (Penguin Press, 2012).

[5] *Facts for Features: Unmarried and Single Americans Week: Sept. 18-24, 2016*, Census Bureau (Aug. 26, 2016).

[6] Gretchen Livingston, *It's no longer a 'Leave It to Beaver' world for American families – but it wasn't back then, either*, Pew Research Center (Dec. 30, 2015).

[7] Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married, As Values, Economics and Gender Patterns Change*, Pew Research Center (Sept. 24, 2014).

[8] Emily Green, *Single Mothers By Choice a Booming Trend*, Working Mother (Nov. 29, 2017).

[9] Matthew Stewart, *The 9.9 Percent Is the New American Aristocracy*, (June 2018).

[10] *See Sveen Melin*, 138 S. Ct. 1815 (2018), where the Supreme Court upheld the retroactive applicability of a Minnesota revocation upon divorce statute to non-probate assets such as life insurance.

[11] *See* DOL, Employee Benefits Security Administration, Retirement Plans and ERISA FAQs.

[12] *See generally*, Goffe, Kamin, Leimberg, Ch. 8.

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first marriages are doing so as well.[13] Such agreements can keep assets separate during the marriage and ensure waiver of any elective share rights. At divorce, the Uniform Probate Code provides for revocation upon divorce of any provisions in favor of the ex-spouse in a will or through non-probate assets beneficiary designations.[14] Most states have adopted this presumption that divorce revokes any bequests to a former spouse in a will that predates the divorce. An increasing number apply this to life insurance, retirement plans, and transfer-on-death account beneficiary designations.

Trusts are a useful planning tool, prior to divorce, for many reasons, including permitting the settlor control over assets being transferred, providing financial security for trust beneficiaries, minimizing the need for future contact between divorcing parties, and potential tax benefits to transfers in trusts from an income tax and/or transfer tax perspective. The following trusts are particularly useful in the context of divorce: (1) Alimony Trusts; (2) Child Support Trusts; (3) Irrevocable Life Insurance Trusts (ILITs); (4) Special Needs Trusts; and (5) Special Securities Trusts.

Keeping property for descendants in a lifetime spendthrift trust is an effective way to safeguard those assets from future creditors, including divorcing spouses.[15] However, practitioners must still take care to research whether their jurisdiction treats spouses as exception credits who can receive alimony even from a spendthrift trust.

BLENDED FAMILIES

Also known as step-families, the blended family is increasingly important for estate planners to understand, with more people forming families after a previous relationship ends. In these situations, attorneys must look at all prior divorce agreements and nuptial agreements and take care to understand family dynamics that can have an impact on estate planning for a blended family.

With multiple marriages comes the opportunity for multiple sets of children and/or stepchildren, meaning there may be potential beneficiaries who face different inheritances and economic circumstances. These disparate situations can often cause discord within a family. Thus, balancing the interests among children from prior marriages and step-children is a critical and delicate issue that estate planners must consider when working with blended families.[16]

The greater the wealth disparity between spouses, the greater the likelihood there will be hostilities between the poorer spouse and children from the wealthier spouse's prior marriage[s]. For smaller estates, estate planners may recommend using a pot trust and appointing an independent trustee to use its broad discretionary powers to equalize the economic status of the various beneficiaries. Estate planners should urge caution to avoid permitting a surviving spouse to act as trustee for trusts for children that are not also that spouse's children, having such children act as trustee for the spouse, or having one sibling act as a trustee for another. Except in rare cases, this puts the individual family member fiduciary in a fraught position. This conflict can be exacerbated when siblings who do not share both parents are put in the position of acting as trustee for each other.

Clients with children from prior marriages may seek to eventually pass most of their assets to those children, rather than to the current spouse. These circumstances may suggest the use of a trust that distributes income to the spouse for life, with the remainder to the children. It may also make sense to divide the assets immediately at death between the children from former relationships and the surviving spouse in order that the children do not need to wait until the surviving spouse's death to receive an inheritance. In particularly tense relationships, it may be desirable to name a charity as the remainder beneficiary (instead of children from a prior relationship).

SAME-SEX MARRIED COUPLES

In the relatively recent past, drafting for same-sex couples was an exercise in finding ways to treat a same-sex life partner as a fiduciary and beneficiary in light of three limitations: (1) without the many allowances that state law provides to a legal spouse (such as right of health surrogacy and to dispose of remains); (2) without the benefit of the unlimited marital deduction for transfer tax purposes; and (3) without the many other privileges that the federal government provides to a legal spouse. Consequently, it was essential to have powers of attorney for property and healthcare naming a client's same-sex life partner as agent, and clients were advised to have copies ready to be provided to custodians and healthcare providers. It was also essential to have testamentary documents permitting the partner to dispose of remains and to receive property at death – particularly tangible property. Additionally, it was often important to have sig-

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[13] Jonnelle Marte, *Why you're more likely to have a prenup than your parents were*, Wash. Post (Aug. 4, 2017).

[14] Unif. Probate Code §2-804 (amended 2010) [hereinafter UPC].

[15] *See* Goffe, Kamin, Leimberg, Ch. 2.

[16] *See id.,* Ch. 3.

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nificant life insurance in place in an irrevocable life insurance trust to offset any estate taxes that would be due when transferring assets to the surviving same-sex life partner without the benefit of the marital deduction. In some cases, same-sex partners would go through an adult adoption in order to make the partner a legal relative who could inherit and be entitled to some benefits under the law.

Some states that did not grant the right to marry instead offered civil unions as an alternative.[17] Civil unions were intended to provide the same legal protections as marriage in the state. For example, the Illinois statute provided that: "Partners joined in a civil union shall have all the same protections, benefits, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil or criminal law, as are granted to spouses in a marriage."[18] Note that a civil union (or the related domestic partner status) does not entitle the parties to the same protections of marriage under **federal** law.[19]

In 2015, the Supreme Court in *Obergefell v. Hodges* held that all states must allow same-sex couples to marry and must recognize same-sex marriages from other states.[20] The right to marry (with its accompanying advantages and disadvantages) that has long existed for traditional different-sex couples is now available to same-sex couples anywhere in the country.

Because same-sex marriage is now universally recognized in the United States, most of the prior drafting concerns have been eliminated or become irrelevant for same-sex spouses. Nonetheless, because not all countries recognize these marriages and because even in the United States, same-sex couples continue to face discrimination, estate planning advisors should be alert to specific recommendations for a same-sex couple that would be unnecessary for a different-sex couple (e.g., such as carrying electronic copies of a marriage certificate and powers of attorney for each other).[21]

MULTINATIONAL COUPLES

The modern family is increasingly more multinational. The U.S. Census Bureau has estimated 13% of the population was not born in the United States.[22] Further, 21% of married-couple households in the United States (11.4 million) consist of at least one spouse who was not born in the United States.Of those 11.4 million couples, 7% (4.1 million) consist of one spouse who was born in the United States and one spouse who was not, and 13% (7.3 million) consisted of both spouses who were not born in the United States.[23] Thus, an increasing number of married couples have highly specific estate planning needs relating to international and non-citizen planning. Estate planners must first establish the citizenship and resident status of each spouse in order to determine what special planning might be useful. A person is domiciled in the United States if living in the United States with no intent to leave and move to another country.

Estate planners should review any existing premarital agreement and identify any jurisdiction-specific issues. The advisor should consider the citizenship of the couple, their resident status, and location of their assets to establish which jurisdiction's laws apply. Moreover, documents provided by clients may contain choice of law clauses, which will have a bearing on the ultimate outcome.

A U.S. citizen who is married to a non-U.S. citizen spouse in excess of the estate tax exemption amount should consider planning to minimize estate taxes. Chief among these options is creating a marital trust that meets the requirements for a qualified domestic trust (QDOT). QDOTs are an effective way for such couples to defer estate tax on assets that would otherwise pass outright to a non-U.S. citizen surviving spouse. Estate planners should make plans to use QDOTs for the benefit of surviving spouses whether the decedent spouse is a U.S. citizen or resident. It is also important to avoid unintentionally creating foreign trusts by failing the "court test" or the "control test" (i.e., having a non-U.S. person control any substantial trust decisions).[24]

UNMARRIED COUPLES

As of 2016, there were about 7.5 million unmarried-partner households in the United States.[25] The rights and responsibilities afforded to them vary greatly across jurisdictions. Some states allow non-

[17] *See* Illinois Religious Freedom Protection and Civil Union Act, 750 ILCS §75 (2011); *see also* Richard A. Wilson, *A Guide to the New Illinois Civil Union Law*, 99 Ill. B.J. 232 (2011).

[18] Illinois Religious Freedom Protection and Civil Union Act §20.

[19] *See* IRS, *Answers to Frequently Asked Question for Registered Domestic Partners and Individuals in Civil Unions*.

[20] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[21] *See generally* Goffe, Kamin, Leimberg, Ch. 6.

[22] Census Bureau, *QuickFacts*.

[23] Goffe, Kamin, Leinberg, Ch. Chapter 5.

[24] *Id.* citing §672(f)(2) and Reg. §301.7701. All section references are to the Internal Revenue Code of 1986, as amended (Code), and the regulations thereunder, unless otherwise specified.

[25] *Table 1. Household Characteristics of Opposite-Sex and Same-Sex Couple Households: 2016 Am. Comm. Survey*, Census Bureau. This included approximately 6.82 million opposite-sex and 880,000 same-sex couples.

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marital couples to establish civil unions, or domestic partnerships, and may allow parties in such a status the same state rights as married spouses. Approximately a dozen jurisdictions recognize common law marriage. If a couple satisfies all of the legal requirements to qualify as common law spouses, then they will have the same legal rights as ceremonially-married couples who have a marriage license.

The Internal Revenue Code views unmarried couples as legal strangers. Donative transfers between non-spouses are taxable gifts if they exceed the annual exclusion of $15,000. However, some couples in a non-marital relationship can structure their financial affairs to reduce tax liability in ways that married couples cannot. For example, they can still utilize old-fashioned grantor retained income trusts.

A cohabitation agreement is a contract between two unmarried individuals. A legally enforceable cohabitation agreement covers property and finances; the couple may include other provisions not subject to legal enforcement, such ones referring to day-to-day activities such as how the household will operate.[26] Such an agreement should address some of the most common issues such as expenses incurred while living together and any obligations the couple wishes to undertake involving such subjects as children, conception, and dispute resolution.

If partners do not want a cohabitation agreement, there are alternatives: partnership and LLCs, revocable trusts, and tenancy in common agreements are potential arrangements to govern two unmarried persons.

POLYAMOROUS RELATIONSHIPS

Planning for polyamorous relationships invokes some of the issues that arise in planning for blended families and planning for unmarried couples (and sometimes also planning for nonmarital children as discussed below). While polyamorous relationships have traditionally been associated with old-fashioned plural marriage, the 21st-century version appears in alternative forms.[27] The most common version of traditional plural marriage in the United States occurs amongst fundamentalist followers of the Church of Jesus Christ of Latter-Day Saints. The structure involves one legal spouse in addition to one or more ''spiritual'' spouses committing to each other for life, and usually results in children raised together in a compound arrangement. While this concept has been somewhat normalized in modern culture through television programs like ''Big Love'' or ''Sister Wives,'' these types of arrangements remain illegal and presumably very rare.[28] Thus, while they may have become popularized on television, they remain rare issues for estate planners and are outside the bounds of this article.

The modern polyamorous relationship instead may arise when spouses choose to spend many years in amicable separation or to establish an open marriage, taking on other known and accepted romantic partners.[29] Surprisingly, this is an increasingly common phenomenon among ultra-high net worth individuals. Investment guru Warren Buffet took advantage of such an unconventional marital arrangement, remaining married to his first wife Susan until her death despite residing with his full-time partner, Astrid Menks.[30] Jerry Weintraub even memorialized his marital and non-marital relationships in the final lines of his obituary, which read that he was survived by his wife of many years, Jane Morgan, from whom he was separated but never divorced, as well as his ''longtime companion,'' Susan Elkins.[31] Prominent philanthropist David Rubenstein famously elected to remain separated from his wife for 12 years despite other relationships stating ''it's complicated,'' as the reasoning behind maintaining the marriage despite the lengthy separation.[32] The pair ultimately divorced in late 2017. Typically, in such arrangements, the new romantic partners become integrated into the family, raising estate planning concerns both for the existing spouse as well as the new romantic partner. This issue is being discussed by family offices and others who serve high net worth clients as advisors seek to ensure the plan adequately provides for all involved parties.

Planning for spouses, nonmarital partners, and/or children raises separate and distinct issues, so clients need to think through different options for each type of family member. No marital tax-free transfers are available for the unmarried partner, but they are available for the spouse. Thus, in taxable situations, often it will best if the exemption from federal transfer taxes is reserved for the unmarried partner and children, and the marital deduction should be utilized for the spouse via marital trust planning for increased control.

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[26] Goffe, Kamin, Leimberg, Ch. 7.

[27] Morning Glory Zell-Ravenheart, *A Bouquet of Lovers*, Green Egg Magazine (1990) (where the term ''polyamory'' was first introduced).

[28] *Big Love.* HBO 2006-2011; *Sister Wives*. TLC 2010-present.

[29] Susan Dominus*, Is an Open Marriage a Happier Marriage?*, N.Y. Times Mag. (May 11, 2017).

[30] Áine Cain, *Inside billionaire Warren Buffett's unconventional marriage, which included an open arrangement and 3-way Christmas cards*, Business Insider (May 9, 2018).

[31] Kim Masters, *When Jerry Weintraub Threatened to Break My Kneecap*, The Hollywood Reporter (May 18, 2018).

[32] Roxanne Roberts, *Billionaire David Rubenstein and his wife, Alice Rogoff, divorce*, Wash. Post (Dec. 8, 2017).

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Where there are children from both marital and nonmarital relationships, it is especially important to consider the definition of descendants. For example, where an older trust document includes only ''legitimately born'' descendants as beneficiaries, this excludes nonmarital children.[33] The results under older trust documents may also impact the current generation's estate planning, as a client may want to protect descendants not provided for by an older instrument.

Depending on the openness of the relationship, it may be prudent to engage in separate planning for a nonmarital partner. Specifically, for some clients (who unlike Buffet or Weintraub prefer more discretion), it may be best to rely on an entirely separate irrevocable trust to make provisions for the non-marital partner. One possibility is to fund the trust with some version of ''permanent term'' insurance. Ideally, there will be premiums of the annual exclusion gift (currently $15,000 per year) or less, so in the event of a breakup, the insured/settlor can simply turn off the insurance payments and let the trust terminate for want of any assets. In designating the remainder beneficiary, it may be best to either include the non-marital partner's family, or a charity, to limit the opportunity for conflict between the non-marital partner and any surviving spouse or children from other relationships.

The client needs to determine whether the currently married spouse, the adult children, if any, or the nonmarital partner should act as agent under powers of attorney. Often, it is advantageous to nominate a neutral third party rather than the non-marital partner.

SPECIAL NEEDS

Approximately one-fifth of adults in the United States are living with some type of disability.[34] Moreover, according to the Center for Disease Control, about one in six children in the United States had a developmental disability as measured in 2006-2008, with one in 59 being diagnosed on the autism spectrum. Between 1979 and 2003, the number of babies born with Down syndrome increased by about 30%.[35] Accordingly, considering disability planning is an imperative when working with the modern family. Some important considerations when planning for these special needs involve the impact of the Affordable Care Act (ACA) and Medicaid, and the potential use of third-party trusts, self-settled trusts, and ABLE accounts.

ACA. The ACA closed the gap in coverage for individuals with disabilities by loosening resource limitations for Medicaid coverage, which made it available for a larger pool of low-income families, subject to state participation in that expansion. Additionally, it prohibited private insurers from denying coverage on the basis of pre-existing conditions. The ACA has expanded access to health coverage for disabled individuals without forcing them to transfer most of their assets to either a d(4)(A) supplemental needs trust or a d(4)(C) pooled trust (both are discussed below).

Third-Party Supplemental Needs Trusts. These are the most commonly used and flexible type of supplemental needs trust. These types of trusts must be created and funded by anyone other than the individual with the disability and is often done by parents, grandparents, or siblings through a lifetime or testamentary gift.[36] Third-party supplemental needs trusts may be used to enhance the beneficiary's quality of life by way of providing goods and services that are not covered by government benefits. Any trust assets that remain upon the death of the beneficiary will then be distributed pursuant to the terms of the trust instrument as set forth by the trust settlor, without any Medicaid reimbursement requirement.

Self-Settled Trusts and Accounts. . The Omnibus Budget Reconciliation Act of 1993 (as amended) permits the creation of self-settled supplemental needs trusts (Pay-Back Trusts) for funds belonging to a disabled individual under the age of 65.[37] These trusts provide a method of preserving public benefits for an individual with disabilities who has or acquires assets in his or her own name, such as by gift, inheritance, or lawsuit settlement. So-called ''(d)(4)(A) trusts'' must be for the individual's sole benefit, and any remainder at the disabled beneficiary's death must be used to pay back the government for expenditures to or for the beneficiary during life.[38]

Pooled trusts under (d)(4)(C) provide an alternative to a privately-created supplemental needs trust. Under this type of arrangement, funds for multiple beneficiaries are pooled for investment management purposes under a common trust agreement, but each beneficiary has his or her own separate account within the trust for his or her own sole benefit. They may be created by a court, parent, grandparent, or guardian of a person with disabilities, and also by the person with the disability themselves. These assets are exempt for purposes of Social Security and Medicaid eligibility during the beneficiary's life but are subject to Medicaid reimbursement upon the beneficiary's death—

[33] Goffe, Kamin, Liemberg, Ch. 4.

[34] Centers for Disease Control and Prevention, *Disability Impacts All of Us*.

[35] CDC, Trends in the Prevalence of Developmental Disabilities in U.S. Children, 1997-2008; CDC, Identified Prevalence of Autism Spectrum Disorder 2000-2014; CDC, Occurrence of Down Syndrome in the United States.

[36] Goffe, Kamin, Leimberg, Ch. 13.

[37] 42 U.S.C. §1396p(d)(4)(A).

[38] Goffe, Kamin, Leimberg, Ch. 13.

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unless the funds were retained in trust by a nonprofit association to benefit other beneficiaries of the pool.[39]

Created in 2014, ABLE accounts are tax-advantaged accounts for individuals with marked and severe functional limitations beginning before age 26. They offer a greater degree of flexibility than supplemental needs trusts and pooled trusts, and they are often more cost effective to administer. Note that many individuals with disabilities view ABLE accounts not as a replacement to supplemental needs trusts, but rather as a helpful complement. Contributions to an ABLE account must be made in cash and cannot exceed the annual gift tax exclusion amount from a single donor to a single donee. The 2017 tax act increased ABLE contributions to the lesser amount of (1) the amount of federal poverty line for one-person households, or (2) the individual's annual compensation.[40]

TRANSGENDER CLIENTS AND FAMILY MEMBERS

An estimated 1.4 million adults in the United States currently identify as transgender.[41] A transgender individual is a person whose assigned gender at birth does not align with his or her gender identity, i.e., the state of his or her ''gender identity'' does not match the individual's ''assigned sex.'' An awareness of transgender issues has led to a rise in transgender individuals coming out, most notably seen amongst the nation's youth. Trans public figures like Chaz Bono, Caitlyn Jenner, and Laverne Cox have taken to mainstream media, using it as a platform to increase trans visibility and dialogue surrounding the subject. Estate planners must be increasingly sensitive to the fact that their clients, or members of their clients' families, may be transgender.

Estate planners must be intentional not only in ensuring that their planning documents reflect the wishes, intent, and goals of transgender clients, but also that any client contemplates having descendants or other beneficiaries who could be transgender. Because these are politically charged times in which transgender clients or family members may face discrimination or challenges, advisors should be sensitive to those concerns as well.

Advisors and attorneys must handle such delicate issues as the use of gendered references and pronouns. They must also understand that a client's preferred gender identification may change over time. Drafting with complete gender-neutrality so that gender-identifying pronouns are not necessary is often preferred. However, where a client is concerned that family members who do not recognize their transition may attempt to recharacterize their gender post-mortem, estate planners should include statements about the individual's gender identity within the estate planning documents. Where using a gender identifier in documents such as wills, trusts, powers of attorney, and pleadings, it is important to use names and pronouns consistent with how the person identifies. Assumptions regarding the client's preferences to identify as a ''he'' or ''she'' should be avoided.[42] The following are examples of specific provisions unique to transgender clientele that should be included or considered when drafting estate planning documents: (1) Giving the fiduciary the right and directive to take whatever action necessary to preserve a client's self-identity post-mortem; and (2) For transgender individual beneficiaries of a trust, consider whether psychological and medical expenses for realigning gender and physical sex are covered as permissible expenses. Estate planners can achieve this by expressly including such expenses in a definition of medical expenses, drafting the definition broadly so that these expenses would not be excluded, or adding a sentence such as: ''Medical expenses shall also be construed liberally to include elective procedures.''

Medical Powers of Attorney. Medical powers of attorney are often statutory forms, many of which do not typically cover issues particular to transgender clients. Estate planners should anticipate the possibility of challenges by family members and specifically grant visitation rights to certain individuals in any medical power of attorney. This also might include establishing which individuals do not have visitation rights and whether or not the agent has the power to control who visits. Finally, a medical power of attorney should direct whether certain medical therapies, such as hormone replacement therapy, should be continued during a period of incompetence and under what circumstances they should be discontinued.

Advising modern families mandates a working knowledge of the sensitive and unique considerations involved in working with transgender clients. There are other distinct legal issues inherent in representation of transgender clients involving everything from medical expenses, income tax considerations, marriage, and changing gender identifiers on legal documents from licenses to birth certificates.

ADOPTION

Adoption is another important aspect for the modern family. Some important issues relating to adoption

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[39] *Id.*

[40] *Id.*

[41] Lindsey Tanner, *More U.S. teens identify as transgender, survey finds*, USA Today (Feb. 5, 2018).

[42] Goffe, Kamin, Leimberg, Ch. 9.

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include: (1) the adoption of minors; (2) adoption of step-children; (3) adult adoptions, including the adoption of same-sex partners; and (4) the treatment of adopted descendants in estate planning documents.

While trusts for one's ''children'' or ''descendants'' historically only included one's blood relatives, that assumption generally no longer holds true. Children who are adopted become the legal children of their adopting parents. Correspondingly, when an adoption is granted, typically the child who is adopted is cut off from her genetic parents for purposes of inheritance law. She cannot inherit from them, nor they from her. Adopted children and biological children now have the same rights for purposes of inheritance from their legal ancestors and siblings. However, the former so-called ''stranger-to-the-adoption rule'' continues to be relevant when working with older trust instruments in jurisdictions relying on state law interpretations of definitions that were in effect when the trust was created, rather than on current interpretations under the law.[43]

A step-parent can adopt a minor child, with the consent of both parents, or where a biological parent: (1) agrees to relinquish parental rights, or (2) is deceased. Some states and the UPC have established special intestacy rules for children adopted by the spouse of one of the genetic parents. While a step-parent can only adopt a child once the other parent's rights have been terminated, either voluntarily or involuntarily, these special rules preserve the ability of the child to inherit from the biological family. Under this exception, the child may inherit from the adopting step-parent and the step-parent's family, as well as from both genetic parents and their families.

Many states allow adults to adopt other adults. This commonly occurs where step-parents adopt a child after the child has turned 18. Prior to *Obergefell*, same-sex couples used adult adoption to establish a legally-recognized relationship through which they could inherit or obtain other rights from each other.[44] While this practice is no longer necessary–and some of these adoptions have actually been undone so the parties could marry one another—some of these relationships may still exist. Courts are divided on whether they are willing to allow inheritance from a non-parent relative based on adult adoption.[45] Under Illinois law, for example, a person adopted after reaching age 18, who never resided with the adoptive parent before attaining the age of 18 years, is not considered a descendant of the adoptive parent for purposes of inheriting from ancestors or relatives of the adoptive parent.[46]

For both initial drafting purposes and for interpreting older documents, it is critical to understand whether an adopted child is included in a class term such as ''children,'' ''nieces and nephews,'' ''grandchildren,'' or ''descendants'' in a will or trust. Older wills and trusts may include express language excluding all adoptees, or those adopted as adults. Further, this exclusionary language may also be implied for trusts executed in past decades.[47]

NONMARITAL CHILDREN

Under common law, children born outside of marriage generally did not inherit from either genetic parent. The law today, however, presumes that references to classes such as ''descendants'' or ''issue'' in a will or trust instrument include nonmarital children unless a showing of contrary intent rebuts the presumption. This presumption does not apply to all existing documents and in some jurisdictions, class definitions may be determined based on the law at the time the document was written. In these jurisdictions, it is presumed that a settlor used a particular term with reference to the law that was then in effect. Further, there are many trust documents in existence today, particularly older trusts, which still define the class of beneficiaries based on their marital birth.[48] Just under 40% of children today are nonmarital.[49]

Social norms have evolved over the last century with regard to the treatment of nonmarital children, and the law has generally followed suit. Historically, states effectively barred nonmarital children from inheriting, unless the parents married. State statutes instead created additional ways for the child to inherit from the father, such as presenting evidence of paternity, with some states requiring paternity to be established during lifetime and some allowing posthumous determinations. However, there remain certain circumstances in which a client may not want to include nonmarital children for inheritance purposes. Establishing definitions determining whether a parent-child relationship exists will allow clients to provide for descendants they intend to benefit, rather than relying on state law.

Establishing the mother of a nonmarital child has typically been straightforward but is becoming less so with the increased use of certain assisted reproductive technologies. Identifying paternity can be more chal-

[43] *See* Goffe, Kamin, Leimberg, Ch. 10.

[44] *Id*.

[45] *See* Susan Gary, Jerry Borison, Naomi Cahn & Paul Monopoli, *Contemporary Trusts and Estates*, Ch. 2 (3d ed. 2016).

[46] *See* Probate Act of 1975 755 ILCS §5/2-4(a) (1998).

[47] Goffe, Kamin, Leimberg, Ch. 10.

[48] Goffe, Kamin, Leimberg, Ch. 11.

[49] Child Trends, *Key Facts About Births to Unmarried Women,* Child Trends (Sep. 24, 2018).

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lenging. Paternity statutes in many states now apply without regard to the sex of the parent, and they may require the following types of proof: (1) the subsequent marriage of the biological parents; (2) the child living with the second parent for a specified period of time along with that individual holding out the child as his/her child; (3) a court order determining parentage; or (4) the person consenting to being named as the parent on the child's birth certificate. Some jurisdictions permit children to have more than two parents, depending on the circumstances. In some circumstances, jurisdictions will recognize the parental rights of a nonbiological de facto parent. In Maine, courts allow a de facto parent to establish parental rights if he or she can demonstrate the undertaking of a permanent, unequivocal, committed, and responsible parental role in the child's life, and that there were exceptional circumstances sufficient to allow the court to interfere with the legal or adoptive parent's rights.[50] In Delaware, courts have recognized the de facto parental rights of a non-biological same-sex spouse to children born using ART.[51]

For both initial drafting purposes and for interpreting older documents, it is critical to identify, and then clarify the status of nonmarital children. If parenthood is established, then they will be included in a class term such as "children," "nieces and nephews," "grandchildren," or "descendants" in a will or trust.

ASSISTED REPRODUCTIVE TECHNOLOGIES

The increased use of assisted reproduction technology has confronted the modern family with unique planning issues surrounding the creation of children and preservation of genetic materials involving the creation of children. While there are many different modes of assisted reproduction, the term encompasses the general definition of conception by any means other than sexual intercourse. Estate planners refer to these modes of conceptions collectively as assisted reproductive technologies (ART).

The widespread use of ART has raised many critical and challenging questions for estate planners, chiefly: (1) how to define parentage and descendants for legal purposes, and (2) how to determine who can control the disposition of frozen genetic material.

The widespread use of ART and the evolution of family relationships has created the possibility that more than two individuals can have a parenting role. ART has thus brought about three distinct categories of "parentage": (1) biological or genetic parentage—contributing the genetic materials to the child (i.e., sperm or egg); (2) gestational parentage—carrying and bearing the child; and (3) functional parentage—raising the child following the birth.[52]

Some of the most common fertility procedures include artificial insemination, in-vitro fertilization, and surrogacy. Artificial insemination involves sperm being transferred to a woman's uterus or cervix and typically involves the use of a couple's own genetic material, but also may use sperm from a donor. In-vitro fertilization (IVF) refers to any procedure that involves conception outside of the human body, followed by transfer of one or more embryos into a woman's uterus. IVF can use the genetic material of both intended parents, or that of one or two third-party donors, to create an embryo; the embryo can then be transferred immediately or frozen for later use. Surrogacy is an arrangement in which a woman other than the intended mother carries the child to term and gives birth to the child. In a "gestational surrogacy," the surrogate's own egg is fertilized with the intending father's sperm, such that the surrogate is the biological mother of the resulting child. Conversely, the surrogate in a "gestational carrier" arrangement has no genetic relationship with the child and carries to term an in-vitro fertilized embryo produced with the genetic material from one or both of the intended parents.

Parentage determinations are established pursuant to state law. Estate planning documents should clearly state that any child born from assisted reproduction is considered the child of the intended parent(s) rather than the genetic donors.[53]

In surrogacy situations, the child's intended parents will become the child's legal parents by way of adoption or through a petition to be named on the child's birth certificate. The parental rights, if any, of third parties, including the surrogate, are then terminated in connection with the adoption or petition. The type of legal procedure varies among jurisdictions.[54] It is important to hire counsel with the requisite expertise in this particular area as drafting definitions that account for surrogacy situations is challenging. Counsel has the option to use the UPC approach, which includes a presumption that a birth certificate identifying an in-

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[50] *Pitts v. Moore*, 2014 ME 59, 90 A.3d 1169 (2014).

[51] *Smith v. Smith*, 893 A.2d 934 (Del. 2006).

[52] Goffe, Kamin, Leimberg, Ch. 12.

[53] For sample language that results in the intended parents who requested the ART procedure becoming the **only** parents for purposes of the drafting instrument, *see, e.g.,* Goffe, Kamin, Leimberg, Ch. 12.

[54] *See, e.g.*, Goffe, Kamin, Leimberg, Ch. 12 (highlighting California's popularity for surrogacy, where surrogates may be paid, the state permits the intended parents to be listed as the child's parents on the birth certificate, and the legal rights can be established in advance of the child's birth).

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dividual other than the birth mother as the parent of a child presumptively establishes a parent-child relationship between the child and that individual.[55]

Considerations motivating the storage of genetic material include a multitude of factors, such as expense, potential infertility from disease (or death), and the emotional toll of the process.

The gamete provider may designate the desired disposition of the genetic material at the time of initial storage. However, problems often arise where the contract is not entirely clear, or there is competing evidence of the donor's intent regarding the treatment of the genetic material.

The issue turns on whether the genetic material is ''property'' in the traditional sense, meaning it would typically be passed by will. State law is currently unsettled in this area, and decisions regarding the destruction and disposition of cryogenically preserved genetic material are not uniform. Courts have overturned orders to destroy cryogenically preserved sperm of decedents.[56] Conversely, courts have determined that genetic material should be destroyed based on language in a storage document that established the decedent's intent to discard the material at death.[57]

Estate planning attorneys should determine whether clients have stored genetic material. This can be done during the intake process by way of questions regarding the client's family, background information, and assets. If so, then the estate planner should review any contracts with fertility providers and storage facilities. Attorneys should consider reiterating the testator's intent with regard to the disposition of genetic material in a will.

Because of ART, children may now be born long after the death of a genetic parent through frozen gametes or even through reproductive materials retrieved after the death of an individual. Issues concerning the rights of posthumous children can result in litigation.

For children born after the death of a parent, the traditional common law approach was that a child born within 300 days of a married parent's death was a child of that parent. Governing laws vary dramatically across jurisdictions. Under the UPC, the child must have been in utero not later than 36 months after the individual's death; or born not later than 45 months after the individual's death. Only three states—Colorado, North Dakota, and New Mexico—have adopted the UPC approach.[58] In total, 25 states have enacted statutes that explicitly address whether a posthumously conceived child is considered an heir of the deceased parent. Twenty-one of those states grant inheritance rights to these children on the basis of various requirements, such as consent from the gamete provider or timing of the birth of the child.[59] Four states have explicitly rejected inheritance rights for posthumously conceived children, while the remaining 25 state legislatures, along with the District of Columbia, have yet to address this issue.[60]

Including statements concerning limitations on both consent and time in any document clarifies the ability of a posthumously conceived child to benefit—for example: (1) consent; (2) timing; (3) legitimacy; and (4) notice.

Consent for a posthumously conceived child to inherit can be given at the time of gamete freezing or

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[55] 18 U.S.C. §2707 (allowing third parties to bring civil actions for violations of the Stored Communications Act (SCA) and including provisions for punitive damages in the case of willful or intentional conduct). The SCA was enacted as part of the Electronic Communications Privacy Act of 1986. The SCA, in part, restricts service providers who provide ''electronic communications services'' and ''remote computing services'' to the public from releasing information relating to communications maintained in electronic storage. 18 U.S.C. §2701-§2712.

[56] *See, e.g., Hecht v. Superior Court of Los Angeles County*, 16 Cal.App.4th 836, 848 (App. 2d Dist. 1993) (California Court of Appeals overturned the trial court's order to destroy the cryogenically preserved sperm of the decedent who had bequeathed the sperm to his girlfriend in his will, stating an unambiguous intent that the stored sperm be used by the girlfriend to have a child after his death. The court held that the sperm fell within the broad definition of ''property'' in California's probate code, citing the American Fertility Society's ethical statement that ''gametes and concepti are the property of the donors . . . [who] therefore have the right to decide at their sole discretion the disposition of these items.'')

[57] *See, e.g.*, *In re Estate of Kievernagel*, 166 Cal.App.4th 1024 (App. 3rd Dist. 2008) (court rejected widow's argument that she had an interest in decedent's sperm because decedent's consent forms signed at the center communicated an unambiguous intent to destroy the material on death).

[58] UPC §2-120(k); Katie Christian, *''It's Not My Fault!'' Inequality Among Posthumously Conceived Children and Why Limiting the Degree of Benefits to Innocent Babies is a ''No-No!,''* 36 Miss. C. L. Rev. 194, 203-209 (2017) (describing the different approaches states take to the inheritance rights of posthumously conceived children).

[59] Cassandra M. Ramey, *Note, Inheritance Rights of Posthumously Conceived Children: A Plan for Nevada*, 17 Nev. L.J. 773, 775 (2017) (states include Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Iowa, Louisiana, Maine, Maryland, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Texas, Utah, Washington, and Wyoming).

[60] *Id.* The four states rejecting inheritance rights include Florida, Minnesota, Ohio, and Virginia. For example, Florida provides that a ''child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.'' Fla. Stat. Ann. §742.17(4). Illinois formerly took this approach but modified their statute as of January 1, 2018. IL Probate Code §2-§3.

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through a written instrument. The instrument should clearly define what constitutes evidence of consent.[61]

Including a time limit in which a posthumous child must be born or conceived provides certainty of property rights for other beneficiaries and avoids the potential of posthumous children frustrating estate or trust administration.

Some states only recognize the posthumously conceived children of a married couple. Consequently, a posthumously conceived child arguably would not inherit because the marriage of the child's parents necessarily ended before the child was conceived (by way of the death of one of the parties). Drafters can ensure that such a child inherits by including language to that effect.

Drafters may consider adding a time period during which the person in control of the decedent's genetic material must notify the fiduciary that a child may be conceived. This ensures the fiduciary does not make premature distribution of assets that could potentially be affected by a child's birth.[62]

The term ''descendants'' should be carefully defined to be broad enough to include those whom the transferor intends to benefit. Estate planners should discuss the groups of children who currently exist or may exist in the future. If the transferor intends to include individuals who are not clearly the settlor's legal children (such as a step child or the legal child of a same-sex partner), such individuals should be specified by name and included in the definition of descendants to avoid future contention. The class of ''children'' could also include someone born to or adopted by a spouse or partner (perhaps within a time limitation). Additionally, the class of descendants should be defined to include more remote descendants. Keep in mind that anti-lapse statutes may not protect descendants of a predeceased child of a partner. Consideration should be given as to whether those individuals should still be provided for even if the relationship with the partner has ended.

LONGER LIFESPANS IN RETIREMENT

Life expectancies are generally increasing in the United States.[63] Increased access to primary medical care, advances in medical treatments, improvements in motor vehicle safety, and clean water supply and waste removal are all factors that have contributed to improvement in the mortality rate. However, with longer lifespans come new challenges, including how to guarantee adequate income for a potentially longer retirement. Retirement plans are critical for estate planners to consider as they now constitute a large portion of the wealth of Americans.

The division of retirement assets is often a contentious issue in divorce. In general, value attributable to funds in a qualified plan or IRA before the marriage remains separate property, but contributions during the marriage, and the appreciation thereon usually are treated as marital assets. The spouses may dispute: (1) the portion of retirement assets that is separate or marital property; and (2) valuation of future pension rights or unvested benefits.

A significant interest in a separate account plan or IRA often is a useful asset for satisfying one spouse's obligations to the other. The division can be accomplished tax-free, with the former spouse receiving a separate account, or rolling the proceeds over into his or her own IRA. The former spouse then assumes the tax obligation as funds are withdrawn.

To ensure a legally-valid and tax-free division of a retirement plan or IRA, a qualified domestic relations order (QDRO) must be used. The Internal Revenue Code defines a QDRO as a domestic relations order that ''creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan. . . .'' and that meets additional detailed requirements set forth in the Code and the regulations.[64]

The ''alternate payee'' is most often the spouse; however, it can be a child or other dependent.[65] The order cannot alter the form or timing of payment of the benefits. For example, it cannot require distribution of benefits that are not yet distributable under the plan.

Note the existence of state statutes that provide for revocation upon divorce of beneficiary designations in retirement assets not covered by ERISA.[66] It is nonetheless important to check beneficiary designations upon any major change in the client's family situation.

LONGER LIFESPANS AND FADING CAPACITY

Fading or diminished capacity is becoming more common as Americans live longer. When presented

[61] Goffe, Kamin, Leimberg, Ch. 12.

[62] *Id.*

[63] KD Kochanek et al., *Mortality in the United States, 2016,* National Center for Health Statistics Data Brief, no. 293 (2017). (There has been a decrease in life expectancy over the last two years, but experts at the U.S. Centers for Disease Control and Prevention note that these two data points are not sufficient to establish a trend of declining life expectancy).

[64] §414(p).

[65] §414(p)(8).

[66] *See Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Sveen v. Melin*, 138 S. Ct. 1815 (2018).

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with a client who may have diminished capacity, attorneys should first determine whether the client is competent to engage the lawyer's services. When it comes to the estate planning process, the tests for testamentary capacity, contractual capacity, capacity for health care decisions, and donative capacity can differ.

Undue influence is a challenging legal issue when dealing with the elderly population. Circumstances implicating undue influence often involve a challenge to a will after the death of a testator. The laws vary from state to state, but the most common definitions acknowledge that this is a process that happens when the client still retains capacity. There are also medical and psychological models of undue influence.[67]

Beginning with the initial client meeting, attorneys can take targeted steps in managing situations implicating questions about capacity. Lawyers must take care to remember that they are the gatekeepers and must be on alert for the possibility of undue influence. It is the competent testator or donor who is subject to undue influence. Attorneys facing these situations should consult all available resources including the ABA Handbook, the ethical rules for the particular jurisdiction, the ACTEC Commentaries on the Model Rules, and their state statutory and case law.

Powers of attorney are the private alternative to guardianship and involve private delegation of decision making. Creating a durable power of attorney is the first step in disability planning. It allows the principal to appoint an attorney-in-fact or agent to act on the principal's behalf to handle the principal's financial affairs if the principal is incapacitated.

Powers of attorney can be either: (1) springing powers, under which the agent's authority only begins upon the principal's incapacity, or (2) durable, under which the agent can act during the principal's capacity as well as upon the principal's incapacity. The agent is expected first to act in accordance with the principal's instructions or wishes and not to substitute his or her own judgments for that of the principal. In the event the principal's wishes are not known, the agent should act in the principal's best interest by respecting the principal's individuality and life choices, and by honoring those values in carrying out the agent's duties.

Court supervised proceedings, such as guardianships or conservatorships, are the default option for those who have not planned for potential disability. Each state has its own guardianship law, but guardianship law nationwide displays a trend towards focusing on the "person first" using person-centered language in drafting to show a commitment to the person's expressed wishes rather than on what a third-party believes to be best.[68] Major issues in guardianship decision making involve health care and residential placement decisions. Financial management issues in conservatorships of the estate and how to balance greater personal autonomy with third-party financial management is another challenge.

CRYONICS AND CLONING

Modern estate planning professionals must also deal with clients who wish to plan for what is currently in the realm of science fiction. While still unusual, more and more clients are deciding that in lieu of burial or cremation, they prefer instead to be cryogenically frozen. Cryonics is an experimental procedure that has the goal of preserving a human body (or at least a human brain) for decades or centuries until a future time when medicine and technology can somehow restore that person to a version of life.[69]

Robert Ettinger introduced the concept of cryonics to the mainstream in a 1962 book, *The Prospect of Immortality*, arguing that a person frozen at the exact moment of death could later be brought back to life. The first cryopatient was cryopreserved in 1967, and the total number of cryopatients and has only grown exponentially since then. Perhaps the most famous case of cryonic preservation was baseball legend Ted Williams. Prior to his death, Williams executed a will saying he wished for his body to be cremated. However, he also signed a "pact" that stated that he, his son, and his daughter would all like to be cryonically frozen. A bitter legal battle ensued. Ted's eldest child, Barbara Joyce Williams Ferrell, filed a petition demanding the return of her father's body to Florida to be cremated after the body had already been frozen in Arizona. Barbara and her husband spent much of their retirement funds on the lawsuit and eventually dropped the lawsuit after settlement. Today, Ted Williams and his son are still cryonically preserved, waiting to see if science can someday bring them back to life.[70] More recently, public figures such as PayPal founder Peter Thiel and computer scientist Ray Kurzweil have publicly disclosed they, too, have booked their space to be cryonically preserved.[71] The practice has become a lucrative and mystifying pursuit, with cryonics companies appearing in the form of Alcor in

[67] For a survey of definitions of undue influence across various jurisdictions as well as a treatment of the psychological models, *see* Goffe, Kamin, Leimberg, Ch. 15.

[68] Goffe, Kamin, Leimberg, Ch. 15.

[69] Alcor Life Extension Foundation, *What is Cryonics*?.

[70] Richard Sandomir, *Williams Children Agree to Keep Their Father Frozen*, N.Y. Times (Dec. 21, 2002.).

[71] Courtney Weaver, *Inside the weird world of cryonics*, The Financial Times (Dec. 18, 2015).

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Arizona, to the Cryonics Institute in Michigan, to KrioRus in Russia. Many view cryonics as a scam.[72] Accordingly, estate planners should remain appropriately skeptical while also being respectful of their clients' beliefs and hopes.

Most people are skeptical of cryonics because there is no evidence that it can be successful on a human.[73] However, some living creatures, including insects and some varieties of frogs, have successfully been frozen and brought back to life. [74] Proponents of cryonics argue that its ultimate success does not depend on the status of current cryopreservation technology, but rather on the potential for continued developments in the field.

For a client or loved one who is cryonically frozen, a primary planning issue is how to provide for themselves upon revival. Estate planners must determine how to assist the client in establishing an estate plan that ensures that his or her wishes to be cryonically preserved are honored, and that provides sufficient funds available to the settler when they are revived. Similarly, it is important to consider establishing a trust for the care of a cryonically preserved client during the period of biostasis. Increasing popularity in cryonics as an option has prompted a surge in the creation of trusts created to hold assets for a person in cryonic preservation until he or she is revived, often called personal revival trusts (PRT).[75] These trusts name individuals both as the settlor and as the future beneficiary. PRTs can be established in states that have repealed or significantly modified the rule against perpetuities. There are multiple trust theories pertaining to cryonics, most notably the ''intermediate being'' theory, which is considered the most effective in achieving the purpose of the personal revival trust. Under this theory, a cryopreserved settlor is considered analogous to a cryopreserved pre-embryo.[76] This theory was legitimized in a Tennessee Supreme Court case concerning a custody dispute over cryopreserved embryos, which the court classified as ''intermediate beings.''[77] Other theories involved in the creation and consideration of PRTs include the ''undead contingent beneficiary'' exception.

Relatedly, the scientific process of cloning involves ''human asexual reproduction, accomplished by introducing the genetic material of a human somatic cell into a fertilized or unfertilized oocyte, the nucleus of which has been or will be removed or inactivated, to produce a living organism with a human or predominantly human genetic constitution''[78] Cloning humans concerns two distinct activities: (1) therapeutic cloning, and (2) reproductive cloning. Reproductive cloning involves implanting an embryo into a uterus and bringing the embryo to term. Therapeutic cloning does not ever contemplate bringing the embryo to term, but rather uses the project to harvest stem cells from that embryo.[79] While there is no federal ban on therapeutic cloning, it remains controversial; and reproductive cloning has been banned by several states. Because cloning of self is an alternative to revival of a cryogenically frozen self, a well drafted PRT should include cloning as a permissible form of revival so that any future clone or clones could benefit from the trust assets if legally permissible in the future.

Both cryonics and cloning present many legal, moral, scientific, and ethical considerations to estate planners and their clients. It is vital for estate planners to communicate honestly and respectfully with their clients, while making sure their clients understand the underlying scientific technology, the uncertainty of success, and the potential future ethical and legal limitations.

DIGITAL ASSETS AND CRYPTOCURRENCIES

In addition to new ways of thinking about the preservation of frozen genetic material, cryonics, and cloning, the modern family must contend with new types of assets that did not exist for prior generations of estate planners. A ''digital asset'' is defined in the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)[80] as: ''an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.'' The Act also defines ''electronic'' as ''relating to technology having electrical, digital, magnetic, wireless, optical,

[72] See, e.g., Michael Hendricks, *The False Science of Cryonics*, MIT Technology Review (Sept. 15. 2015).

[73] David Gorski, *Cold Reality Versus the Wishful Thinking of Cryonics*, Science-Based Medicine (Aug. 2, 2014). For further criticism of the science behind cryonics, see also Daniel Kolitz, *Will Cryogenically Frozen People Ever Be Revived?*, Gizmodo (Oct. 23, 2018).

[74] Cynthia Gorney, *Frozen Dreams: A Matter of Death and Life*, Wash. Post, May 1, 1990, at D1.

[75] Eric Engelhardt, *Issues Facing Trustees of Personal Revival Trusts*, 1 J. Pers. Cyberconsciousness 12, 12 (2006).

[76] Igor Levenberg, *Personal Revival Trusts: If You Can't Take It With You, Can You Come back to Get It?*, 83 St. John's L. Rev. 1469, 1472 (2009).

[77] *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

[78] This definition is provided under state law: N.D. Cent. Code 12.1-39-02.02(1)(c) (2003).

[79] Steven Goldberg, *Cloning Matters: How Lawrence V. Texas Protects Therapeutic Research*, 4 Yale J. Health Pol'y, L. & Ethics 305 (2004).

[80] *See, e.g.,* 755 ILCS §70/1 et seq (2016).

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electromagnetic, or similar capabilities."[81] Many different items fit into this broad definition: personal computer files, social media accounts, financial accounts, business accounts, domain names, blogs, and loyalty benefit programs, among others.[82] By excluding the non-digital underlying assets, the RUFADAA definition applies only to the records, not the assets that may be stored in digital form.[83]

Access to digital assets is governed by both federal and state laws. Most states have adopted RUFADAA. Consequently, unless a client's estate planning instruments specifically confer the power to access digital assets, the power will be extremely limited and typically not include content.[84] RUFADAA establishes a three-tier hierarchy for fiduciary access:[85]

(1) If the internet provider has established an online tool (such as Facebook's Legacy Contact or Google's Inactive Account Manager) for addressing issues of fiduciary access, and the user has filled out that form, then that controls the fiduciary's access to that particular asset, regardless of what the user's will, trust, or power of attorney might otherwise provide. This is analogous to a beneficiary designation. Thus, for example, Google has established an Inactive Account Manager; if the user has set that up, then the instructions in the Inactive Account Manager override any contrary provision.

(2) Where the provider has not established an online tool, or the user has not used that tool, then the user's written direction in a will, trust, power of attorney, or other record overrides a general direction in the internet service provider's terms-of-service agreement.

(3) If a user provides no specific direction under (1) or (2), then the internet service provider's terms of service will govern fiduciary access. If the terms of service do not address fiduciary access, the default rules of RUFADAA will apply.

Estate planning for digital accounts is an important part of working with a client to ensure asset management upon incapacity and transfer upon death. Under federal law, it is a crime to intentionally access without authorization and obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage.[86] Without the proper authority, it would be a crime for a fiduciary to access the digital assets. Thus, preparing a plan for a client's digital assets is critical. Possible steps include: (1) identifying the digital assets; (2) deciding what the client wants to do with them; (3) naming a digital fiduciary and granting the fiduciary the necessary powers to access digital assets; and (4) preparing instructions to accomplish the decedent's intent regarding digital assets.[87]

Explaining the importance of planning and the consequences of failing to plan for digital assets will help clients understand which accounts and assets can and should be shared with family members or other individuals and who will act as a fiduciary over the assets. It is important to ascertain exactly and entirely what digital assets the client owns. Clients may be initially reluctant to disclose some digital assets that are sensitive. However, failing to account for these in planning may result in access to them being given to an unintended (or unwanted) party. Planners can encourage disclosure through a conversation or a written questionnaire.

A digital fiduciary can be given the right to access and manage digital assets and accounts on behalf of the decedent to the full extent of state and federal law. Choosing a digital fiduciary should be done with the same care as choosing a trustee or executor. Desirable qualities include a familiarity with modern technology, discretion, and the ability to seek outside help in situations that require additional technical skills. The will, trust, or other document appointing the fiduciary should grant the specific authority to access and inspect any online accounts, hard drives, or other electronic devices that store digital information. Under RUFADAA, unless the user consents to disclosure of electronic communicaitons to a fiduciary through the use of an online tool or in estate planning documents, the fiduciary may find it impossible to access those assets.

Because clients may have privacy concerns, it is incumbent to help them consider certain issues such as whether they want their fiduciaries (e.g., parents, spouses, or children) to have full access to their digital lives or if they want accounts destroyed. Do they want their likenesses to continue to exist on social media for future generations? Are they concerned about active Facebook accounts after their deaths?

[81] *See* 755 ILCS §70/2 (1)-(11) (2015).

[82] Gerry W. Beyer, *Practical Planning for Digital Assets and Administration of Digial Assets by Fiduciaries*, 43 Tax Mgmt. Est. Gifts & Tr. J. 3 (Jan./Feb. 2018).

[83] Goffee, Kamin, Leimberg, Ch. 17.

[84] *See Legislative Fact Sheet—Fiduciary Access to Digital Assets Act*, Uniform Law Commission (2015). (As of May 2018, RUFADAA has been enacted in 40 states, as well as the U.S. Virgin Islands. 2018 inductions count six new states including the District of Columbia).

[85] See Naomi Cahn, *The Digital Afterlife is a Mess*, Slate (Nov. 29, 2017).

[86] *See* Stored Communications Act, 18 U.S.C. §2701(a).

[87] Goffee, Kamin, Leimberg, Ch. 17.

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These are some of the many questions estate planners need to anticipate when working with clients concerning the maintenance and disposition of their digital assets. Instructions to a digital fiduciary should indicate the decedent's intent regarding each digital asset or class of assets along with the means to carry out that intent. If the client has used an online tool, then the client should ensure the fiduciary is aware of the tool and has been granted access through it. Google has a process for accessing mail accounts upon a user's death[88] and, in addition to its Legacy process, Facebook has allowed access to deceased user's accounts through a special form.[89] Of course, the Facebook and Google tools apply only to those products.

The estate planner can discuss the utility of a password manager, which can be regularly updated. In addition, a comprehensive list of digital assets should include cryptocurrencies, which are a technology that can be used to transfer money, record data, and invest. They do not exist in any physical form, and are considered digital assets, but are not controlled by a centralized bank or government. Rather, they are generally recorded on a decentralized, public ledger called blockchain.[90] Popular forms of this currency include Bitcoin, Ethereum, and Litecoin. As of November 2018, the total cryptocurrency market had a capitalization of around $138.6 billion, with Bitcoin worth approximately $4,300 per coin.[91] Regulators struggle with the decentralized structure of cryptocurrency. Gains from virtual currency investments are subject to the capital gains tax, according to the IRS.[92] Regulators warn that cryptocurrencies are hotspots for theft and fraud,[93] so planning for them is important.

The estate planner should ensure that the client is aware of the online digital tools and plans accordingly. If the client has not used an online tool, then the client can set out plans for digital assets in a will, trust, or other planning document.

INTELLECTUAL PROPERTY

When working with the modern families, it is also important to consider whether the clients have any intellectual property that should be taken into consideration. Intellectual property—copyright, trademarks, patents, and trade secrets—continues to present unique challenges for practitioners in estate planning. Intellectual property constitutes an intangible asset that can potentially generate significant amounts of income for generations if structured and disposed of properly. Planners must consider not only income, gift tax, and estate tax rules, but also intellectual property laws that present different issues from other categories of assets.[94]

The Copyright Act protects original literary works; music, including lyrics; dramatic works; choreography, including pantomime; pictures; graphics; sculptures; movies and other audiovisual works; sound recordings; and architecture.[95] In situations where a creator has a new copyright and its value has not yet been established, planners can encourage the creator to sell the copyright to a trust for the benefit of the creator's children or grandchildren, which should result in a tax imposed at capital gains rates.[96]

PETS

Humans and charitable institutions are no longer the sole beneficiaries for whom clients wish to provide when disposing of their assets at death. There has been a surge in planning for pets where high networth or high-profile individuals die with provisions in their wills or trusts for the benefit of their animals.[97] The development of ''pet trusts'' can be attributed both to the intense emotional bond between owners and their animals, and also to changing social values whereby animals are considered not just companions but ''fur babies.''[98]

Pet trusts are a type of noncharitable purpose trust that allows an individual owner to designate a specific amount of money for the future care of a pet in the event of the owner's death or incapacitation.[99] While its purpose does not serve the public, it simultane-

[88] *Submit a request regarding a deceased user's account—Account Help*, Google.

[89] Donna Leinwand Leger, *New Facebook policy allows social media immortality*, USA Today (Feb. 12, 2015) . *Special Request for Medically Incapacitated or Deceased Person's Account—Help Center*, Facebook.

[90] Scott D. Hughes, *Cryptocurrency Regulations and Enforcement in the U.S.*, 45 W. St. L. Rev. 1 (2017).

[91] Ryan Browne, *Cryptocurrencies Have Shed Almost $700 billion Since January Peak*, CNBC (Nov. 23, 2018).

[92] Hughes, *Cryptocurrency Regulations and Enforcement in the U.S.*.

[93] *E.g.,* Ted Knutson, *Cryptocurrency Fraud Widespread, Warns Regulator*, Forbes (April 10, 2018).

[94] See generally, Goffe, Kamin, Leimberg, Ch. 18.

[95] 17 U.S.C. §102-§103.

[96] William M. Weintraub & Burton A. Mitchell, *Estate and Gift Tax Planning for Copyright Owners*, L.A. Law. at 20 (May 2002).

[97] *See, e.g.,* Stephanie Strom, *Helmsley Left Dogs Billions in Her Will*, N.Y. Times (July 2, 2008). (Hotelier Leona Helmsley left $12 million in her will to her white Maltese, Trouble).

[98] *See,* Goffe, Kamin, Leimberg, Ch. 19. *See also.,* Vasiliki Agorianitis, *Being Daphne's Mom: An Argument for Valuing Companion Animals as Companions*, 39 J. Marshall L. Rev. 1453 (2006); Anjana Shekar, *Fur babies over human ones? Meet millenials who choose to raise pets instead of kids*, The News Minute (March 13, 2018).

[99] Breahn Vokolek, *America Gets What It Wants: Pet Trusts and a Future for its Companion Animals*, 76 UMKC L. Rev. 1109, 1121 (2008).

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ously does not violate any public policy, thereby neither helping nor hurting society. There are two forms of pet trusts: common law and statutory. For a comprehensive collection of animal statutes organized by state, see Texas Tech Professor Gerry W. Beyer's website.

In 1990, §2-907 of the UPC was amended to provide statutory recognition of honorary trusts for pets and domestic animals. It required the trust to end either 21 years after its creation, or when no living animal was covered by the trust, whichever came first. The original 21-year limit was later put into brackets, indicating that an enacting state may select a different figure and create a specific exemption to the Rule Against Perpetuities to perhaps create an enforceable trust for the duration of the pet's lifetime and any offspring.[100] The amendments to §2-907 prompted similar amendments to the Uniform Trust Code in 2000.

The UTC was amended in 2000 to make honorary trusts for pets and domestic animals enforceable. The main difference between the UTC and the UPC is that the UPC recognizes honorary trusts but does not deem them valid or enforceable per se.[101] Several states have enacted the UPC, UTC, or a variation of the two.[102]

Often, pet trusts will designate a trustee to manage the money and a caretaker to provide for the daily care of the pet. The pet owner generally names a remainder beneficiary to receive the residual property when the pet passes away or the trust terminates. When drafting the terms of the trust, the settlor should expressly provide for "expenditures for food, shelter, veterinary care, medication, boarding or pet-sitting, and costs for the disposition of the pet's remains."[103] Additionally, any preferences or instructions for the disposal of the pet's remains upon death or directions for euthanizing the pet should be explicit.

The funding for a pet trust is a taxable event. Any amount gifted to a pet trust will be included in the gross taxable estate.[104] Income tax is also a concern, because the IRS does not recognize pets as beneficiaries. There are two Revenue Rulings that are directly on point in regard to pet trusts and their tax implications. Revenue Ruling 78-105 requires that "no portion of the amount passing to a valid trust for the lifetime benefit of a pet qualifies for the charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity."[105] Revenue Ruling 76-4876 holds that "an enforceable pet trust established under a state statute would be taxed on all of its income, regardless of any distributions made for the benefit of the pet beneficiary."[106]

State legislatures are increasingly enacting §2-907 of the UPC or a functional equivalent that authorizes pet owners to create enforceable, long-term care trusts for the benefit of their companion animals.[107]

MODERN PHILANTHROPY

There is a long-established history of personal philanthropy in the United States. Individual giving and bequests from family foundations contributed to a new high of total charitable donations in the amount of $390.05 billion in 2016.[108] The classic structures for family philanthropy include private foundations, contributions to other organizations, charitable remainder trusts, and charitable lead trusts, all of which are explored in greater depth below.

Private foundations are appealing to donors because they present a more permanent option for a donor to carry out charitable intentions. Like public charities, they are tax-exempt entities, but due to their private nature, they are subject to more restrictive rules concerning taxpayer deductions. Estate planners should counsel clients about the potential for abuse if: (1) the founder engages in self-dealing, or (2) the foundation fails to distribute assets in furtherance of active charitable purposes.[109] If self-dealing occurs, the tax code imposes a 10% excise tax on the self-dealer and a 5% excise tax on the foundation manager. These figures can rise to 200% and 50% respec-

[100] UPC §2-907 (c)(2) (1993); Jennifer Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 Quinnipiac Prob. L.J. 419, 438 (1999).

[101] Emily Gardner, *An Ode to Roxy Russell: A Look at Hawaii's New Pet Trust Law*, 11 Haw. B.J. 30, 31 (2007).

[102] In 2005, the Hawaii State Legislature passed H.B. 1453 by unanimous vote to validate trusts for domestic and pet animals extending beyond the death of the transferor. The law provides "a trust for the care of one or more designated domestic or pet animals shall be valid," and "terminates when no living animal is covered by the trust."

[103] Bambi Glenn, *Estate Planning for Your Pets*, 40 Md. B.J. 23, 27 (2007).

[104] Darin I. Zenov & Barbara Ruiz-Gonzalez, *Trusts for Pets*, 79 Fla. B.J. 22, 25 (2005).

[105] Rev. Rul. 78-105.

[106] Rev. Rul. 76-4876.

[107] Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 Santa Clara L. Rev. 617, 676 (2000).

[108] Giving USA Foundation, *Giving USA 2017: The Annual Report on Philanthropy for the year 2016* (2017); (Giving USA is the longest-running and most comprehensive report of its kind in America, researched and written by the Indiana University Lilly Family School of Philanthropy).

[109] Michael J. Hussey, *Avoiding Misuse of Donor Advised Funds*, 58 Clev. St. L. Rev. 59, 79 (2010) (citing Comm. on Ways & Means, Tax Reform Act of 1969, H.R. Rep. No. 91-413, at 20-21 (1969)).

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tively, upon the self-dealer and the foundation manager if gone unchecked and uncorrected.[110]

Although there are heavy burdens imposed on the founder and the founder's family when operating a private foundation, these are balanced against the benefits of this method of giving. The donor maintains significant control over where the charitable contributions are distributed, and the founder can appoint (1) the initial board of directors if the foundation is a corporation, or (2) the initial trustees if the private foundation is a trust. This is a useful charitable giving vehicle for donors who have a clear philanthropic goal in mind and want to be able to personally execute their specific charitable giving intentions. Private foundations, however, are not the ideal charitable giving mechanism for all taxpayers; for example, such foundations need significant resources that will generate income beyond what is needed to pay legal and accounting fees to remain in operation.

Charitable remainder trusts are a type of tax-exempt trust that is subject to some, but not all, of the private foundation excise taxes on self-dealing and taxable expenditures. Distributions from charitable remainder trusts are taxed under a special rule known as the ''four-tier'' rule, which aims to have as much of the distribution as possible to be taxable as ordinary income or as a capital gain before the income beneficiary receives anything that is tax-exempt.[111] Charitable remainder trusts may be structured as either charitable remainder annuity trusts or charitable remainder unitrusts. An annuity trust pays the noncharitable beneficiary a fixed dollar amount that is specified in the trust agreement, while a unitrust pays a fixed percentage of the value of the trust property. The payouts from an annuity do not vary year to year, although distributions of a unitrust can fluctuate based on the increase or decrease in value of the trust.[112] Estate planners generally recommend a unitrust for younger individuals due to its ability to ''cope with inflation'' and its ''greater flexibility for other purposes.'' Conversely, older individuals might prefer the annuity trust because payments are not subject to short-term risks of assets that might fluctuate in value or changes in interest rates. In order to constitute a charitable remainder trust, the amount or percentage distributed to income beneficiaries each year must not be less than 5% of the value of the property in the trust. The trustee does not have the discretion to pay the income beneficiary more or less than what is in the trust agreement. Payments may be made over concurrent or successive lives to income beneficiaries.

A **charitable lead trust** is an irrevocable trust structured to provide financial support to one or more charities for a set term. At the conclusion of the trust term, the remainder is distributed to non-charitable beneficiaries, such as family members.

Donor advised funds have become the cornerstone of modern philanthropy and have surged in popularity in recent years.[113] The largest commercial donor advised funds is the Fidelity Gift fund, which in 2017 made a record 1 million donor recommended grants, totaling $4.5 billion.[114] These funds resemble a version of the typical private foundation and afford donors a measure of control and involvement without being under the donor's explicit control.[115]

The Pension Protection Act of 2006 provided the first statutory definition of a donor advised fund as a ''fund or account (i) which is separately identified by reference to contributions of a donor or donors, (ii) which is owned and controlled by a sponsoring organization, and (iii) with respect to which a donor (or any person appointed or designated by such donor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor.''[116]

There are many advantages of a donor advised fund. They are easier to create than a charitable trust or a private foundation; moreover, donors do not need to select the recipient charity at the year's end but can elect to defer that decision while still receiving the tax benefits in the year of the contribution despite having delayed the decision on recipients.

CONCLUSION

This article has provided an overview of many of the estate planning concerns for modern families. Estate planning professionals can do a better job in accommodating a wider array of clients by keeping in mind this diversity of issues. To help identify your client's unique circumstances and needs, it is helpful to develop an extensive client questionnaire covering issues common to modern families. Because the shape and constitution of families and their needs will continue to evolve, the other focus in planning must be to preserve flexibility.

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[110] §4941(b).

[111] §664(b); Christopher R. Hoyt, *Transfers from Retirement Plans to Charities and Charitable Remainder Trusts: Laws, Issues and Opportunities*, 13 Va. Tax Rev. 641, 681 (1994).

[112] Goffe, Kamin, Leimberg, Ch. 20.

[113] Emanuel J. Kallina II et al., *Charitable Giving with Donor Advised Funds - Part I*, Planned Giving Design Center (Apr. 18, 2000).

[114] Fidelity Charitable Gift Fund, *2018 Annual Report* (2018).

[115] Darryll K. Jones, *Regulating Donor Advised Funds*, 75 Fla. B.J. 38, 40 (2001).

[116] §4966(d)(2)(A).

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