More Expensive by the Dozen:

TWELVE FREQUENT ESTATE PLANNING MISTAKES WHICH CAUSE MOST ESTATES PLANS TO BE FLAWED

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FREQUENT ESTATE PLANNING MISTAKES

A high percentage of estate plans go awry simply because of the failure to properly consider and address important estate planning goals. The authors believe it is a very safe assertion that well over ninety percent of estate plans have a serious flaw that could result in a substantial estate planning goal of clients not being obtained. These include: loss of family harmony; the estate or trust being mismanaged; substantial unnecessary administrative or legal costs being incurred; substantial potential tax-savings benefits being lost; or estate or trust assets not passing to the intended parties or in their intended amounts. In fact, the authors believe it is an equally safe statement that at least fifty percent of the time such flaws will actually manifest themselves in the post-death administration of an estate or revocable trust and cause substantial damage to such goals.

Unfortunately, unless clients are apprised of the benefits which can be achieved by a thorough and comprehensive estate plan, they normally will be unaware that their particular plan is significantly flawed. As well stated by the adages, "You don't know what you don't know" and "Ignorance may be bliss, but it can be expensive." The discussion below addresses the most common areas where such mistakes are made and the methods to avoid them.

1. Risking Destruction of Family Harmony by Naming a Child as Executor or Trustee.

There is little question but that the most frequent, as well as most damaging, estate planning mistake is not giving sufficient consideration to the effect on family dynamics and proper trust or estate administration in the naming of an Executor of the estate under a Will or a Trustee of a Revocable Trust. Almost all of such failure is attributable to estate planning counsel either not spending sufficient time with clients on this issue, not being knowledgeable of the factors that weigh on such decision, or simply being insensitive to the importance of the issue. Consequently, the vast majority of estate planning counsel simply rely on the client's predilection in this regard, with little to no discussion as to the various factors that should go into such decision and their implications.

PREDILECTION OF PARENT TO NAME A CHILD

Upon the death of the client, assuming there is no surviving spouse who could so serve, such predilection of most parents is to name a child or children to serve as fiduciary of their estate or Revocable Trust following their deaths. This is a normal instinct, with the parent typically choosing the oldest child or child living close to the parent to serve as such fiduciary at such time, the time at which their property is passing to their children. This is an understandable propensity, for parents are prone to view such post-death administration as a family matter, rather than its true character as a legal and financial matter. As such, most parents will instinctively believe their child is the proper financial fiduciary to be their surrogate in carrying out their dispositive wishes.

CAUSES OF FAMILY DISHARMONY DUE TO CHILD SERVING AS FIDUCIARY

This strong tendency of a parent to name their child or children as Executors or successor Trustees of a Revocable Trust creates a very volatile emotional situation when the parent has more than one adult child. The consequence is a frequent loss of the most valuable "asset" a family possesses: its harmony. Based on interviews and polling of a very large number of estate planning professionals, the authors believe that due to a multitude of factors discussed below, naming a child as financial fiduciary in such situation will result in significant family discord approximately one-third to forty percent of the time in such situations.

What may be viewed as a great compliment by a child chosen as financial fiduciary is often viewed as a personal affront by other children, who tend to conclude that their parents either did not trust them or believed they were not sufficiently competent or responsible for the position. Naming multiple children to serve as co-fiduciaries may avoid the resentment of children not being chosen, but it tends to exacerbate tension levels by involving multiple children in every administrative decision.

Beyond resentment as to the child or children chosen as financial fiduciaries, there are a myriad of other potential causes for such discord, including sibling rivalry, personality clashes, financial conflicts of interest and unwarranted and unwanted in-law participation. It can also result from disagreements over the management of the estate or trust. For example, other family members are prone to "second guess" a decision of another family member serving as fiduciary (e.g., the selling of property of the decedent which subsequently appreciated in value, retaining property which subsequently incurred a loss in value, or simply questioning whether the highest value was achieved in the sale). There also may be disagreements with regard to whether the estate or trust estate was properly invested, whether the child serving as financial fiduciary complied with statutory requirements regarding inventories and accountings, and the distribution of the assets of the estate or trust (particularly personal items such as jewelry and household furniture and furnishings, more fully discussed below). There can be disagreements with regard to the fee taken by the family member as fiduciary (other family members often expect that the fiduciary family member should perform such services for nothing), suspicions as to whether all of the decedent's property was appropriately disclosed or reported, questions as to the accuracy or completeness of accountings, questions as to the degree of communication and consultation of the child serving as financial fiduciary with other family members, resentment by the child serving as financial fiduciary of the estate or trust with respect to such inquiries (perceiving

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them to be a lack of trust), discord caused by the financial fiduciary's real or perceived lack of appreciation for the effort expended in managing the estate or trust, and conflicts caused by the lack of understanding of children not serving as financial fiduciary as to the time necessary to ensure payments of taxes and bills of the decedent prior to concluding the administration of the estate or trust. Non-fiduciary siblings often deem valuations placed on property distributed in kind, such as real estate and closely held businesses to be skewed in favor of the child serving as financial fiduciary.

Inexperienced family members are also much more prone to making mistakes in the management of the estate or trust than are experienced third parties serving as Trustee. In addition, there are frequent disagreements on the speed at which the administration is progressing or the timing of distributions. Other family members can be often very unforgiving with respect to any such real or imagined management mistakes, particularly if they result in substantial additional costs or taxes.

The family schisms that can occur as a result of such disagreements frequently endure for a lifetime. Most individuals simply fail to appreciate either the magnitude of the risk or its deleterious impact on family harmony. Moreover, such family disharmony risks do not redound solely upon children not chosen as the financial fiduciary. Children chosen as financial fiduciary can end up resenting both their parent's appointment and their siblings. Fiduciary responsibilities can consume substantial amounts of the financial fiduciary's time, negatively impacting both family life and employment. Disagreements and contentious disputes frequently arising between the financial fiduciary and siblings regarding the administration of the estate or trust can exact a considerable emotional toll. Adding insult to injury, the financial fiduciary's services are typically unappreciated by siblings who usually ungraciously expect such services to be provided at no compensation.

In short, family dynamics are clearly a significant hindrance, not a benefit, in the administration of an estate or trust. No child can be expected to be objective in that situation regarding another child's discharge of their fiduciary duties. Placing a child as financial fiduciary in this highly emotional environment following the loss of a parent, with emotional and financial conflicts of interest among children regarding the administration of a parent's estate or trust, is extremely risky to the very asset families tend to value the most, their family harmony.

INCLUDING "IN TERROREM" CLAUSE DOES NOT AVOID FAMILY DISHARMONY

Some estate planning practitioners have a "knee jerk" response that the best solution to avoid family disharmony, particularly when a child is serving as a fiduciary, is to include what is termed an "in terrorem" or "no contest" clause which provides for a child or other beneficiary to be disinherited if he or she challenges the acts of the fiduciary or any other aspect of the estate plan. Such clauses are not given legal effect by the courts if there is probable cause for bringing any such challenge. Nonetheless, the inclusion of such a clause will normally only serve to aggravate family disharmony, for a child who is dissuaded from bringing any challenge to the administration of the estate or trust by the potential impact of such a clause becomes even more unhappy with a sibling serving as fiduciary by virtue of having no redress. Moreover, such clauses often have a chilling effect on bringing any challenge to the actions of a fiduciary, even challenges which are warranted when the fiduciary is improperly performing his or her duties, including committing malfeasance.

This is not to say such clauses do not have their place. For example, they can be included to discourage challenges to the estate plan the estate planning attorney knows would be without merit, e.g, the testator under the Will or Grantor of the Revocable Trust was incapacitated or the plan was procured by undue influence. In such circumstances, the clause should be drafted with narrow precision for that purpose.

But a family harmony enhancer when a child is serving as a financial fiduciary it is not and normally such a provision should not be made applicable to such situation. The estate plan is normally far better served by including provisions which encourage mediation and/or arbitration of fiduciary management issues when another family member is serving as financial fiduciary. This option does not discourage proper redress of management issues while providing a non-judicial forum for its resolution which is far less antithetical to family harmony.

NAMING INDEPENDENT FIDUCIARY NORMALLY DESIRABLE AND COST EFFECTIVE

Naming a financially astute outside independent party, such as a bank trust department, trust company, or certified public accountant to serve as fiduciary normally is the better choice to greatly enhance the prospects of family harmony in the administration of an estate or Revocable Trust. It is also likely to greatly increase the likelihood that the estate or Revocable Trust is well managed and relieve family members from having to undertake this burden. If family harmony among children has already suffered prior to the decedent's death, the benefits of going outside the family in naming a fiduciary are no less important. In that circumstance, a child serving as

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fiduciary would likely incur even greater animosity from siblings and the prospect of family litigation and resultant attorney fees can be quite significant.

Any resultant additional costs in naming a fiduciary outside the family is typically relatively modest, perhaps averaging at most 1% of the value of the estate or trust assets, assuming there is no substantial family discord as a consequence and the family member secures adequate accounting and legal expertise such that the trust or estate administration is competently handled. This is because a professional is usually going to incur less cost from other outside professionals (e.g., accountants) in the management of the estate or trust than would a family member. In fact, if the greater efficiency and expertise of a professional fiduciary ensuring the estate or trust is properly managed, as well as the potential additional costs of family discord are factored in, there is likely to be no additional costs, and perhaps even a substantial cost savings, in selecting an independent experienced fiduciary. Finally, if the family member is also charging a fiduciary fee which is factored into the equation, the total administrative costs often will typically leave the other family members with shares far less than they would have been had a non-family member served as fiduciary.

It is also important to keep in mind that if the independent fiduciary is a bonded bank or trust company, or a certified public accountant whose duties as a fiduciary would be covered by malpractice insurance, there should be no loss due to negligence or malfeasance. Independent professional fiduciaries are typically quite averse to any litigation which would adversely impact their professional goodwill. Even ignoring the fact that the risk of an estate or trust not being well managed is usually much greater when a child is serving as financial fiduciary, including the possibility that a child may purloin assets of the estate or trust for his or her own benefit, the possibility that any loss incurred by the improper or negligent discharge of the fiduciary's duties may not be able to be economically redressed is also much greater when children are serving as a financial fiduciary. First of all, the provisions of the Will or Revocable Trust typically waive the liability of children serving as a financial fiduciary for losses that are incurred while they act in good faith. In addition, even if the actions of the child as financial fiduciary are subject to legal redress, children who cause losses through malfeasance are often judgment proof. Third, much greater, often unrecoverable, legal costs tend to be incurred in seeking any monetary redress from a sibling serving as financial fiduciary. Such economic damages are in addition to the untold emotional and family harmony damage that is typically caused by pitting children against other children with regard to such issues.

HYBRID STRATEGIES TO PRESERVE FAMILY HARMONY WHILE PROVIDING FOR FAMILY INPUT

The benefits of going "outside the family" in the selection of a fiduciary to avoid the foregoing adverse economic and family harmony consequences can be achieved without the loss of indirect control of the family member or members who would otherwise have been named to serve as a fiduciary. Such family member(s) may be given the right under the provisions of a Revocable Trust to discharge the named Trustee for any reason and name another Trustee (other than the family member if retaining family harmony is the primary goal). This "Trustee Discharger" provision is discussed more fully below.

The "Trustee Discharger" strategy is normally far preferable to naming an independent fiduciary to serve as co-Trustee with a child. Although having a professional independent Trustee serve as co-Trustee will reduce the "air of suspicion" regarding a child's discharge of his or her fiduciary duties and give a much greater assurance that the estate or trust will be well managed, it will still carry with it the possible resentment of other children who were not so named, require a child to spend a considerable amount of time away from family and possibly their employment to properly discharge their duties (which the other children will expect to be uncompensated), and will not avoid the child who is serving as co-Trustee from being blamed by siblings for all management decisions with which they disagree.

BENEFIT VERSUS RISK ANALYSIS

Deciding whether to go outside the family in naming a financial fiduciary should be based upon whether an individual is willing to take the foregoing substantial family harmony risks in naming a family member in order to save any additional cost (albeit normally quite moderate, if there is any additional cost at all) that might otherwise be incurred in having a non- family member serve as fiduciary. Such decision should also factor in the stress and anxiety it can create in family members and the typical substantial effort it will require of family members to adequately perform in such capacity, thus taking time away from their family or employment.

CONCLUSION

In sum, naming a child as financial fiduciary in a multi-child family has not only a very high risk of damaging, if not destroying, family harmony, an asset which most families consider to be more valuable than all of their worldly assets put together, but substantially increasing administrative costs and the amount of assets they pass to their family in the process. The scope of this problem appears to be sizable. Based on decades of estate planning experience and consultation with numerous other estate planning professionals, the authors believe approximately eighty percent of parents name a child or children as the financial fiduciary of their estate or trust

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in circumstances where there is no surviving spouse. The authors' experience is that only about twenty percent will do so after a full discussion of all of the relevant factors, including those discussed above, which should impact that decision.

The same potential family harmony problems can be engendered, albeit to a somewhat lesser extent, by naming a child to serve as agent under a parent's power of attorney. Such problem is somewhat less in this circumstance due to the fact that the greatest risk to family harmony is when a parent has passed away and a child is serving as financial fiduciary regarding the distribution of the parent's estate among children.

Choosing a competent and experienced third-party financial fiduciary, such as a certified public accountant or bank or trust company, not only greatly lessens the risk of family disharmony at a normally quite modest cost (perhaps one to two percent of the value of the estate or trust on the average), it furthers the proper administration of the estate or trust and relieves a child of the burden of such responsibility. Unfortunately, only in a small minority of situations are parents sufficiently counseled by estate planning attorneys on this overarching estate planning issue. As a result, a parent's choice of financial fiduciary is usually more the product of an instinctive reaction to the estate planning attorney's inquiry than an informed and well- reasoned decision.

A fuller discussion of this issue is found in the article on our website titled "Preserving Family Harmony."

2. Not Properly Addressing the Distribution of Tangible Personal Property Items.
As mentioned above, an aspect of estate planning and trust and estate administration which is particularly problematic, while potentially engendering substantial family disharmony in the process, is the distribution of tangible personal property under the provisions of a will or revocable trust. Due to its high susceptibility to result in family disharmony, and there being little discussion of this issue in estate planning articles or seminars, or typically by estate planning attorneys with their clients, such nettlesome situation merits a more extended discussion.

Problems arise in this area from two perspectives. First is the choice of the financial fiduciary who or which is to handle such distribution under the provisions of the will or revocable trust. The second perspective is the method or procedure employed to handle such disposition and the provisions of the instrument which govern it.

Mourning the loss of a parent, usually a surviving parent, children are understandably at that time in a fragile emotional state. Many of such items typically have a very high sentimental value among children and can be a touchstone to their family heritage. Impacted by sibling rivalry and possessed of intense emotional and financial conflicts of interest, children's viewpoints on the fairness of their distribution usually have only a coincidental relationship to objectivity. Unwanted in-law participation frequently exacerbates already high tension levels. When these factors are infused into an estate plan typically devised with little sensitivity to

family harmony issues, a "perfect storm" of family disharmony enabling factors is presented. The result is that the disposition of such items among children following a parent's death is a major contributor to the family disharmony which all too frequently accompanies the administration of an estate or revocable trust.

CHOICE OF FINANCIAL FIDUCIARY

Problems surrounding the distribution of tangible personal property items among children cannot be adequately addressed without discussing the importance of the choice the financial fiduciary, be it an Executor or Trustee, entrusted to handle such disposition. As discussed above in this outline, this choice has a great impact on family harmony during all phases of the post- death administration of estates and trusts, not the least of which is the distribution of such items.

As a consequence, there is little doubt but that much of the very high frequency of significant family disharmony which occurs in the post-death administration of an estate or trust in a multi-child family is directly attributable to children having served as financial fiduciary. Due to the extremely sensitive nature of the disposition of tangible personal property items, family harmony risks in the estate or trust administration process are often at their zenith at that time. As also noted above, family dynamics which become pronounced when a child serves as financial fiduciary are a hindrance, not a benefit, to the objective distribution of such items. Moreover, any family disharmony resulting from the distribution of such items usually occurs early in the estate or trust administration period and tends to pervade not only throughout the remaining administration period, but can endure thereafter for the remainder of the children's lifetimes.

Thus, the inherent problems in the distribution of tangible personal property items are unquestionably exacerbated if a child or children, rather than a knowledgeable, independent party, is chosen as a fiduciary to handle the process.

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SECURING THE PERSONAL RESIDENCE

When a parent passes away as the sole occupant of a personal residence, it is normally desirable for the personal residence to be secured by changing the locks (and installing an alarm system if one is not already present) as soon as possible following the parent's death. Otherwise, the vacant residence is vulnerable to burglaries and its contents to theft by a known or unknown third party having access to a residential key. In addition, as most estate planners have unfortunately experienced, in the absence of securing the residence children or members of the decedent's family have been known to surreptitiously take tangible personal property items from the premises outside the prescribed distribution process under the estate plan. A child's access to the premises will at the very least often breed suspicion among other children that such untoward takings may have occurred. Such problematic circumstances can be avoided by not permitting access of family members to the residence when the financial fiduciary is not present until all important tangible personal property items have been distributed or otherwise disposed of in the estate or trust administration process.

For such authority to be exercised with the alacrity it warrants, the financial fiduciary needs to be aware of this directive at the time of the parent's death. If the financial fiduciary was not made so aware during the parent's lifetime, another person entrusted with such responsibility should make the financial fiduciary aware at the time of the parent's passing. Otherwise, the financial fiduciary might not become aware of the directive until a later time after the administration of the estate or trust is commenced. Even then, securing the personal residence of the decedent is much more practically and timely implemented by a trustee of the parent's revocable trust than by an executor or personal representative under the provisions of the parent's will. The former financial fiduciary would possess immediate authority to do so following the parent's death as successor trustee, while the latter fiduciary would have no such authority until judicially appointed as personal representative of the decedent's estate.

Irrespective of when such authority is exercised, it is likely to incur resentment in children who tend to view such action as "heavy handed," cold, exclusionary or distrustful of them. Testamentary instrument provisions or parental directions left for the financial fiduciary with the testamentary instrument can militate against this consequence by directing the financial fiduciary to secure the premises in the above manner. Such direction would avoid any specific mention of children, but simply enunciate its purposes of protecting the contents against burglary or theft by any unknown third party who might have access to a key and avoiding any question as to the integrity of its contents until tangible personal property items are distributed pursuant to the provisions of the testamentary instrument. Thus, in complying with such instruction, the financial fiduciary would not be acting upon the fiduciary's initiative, but simply following the parent's direction.

Despite the foregoing benefits of securing the personal residence, its implementation by a child serving as financial fiduciary carries with it family disharmony risks which may outweigh its benefits. Securing the residence and insisting that no sibling have access to the residence outside the financial fiduciary's presence can be quite divisive, most particularly if there are other children in possession of a key to the residence. The fact that a child would be simply following the parent's directive may not sufficiently assuage the resentment of siblings. Moreover, such resentment may spill over into a suspicion that the child serving as financial fiduciary improperly took tangible personal property items from the residence. Such problems illustrate yet another negative family harmony, as well as practical limitation, in appointing a child to serve as financial fiduciary.

ACHIEVING ECONOMIC PARITY AMONG CHILDREN

The choice of financial fiduciary aside, there are two other fundamental causes of estate plans engendering family disharmony in the post-death disposition of tangible personal property items among children. First, they may actively foster such disharmony by specifying a distribution method providing a monetary incentive for children to compete against each other for such items or which could result in unequal monetary benefits being conferred among them. Second, they may passively permit such result by reposing discretion in the financial fiduciary to choose a distribution method which could occasion either such adverse consequence.

To avoid creating an unfavorable family harmony environment for the disposition of tangible personal property items, provisions in the testamentary instrument must satisfy two basic principles. First, they must foster an atmosphere in which children's desires with respect to tangible personal property items are motivated not by their monetary value, but principally by their sentimental value (such as with respect to a family heirloom) or a combination of their sentimental and personal use value (such as a parent's furniture) to the child. Secondly, the distribution of such items must have no adverse impact on a child's ultimate economic share of the estate or trust. Satisfaction of the former prerequisite is necessarily dependent upon satisfaction of the latter.

A simple requirement in the testamentary instrument for the equal value division of such items among children is insufficient. Family disharmony can nonetheless result from children seeking items they do not want, but which are wanted by a sibling, in order to achieve an actual or perceived equal value distribution of all items subject to distribution. Further, such provision fails to recognize that value parity in the distribution of such items is often impractical under the circumstances. Instead, enhancement of family harmony in the

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process of distributing tangible personal property items requires provisions in the testamentary instrument which properly adjust for any disparity in the values of such items actually distributed among children. This adjustment would come either from the sale proceeds of any items not desired by children or from the children's shares of the residue of the estate or trust.

In order to be able to monetarily adjust for disparate values of tangible personal property items distributed to children, such items need to be valued by the financial fiduciary. Valuations of such items would be required in any event in circumstances where a federal or state estate or inheritance tax return was required to be filed. Items having a significantly greater value or personal usage as a collection or set, rather than individually, would be valued and distributed as one item. To make such appraisals as economical as possible, the testamentary instrument should require the financial fiduciary to procure formal appraisals from knowledgeable and experienced appraisers only with respect to tangible personal property items judged to be of substantial value, e.g., antiques, paintings, jewelry and collectibles. A more economical "walk through appraisal" approach from knowledgeable estate sales persons would be authorized with respect to other tangible personal property items which, although not of substantial value, were perceived to have more than a nominal value (say perhaps in excess of $50 adjusted for inflation from the date of the testamentary instrument). All other items having a de minimis or no value would be given a value of zero in the distribution process.

As the economic parity provisions of the testamentary instrument favor selection based upon sentiment, it follows that children would normally select items they would not have purchased in the open market. Moreover, children would not be expected to net the full retail fair market value of selected items should they later choose to sell them. In recognition of these factors and the parental desire for true economic parity among children, the parent may want testamentary instrument provisions to direct that such appraised values of items be set at somewhat less than their actual fair market value on the open market, say eighty percent of such value.

To further ease the financial fiduciary's task and reduce administrative costs in procuring such value determinations, the financial fiduciary would be directed to circulate a preliminary list of the parent's tangible personal property items available for distribution to children which are to be later given an ascribed value greater than zero in the distribution process (thus being in need of an appraisal). The financial fiduciary would reference with children the economic parity provisions in the parent's testamentary instrument regarding distributed items and inform them that such provisions are designed (and should specifically so state therein) to incentivize children to select items not on their monetary value, but on their sentimental or personal use value. When all children have noted items in which they may have an interest, unless valuations were otherwise required for an estate or inheritance tax return, only those items would have to be appraised and valued for the purpose of the distribution process.

The above-determined values of tangible personal property items then would be given to children prior to the distribution process, thus providing them with sufficient information to make an informed decision relative to comparing an item's sentimental or personal use value with its monetary value.

DISTRIBUTION OF TANGIBLE PERSONAL PROPERTY BY LIST

The laws of most states, including Kansas, assist in the disposition of tangible personal property items by providing, without need of the formalities of wills, for an individual to dispose of tangible personal property by simply leaving a written list (hereinafter referred to as a "Personal Effects List" or simply "List"), provided there is a reference in the will to such optional List. These laws usually require that the List either be in the handwriting of-or signed by-the testator. Further, the List must describe the items with "reasonable certainty" so that the items are easily identified and properly distributed. Some states, such as Kansas, repose similar authority in grantors of revocable trusts, although such disposition should be able to be effectuated even in the absence of specific statutory authority simply by drafting the List in the form of a trust amendment. Identifying furniture and household effects items by referencing numbers attached to the back of the item, rather than by description, although a time-honored technique employed by many parents, is far from foolproof and should be avoided. As most estate planners have unfortunately experienced, such numbers can become quite mobile following a parent's death.

If parents duly provided for the disposition of all tangible personal property items of interest to children either in their testamentary instruments or under the provisions of a Personal Effects List, potential resentment by children of parental choices in their disposition aside, family harmony would not be impacted as a result. However, given the normally large number of such items, their changing makeup, the vicissitudes of parental desires regarding their disposition, and the reluctance of parents to undertake this task, this is understandably a far from normal occurrence.

Nonetheless, rather than leave the post-death disposition of tangible personal property to methods discussed below having at least some risk to family harmony, parents should be strongly encouraged by their estate planning attorneys to utilize such authority as much as practically possible. A Personal Effects List should be created which at a minimum includes items the parent perceives to

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be of the most significant sentimental or personal use value to children. Preparation of the List should also reduce both the impact and the possibility of a contentious, and frequently baseless, assertion by a child that a parent "told me that [a particular item] would be mine." If true, it would have been expected that such item would have been included on the List.

The preparation of a Personal Effects List is particularly important in second marriages when the default provision in the testamentary instrument provides for the disposition of tangible personal property items to the surviving spouse. In that situation, the parent should ensure the List directs the disposition of items important to their children rather than permit such items to pass under the default provisions to the surviving spouse, who may not later distribute such items among the predeceased spouse's children by gift or testamentary instrument or simply not survive long enough to do so.

Personal Effects Lists have an unfortunate habit of "disappearing" when kept in an insecure place, such as in an unlocked cabinet or drawer in the parent's residence, or even in a secure place, such as the parent's safe deposit box, when a child is named as successor financial fiduciary. Thus, the List should be placed with the parent's original documents in a sealed envelope in a safe deposit box when someone other than a child is named financial fiduciary. If a child is named as financial fiduciary, a duplicate original should also be given to the parent's attorney. In other circumstances, the parent's attorney should at least be given a copy of the most recent List.

The Personal Effects List should be revisited periodically, removing any items which may have been lost, sold, or destroyed in the previous year, and adding items acquired during the prior year which they believe might be of sentimental or personal value to their children. The parent also may find it desirable to make a video of such items. An accompanying audio component could reference items on the List and perhaps also outline the family heritage of heirlooms for the benefit of children and their descendants.

PARENTAL DISCUSSIONS WITH CHILDREN IN PREPARATION OF LIST

Prior to creating a Personal Effects List, it is advisable for parents to consider discussing with their children their preferences in receiving tangible personal property items following their death. Rather than leave parents to their own devices in such discussions, estate planning attorneys should outline a strategy for their clients to use that garners sufficient information for the parent to make an informed and equitable decision (from the parent's perspective) while preserving family harmony in the process. The procedures outlined below typically satisfy both such objectives.

Parents choosing to discuss the disposition of tangible personal property items with children should preface such discussion by advising them that the distribution of such items following their death is designed to maximize family harmony, the parent's most import estate planning goal, while achieving monetary equality among their children in their disposition. Consequently, children would be made aware that any inequality in values in their disposition among children will be adjusted from other assets in the estate or trust. With economic consequences being removed as a factor, children would be instructed to make their choices based solely upon their sentimental or personal value.

Each child would then be told to prepare a list of items they would like to receive following the parent's death, listing them in order of their priority. Children would be informed that in circumstances where a given item is desired by more than one child, the parent would determine its disposition in as fair a manner as possible. Children could be told that the parent would take into consideration the priority placed on such item by mutually interested children and the overall number and priority of requested items of children not desired by other children. If all factors were equal, the parent could indicate the choice would be made strictly by random selection.

Further, the parent would advise children that lists submitted would not be shared with other children, nor would the specifics of the parent's Personal Effects List be disclosed to any child until the post-death administration of the parent's estate or trust in order to further family harmony estate planning objectives. Children having knowledge of the List conceivably might try to persuade parents to make changes to the List, seek current distribution of such items, or take umbrage at their disposition to other children. They also might resent other children desiring the same items they wish to receive or believe other children were given an unfair preference by parents.

Following its preparation, in order to preserve confidentiality the Personal Effects List should not be stored in a place where it might be accessible to a child. Rather, as noted above, it should be kept in a secure location with the parent's attorney being given a copy of the List.

SINGLE LIST FOR MARRIED COUPLE

In the common situation where married parents provide for all tangible personal property items to pass to the survivor and then pass to their children upon the death of the first parent, a high percentage of parents will see no need to prepare a Personal Effects List

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while both are living. Instead, that task is likely to be left for the survivor. Obviously, this is not a prudent strategy. The couple may die simultaneously or the surviving spouse might pass away within a short time of the predeceased spouse, leaving insufficient time for the survivor to prepare the List. Moreover, incurring such an extended delay in the preparation of the List significantly diminishes the chances of its eventual preparation.

Preparing the Personal Effects List while both parents are living need not necessitate the inconvenient preparation of a List by each parent. Instead, the couple may create one combined List. The List would specifically direct for the disposition of tangible personal property upon the death of the survivor. To facilitate the process, it is desirable for their estate planning attorney to prepare a form for this purpose which references an attached exhibit. The exhibit would have columns for the items and named distributees, noting the need for a description of an item sufficient for its proper identification.

The exhibit could also provide, item by item with a "yes" or "no" marking, whether the value of specific items disposed of by List are to be taken into account regarding the disposition of any remaining tangible personal property items not included on the List. Normally, as noted above, it is advisable for the provisions of the testamentary instrument to be designed to ensure that the disposition of all such items is intended to achieve an equal monetary disposition to all children. Consistent with the concept of equalizing monetary distributions of such items, it would be expected most items would be marked with a "yes." Nonetheless, there may be a need to make an exception. For example, a "no" marking might be appropriate in extenuating circumstances, such as where a parent has designated a particular item received as a gift from a child to pass to the child who was its donor. If so, it would be both helpful and desirable from a family harmony perspective for the reason for such non-advancement treatment to be noted thereon.

TIME PERIOD FOR LOCATING LIST

In addition to including any requisite provisions in the testamentary instrument necessary to validate the Personal Effects List, a reasonable time frame should be specified for the discovery of the List following the testator's death, say perhaps sixty days. If, at the expiration of such period no List has surfaced, the financial fiduciary would be authorized to conclusively presume that no List exists and proceed to distribute such items as provided in default thereof under the provisions of the testamentary instrument. Thus, such distribution would be final even should a List later surface.

DISTRIBUTION OF REMAINING TANGIBLE PERSONAL PROPERTY NOT DISPOSED OF BY LIST

Unfortunately, as noted above, only a minority of parents even prepare a Personal Effects List disposing of their tangible personal property. Those that do usually leave a List that is far from comprehensive. Thus, in the vast majority of situations, there is a significant amount of tangible personal property items not disposed of by a List. As such, it is important that the testamentary instrument appropriately address this situation by providing a mechanism for the disposition of such items not disposed of by a List that is most facilitative to the maintenance of family harmony. Placing the discretion for such disposition method in the financial fiduciary may incur risks beyond simply the financial fiduciary choosing a method not conducive to its maintenance. It leaves the financial fiduciary vulnerable to children asserting that the financial fiduciary was arbitrary in the method chosen. If a child is chosen as financial fiduciary, it risks disagreements with siblings over the method chosen and the financial fiduciary being blamed for an outcome a sibling deems unfavorable.

The distribution procedures that are favorably discussed below are designed to satisfy the two aforementioned family harmony prerequisites, i.e., providing an incentive for children to choose tangible personal property items solely on their sentimental or personal use value

and ensuring their distribution does not affect a child's ultimate economic share of the estate or trust. However, as will be noted in the discussion, their procedures can vary on their impact on family harmony. All such methods assume the financial fiduciary has determined the values of tangible personal property items in the manner discussed above and provided such values beforehand to the children. Strictly from a logistical standpoint, financial fiduciaries may find it favorable to implement them in two phases, first as to items having an ascribed value, then as to items given a value of zero.

DISTRIBUTION BY AGREEMENT OF CHILDREN

It would appear to be both reasonable and consistent with parental desire for the testamentary instrument to give children a reasonable amount of time, say sixty days, following a parent's death, to agree among themselves on the disposition of tangible personal property items not disposed of by List. Such period would correspond with the above-discussed period for the List to be located. If there are any minor children at the time of execution of the testamentary instrument, such authorization should have a condition precedent that there be no minor child at the time of such agreement. Items not disposed of by agreement would be distributed among the children under one of the methods discussed below.

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However, clients should be counseled that such authorization for agreement by children possessed of emotional and financial conflicts of interest is fraught with the possibility of contentious arguments. This is where an independent third party serving as financial fiduciary could provide a facilitative role. The third party could be authorized to request each child to make a list of tangible personal property items the child wishes to receive. To the extent only one child desires a specific item, the financial fiduciary could award such items to the child who requested them. To foster objectivity and rational discourse, the third party financial fiduciary could moderate discussions among children regarding the distribution of the remaining items desired by more than one child. Due to their strong potential to have a fractious effect on family dynamics, in-laws should be specifically excluded from such discussions.

A child serving as financial fiduciary would be expected to be much less objective, and much more divisive, than an experienced third party in this role. Thus, rather than risking vitriolic arguments on the division of such items when a child is serving as financial fiduciary, consideration should be given to leaving such disposition entirely to one of the alternative distribution methods discussed below. Moreover, the request of a child serving as financial fiduciary for in-laws to be excluded from such meeting can incur significant sibling resentment and is yet another peril to naming a child as financial fiduciary.

DISTRIBUTION BY AUCTION

One distribution method for remaining tangible personal property items is by auction. The auction could be directed to be private, with each child either to use their own money or being given an equal amount of either "virtual money" to bid on items of their choice, with the proceeds in the former circumstance being distributed equally among the children. Alternatively, the testamentary instrument could provide for a public auction, whereby the attendees would be children and the general public, the proceeds being distributed equally among the children. Whatever the chosen auction method, having already valued items under the above described method with respect to which any child has expressed an interest will aid children determining the appropriate bid.

If the auction involves actual money, children ostensibly will be equally treated from an economic standpoint. The proceeds would be assigned to the residue of the estate or trust, where it would be proportionately distributed among the children, or perhaps more desirable administratively, the cumulative purchase price of items purchased by each child would simply be charged as an advancement against each child's shares of the residue. However, this may not be the substantive result. Children, when competing against each other in the bidding process, may pay well in excess of the fair market value of items, thereby proportionately diminishing the share they otherwise would have received in the trust or estate to the extent of such excess.

Nor is this procedure without significant family harmony pitfalls. Children who do not have significant outside assets may resent the purchasing power of siblings to procure desired items, particularly if the parent's estate does not leave them a substantial residuary share. Children who have to bid beyond the market value of an item in order to get it may resent other children who drove up the bid price. Children who were outbid by other children may resent other children to whom items were lost in the bidding process. If the auction is open to the public, it can have the further deleterious consequence of strangers walking away with family heirlooms.

If a silent, as opposed to an open, auction is held, the bids would be sealed and not opened until all bids were in. If a child is serving as financial fiduciary, unless the bids are opened in the presence of the other children at the close of the auction, there can be suspicions they were reviewed by the financial fiduciary prior to the financial fiduciary making a bid. Irrespective of whether a child is serving as financial fiduciary, once opened, the sealed bids should be shared with all children to ensure process transparency. A sealed bid silent auction has the benefit over an open auction in avoiding confrontation in the bidding process, but it does not avoid the anxiety of children having to determine the purchase price necessary to outbid their siblings and will not avoid the possible resentment of children who have been outbid, particularly with respect to items of high sentimental interest.

The use of "virtual money" in the auction process is more problematic and should be avoided. Although each child is given an equal amount of virtual money to use in the bidding, it creates additional tensions in children having to strategize and compete among themselves in using their limited amount of allocated "money" to ensure they have enough left to secure remaining wanted items. If it is an open auction, they can also become quite resentful of other children when the "money" prematurely runs out during the bidding process. Moreover, as there is no certain nexus between the amount of "virtual money" used in bidding and the market value of such items, economic parity is not necessarily obtained with regard to the value of the items received and there can be no reconciliation in the residue, for there are no proceeds to allocate to the residue.

In short, even if economic parity is achieved among children regarding the proceeds of the auction, the tendency of the auction process to cause anxiety among children, the potential inequity in substantive economic benefits conferred among children due to the bidding process, the possible resentment of children who are outbid by siblings, and the confrontational and contentious nature of the proceedings if an open bidding process is chosen, are aspects that are unavoidably antithetical to the maintenance of family harmony.

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DISTRIBUTION BY LOTTERY

A second distribution method is by lottery. A very common lottery method not consonant with the maintenance of family harmony is the use of a random number selection process determining the sequence of each child choosing a desired tangible personal property item. The sequence is repeated until all desired items have been chosen. Under this method, there is no monetary adjustment among the children for any disparity in the values of items distributed. This method is frequently preferred by estate planners and their clients due to its simplicity without much aforethought. Such method may be embodied in the provisions of the testamentary instrument or simply chosen by the financial fiduciary under authority granted there under. However employed, in failing to provide for economic equality in the distribution of such items, it is inherently not conducive to the maintenance of family harmony. Moreover, it creates some inequity in continuing to favor children who have drawn low numbers in subsequent rounds. The quite frequent use of this distribution method is attributable to parents and financial fiduciaries not being sufficiently advised by their counsel on its adverse effect on family harmony or other distribution methods much more amicable to its maintenance.

However, material variations can be made in such foregoing lottery procedure to yield a lottery method much more protective of family harmony. As with the foregoing lottery method, in the first round the child drawing the number one would choose the first item, the next item would be selected by the child who drew number two, and so forth. However, in the second round, the order would be reversed with the child who had the last number in the first round going first in the second round. The drawing order would again reverse every subsequent round to avoid children drawing the lowest numbers being continually favored throughout the process. Reversing such order tends to "even out" the advantage of children having a preferred initial selection in the process. Moreover, and more importantly, to eschew contentious competition among children to achieve an economic advantage, any inequality in the value of distributed items among children would be charged as an advancement against preferred children's shares of the remaining assets of the estate or trust.

Thus, children would be advised at the outset of such modified lottery procedure that the economic parity provisions in the testamentary instrument favor selecting items principally on their sentimental or personal use value. Consequently, a child would not be expected to feel any compulsion to continue in any subsequent round should there be no remaining items of sentimental or personal use interest. Distribution of items would cease when all children had opted out of their turns. Although this method has some family harmony risk in that children may resent other children selecting an item they desired, it is far more protective of family harmony than the "bidding wars" dynamic inherent in all of the above permutations of the auction procedure.

DISTRIBUTION BY FINANCIAL FIDUCIARY PURSUANT TO TESTAMENTARY INSTRUMENT GUIDELINES

The final distribution method is for the financial fiduciary to distribute remaining tangible personal property items under a method the fiduciary deems fair and equitable without any formal procedure being designated in the testamentary instrument, such as an auction or lottery. This is probably by far the most frequent method under most testamentary instruments, arrived at usually with little or no discussion with clients. If a full discussion of the above options is entertained with a client, giving the financial fiduciary authority to determine the distribution of such items outside a designated formal procedure in the testamentary instrument would result only if the client either could not conclude which method was most desirable or had concluded neither the auction nor lottery method was acceptable. Otherwise, one would assume a specific method would be delineated in the instrument. If such authorization was due to the client concluding neither method was acceptable, it is very important that guidelines for such financial fiduciary to employ be provided in the instrument. Otherwise, leaving the choice of such method up to the financial fiduciary runs a significant risk of the fiduciary selecting a method inapposite to the preservation of family harmony.

For example, the financial fiduciary could be directed to request that children, already possessed of a list of value determinations of tangible personal property items, submit priority lists to the financial fiduciary regarding tangible personal property items they desire for sentimental or personal use value. Items requested by only one child would automatically be distributed to such child. The financial fiduciary would take into account the priority and number of items on the individual lists (including uncontested items received in the initial "child agreement" phase of such distribution) in making a final determination as to the remaining items. To ensure accountability, the financial fiduciary would be required to distribute all lists submitted to the financial fiduciary to all of the children along with the fiduciary's rationale as to their distribution. To the extent the final distribution by the financial fiduciary resulted in disparate values being distributed to children, the provisions of the testamentary instrument would provide that financially favored children would be charged with an advancement against their share of the remainder of the estate or trust.

For obvious reasons, this method has the potential of being quite disruptive of family harmony in circumstances where a child or children are named as financial fiduciary. When an experienced and competent third party is named financial fiduciary, this method is probably the most protective of family harmony, as it removes children totally from the final determination of the disposition of

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such items. However, although only being a small risk in actuality, parents can still be wary the financial fiduciary might exercise such discretionary authority in a capricious manner.

SUMMARY

Providing a time period in which children can agree on a method of distribution of tangible personal property items not distributed by a Personal Effects List is more advisable when a child is not named as financial fiduciary. When a child is named financial fiduciary, it can be problematic to family harmony by risking contentious arguments in the distribution process. Regarding tangible personal property items not distributed by List or by agreement of children, the above-discussed auction method, modified lottery method and distribution by the financial fiduciary pursuant to the guidelines outlined above all incorporate the most important family harmony friendly aspects of achieving economic parity among children and incentivizing children to select items not on their monetary value, but upon their sentimental value or a combination of sentimental value and personal use value.

Nonetheless, such methods do not have an equal impact on family harmony. The auction method places family harmony at significant risk due to competitive aspects inherent in a bidding process, a "sealed bid" private auction procedure having the least such adverse aspects. The modified lottery method outlined above is most protective of family harmony procedurally when a child is chosen as financial fiduciary. When a third party is chosen as financial fiduciary, distribution by the financial fiduciary pursuant to the foregoing guidelines outside a formal auction or lottery process is the most protective of family harmony. On balance, however, the author favors the modified lottery method overall because it avoids the slight risk of an arbitrary distribution by the financial fiduciary under a guideline procedure while only being slightly less favorable to the preservation of family harmony.

MISCELLANEOUS TESTAMENTARY INSTRUMENT PROVISIONS

Providing for a separate Personal Effects List in the testamentary instrument, as well as outlining specific family harmony friendly procedures for the distribution of tangible personal property items and the equalization of disparate monetary values which may result in that process, are not the only pertinent drafting considerations. The testamentary instrument also should include other provisions designed to limit the types of tangible personal property items to be distributed under the personal effects clause, address the disposition of items unwanted by children, and provide practical considerations in their outright distribution and treatment of intangible items.

DEFINITION OF TANGIBLE PERSONAL PROPERTY

A significant problem area in the disposition of tangible personal property items is in their definition. Many provisions governing their disposition either fail to clearly define such items or are too broad in their definition. If the definition of such items is too encompassing, family harmony problems are exacerbated by unnecessarily increasing the number of items which are part of the distribution process and thus could occasion family disharmony. Their definition should be limited to personal use property and thus specifically exclude business and investment property, the latter normally being precluded from being distributed by a Personal Property List under wills.

Moreover, consideration should also be given to further limiting such definition to specified categories of sentimental items (jewelry, scrapbooks, pictures, clothing, heirlooms, etc.) or items of interest for their personal usage (furniture, recreational equipment) which are not of significant value. This would exclude such "big ticket" items as cars, airplanes, and boats, as well as valuable paintings, artworks and collections (such as coin, stamp, and figurines). Such items typically have limited sentimental value, are often more in the nature of investment property, and their significant monetary value can destabilize family dynamics in the distribution process.

Such limited definition also favors estate planning objectives. Tangible personal property items having little or no sentimental or personal use value to children, particularly if they have significant monetary value, are best distributed from an estate planning standpoint through the residuary clause. Residuary assets are normally sold to third parties with the proceeds often left in trust either for management purposes for young, disabled or spendthrift children, or for asset protection and estate tax purposes for older children typically named as trustees of trusts created to hold such assets for their benefit.

DISPOSITION OF UNDISTRIBUTED OR UNWANTED ITEMS

If the outright distribution of tangible personal property items is to be based strictly on sentiment or personal use value to children, it is desirable for the testamentary instrument to include a provision for the disposition by the financial fiduciary of unwanted items or items having no sentimental or personal use value to children. In addition to possessing the discretionary authority to sell such items and distribute the proceeds under the residuary clause, the financial fiduciary should be specifically given the discretion to donate

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items having de minimis value to charitable institutions or dispose of them in any other manner the financial fiduciary should deem appropriate.

PHYSICAL DISTRIBUTION OF TANGIBLE PERSONAL PROPERTY

The testamentary instrument should also address the financial fiduciary's responsibility in the delivery or storage expenses relating to the distribution of tangible personal property items. This issue can come into play when children who are not in the same geographic area as the estate or revocable trust situs request items be shipped and the subject property is of a size, weight or value that its shipping costs (including insurance) could be significant, particularly in relation to the value of the property. It might also arise when the child is currently incapable of picking up the property (e.g., in the military service overseas, disabled, in ill health or under detention) so as to favor storage of the property for a period of time.

These issues should not be left open to interpretation, for they can lead to possible disagreements as to fairness and parental intent, and resultant family dissension. As in many estate and trust administrative issues, such issues can have a level of dissent far in excess of the monetary issue involved. If the financial fiduciary pays such costs without authority in the testamentary instruments to charge the residuary estate or trust share of the child directly benefiting with an advancement equal to such costs, such costs would be borne by all children. Thus, the governing instrument should make it clear that the financial fiduciary is not required to pay the costs for the packing, shipping, or storage of such tangible personal property items passing to children, but instead be given the discretion to pay such expenses in circumstances where such costs are deemed nominal or insignificant. In the event the financial fiduciary decides not to pay such expenses, the child receiving the item would be required to pay such costs or pick up the item within a reasonable period, say forty-five days of being so notified, or the fiduciary would be authorized to sell the item and send the net proceeds to the child.

Regarding the disposition of tangible personal property items to minors, provisions in the testamentary instrument should permit such items to be held either in any residuary trust created for such beneficiaries or by a Custodian to be named by the financial fiduciary under the Uniform Transfers to Minors Act until such beneficiary attains age twenty-one. In the absence of such provisions, state law would normally require the appointment of a conservator to hold such item until the minor attains the age of majority.

ELECTRONIC DUPLICATION OF INTANGIBLE ITEMS

The increasing ease in using electronic reproduction has reduced the importance of actual possession by children of significant intangible parental items such as photographs, letters and legal documents. Consequently, the testamentary instrument should specifically authorize the financial fiduciary to electronically duplicate the pictures, letters, documents and records of the parent for dissemination among all children who desire them, with the costs being borne by all children proportionately according to their shares of the residue of the estate. This helps mollify any potential resentment among children who did not receive the original of the item in the distribution process.

CONCLUSION

The death of a parent is an emotionally tumultuous time for children. When such tumult is infused into a cauldron of financial conflicts of interest, sibling rivalries and the panoply of potentially contentious issues accompanying the administration of a parent's estate or trust, family harmony is placed at significant peril. The administrative task of distributing tangible personal property items among children in such environs is particularly problematic, for it involves items of great familial interest and emotional significance to children. If this very precarious post-death administrative task is not properly and comprehensively addressed by legal counsel in the estate planning process, family relationships can suffer irreparable damage and parents can literally leave a lasting legacy of family disharmony in their wake.

3. Dividing a Farm or Closely Held Business Among Children.

An additional common mistake having a family disharmony rate probably well in excess of fifty percent, plus likely to engender substantial legal fees in the process, is an estate plan providing for both "active management" and "passive investor" children to hold interests in the agricultural or business enterprise.

WHEN ARISES

This often arises when there are insufficient other assets in the estate or trust with which to equalize the desired shares among children who are not active in the business with business interests bequeathed to children who have been active in the business. Often, a limited liability company or corporation is formed to hold the enterprise and active management children are given a controlling voting interest in the enterprise following the parent's death, with passive investor children either being given a non-controlling voting interest or simply non-voting interests in the entity. It can also result by default when children are devised tenants in common interests in farm land under the testamentary instrument.

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THE PROBLEM

Typically, such "passive" children become quickly disenchanted with owning an illiquid, undiversified investment usually providing little cash flow. If the enterprise is being managed through an entity, they also tend to resent having no management role and frequently criticize, if not legally challenge, their "active" siblings' salaries and management decisions. If the entity is farm land not held in an entity, the land may be held as tenants in common by the children following distribution by an estate or revocable trust.

Unsatisfied with income distributions, the "passive" children may criticize the efficiency of the "active" siblings' operation of the farm or other business or the salaries paid to the "active" children. Such dissension usually becomes even more emphatic if the fortunes of the business begin to falter. On the other hand, "active" children tend to view any success of the enterprise being solely attributable to their efforts rather than market forces and any downturn to market forces beyond their control, thus resenting any questioning by "passive" children, let alone criticism, and view themselves as being entitled to any increase in business value.

If the property is farm land held as tenants in common among the children, a dissenting child may initiate a partition suit to divide the agricultural real property. If the property is held in an entity which normally would preclude any owner from compelling its liquidation, such as a limited liability company, lawsuits may be initiated by dissenting children challenging acts of the principal children in the business. Irrespective of means used to seek redress, a cauldron of discontent is very frequently caused by these conflicting tensions and interests, engendering substantial financial costs and often irreparably shattering family harmony in the process.

AVOIDANCE STRATEGIES

Consequently, if there are insufficient non-business assets to satisfy "passive" children's estate or trust shares, the client should be advised of the highly incendiary nature of the situation, its extreme risk of engendering divisive family disharmony and alternative strategies for its avoidance. Such avoidance strategies include a parent purchasing life insurance to fund equalization of desired shares among "passive" children. Another strategy is to include provisions in the testamentary instrument which compel "active" children, in consideration of their acceptance of business assets as part of their dispositive shares, to purchase the entire business interests from the estate or trust that would otherwise have devolved to "passive" children. If such strategies are not employed to ensure that there are no passive investor children, at the very least consideration should be given to giving such "passive" children "puts" such that they can compel the entity or "active" children to purchase their interests at any time they are unsatisfied with holding interests in the entity. Such "put" could be at a reduced value from the pro rata value of their interests, such as at a one-third to forty percent discount, in recognition of lack of marketability and lack of control discounts reflective of its market value, and also in recognition of providing liquidity by virtue of the "put" that is not available to the "active" children and the financial pressures that will occur on the entity or other "active" children by its exercise.

4. Insufficiently Protecting Assets Left to Family Members from Third Party Claims.

Individuals who don't want to protect the beneficiaries of their estate from themselves (e.g., minors or spendthrifts) by leaving their assets in trust only infrequently consider leaving such assets in trust nonetheless to protect the beneficiary from third party claims. There is one exception. Most married individuals with larger estates have been advised to leave assets in trust at their death for the benefit of a surviving spouse in order to keep assets out of the surviving spouse's estate for Federal estate tax purposes. Obviously, with an applicable exclusion amount currently in excess of $5.0 million and portability permitting a surviving spouse to use the unused applicable exclusion amount of a predeceased spouse, this need is far less than it has been in prior years. However, there are numerous other circumstances which merit a similar approach.

Leaving assets in trust for spouses and children can not only avoid the inclusion of assets in the beneficiary's estate for Federal or state death tax purposes (whether the beneficiary is a spouse or child of the decedent), it can, irrespective of the size of the estate, also protect the assets from the claims of spouses (e.g., a divorce or forced inheritance) or creditors of beneficiaries (e.g., a tort or contractual claim), maximize the availability of governmental resource payments (such as Medicaid and SSI) and often significantly reduce overall income taxation on income from the assets. The Kansas Uniform Trust Code is one of the strongest asset protection laws in the country governing what are termed "third party trusts," i.e., trusts created by the grantor for a person other than the grantor. This includes post-death trusts created under wills and revocable trusts for family members. For individuals not desiring to protect a beneficiary from himself or herself by naming a third party to serve as Trustee, a beneficiary (e.g., a mature adult beneficiary) may be named to serve as Trustee of such beneficiary's own trust with authority to manage, invest and distribute the trust assets. As discussed more thoroughly below, such beneficiaries may be given a level of control over the trust assets approximating outright ownership without substantially compromising these asset protection objectives.

5. Inflexible Trust Provisions.

Most estate plans are far too inflexible than they have to be, thus failing to provide the flexibility clients would normally desire. For

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example, as noted above with respect to asset protection, frequently property is left in trust, rather than outright, by a decedent for a surviving spouse solely for the purpose of protecting assets from a third party claim (e.g., to keep the property out of the surviving spouse's taxable estate, to protect the surviving spouse from the claims of a creditor or spouse upon a remarriage, or to maximize Medicaid benefits to the surviving spouse by minimizing the amount of "spend down" requirements that otherwise would have been required had the assets been left outright to the surviving spouse). The foregoing principles similarly apply to property left in trust for children solely for third party asset protection purposes.

STRUCTURING FOR FLEXIBILITY IN BENEFICIARY SERVING AS TRUSTEE OR CONTROLLING WHERE ASSETS PASS

In that situation, the beneficiary for whom such trust was created may serve as Trustee of the trust without unduly compromising asset protection and tax objectives. However, trust provisions in such circumstance typically are not as flexible as they can be, and as clients would normally desire, with respect to a beneficiary's control over- and access to- the property in the trust. For example, the beneficiary can serve as sole Trustee of the trust created by the predeceased spouse, have the right to expend both the income and principal for the beneficiary's health, education, support and maintenance needs, have the additional authority to distribute income or principal of the trust to descendants during the beneficiary's lifetime to satisfy a similar need of a descendant or to cause the trust income to be taxed at a lower tax bracket of a descendant, have the authority to change the named successor Trustee, and have the right to alter the disposition of the trust assets among the descendants of the couple (and also perhaps to surviving spouses of descendants and charities) following the beneficiary's death due to changes in family circumstances or the law. A high percentage of estate plans simply fail to provide such flexibility.

FLEXIBILITY IN CHANGING TRUSTEES

Flexibility with regard to changing the current party serving as Trustee can be provided by giving a third party following the death of the person creating a Will or Revocable Trust the right to discharge the then serving Executor or Trustee for any reason and naming another party (perhaps a corporate fiduciary such as a bank or trust company or certified public accountant) as successor Executor or Trustee. For example, if an individual has named a certified public accountant or bank or trust company as Trustee of a trust created for minor children at death, a relative could be named as a "Trustee Discharger" for the purpose of monitoring trust affairs. If the Trustee Discharger is not satisfied with the performance of the Trustee or that fees are reasonable, the Trustee Discharger could simply exercise his or her authority, discharge the then serving Trustee, and name a successor Trustee (perhaps limited by the trust provisions to a certified public accountant or bank or trust company).

As another example, if a third party is chosen as Trustee or Executor to manage and distribute a parent's estate in order to preserve family harmony, the child or children who otherwise would have served in such capacity can be named as "Trustee Discharger" with the authority to discharge the Trustee and name another third party to serve in such capacity. This provides a "check and balance," ensuring that the trust assets are both economically managed in terms of Trustee fees and properly administered by a competent and experienced third party Trustee under the watchful eye of a trusted person, while at the same time avoiding placing the burden of trust administration on a relative or other person who is inexperienced in such matters. It also gives children satisfaction in at least having a participatory role in the process. It is normally desirable in such circumstance that such authority be reposed in all responsible children to foster a broad and non-exclusionary feeling of participation and be exercisable only by unanimity to protect against an arbitrary exercise or one motivated by parochial economic interests.

SPECIAL TRUSTEE PROVISIONS

Additional flexibility can be provided by including Special Trustee provisions. A Special Trustee is a named third party (typically an attorney or certified public accountant) who is given the authority to amend an otherwise irrevocable trust in order to achieve specific estate planning goals which might otherwise be thwarted (e.g., due to a change in the law) following the death of the person creating the trust.

Because the purpose of having a Special Trustee is to carry out the intent of the Settlor which would be otherwise thwarted by the trust provisions, unsatisfactory trustee performance or intentional misdeeds, or outside circumstances, the Special Trustee provisions should recite the purposes for which the Settlor is retaining assets in trust. Such typical purposes include:

1. Protecting the value and stability of trust assets.

2. Protecting trust assets from the claims of a creditor of a beneficiary.

3. Protecting trust assets from the claims of a spouse of a beneficiary.

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4. Minimizing taxation to the trust and its beneficiaries.

5. Maximizing the availability of governmental resource benefits to trust beneficiaries.

6. Providing financial management for a minor or young beneficiary until attainment of legal majority and emotional and financial maturity.

7. Protecting beneficiaries from their own mismanagement or undesirable spousal influences.

8. Not having a beneficiary who is not psychologically, emotionally, or emotionally able to manage the trust estate from succeeding to its management (e.g., either as an outright distribution or as successor Trustee when attaining a certain age).

Unfortunately, very few trusts contain Special Trustee (often otherwise referred to as Trust Protector) provisions. Those that do often give the Special Trustee too much authority and while providing provide too little specificity as to the client's goals in implementing its provisions. Without Special Trustee provisions, the only method of amending an irrevocable trust when the Grantor is deceased is to seek a judicial amendment or reformation under provisions of the Kansas Uniform Trust Code. Such statutory authority is limited, costly in terms of legal fees, legal proceedings seeking such amendment or reformation are a matter of public record, such proceedings can cause family disharmony by having family members who are additional beneficiaries taking contrary positions, and such proceedings can take time which can result in additional economic costs (e.g., having to private pay medical costs out of a trust which does not currently qualify as a "special needs" trust so as to make the beneficiary eligible for Medicaid benefits until it can be appropriately amended).

CONCLUSION

A high percentage of trusts simply are far too rigid. Their lack of flexibility often results in the trust beneficiaries being unduly restricted in the disposition of the trust estate, governmental resource benefits not being maximized, or the trust provisions simply being unable to adapt to changes warranted by subsequent events, either by the family situation or governing law. This in turn can result in trust property being managed by an undesirable successor Trustee or the trust property being distributed to beneficiaries in improper proportions or manner (e.g., outright instead of in trust) or at improper times (e.g., outright at a time they are chemically dependent, have a psychological problem, are being sued or going through a divorce).

6. Lack of Specificity in Trust Provisions.

Trust provisions are typically lacking in specificity with respect to discretionary distributions as much as they are typically lacking in flexibility. Most trusts should be designed with distributions of income and principal being discretionary rather than mandatory. Mandatory distributions are inflexible in addressing the specific needs of a beneficiary, require distributions even when undesirable under the beneficiary's circumstances (e.g. chemically dependent or a spendthrift) and expose distributions to the claims of the beneficiary's creditors or spousal claims.

However, particularly in circumstances when the beneficiary is not serving as Trustee, it is important to be specific with respect to the situations which merit a distribution and the amount of such distribution, which is normally related to the beneficiary's health, education, maintenance and support needs. This includes: priority of beneficiaries when there is more than one beneficiary (e.g., a spouse over all other beneficiaries, a beneficiary over the beneficiary's descendants, minors over adults and disabled beneficiaries over non-disabled beneficiaries); consideration of other resources available to the beneficiary (e.g., income, investment property, insurance and governmental resources, the support obligation of another person, another trust which provides for the same needs, and the ability of an adult beneficiary not attending an educational institution full time or taking care of a minor or disabled child in the home to engage in gainful employment); and the meaning of maintenance and support as such terms related to younger beneficiaries (e.g., very conservative so as to provide for the beneficiary's barest necessities of life while under the age of thirty so as to not impede such beneficiary's normal maturational development, personal ambition and financial independence).

This lack of specificity results in needless arguments and disagreements between the beneficiary and Trustee as to what was the Grantor's intent, potential litigation in that regard, and a trust instrument with respect to which the Grantor's intent cannot be discerned with any reasonable certainty. In short, the trust instrument is lacking as to its most important aspects, i.e., under what circumstances and in what amounts the assets of the trust are intended to benefit its beneficiaries. On the one hand, a "trust fund baby" may result from the Trustee being too indulgent. On the other hand, the beneficiary may be deprived of distributions the Grantor would have wanted made on the other.

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The problems engendered by such lack of specificity do not end there. The language in providing such discretion tends to be far too broad, e.g., in the Trustee's "discretion" or "sole and absolute discretion." What most practitioners fail to realize that by so doing they have created a pure "discretionary trust" with regard to the beneficiary's health, education, maintenance and support needs. This means that the Trustee normally cannot be compelled to make a distribution to a beneficiary in circumstances the Grantor of the trust would have desired such distribution to have been made.

A thorough discussion of such issues is found on this website "Drafting Support and Discretionary Trusts: Navigating the Perils and Possibilities."

7. Not Providing for "Pot Trusts" for Minor Children.
When parents have minor children, they normally provide for the assets they leave them to be held in trust at least until the children attain an age when the parents hope that will have attained sufficient maturity to responsibly manage the assets they are leaving them.

SEPARATE SHARE TRUSTS FOR MINORS DISTORT DISPOSITIVE PLAN

Unfortunately, typically the trust instrument provides for separate trust shares for each minor child instead of leaving all assets in a single "pot trust" for all of the children. Separate share trusts for minor or young adult children fail to mirror how the deceased parent would have provided for his or her children in several respects. First of all, it benefits the older child or children to the disadvantage of younger children. At the time of the parent's death the older child or children have had more years of their care provided for by the parent than a younger child or children. Thus, it is likely that the younger child or children will need to have more of their trust estate expended for their care during their minor or young adult years than the older child or children, resulting in their trust estate having a lesser amount of assets when they are older than the older child or children. Such disparity may not result simply from a difference in ages at the time of the creation of such shares. It can also result simply due to one child needing more resources for their health, education, support and maintenance needs during their developmental years than another child.

OTHER NEGATIVE ASPECTS

This consequence has several other negative aspects. First, it simply fails to mirror what most parents would have done had their children all been well into adulthood at the time of the estate plan. Irrespective of the amount of assets needed to provide for their children during their minority or young adulthood, they almost universally tend to treat them all equally economically in terms of their trust shares. Second, it can create jealousy and disharmony between or among children as a result of such disparity. Finally, it can result in a child exhausting such child's trust share during his or her developmental years and not having any available resources to provide for his or her needs, for the other trust shares for other children would be unavailable.

INADEQUATE PROVISIONS IN "POT TRUST"

Even when a "pot trust" is created for young children, its provisions often fail to provide for its termination at the proper time. The termination time should be the age of a child at which the parent would have ceased to provide support for such child. Typically, this is when the child has had sufficient time to complete a college education, say age 23. Thus, the trust should terminate when there is no child under such age. At that time, the "pot trust" would be divided into equal shares for each child, not only putting the children on equal economic footing, but even more importantly mirroring what the parent would have provided for with respect to the trust estate had the parent lived past the termination date.

Beyond providing for the proper termination date of the "pot trust," there are other typical failures in its drafting. Its provisions often fail to provide-as well as account- for any distributions made to a child who is beyond the termination age while the trust estate remains intact until all children have attained such age. To preclude distributions from the "pot trust" to child who has attained such age would deprive the beneficiary of access to the trust estate which would be continuously available to the youngest child, once the youngest child has attained such age, due to the trust estate having been divided into separate shares. On the other hand, failing to take into account distributions to a child who has attained such age would economically disadvantage the youngest child who either did not have that opportunity or economically disadvantage children who received less from the trust estate after having attained such age. Thus, there should be an "advancement" provision in the "pot trust," treating as an advancement against a child's share all distributions received from the "pot trust" after attaining such age, preferably including an interest rate on all such distributions (e.g., the federal AFR rate) to take into account "time value of money" concepts. Finally, the trust provisions should caution the Trustee from making distributions to a child who has attained such age in any amount which could result in the amount of such advancement exceeding the share the child is likely to receive upon termination of the "pot trust."

8. Picking the Wrong Probate Avoidance Device.
Avoiding probate has many principal benefits. It saves the costs of a probate procedure in passing the title to property interests

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following death, makes assets immediately available following death, is much less cumbersome in transferring ownership of the decedent's property at death, preserves family privacy due to the disposition of the estate not being a matter of public record, and is far less susceptible to creditor claims against the decedent's estate.

AVOIDING PROBATE NORMALLY SHOULD NOT BE THE PRIMARY ESTATE PLANNING GOAL

However, the cost savings in avoiding probate is often exaggerated. Although no definitive study has been undertaken in Kansas to the knowledge of the authors, such average cost savings would be expected to be less than 1% of a decedent's estate if the attorney is charging by the hour, and not as a percentage of the probate estate. Consequently, the cost benefits in avoiding probate are normally insufficient to warrant probate avoidance being one of the primary goals of an estate plan. To the contrary, the goals of asset protection, income and estate tax savings, preservation of family harmony, and ensuring that the estate is properly distributed at the appropriate times to estate beneficiaries usually are normally of far greater importance.

JOINT TENANCY AND BENEFICIARY DESIGNATIONS AS PROBATE AVOIDANCE DEVICES CAN BE PROBLEMATIC

Placing unwarranted importance on probate avoidance often results in choosing a probate avoidance device which incurs a detriment to the foregoing other estate planning goals far greater than any benefits achieved in avoiding probate. For example, if joint tenancy and beneficiary designations are used exclusively to avoid probate, a substantial distortion of the estate plan can result. If the order of deaths is other than expected with respect to a parent who creates joint tenancy interests with children or who names children as beneficiaries on assets, i.e., a child predeceases a parent, a disinheritance of the predeceased child's family can result. This is because the interest of the predeceased child who was a joint tenant or beneficiary would normally pass to the other joint tenants or beneficiaries and not to the predeceased child's children. Placing joint tenants on property can also present substantial problems in subjecting such property to the claims of the other co-owners' spouses and creditors and requiring the signatures of other co-tenants (and often their spouses) to sell or transfer the property.

ASSET PROTECTION AND POST-DEATH ADMINISTRATION BENEFITS NORMALLY MILITATE IN FAVOR OF REVOCABLE TRUSTS AS PROBATE AVOIDANCE DEVICE

For an individual whose entire property is either held in joint tenancy with someone other than a spouse or which names a beneficiary other than a spouse (e.g., children), there are no assets under the control of an Executor under a Will or Trustee of a Revocable Trust. Consequently, no individual or party is entrusted with the authority following death with respect to such matters as the payment of the decedent's bills, distributing tangible personal property items, the selling of assets and the filing of income tax or death tax returns. The attendant post- death family anarchy and chaos which often ensues in this situation can completely destroy family harmony.

Finally, property held in joint tenancy or which has an individual named as beneficiary passes outright to individuals, rather than in trust where the asset protection benefits discussed above can be obtained. If a beneficiary dies prior to the owner of property, such beneficiary's children may be disinherited, for it is very difficult to provide for alternate beneficiaries and many vendors will not permit the naming of contingent beneficiaries.

Thus, for those wishing to both avoid probate and any of the foregoing detriments which can be caused by joint tenancy ownership and beneficiary designations, a Revocable Trust is usually the probate avoidance device of choice. The Trustee of the Revocable Trust is entrusted with the authority necessary to manage and distribute the decedent's estate and property can also be left in subsequent trusts for family members for asset protection purposes. Although the Executor under a Will can be given similar authority and the estate assets can likewise be left in asset protection trusts for estate beneficiaries, probate would be required. Revocable Trusts are the only estate planning device which can provide for a party to handle post-death administration and retain property in trust for family members without the necessity of probate.

9. Improperly Dividing Ownership of Spousal Property.

For married couples, estate planning goals are often dependent upon the proper division of property ownership between spouses.

ESTATE TAXATION USUALLY NO LONGER A FACTOR

With "portability" of the federal estate tax exclusion amount and a large applicable exclusion amount in excess of $5.0 million such that the federal estate tax impacts only a very small percentage of estates and there no longer being a Kansas estate tax, the desirability of dividing property between spouses to maximize the federal estate tax applicable exclusion amount is no longer a major consideration in the vast majority of estate plans. Prior to the passage of such federal legislation greatly minimizing the impact of the federal estate tax on American citizenry, estate planning for a married couple typically meant that ownership of marital property be properly divided

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between the spouses such that, irrespective of the order of deaths, the predeceased spouse will have a sufficient ownership interest in the marital property to be able to maximize the amount of property left in trust for the surviving spouse at death.

PROPERTY DIVISION IMPORTANT FOR INCOME TAX MINIMIZATION

However, such minimization of the federal estate tax does not mean that division of the assets of a married couple under the estate plan is no longer important. Property division between spouses should also consider other estate planning goals. Property owned at death (other than what is called "income in respect of a decedent" property such as qualified retirement plans and individual retirement accounts) normally receives a "step up" in income tax basis from its typically lower income tax basis to its fair market value at date of death. However, if property is held in joint tenancy between spouses, only one-half of such property (the predeceased spouse's interest in the property) will receive a "step up" in basis at death. Thus, as husbands tend to predecease their wives, it might be appropriate to title more of the appreciated assets such as stock portfolios, rental properties or farm machinery having a tax basis much less than fair market value in the husband's name with his spouse named as beneficiary or titled in his Revocable Trust if the assets are to be left in trust for the spouse to achieve the asset protection benefits discussed above. In that manner, should the more likely event of the husband predeceasing his wife occur, his wife or the fiduciary of his estate could either sell such property with less capital gain. If the property with the "stepped up" basis was retained and was depreciable, a greater depreciation deduction could be taken due to the property's increased income tax basis.

If property eligible for a "step up" in income tax basis is left in joint tenancy with a spouse due to the couple desiring that all of such property pass outright to the surviving spouse, there is no property which would achieve a full "step up" in income tax basis upon the death of the first spouse. One-half of the built-in capital gain would remain with respect to all of such assets. Thus, e.g., it would normally be best to divide stock portfolios such that each spouse has a portion of the portfolios titled solely in their names alone, naming the other spouse as "transfer on death" or "TOD" beneficiary. In that manner, irrespective of which spouse survives the other, there will be a stock portfolio that could be sold by the survivor without having to recognize any capital gain to the extent the sale price does not exceed the portfolio's fair market value at the time of the predeceased spouse's death.

PROPERTY DIVISION IMPORTANT FOR ASSET PROTECTION MOTIVES

As another example, if property is to be left in trust for a surviving spouse supplemental to any Medicaid benefits, it is often important that the property be titled in the spouse who either has the shorter life expectancy (if both spouses are in good health) or the spouse who is in better health (if the other spouse is infirm and likely to need long term care) to ensure that the greatest amount of assets are left in trust to maximize such benefits as much as is possible under current laws. Finally, under Kansas law, normally, unless a spouse has agreed to be obligated on the debt of his or her spouse (e.g., signing a promissory note), he or she is normally not liable for the debts of the other spouse. Thus, if one spouse is more susceptible to the claims of a creditor (e.g., by being involved in a profession or occupation where malpractice or other claims are both frequent and large), often it is more desirable considering all of the circumstances for the spouse susceptible to creditor claims to mostly have the at risk spouse hold assets which are exempt from creditors under Kansas law (e.g., the personal residence).

10. Not Properly Ensuring the Integrity of the Estate Plan.

There are substantial obstacles to ensuring the integrity of the estate plan. These include making sure that property of the decedent is governed by the decedent's Will or Revocable Trust and that certain interactions of a parent with children do not result in a distortion of the estate plan. When they occur, they may not only distort the estate plan, they are likely to result in substantial family disharmony in the process. Those factors are discussed below.

PROPERTY PASSING OUTSIDE THE PROVISIONS OF THE WILL OR REVOCABLE TRUST

A high percentage of individuals do not understand or plan for the fact that Wills must be probated to be effective with regard to the disposition of a decedent's property and that Wills only control property passing through probate. A significant percentage of individuals also do not understand that Revocable Trusts, although avoiding probate, only control property which is legally owned by the Revocable Trust or which names the owner's Revocable Trust as beneficiary at death. Consequently, property held in joint tenancy with rights of survivorship passes to the surviving joint tenant(s) at death and property naming a beneficiary other than the estate or Revocable Trust of the owner is not controlled by the Will or Revocable Trust and thus will pass directly to the beneficiary upon death outside the provisions of the decedent's Will or Revocable Trust.

This can substantially distort the owner's estate plan. For example, if an individual owns a bank account in joint tenancy with one child and provides under his Will for his estate to go equally to his children, upon his death that one child will receive the entire bank account as well as an equal share of the probate assets. Moreover, for individuals who, rather than use a Revocable Trust, place all of their property either in joint tenancy or who name a beneficiary on such property, many problems can ensue. Joint tenants are co-owners,

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thus subjecting joint tenancy property to the claims of spouses and creditors of the joint tenants. If there is an unexpected order of deaths, e.g., a child predeceases a parent, as noted above that child's family can be disinherited. Finally, there would be no person in that circumstance in charge of the parent's affairs following the death of the parent to attend to such matters as paying the parent's bills, distributing tangible personal property, and filing the parent's income tax and death tax returns.

Based on a poll taken by the Kansas Bar Association a few decades ago, the vast majority of the public does not understand that a Will does not control all property in which the decedent had an interest at date of death. Estate planning counsel should ensure that their clients are aware that assets held in joint tenancy or which name a beneficiary will pass to the surviving joint tenant or beneficiary upon their deaths, irrespective of the provisions of the Will or Revocable Trust unless, of course, the estate or Revocable Trust is named the beneficiary of the asset. Moreover, unless such counsel is involved in reviewing the titling of the client's assets as part of the estate plan, the estate plan is likely to go awry.

PROVISIONS NOT ADDRESSING PROPERTY PASSING OUTSIDE OF THE TESTAMENTARY DOCUMENT

Similarly, with respect to addressing the far too common nettlesome circumstance of property passing directly to a child or other beneficiary of the estate or trust outside of the testamentary instrument as a surviving joint tenant or beneficiary, the governing instrument should specify whether any property passing outside its provisions is to be disregarded or instead treated as an advancement against such child's dispositive share. This not only is a very frequent cause of family disharmony, it typically distorts the integrity of the decedent's intended disposition of the trust or estate in the process. In the unusual situation where the decedent does not intend for advancement treatment of such joint tenancy or beneficiary property, the document should so state to the contrary.

ESTATE PLAN NOT PROPERLY TAKING INTO ACCOUNT GIFTS AND LOANS TO BENEFICIARIES

A number of other provisions can be inserted in wills and revocable trusts to ensure that the integrity of the estate plan is not damaged by outside circumstances. For example, lifetime parental transfers often present post-death family arguments, as well as legal and factual issues, whether such transfers were parentally intended to be gifts or loans, the terms of verbal loans, and their intended effect on children's shares of the estate or trust. Although gifts by a donor normally are not treated under the law as advancements against a donee's share of the donor/decedent's estate absent a provision in the testamentary instrument dictating such consequence, this does not avoid arguments as to the decedent's intent, whether the scrivener drafting the testamentary instrument consistent with the decedent's intent, or legal challenges making that assertion. Thus, if gifts are not intended to be treated as an advancement against a donee/child's share, the governing instrument should so state.

A viable strategy for loans consistent with most clients' goals is to provide for the forgiveness of verbal loans (due to difficulty in proving status as a loan, as well as the terms) and allocating the unpaid balance of written loans to the child's share, irrespective of legal impediments to enforcement (such as a governing statute of limitations) or any alleged modifications not in writing. Such provisions should also include provide similar treatment for situations in which the decedent guaranteed, or co-signed on, the loan of the beneficiary and the trust or estate of the decedent was forced to pay the loan due to the lender calling the loan upon the death of the decedent.

Should the client desire any existing verbal loans to be considered in the dispositive scheme, the client would be advised to secure the promissor/child's execution of a demand note in favor of the client or the client's revocable trust and furnish a copy to the estate planning attorney so as to be available in the event an evidentiary issue should later arise. In that manner, the parent could dictate the payment terms with the promissory child as circumstances warrant, with any unpaid balance at the parent's death being allocated to the promissor/child's share of the estate or trust.

NOT ADDRESSING POTENTIAL ECONOMIC CLAIM OF CHILD FOR PERSONAL SERVICES RENDERED TO A PARENT

Following the passing of a parent, children may contend their dispositive share should be increased to account for personal non-fiduciary services rendered to their parent, such as personal care, financial management, transportation, or meal preparation. Such claims may be based strictly on a "family equity" argument or an asserted express or implied contract that the parent was to pay them or increase the child's share of the parent's estate or trust. Obviously, the very assertion of any such claim is likely to engender significant family disharmony with the siblings of any such claimant.

Unless based on a written agreement, such claims often are without legal merit and almost always result in significant family disharmony. To avoid such consequence, the governing instrument should specify parental intent that any filial services not rendered pursuant to a written agreement are to be considered to have been rendered strictly out of affection and not in anticipation of any monetary remuneration. The instrument may additionally provide that any legally mandated satisfaction of such claim would

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be treated as an advancement against the beneficiary's share of the estate or trust. This not only makes the parent's intent clear, but it would amount to a "poison pill," for if deemed legally enforceable, the beneficiary would normally have incurred legal fees in pursuit of such claim and the satisfaction of such claim would be taxable income, as opposed to a normally income tax-free inheritance, thereby netting the child, thereby resulting in a lesser amount than would have been the case had the beneficiary not made such a claim. Whether legally enforceable or not, it should have a "chilling effect" on the making of any such claim.

11. Not Properly Planning for Mental Disability.
In the absence of prior planning, a mental disability normally requires that a court appoint a conservator to manage the disabled person's assets and a guardian to make such disabled person's personal care decisions. This can not only be an expensive, cumbersome and restrictive process, it may result in a conservator or guardian being appointed who would not be of the disable person's choosing. Durable Powers of Attorney for financial and health care decisions can avoid this result by naming agents to manage one's assets and personal affairs.

However, financial powers of attorney often are not drafted in a manner which lends them to be readily accepted by third parties, do not adequately address the issue of successor agents, or simply fail to address important issues such as the agent's compensation or the standard upon which an agent can be held personally liable. Agents also are often given too much authority in estate planning matters (e.g., the authority to change beneficiaries or make gifts in a manner not required to be consistent with the estate plan). Individuals disposing of their estates under Revocable Trust provisions which also provide for the successor Trustee to manage trust assets in the event of an incapacity should keep in mind that a properly drafted Durable Power of Attorney is still necessary for any personal financial decisions not involving the trust estate (e.g., handling any lawsuits, filing individual tax returns, managing assets such as IRAs held outside the trust, etc.).

Individuals using Revocable Trusts to distribute their estates at death outside of the probate process also have an advantage with respect to the management of their trust estate should they become disabled and no longer capable of serving as Trustee. The trust provisions normally provide for a successor Trustee to manage the trust estate during any period of disability. Third parties are normally more accepting of successor Trustees managing the trust estate in such circumstances than they are of financial powers of attorney in the management of personal assets.

12. Inappropriately Disclosing Estate Plan to Children.
Conventional wisdom held by the general public, as well as a high percentage of estate planning professionals, is that parents should inform children of their estate plans. Admittedly, there are situations favoring at least a limited disclosure of the estate plan. For instance, discussing any family business succession aspects of the plan with children active in the business is necessary to test the viability of the succession plan. However, in most other scenarios the authors are convinced from years of experience that family disclosure meetings generally present far more family harmony problems than they could potentially solve.

UNREASONABLE EXPECTANCIES

When gauging any potential benefits of any such discussion, it is important to be first cognizant of both parental expectancy levels and the typical family milieu such disclosure would take place. Just as parents are understandably less than accurate predictors of disharmony within their own family following their deaths, they also tend to erringly assess the benefits of a disclosure meeting. Further, they normally have an unrealistic assessment of their children's objectivity, failing to appreciate that such objectivity usually has been severely compromised by their own economic and personal self-interest, if not by intra-family rivalries and other familial issues.

NUCLEAR FAMILY NOT WHAT IT USED TO BE

Also, children are increasingly tending to be more dispersed geographically and thus more emotionally distant as well. This tends to create a more stratified, personal interest perspective among siblings. Finally, disclosure may create an unhealthy "air of expectancy" as well as attract unwanted in-law participation, be it direct or indirect.

DISCLOSURE WILL NOT "CLEAR THE AIR"

One of the most common supporting statements in favor of such aphorism is that it "clears the air," i.e., creates a more favorable family harmony atmosphere surrounding the post- death administration of the parent's estate. However, specific post-death administration issues that might arise cannot possibly be anticipated in advance with any reasonable degree of certainty during the parent's lifetime. Even if they could, there is little likelihood that agreement would be reached as to their resolution by the family in advance. Thus, any perceived benefit of such disclosure in minimizing post-death administration issues is largely illusory. Other than a minimal family comity benefit in such "family pep talk," parents should not expect disclosure will significantly minimize post-death

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administration risks nor have an enduring benefit.

WILL NOT BE BENEFICIAL IN "AVOIDING SURPRISES"

The other frequently articulated reason for having a family disclosure meeting is to "avoid surprises." This rationale has two precepts. It first assumes there would normally always be at least one element of the estate plan a child would otherwise find objectionable, thus meriting a family vetting of the plan. The second precept is that such objections are reduced by parents informing children of their estate plan prior to their death. Both such assumptions are flawed.

With regard to the first precept, there is normally only a very small risk of filial displeasure in circumstances where a third party is named financial fiduciary (particularly when the reasons for such appointment are articulated in the instrument as above suggested), the children share equally in the estate or trust, and the child's access to such share is not unduly restricted, e.g., such child's share is either distributed outright or held in an accessible trust where the child serves as trustee. What small risk of family disharmony in this situation that results from appointing a third party as fiduciary can be further reduced to a minimum by addressing the foregoing ancillary issues in the provisions of the will or revocable trust. The vast majority of situations in which a parent's assets are to pass to adult children involve the passing of their estate to children in equal shares.

A child's displeasure with a parent's estate plan usually results in the converse circumstance where another child is named as financial fiduciary, unequal shares are passing to children, or there are restrictions a child may find objectionable regarding such child's control of his or her share of the estate or trust. Such displeasure may result from a perceived lack of fairness, a misunderstanding of parental intent, lack of objectivity, jealousy or simple avarice. The author terms such resulting displeasure "spill over disharmony," for the resulting animus is usually inflicted against siblings.

With regard to the second precept, in the author's experience lifetime parental disclosure of the estate plan normally does little to reduce such "spill over disharmony." The better strategy is for the parent to simply place a well articulated rationale regarding perceived "sensitive" provisions in the parent's will or revocable trust, keeping the sensibilities of children in mind and noting the estate plan was independently derived and not the product of the influence of any child.

SUBSTANTIAL DOWNSIDE RISKS

If the worst case scenario regarding such family estate planning discussions was that they would simply be ineffective, there would not be substantial criticism beyond them simply being superfluous. However, such discussions are typically far from benign. There are numerous significant downside risks. First, children may get a sense of "entitlement" to a parent's estate or rely on a parent's inheritance to increase their standard of living. Even more damaging, disclosure can create the very disharmonious family circumstance it was intended to alleviate. Lifetime disclosure and ensuing family discussions give children and parents an opportunity to discuss all elements of the plan amongst each other, often resulting in disheartening disagreements, arguments and in-fighting. Children may also pressure parents to change the estate plan to their own advantage to the consternation of their siblings and parents. The authors have seen many situations when such disclosure results in children "taking over the estate plan," pressuring parents to alter their estate plan and implement one more to their liking.

More often than not, however, children disagree on the appropriate plan. A child may feel he or she deserves a greater share of their parents' estate than a sibling, e.g., due to a more adverse economic circumstance or a sibling having married well. Such a position typically finds immediate disfavor with other children, who not only tend to view a disparate distribution as inequitable, but as penalizing their success. Children may want their "share of the estate" to pass to their spouse should they predecease a parent, a dispositive wish not often shared by their parents. Children will normally disagree with an "outsider" managing the parent's estate following their passing and typically have little understanding of the benefits and limited cost, let alone the disharmonious circumstances which can be occasioned by children serving as a fiduciary, most particularly if they are named to so serve in such capacity.

If parents solicit the input of their children with regard to their estate plan and then disregard their suggestions or personal wishes, and it would be impossible to comply if children have inconsistent positions with respect thereto, children will tend to hold their parents in greater disfavor than they would have had the plan been disclosed following their death without having solicited their input. If parents disclose their current estate plan to children, they will also expect their parents to disclose any subsequent change.

Children also will occasionally solicit parental gifts in order for them to "enjoy the benefits of our inheritance now, at a time we can most use it." Even the relationship of parents with their grandchildren can be indirectly adversely affected, particularly if an in-law becomes disenchanted with the parent's estate plan as a result. Any such disharmony will not only present itself during the parent's lifetime, but it will tend to be quite enduring. There is often not only disharmony between a parent and a child or children as a result,

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but also between or among children. Finally, any disharmony among children emanating from such disclosure can incite or exacerbate family disharmony during the post-death administration of a parent's estate or trust.

SUMMARY

In sum, family harmony is best preserved not by a parent discussing the estate plan with children, but by estate planning attorneys surgically addressing the foregoing issues in discussions with their client and including the foregoing family harmony enhancing provisions in the parents' testamentary instrument. If such counseling and inclusion has not taken place, no amount of discussions between a parent and child is likely to significantly ameliorate such adverse consequences. If it has, the incidence of family disharmony following a parent's disability or death will already have been reduced to a very low incidence which no additional discussions are likely to reduce any further. Thus, having such discussions in the latter circumstance is not only likely to serve no beneficial purpose, but there would be a very high risk that such discussions would only serve to cause the foregoing adverse consequences and disharmony that would potentially extend beyond the parent's death.

All family harmony enhancing provisions, including explanations as to sensitive provisions, should be given their proper emphasis by being placed in the first "Family Harmony Preservation and Personal Declaration" article of the testamentary instrument, to be disclosed to children following the parent's death, at a time they will be beyond debate. This includes provisions explaining why an independent fiduciary has been appointed to manage the estate (i.e., to ensure family harmony in the administration of the estate or trust, to avoid children having to take time away from their family or job to do it and to avoid having to choose which child or children to name in such capacity) and including the plan integrity provisions discussed above. It is incorporating such provisions in the testamentary instrument that best ensures family harmony, not disclosing the estate plan to children, which tends to have the opposite effect. If the primary instrument is a revocable trust, such declaration will not be a matter of public record and privacy will be preserved.

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