The Need for a Last Will and Testament: Checklist Review

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[¶4105] THE NEED FOR A LAST WILL AND TESTAMENT: CHECKLIST REVIEW

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It doesn't matter if the value of the estate is small or large, a last will and testament is an integral part of the estate plan. Simply stated, a will is a legal document that allows a person to direct the disposition of his or her estate at death. Also, a properly drafted will can lessen (or even avoid) some estate administration costs and expenses, eliminate intrafamily conflicts, and provide answers to other issues that may arise.

If a person dies without a will (intestate), state intestacy laws will control disposition of the decedent's property. The result might not be precisely what the decedent wished, and it may be unnecessarily costly—both to the estate and to the decedent's loved ones. Let's look at an example of an intestacy statute based on Pennsylvania law:

1. If there is no surviving issue or parent of the decedent, the entire intestate estate goes to the surviving spouse.

2. If there is no surviving issue of the decedent, but decedent is survived by a parent or parents, the first $30,000 plus one half of the balance of the intestate estate goes to the surviving spouse, and remainder to the parents.

3. If there are surviving issue of the decedent, all of whom are issue of the surviving spouse also, the first $30,000 plus one-half of the balance of the intestate estate goes to the surviving spouse and remainder to issue of the decedent.

4. If there are surviving issue of the decedent, one or more of whom are not issue of the surviving spouse, one-half of the intestate estate goes to the surviving spouse and remainder to issue of the decedent.

5. If there is no surviving spouse, the entire estate goes to the issue of the decedent.

6. If there is no surviving spouse or issue, the entire estate goes to the parents of the decedent; and if parents do not survive, then to the issue of the parents.

This analysis examines many of the provisions that should be included in a last will and testament and explains what will occur if these particular items aren't included in the instrument. The analysis is divided into these major topics:

[¶4105.1] IMPORTANT WILL CLAUSES

Except for some statutory requirements about how a will must be executed, there are no set contents for a will. Although the maker of a will (the testator) can basically control the disposition of his or her estate, there are some limitations imposed by state law. Almost all states won't allow a spouse to be disinherited; he or she can elect to "take against the will" if the will doesn't leave the required amount to the spouse. Also, many states' laws protect the testator's children from disinheritance. Such legislation generally provides for the treatment and shares of children who are adopted and children who have not been mentioned (pretermitted) in the testator's estate plan. Finally, many states impose limitations on charitable gifts, and prohibit bequests that are against public policy.

Although there's no such thing as a "standard will," a properly drafted will generally contains certain clauses.

Burial arrangements. Normally, a burial arrangements clause is included in a will to direct where the funeral should be held and who should conduct it. This clause may also contain instructions for cremation or donation of organs for medical research or transplant. Practitioners, however, disagree over whether the foregoing provisions should be inserted in the will. In some cases, the will is either not discovered immediately or is sealed in a safe deposit box that isn't opened until after the funeral. Therefore, the issue of burial arrangements may be moot at the time a will is read. Such problems can be easily avoided.

WHAT TO DO→ In addition to including the foregoing burial provisions in the will, the testator should prepare a letter or memorandum and give it to the executor, a close friend, or a relative. By doing this, the testator can be fairly certain that he or she will be buried in the manner, location and procedure of his or her choice.

Payment of debts. Most states' laws mandate that certain debts, such as funeral expenses, taxes, and administration expenses, be paid by the estate's personal representative. Other debts may be paid at the personal representative's discretion unless the will directs otherwise. Thus, a payment-of-debts clause can be used by the testator to direct the debts and expenses to be paid, and can indicate where the money for payment should come from.

PROBLEM→ If the clause isn't drafted carefully, it might be construed as showing the testator's intention that even debts barred by the statute of limitations, bankruptcy, and the statute of frauds be paid. The personal representative should be afforded ample discretion over which debts and expenses should or should not be paid.

Sometimes the payment-of-debts clause contains instructions for payment of funeral and last illness expenses. In reality, these instructions are not necessary, because such expenses must be paid by the personal representative. However, some states, by statute, make the surviving spouse responsible for paying the funeral expenses. To avoid burdening the surviving spouse, you might want to direct that the personal representative is to pay this expense.

The debt clause also becomes important if the testator devises property that is security for a debt. For example, if the beneficiary gets property encumbered by a mortgage, does the executor pay off the mortgage, giving the property to the beneficiary free and clear? Or, is it the beneficiary's responsibility to satisfy the mortgage debt? These questions can and should be answered in a carefully drafted payment-of-debt clause.

Tax clause. Generally, state law decides who bears the burden of paying death taxes. Some states require that these taxes be paid out of the residuary, while others require them to be apportioned among the beneficiaries (except for the marital and charitable bequests). Some states don't have a statute, and payment of taxes is a matter of common law. Whether there's a statute or not, the testator can always direct in the will how the taxes will be paid. A clear-cut direction will override any statutory presumption, and such a clause should always be included in any will that you draft.

Federal estate tax clause. Federal estate taxes can eat away a fairly large chunk of the decedent's estate. But careful planning can minimize the tax bite and preserve the estate for the beneficiaries. Let's take a quick look at two important elements in planning for estate taxes.

Unified credit. A federal estate tax return generally does not have to be filed unless the value of the adjusted gross estate exceeds $600,000. A credit of $192,800 is available which will shelter estate assets and transfers up to $600,000 from federal estate and gift tax.[1]

Marital deduction amount. ERTA also revolutionized the use of the marital deduction. Under old law, a decedent was able to pass to his or her spouse tax free the greater of $250,000 or

References start at the end of this analysis.

one-half of the adjusted gross estate (for estate tax purposes), and the first $100,000 of all gifts and 50% of all gifts over $200,000 (for gift tax purposes). Now, as long as the property passes to the decedent's or donor's current spouse, its value is 100% deductible.[2] Of course, the testator can completely eliminate any federal estate tax on his or her estate simply by leaving the entire estate to the spouse. But this might not be the best course to take. *Reason:* Leaving everything to the surviving spouse may enlarge that spouse's estate, resulting in higher estate taxes at the surviving spouse's death.

BETTER WAY→ The estate planner should consider using a marital deduction formula clause that leaves exactly enough assets qualifying for the marital deduction to the surviving spouse to reduce the estate tax payable, after applying the entire unified credit remaining at the decedent's death, to the lowest possible figure. This will, it is hoped, result in no estate tax at the decedent's death, and a greatly reduced estate tax at the surviving spouse's death.

Another alternative. Another possible marital deduction alternative is a QTIP trust. This trust is funded with assets qualifying for the marital deduction. The surviving spouse is given a qualified income interest for life (payable at least annually) with the remainder assets going to designated remaindermen at the surviving spouse's death.[3] Recent Tax Court decisions have reaffirmed that draftsmen of QTIP trusts should meticulously follow the letter of the law in order for such trusts to qualify for the marital deduction.[4] In all cases, draftsmen of QTIP trusts are strongly urged to consult the most recent tax bulletins to ascertain the most recent changes and updates in the QTIP legislation. The Executor must elect the use of the QTIP and such power should be granted under the power clause for the Executor in the Last Will.

Full consideration of all possible marital deduction planning possibilities is beyond the scope of this analysis. Obviously, the will provision about federal estate taxes requires careful planning and analysis. Also, the planner must be aware that the state law marital deduction provisions might not be the same as federal law. This must be taken into consideration when building the estate plan.

Specific bequests. If the testator wants certain individuals to receive a specific bequest of estate assets, this must be clearly set out in the will. To be sure, this clause should contain specific references to (if applicable) quantity, serial numbers, and/or model numbers. Also, if the testator wants property transferred to a beneficiary free of all encumbrances, this should be noted in the will.

If the property given is no longer owned by the decedent at his or her death, the beneficiary (known as a legatee or devisee) will get nothing. This is known as an ademption. It is something that can easily be guarded against in the will.

WHAT TO DO→ The testator can guard against ademption by inserting a clause giving the beneficiary an amount of money equal to the adeemed property. In the alternative, the testator may direct the personal representative to sell a different estate asset and turn the proceeds over to the legatee as a substitute for the adeemed property.

What happens if the estate assets aren't enough to pay all the specific bequests? State law will determine which gifts abate first. However, this statutory order of abatement can be changed by a will provision.

SUGGESTION→ Generally, gifts of the residue abate first—even though the residuary legatees are usually the people the testator wants to benefit most. Therefore, to protect the beneficiaries, it's important to include a provision designating the order of abatement.

Real estate clause. The testator's will should include a separate clause indicating the disposition of any real property. Specific reference should be made to the testator's intent regarding disposition of personal property used in connection with the real estate and any insurance policies

or proceeds covering the real property. If the testator desires that these items be disposed of separately from the real property, then the same should be specifically indicated.

⋙CO-OPS AND CONDOS→ In recent years, more and more people have become owners of either co-ops or condominiums. The stock in the co-op and the proprietary lease generally are not considered to be real estate. Therefore, any co-op interest should be disposed of in a separate clause.

Business interest. Whether a business interest is a proprietorship, partnership, or corporation, the exact disposition of the business interest should be clearly set out in the will. The testator may direct that the personal representative operate a business, transfer it to a designated beneficiary, or liquidate the business and distribute the proceeds to one or more beneficiaries. In all cases, the estate planner should consider the estate tax consequences as testamentary and inter vivos dispositions of business interests.

⋙OTHER ALTERNATIVES→ Other provisions, such as buy-out provisions, insurance funding, extension of estate tax payments, or stock redemptions, can be drafted to insure that the business interest will be disposed of according to the testator's wishes. Of course, these provisions should be carefully reviewed by a tax planning adviser.

Charitable bequest clause. If the testator wants to make charitable bequests, this should be clearly stated in the will. To avoid problems, the correct legal name (and exact address, if possible) of the charity should be indicated. If the charity is not designated with the appropriate specificity, the charitable bequest may be rendered null and void.

Guardian clause. A carefully drafted will should always provide for the guardian of the person and assets of the minor children in the event that both parents die. If the will is silent on this matter, or if there is no will, then the court will appoint a guardian for the minor children. Usually, a bond must be posted, the cost of which will be charged against the estate. In many states, court approval must be obtained in order for the guardian to distribute estate assets to a minor. This also involves costs payable from the estate which could and should have been avoided by insertion of the appropriate guardianship language in the will.

Normally, a minor is eligible to receive property when he or she reaches the age of majority. However, it may be the testator's desire that distribution be withheld beyond the time when the minor reaches majority. In such case, the testator's will may provide for the establishment of a trust wherein a testator can direct when and how assets will be distributed to a beneficiary.

Creditors. The Last Will may contain a clause that no creditor of a beneficiary may attach any estate assets until actual distribution.

Will contests. To help deter a will contest, a clause may be inserted that if a beneficiary of the Last Will becomes an adverse party in any proceeding to contest the Will, then such person shall forfeit his or her entire interest under the Will.

After-born or adopted children. In some cases, a testator might have a child, or adopt one, after the will has been drawn. State laws differ on whether these children share in the estate. The testator should not allow this decision to be made by state law. Instead, a simple provision in the testator's will should be included regarding whether after-born or adopted children should be allowed to share in the estate. The testator's will should also state the percentage or share of the estate to which after-born or adopted children may be entitled.

Power clauses. The Last Will should contain a power clause for the Executor(s) to make clear what powers they have to administer the Will, along with their powers under the applicable probate law. For example, some state probate laws limit the type of investment unless allowed under the Will. An example of power clauses follows. The example includes some items the drafter may delete under certain factual situations. (For example, power clause "N" in the example would not be used when the Testator(trix) is unmarried or widowed when executing the Will. Also, clauses "O"

and "P" would be used only when the estate may be subject to the federal estate tax and when trusts are involved containing QTIP language (clause "P") and possibly subject to the generation-skipping tax (clause "O").)

My Executor(s) shall have the following powers with respect to all property along with powers given to such Executor(s) under law.

A. To retain any or all of the assets of my estate, real or personal, including stock of my corporate fiduciary, without regard to any principal of diversification or risk. The right to retain assets shall apply to the stock of any companies in which I may be a stockholder or a partner, and my Executor(s) shall not be required to diversify, even though the stock or assets of such business or corporation might constitute the bulk of my estate.

B. To invest in all forms of property including stocks and common trust funds whether operated by my corporate [Pennsylvania] fiduciaries, as my Executor(s) deem(s) proper, without regard to any principle of diversification or risk.

C. To sell at public or private sale, to exchange, or to lease for any period of time, my real or personal property, and to give options for sales, exchanges or leases, for such prices and upon such terms as my Executor(s) deem(s) proper.

D. To allocate receipts and expenses to principal or income or partly to each as my Executor(s) from time to time think(s) proper.

E. To employ and compensate, out of the income or principal or both, as my Executor(s) shall deem proper, agents, custodians of estate property, accountants, investment counsel, brokers, attorneys in fact, attorneys at law, tax specialists, realtors, and other assistants and advisors deemed by my Executor(s) needful for the proper settlement of my estate and administration of the trusts created herein, and to do without liability for any professional representative, provided such representative was selected and retained with reasonable care.

F. Whenever my Executor(s) shall have the right to elect (a) whether any item of expense connected with the administration of my estate shall be claimed as a deduction for the federal estate tax purposes or (b) to value my gross estate as of a date that causes larger death taxes to be payable than would have been payable if my Executor(s) had elected another date, I hereby authorize my Executor(s) to exercise any such right of election in such manner as my Executor(s) in the absolute discretion of my Executor(s) determine(s) to be advisable, even though the manner in which any such election is exercised may result in an advantage or disadvantage to any beneficiary hereunder as compared with any other beneficiary or beneficiaries hereunder.

G. To compromise any claim or controversy.

H. To distribute in cash or kind or partly in cash.

I. To exercise any and all of the powers, authorities and discretions conferred hereunder in respect of any securities of any corporate fiduciary acting hereunder, or in respect of any securities of any holding company or corporation owning securities of any corporate fiduciary hereunder.

J. To allocate to income (unless otherwise directed herein) all interest, all rental income not set aside as a reserve for depreciation and all cash dividends or other cash distributions (whether ordinary or extraordinary) received from any source, including by way of illustration and not of limitation; all capital gains cash dividends received from investment companies or investment trusts and all dividends and distributions received in cash from any mining or other wasting asset corporation (notwithstanding that such cash dividends or distributions may constitute a return of capital or distribution from depletion reserves), without setting apart any portion of such cash dividends or distributions to maintain principal intact, provided, however, that any cash dividends or distributions in connection with the winding up of the business or the liquidation of substantially all of the assets or the dissolution of any corporation shall be allocated to principal.

K. To allocate to principal (unless otherwise directed herein) all dividends and distributions payable in property or in stocks, bonds or other securities whether of the disbursing company or another company.

L. To determine whether or not to amortize the premium on any investment in bonds or similar obligations or to allocate to income all or any part of any discount on any such investment; and to allocate to income or to principal as shall be deemed advisable any dividend or distribution the allocation of which is not ascertainable under the preceding two sub-paragraphs or concerning the allocation of which there is any question, and the decision with respect thereto shall be final and binding upon all persons interested hereunder.

M. To enter into any transaction authorized by this article with Trustee(s) or legal representative(s) of any other trust or estate in which any beneficiary hereunder has any beneficial interest, even though any such Trustee(s) or legal representative(s) is also Executor hereunder.

N. To join my spouse, or my spouse's personal representative, in filing a joint income tax return without requiring my spouse or my spouse's estate to indemnify my estate against liability for the tax attributable to my spouse's income and to consent to any gifts made by my spouse during my lifetime being treated as having been made one-half by me for purposes of the federal gift tax law.

O. To allocate any portion of my GST exemption under Section 2631(a) of the Internal Revenue Code, or any similar exemption, exclusion or other benefit allowable under the law in force when I die, to any property as to which I am the transferor, within the meaning of Section 2652(a) of the Internal Revenue Code, including any property transferred by me during life, to elect out of any deemed allocation or revoke any prior election out, and to exercise the special election provided in Section 2652(a)(3) of the Internal Revenue Code as to any part or all of the Marital Trust. I exonerate my Executor(s) and Trustee(s) from any liability arising from any exercise or failure to exercise these powers, provided the actions or inactions of my Executor(s) and Trustee(s) are taken in good faith.

P. To elect that any part or all of any amount passing under this Last Will and Testament be treated as qualified terminable interest property for the purposes of qualifying for the marital deduction allowable in determining the federal estate tax upon my estate. Without limiting the discretion contained in the forgoing sentence, my Executor(s) may make said election with respect to all of any such amount unless the timing of my spouse's death and mine and the computation of the combined death duties in our two estates render such an election inappropriate.

Appointment of personal representative. The appointment of a personal representative is one of the most important parts of a will. If a person dies intestate or without specifically nominating a personal representative, then the court will make such appointment. Generally, the personal representative nominated by the testatory will be accepted by the court unless that person (or the corporation) is unable and/or unwilling to act as such. It is also important that the will designate a successor personal representative in the event that the nominated representative cannot or will not serve. It is always good practice to nominate a personal representative who is familiar with the testator's affairs and property. In order to greatly reduce estate administration expenses, a simple phrase should be inserted that allows the personal representative to serve without posting a performance bond.

EXPAND POWERS→ In many cases, the nominated personal representative will be either a relative or a trust department of a financial institution. Generally, it's in the best interests of the beneficiaries and the estate that the personal representative be given sufficient flexibility to adapt to changing circumstances without having first to apply for the court's permission. Thus, it's a good idea for the will expressly to give the personal representative powers above and beyond those provided by law.

Simultaneous death clause. Many states have adopted the Uniform Simultaneous Death Act. This Act creates the presumption that each spouse is deemed to have survived the other in the case of a simultaneous death. Obviously, this presumption can wreak havoc on the estate's marital deduction planning and can cause the loss of estate tax savings. To prevent this result, the will should contain a clause specifying the order of death in the event of a common disaster.

Limited survivor clause. The death of a beneficiary within a short period after the testator's death can cause needless double taxation and administration expenses. Also, the property may not pass according to the testator's wishes. This is especially true if both spouses die within a short time of each other. In order to prevent such problems, the will should contain a clause conditioning a bequest or a gift to a beneficiary on the beneficiary's surviving the decedent for a stated period. If the gift or bequest is to the spouse, and the survival period is specifically limited to six months or less, then the gift or bequest will not violate the terminable interest rule and will qualify for the federal marital deduction if the spouse survives for the stated period.[5]

Witnessing clause. To be valid, a will must comply with certain statutory formalities when it is executed. Although the exact requirements for a valid will differ from state to state, all states require that a will be witnessed. The number of required witnesses varies; most states require two witnesses, but some require many more (e.g., Louisiana requires as many as five or seven, depending on the type of will).

As a general rule, witnesses should be persons who will be accessible and competent to testify at future probate proceedings. Provisions should be made for each witness to insert his or her current address and/or telephone number. A beneficiary shouldn't be a witness. *Reason:* In many states, a witness-beneficiary will lose his or her share (or part of it) of the legacy unless the will can be proved without that person's testimony.

Self-proving clause. Some states now recognize the validity of self-proving clauses. A self-proving clause is a written acknowledgement sworn to and subscribed by the witnesses that they saw the testator sign the will as his or her free and voluntary act. The acknowledgement must further provide that each of the witnesses was in the presence and hearing of the testator and that the testator was of legal age, sound mind, and under no constraint or undue influence. Finally, such acknowledgement should state that the subscribing witness affixed his or her signature to the will as his or her own free and voluntary act.

[¶4105.2] CHECKLIST FOR DRAFTING WILLS

A checklist can be an invaluable aid to the estate planner, as well as for his or her client who is contemplating drafting a will. It can serve as a logical guide in drafting, and can be used to "double-check" that matters have been adequately covered.

(1) Formalities

1. Testator must—
    a. Have testamentary capacity
    b. Be old enough
    c. Be free from undue influence
2. Introductory clause
    a. Testator's correct name, names used (nicknames, aliases)
    b. Testator's domicile or residence
    c. Expressly revokes all prior wills and codicils
3. Execution and attestation
    a. Only original will signed
    b. Statutory requirements met, e.g.—
        - Testator knew and declared it to be last will
        - Signed at the end by testator
        - Testator and witnesses signed in each other's presence
    c. Notation of number of pages in will, alterations, or interlineations
    d. Are witnesses disinterested parties?
    e. Where is will kept for safekeeping?

(2) Payment of Debts and Taxes

1. Payment of debts
    a. Simple payment-of-debts clause?
    b. Charge debts against specific bequest, or portion of estate (e.g., the residue)?
    c. Establish a liquidation preference if assets must be sold to pay debts—which legacies preferred?
    d. Make bequest to a particular creditor to satisfy a debt?
    e. Pay debts owed to others that are not legally enforceable?
2. Payment of death taxes
    a. Apportion taxes according to state's apportionment statute?
    b. Pay taxes from residue, or specific portion of residue?
    c. Pay taxes as debts or expenses of administration?
    d. Which property pays taxes due on non-probate property?
    e. Directions to—
        - Make tax elections?
        - Minimize estate taxes?
    f. Effect on estate tax marital deduction

(3) Form of Bequest

1. Outright
    a. Are beneficiaries clearly identified?
    b. Are legacies accurately described?
    c. If a general bequest:
        - Simple percentage bequest?

- Cash bequest with percentage limitation?

d. If a specific bequest:
- Are items clearly described?

e. If a demonstrative bequest:
- Is source identified?
- What if it's insufficient?

f. Any restrictions or conditions on beneficiary's enjoyment of bequest?

g. Bequest to minor—place in trust at testator's death?

2. In trust

a. Composition of trust principal
- Pecuniary bequest?
- Specific assets?
- All or portion of residue?
- Pour-over to living trust?

b. Beneficiaries accurately identified?

c. Beneficiaries' interests in trust specified?
- Alternative gift if beneficiary predeceases testator?

d. Type of trust
- Income distributed?
- Accumulation trust?
- General family trust?
- Sprinkling trust?

e. Spendthrift provisions?

f. Carrying out antenuptial agreement?

g. Is trust sure to terminate within the lawful period (rule against perpetuities)?

h. To whom is principal payable when trust terminates?
- If beneficiary fails to exercise appointment power?

(4) Property Transferred

1. Personal property

a. Accurately described?

b. If classes of property—who has right to pick and choose?

c. Any special powers for executor with respect to specific items?

d. Provisions for keeping valuable heirlooms in family?

e. Special treatment of art collections?

f. Specific legacy of stock?

g. Insurance proceeds payable to estate?

2. Real property

a. Accurately described?
- Address; or metes and bounds (farm property)

b. Sell it—and distribute proceeds?

c. Do all estates in the property pass under the will—have any been left out?

d. Will property pass subject to encumbrances—or will mortgages and liens be paid out of personal estate?

e. If bequest of life estate—provision as to residence, sale, waste, or maintenance costs?

f. Provision for new residence that may be acquired after will executed?

g. Rule against perpetuities

- Do all interests vest within period allowed?
- Perpetuities saving clause?

3. Miscellaneous property and problems

a. Problems of out-of-state property?

b. Forgive debts owed to testator?

c. Provisions for substitutional gifts to avoid ademption?

d. If insufficient property in estate—method of abatement?

(5) Beneficiaries

1. Naming the beneficiaries

a. Clearly identified?

- Are names of corporate and other nonpersonal beneficiaries exact?

b. Is distribution per stirpes, per capita, or in some other manner?

c. Are "words of art" used precisely and explained clearly—to eliminate ambiguity (e.g., "children," "issue," "next of kin," "distributees")?

- Does "children" include adopted or illegitimate children?

d. Class of gifts

- When is composition of "class" fixed?
- If gift is to named persons who make up a class—is it clear that it's a class gift, or merely a gift to individuals?

e. Provisions for changing beneficiaries

- After-born children?
- Divorce or remarriage—who is "wife"/"husband"?
- If beneficiary predeceases testator and gift lapses—contingent beneficiaries?

2. Surviving spouse—marital bequests

a. Outright, or in trust?

b. Does taking a marital deduction make tax sense?

- Should there be a unified credit trust?

c. If you set up a marital deduction trust, does it give the surviving spouse—

- All or a specific portion of the income for life, payable at least annually, and
- An inter vivos or testamentary power to appoint to him or herself or his or her estate—exercisable by the spouse alone and in all events, and with no one else able to appoint trust property to someone other than the spouse?

d. Form and funding of bequest

- Pecuniary?
- Pecuniary formula

—With "minimum worth" provision?

—With "true worth" provision?

- Stated fraction?
- Fractional formula?
- Estate trust

—Does property pass to surviving spouse's estate at death—so it qualifies for marital deduction now?

- QTIP trust?

e. Surviving spouse
- Deemed to be survivor in case of simultaneous death—if you want marital deduction?
- Any requirement to survive for a stated period?

f. Other spousal rights in the estate
- Previous property settlements?
- Will provisions expressly in lieu of dower and all other spousal rights in estate?
- Statutory right to elect against will?

g. Powers over principal (e.g., power to invade) for surviving spouse? Income tax implications (see IRC § 678)?

h. Exonerate marital share from taxes and from abatement for other bequests?

i. Who takes if power of appointment is not exercised?

j. Options if marital deduction not desired
- Terminate trust on remarriage?
- Spousal power to appoint to specified class—and not him or herself or the spouse's estate (special power of appointment)?
- Executor instructed not to elect marital deduction even if trust qualifies as QTIP?

3. Charitable beneficiaries

a. Bequest: outright or in trust; conditional?

b. Charitable organization:
- Clearly named?
- Trustee authorized to choose charities?
- Provision for gift-over if charity doesn't qualify?

c. Form of trust
- Income (lead interest) trust? For estate tax charitable deduction, set up as either—

(1) Guaranteed annuity, or

(2) Yearly distribution of fixed percentage of principal

- Remainder trust? If you want estate tax charitable deduction, must be either—

(1) Annuity trust,

(2) Unitrust, or

(3) Pooled income fund

- Trust entirely for charity?

d. Life estate in residence or farm with remainder to charity?

e. Potential violation of state's mortmain statutes?

(6) Fiduciaries

1. Appointment of fiduciaries

a. Executor and trustee

- Identified and capable of serving?
- How many?
- Individual or corporate?
- Alternates or successors designated—procedure for appointing successor trustee?
- Compensation?
- Bonding requirement waived?
- Waive court proceedings to qualify trustee?
- Provision exonerating trustee?

b. Guardians of person and property for minors and incompetents?

c. Ancillary fiduciaries needed?

2. Powers of executor

a. Statutory powers in state law?

b. Powers comparable to trustee's?

c. Authority to sell assets without court approval?

d. Power to make QTIP election?

3. Powers of trustee

a. Broad discretionary powers to cover contingencies, or rigid standards?

b. Investment powers

- "Prudent person" standard?
- Limited to specific types of investments?
- State law?

c. Retaining certain assets

- Not readily transferable, e.g., stock of family corporation?
- Assets owned at death, but not authorized as a reinvestment?

d. Authority to continue testator's business?

e. Authority to sell trust assets without approval?

f. Power to invade principal—what standard?

g. Powers over income—accumulation or distribution?

h. Hold separate trusts in consolidated fund?

i. Third parties

- Consultation on investment decisions?
- Approval required?
- Authority to employ agents?

j. Special rules when there are co-trustees?

(7) Miscellaneous Provisions

1. Powers of appointment

a. Does will specifically exercise, or decline to exercise, any power of appointment held by testator?

b. Does exercise of the power meet all procedural requirements?

c. Does residuary clause, under state law, automatically exercise any power?

2. Funeral or burial instructions
   a. In will, or separate documents?
   b. Any prearrangements—anatomical gifts, funeral services?
   c. Place of burial; family plot?
   d. Perpetual care of burial plot?
3. Other clauses
   a. Any precatory requests?
   b. Disinheritance clauses?
   c. In terrorem, or no contest clause?
   d. State law governing will construction?
   e. Are gifts before death to be considered advancements?
   f. During administration period—which beneficiaries will receive estate income? In what proportions?
   g. Self-proving wills (if applicable).

Consult Table Under Tab Card "Cross Reference Tables" for Other Articles and New Developments Related to This Subject

REFERENCES

Listed below are references cited in the preceding analysis.

(1) IRC § 2010. Before OBRA '87, estate and gift tax rates were graduated regardless of the size of transfers. A progressively higher marginal tax rate applied as the dollar amount of transfers increased. In addition, the unified gift-and-estate tax credit of $192,800 sheltered from tax the first $600,000 of transfers, no matter how much was transferred.

Effective for transfers after 12-31-87, OBRA phased out the benefit of the graduated rates, and the unified credit, for larger estates. This phase-out was accomplished by means of a 5% surtax on taxable transfers over $10 million. The rate adjustment for decedents dying, and gifts made, after 12-31-87 occurs for cumulative taxable transfers between $10 million and $21,040,000. Once the maximum adjustment applies, the 55% rate becomes the rate of taxation.

(2) IRC § 2056.

(3) IRC § 2056(b)(7).

(4) Id.

(5) IRC § 2056(b)(3).