Simple Estate Planning

A Supplemental Booklet for Clients

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Outline

Chapter 1 - Property Ownership

1.0 Disclaimer

This booklet is to be used in connection with the advice of an attorney or other appropriate professional. It is for informational purposes only. While an attempt was made to make this material current as of the date it was prepared, the law does change and you should not rely upon any statements in this booklet.

2.0 Ownership Interests in Property

2.1 Introduction

There are two types of property: real and personal. Real property has the following characteristics: land and things attached to it, a location, is indestructible (value can be reduced but is still there), is immobile, the supply is fixed, and each parcel (location) is unique. Personal property is every other thing that can be subject to ownership. Personal property is then subdivided into tangible (things that can be touched, like a piano) and intangible (like contracts) property. A sub-type of intangible property is Intellectual Property (like patents).

2.2 Real Property

2.21 Historical Development

Real Estate can be divided, owned, or held; in many ways. For example, by: number of persons, lots, layers of depth in the earth, right of joint ownership, life estates, ownership and use, etc. Many of these concepts have come down to us from feudalism.

In 1066, William the Conqueror brought to England a system of land ownership which would insure continued support by his lieutenants. I was called fee simple land in perpetuity for which rent was paid. The rent (at least to the King) was measured in military service, not in money. This worked very well for a long time. The knights receiving the initial grants (land grants) tended to do the same thing. However, the duties required for the rent varied with the overlord being obligated to provide security and protection in return for rents paid.

Land was transferred in a special ceremony called a “feoff”. There were to types of land transfer: Sub-infeudation, which gave up all the land (it could be a portion of the original grant) and the new owner assumed all duties upward of the original grantor. No consent was needed for this type of transfer because the original grantee was still responsible to pay the rents. Transfer by substitution gave

the land horizontally. It required permission and a fee. The new owner was then responsible for the rents.

In the event of death, the property passed to the oldest son. If there was no male heir, females could take in equal shares.

The words used to describe transfer of ownership made a difference on the type of ownership transferred (just as it does today). The words "a to b and his heirs" was fee simple forever (or absolute). If "b" died it went to his heirs. The heirs then owed all rents to "a". If he had no heirs, it went back to "a". This is called Escheat. Land could also escheat as a result of criminal action, treason or felony. (Can you see where people might be accused of things they didn't do?) Today it means land that goes to the state because there are no heirs. If on b's death his heir was a minor, "a" held control of the land and rents until the heir reached his majority. If "b" dies and his heir is a girl, "a" can marry her off with the land (usually in return for large bribes). Sub-infeudation (or sale) was often used during life to transfer property to ones heirs to avoid the problems of escheat, wardship and marriage. Dad got cash, the sons got the land, the king got the rent. The words "a to b" meant a fee simple life estate. Everything went back to "a" on "b"'s death.

From this you can see that how land is titled can make a great deal of difference in the rights you may possess.

2.22 Different Interests in Land

2.221 In General

There are three general types of interests in land: Freehold Estates, Non-Freehold Estates, and Non-Estates. The following will be a simplified explanation of each type. A number of complex types will not be discussed, such as "remainder" or "conditional" interests.

2.222 Freehold Estates

The first type of real property is called a "freehold estate". A freehold is an actual ownership interest in the land as opposed to a use interest in the land.

Freehold Estates	
Life Estate	"a to b reserving a life estate", a can use the property until death, at which time full ownership of the property goes to b.
Fee Simple Absolute	"a to b and his heirs" or "a to b", b has full rights of ownership and can sell the property if desired.

Next are what we call Concurrent Interests in real property. This is where more than one individual at a time has an interest in the same property.

Concurrent Ownership			
Title	Tenants in Common or Joint Tenants	Joint Tenants with Rights of Survivorship	Tenancy in the Entirety
Language	"a to b and c"	"a to b and c as joint tenants with rights of survivorship and not as tenants in common"	"a to b and c, husband and wife"
	"a to b and c as tenants in common"	"a to b and c as joint tenants with rights of survivorship"	"a to b and c, as tenants in the entirety"
	"a to b and c as joint tenants"		
Shares	Equal or Unequal	Must be Equal	Equal
Number of Tenants	No Limit	No Limit	Two

There are three additional concepts that should be mentioned at this point in connection with the ownership of land. Although this actually has application when we discuss the Divorce Law. These concepts can allow an individual to obtain an equitable or unrecorded interest in land.

Separate and Community Property	
Separate	property owned by each spouse prior to marriage, and property acquired after marriage by gift, bequest, device or descent, together the with rents and profits therefrom.
Community	all other property acquired by either spouse or both after marriage. Strong presumption that is community. Community property states create additional rights in spouse.
Commingled	any property that has been joined together and treated as joint property becomes community property even if its original character was separate property.[1]

2.223 Non-Freehold Estates

The next type of interest in land is called the Non-Freehold Estate. Sometimes these are called Leasehold Interests. They typically involve full use of the property for more than a momentary period. If you have rental properties, your tenants will have non-freehold interests.

2.224 Non-Estates

There are three types of non-estates that can affect land ownership: easements, profits, and servitudes. An easement is the right to limited use of the property, such as for roads or utilities service. Profits is the right to extract things such as oil or minerals from the land. And servitudes are restrictive covenants, or rules limiting the use of the land.

[1]Usually cash not land.

Chapter 2 - Methods of Property Transfer

1.0 Methods of Transferring Real Property

1.1 In General

This Chapter is on the methods used to actually transfer an interest in real property. Property may pass by Gift, Inheritance, Purchase, Adverse Possession, Condemnation, or Escheat.

1.2 Gifts

The first method is by gift during ones lifetime. This is called an "intervivos" gift. This is usually done through the preparation and recording of a Deed. In Utah this recording is done at the Office of the County Recorder in the County in which the property is located.

1.3 Inheritance

Inheritance is in a sense a gift given after death. It is called a "testamentary" gift. Testamentary gifts are usually given as part of a Will, but there are other methods of after death transfer of an interest in property.

Unfortunately, a will alone cannot give clear title to real property. As a result a Will must be probated so that a Personal Representative's Deed can be prepared and recorded.

If an individual dies without a Will, one or more of their heirs may still acquire an interest in any property he or she owned at death through Intestate Succession. As part of the deceased individuals probate action, a Personal Administrator's Deed can be prepared and then recorded.

If one of two individuals, holding property as Joint Tenant's, dies, the survivor succeeds to full ownership of the property. Since the deed has already been recorded in this case, the survivor prepares and files a document called a Termination of Joint Tenancy.

Finally, an individual may obtain an interest in real property through a Trust. Most trusts also become effective, at least as far as the successor beneficiaries are concerned, on the death of the Trustor. During his or her lifetime, the Trustor transfers property by deed into the trust. According to the terms of the trust the successor trustee will transfer the property by deed to the beneficiaries. A trust avoids the necessity of probate, because delivery has occurred during the life of the

Trustor. A trust is used to give what is called a remainder interest. Someone uses it now, someone else gets it later.

1.4 Purchase

Property may also be obtained by purchase. A purchase with a Quit Claim Deed transfers to the buyer whatever interest in the property the seller possessed. A purchase using a Warranty Deed includes a promise that the seller actually holds clear title to the property being transferred. Most purchases are evidenced by Warranty Deeds that are then recorded.

1.5 Adverse Possession

A form of involuntary transfer occurs with adverse possession. Adverse possession requires open use and possession of another's property for a period of seven years. Most often it applies to determining boundaries, from fence lines that are different than those recorded by deed. However, it can also apply to tracts of land. In Utah the added requirement of paying taxes on the land has been added to protect absentee owners.

1.6 Condemnation

Condemnation is another form of involuntary transfer where the Government, or someone with the approval of the government like a Utility Company, takes land for a public purpose. Condemnation requires a Court Hearing and fair compensation to the owner of the property.

1.7 Escheat

Escheat is an exercise of governmental power. In it, the government takes the land because it was involved in some illegal activity (like the production of drugs) or a person dies without heirs.

2.0 Deeds

2.1 History

The actual document used to transfer property was originally called an "indenture" or a "deed poll". With an Indenture a duplicate deed was prepared on the same piece of paper (or sheepskin) and signed by the grantor and the grantee. If this was not done the grantee was not responsible for rents. The paper was then and torn in two with a jagged or indented (hence the word indenture) edge. If there was ever a question of validity or modification, the two were brought back together

and compared by a Judge. With a Deed Poll only one copy of the document was prepared and executed. It had a straight top edge and no duties on part of grantee.

2.2 Requirements for Validity

2.21 A Written Instrument

A Deed is a written document that must contain a number of things. First, the parties to the deed must be identified. There is the Grantor or Grantors are the parties giving up the property. Their names must be spelled the same as those on a prior recorded deed if the new deed is to be valid. Further, if there are multiple owners of a property and only one grantor is on the deed, he or she can convey only their interest in the property. The Grantee or Grantees (plural) are the individuals who are receiving an interest in the property. The parties to the deed must also be alive at the time the deed is signed for it to be valid.

Second, some consideration for the transfer should be mentioned. This is done to show a present intent to permanently transfer the property. At the present time the language "Ten Dollars and other good and valuable consideration" is the standard used.

Third, are words of conveyance or transfer. For example, Grantor "Quit Claims" the property to Grantee. This means that the Grantor gives to the Grantee whatever interest he or she may have in the property. This could be all the property, a part of the property, or none of the property. If the Grantor "Conveys and Warrants" the property to the Grantee, the Grantor guarantees to the Grantee that he or she has clear title to the property (there is no debt on it) and the legal right to convey it

Fourth, the property should be described. A legal description is required so that other individuals reviewing county records can determine who owns a specific parcel of land. There are three types of legal descriptions, only two of which may be used. The first is a metes and bounds description. Using a fixed point as a reference the property is described by the length and geographical angles of it's borders. The second type of acceptable description is the Plat Map. A builder of a Sub-Division, a group of houses, will record a Map showing the entire project with each home identified by a letter. This is much simpler, and less subject to error than a Metes and Bounds Description. The third type of description, which should not be used, is the "tax description" of property as found on an individuals annual tax valuation notice from the County. The tax description is usually a short hand metes and bounds description. It is not accurate and should not be used.

And finally, there is the Execution Clause. To be validly executed the deed must include the date, Grantor's signature, and the witnessing of that signature. This can be through actual witnesses, although it is more common to have the document Notarized.

2.22 Delivery & Acceptance

The next requirement for a valid deed is delivery and acceptance. The next chart summarizes the methods of delivery.

Delivery of Deeds		
Actual Delivery		
	To the Grantee	Is valid, but must be recorded to offer protection against third parties.
	By Recording	Is valid, but is subject to rejection by the Grantee.
Constructive Delivery		
	To an Agent	Is valid, but could be revoked by the Grantor or a Court.
	To Escrow	Is valid, and cannot be revoked.
	In the dresser drawer with a note to record on death.	Is not valid. However, it may be treated as valid if recorded and no one objects.

Note that constructive delivery is a question of intent and specific instructions.

2.23 Perfection

Before an ownership interest in property can be protected, that interest must be recorded. In the past it was often difficult to determine who really owned the piece of property you wanted to buy. As a result it was quite easy to be defrauded by purchasing property from someone who really didn't own it. This problem has been resolved through Recording Statutes, that require you to record a deed before you have a protected interest in that property. As a general rule, the first person to record a valid deed is the record (and therefore legal) owner of the property.

In most cases, an individual buying a home will have a Title Search done to ensure that the seller can warrant clear title. An individual will then research the county records to determine who is the record owner of the property. If the seller does have clear title, the Title Company will issue a Title Insurance Policy to the buyer. This protects the buyer if a problem arises latter with the title. The buyer looks to the Title Company for compensation or redress; and the Title Company then looks to the seller.

3.0 Assignment of Interest

Sometimes an individual will not have title to property, but may have an interest in the property. For example, an individual may have sold the property on Contract and be entitled to receive a monthly payment from the buyer. This contract right in property can then be Assigned (meaning given or sold) to someone else.

Chapter 3 - Tracing Property and Intestacy

1.0 Tracing Ownership of Property

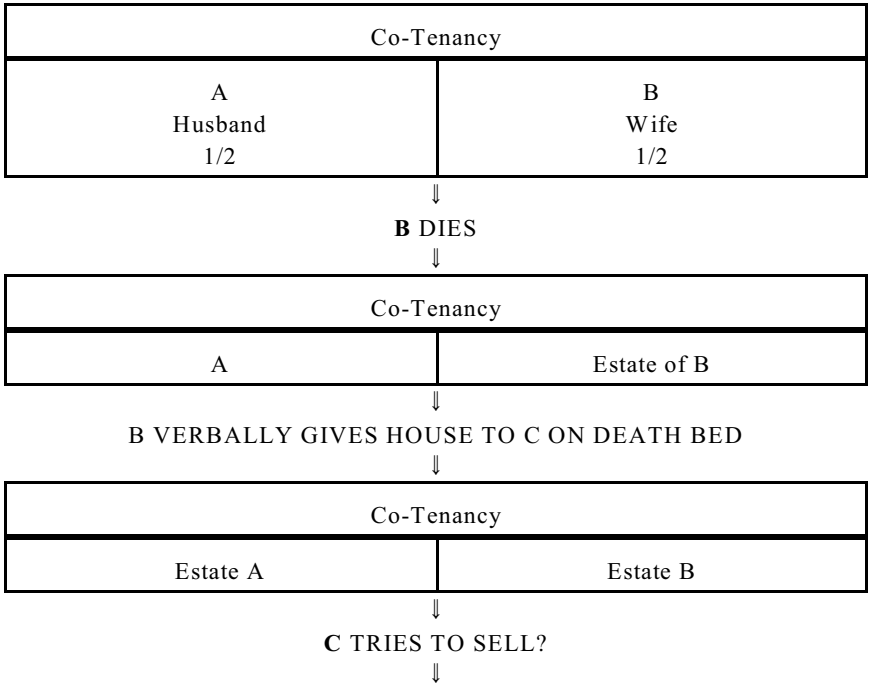
1.1 In General

One of the skills that is essential to Simple Estate Planning is the ability to Trace or Chain the Paths of Ownership in Real Property. Since an individual can transfer only the interest that they possess in real property, it is important to determine the interest they have. It is not uncommon to have to probate the estate of a deceased relative before an interest in property can be transferred into a trust.

1.2 Tracing Ownership

As a example of the importance of tracing, look at the fact situation charted out below.

A & B as husband and wife. B dies. A lives in property until his death. On death bed he says Child C can have the house. Child C moves in, no one objects. Twenty years later C wants to sell the property.



Problems:

1. C cannot sell the property because she does not own it.
2. The property is still owned by the estate of A and the estate of B.
3. It will be necessary for C to probate the estate of A and B, and if necessary get a release or pay the other siblings for their interest in the property.

2.0 Intestacy

Before we begin a discussion of wills, it is helpful if you understand a number of preliminary concepts. One of these is intestacy. Intestacy is generally defined as " the state or condition of dying without having made a valid will,..." Black's Law Dictionary.[2] In the event a person dies intestate, his property is divided among his heirs or next of kin, according to " rules of distribution" set forth by state stature.[3] The Utah distribution pattern may be found in the chart on the next page.

[2]Questions of intestacy may also arise where all or part of a will is invalid, where a will is attacked by heirs who may declare part or all of the will invalid, or where the will fails to dispose of all of the decedents property.

[3]Thus, an individual contemplating leaving no will should ascertain whether the state distribution pattern is the same as the pattern he would desire.

<table>
<tr><td colspan="3">Intestate Succession to Separate Property[4]</td></tr>
<tr><td colspan="2">Spouse Surviving</td><td>No Spouse Surviving</td></tr>
<tr><td colspan="2">Spouse and Surviving Issue if Also Issue of Surviving Spouse</td><td>All to</td></tr>
<tr><td colspan="2">First $50,000 to Surviving Spouse and Balance:</td><td rowspan="4">Children or their issue by representation</td></tr>
<tr><td>½ to Surviving Spouse</td><td>½ to Surviving Child or Issue (equally)</td></tr>
<tr><td colspan="2">Spouse, No Surviving Issue</td></tr>
<tr><td colspan="2">First $100,000 to Surviving Spouse and Balance:</td></tr>
<tr><td rowspan="5">½ to Surviving Spouse</td><td>½ to Surviving Parent or Parents</td><td>If none, all to parent or parents.</td></tr>
<tr><td>If neither, then to Brothers and Sisters, or their Children or Grandchildren</td><td>If neither, all to issue of parents by representation</td></tr>
<tr><td>If none, then ½ each to paternal and maternal grand-parents or their issue or the survivor of them</td><td>If none, then ½ each to paternal and maternal grand-parents or their issue by representation. If no grand-parents or issue on either side, entire estate to other side.</td></tr>
<tr><td>If none, then to next of kin in equal degree</td><td>If none, then to next of kin in equal degree</td></tr>
<tr><td>If none, then to State of Utah (School fund)</td><td>If none, then to State of Utah (School fund)</td></tr>
</table>

[4]Sec, U.C.A.§75-2-101-103

Chapter 4 - Estate Planning Tools

1.0 In General

From the last chapter it should be clear that if you do nothing to plan the disposition of your estate, the government will make those decisions for you. The efforts an individual makes to have his or her property distributed in the way they want is called estate planning. Your estate is simply everything you have an ownership interest in.

Estate planning is important to everyone for two reasons. First, an estate plan provides the legal means for disposing of your property at death in a way that recognizes your wishes, the needs of your survivors, and minimizes taxes. Second, it can provide for the handling of your affairs in the event of disability or medical treatment involving life support.

As with most things, there are right ways and wrong ways to go about estate planning. In the material which follows a number of tools used in estate planning will be discussed.

2.0 Will Substitutes

2.1 In General

For a variety of reasons, including cost, many individuals will use various self-help estate planning methods rather than seek the assistance of an attorney. I call them “Will Substitutes”. Unfortunately, because of lack of legal knowledge these substitutes (which can be great tools when used in conjunction with wills or trusts), can have serious adverse consequences and the property may not end up being disposed of as they wish. Using the assistance of an attorney is a lot like taking out an insurance policy. It insures that the result you want actually takes place. Will Substitutes might be considered “temptations” that should be resisted. A number of these self-help methods and their potential consequences are as follows:

2.2 Joint Property

2.21 Between Husband and Wife

This occurs most often in the case of real property where both husband and spouse are listed as joint owners. Caution should be taken to ensure that the proper formalities have been met and that the deed actually states “H and W as joint tenants with rights of survivorship.” In the event the formalities have not been met, the property is actually owned half by each of the parties (as co-tenants) and the

decedent's share will not automatically pass to the surviving spouse. It should be noted that a valid joint-tenancy may be converted prior to the death of either party into a co-tenancy by either party. Thus, in the case of an unfaithful or spendthrift spouse, joint tenancy may not be a wise idea. In fact, there is a reported case where a disgruntled wife sold her interest to her mother and after litigation, the court ordered the husband to allow the mother-in-law, whom he detested, to live in one half of the parties' residence. Further, if both parties were to die at the same time the property would pass by intestacy and would require probate.

2.22 Between Parent and Child

A very common practice is to execute a "quit claim" deed which adds a child's name as a joint owner of the property. Upon the recording of such a deed, the child immediately obtains an interest in the property, and upon the death of the other joint owners will succeed to full ownership of the property (assuming the deed is correctly drawn). However, because the child gets an immediate interest in the property, that interest is subject to the rights of creditors. Therefore a home could be sold to satisfy the demands a child's creditors before the death of the joint owner parents. At the time the property is sold by the creditor, the parents will only be entitled to a percentage share of the sale proceeds.

2.3 Insurance

Term life insurance is a commonly used estate planning tool. Caution should be used to ensure that life insurance policies are properly owned and that the beneficiaries are properly designated. For example, if a husband were to purchase a policy on his life, making his wife the beneficiary, and he were to die first, the total value of the insurance policy may be included in his estate for tax purposes. However, if he had made his wife the owner and beneficiary of the same policy, she would receive the amounts free of estate tax. It is also a wise policy to include the children as secondary beneficiaries in the case of simultaneous death.

2.4 Deeds with a Reservation

2.41 In General

As a preliminary note, it should be re-stated that a deed must be delivered before it is effective. Deeds delivered to grantees with reservations generally fall into one of three categories.

2.42 Reserving a Life Estate

The first is where the deed on its face reserves a life estate to the grantor. If this deed is delivered during the grantor's lifetime, the transfer is effective. Note should be made, however, that this transfer may qualify as a "gift" resulting in some tax consequences. It is however, one of the safest of the will substitutes.

2.43 Oral Reservations

The second circumstance is where a deed is delivered which is express or absolute on its face in conveying title and the grantor "orally" states that the deed is to be effective only on the grantor's death. The general rule in this case is that an absolute transfer has occurred. The grantor has no further interest in the property. This method of transfer should be used only with extreme caution, since the grantee is now the owner of the property, and is entitled to possession, notwithstanding any equitable claims by the grantor. Further, tax implications may arise if the grantor were to continue to live on the property, in that the grantee may have to pay taxes on " imputed rental income".

2.44 Written Condition

The third situation is where a deed is absolute on its face but contains a written condition. For example, that the transfer is only valid on the grantor's death. In such cases, the courts have resolved the matter in a number of ways. Nevertheless, the general rule is that the transfer is invalid.

2.45 Held Until Death

Another common practice is to execute a deed transferring property to the children, placing it in the desk drawer, and then instructing the children at the time of your death that they are to retrieve the deed and record it. Unfortunately, such recordings are invalid in most states. If the deed is not delivered to the children during the lifetime of the grantor it is not considered a valid transfer.

2.46 Deeds Held by an Escrow Agent

In the event that the grantor prepares an absolute deed which he delivers to a trustee or escrow agent with instructions (written or verbal) that the deed is to be recorded on his death, such a transfer is valid. However, if the escrow is revocable, or the property is to be returned in the event the grantee does not survive the grantor, the transfer is invalid.

2.5 Government Bonds

With many government bonds it is possible for the purchaser to designate on their face who should be paid in the event of the purchaser's death. These are often called "POD" (Paid On Death) bonds. A special form of bond is called a "flower bond." These bonds can be applied to taxes at their full face value, even though that value has not yet accrued. Bonds often result in the same difficulties as joint tenancies.

2.6 Bank Arrangements

2.61 In General

There are three general types of bank account arrangements: Totten Trusts, Joint or Survivor Accounts, and Pay on Death Accounts. Each will be discussed below.

2.62 Totten Trusts

The first is called a "totten" trust. This is where "A" deposits money in a savings account in trust for "B", with "A" retaining the right to withdraw all or any of the money at any time. The courts go both ways on totten trusts, some approving, some invalidating. A totten trust is essentially a revocable intervivos trust. It may suffer from the same problems that joint tenancy in real property suffers from.[5]

2.63 Joint or Survivor Accounts

The second situation is a joint or survival account. This generally occurs where two individuals are named on the account. This method of transfer is valid, although it suffers from the same problems as joint tenancy and may have an additional problem in that the bank, if it learns of the death of one of the parties, may not release the funds for fear that it may eventually become liable for debts of the decedent.[6]

Many individuals will put a single child's name on their bank account under the assumption that at death the child will divide the bank account proceeds evenly with their brothers and sisters. However, there is nothing the other brothers or

[5]See, U.C.A. § Section 7-13-41.

[6]See, U.C.A. § 7-3-45, and 12 Utah 2d 388, 10 Utah 2d 405, 85 Utah 364, and 122 Utah 445.

sisters could do if they choose not to share the proceeds. Under the law all of the proceeds in the account belong to whoever's name is on it. It might be possible to argue a constructive trust, but the evidence must be clear and convincing.

2.64 POD Account

The third situation arises where the bank account includes a payable-on-death designation. In other words the funds in the account will go to the named beneficiaries after the death of the account holder. This is the preferred method of dealing with bank accounts in Utah.

2.7 Name Tags

Another common practice is to put name tags on the bottom of every nicknack or item of furniture. While this makes a lot of sense, it also is legally unenforceable and there is no guarantee that the property will go to the individuals you want. A wiser practice is to use the "dresser drawer" provisions [which we will discuss later] in a will.

2.8 Contracts

Utah law recognizes that succession in property can be affected by contract among the successors.[7] For example, a pension plan will often designate a beneficiary in the event of death (and courts have held these to be valid) even though they do not meet the requirements of the Statute of Wills.

3.0 Wills

3.1 In General

One of the most common estate planning tools is the Will. A will is a legal document that contains the Testator's[8] wishes regarding the distribution of his property at death and contains a date, a signature, and generally some sort of attestation language. Most state statutes will allow an individual to write their own will. However, there are some dangers in doing so if the personally prepared will does not meet the statutory requirements. For example, in some states, the will must either entirely hand written or entirely typed. To mix typed with hand written text may result in an invalid document. Wills also do not take effect until death.

[7]See, U.C.A. §75-3-912.

[8]Male = Testator, Female = Testatrix.

3.2 Will Contents

A typical simple Will should contain: (1) a clause revoking all prior wills to let the heirs know that the last dated document is the valid one, (2) a reminder to pay debts and costs of the estate, (3) a statement of ones marital status, (4) identification by name of one's spouse and children, (5) a power of appointment clause that can minimizes tax consequences, (6)provision for a personal property list, (7) the bequest of the remainder of your estate (usually first to your spouse then to your children or to a family trust), (8) a reminder to file tax returns, (9) the appointment of both a personal representative and a successor personal representative to serve without bond, (10) the appointment of guardians and successor guardians for minor children to serve without bond, and (11) execution clauses which insure the validity of the will. Custom wills can include words of counsel or advice, provisions providing for forgiveness of debt, payment of debt, the carrying on or liquidation of a business, rewards for kindness, burial provisions, monument inscriptions, the treatment of any gifts made prior to death, gifts to charity, safety deposit box information, or information relating to a trust. These provisions result in additional costs. Finally, there are complex wills that are designed to minimize taxes. These are often called "twin trust marital deduction wills".

3.3 Who Needs a Will?

Almost everyone needs a will. However, if someone is married, has minor children, has property, wishes to leave specific instructions to their heirs, or does not agree with the state pattern of intestate distribution, they need a will.

If someone is married, the will can provide for their spouse and give important instructions at a time of great emotional difficulty, that can make their loss more bearable.

If someone has minor children, their will can name the individuals that they wish to care for their children after death. If they do not so designate the choice will be left to the probate court, and the individual chosen may not be one that they would approve of. Further, if their estate leaves any money to their minor children, it will be necessary for the court to appoint an individual to supervise that money who will have to post a bond. Thus, the individual who ends up caring for their child may have to pay money to the court for the privilege of doing so. A will can avoid this complication by waiving the bond.

If someone has property which they wish to give to a specific individual, a will provides a legally enforceable means for doing so. Most state statutes allow them to give tangible items of personal property to specific named individuals simply by attaching a list to a properly prepared will. This list is extremely flexible in that it

can be changed from time to time becoming binding only at their death.

A will also allows someone to leave specific instructions to their heirs or personal representative. Such items may include reminders to pay bills, to file tax returns, or may disclose the location of important documents or papers.

And finally, a will gives someone control over the disposition of your property. If someone dies without a will (called dying intestate) their property will be distributed according to the statutes of their state. Many individuals falsely believe that a surviving spouse with small children will receive their spouse's entire estate. Under most intestacy laws ,the spouse only receives one-third of the estate, and a conservator must be appointed to handle the money belonging to the minor children. In the case where there are no children, the state may give one-third to one-half of the estate to the surviving spouse with the rest going to the deceased individuals parents. A will can solve these types of problems.

3.4 Types of Wills

There are a number of different types of wills. They include: Holographic (hand written), Oral (spoken), Video (a new derivation of oral), and Typed. In Utah, §75-2-502 provides, with some exceptions, that a will must be in writing.

3.5 Will Disadvantages

One of the major disadvantages of a will is that it cannot pass "title" to property. As we learned previously, title to real property requires a written instrument called a deed which must be signed by the Grantor during his or her lifetime. As a result, a Will may designate who is to receive the real (or other titled) property, but it takes a Probate Proceeding to appoint the Personal Representative with the authority to sign a Probate Deed conveying title.

A second disadvantage is that an individual is not totally free to give property as they may desire. For example, (1) you may not give a spouse less than his or her elective share, (2) you cannot omit a child except in very narrow circumstances, and (3) children must generally share equally in the proceeds. If a will violates the statutory protections afforded to heirs, those portions of the will can be declared invalid.[9]

[9]The next lesson will include more information on this topic.

4.0 Trust

4.1 In General

Trusts are widely used in Estate Planning. And, while Trusts are more frequently used by individuals with large estates, they can also be effectively used by many other individuals. As indicated in the previous section, one of the drawbacks of a Will is that it cannot pass Title to Real Property. A Trust resolves that problem by conveying the property during life to a third person (the Trust) who has instruction to convey the property to ones heirs after death. A Trust also solved the problem of preferential transfer because the property is conveyed during ones lifetime. Apparently the legislature thinks we know what we are doing during our lifetime, but not what we want to occur when we are dead.

While Trusts are called by a number of different names, there are essentially two types of Trusts: Revocable (often called Living) and Irrevocable. A Revocable Trust is a trust that can be changed or modified by the trustor until his or her death. Revocable Trusts are those which are most often used for Estate Planning purposes. An Irrevocable trust is a trust which cannot be changed once it is created. Irrevocable Trusts are most often used to divert income and save taxes for the very rich. If the trust does not state whether it is Revocable or Irrevocable, it is usually deemed to be Irrevocable.

4.2 What is a Trust?

A Trust is an arrangement whereby an individual transfers property to another (or to himself) in trust, with the intent that the property is to be used for the benefit of one or more individuals. The person who initially creates the Trust is called the Trustor. The person who administers the Trust is called the Trustee. And the person for whose benefit the trust is created is called a beneficiary.

If a Trust is created during a persons lifetime, it is sometimes called an “Inter-vivos Trust”. If the Trust is created at death through a Will, it is called a “Testamentary Trust”. Property that is transferred into a Trust is called the "corpus" or "principal" of the Trust. This property, plus any income earned from trust property (called "interest"), constitutes the “ Trust Estate”. It is important to note, that a Trust is actually created when the property is actually placed into the Trust, not when the Trust documents are signed. The most common malpractice problem in the creation of Trusts is the failure to convey property into the Trust.

4.3 Taxation

Revocable Trusts are generally taxed as part of the estate of the Trustor. Irrevocable Trusts on the other hand are separate taxable entities which file their own tax returns. It is possible for a Revocable Trust to have a tax ID number and to be taxed separately. This most often occurs when assets are transferred into a Trust that may only be transferred to a tax ID number. Gifts from an individual to his or her own Revocable Trust are generally not taxed. However, transfers to an Irrevocable Trust are subject to the gift tax rules. Any gifts over ten thousand dollars per year may subject the donor to tax liability.

4.4 What are the Benefits of a Trust?

The first benefit of a trust is that it avoids the expenses associated with probate. Because the property held by a Trust does not pass under an individuals Will, it is not included in the probate-able estate. As a result, if the Trust is properly drafted, probate may be avoided completely.

The second benefit is that it avoids the delays of probate. Typically a probate case takes two to six months in a simple estate. It could take much longer in a complex estate. As a result, the property may not be delivered to the beneficiaries for a substantial period of time. With the Trust the property can be transferred as soon as a death certificate is obtained.

Connected with the avoidance of probate, is the avoidance of ancillary probate. If an individual owns property in more than one state, it may be necessary to file separate probate actions in each of the states where property is located. By placing the property in a trust, there is no need for probate.

Fourth, it maintains privacy. Probate is a public proceeding, and is subject to a public record that can be viewed by anyone who is interested. Trusts are generally private documents and the distribution of property from a trust is usually not a matter of public record. It should be noted, however, that if the property in the Trust is Real Estate, and that Real Estate is to be transferred to a beneficiary, there will be a recorded deed that can be viewed by interested parties.

Fifth, it avoids Will contests. Because of the rules related to Wills, an incorrectly drafted Will often results in litigation. A properly drafted Trust avoids litigation because the property is transferred during the lifetime of the grantor.

Sixth, it can protect the Trustor in the event of disability. Should an individual become incapable of handling their own financial affairs, a Trust can provide that a successor Trustee assume those duties. It should be noted that these provisions

are not normally included in a simple Revocable Trust and may require the assistance of competent medical personnel before the Trustor can be declared disabled or incompetent.

Seventh, it may provide some protection from creditors. Because the property in a revocable Trust is not subject to probate, it is not directly subject to claims of a decedent's creditors. Further, because the property was transferred during the lifetime of a trustor, it takes a particularly knowledgeable and aggressive creditor to find and attach Trust assets.

And finally, it may provide for continuity in the management of Trust assets. A Trust can in fact be an operating business which survives the death of the Trustor. While corporations[10] are probably more affective for this purpose, a Trust can also be used.

4.5 Disadvantages of a Trust

The first disadvantage of a trust is the time and money involved in preparing the Trust document. As part of the expense, title to assets must be transferred into the trust. Each type of asset may require a unique type of transfer including the preparation of legal documents and the payment fees.

Second, if a trust is to be affective, it must be properly maintained. This means that it may be necessary to amend the trust from time to time and/or place newly acquired assets within the Trust.

Third, Trusts require record keeping and segregation to keep trust assets separate from the trustors property. Some Trusts will require annual tax filings.

Fourth is inconvenience. Whenever property is disposed of which is subject to a trust, special forms of conveyance must be used. Sometimes this will result in additional expense.

Fifth, the full value of any property in a revocable trust is included in the Trustor's Estate for tax purposes. Only irrevocable trusts escape estate taxation.

Finally, certain assets, such as stock and professional corporations, cannot be held by Revocable trust.

[10]Corporations as an Estate Planning Tool will not be discussed in this lesson. This topic will be discussed under Corporations.

4.6 Who Needs a Trust?

In general a trust is needed by any individual who owns Real Property, has life insurance, has a spouse or children with special needs, or wishes to protect other titled property.

As indicated above, since a Trust can hold titled property and then transfer that property according to the trustors desires after death, and the transfer into the Trust takes place during the trustors lifetime, the transfer is valid against heirs and creditors, and probate is unnecessary.

A trust can also provide a vehicle for collecting the proceeds of life insurance and then can provide detailed and unusual distribution of those proceeds.

If an individual has under-age children, these children are not entitled to hold property. Thus, under a Will, a guardian and/or conservator would need to be appointed. With a trust, the trustee can hold and disperse the money until the children are of age.

Sometimes Trusts are very helpful in split family situations. It can insure that the assets go to the children of the appropriate party, while still providing for the maintenance of a surviving spouse.

4.7 Trust components

A simple trust will include language creating the Trust, provisions related to insurance policies and how they should be handled, provisions on how to add property to the Trust, provisions related to the management of the Trust during the lifetime of the Trustor, how the Trust should be managed upon the death of the Trustor, the powers and duties of the Trustee, the naming of the successor Trustee, and a list of the property included in the Trust. Custom Trusts can include medicare or other entitlement program restrictions, irrevocability provisions, spendthrift provisions, advancement provisions, and provisions for education or missionary funds. Complex Trusts are designed to reduce estate taxes.

5.0 Ancillary Documents

5.1 In General

There are a number of tools that are also used with wills. These include the living will, the power of attorney, and the personal property list. Each will be discussed below.

5.2 Living Will

5.21 In General

The living will is a document that attempt to avoid dissipation(reduction) of an individual's estate by providing that life support equipment is not to be used in the case of a terminal condition. Everyone understands that medical expenses are very high, and the individual can be kept alive through mechanical means for a substantial period of time. Living wills in Utah are governed by statute. Therefore, it is very important to follow the statutory pattern, or the medical provider may ignore the living will. Most hospitals have living will forms that they provide free for their patients.

It is important to note that a living will only goes into affect if the individual receiving treatment lacks the capacity to make their own decisions about receiving medical care. Closely related to the living will is the medical power of attorney which will be discussed below.

5.22 Revocation

A living will may be revoked by separate written instrument or by destroying the original signed copy of the living will. If copies have been made, those copies should be destroyed as well.

5.3 Power of Attorney

5.31 Introduction

A Power of Attorney is a document in which one person (the "principal") gives his authority to another person ("Attorney in fact", who need not be an attorney) to act on his or her behalf. In other words, a third party may perform an act with the same authority as the principle. There are different types of power of attorneys that will be discussed below.

5.32 General Power of Attorney

The general power of attorney is not used very often in estate planning. A general power of attorney gives the attorney in fact the ability to do *anything* that the principal could do. The general power of attorney must be signed and notarized. Banks and other parties will generally not accept copies of a power of attorney, although they will make a photocopy if the power of attorney is used at their institution.

5.33 Special Power of Attorney

A special power of attorney, sometimes called a limited power of attorney, gives the attorney in fact authority to perform *specific* tasks on behalf of the principal. For example, the attorney in fact may have the authority to complete a real estate transaction or to purchase a car. The use of a limited power of attorney is much safer than a general power of attorney.

5.34 Durable Power of Attorney

The durable power of attorney is used most often in a state planning. A durable power of attorney may be general or limited. The benefit of a durable power of attorney is that it is valid regardless of the subsequent disability or incapacity of the principal or the passage of time. Most powers of attorneys terminate upon disability, incapacity, and/or uncertainty as to whether the principal is alive or dead. All powers of attorney terminate on the death of the principal.

An additional form of a durable power of attorney that is sometimes used is the springing durable power of attorney. This type of power of attorney only goes into affect upon disability or incompetence. The problem with this type of power of attorney is that it may require medical evidence to prove disability or incompetency before it is valid.

5.35 Medical Power of Attorney

The final type of power of attorney that we will discuss is the durable Medical power of attorney. This is similar to the living will, except that it places the power in the hands of a third party to make medical decisions. While this can be very helpful, it can place great pressure on the individual to whom the power of attorney is given. The party may feel like they are killing their parent or significant other if they exercise the power to terminate life support or other medical treatment.

5.36 Revocation of Power of Attorney

A power of attorney may be revoked by written instrument or by destruction of the original document. A form revocation of power of material has been included in your material.

5.4 Personal Property List

As you may recall, a will can provide that an individual may make a list of tangible personal property and the individual to whom that property is to be given. Unfortunately, most individuals do not complete this list prior to their death.

Chapter 5 - Probate

1.0 What is Probate?

Probate is a Court administered process whereby the assets of a decedent are distributed in an orderly fashion to his or her creditors and heirs. If the individual dies without a will, it is called Intestate Probate. If they die with a will it is called Testate Probate. Probate may be Supervised or Unsupervised. In supervised probate the court must review and approve each decision of the Personal Representative (Testate) or Administrator (Intestate). In unsupervised probate the court makes a single review at the end of the case. A probate is generally begun by the filing of a petition with the District Court in the County in which the person died.

2.0 What are the Positive Aspects of Probate?

Probate can have a number of important benefits. First, the probate court will appoint a representative or an administrator who has the power to gather assets, sign documents, or otherwise manage the affairs of the decedent as if they were the decedent. Second, probate allows for the transfer of titled property. Titled property generally cannot be transferred to another person without a signature. Once an individual is deceased, they can no longer sign documents transferring ownership. Probate provides for the orderly transfer of such property. Third, probate can be used to fix or terminate the rights of creditors. In most probate cases notice is published in a newspaper. Creditors then have a specific amount of time in which to make claims against the estate. The failure to present a claim within the designated period of time will result in the disallowance of that claim. Fourth, probate can be used to give closure to an estate by determining who an individual's heirs are, fixing their rights and claims in the estate, and otherwise making final determination in any disputes between heirs. Probate can be a very effect tool to protect the representative or administrator when there is a great deal of animosity between the parties.

3.0 What are the Negative Aspects of Probate?

There are two main problems with probate. First is the expense and second is the time it takes. Probate costs vary from state to state and from attorney to attorney. However, it is not uncommon for the probate of a simple estate to exceed $1500, and the probate of a complex estate to cost several hundred thousand dollars. Further, probate can be completed in as little as three to four months while some complex cases take years to complete.

4.0 Does My Estate Have to be Probated?

Probate generally occurs when (1) the decedent owns titled property in their own name at the time of death, (2) their estate planning documents have not been properly drafted, (3) their Will includes provisions contrary to the statutory scheme and someone objects, or (4) the representative or administrator of the estate wishes the courts protection. If none of these circumstances apply your estate will not need to be probated.

5.0 Are There Alternatives to Probate?

The purpose of estate planning is to avoid the negative aspects of probate. There are a number of estate planning tools which can be used to avoid probate. Some of these were discussed in the prior chapter. Primarily, these tools are devices that convey titled property out of your name during life and to your heirs after death. The most common of these tools is the trust.

It is important to note, that avoiding probate does not mean avoiding taxes. Your estate may not have to be probated, and yet you may still have substantial tax liabilities at death.

Chapter 6 - The Estate Planning Process

1.0 The Initial Consultation

1.1 Determining the Client's Needs

As part of the initial consultation, the attorney will ask a number of questions so he can determine the clients needs and which estate planning tools will best meet those needs. The attorney will usually ask questions about existing documents, family, property, if there are any special needs or concerns, and what the client hopes to accomplish.

1.2 Explaining the Options

Once the attorney has sufficient information to determine the parties needs, he may explain the benefits, limitations, and consequences of the various tools which are available. He will often indicate the costs of the various options and what these same options might cost elsewhere. Then he may make recommendations and ask what the client would prefer. The Client is the final decision maker.

If a potential client has brought in a Will, Trust or other legal documents, those documents will be carefully examined for their legal import. The attorney will often give a running commentary on the purpose of each of the documents, the legal significance of the major provisions of those documents, and how they impact the decedents heirs. This will often to show that the current documents do not meet the client's expressed desires. Sometimes the documents will be fine and the client will not actually need anything.

1.3 Gathering Detailed Information

1.31 In General

Once the client has determined what estate planning documents they wish to have prepared, it is necessary to obtain the information necessary to prepare those documents. Questionnaires have been prepared to help gather this information. The questionnaires can be given to a client to take home and complete, or they can be completed during the interview.

1.32 Will Questionnaire

1.321 Client Information

The top half of the form is quite simple and contains basic personal information about the Testator (or Testatrix) and their family. If the parties are married enter the husbands information first. If the children are daughters who are married it is recommended that their maiden, rather than married, names be used (because of the current divorce rates and the likelihood that their names may change).

1.322 Client Decisions

####### 1.3221 In General

There are a number of decisions that must be made before a Will can be prepared. These include: how the estate will be divided, who will serve as personal representative, and the guardian for any minor children.

####### 1.3222 Asset Distribution

First, the clients must determent how they want their property to be divided after their passing. Normally, the bulk of the estate goes to the surviving spouse, and then to the children. Sometimes there will be more complex distribution patterns. It is also a good idea to ask where they want the property to go if their intended beneficiaries do not survive them. If the parties are creating a Trust at the same time as the Will, the Trust is generally designated to receive the estate after the surviving spouse.

####### 1.3223 The Personal Representative

Next , they need to select an individual called the personal representative who will be in charge of finalizing the financial affairs of the estate when they are gone. If they are married, the spouse is generally selected first. Although, if this person is unskilled in the financial affairs, it may be wise to choose someone else. An alternate personal representative should also be selected in case the first individual is unable or unwilling to serve.

####### 1.3224 Guardians

If the parties have minor children, one of the decisions will be who to have take care of the children if both parents do not survive. It is also important to select an alternate individual (or set of individuals) if the first are not available or cannot serve.

1.33 Trust Questionnaire

1.331 In General

If the client wishes to have a Trust prepared, the attorney will usually complete the entire questionnaire during the interview. If there are decisions that they are not prepared to make at that time, he will ask them to give him a call with the missing information.

1.332 Client Information

The top portion of the form is the same as the Will questionnaire. If the parties are creating Wills and a Trust, do not re-enter this information, since it is on the other questionnaire.

1.333 Client Decisions

1.3331 In General

There are a number of decisions that must be made before a Trust can be prepared. These include: the names of the Trustors, Trustees, Successor Trustees, Beneficiaries, and how the property is to be divided.

1.3332 The Parties Named in the Trust

The Trustor of a Trust is the individual creating it. Generally this will be the same individual who is placing property into the Trust. The Trustee is the person who manages the Trust. Usually the Trustor will also be the initial Trustee of the Trust. In the case of Irrevocable or Spend Thrift Trusts, a third party generally serves as the initial Trustee. This is to prevent loss of the Trusts intended benefits through the doctrine of merger of interest. It is also wise to select a Successor Trustee in the event of death or incapacity of the original trustee. The Beneficiaries are those who will receive some benefit from the Trust. Usually, the Trustor will be the initial beneficiary, with his or her heirs being the contingent (or successor) beneficiaries. Alternate beneficiaries may also be chosen.

1.3333 Trust Assets

1.33331 In General

The client next needs to determine what property should be placed in the Trust. Depending upon the property to be placed in trust, additional documents may be needed from the client, so the attorney can prepare the appropriate transfer

documents.

1.33332 Real Property

Real property is placed in a Trust in one of two ways. The most common tool is the quit-claim deed that transfers the interest of the Trustors to the Trust. The client will be directed to a title company to complete this part of the documentation. Occasionally, the Trustor has already sold the property on Contract or via Trust Deed (or Mortgage) to a third party. A contractual interest in real estate is conveyed through an assignment of interest form, which also needs to be recorded. A copy of the contract should be provided to the attorney so an accurate "Assignment of Interest" can be prepared.

1.33333 Life Insurance, Annuities, and Retirement Benefits

Life insurance, annuities, and retirement benefits are essentially contract interests. As a result, the companies who provide these benefits usually have a system for determining the beneficiary who is to receive the proceeds. The owner of the contract usually has the right to change these beneficiaries through the use of a change of beneficiary form.[11] As a result, the trustor should write to each company asking for a change of beneficiary form. Usually the form will be completed by having the spouse as the primary beneficiary and the Trust as the secondary beneficiary, although it is possible to name the Trust as the primary beneficiary.

Some companies will not allow a Trust to be the beneficiary unless the Trust has a tax ID number. This is to insure that when the policy pays out, the proper tax ID number is noted to the IRS. In these cases, the client will need to make a decision as to how they wish to handle the matter. The problem is that once the tax ID number is established for a Trust, the Trust must thereafter file it's own annual tax return. This results in additional cost and expense to the client. However, it may be the only way to place these assets within the Trust. As an alternative, if the Trustor does not believe the additional expense to be worthwhile, the spouse should be named as the primary beneficiary and each of the children should be named as alternate beneficiaries. When any new children are born, a new change of beneficiary form will need to be completed in order to add them to the policy.

[11] This is called a "Power of Appointment".

1.33333 Bank Accounts

Bank accounts are handled by having the Trustor go to the bank and add the Trust as a pay on death beneficiary of the account. Unfortunately, some banks now require a tax ID number before allowing the Trustor to do this. In that case, the Trustor makes the same decision as he must when dealing with insurance policies. As a general rule, it is not recommended that any change be made to bank accounts until such time as the Trustor is incapable of handling his or her financial matters alone.

1.33334 Motor Vehicles

As a general rule, motor vehicles are not placed in Trust. Usually individuals will live much longer than the vehicle will be functional. In addition, in Utah there is something called the small estate affidavit. This allows the heirs of a decedent to transfer tittle to a motor vehicle simply by filing a affidavit with the department of motor vehicles. However, vehicles can be placed into a trust with the assistance of the department of motor vehicles.

1.33335 CD's

In order to change the ownership interest in a certificate of deposit, the Trustor must go to the bank and change ownership of the certificate of deposit. Usually they should wait until the next renewal period before do this or there may be tax and interest consequences. Many banks are now requiring the Trust have a tax ID number before allowing the transfer. In addition, it should be noted that depending upon the value of the Cd's, the Trustor may need to prepare a gift tax return.

1.33336 Water Shares

The ownership of stocks and bonds are changed by contacting the company issuing them and requesting paperwork to change ownership. Those papers are completed and new ownership certificates can be issued.

1.3334 Asset Distribution

Normally the Trustors (in a Trust created by Husband and Wife) will have the right to treat Trust Property as if it were their own. On the death of the first, the second will continue to use the property as desired. Then upon the death of the second Trustor, the property will pass according to the terms of the trust to the beneficiaries. Thus, the clients must determent how they want their property to be divided after their passing. As with a Will, it is also a good idea to ask where they want the property to go if their intended beneficiaries do not survive them.

Usually, if a child predeceases the Trustors, their share will pass directly to their children (bypassing the spouse). This is a rather recent development because of the divorce rate. In the past, the funds were usually given to the spouse who would use them for the children's benefit.

1.34 Ancillary Documents

Often the client will ask for the preparation of a Living Will or Power of Attorney. The Living Will is a simple document that tells medical personnel not to use life support equipment. A power of attorney allows the recipient to sign documents for the grantor.

1.4 Explain the Estate Planning Process

The next step is to explain the procedure that will be followed in preparing their documents. The attorney will indicate that it generally takes two to three days once we have all the information we need to prepare their documents. The client will then be called to come in to review and execute the documents. The documents will be finalized and the client will receive another call to pick up the completed documents.

1.5 Attorney Considerations

1.51 In General

Prior to actually preparing a will for a client there are a number of matters which the attorney must consider. These include Validity, Testamentary Restrictions, Ambiguities, and Contracts Related to Wills. Some of these factors go to whether the document created can actually do what the client wants and others are important to insure that the actual intent of the client takes place.

1.52 Competency Considerations

1.521 General

One of the first consideration is validity. Wills (and Trusts for that matter) may be declared invalid in certain circumstances. These can include lack of capacity in the party making the will, undue influence, fraud, or mistake in the inducement. The attorney has a duty to insure that the party making a will has the capacity to do so and that they understand the consequences of the testamentary instruments they may sign.

1.522 Capacity

§75-2-501 of the Utah Code provides that "any person 18 or more ears of age who is of sound mind may make a will." The question of the testator's capacity usually arises only in circumstances where the will is being contested by his heirs. Typically, a person is considered of sound mind if he knows and understands (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty, and (3) the nature of the disposition he is making. The fact that a person has been adjudged insane or for whom a guardian or conservator has been appointed does not necessarily lack testamentary capacity. While such an adjudication generally creates a presumption of lack of the required mental capacity, it is not conclusive and can be overcome by showing that the testator still met the standards set forth above.

A person may have sufficient mental capacity to conduct his affairs and make a will, but may be suffering from an "insane delusion" so as to require a particular provision in a will to fail on the ground of testamentary capacity. An insane delusion may invalidate the entire will or only a portion thereof. The will can be set aside on the grounds of insane delusion only if and to the extent it can be shown that the delusion "caused" the testamentary disposition (the testator would not have made the disposition in question but for the insane delusion). A delusion is a conception of reality which has no foundation in reality and is not supported by evidence of any kind. An insane delusion is one to which the testator adheres irrationally, against evidence and reason to the contrary. The general test is, would a rational person in the testator's situation have drawn the same conclusion reached by the testator. If the question of mental capacity arises the burden of proof is on the contestant.[12]

1.523 Undue Influence

A will is invalid if it is obtained through mental or physical coercion which deprives a testator of his free agency and substitutes the will of another for his own. In addition, a revocation procured through the same means may be declared void. Usually, the individual alleging undue influence must prove that the testator was susceptible to undue influence, that the person alleged to have committed the influence had the opportunity to do so, that such person had the disposition to do so, and that the provisions of the will appear to be unnatural, and a direct result of such influence.[13] A presumption of undue influence may be shown by the

[12]See, 51 Utah 410 and 82 Utah 390.

[13]Note that these are elements of a "cause of action".

existence of a "confidential relationship," that the beneficiary participated in procuring, drafting or executing the will; or that the provisions of the will appear unnatural and favor the person who allegedly exercised the undue influence. As with mental capacity, undue influence may invalidate all or just a portion of the will.

1.524 Fraud

Where the execution of a will or the inclusion therein of a particular gift is a result of fraud, the will or the particular gift is invalid. Fraud requires that the testator have been willfully deceived as to the character or content of an instrument, or as to extrinsic facts which would induce the will or a particular disposition or with respect to facts material to the disposition. Generally, the fraud must have been perpetrated by a beneficiary who benefits by the fraud and only the beneficiary's interest is invalidated thereby. Fraud generally fits into one or two classifications: either fraud in the execution (a misrepresentation as to the nature of the contents of the instrument) and fraud in the inducement (where the testator intends to execute the instrument but does so because a particular misrepresentation influences his motivation).

1.53 Drafting Considerations

1.531 In General

Under the law there are a number of things that cannot be done in a Will (and sometimes in a Trust). These are called Testamentary Restrictions. They include thing like: omitting a spouse or child from a Will. Other items can be included in the documents such as the ability to create a dresser drawer list. Three of these times will be discussed below.

1.532 Pourover Trusts

Utah has adopted Section 1 of the Uniform Testamentary Additions to Trust Act in §75-2-501 of the Utah Code. This means that in a will the testator may devise property to a trust which has been established by him during his lifetime. Originally such provisions were declared invalid because the trust was often not in existence at the time the will was executed.

1.533 Dresser Drawer List

Originally, testators tried to prepare changing lists to dispose of personal property under the theory of acts of independent significance. In Utah, §75-2-513 was enacted to specifically make such distributions valid:

Separate writing identifying bequest of tangible property. Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other tan money, evidence so f indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will. If there are several writings in existence which contain conflicting provisions, the writing which is established by a date or other circumstances to be the most recent shall control. If it is impossible to determine which writing is the most recent, the consistent provisions of the several writings shall be considered valid, and the conflicting provisions shall be considered invalid. §75-2-513.

1.534 Joint Wills

A joint will is the will of two or more persons executed on the same piece of paper and intended to serve as the will of each. New wills dealing with changed circumstances cannot be written unless both parties are still alive. Joint wills also tend to result in litigation and are not recommended[14]

1.54 Ethical Considerations

As part of the initial consultation, the attorney should also watch for potential ethical problems. The attorney should watch for potential conflicts between the parties. The attorney can only represent one person and therefor must choose who he or she will represent. That fact should be clearly communicated to each of the parties involved.

In addition, the attorney should refrain from handling the case if he or she is a beneficiary of the estate. While not technically improper, it does give the appearance of evil and may be a source of conflict with the heirs extending the time of litigation and the expense thereof. Further, the attorney should generally not act as a Trustee, Personal Representative, Guardian, or Conservator. Especially if receiving some benefit under the Will or Trust.

[14]See also, 57 Utah 376 and 6 Utah 2d 18.

Chapter 7 - Completing the Documents

1.0 In General

Once the pleadings have been completed and reviewed by the attorney, the client should be called to schedule the second appointment with the attorney. The purpose of this appointment will be to finalize the documents.

2.0 Review Documents

2.1 In General

During the second consultation, the attorney will review each of the documents with the client explaining the legal significance of the provisions of each document and insuring their provisions meet the client's needs and desires. Once reviewed, the documents will need to be executed.

2.2 The Will

2.21 Header

This indicates the type of document, in this case a will, and the party making it.

2.22 Reminder to Pay Debts

Article One is a reminder to pay debts. Often the children of the decedent will begin to spend the assets of an estate before paying its bills. This is a reminder in the hopes this will not happen. You will also note that the Personal Representative is given some flexibility in respect to the home. It is often wiser for the surviving spouse to use the estate proceeds to live on or improve their economic position than to pay off the house.

2.23 Identification of Status

Article Two includes provisions identifying the client's marital status and whether they have children. The terminology "and to any other children hereafter born to or adopted by me" is provided as a comfort to parents who will have additional children. Many individuals believe that each child must enumerated in the will to be covered by it. That is not the case. With this provision in place, the individual need not run out and pay the expense of having a new will prepared each time a child is born.

2.24 Powers of Appointment

Article Three deals with Powers of Appointments. A Power of Appointment is the ability to name an individual as a beneficiary under a document such as an insurance policy. This provision simply states that the beneficiary as set forth on the document is the beneficiary which the individual intends to receive the money. In the past, it was a practice of the Internal Revenue Service to assume an individual changed the beneficiary of a policy to themselves at the moment of death , so it could be taxed as part of their estate. This particular article prevents that from happening.

2.25 Disposition Clauses

Article Four contains a number of sample Disposition Clauses including the Dresser Drawer List terminology.

As indicated in a previous chapter, an individual may keep with his will a list of tangible personal property, other than money, and may indicate to whom that property should be given. Other than identifying the property, the name of the individual to whom it should be given, and signing the list; no other legal formality are required. The individual can change this list at any time. The final list in existence at time of death governs.

An optional paragraph of Article Four is the standard disposition of first to the spouse and then to the children.

Another optional paragraph of Article Four creates a testamentary trust. Testamentary meaning created by will or at death. For individuals who cannot afford the expense of a Trust, and who have minor children, this may be a wise addition.

And the last paragraph of Article Four is used after the Dresser Drawer List language in cases where the party is creating a Trust at the same time as the Will.

2.26 Tax Returns

Even if the individual lives only one day into a new tax year, they may be required to file a tax return. It is usually advisable to file an income tax return even if there is zero liability. This prevents potential problems in the future if the IRS should determine to audit the decedent. Further, it may be necessary to prepare a state tax return. A CPA should be consulted to determine if such a return is required.

2.27 Personal Representative

Article Six appoints the Personal Representative of the will. A personal representative is the individual who is charged with the responsibility of carrying out the Testator's wishes. If the estate is not to be probated, the personal representative need not obtain formal approval by the court. However, if the estate needs to be probated, then the personal representative must be appointed by the court.

2.28 Guardians

One of the most important provisions that a will can contain, if the party has minor children, is a designation of the Guardian. A guardian is the individual who is appointed by the Court and has legal authority to take care of the children. If there is no will, or if the will is silent on the issue of a guardian, the court has the authority to appoint the Guardian that "would be in the best interests of the minor."[15]

In addition, a guardian is normally required to post a bond in the amount of two times the value of the estate to which the child maybe entitled. These funds are posted with the court or a bonding agency to insure faithful performance of the guardian's duties. If the testator desires one individual to take care of the children and another individual to take care of the children's money, the party handling the money is called a Conservator. Generally, the will should provide the guardian and conservator to serve without bond.

2.29 Execution Clause

As indicated previously, if a will contains certain provisions it becomes a self proving will, that is valid anywhere in the world. The sample Will includes each of the required provisions.

2.3 The Trust

2.31 Introduction

The first paragraph of the Trust identifies the Trustor, the Trustee, and the successor Trustee or Trustees. It also indicates the location where the Trust is created and the date. This becomes important because the Trust is usually identified by it's name and date of creation. For example, the "Philip Jones family Revocable

[15]UCA §75-5-206.

Trust dated Jan. 21, 2002."

2.32 Article I

Article one indicates how the Trust is to be funded. It also references the schedule A at the end of the Trust where each item placed into the Trust needs to be listed.

2.33 Article II

Article two indicates that additional property may be added to the trust. However, it also provides that the Trustee must accept the property for it to be part of the Trust. This provision can be used to protect a trust from acquiring property that could be burdensome. For example, placing a gas station into a trust may not be advisable because of EPA clean-up requirements.

2.34 Article III

Article three governs the Trust during the lifetime of the Trustor. It will provide that the Trustor is the beneficiary of the Trust during this period of time, and may use the Trusts property as he or she sees fit. Further the Trustor has the right to amend or revoke the Trust in whole or in part as long as they are competent to do so. It gives instruction relating to life insurance policies and acts as a reminder to the Trustor's heirs that there may be a Will or other estate planning documents that need to be gathered and used in conjunction with the Trust after the Trustors death.

2.35 Article IV

Article four governs the disposition of Trust assets after the death of Trustor. Generally it provides for payment of debts and expenses as appropriate and in the event of a surviving spouse provides for a continuation of the Trust.

2.36 Article V

Article Five governs the disposition of the Trust upon the death of the final Trustor. It provides for settlement of final expenses and contains the provisions as to distribution of the trust estate to the trustor's heirs.

The particular pattern that we use provides some protection in that beneficiaries are not entitled to take their share until after reaching age 21. However the successor trustee does have the authority to disburse money to the benefit of minor beneficiaries. In addition, the particular form we use includes provisions that allow the beneficiaries to continue the Trust if they so desire. For example, if the Trust

contained a time-share unit or recreational property, it might be in the best interest of the beneficiaries to continue to jointly hold and use the property rather than sell it and take the cash.

2.37 Article VI

Article six governs the powers of the Trustee. These provisions are to insure that the Trustor has full authority to treat the property as if it were his or her own. In addition, under the common law a trust could only hold Real Property. Other investments such as stocks, bonds, mutual funds, or certificates of deposit were considered to be too speculative and too risky. The powers currently given to Trustees authorize them to invest in any reasonable investment.

2.38 Article VII

The Situs of the Trust is the location where the Trust is created and the laws under which the Trust is governed. As indicated previously, a Trust can be governed by laws other than the state in which it is created if it is so specified.

2.39 Article VIII

This article contains provisions related to the rule against perpetuities. Congress has determined that Trusts should not last forever, and therefore Trusts must terminate twenty-one years after the death of the last surviving beneficiary.

2.3-10 Execution Clause

The Trust is executed by the Trustor and the Trustee, but need not be executed by the successor Trustees.

2.3-11 Schedule A

Schedule A is where the property being placed in the Trust is listed. Simply listing titled property does not place it within the Trust. Separate documents need to be prepared and executed to do that. However, the property placed within the Trust does need to show up on Schedule A and the Trustor and Trustee must initial showing that they are willing to accept that item as part of the Trust.

Notwithstanding the above, personal property can be placed in the Trust simply by describing the property on schedule A.

2.4 The Living Will

This document is fairly straight forward and it's text is governed by statute. It should be noted that no entries need be made under paragraph 4. This space is for modifications of the standard form to allow certain types of life sustaining measures to be used.

2.5 The Power of Attorney

Once the proper Power of Attorney form is selected, completing it is rather simple. In the Special Power of Attorney document, it is very important that the 2nd paragraph contain only those items that the client wants the third party to do.

3.0 Execute Documents

3.1 Execution of the Will

It is important that a will be properly executed in order for it to be valid. An attorney who permits a will to be executed without complying with the proper execution of witnessing standards can be liable for malpractice. As a result, it is wise for the attorney to establish a standard procedure for executing and witnessing wills.

Before beginning the execution practice, the attorney should assemble the testator (or testatrix), the required witnesses, and the notary. The execution process should continue uninterrupted until completed. Interruptions are a prime source of omissions and mistakes. All signatures on all documents should be in permanent ink. Blue is better than black since sometimes it is difficult to tell a photocopy from an original.

It is recommended that the witnesses not be related to the testator to testatrix. It is important that the testator or testatrix verbally state the material in the declaration or testimonium clause in the presence and hearing of the witnesses.

3.2 Execution of The Trust

Executing the Trust requires less formalities than the Will. The Clients typically sign as Trustors and Trustees in front of a Notary who then signs and stamps the document. Then the initials of the Trustors and Trustees are placed on the Exhibit A acknowledging the acceptance of the assets being placed into the trust. Next any deeds or transfer documents will need to be executed in front of the notary.

3.3 Execution of The Living Will

3.31 Signing Requirements

A living will must be signed in the presence of two adult witnesses. If an individual is not able to sign, they may place an "X" on the appropriate line. Only one copy of the living will should be executed.

3.32 Witness Requirements

The witness to a living will may not be the party's attending physician, his or her employees, the employees or patients of a health care facility of which the party is a patient, a person who is a creditor, or parties who are heirs or beneficiaries of the person making the living will.

3.4 The Power of Attorney

No witnesses are required in the execution of a Power of Attorney. It simply needs to be signed before the notary who will then sign and stamp the document verifying the client's signature.

4.0 Copies for the Client

4.1 The Will

After the document is executed copies may be made for the client and at least one copy should be retained by the attorney. It important that the attorney retain a photocopy of the signed documents, otherwise, it may be impossible to prove that the documents were actually executed if the original becomes lost.

4.2 The Trust

After the documents are executed, copies of the documents should be made for the client and at least one copy retained for the file.

Chapter 8 - Asset Transfer Into Trust

1.0 In General

There are a number of steps that may be necessary to complete your Trust. This includes the transfer of property into the Trust. While tangible personal property may be placed into the Trust simply by noting it on the "Schedule A" all other assets must be placed in the Trust by executing and recording the appropriate documents. If you have any questions you should contact the attorney.

2.0 Real Estate

If you wish to place your home or any other real estate that you own into the Trust, take a copy of your Trust Agreement to a Title Company. Ask them to prepare and record a Quit Claim Deed transferring your property into your trust. Once the Deed has been recorded, place the deed with the original of the Trust, and initial acceptance of the property into the Trust on the "Schedule A".

3.0 Contract Rights

If you wish to place Life Insurance, Annuities, Retirement Accounts, or Investments into your trust; you should first consult with an expert to determine the potential tax and distribution consequences. Be aware that placing such property in a trust may result in the necessity of filing tax returns for your trust and that death could result in unforseen tax distribution consequences. It may also be appropriate to change the owner, beneficiary, or annuitant of the account to ensure that your desires are fulfilled. Then contact the company through which you have your Policy or Account and ask for a change in beneficiary form. Once the documents arrive, using the advice of the appropriate professional complete the change of beneficiary form and return it by certified mail after making a photo copy for your records. Finally, note the property on "Schedule A" of your Trust and initial in the appropriate column.

4.0 Bank Accounts

Bank Accounts are generally not placed in your trust although they could be. The better alternative, if your beneficiaries have reached their majority, is to go down and place a Pay on Death designation (POD Acct) on your account and list the beneficiaries. You will probably need their social security numbers to do this.

Chapter 9 - Making Changes

1.0 In General

Sometimes changes will need to be made to the documents that have been previously prepared. Be sure not to ever write on the originals of your documents. It may invalidate them. Make corrections on a copy of the document or separate sheet of paper.

2.0 Wills

A codicil is an amendment or a supplement to a Will. It may explain, modify, add to, delete from, qualify, alter, to revoke one or more of the provisions of an existing Will. Codicils are typically used when the testator or testatrix wishes to make minor changes to the will. However, if major changes are made it is actually better to prepare a new will. This results in less confusion and the possibility of documents being lost.

3.0 Trusts

3.1 Amendment

A Trust is changed through the preparation of an Amendment. The Amendment should identify the Trust to be amended and set forth the corrected or additional provisions. The Amendment should be executed by the Trustee (or other party holding the power to amend the trust).

3.2 Revocation

A Revocable Trust may be revoked through written instrument in the same way that a Will may. An irrevocable Trust may only be revoked by Court action. Such action generally requires consent of all of the beneficiaries.

4.0 Living Wills

A living will may be revoked by a separate written instrument or by destroying the original signed copy of the living will. If copies have been made, those copies should be destroyed as well.

5.0 Powers of Attorney

A power of attorney may be revoked by written instrument or by destruction of the original document.

Fees and Costs

Wills are written for individuals and thus a husband and wife would need two wills, one for each of them. Living Wills and Powers of Attorney are also individual documents. Trusts are joint documents in that a single document suffices for a husband and wife or an individual.

Wills

Simple Will	$50.00
Custom Will[16]	$100.00
Complex Will	Not Available

Trusts

Simple Trust	$100.00
Custom Trust[17]	$200.00
Complex Trust	Not Available

Living Will

Statutory Living Will	$20.00

Power of Attorney

Medical	$10.00
Durable	$10.00
Special	$20.00
General	$10.00

Amendments

Simple	$20.00/Page
Complex	$40.00/Page

The preparation and recording of Transfer Documents involves additional fees and charges. Please consult with the attorney regarding them.

[16] Includes additional provisions not found in the standard simple will.

[17] Includes additional provisions not found in the standard simple trust.