The business of estate planning is continually changing. Client perceptions and needs are molded by family dynamics and the changing society around them. Laws change. Techniques come and go. The IRS issues rulings and regulations designed to clarify the Code and rebut both legitimate and questionable tax avoidance - and occasionally tax evasion. In response, practitioners develop new strategies to offset IRS positions.

While the business is continually fluid, there are times when more dramatic changes occur. For example, during the Reagan administration Congress enacted significant tax changes that drastically changed how we approached both estate and income tax planning. It is the author’s belief that we are in the midst of a similar transition. The changes are fundamental and broad based, applying not just to the millionaire next door, but also to the less wealthy. These ongoing transformations will change not only how we plan, but also the manner in which we provide planning services.

This is the first in a series of four articles discussing The Changing Nature of Estate Planning. The series will discuss why estate planning is changing, how it is changing, and some of the results of the changes. We will attempt to provide additional research sources and provide some insights into areas which have not received much scrutiny. Concepts which have received significant attention will not be discussed in much detail.

**IS ESTATE PLANNING DIMINISHING?**

Estate planning is anything but a dying industry. To the contrary, because of the demographics discussed below, estate planning and probate administration could be two of the fastest growing legal businesses in the country over the next few decades. Because many Americans will fail to develop a plan, intestate probate work will increase. Trust and estate litigation will also grow out of the failure to properly plan.

Clients are not planning for their death or incapacity. According to a recent article, 70% of Americans do not have an estate plan and 21% have estate plans which are out of date. Effectively, 91% of Americans may need an current estate plan. To many clients, having successive root canals without anesthesia is preferable to going through the process of planning for their incapacity and death. Updating the plan, when you know what to expect, could be worse.

We will all die. The need is apparent. However, Paul Simon may have gotten the perspective of many of our clients correctly: [I will]... “continue to continue to pretend that my life will never end...”

The central question has been how to motivate clients to not only begin the process, but complete and update it periodically. Perhaps a part of the problem is that advisors have started at the wrong beginning. Benjamin Franklin said: “...but in this world nothing can be said to be certain, except death and taxes.” Perhaps we have taken him a bit too literally in how we tell clients to approach estate planning. Is estate planning principally for the dead and the avoidance of their taxes? How many dead people care about their taxes? Motivating people using the fear of something which will not affect them simply does not work. Instead of being for the dead, ESTATE PLANNING SHOULDN’T DESIGNED FOR THE LIVING!

When the focus shifts to the living, the focus is not on mortality and the avoidance of a death tax. Instead the first focus is on the legacy clients leave behind. Jon Gallo has pointed out that five of the most stressful events a client can face are: death of a child, death of a spouse, death of a sibling, death of a parent and divorce. All these potentials are continually addressed as a part of most estate planning meetings with clients. Mr. Gallo says: “I probably killed off my clients and their children in the first half hour of our meeting.” He is not alone. No wonder clients have such an adverse reaction to estate planning!
Clients are motivated more by the positive legacy they will leave behind, than by the event of death and the taxes that accrue as a result. The significant reduction in the number of Americans subject to estate taxes has at the least the potential to re-orient both clients and advisors from believing that the protection and preservation of family assets (e.g., minimizing transfer taxes) is the most important goal of estate planning. The first goal should be PROTECTING AND PRESERVING THE SURVIVING FAMILY. 6

Increasingly, clients and planners recognize there is often a misplaced emphasis which focuses both the client and the planner on assets rather than family, on structure and technique over perspective, on tax savings in place of family need. When "protecting and preserving the family" becomes the beginning point of planning, clients first focus on how to leave a positive impact on their family. Both the client and the planner may be forced to deal with difficult family issues, which both may have preferred to ignore - to the ultimate detriment of the client’s family. Saving taxes is important, but it pales in significance to protecting family. One element of this new perspective is that many clients have come to believe that their families may have more to fear from the negative impact of family wealth7 than they do from a confiscating estate tax. Katherine Gibson of the Inheritance Project has said: The guilt and shame of inheriting wealth increases with each generation. The farther a generation is from the initial creation of wealth, the greater the guilt and shame become.9 Clients want to provide for family, but are concerned about providing an unearned lavish lifestyle. This new perspective is captured most succinctly by Warren Buffett: "[The perfect inheritance is] enough money so that they feel they could do anything, but not so much that they could do nothing."9 A study by U.S. Trust10 offers some insights into the perspective affluent parents have about their descendants:

- 83% of today's millionaires expect their child to contribute to the cost of their own education. Something given is never as valuable as something earned.
- 91% of the women and 80% of the men expect their children to support themselves entirely from their own earnings. They will provide opportunities, but lifestyle support is not in the cards.
- The two highest goals parents placed for their children were finding a satisfying career and supporting themselves and their families. Financial success was a low priority. Inherent in this perspective is that doing what you like, not wealth, brings fulfillment.
- Only 64% of the millionaires say their children will inherit their wealth. While this seems to be a large percentage, it means that 36% have decided that their children, for whatever reasons, should not inherit their wealth.
- But the concern often goes beyond worries about how much of an inheritance an heir should receive. Any significant inheritance will affect the recipient. Clients increasingly want to influence that impact. They often want to place restraints on inheritances and create incentives and opportunities. They do not want their families to quit working and enjoy a lavish, unearned lifestyle. There is ample evidence that the concern is well founded. For example, in a recent study,11 44% of the persons polled indicated they would quit work if they received a sizable inheritance. Interestingly, the higher someone's salary, the less likely they would quit working. A 1992 study showed that almost 20% of the people who inherited as little as $150,000 quit working.12 The concept of influencing the behavior of heirs will be discussed in more detail in the next article in this series.

Estate planning is not diminishing. Instead it is refocusing its attention from tax avoidance to the legacy left behind for family members. There are other influences that assure the continuing need for estate planning, including those noted below:

Explosion of Wealth. There has been an explosion of wealth in this country. It is estimated that somewhere between $1013 -13614 trillion will pass in the United States in the next 40-50 years. Although these reports preceded the recent stock market adjustments, the authors of the most recent report have indicated that they believe their low expectation of $41 trillion remains valid.15 Others believe the estimates may be overstated.16 While the top 5% of the wealthy have certainly gotten richer, the wealth accumulation appears to be relatively broad based. According to Time Magazine,17 America has 2.5 million millionaires and 267 billionaires.

It is not just the wealth, but the demographics of that wealth and related perspectives and implications, which are driving the revolution. For example, according to the U.S. Trust study:18

- Only 10% of today's millionaires inherited their wealth.19 As pointed out in Forbes magazine:20 "To New Money nothing outclasses achievement. Wealth that one possesses but did nothing to earn - or at least add to - is viewed as frivolous."
- 46% of today's millionaires became millionaires from their own businesses. Any entrepreneur who has created a business understands the monetary, emotional, mental and physical stress that comes from growing a successful business. However, it also may provide a profound sense of accomplishment, which many entrepreneurs would like their own descendants to experience, but without ALL of the hardships.
- The average millionaire comes from a middle class or lower background and worked his or her way through college. Many of these people recognize that their early struggles provided them the sense of self-worth that made them successful later in life and, hopefully, fulfilled.
- The average millionaire works a 56 hour work week and has worked for over 29 years. 93% believed that their willingness to work hard was the most important factor in leading to their financial success. Today's millionaires see hard work, not as an alternative, but as an obligation.
- 27% of the average millionaire's after-tax income is invested. One central point of the Millionaire Next Door21 was that these Americans were not extravagant. They saved rather than spent and they want their children to do the same. Too many clients have seen heirs dissipate an inheritance on a lavish, unearned lifestyle.
Transfer Tax Reductions. It is not just the growth of wealth. It is also the reduction in transfer taxes which is driving the process. In 1976, the amount a taxpayer could pass tax-free to descendants was only $60,000. By 1981 it had increased to $175,000. These relatively small exemption amounts meant that much of the middle class was subject to an estate tax. In the 1980s, President Reagan effectively took the middle class out of the transfer tax system by proposing the adoption of a series of reforms, including an unlimited marital deduction and the phased-in unified tax credit equivalent to a $600,000 exemption. The 1997 tax bill provided for an increase in the exemption to $1.0 million by 2006. The 2001 tax bill has provided for even higher tax-free transfers. Significant estate tax exemptions will probably remain for the foreseeable feature, reducing the tax confiscation many clients expected and increasing the concerns about too much wealth passing to family.

The 2001 tax bill provides for the elimination of the estate tax in 2010. However, unless the elimination is re-enacted before January 1, 2011, the pre-2001 transfer tax rules will be reinstated. Will the estate and gift tax be eliminated after 2011? It is highly unlikely for a number reasons, including:

- Polls indicate most Americans want to eliminate the estate tax. But, according to a number of studies, only 2% of decedents are currently subject to the estate tax. The tax has a limited impact on the population and its elimination may be traded away for broader-based tax reductions like alternative minimum tax reform.
- Although estate taxes made up only 1.1% to 1.3% of the federal budget during the 1990s, it could be a significant source of future federal revenue. Given the significant funding issues with Social Security, Medicare and Medicaid, the revenue may be needed.
- There is widespread speculation that the elimination of the estate tax will reduce both charitable bequests and state death taxes. Opponents are using this concern to press for a reduction in the estate tax, but not an elimination.
- The federal budget surplus is gone and there will be growing pressure in the next few years to fix the alternative minimum tax system, resulting in further reductions in the federal revenues. There is probably not enough revenue to fix other broad based tax concerns and eliminate estate taxes.
- In February of 2001, Warren Buffett and over 300 hundred of America’s wealthiest citizens publicly opposed the elimination of the estate tax. They pointed out that the purpose of the tax was not to raise revenue, but to avoid creating a class of perpetually wealthy Americans. The debate may shift to the taxation of the super-wealthy as a social goal.
- Because of the 2011 sunset of the elimination, all opponents have to do is block passage of a new tax bill and wait for the automatic repeal of the elimination. The primary pressure is on those who want to eliminate the tax.

Even if elimination does not occur, the unified credit exemption amount will probably remain at a high level. Assuming the exemption levels created by the 2001 tax act remain in place, the remaining transfer tax structure will have minimal impact on most Americans. Today only 2% of all estates are taxable, and if the $3.5 million unified credit is in place in 2009, it is expected that less than 0.3% of all estate will pay an estate tax.

The reduction in the number of taxpayers subject to a transfer tax will create significant changes in how clients approach their basic estate planning. For example:

- The benefit of prepaying estate or gift taxes may be eliminated. With rates dropping over the next 5 years, the pre-payment of a transfer tax could result in a larger overall tax burden.
- The transfer tax benefit of equalizing estates of a married couple to use the lower marginal transfer tax brackets of each spouse is reduced and may be effectively eliminated in 2006 when the estate tax becomes a flat 46% (dropping to 45% in 2007). Planners may want to make sure each estate has enough assets to fully fund the individual unified credits.
- The existence of a flat tax rate generally increases the benefit of deferring transfer taxes as long as possible.
- It will be relatively easy to compute the estate tax cost of any transfer by using a straight 46% rate in 2006 (45% in 2007).

Even though there will be substantial reductions in federal transfer taxes, state death taxes will offset at least part of the reduction. As a part of the 2001 tax bill, Congress replaced the state death tax credit with an federal estate tax deduction. Thirty-eight states use the federal credit as their state estate tax. It’s elimination will require them to revise the state’s death tax laws - an unpleasant political act. Even if the state death credit is restored, the higher federal exemptions would still wipe out considerable state revenue, because if an estate tax is not due to the federal government, none may be due to the 38 states. As a result:

- Thirty-eight states which were using the federal estate tax law as the basis of their state death tax will have to revise their statutes or face a serious loss of revenue.
- Some states will ignore the higher federal exemption amounts, creating a state death tax when no federal estate tax is due.
- Some states may restore state inheritance taxes, with the tax rate being determined by the relationship of the decedent to the heir (i.e., the more remote the heir, the higher the tax rate).
- Some states will freeze their state death tax as the pre-2001 federal credit, resulting in an top effective state tax rate of 16% (i.e., the top rate for the state death tax credit). This tax may be imposed on lower levels of inheritance than the federal estate tax (i.e., with lower state tax exemptions then the federal government allows).
- Like the federal government did in 1924, more states will adopt a state gift tax to stop the loss of transfer tax revenue through life-
time gifts.  

- The lack of uniformity in state death taxes will add complexity to estate plans. For example, if a person owns property in more than one state, the avoidance of the cost and taxes of ancillary probate may become a greater part of the estate plan.
- The pressure to “forum shop” will increase as taxpayers attempt to move their tax domicile to less costly states like Florida, which may not be able to amend it’s state estate tax without a constitutional amendment (a unlikely event given the number of retirees in south Florida).

The reduction in the number of estates subject to an estate tax will also cause a shift in tax planning from transfer tax avoidance to income tax avoidance. For example:
- The vast majority of estates will be exemption from estate taxes. Because of the step-up in basis that occurs at death, valuation strategies for non-taxable estates will shift to increasing the fair market value of an estate’s assets. If the estate is not taxable, obtaining a higher valuation (but below the taxable point) may allow heirs a higher step-up in basis (i.e., that occurs at the time of death), reducing the taxes paid by the heirs on the sale or depreciation of inherited assets. Perhaps those brilliant valuation arguments of the Internal Revenue Service were simply misunderstood and should now be adopted, but only for taxpayers who are not subject to an estate tax. This change will create an interesting problem for the IRS. Previously their attention was focused on whether taxpayers had purposely undervalued assets (i.e., to avoid transfer taxes). Now they will also have to focus on whether taxpayers are purposely overvaluing assets to obtain a higher basis (i.e., to avoid income taxes). A pivotal issue will be the proper documentation of the value of non-marketable assets, especially in non-taxable estates. Because there is no statute of limitations on the basis of assets in non-taxable estates (i.e., no estate tax return is filed) appraisals will be necessary to establish the income tax basis of non-marketable assets in non-taxable estates.

- Investments in trusts and estates may change to those that are more tax effective. For example, fiduciaries will be more prone to use tax efficient mutual funds and capital gain investments.
- Instead of using tax deductions on the estate tax return, clients will increasingly use them to reduce income taxes. More executors will waive their fiduciary fees.
- Trusts will increasingly provide for discretionary “spray” powers. Such powers will give the trustees broad discretion in allocating trust DNI to taxpayers in lower income tax brackets.

The Elder Boom. The elderly are increasing more than any other demographic group in the United States. Not only are the number of U.S. citizens age 65 and older expanding rapidly, but people are generally living longer. The number of people over age 85 are increasing more than any other group.  

- While over 45% of the women over age 65 are widowed, 74% of men over age 65 are married.
- One study reports that those over age 65 are twice as likely to avoid estate planning than those under age 65. According to the AARP, only 17% of Americans over age 50 have a will and durable power of attorney.  
- Fear of planning for their own mortality may lie at the heart of this problem. Years ago I had an elderly widow who came to me for estate planning. After thoroughly reviewing her estate plan, we had a follow-up meeting to sign her documents. In the meeting, she looked at the documents, looked at me and, without any emotion, told me she could not sign the documents. When I asked her why, she indicated her deceased husband had come to her the previous evening in a dream and told her she would die that day if she signed the documents. She paid our bill and left. I talked with her daughter a few months later and the daughter indicated she had asked her mother about signing the documents and the mother’s reply was: “Look, I haven’t died, the vision was true.” There is a certain tragic logic at work.

To have any hope of implementing an estate plan, practitioners will have to address the unique psychological, long term care and financial issues of the elderly. The desire to retain a sense of control over their lives may impend many of the more sophisticated planning approaches. As a result, planners may be forced to view this type of planning as a series of small steps - each done only after the client has reached an comfort level with the prior stage of the plan. The combination of a reduced estate tax and the potential shortfall in funds for retirees will create a reticence on the part of taxpayers to make lifetime gifts to descendants and other heirs.
Planners must address not only the needs of the elderly, but also plan for the potential death of adult children who may be providing benefits to their elderly parents. For example, part of the adult child’s unified credit trust could be applied to a trust for the benefit of elderly parents. The plan might provide that the parents’ beneficial rights are intended to supplement any government social programs.37

Internet Resources for the Elderly
• www.aoa.gov - the federal government’s Agency on Aging
• www.elder.care.gov - a website of the Agency on Aging
• www.medicare.gov - the national website for Medicare
• www.cms.gov - The government’s center for both Medicare and Medicaid advice
• www.socialsecurity.gov - the Social Security website
• www.aao.org - American Association of Retired Persons website
• www.caremanager.org - a helpful website on care giver resources
• www.nia.nih.gov - providing information on gerontology

WHOSE SAFETY NET?
The growth in the number of elderly Americans is pressing governmental social programs38 and may result in wealthier taxpayers either being excluded from many such program or being taxed on their benefits (an indirect exclusion).39 It is also appears to be causing Congress to provide tax benefits for taxpayers who can afford to privatize their retirement and long term care needs.

Government programs like social security have made an enormous difference in the lives of older Americans. According to Newsweek magazine40 one-third of all senior Americans receive virtually all of their income from governmental programs like social security, while another third get roughly half of their income from such programs. According to the Social Security Administration only 11% of retired Americans live in poverty, but without social security the percentage would rise to 50%.41

According to the Social Security Administration42 in 1946, 8% of the population was over age 65. It is currently about 13%, but will increase to 20% by 2030. This demographic imperative is creating uncertainty about the long term viability of social security and other governmental programs for the elderly. According to Social Security Administration43 beginning in the middle of the next decade, benefit payments will exceed collected social security taxes and by the late 2030s,44 the system will be bankrupt.45

But the above statistics are only part of the problem. Contrary to much of the public’s belief, there is not an invested account for social security participants. The federal government has already spent the money and given the Social Security Administration an IOU. As long as the collected social security taxes exceeded the paid-out benefits, the IOU was relatively benign. However, somewhere around 2015, the government will have to start paying into the social security system - paying off its IOU. This cost will place additional stress on the federal budget and may cause Congress to reexamine how benefits are paid. Many people think the result may be a system which is more “needs-based” than the current system. The Social Security Trustee’s report indicates that social security taxes would either have to be increased to 18% of payroll, or benefits would have to be slashed by 32%.46 Contrary to the general perception, social security benefits are not guaranteed. According to the Supreme Court, Congress retains the ability to reduce or even eliminate benefits at any time.47

While social security may be bankrupt in the 2030s, Medicare may be under even more stress. According to its Trustees, the program could be insolvent by the end of the decade.48 Medicare is the primary health care plan for the most elderly, but it provides little help in funding the long term care needs of participants.

Medicaid provides some long term care benefits, but the level of benefits does not provide a very high level of support and qualifying for the system generally requires that the elder be destitute. Moreover, the lack of state-to-state uniformity of Medicaid rules and their ever changing nature makes it hard to provide advice to clients and offers traps for the unwise client and advisor. Providing long term care advice to elderly Americans will require a comprehensive understanding of Social Security, Medicaid, Medicare, retirement and health care plans (including the unique issues of military and government plans) and retirement home possibilities. Although the topic is beyond the scope of this article, there are a number of good articles that discuss long term care and government programs.49 Advisors should never rely on the general statements of an article, but should make sure that local requirements or intervening changes have not made the article’s recommendations moot.

As a result of these demographic imperatives, clients are increasingly concerned about both their own and their heirs’ ability to rely upon governmental benefits to provide some safety net level of support. Estate plans are beginning to reflect these concerns. These concerns create an increasing interest in the use of family safety nets, dynasty trusts, supplemental needs trusts and spendthrift trusts.
These concepts will be developed in future articles.

CHARITABLE INVOLVEMENT

Estate planning increasingly includes some form of charitable planned giving. During the 1990s wealth exploded in the United States, but clients tended to increase their charitable transfers more than their family inheritances. According to Paul Schervish at the Social Welfare Research Institute at Boston College: “A growing number of wealthy Americans are shifting their financial legacies from heirs to charity.”50 According to Mr. Schervish from 1992 to 1997 the value of charitable bequests went up 110% while bequests to heirs only grew 57%. For estates above $20 million, charitable bequests went up 246% while heirs only received 75% more.51 According to an article in the New York Times32 which quotes Paul Schervish and John Havens, on average, the greater the estate, the less the percentage which passed to heirs:

<table>
<thead>
<tr>
<th>Estate Size</th>
<th>To Taxes</th>
<th>To Heirs</th>
<th>To Charity</th>
<th>To Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over $20M</td>
<td>34%</td>
<td>23%</td>
<td>39%</td>
<td>3%</td>
</tr>
<tr>
<td>$1-5M</td>
<td>22%</td>
<td>66%</td>
<td>8%</td>
<td>4%</td>
</tr>
</tbody>
</table>

Affluent Americans are also encouraging their heirs to become involved in charitable work. In a U.S. Trust study,53 82% of affluent parents encouraged their children to be involved in charitable work. In 2001, Americans gave $212 billion to charity.54 Despite a poor economy and stock market, the total giving increased more than $1.0 billion over the previous year. According to the Foundation Center, in 2000 there were 24,434 family foundations, a 19.2% increase from 1999. In 2000, such foundations controlled over 197.7 billion in assets.55

Not only are charitable gifts increasing, but wealthier Americans are getting more involved in philanthropy themselves. In a recent study,56 83% of affluent Americans did volunteer work. Increasingly, these wealth citizens are not just giving to charity, they are making sure the funds are handled in ways they approve.57 The increased involvement of affluent Americans in charitable work also seems to be increasing their lifetime charitable giving. In a recent article,58 John Havens and Paul Schervish stated: “In recent years, there has been evidence, especially among the wealthy, of a growth of systematization of charitable giving during the donor’s lifetimes, and of increased utilization of planned giving vehicles that allow donors to make substantial charitable contributions while they are alive.”

The reduction in estate taxes from the 2001 tax bill may only increase charitable transfers as clients transfer this “found money” to their favorite charities rather than heirs.

PLANNING FOR INCAPACITY

As clients age, their mental capacity often diminishes. Planning for incapacity will be an increasing and pivotal part of all estate plans, particularly for the elderly.

General Powers of Attorney. Using a power of attorney in lieu of guardianship can reduce the expense (e.g., bond cost and attorney’s fees), time delays, court oversight and transactional restrictions on guardians. Because of the problems with guardianship, virtually every client should execute a durable general power of attorney.59 Because all states statutes do not provide that the power of attorney is durable (i.e., it survives the maker’s incapacity), the document should have language which indicates that it survives the maker’s incapacity.

In many states the instrument can provide that it becomes operative upon the client’s incapacity. This avoids giving others broad authority when the client can still act. In some states, these “springing” powers of appointment are not permitted (e.g., Florida). In those states, it may make sense to have the family lawyer hold the documents in escrow until the client becomes incapacitated.

However, if incapacity is the triggering event, who decides when incapacity has occurred? Just stating that the document is triggered by incapacity might mean that a formal guardianship/competency hearing is necessary. Instead, the document may provide that incapacity is triggered by the client’s primary physician sending a letter to the holder of the power of attorney that the client can no longer handle his or her personal and financial affairs. In the alternative, a trusted committee of family members, advisors and/or friends might be required (by majority or unanimity) to sign a document indicating they believe the client could no longer handle personal and financial affairs. Because many people suffering from mental illness or reduced capacity are unwilling or unable to admit the problem and may sue the person triggering the power of attorney, the document may provide for the indemnification of the person(s) being asked to exercise their judgment about the client’s future mental capabilities.

It is the author’s experience that persons dealing with a general power of attorney, especially financial institutions and the IRS, want the document to grant specific authority to handle the maker’s affairs. Someone relying upon a power of attorney does not want to be pulled into litigation because the maker or the maker’s heirs dispute the actions taken by the holder of the power of attorney. Therefore, instead of using a power of attorney which says: “I grant all power to my attorney in fact” use specific power such as: “I grant my attorney in fact the right to buy and sell property, do like kind exchanges, mortgage my property, grant leases over my property, enter into easements, ....” Among the provisions to be considered are:

- Particularly if incapacity is imminent, allow the power holder, possibly with written approval of designated parties, to make specific
estate planning based decisions (e.g., transferring assets to a living trust).

- In many cases, the existing designation of a beneficiary for a retirement plan or insurance policy does not make tax sense. Allowing the power holder (with reasonable constraints, such as approval of a third party or beneficiaries) to make appropriate changes in the beneficiary designation could save significant taxes.

- Authorize the power holder to deal with the IRS. The power of attorney should make specific reference to the particular years (e.g., A1985 through 2030) and tax forms to which the power applies (e.g., “1040, 709, 1120”). Allow the power holder to make settlements with the IRS.

- Give the power holder access any safety deposit boxes.

- Allow the power holder to “acknowledge” a signature. This is required by some states to convey real estate. In addition, in order to transfer real property, make sure that the power of attorney is executed with the same formalities as a deed (generally, up to two witnesses and a notary).

- The document should also allow the power holder to make medical payments incurred by a health care agent.

- The power of attorney may authorize the power holder to change the state of residence (e.g., Florida to reduce income taxes).

- In many states the appointment of a guardian automatically revokes the power of attorney. To avoid back-door contests, specifically appoint the power holder as the guardian.

- In case the power holder is unable to act make sure to appoint 2-3 successors.

Under the current IRS position, annual exclusion gifts can be made only if the power of attorney or state law specifically authorize such gifts. A power of attorney granting “all authority” (or similar words) is not sufficient under the present IRS position. Because of the substantial estate tax savings from making annual exclusion gifts, make sure your power of attorney specifically authorizes and sets conditions for making any gifts.

The increasing use of powers of attorney and the probable increase of cases of abuse by power holders will increase the probability of legislation describing the nature of the power holder’s fiduciary responsibility. Currently, there is little developed legislative or case law on the limits of the power holder’s authority as a fiduciary. For example, how speculatively can the power holder invest funds? Until clear, objective standards are set, power holders should probably be very cautious and carefully document the decisions made by them. The document might also state that the power holder is to be held harmless and indemnified for acts taken in good faith.

If the power holder is expected to serve as a de facto guardian, with all of the time and attention required, how will the power holder be compensated? While the power holder may have fiduciary responsibility, state statutes may not provide a compensation structure, or the statutory compensation structure may not meet the client’s desires. As a result, the document might provide that the power holder is compensated in a basis comparable to the published fee schedule of a specific institutional trust department.

Living Will. A living will should be a part of every estate plan. A living will is a declaration that you do not desire life sustaining treatment if there is no significant hope of recovery. In Cruzan v. Director, Missouri Dept. of Health, the U.S. Supreme Court ruled that to be taken off life support (including intravenous nourishment and fluids), the person must have declared his or her desire before becoming incapacitated. A March 1994 study in the Archives of Internal Medicine reported that having a living will or medical power of attorney saves more than $60,000 per patient in the final stay in the hospital.

Medical Power of Attorney. Every client should execute a medical power of attorney. A living will is simply a declaration not to use life sustaining measures. A medical power of attorney (also called a health care power of attorney) is designed to give someone the power to make medical decisions upon incapacity, including the withdrawal of life support. The client can also name successor power holders if the originally appointed person is deceased or incapacitated.

Although both a living will and a medical power of attorney deal with life sustaining issues, we generally recommend signing both a medical power of attorney and a living will. Having a medical power of attorney generally assures that the family (not the doctors) have the final say in treatment. But if it is clear that life cannot be sustained, the power holder can step away and allow the living will to take affect. AThis is his decision, not mine” makes it much easier psychologically for the power holder.

In the author’s experience, many elderly clients have concerns about how the living will and medical power will be exercised and the types of situations which would trigger their exercise. Two valuable resources may help:

- If the client is concerned about specific decisions the agent may make, review using a detailed, grid-based medical directive. Copies of the directive can be obtained by going to www.MedicalDirective.org.

- If the client is concerned about what events would trigger the documents and how life support is withdrawn, they may want to go to www.critical-conditions.org

Providing Information to Your Family. Perhaps the most frustrating and time consuming aspect of dealing with the disability or death of a family member is the lack of necessary information. To reduce this problem, the author has developed a client form which pro-
vides information the family needs if the client become disabled or dies.62

**ASSET PROTECTION**

Clients are increasingly examining estate planning approaches which provide asset protection for their own benefit and the benefit of children. States are adopting statutes which make it easier for clients to use domestic trusts to restrict the claims of creditors.63 A detailed discussion of asset protection is beyond the scope of this article, but there are a number of other sources.64

**MARRIAGE AND DIVORCE**

According to Time Magazine,65 49% of all U.S. marriages end in divorce. In 1970 72% of the population was married. Today the percentage has dropped to 60%. Over one million children are involved in divorce each year, with 28% of children under age 18 living with only one parent in 1996.

Divorce is largely an ignored issue in most estate planning.66 The high divorce rate means that planners will increasingly have to deal with the complexities of blended and dysfunctional families, and competing spousal views of how children and step-children should be treated. Conflicts among members of blended families will also create more estate litigation. Clients should address the potential of both their own and their heirs divorce as a pivotal part of estate planning. This topic will be discussed in more detail in a later article.

**INTERNATIONAL ESTATE PLANNING**

The number of Americans living abroad67 and the number of foreign nationals living in the United States68 continue to grow. These cross-national living arrangements raise a myriad of estate planning and tax planning issues (e.g., the limits on tax free transfers by U.S. based foreigners).69 This area is rapidly becoming a specialty area of its own.70

**SUMMARY**

Estate planning is changing and practitioners will have to adjust to the changes or lose business to those planners who do respond to the changing marketplace. Future articles will discuss influencing the behavior of heirs, placing restraints on wealth, conflict management, effectively using trusts and changes in how estate planning services will be delivered.

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2Paul Simon, "Flowers Never Bend with the Rainfall.
4Jon J. Gallo, "The Psychological Education of an Estate Planner," Journal of Financial Planning, May, 2001. This is a delightful eye-opener that every estate planner should read.
5Id.
6For a detailed discussion of the implications of this shift see: John J. Scroggin, "Protecting and Preserving Family - The True Goal of Estate Planning," ABA Probate & Property (two parts), Spring and Summer 2002.
13The lowest estimate came from a study by Avery & Rendall, "Inheritance and Wealth," Presented to the Philanthropy Roundtable, November 1993 which estimated that $10.365 trillion would pass by the year 2040.
14The newest estimate came in 1999 from Boston College researchers Paul Schervish and John Havens and covers a larger period. He estimates that, by the year 2050, between $41 and 136 trillion will have passed. This transfer will include bequests, charitable transfers, taxes and fees. See: Schervish and Havens, "Millionaires and the Millennium. New Estimates of the Forthcoming Wealth Transfer and the Prospects for the Golden Age of Philanthropy," Social Welfare Research Institute, Boston College, Boston, MA, October 1999. See the report at: http://www.bc.edu/bc_org/avp/gsas/swri/
18Supra, note 10.
19Interestingly, over 43% of the persons listed on the 1996 Forbes List of the 400 wealthiest persons inherited a substantial portion of their wealth. This dictomy may be due to the difference in wealth of today’s ‘millionaire next door’ and the mega-wealthy who used their inheritance as a base for even larger wealth.


68The U.S. Census Bureau estimates that there were 32.5 million foreign born persons in the United States in March 2002, representing 11.5 of the U.S. population. See: “Foreign-Born Population in


497 U.S. 261, 110 S.Ct. 2841 (1990)


46Supra note 43.


Supra note 43.

27 Currently only Connecticut, Louisiana, North Carolina, Tennessee, and Puerto Rico have a state gift tax.

26For example, Florida in 1999 received almost $650 million from the credit. Unless other sources of revenue are located, Florida (which has no income tax) could be facing severe budgetary problems.


20For an excellent series of articles on the debate, see the Money and Investing Section of the Wall Street Journal for Monday, February 26, 2001.

19See information about the 2000 Census at www.census.gov


17Id.

16Id.  and Kollikof, supra note 16.


13See: www.ssa.gov/pubs/10055.html

12Id.

11Id.

10Other reports indicate an earlier date. See, for example, www.economicsecurity2000.org which indicates that shortfalls will begin in 2012 and bankruptcy may occur in 2029.


9For an excellent series of articles on the debate, see the Money and Investing Section of the Wall Street Journal for Monday, February 26, 2001.