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Chapter 2

PLANNING, PREPARATION, AND EXECUTION OF WILLS AND TRUSTS

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I. Preparation of a Will, a Trust, or Both

A. Types of Wills

1. (§2.1) Simple Will

Clients often request just a "simple will," perhaps thinking if the will is "simple" it will be less costly. And often they are right because many attorneys still charge a nominal fee for preparation of a basic will. But by the time an attorney meets with the client, asks all the questions necessary to determine that a simple will is indeed appropriate, and drafts and supervises execution of the instrument, a nominal fee is insufficient.

A simple will usually refers to one that contains no trusts and provides for outright distribution of assets. A personal representative is appointed, often to serve without bond. If the client has a taxable estate, a significant, albeit non-taxable estate, a second marriage, or minor children, a simple will may not be appropriate. In the initial interview with the client, the attorney should ascertain if the simple will is an effective and appropriate means of transferring assets.

Even in a simple will, it is sometimes helpful to the client to be able to make a list for the disposition of tangible personal property. If the will authorizes it, the testator may prepare a supplemental document disposing of tangible personal property. Section 474.333, RSMo 2000. Such a list may not, of course, dispose of money, evidence of indebtedness, such as a promissory note, documents of title, securities, or property used in a trade or business.

The attorney may wish to give the client a model form that the client may use to prepare the list. If the attorney already knows what is to be in the original list, this may be prepared and signed at the time the will is executed. In any event, the client should be encouraged to keep the last list with the will. The statutory authorization for making a list, which is available in many states, was enacted to enable an individual to make minor changes in the disposition of property without the need to have an attorney draft a codicil to the will each time the testator has a change of heart.

And a simple will is preferable to having clients place childrens' names on all manner of accounts and even on the title to real property as a means of avoiding what they perceive to be the rigors of probate. Adverse tax consequences may result from a client making gifts to a child while the client is living even if the estate is non-taxable. In addition, the child may have credit issues that would subject the asset to attachment or liens.

The donee takes the donor's tax basis instead of receiving a step-up in basis that would apply if the asset were received on the donor's death. For highly appreciated assets, lifetime gifts can create a significant tax burden that could have been avoided by making the transfer effective on the death of the donor. A simple will, often coupled with a beneficiary deed for real property, can avoid these issues for the client.

2. (§2.2) Pour-Over Will

A pour-over will is one that provides for a transfer of assets to an existing trust. Any assets left in the decedent's name are "poured over" into the trust. The assets are then disposed of in accordance with the dispository provisions contained in the trust. Clients often question why a will is necessary if they have a trust, and, in fact, the will may not be utilized if all assets are properly placed in or directed to a trust. But the pour-over will acts as a safety net for those assets not transferred into the trust by oversight or intention. Even if all assets are initially placed in the trust when it is established, clients have a way of undoing things. For example, a piece of real estate may be transferred into the trust. The property is later sold and the client purchases another property takes title in the client's individual name instead of as trustee of the trust. The pour-over will ensures that the asset will be transferred to the trust unless some other provision, such as a beneficiary deed, governs transfer of the asset.

A will, to be effective, must be presented for and admitted to probate. Missouri law requires that the will be presented within one year after the death of the testator. Section 473.050.3(2), RSMo 2000. For a case holding that mere filing of a purported will without presentment is insufficient, see *Brunig v. Hamburg,* 957 S.W.2d 345 (Mo. App. E.D. 1997). If the will is presented within the time requirements under § 473.050, it may be admitted and a probate administration initiated at any time thereafter. Section 473.050.4. Under prior law, assets found after the one-year period following the testator's death were disposed of by intestacy rather than by the terms of the will. As a result, it is recommended that all pour-over wills be properly presented so that they will be effective in the event assets are later discovered in the name of the decedent alone. No harm results from presenting the will if no assets are ever discovered. An attorney should be especially mindful of advising a personal representative of the need to present a pour-over will before the one-year period expires, especially in instances in which the disposition under the provisions of a trust that the assets would pour into is different from the disposition provided for by the Missouri intestacy statutes.

3. (§2.3) Joint Will

A joint will is a single document that contains the testamentary dispositions of property for two people, usually husband and wife, and is separately executed by both parties. As to the valid disposition of individually owned property, see *Graham v. Graham,* 249 S.W. 37 (1923). The only perceived advantage of a joint will is that there is only one document. Joint wills, however, are infrequently used because of their numerous disadvantages. First, the same will must be probated twice. If the testators die in different jurisdictions, the probate court in the first probate jurisdiction would have to return the original or a fully authenticated copy to the personal representative for presentation in the other jurisdiction. Second, it is unclear what happens if one party wishes to make a codicil to the joint will that the other does not wish to make or desires to revoke the will *in toto*. Finally, the joint will may be viewed as a contract, which would prevent the second to die from making an effective change in the will. MO Statute §474.155, however, states that execution of a joint will in and of itself does not give rise to a presumption of a contract not to revoke the wills. The joint will may also give rise to litigation for breach of contract in the event one party tries to change the dispository provisions after the death of the first party. See *Porter v. Falknor*, 895 S.W.2d 187 (Mo. App. E.D., 1995) Joint wills are best avoided.

4. (§2.4) Holographic Will

A holographic will is a will entirely in the handwriting of the testator, who signs and dates the will. A holographic will is not witnessed or executed in conformity with the statute of wills. In states that recognize these wills, witnesses are not usually required.

Missouri does not authorize holographic wills, but states that written wills are valid if executed in compliance with the laws then in effect at the place of execution. See § 474.360(2), RSMo 2000. Thus, if a holographic will that was validly drawn up and executed in a state recognizing these wills were presented in Missouri, it should be effective.

5. (§2.5) Nuncupative Will

A nuncupative (oral) will is recognized to a limited extent under § 474.340, RSMo 2000. A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, and is valid only if the testator died as a result of the impending peril. Thus, if a person recovers from the illness or escapes the other life-threatening event, the will is no longer valid.

Nuncupative wills must also be: "(1) Declared to be his will by the testator before two disinterested witnesses; (2) Reduced to writing by or under the direction of one of the witnesses within thirty days after such declaration; and (3) Submitted for probate within six months after the death of the testator." Section 474.340.1(1)–(3).

The nuncupative will may only dispose of personal property with a value not in excess of five hundred dollars. Such a will can be revoked by another nuncupative will, which one supposes would have to be made while the person is still in immediate peril and without recovery, that invalidates the will. But no nuncupative will can change an existing written will.

B. (§2.6) Testamentary Trust—Will Creating a Trust

Testamentary trusts are those created on death under the will of a testator. They are most frequently used to hold assets that would be distributable to a minor. For example, a couple in their early thirties may have three young children. The couple may have insufficient assets to justify a revocable living trust or may simply not want to have a trust at the time. But there is a need to provide for the children during their minority. A will containing trust provisions for the minor children often provides just the type of instrument the couple needs. Frequently, the main asset of a younger family is life insurance. The owner of the policy may execute a beneficiary designation naming the trustee under his or her will, thereby avoiding probate on the large asset.

C. (§2.7) Trust Funding

Upon establishing a revocable living trust, the attorney should impress on the client the importance of funding the trust with the client's assets. Some clients believe that once a trust is established, the work is complete. An analogy useful in explaining the funding principle to clients is that of a bucket and several balls on the ground outside the bucket. The bucket represents the trust and the various balls are the assets. Each ball must be placed in or directed to the trust, and how that is done depends on the type of asset being transferred.

It is recommended that the attorney provide the client with a letter stating which assets the attorney will place in trust and which the client must handle. Of course, the client should receive written instructions explaining how to make the transfers. It is also helpful for the attorney to draft a written proposed scheme for funding the trust, especially if there is a separate trust set up for each spouse. Suggest to the client that certain assets be placed in one trust and other assets in the other trust. Generally, each trust should be funded so that the trusts are roughly equal in value.

1. (§2.8) Life Insurance

The proceeds of life insurance are usually directed to the trust by making the trustee the beneficiary of the policy. The beneficiary may be designated as follows: John Doe, Trustee, John Doe Revocable Living Trust, dated ______________. Each insurance company tends to have its own form and its own instructions for making the trustee the beneficiary. Simply follow the outlined procedures to make sure the proceeds funnel into the trust.

Practitioners should be aware of *Egelhoff v. Egelhoff*, 530 US 1242 (2000). The US Supreme Court granted certiorari to resolve a conflict in which courts have held that certain non-probate statutes which automatically revoke a designation of an ex-spouse as beneficiary of a life insurance policy or retirement plan governed by the Employee Retirement Income Security Act of 1974 (ERISA) are not preempted under federal law.

In the *Egelhoff* case, the Supreme Court examined a Washington State statute which stated that:

> “If a marriage is dissolved or invalidated, a provision made prior to that event that relates to a payment or transfer at death of the decedent’s interest in a non-probate asset in favor of or granting an interest or power to the decedent’s former spouse is revoked.”

The Court took special note that all nonprobate assets were affected by this provision. They conclude that such a law is preempted by ERISA, and thus invalid with respect to assets governed thereby.

Missouri had a similar statute, contained in section 461.051, which is now preempted and invalid as it applies to ERISA. As a result, practitioners should pay special attention to beneficiary designations of divorced clients owning retirement and life insurance policies governed by ERISA.

2. (§2.9) Real Property

To place real estate in a trust, a new deed must be prepared transferring the property from the titleholder to the trustee of the desired trust. A typical transfer would be from John Doe and Jane Doe, husband and wife, Grantors, unto Jane Doe, Trustee, Jane Doe Revocable Trust, dated _______________, Grantee, and to her successors and assigns. Sometimes attorneys place an undivided one-half interest in the trust of each spouse, or all in a joint trust, depending on the circumstances. The deed should be recorded in a timely manner.

Keep in mind that in some states, deeds cannot be recorded after the death of the grantor. A few states, such as Florida, have taken the position that an attorney must be licensed to practice in Florida to draft a deed recorded in the state.

The process of transferring real property is easy enough for property within Missouri, but other states sometimes have specific requirements. Attorneys should contact the Recorder in the county in which the out-of-state property is located to ascertain: the filing fee; any special format required, such as leaving the top two and one-half inches free for the recorder's stamp; any special forms that must be filed with the deed; and whether there should be a reference to a statutory exemption from the payment of transfer taxes. Some states have very specific and detailed forms that must be filed along with the deed or it will be returned for correction.

For Missouri real property, the attorney may wish to use a beneficiary deed listing the trustee as the beneficiary as an alternative to deeding property directly into the trust. A beneficiary deed is especially helpful if the client frequently refinances the real property, since many lenders require the property to be deeded back into the owner's individual name so that the deed of trust is the obligation of the borrower individually, rather than that of the trustee of a trust. After completing the refinance, the property must then be deeded back into the trust to avoid probate of the asset in the event of the owner's death. The deed transferring the property back into trust is often unintentionally omitted. A beneficiary deed, on the other hand, leaves the title to the property in the owner's individual name so that the drafting and recording of deeds is not necessary.

3. (§2.10) Securities

Securities should be transferred by the use of stock powers. The transferor's signature must be guaranteed by a commercial bank or stock broker member of the New York Stock Exchange. The stock power and certificate must be submitted together with any other documents required by the transfer agent. Because of the nearly universal recognition of the Uniform Law for Simplification of Fiduciary Security Transfers, Chapter 403, RSMo, transfer agents do not require a copy of the trust instrument. As a practical matter, if the client has a brokerage account, the broker can, for a nominal fee, make the transfers for the client.

4. (§2.11) Certificates of Deposit and Bank Accounts

Certificates of deposit and bank accounts are transferred by the assignment of the certificate and execution of new signature cards for the bank accounts. Banks sometimes request a copy of all or part of the trust instrument. Clients may either actually retitle the accounts in the name of the trustee or add a POD (pay on death) designation to the account, listing the trust as the beneficiary.

5. (§2.12) Assets Without Title

Items that do not have a title, such as household goods and furnishings, tools, artwork and other personal property that does not have a title, may be transferred into the trust by means of a Bill of Sale. Although there is no statutory authority for making a list of beneficiaries for tangible personal property in a trust, it is widely used in Missouri. The trust instrument usually states that the list is considered an amendment to the trust that is valid without following the procedures set out for other amendments of the trust. *See Central Trust Bank v. Scrivner,* 963 S.W.2d 383 (Mo. App. W.D. 1998).

II. Preparation and Execution of Wills and Trusts

A. Requirements for a Will and Trust

1. (§2.13) Executing a Will

Any person of sound mind who is at least eighteen years old may make a will. See §474.310. Wills must comply with the provisions contained in §§ 474.320–474.330, RSMo 1994. As required by section 474.320, a will must be:

- In writing
- Signed by the testator or at the testator's direction
- Attested by at least two competent witnesses who sign the will in the presence of the testator

No attestation clause is required by law, but it is sound practice to include one. After the testator has informed the witnesses that the testator wishes them to attest the will, it is appropriate for one of the attesting witnesses to read the attestation clause. The witnesses should then sign their names. Addresses may help to locate the witnesses. If the prior pages are to be initialed by the witnesses, this should be done at the same time.

There is no required age for a witness, although it is certainly better to use an adult. Section 474.330 simply states that the person must be competent. The will is not invalidated if witnessed by an "interested person." An interested person is defined in the statutes as an heir, devisee, spouse, creditor, or other having a property right or claim against the estate of a decedent. *See* § 472.010(15), RSMo 2000. But an interested witness forfeits any amount stated in the will that is in excess of what the person would have taken if the decedent had died intestate. Notwithstanding the foregoing definition of an interested person, section 474.330.3 states that merely being a creditor or executor of a will does not make the party an interested witness, unless the will gives such person a personal interest.

If a will or codicil *must* be executed out of the office and without the attorney's presence, the client needs detailed instructions. If at all possible, the attorney should be present at the execution of the instrument because, despite careful instructions, clients will often have an interested party witness the document or violate some other statutory requirement for proper execution.

a. (§2.14) Mechanics of Preparing a Will

None of the following mechanics is legally required. They are suggestions that the attorney may wish to consider. The mechanics are:

- The paper for a will or trust may be a special paper that is used in the office primarily for this purpose. One New York firm uses a light gray, 100% rag paper that is used only for the originals of wills and trusts. Rag content is suggested, but it need not be 100% rag or 24-pound weight. Good paper is recommended because the document may need a long life.

- Letter-size paper, 8-½ by 11 inches, is recommended. Very few clients have legal-size files. Courts are moving rapidly to this size rather than the longer paper.

- Because the attorney will frequently be involved in preparing quite similar wills for a husband and wife for execution at the same time, some method of distinguishing them is desirable. One attorney uses a red-ruled paper for the wife and a blue-ruled paper for the husband. In this way, the attorney can be sure that the documents are correctly collated and not mixed.

- The original copy of the will should be the one that is executed.

- Some attorneys fasten the will *before* execution, presumably to make sure that pages of different wills are not mixed. The procedure obviously makes copying difficult, at best, or requires someone to remove the staple for copying. The point is that careful attention should be paid to keeping documents together. This may be best accomplished by executing only one document at a time and clipping the execution page to the front of the document.

- The instructions an attorney gives the secretary are personal to the attorney. Because almost all attorneys today use computer-printed documents, it is easy enough to reprint rather than initial errors in the document. Each document should be reviewed even if the attorney has used it for years. The attorney should look for errors in spelling and in the listing of the names. The author read a power of attorney in which John Doe, principal, appointed himself rather than his spouse attorney in fact. This mistake is very easy to make if the attorney does not carefully proof the document. With forms on computers, the attorney should take care to place the proper name in the proper place.

- Some law offices purchase special paper for use in the original or signature copies of wills and codicils. They may adopt a somewhat different but unique paper for the use of trusts and trust amendments. This effectively differentiates the executed documents from the drafts in the files.

b. (§2.15) Capacity, Execution, and Other Practical Suggestions

Several issues with regard to the signing of the will by the testator and witnesses are discussed below along with a few practical suggestions.

(1) (§2.16) Testamentary Capacity of the Testator

The testamentary capacity of the testator should be clear to the attorney. "Sound mind" involves lucidity, reasoning power, awareness of the natural objects of the testator's bounty, knowledge of the property the testator is disposing of, and freedom from duress or undue influence that would override the testator's normal free will. The attorney should be satisfied as to the client's competence at the time and place for execution of the will. The document may be reviewed with the testator in its entirety. If the client has had an opportunity for an advance review of the final document or the prior draft, it should be satisfactory if the attorney reviews with the client the changes, if any, that have been made since the preparation of the document that the client has studied. Interpretation and explanation may be appropriate. All of this can be completed before the witnesses and notary are involved.

(2) (§2.17) Self-Proving Wills

Since 1980, Missouri has authorized the self-proving will. Section 474.337, RSMo 2000. This statute contains a suggested form of affidavit that is surely safe for use. Revision of the suggested form is acceptable, although rarely done, because § 474.337 authorizes an affidavit that is substantially the same in form and content. This affidavit is normally below the attestation on the last page or on a separate attached page.

In fact, a self-proving will provides prima facie evidence of testimentary capacity, shifting the burden to the party alleging the testator lacked capacity. In *Milum v. Marsh*, 53 S.W.3d 234 (Mo. Ct. App., 2001), the court considered the capacity of a testator whose will was self-proving and held, "As a matter of law, we hold that the admission to probate of a self-proving will provides a prima facie case of due execution and of testimentary capacity." After introduction of a self-proving will, the court would require "substantial evidence to rebut the prima facie case of due execution and testamentary capacity."

(3) (§2.18) Changes or Corrections in the Will

If changes or corrections are required in the will, these should be made before execution. If retyping or reprinting of the page is not feasible, the change can be made in ink before the testator or witnesses sign. In that event, it is advisable to (1) have the testator and attesting witnesses initial in the margin opposite the correction and (2) insert in the attestation clause a reference to the correction as having been made before execution of the will.

(4) (§2.19) Execution of the Will

Only the original of a will should be executed. If multiple copies are executed, all must be produced or one may face the argument that the missing executed copy was destroyed with the intention to revoke it. Clients must be warned that the original should not be marked or written upon. They may do it anyway, but at least they will have been warned.

The attorney will wish to have a confirmed copy in the attorney's file. This can be done manually on an extra copy or the original may be photocopied before the client leaves the office. Copies should be clearly marked as copies.

The client should be given an extra copy of the will to keep at home or in the office. It is available then for ready reference. If the client is planning some changes, the client can mark on this copy without marking the original. A further safeguard is a top sheet of paper clipped to the document stating that it should not be written on.

(5) (§2.20) Safekeeping of the Will

The client should be aware of the importance of the safekeeping of the original executed will. It may be deposited with the probate court. Section 474.510, RSMo 2000. Despite this authorization, the practice has not become very popular. There are certain built-in inconveniences if codicils or later wills are executed. Because this practice is not common, the location of the original will may not be discovered. The clerk of the court may not be aware of the death of the testator. If the will wrapper has been endorsed with a name of the person to whom the will may be delivered after the death of the testator, the will is removed from the probate court and may be destroyed.

Many attorneys like to keep the original executed will in their vault or safe deposit box. This clearly creates a situation where the testator or the family, after the testator's death, must come to the attorney's office for that original. Although this obviously has certain business perpetuation advantages, there is also a risk that the attorney will not know of the client's death, the attorney may have died, or the family may not know that this attorney has the testator's will.

Banks and trust companies will provide safekeeping for wills and provide a receipt that can be placed in the testator's safe deposit box.

Perhaps the best repository for wills and codicils is the testator's safe deposit box. Under Missouri practice, both the removal of the will and its filing in the appropriate probate court are simple and quick.

(6) (§2.21) Options for the Testator Who Owns Property Outside Missouri

If a testator has property in several different states, and more particularly if the testator owns property in foreign countries where the law differs substantially from Missouri, the attorney may desire to have the client execute multiple wills. Each will can, by its terms, be limited to the property in one particular jurisdiction whether it is a state or country.

This procedure is perfectly valid but requires most careful integration into a single estate plan. Care must be taken when new wills are written, codicils are attached, or changes in the law occur.

If the objective is to avoid or minimize probate in Michigan where the summer cottage is located, in Aspen with its ski lodge, or in Arizona or Florida with its winter home, a better procedure may be the self-declaration of trust for that real

estate and personalty only. One may, of course, place real property of other jurisdictions in a Missouri trust to ease the process of distributing or selling the property at any time without the necessity of a probate proceeding in the state in which the property is located.

(7) (§2.22) Billing the Client

When all documents have been executed, it is time to bill. Some attorneys require a portion of the total fee in advance as a retainer, and the balance upon execution. It is suggested that one-half of the total anticipated fee be collected upon commencement of the representation, and the balance when instruments are signed in the attorney's office. If the client decides not to proceed after the attorney has completed the documents but before execution, which does sometimes happen, there is at least some compensation for the attorney's time.

The client is entitled to know what part, if any, of the legal service is deductible on the client's income tax returns. Some attorneys separate the deductible portion on the *single* bill that they send out. Other attorneys send a separate bill for the tax-deductible service.

The attorney may wish to accompany the bill with a covering letter. This may include a reminder that original documents should not be modified or updated without the legal formalities that are required.

2. (§2.23) Creating and Executing a Trust Agreement

A trust may be created in several ways. First, it may be created by simply transferring property to another as trustee. A person may also make a declaration that property is being held as trustee. See §456.4-401 RSMo Supp. 2008.

Most trusts, however, are created in accord with the requirements listed in § 456.4-402 of the Uniform Probate Code. That statute states that a trust is created only if: 1) the settlor has capacity and indicates an intent to establish a trust; 2) the trust has a definite beneficiary and the same person is not the sole trustee and beneficiary.

There is no formal requirement for the execution of a trust agreement. It is merely necessary that the grantor sign the agreement and that the trustee accept the trusteeship by signature. It is recommended that the parties signatures be notarized. Because the pour-over will often incorporates the trust, the trust should be in existence before the will.

B. Revoking or Amending a Will or Trust

1. (§2.24) Revoking a Will

Section 474.400, RSMo 2000, provides the most direct references for revocation: "No will in writing, except in the cases herein mentioned, nor any part thereof, shall be revoked, except by a subsequent will in writing, or by burning, canceling, tearing or obliterating the same, by the testator, or in his presence, and by his consent and direction."

In *Baiwir v. Moody,* 947 S.W.2d 822 (Mo. App. S.D. 1997), a case on obliteration, the court held that, to revoke a will, both intent to revoke it and an actual burning, tearing, or destruction of the will are required. Merely marking thorough names is insufficient.

Section 474.410, in a cumbersomely worded provision, states that if a second will (which would have validly revoked a prior will) is revoked, then that first will is also thereby revoked. The statute further provides that the first will is not revoked by revocation of the second, if it is clear that revocation of the second was not intended by the testator to revoke the first. Lack of intent to revoke a first will or destruction of a second will may be shown by the declaration of the testator or by the terms and provisions of a third will.

The provision with regard to the testator's declaration of intent not to render invalid the first will is contrary to the apparent majority rule to the effect that parol evidence is not admissible to show the conditional nature of the revocation or mistake where the revocation is by subsequent instrument as opposed to a revocation by physical act. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 459 (2nd ed. West 1953). Section 470.420, RSMo 2000, states:

> If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked but the effect of the revocation shall be the same as if the divorced spouse had died at the time of the divorce. With this exception, no written will, nor any part thereof, can be revoked by any change in the circumstances or condition of the testator.

Apparently, "the time of the divorce" refers to the finality of the judgment dissolving the marriage, and contractual settlements entered into contemplating a dissolution will not bar the surviving spouse. *Crist v. Nesbit,* 352 S.W.2d 53 (Mo. App. W.D. 1961).

2. (§2.25) Amending a Will

Strictly speaking, a will cannot be amended. The process by which terms of a will are changed is the publication of a new will incorporating the unchanged portions of the prior will into the new will. This document is referred to as a codicil. There may be any number of codicils to a will. Codicils, like amendments to a trust, are usually referred to as "First Codicil to the Last Will & Testament of John Doe." Later ones are numbered consecutively.

3. (§2.26) Revoking a Trust: Revocable and Irrevocable

a. Revocable Trusts

No special form is required to revoke a revocable trust. Of course, the grantor of the trust must have capacity to amend or revoke the instrument, and the law now states that the same capacity required to make a will is the capacity that is required to create, amend or revoke a trust. *See* §456.6-601. It had always been assumed that the capacity to create, amend or revoke a trust was the same as that required to make a will, but there was no actual statute until the passage of §456.6-601.

In Missouri, under prior law, a trust was irrevocable unless there was a reservation of right to amend or revoke the instrument contained in it. This rule now applies only to trusts executed before January 1, 2005. The rule for trusts executed thereafter is:

> Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created before January 1. 2005.

MO Uniform Trust Code, §456.6-602 RSMo Supp 2008.

Because Missouri now provides for trust registration, *see* §§ 456.027 through 456.033 RSMo Supp. 2008, if the trust to be revoked has been registered, a declaration of the revocation should be filed in the probate division of the court where the trust is registered. Very few trusts are actually registered in Missouri because there are minimal, if any, advantages and several disadvantages. A registered trust becomes a document open to the examination of a party requesting it. Section 456.031, RSMo Supp. 2008, states that, "Upon payment of the fees required by the law the clerk must issue certified copies of any record or paper filed or recorded."

Some attorneys, apparently unaware that a trust may be amended or restated *in toto,* revoke a trust and create a new one. This causes great anguish in the client when it becomes apparent that the new trust must be completely funded again.

Other attorneys include a document entitled "Revocation of Trust" with the instrument. If the grantor signs the revocation without making new estate documents, the result could be highly unfavorable. It is suggested that no such document should be given to a client. Any client wishing to revoke a trust should make an appointment with the attorney to revoke the trust if that is actually what the client, after counsel, decides to do.

b. Irrevocable Trusts

The Missouri Uniform Probate Code has simplified the procedure to revoke an irrevocable trust, so that under certain circumstances, it is no longer necessary to petition the court for termination of the trust. Section 456.4-411.1 states that a noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries without court approval. The revocation may take place even if it is inconsistent with a material purpose of the trust.

If it is not possible to obtain the consent of all beneficiaries to terminate the irrevocable trust, a court may nevertheless order termination if the court is satisfied the non-consenting beneficiary's interests are protected and that no material purpose would be served by continuing its existence. These provisions apply only to trusts executed after January 1, 2005.

4. (§2.27) Amending a Trust

As is the case with revocation, no special statutory form of amendment is required. But it is important that any amendments be clearly designated as such rather than leaving it to the expensive process of litigation to determine that one trust instrument fully revokes and supplants a prior trust instrument. *See Rosenblum v. Gibbons,* 685 S.W.2d 924 (Mo. App. E.D. 1984).

When amending a trust, the attorney should be careful to read the entire instrument to determine any requirements for an amendment stated in the document. Some revocable trusts contain language that appears to restrict the right of a surviving spouse to amend the trust instrument. Other documents require specific procedures. Most amendments are signed by the grantor and trustee and notarized. Amendments are usually titled: “First Amendment to the Revocable Living Trust of John Doe, dated ___________.” Subsequent amendments are numbered consecutively.

In *In re Estate of Mueller,* 933 S.W.2d 903 (Mo. App. E.D. 1996), the court held that, while a trust must be amended in accordance with the manner specified in the trust instrument, failure to have the trustee sign a document is not fatal if the trustee waives the right of notice by learning of and acquiescing to an amendment. *Id.*

Section 456.6-602 sets forth general rules regarding revocation and provides that the settlor of the trust may revoke or amend a revocable trust by "substantially complying with any method provided in the terms of the trust." *See* § 456.6-602.3(1). It further provides that, if the instrument does not state a means for revocation or amendment of the trust, "any other method manifesting clear and convincing evidence of the settlor's intent" will be effective. Section 456.6-602.3(2).

There are several issues the attorney drafting an amendment for a client may wish to consider. Especially when amending a trust that the attorney did not initially prepare, it is unclear exactly to what extent, if any, the attorney may become responsible for the drafting of the original instrument.

For example, a client may ask the attorney to change the successor trustee in the client's revocable trust. The same party may also be named as personal representative under the will. If so, the attorney should ask the client if the change should be made in the will as well as the trust. One should also check for the party in other instruments, such as in the powers of attorney. Clients do not usually realize or recall that the party may be listed in multiple instruments, perhaps in several articles or sections. There may even be a special disposition to the person that the client now wishes to omit.

But does an attorney have an obligation to review the whole instrument being amended? Is it necessary to do so even if the client does not request a review or desire to pay for one? It may be prudent to decline to represent a client that does not want the whole instrument reviewed because the amending attorney may become responsible for errors contained in the draft the amending attorney did not prepare.

It would seem to be clear that the amending attorney has an obligation to point out and correct errors or ambiguities discovered while preparing an amendment. But it is unclear how far the attorney is required to go to look for errors in the client's instruments. At a minimum, an attorney should briefly examine all estate planning instruments delivered for references to the item being changed. An engagement letter might note that the review was confined to the issues raised by the client. As a result of the lack of clear obligation on the part of the amending attorney, some attorneys decline to amend an instrument they did not initially prepare.

Attorneys are almost always well advised to avoid the review of instruments personally drafted by the client using some sort of commercially available software or internet legal form. The client is usually expecting the attorney to rubber stamp the client's work at a fraction of the cost the attorney would charge to prepare it. Even if the attorney did not object to reviewing the instruments, the attorney would not know if the client correctly and accurately answered the questions posed by the program. Internet legal forms may also be in conflict with local law or practice.

Finally, an attorney should not hesitate to suggest a complete restatement of a trust that has been heavily amended. It is difficult to make numerous amendments consistent throughout. Clients and successor trustees dealing with a restated instrument will also appreciate the clarity.

5. (§2.28) Office Procedure Revoking a Will

Clients often ask the attorney what they should do with their prior will. It is likely that the new will expressly revokes all prior wills, but the client wants to know whether to throw the old will away. On the one hand, saving the old will, if the disposition provisions are similar, may show the continuity of the testator’s intent. A will that is a radical departure from a prior will might give rise to allegations of undue influence or assist those attempting to attack a will. A secondary concern with retention of a will different from a later will is that the wrong will might be probated. If an heir tries to probate a prior will under which the dispository provisions were more favorable, litigation might ensue that could have been avoided.

6. (§2.29) Office Procedure Amending a Will

It is sometimes easier and more effective to draft a codicil to a will, especially when the attorney making the codicil did not draft the original instrument. If a change is relatively minor, a codicil is satisfactory. But just as with a trust, once there are numerous changes to a will, it may be more effective to redo the instrument to reflect the client's latest wishes.

7. (§2.30) Office Procedure Revoking a Trust

A significant problem exists in notifying third parties that a trust has been revoked in that most trusts are executed in several counterparts. It is, therefore, important to note in some document, even on the trust instrument itself, that the trust has been originally executed in several or more counterparts. The location of each copy of the trust should be constantly updated either in the files of the settlors, trustees, or the attorneys concerned.

8. (§2.31) Office Procedure Amending a Trust

Clients should be discouraged from amending their own trusts. Unintended results may well result when a client decides that certain provisions are not to the client's liking. Some clients come in with their original trusts highly marked up and redrafted. The ones that do not come in sometimes end up in court. It is a good idea to provide the successor trustee with all amendments to a trust to reduce the possibility that the changes will not be carried out for lack of knowledge of the amendment.

III. (§2.32) Revocable and Irrevocable Trusts

A transfer of assets by the grantor to a revocable trust is not considered a completed gift for gift tax purposes because of the ability of the grantor to remove the assets. But transfers to irrevocable trusts are completed gifts and may result in imposition of a gift tax. As mentioned in §2.26 above, in Missouri, a trust is now revocable unless there is a provision in the trust that states it is irrevocable.

The tax rates for gifts made during life and the rates for taxation of estates have been “unified,” which means they are figured from the same tax tables. The top marginal tax rate applicable to estates and gifts decreased from 46 percent in 2006, and to 45 percent in 2007. The 45 percent rate is scheduled to remain at that rate through 2009. The estate tax has been repealed for 2010, and the highest gift tax rate will be decreased to 35 percent for 2010. These provisions are scheduled to expire for estates and gifts made after December 31, 2010. Note that while the unified credit against estate taxes increases to $3.5 million for 2009, the exclusion amount has always remained at $1 million for taxable gifts.

IV. Wills and Trusts Involving Tax Planning

A. (§2.33) What Is a Marital Deduction?

The estate of a decedent receives a deduction for amounts passing to the surviving spouse. I.R.C. § 2056. This deduction is frequently used to defer estate taxes that otherwise would be due on the death of the first spouse to die until the time of death of the surviving spouse. In order to qualify for the deduction, certain requirements must be met. These requirements are discussed in §2.34 below. A parallel provision for transfers between husband and wife for gift tax exclusion is contained in I.R.C. § 2523. That section states that qualified transfers to a donor’s spouse are fully exempt from any gift tax.

B. (§2.34) Tax Avoidance or Deferral With the Marital Deduction

The election of the executor or donor to claim that certain property qualifies for the marital deduction in effect exempts that devise or gift of property from federal transfer tax at the time of the death or gift. The property passed to the surviving spouse will be taxed in the surviving spouse’s estate upon the spouse’s subsequent death. But if the surviving spouse does not, at the time of death, have a taxable estate because it is less than the amount that may pass without tax—that is, the unified credit exceeds the amount of the estate—no estate tax will ever be imposed on the property.

C. (§2.35) When to Use the Marital Deduction

The marital deduction is almost always used to defer taxation on the death of the first to die of a husband and wife. There is no dollar limit on the amount of assets that may qualify for the marital deduction. But the indiscriminate use of the deduction may result in bunching the assets in the estate of the survivor and generating a tax on the death of the survivor. For example, if a husband and wife have a taxable estate, which is one that exceeds $3.5 million in 2009, it may be inadvisable to pass all assets to the surviving spouse because the first spouse to die will not have used the available unified credit. The unified credit is, of course, the amount that may be transferred either during one's lifetime or at death without imposition of estate taxes.

Thus, if a couple has an estate of $4 million in 2009, and the estate plan simply gives all assets to the surviving spouse on the death of the first to die, the surviving spouse will only be able to use the unified credit of $3.5. If the second to die has an estate value of $4 million, assuming the exemption amount is still $3.5 million, then $500,000 will be subject to estate tax. This failure to utilize the unified credit of the first to die may be cured by postmortem estate planning if disclaimers are made within the time requirements set forth under federal law.

In the above example, the couple with the estate of $4 million would be better served by having the amount in excess of the unified credit flow into a credit shelter trust—also sometimes referred to as a by-pass trust—that would allow the first to die to use the unified credit.

There are exceptions to the general rule that a person should use the available unified credit, such as when a young couple has minor children and the surviving spouse will likely need all the couple's assets to raise the children. In addition, with the unified credit reaching $3.5 million in 2009, it is unlikely that a young surviving spouse would have a taxable estate at the time of death. If a young couple has assets that significantly exceed the unified credit, provision for using the unified credit of each should be incorporated into the estate plan.

Unless Congress changes the law, the unified credit is scheduled to increase to $3.5 million on January 1, 2009, and to be repealed for 2010. After 2011, the estate tax will return to a $1 million exclusion amount and the top tax rate on estates will again be 55%. These provisions were contained in Economic Growth and Tax Reconciliation Act.

The lack of predictability in the tax law has made estate planning more difficult. As of the date of this writing, early 2009, there has been discussion by Congress and the President of retaining and making permanent the provisions of the Act. However, estate planners have been waiting for Congress to act and establish some certainty in the estate tax area for eight years.

D. (§2.36) Requirements to Qualify for the Marital Deduction

The requirements to qualify property-interest transfers for the marital deduction are contained in I.R.C. §§ 2056 and 2523. Generally, interests that may terminate do not qualify for the marital deduction. For example, a gift that terminates if the surviving spouse remarries is a terminable interest and the gift will not qualify. There are, as mentioned below, terminable interests that do qualify. The transfers on death that qualify under I.R.C. § 2056 are:

- An outright transfer of assets to the surviving spouse—the assets may pass by will, trust, or by operation of law, such as in the case of property held as tenants by the entirety. Only one-half the value of property held as tenants by the entirety will qualify for the marital deduction, the remaining one-half interest being treated as owned by the surviving spouse.

- A requirement of survival for a limited period is an acceptable terminable interest under I.R.C. § 2056(b)(3). If the transfer is contingent and will fail if the spouse does not survive the decedent for a period of up to six months, then it will qualify for the marital deduction as long as the surviving spouse does not die within that period.

- I.R.C. § 2056(b)(5) allows a marital deduction for an interest passing to a spouse if the spouse is entitled for life to all of the income from the whole interest, paid at least annually, and has the right to appoint the whole interest to any person other than the surviving spouse.

- I.R.C. § 2056(b)(6) allows a deduction for life insurance or annuity installment proceeds paid to the surviving spouse if the payments begin within thirteen months of the death of the insured, payments are made at least annually, and the spouse has the power to appoint the amounts payable under the contract.

- Qualified Terminable Interest Property (QTIP) is also an exception, perhaps the most important one, to the general rule that terminable interests do not qualify for the marital deduction. I.R.C. § 2056(b)(7) sets out the requirements for the QTIP as follows: the property passes from the decedent to the surviving spouse, who has a “qualifying income interest” for life and for which an election is made to qualify the property on the estate tax return.

A spouse is deemed to possess a qualifying income interest if the spouse is entitled to all of the income from the property, payable at least annually, and no other person has the power to appoint any part of the property to any person other than the surviving spouse.

E. (§2.37) Property Interests Must Pass From the Decedent to the Spouse

Property interests must pass from the decedent to the spouse in order to qualify the property interests for the marital deduction. In addition to property interests passing to the spouse as a legatee, devisee, heir, or donee of a decedent, property passing to the surviving spouse as a surviving tenant by the entirety or joint tenant also qualifies.

If the decedent was the holder of a general power of appointment and the surviving spouse received the property subject to that power, either by exercise of the power by the decedent or as a taker in default upon the decedent's release or non-exercise of the power, the property subject to the power would qualify for the marital deduction.

Additionally, insurance received by the surviving spouse as beneficiary of the decedent's life insurance qualifies as does property passing under statutory provisions such as dower, curtesy, and surviving spousal allowances as long as those statutory allowances are not deemed to be terminable interests under state law. Because dower and curtesy have been abolished in Missouri and the statutory allowance to the surviving spouse replaces those common law origin rights, the issue becomes whether a spousal allowance is a terminable interest in Missouri. By statute, the spousal allowance has been qualified vis-a-vis the terminable interest rule.

F. (§2.38) Property Interest Must Be a "Deductible Interest"

Treasury Reg. § 20.2056(a)-2 defines deductible interest negatively, that is, by defining what property interests are nondeductible. Nondeductible interests include interests in the decedent's estate that pass to the surviving spouse to the extent that the interests are not included in the decedent's gross estate. Further, if a deduction is allowed in another section of the Internal Revenue Code for the same property interest, even though that property interest passes to the surviving spouse, the interest does not qualify for the marital deduction. In other words, there are provisions prohibiting double deductions for property interests in connection with determining what property qualifies for the marital deduction.

For instance, payment of a debt of the surviving spouse from the estate by transfer of property does not give rise to a double deduction for payment of the debt and a marital deduction for the transfer of the property.

The most important nondeductible interest is a property interest termed a "terminable interest." In general, a "terminable interest" is an interest in property that will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Specific examples include life estates, interests for terms of years, annuities, patents, and copyrights. Specific rules may be found in the cited regulation together with examples. Treas. Reg. § 20.2056(a)-2.

G. (§2.39) Decedent Must Be a Citizen or Resident of the United States

Unless the surviving spouse is an American citizen, the marital deduction is unavailable and estate taxes must be paid on the death of the first to die. There is an exception to this general rule, namely, the qualified domestic trust (QDOT) as provided in I.R.C. § 2056(d)(2). A QDOT requires at least one trustee to be an American citizen or domestic corporation and for no distribution to be made unless the trustee has the right to withhold from the distribution the tax imposed by I.R.C. § 2056(a). An election must also be made. An in-depth discussion of this issue may be found at FED. TAXES (P-H) ¶ 120,560.

H. (§2.40) Some Arrangements That Will Not Qualify for the Federal Estate Tax Marital Deduction

Referring to §§2.33–2.39 above, the following are some arrangements that will not qualify for the federal estate tax marital deduction:

- A deed creating a legal life estate in the surviving spouse—the value of the life estate does not qualify because it is a terminable interest

- The grant of a lease to the surviving spouse for a term of year—the value of the leasehold interest does not qualify because the interest is terminable

- The discharge of a note payable to the surviving spouse in satisfaction of the debt evidenced by the note because the debt is otherwise deductible—this arrangement does not qualify because a double deduction would be allowed

- A trust in which the surviving spouse is granted income and principal payments at the discretion of the trustee with the remainder to pass to named beneficiaries

I. (§2.41) Arrangements That Qualify for the Federal Estate Tax Marital Deduction

Referring to §§2.33–2.39 above, the following can be determined to qualify:

- Joint tenancy property
- Tenancy by the entirety property
- Property passing by will to the spouse
- A deed creating a legal life estate with a power of sale and consumption
- Various trust arrangements as detailed in §2.33 above

J. (§2.42) Types of Marital Formula Clauses

In general, the types of formula clauses in current use are described as pecuniary-amount or fraction-of-the-residue clauses. A further classification may be:

- Credit shelter pecuniary amount
- Marital deduction pecuniary amount
- Division of residuary estate by fraction-of-the-residue formula into credit shelter and marital deduction shares
- Single trust with specific portion election and disclaimer right

A full discussion of drafting considerations of these various marital formula clauses is found in Chapter 4 of this deskbook.

K. (§2.43) The Estate Plan

The estate plan must take into account the types of assets owned, their net value, and any outside agreements or documents that may affect their disposition. For example, if S corporation stock is placed in a trust, then the trust must be of a type that qualifies to hold S corporation stock, such as a qualified sub-S trust. Partnership and other business interests may be subject to buy/sell or other agreements that prohibit their transfer into trust. The estate planner must also consider the appreciation potential of the assets in devising funding scenarios.

V. Planning for Generation-Skipping in the Trust Instrument

A. (§2.44) What Is the Generation-Skipping Tax?

Estate taxes are potentially collectible from each individual. If an individual can pass assets not to a child but instead to a grandchild, then the assets will not be taxed in the child's estate. This skipping of generations results in tax revenue being lost. To curb this perceived abuse, the generation-skipping transfer (GST) tax , at a flat fifty-five percent rate—one of the most burdensome in all of the tax code—first appeared in the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, when Chapter 13 was added to the Internal Revenue Code. The specific provisions are found in I.R.C. §§ 2601, *et seq.* The GST tax applies to:

- A taxable distribution
- A taxable termination
- A direct skip

I.R.C. § 2611(a). These terms of art are defined in the code and regulations and will be examined in turn.

A "taxable distribution" occurs whenever there is a distribution from a generation-skipping trust to a skip person.

A "taxable termination" occurs on termination of an interest in a generation-skipping trust unless a non-skip person has an interest in it upon the termination or unless no distribution may be made at any time to a skip person.

A "direct skip" occurs either upon an outright transfer to a person who is two or more generations below the transferor or upon a transfer of property to a trust for one or more such persons.

But certain transfers are excluded from the GST tax. First, any transfer that is made by a living person and not treated as a taxable gift under

I.R.C. § 2503(e) is not taxed. Under I.R.C. § 2503(e), a person is allowed to pay the medical and educational expenses of a person without imposition of a gift tax. Second, any transfer of property previously subject to the GST tax is not taxed again if the transferee in the prior transfer was assigned to the same or lower generation than the transferee in the second transfer. It is also important to note that a transfer to a transferor's grandchild will not be subject to the GST tax if the child of the transferor who was the grandchild's parent is deceased at the time of the transfer. In other words, the grandchild steps up into the position of his or her parent for purposes of determining the generation to which the grandchild belongs. A transfer to a child is not subject to the GST tax so the grandchild now occupies that same position if the parent of that grandchild was deceased at the time of the transfer.

B. (§2.45) Definition of Terms

Several terms are crucial to understanding how the tax will apply. First, the code uses the term "transferor" to mean the decedent or the donor of a gift. *See* I.R.C. § 2652. An important exception to this rule is provided for qualified terminable interest property (QTIP). The QTIP election may be disregarded and the original transferor spouse is considered the transferor even though the property will be a part of the surviving spouse's estate. I.R.C. § 2652(a)(3). In order to disregard the QTIP for purposes of the GST tax, an election must be made.

The definition of the term "generation" is also important. It is determined along family lines. For example, the transferor, a spouse, and any siblings are all deemed to be in the same generation, regardless of their age. The transferor's children comprise the next generation and grandchildren are two generations below the transferor. Individuals that are not lineal descendants of the transferor are assigned to a generational level based upon age. If the person was born within twelve and a half years of the transferor, the person will be deemed to be in the same generation. If born more than twelve and half years but less than thirty-seven and a half years after the transferor, the person will be in the next generation for GST tax purposes. Subsequent generations are based on twenty-five-year intervals. I.R.C. § 2651(d).

The term "skip person" is also used in the Internal Revenue Code. A skip person can be a natural person or a trust. A person is a skip person if assigned to a generational level that is two or more below the transferor. *See* I.R.C. § 2613(a)(1). A trust, on the other hand, is also referred to as a skip person if all interests in it are held by skip persons or if there is no non-skip person holding an interest in the trust and at no time after the transfer may a distribution be made to a non-skip person. I.R.C. § 2613(a)(1) and (2).

C. (§2.46) Tax Planning for the Generation-Skipping Transfer Tax

The GST tax for 2009 provides every individual a $3.5 million exemption, which may be allocated by the individual or the executor to transfers or trusts for which the individual is the transferor. The top tax rate for GST for the 2009 is 45%. In 2010, the GST tax, along with the estate and gift tax, are repealed. Thereafter, unless Congress acts, the tax will revert to the pre-Economic Growth and Tax Reconciliation Act of $1 million, plus inflationary adjustments. The uncertainty in this area of the tax law makes estate planning difficult and speculative. The law further permits allocation of the GST exemption to a marital deduction trust for which a QTIP election has been made even though the spouse will be treated as the transferor for estate or gift tax purposes. But in most cases, it will prohibit both spouses from allocating both of their exemptions to a single QTIP trust.

Unless otherwise allocated, the Internal Revenue Code allocates the GST exemption first to direct skips occurring during the life and at the death of the transferor and then to trusts from which generation-skipping transfers—taxable terminations or taxable distributions—might occur. In certain situations, it provides for allocation of the exemption in a manner that protects only a portion of a direct skip or a trust, assigning an "inclusion ratio" to refer to the portion of the direct skip or trust subject to the tax and an "applicable fraction" to identify the exempt portion. Practitioners should be aware that the Service has adopted opt-out provisions for direct and indirect skips subject to GST. Such elections must be made at the latest by the tax return due date.

Once it has been recognized that there is a potential generation-skipping tax problem—for instance, a classic generation-skipping trust with a life estate to a child and remainder to grandchildren—detailed analysis of the ends to be accomplished by the generation-skipping, including but not limited to minimization of income taxes and federal estate and gift taxes, would dictate an application of several planning approaches.

First, the trusts could be layered, which involves the creation of separate trusts for each generation level in lieu of one trust for beneficiaries in different generation levels. *See* C. Ufford, Jr. & G. Haas, *Careful Use of "Layering" Technique Can Avoid Generation-Skipping Tax for Estates of Any Size,* 8 EST. PLAN. 268 (1981).

Another device that is available involves lifetime generation-skipping transfers because those transfers are taxed at rates determined without taking the deemed transferor's estate into account. Additionally, these generation-skipping transfers do not increase the tax rates applied to the deemed transferor's own gifts or estate.

I.R.C. § 2613(a) excludes income distributions from the definition of taxable distributions. It may be desirable, therefore, to maximize the amount of current income passing to lower-level younger generation beneficiaries.

Lastly, there are tax deferral techniques that essentially involve creating a single trust that includes as current beneficiaries several generations. A detailed description and application of this may be found in M. Kalik &

J. Kartiganer, *Planning Techniques for Minimizing and Deferring the Generation-Skipping Tax,* 7 EST. PLAN. 70 (1980).

The GST tax will affect individuals whose estates might exceed $3.5 million in 2009. Because certain grandfathered trusts can lose their exempt status, the tax may also influence the estate plan of a seemingly less wealthy individual if the person holds a power of appointment over or a right to recover a tax liability from a trust that was irrevocable on September 25, 1985. Treas. Reg. § 26.2601-1. Planning for the GST tax therefore normally involves two primary considerations: avoiding liability for the tax and utilizing the $3.5 million GST exemption.

Estate plans may remain free of any generation-skipping problems by simply making all direct transfers to non-skip persons and, if trusts are used, establishing trusts that only benefit non-skip persons. But plans that use trusts frequently include at least a remote chance of benefiting a skip person in a catch-all distribution provision and will require the trustee to monitor the trust's inclusion ratios for GST tax purposes. Moreover, some plans will call for direct transfers to skip persons.

Plans that include direct transfers to skip persons or establish trusts that might benefit skip persons may avoid the tax by limiting the value of the direct transfers and trusts to $3.5 million, which protects them, as well as any future appreciation, with the GST exemption. If the value of the trusts at the time of allocation of the exemption may exceed the available GST exemption, tax liability may be avoided by adding terms that subject the nonexempt portion of the trusts to estate tax in each generation. See Chapter 4 of this deskbook for a provision designed to avoid taxable generation-skipping transfers by dividing a trust into a nonexempt trust and an exempt trust and giving a general power of appointment over the nonexempt trust to a non-skip person. Although subjecting the nonexempt portion of the estate plan to estate tax in each generation will avoid liability, it might not fully utilize the GST exemption because the exemption is wasted to the extent an exempt trust benefits non-skip persons.

Full utilization of the GST exemption will therefore require additional planning. Tax-motivated estate plans will limit the benefits that non-skip persons receive from exempt trusts. See Chapter 4 of this deskbook for a provision that directs the trustee to make distributions for non-skip persons first from the nonexempt trust.

Finally, the generation-skipping tax planning should accommodate other estate planning considerations and objectives, including the unified credit for estate taxes, the estate tax marital deduction, and the spouse's estate plan. Some plans will call for a lifetime transfer of property between spouses to assure that the entire GST exemption of both spouses will provide protection regardless of their order of death. Estate planning documents may coordinate use of the GST exemption with the estate tax unified credit and marital deduction, dividing the estate into three shares:

- A credit shelter trust funded by the largest amount that may pass by reason of the unified credit
- A marital deduction QTIP trust funded by an amount equal to the unused GST exemption
- A residuary marital deduction QTIP trust

See Chapter 4 of this deskbook for a provision that allows the division of a trust into two trusts for transfer tax purposes. *See also* Blattmachr et al., *The Tripartite Will: A New Form of Marital Deduction,* 127 TRUST & EST. 47 (1988).

D. (§2.47) Division of Trusts for GST Purposes

There may be times when an instrument fails to provide for division of trusts that would make one trust wholly GST exempt and the other fully GST taxable. Missouri state law, contained in § 456.4-417 RSMo Supp. 2008, provides for combination or division of trusts provided notice is given to the qualified beneficiaries and the action does not impair the rights or the beneficiaries or frustrate the purposes of the trust. The terms of the newly divided trusts do not have to be the identical if the interests of the beneficiaries remain substantially the same.

With regard to federal law, the IRS recently issued final regulations (T.D. 9421) regarding creation of separate trusts after the death of an individual for generation skipping transfer tax purposes. See Reg. 26-2654-1(b). The regulations state that a taxpayer may make a "qualified severance" which splits a trust that is partially subject to GST into two trusts, one to which the GST exemption is applied, and one to which it is not applied.

A "qualified exemption" must be:

1) made pursuant to the terms of the trust, or pursuant to local (i.e. state) law;
2) effective and recognized under local (state) law;
3) funded within a reasonable time, not later than 90 days after the severance;
4) severed on a fractional basis, with each trust funded with part of that fraction, and with the total of all trust fractions allocated equaling one; and
5) one is which the resulting trusts do not alter the interests of the beneficiaries in the original trust.

The GST exemption for amount for a trust would be locked in to that amount in effect on the date of death. For further details and information on trust severance, see *Trust Severances and Other Estate Planning Under the New Final and Prop. GST Regs*, Estate Planning, January 2008, by Scott Bieber and David R. Hodgman.

VI. (§2.48) Bibliography

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