Estate Planning Fundamentals

Tuesday, October 20, 2015
E.E. “Tom” Thompson Courtroom
University of Missouri- Kansas City School of Law
500 E. 52nd Street
Kansas City, Missouri 64110

Fundamentals Committee Chairperson
M. Suzanne (Suzy) Hall • Country Club Trust Company

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Tuesday, October 20, 2015 – UMKC School of Law, 500 East 52nd Street, Kansas City, Mo. 64110  
Registration 7:30 AM; Seminar 8:00 AM – 4:25 PM; Cost: $75  
Credit: CLE credit for Missouri 8.9 includes 1.0 ethics / Kansas credit pending / CPE Credit for CPAs is available.

**SCHEDULE**

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<th>Time</th>
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<tr>
<td>7:30 AM</td>
<td><strong>Registration</strong></td>
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<tr>
<td>8:00 AM</td>
<td>Trusts v. Wills, Revocable/Irrevocable Trusts, Selection of Trustee</td>
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<td>Chris Anderson, Armstrong Teasdale LLP</td>
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<td>8:35 AM</td>
<td>Trust Funding and Digital Assets</td>
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<td>Heather Counts Garrett, The Counts Law Firm, LLC</td>
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<td>9:00 AM</td>
<td>Trusts you do not see every day (SNT, Pet Trusts, Gun Trusts, Trusts for Minors-2503c, QPRT)</td>
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<td>Scott Blakesley, Spencer Fane Britt &amp; Browne LLP</td>
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<td>Durable Powers of Attorneys and Health Care Directives</td>
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<td>Andrew Felker, Chinnery Evans &amp; Nail, PC</td>
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<td>10:05 AM</td>
<td><strong>Break</strong></td>
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<td>Elder Law</td>
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<td>Craig Reaves, Reaves Law Firm, P.C.</td>
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<td>10:50 AM</td>
<td>Diminished Capacity</td>
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<td>11:15 AM</td>
<td>Drafting to Avoid Common Mistakes in Trust Agreements</td>
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<td>Susan Teson, UMB Bank n.a.</td>
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<td>12:05 PM</td>
<td><strong>Box Lunch (included in fee)</strong></td>
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<td>IRA/Qualified Retirement Plans</td>
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<td>Paul Himmelstein, Van Osdol &amp; Magruder, PC</td>
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<td>Representing Family Business Clients</td>
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<td>Joe Gowney, Lathrop &amp; Gage LLP</td>
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<td>1:30 PM</td>
<td>Business Development and Client Representation (Panel Discussion)</td>
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<td>Moderator: H. Joseph Price Jr., Dysart Taylor Cotter McMonigle &amp; Montemore, P.C.</td>
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<td>Running Your Practice</td>
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<td>Lynn Cockle, Polsinelli PC</td>
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<td>Kimberly S. Zellmer, Zellmer Law Firm, LLC</td>
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<td>Angie Nichols, Stinson Leonard Street LLP</td>
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<td>Ethics</td>
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<td>Dan Wheeler, Kirklan Woods &amp; Martensen PC</td>
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<td>4:25 PM</td>
<td>Adjournment and Networking Happy Hour</td>
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*Schedule subject to change. Course materials will be provided in electronic format only and are accessible with your laptop, tablet or other mobile device during the event. On-site registrations are welcome; however, seating and/or meals cannot be guaranteed unless you pre-register.
2015 Estate Planning Fundamentals Planning Committee

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Scott E. Blakesley • Spencer Fane Britt & Browne LLP
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Trusts v. Wills, Revocable/Irrevocable Trusts, Selection of Trustee
Presenter: Chris Anderson, Armstrong Teasdale LLP

Trusts you do not see every day (SNT, Pet Trusts, Gun Trusts, Trusts for Minors-2503c, QPRT)
Presenter: Scott Blakesley, Spencer Fane Britt & Browne LLP

Durable Powers of Attorneys and Health Care Directives
Presenter: Andrew Felker, Chinnery Evans & Nail, PC

Elder Law
Presenter: Craig Reaves, Reaves Law Firm, P.C.

Diminished Capacity
Presenters: Stacey Janssen, Law Office of Stacey Janssen
Jonathan Klem, Country Club Trust Company

Drafting to Avoid Common Mistakes in Trust Agreements
Presenter: Susan Teson, UMB Bank n.a.

IRA/Qualified Retirement Plans
Presenter: Paul Himmelstein, Van Osdol & Magruder, PC

Representing Family Business Clients
Presenter: Joe Growney, Lathrop & Gage LLP

Running Your Practice
Presenters: Lynn Cockle, Polsinelli PC
Kimberly S. Zellmer, Zellmer Law Firm, LLC

Litigation
Presenters: Angie Nichols, Stinson Leonard Street LLP

Ethics
Presenter: Dan Wheeler, Kirkland Woods & Martansen PC

Trust Funding and Digital Assets
Presenter: Heather Counts Garrett, The Counts Law Firm, LLC
TRUSTS V. WILLS, REVOCABLE/IRREVOCABLE TRUSTS
SELECTION OF TRUSTEE

Wills and trusts are complementary documents, not alternatives. Estate plans should include a Will in all cases. In addition to including a Will, the question then is whether also to use other testamentary dispositions – joint ownership, beneficiary designations, revocable trusts and irrevocable trusts. Although not part of the assigned topic, there is a section at the end of the materials about beneficiary designations and joint ownership, and the potential lurking dangers of both.

Wills

Wills are the fundamental testamentary document. If there is not a revocable trust as part of the estate plan, the Will should dispose of all of the client’s property at the client’s death. However, if a revocable trust is part of the estate plan the Will should be a “pour-over” Will in order to avoid the possibility that ultimate disposition could be dependent upon whether property is titled in the decedent’s name or was transferred into the decedent’s revocable trust.

There are three main grounds for challenging Wills. One is within your control. The other two are items which you should be aware of during your conferences with your client and when the Will is executed.

The issue under your control is proper execution of the Will. The execution requirements reflect several hundred years of history and tradition. And not following the proper form for execution can have serious consequences. The Will must be signed by two witnesses in the presence of the testator and in the presence of each other. I generally think it is a good rule to use three witnesses -- if there is a contest and the witnesses have to be located many years later,
it is easier to find two out of three witnesses than two out of two. A beneficiary should not be a witness. Wills should be self-proving, which requires notarization. Notarization is not a requirement for validity, but avoids the need for the witnesses to go to the probate court to prove up the will.

Although not within your control, you also should be mindful of the testator’s capacity and whether there is undue influence lurking in the background. Undue influence and lack of capacity are beyond the scope of this presentation, but some in some situations the attorney must make a judgment on capacity based upon conversations with the client. And if there is some question about capacity, or if there is any possibility of undue influence, the conversations should not be in the presence of any other person.

If there appears to be a significant chance of a Will contest (for example, a child being disinherited) you might consider videotaping the execution ceremony, including an explanation by the testator as to why the child is being disinherited.

**Revocable Trusts**

This section is about revocable grantor trusts – those trusts where the grantor serves as the trustee. Such trusts are disregarded entities for income tax purposes. For that reason, these trusts are in many ways the equivalent of title holding devices – they do not limit or restrict the grantor in any way because grantor is the trustee and primary beneficiary and the trust can be amended or revoked by the grantor. There are several advantages to using revocable grantor trusts as part of the estate plan.

**Probate Avoidance.**

Assets titled in the name of the grantor as trustee are not probated. Although the assets are entirely within the control of the grantor, probate is avoided because legal title is in the name
of the trustee, not in the name of the grantor. And probate is, at heart, the process by which assets in the sole name of the decedent, without a beneficiary designation, are transferred to the decedent’s beneficiaries. At the death of the grantor, the successor trustee assumes the trusteeship without any action by the probate court.

On the other hand, although it has become a bit more cumbersome (and hence a bit more expensive) procedure in Johnson County lately, probate court costs on both the Kansas and the Missouri sides generally are not particularly significant. Probate costs generally are high only when there is a fight among the beneficiaries. And then it is usually quicker (and less expensive) to fight in probate court than elsewhere.

Management and Investment of Assets.

While the grantor is the sole trustee and capable of acting, from the grantor’s perspective there is no practical difference between having the assets in the trust and not. However, at some point in the future the grantor might want to have either another individual or a professional trustee manage his or her assets. A grantor can easily accomplish this by naming that person or institution as trustee of the grantor’s revocable trust. This can be done at the time the trust is established, or the person or institution can be designated as successor trustee of the trust. In the latter case the grantor would serve so long as she was willing and able to do so, and at some later time would turn over management of the trust to the successor trustee. When another person is serving as trustee, the trust remains revocable and entirely within the control of the grantor. However, asset management has been transferred to another person or to a professional trustee. And when a third party is acting as trustee, there is a higher fiduciary duty to the grantor than that person or institution would have if the management were not in a trust (for example, an asset management account).
Privacy.

Wills are public documents. Trusts are not. Although the Kansas City Star no longer publishes estate inventories (which was done at one time), estate inventories and accountings are filed with the court. These generally are not easily available to the general public online, but they are public documents. Additionally, Wills require notice to all heirs and beneficiaries of the testator’s death. Trusts do not (other than notice to creditors if the rights of creditors are to be cut off).

What is Appropriate?

There are several instances where revocable trusts may not be appropriate – in effect, where using a revocable trust would be the legal equivalent of overkill. For example, a young couple whose primary purpose in having Wills is to designate a guardian and conservator for young children, but who own no assets which are not joint (a house, bank accounts) or have beneficiary designations (insurance, qualified plans). As all of their property is owned either in joint name or has a beneficiary designation (very typical), there will be no probate at the first death in any event. The odds of a simultaneous death (or deaths happening very close together) are minuscule. All that really is required are Wills. The Wills designate guardians and establish a short contingent trust for the children. The unlikely event of incapacity can be addressed with powers of attorney. In sum, this is a situation where there is a very small chance of the Wills being used in the first place and not a particularly complicated probate estate if they are.

On the other hand, there are several situations where use of a trust is appropriate. If a person (or a couple) owns real estate in more than one state, probate costs can escalate quite a bit when there are multiple probate estates required. If there are substantial investment assets outside of qualified plans (which cannot be put into a trust in any event) a trust often is
appropriate both for asset management and privacy purposes. A closely held business is quite a bit easier to manage in a trust than as part of a probate estate. The same is true of any assets which might deteriorate in value quickly – while there is not a great deal of delay in opening a probate estate, there can be some and if assets might deteriorate quickly the ability to have a successor trustee step in immediately can be valuable. From the standpoint of health of the client, if the client is single and elderly or in poor health, or both, and proper management of the assets during the client’s lifetime is a serious concern, a trust is often the best alternative. In general, these are situations when probate could be expensive, where privacy is important, or where the chance of incapacity is non-trivial. Trusts are a much better vehicle to manage property in the event of incapacity than powers of attorney, and are certainly vastly superior to a conservatorship.

In summary, whether to use a trust is a cost/benefit decision. Trusts are more expensive to establish than having just Wills. Trusts require some ongoing “care and feeding” if they are to be of significant benefit (generally, making certain that the trusts are funded and stay that way). Consequently, in situations where there is unlikely to be a probate estate in any event, where there are no assets which are difficult to manage in a probate estate, and where incapacity is not an issue, use of revocable trusts may not be appropriate.

Two Trusts or One.

For background, when I started in practice the threshold for filing an estate tax return was a gross estate of $60,000. It is now $5.43 million, and going up with inflation. We now have portability of the exemption, so the effective limit for a married couple is about $11 million. Until relatively recently, although many couples would have preferred to maintain joint ownership, doing so was inadvisable from an estate tax standpoint. For virtually all clients the
estate tax is now irrelevant – with a high exemption and portability, there are very few clients facing estate tax issues. Consequently, although two separate trusts was the preferred planning approach for decades, I now am frequently using joint trusts – one trust for a married couple. Although there are situations where this is not appropriate (essentially the same situations where joint ownership would not be appropriate – second marriages, recent marriages, etc.), using a joint trust more closely corresponds to most clients’ wishes than separate trusts. Portability also provides some leeway. However, I typically think that when a couple’s assets begin to approach $5,000,000 there should be a discussion about the advantages and disadvantages of using separate trusts or a joint trust.

**Choice of Trustee**

Assuming the client(s) will be the initial trustee(s), this is a question of whom, or what institution, should be the successor trustee. In a situation of a long-standing marriage with no children outside of the marriage the choice of clients generally is that no successor trustee will come into the picture until neither spouse can act. When neither can act, the first choice of most clients is their children. While this can work well in many situations, it raises the potential for conflict, especially if a child is being put into position of being a trustee for his or her siblings. The potential for damaging family relationships in that situation is relatively significant. Many times clients do not recognize (or refuse to recognize) those looming conflicts.

It also is important to point out to clients that there can be a significant difference in investment results between having family members as trustees and using a corporate trustee, a difference which may more than make up the fee of the corporate trustee. But for most clients, the difference between a 1% fee and making 1% less on investments remains a significant difference.
In very broad general terms, I tend to categorize corporate trustees as falling into one of four types: bank trust companies, fee based financial planners, stockbrokers, and insurance professionals. All of these organizations can do a fine job. But because of their different histories, I generally find that they have different orientations. This is a very broad oversimplification, and the characteristics I describe are neither exclusive nor based upon any type of study. It is merely my experience over the years.

Not surprisingly, I think that bank trust companies tend to be the most conservative. This is appropriate for many clients, especially more elderly ones, who also tend to be more comfortable with conservative investments. Brokers tend to be more aggressive with investing, which is natural given their history. But this fits the profile which some clients are seeking. Fee based financial planners tend to have less of a categorical investment style, but one which the client is familiar with and approves of. Insurance firms tend to be involved when the client has a great deal of life insurance and tend to view investments through that lens.

**Irrevocable Trusts**

This outline includes only a few comments about irrevocable trusts. That is because irrevocable trusts are used for specific purposes. And they actually are irrevocable. Consequently, if you do not know exactly what the problem is you are solving by using an irrevocable trust (frequently a tax issue), and how the irrevocable trust fits into the solution, you should not use an irrevocable trust without associating with someone who is familiar with the type of trust you plan to use.

The alphabet soup of some of the usual irrevocable trust suspects are GRATS (grantor retained annuity trust), GRITS (grantor retained income trust), QPRTS (qualified personal residence trust), ILITS (irrevocable life insurance trust) and IDGTS (intentionally defective
grantor trusts), SNTS (special needs trusts), CRTS (charitable remainder trusts), CLATS (charitable lead annuity trusts), and a variety of even more specialized trusts.

The No-Probate Estate Plan

This section discusses some of the issues with the two primary ways in which probate is avoided other than use of a revocable trust: transfer on death titling and joint ownership.

Transfer on Death Titling

Especially for clients who do not have significant financial assets, use of transfer on death (TOD) registration can avoid the need for a probate estate. Although the TOD provisions in Kansas are not as extensive as the extensive non-probate transfer provisions in Missouri (Chapter 461 RSMO), the Kansas provisions are broader than in many other states. Kansas allows TOD designations of accounts with financial institutions (KSA §§ 9-1215, 17-2263 and 17-5828); securities (KSA §§ 17-49a01 et seq.); real property (KSA §§ 59-3501 et seq.); and automobiles (KSA §§ 59-3508 et seq.).

When naming TOD beneficiaries, it is possible to name more than one beneficiary and to designate the interest of multiple beneficiaries (for example, either as joint tenants or tenants in common). A TOD designation can take effect following the last to die of joint owners. Consequently, for direct transfers of modest amounts TOD designations can substitute for a probate estate. There, however, are several drawbacks to using TOD designations.

First, as a practical matter, TOD designations often "disappear" when additional planning is undertaken some years later. People can and do forget the TOD designations on their assets and then execute a Will which runs counter to the TOD designations. This is done without checking titling. The TOD designation, of course, governs in this situation.
Second, and especially in the case of clients with substantial assets, there is no one person who is in charge of managing the decedent's assets. In an extreme case this could lead to the opening of a probate estate and bringing an action to recover part or all of the TOD property.

Third, it is deceptively easy to end up with an ineffective TOD designation. In *Delcour v. Rakestraw (Mo. App. S.D. 2011)* a married couple executed a beneficiary deed, presumably on a printed form of beneficiary deed. The husband was the owner of the property. In order to waive her marital rights, the wife also signed the deed. (Quite properly.) However, both were, under the terms of the form of beneficiary deed, “Grantors”. This, in and of itself, was not a problem. However, the form of deed also stated that it was “not effective to convey title . . . until Grantor’s death or the death of the last to die of two or more Grantors.” The husband died. Although Missouri has extensive provisions governing non-probate transfers, and those provisions even had been amended to address a similar situation which arose six years earlier, the beneficiary deed was held ineffective. Under the language of the deed form, both the husband and wife were “Grantors” and the transfer was not effective until the second of them to die. However, the wife was not an owner of the property. This raises an issue of who owns the property at the husband's death. Not the wife, because she was neither an owner nor a beneficiary. Not the beneficiaries, because the wife was still alive and the beneficiary designation was not yet effective. Consequently, the beneficiary deed was held ineffective and the property presumably became an asset of the husband’s estate.

Finally, especially in Kansas be certain that you understand what happens if a beneficiary predeceases the decedent. Unlike Missouri, Kansas does not have extensive statutory provisions covering this issue, nor is it certain that the same result will apply to the different categories of property. The safest approach is to explicitly cover this in the TOD designation.
Perils of Joint Tenancy

Titling assets as joint tenants with beneficiaries (typically with spouses and/or children) is a common no-probate estate plan. When used between spouses it is useful and in most situations there are few serious drawbacks in most cases. This is especially true with young couples just starting out or with first marriages of long standing. Second marriages present obvious issues which joint tenancy can exacerbate. And there are serious issues with children as joint tenants.

The discussion of these perils does not necessarily apply to bank accounts, which are different than other forms of joint tenancy for most purposes. This is because bank accounts can be withdrawn by any one of the co-tenants and there is no gift by a person depositing funds in the account unless and until the funds are withdrawn by another co-tenant. Although joint bank accounts can present some issues, the issues are most serious with other types of assets, such as real estate and securities.

The balance of this section will focus upon the perils of joint tenancy with real estate. A securities account presents many if not all of the same issues. And because joint tenancy between spouses does not present all of the issues that joint tenancy with children does, it will focus on parents adding children as joint owners.

The first issue is a tax issue. When a parent adds children as co-tenants he or she is making a gift to the children of a percentage interest in the property. This is not an issue for most clients. However, it can be an issue for high net worth clients, especially those who do not typically think of themselves as high net worth (situations where net worth is not largely in investments – insurance, family owned businesses, and the like).

A second problem concerns creditors of the children. If a child has a creditor who brings suit against the child, there may be a judgment lien against the child’s interest in the property. That lien can be foreclosed by the creditor. Even if the children are financially stable, creditors
can arise out of automobile accidents, deteriorating financial situations following a divorce, and the like.

Because dealing with real property requires signatures of all of the co-owners and their spouses, incapacity of a child co-owner or a deteriorating marital situation of a child co-owner can present problems if real property is to be sold or mortgaged.

And finally, an unusual order of death can result in an inequitable distribution of property. This is especially true if, at the time a child dies, the parent is incapacitated and the ownership arrangement cannot be changed.
TRUSTS YOU DO NOT SEE EVERY DAY

Scott Blakesley
Spencer Fane LLP
1000 Walnut, Suite 1400, Kansas City, Missouri 64106
Phone: (816)292-8268 -- E-mail: sblakesley@spencerfane.com

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Estate Planning Fundamentals
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Kansas City Estate Planning Symposium
and KCMA UMKC CLE

October 20, 2015
I. INTRODUCTION

A. Why do we need to use trusts?
   1. Allows assets to be set aside for the benefit of desired beneficiaries without the risks associated with giving the beneficiary total control.
   2. Allows grantor to establish restricted uses and/or disposition limitations on certain types of assets.

B. Adapting trust provisions to accomplish a client’s goals.
   1. Revocable Living Trusts are not the only game in town.
   2. Trusts can provide flexibility to accomplish client intentions in ways that are not otherwise possible.
   3. Best approach is to find out what results a client wants, then develop a plan and trust provisions to accomplish that result.

C. Limited scope of materials.
   1. These materials are not designed to cover all the “unusual” types of trusts that might get used.
   2. These materials are not designed to provide detailed analysis of any of these trusts, but just a general overview of the purpose and function of such trusts.

II. 2503(c) TRUSTS

A. When do you use them?
   1. Setting aside assets for the benefit of “minor” beneficiaries without putting beneficiary in total control.
   2. Most often used in situations where a client wants/needs to make annual exclusion gifts, but doesn’t want the beneficiary to use it for the wrong reasons.

B. How do they work?
   1. Specifically established under the Internal Revenue Code.
   2. Automatically qualifies for the annual exclusion – without the use of withdrawal rights (“Crummey rights”).
   3. Trust must terminate when beneficiary reaches age 21.
4. Alternative approach to include provision to give beneficiary a right, for a limited period of time, to withdraw the assets after age 21 – and failure to exercise the right continues the trust for an additional period of time (i.e. to an older age).

III. PET TRUSTS

A. When do you use them?

1. Client has a pet for which they care greatly (sometimes the pet is more beloved than the children -- or maybe they don’t have children, and the pet becomes the “child”).

2. Client wants to designate a certain person to care for pet rather than just leaving it up to the regular trustee (who may not be an “animal person”).

B. How do they work?

1. Both Kansas and Missouri (and most states) permit the creation of a trust for the benefit of a pet. [Wasn’t always that way.]

2. Pet Trust should include funds to provide for the expenses of caring for the pet, but this is not a requirement.

3. If Pet Trust provides for some economic benefits for the caretaker, there is a risk that Trustee might try to keep the trust in place as long as possible (and even replace the pet with a duplicate pet).

4. If Pet Trust provides for caretaker to receive the balance of the funds after the pet’s death, there is a risk of the “premature death” of the pet. Perhaps it is best to provide for the remainder to pass to charity (especially a charity that supports pets).

IV. SPECIAL NEEDS TRUSTS

A. When do you use them?

1. When an intended beneficiary is one who otherwise will qualify for, and rely upon, government assistance programs such as Social Security or Medicaid.

2. Without special provisions included, a trust can be considered a “resource” which can prevent a beneficiary from qualifying for the above programs (even if the beneficiary is not in “control” of the trust assets).

3. Usually created for the beneficiary by a person other than the beneficiary (referred to as “third party special needs trusts”).
4. Can also be created by beneficiary (or representative) with beneficiary’s own assets. These are subject to more restrictive rules and require special analysis and probably best handled by persons who do this on a regular basis.

B. How do they work? [Third Party Special Needs Trusts]

1. Trust designates a trustee (other than the beneficiary) with absolute discretion to use the trust (or not) for the beneficiary’s benefit.

2. Trust should provide that distributions are to “supplement and not replace” the beneficiary’s general sources of support – such as Social Security and Medicaid (or more generally, governmental or charitable programs).

3. For avoiding treatment of trust as a “resource” it may be best if there are multiple beneficiaries who could receive distributions during the special needs beneficiary’s lifetime.

4. Important to have a remainder beneficiary (individual or charity) to whom the remaining assets will be distributed after the special needs beneficiary’s death (justifying the Trustee’s decision to preserve assets for remainder beneficiary).

V. GUN TRUSTS

A. When do you use them?

1. Gun owner wants to provide for others (now or later) to be able to use a gun without bothering with multiple re-registrations of ownership.

2. Usually reserved for “significant” and unusual types of firearms, not just your usual concealed (or non-concealed) hand gun. For example: short barreled rifles, shot barreled shotguns, destructive devices, machine guns and special silencers and other attachments.

4. Gun Trust can also provide privacy with respect to ownership of firearms.

B. How do they work?

1. Compliance with National Firearms Act (NFA) relating to the regulation and licensing of firearms.

2. Specifically provides for who can use the guns and for what purpose

3. Future users (beneficiaries) of the Gun Trust will not have additional registration or ownership issues, because the Trustee continues to be designated as the official registered owner of the firearms in the trust.
VI. TRUSTS FOR FAMILY VACATION HOMES

A. When do you use them?

1. Recreational residential property that client wants to remain available for use by various members (and generations) within the family.

2. Creates an opportunity to provide structure, continuity and longevity to ownership and use of the property.

3. Often the intent is to avoid conflict and disagreements between family members in the future – as well as to provide a “legacy” for multiple generations.

B. How do they work?

1. Property is put into the trust along with a fund of money to create a maintenance and repair fund (the money is important, but not required).

2. Trust Agreement sets out the process by which the property will be used by family members and how additional costs might be allocated.

3. Trust usually restricts the sale of the property without the prior consent of some percentage of the family members (often a super majority).

4. Trust can also provide for purchase rights in certain family members – including the right of some family members to buy out the rights of other family members.
Dusting Off Those

Durable Powers of Attorney and Health Care Directives

Prepared by
Molly Nail
Chinnery Evans & Nail, PC
mnail@chinnery.com; 816-525-2050

With Additions by
Andrew S. Felker
Chinnery Evans & Nail, PC
afelker@chinnery.com; 816-525-2050

Definitions. First, let’s get the terms straight… or at least try. Our clients sometimes
misuse legal terms, but that doesn’t mean that we should.

The power of attorney is the document in which one person (the principal) authorizes
an agent or attorney-in-fact to act on his or her behalf.

If the power of attorney is durable, it means that the agent’s authority lasts throughout
the principal’s incapacity. If the durable power of attorney is springing, then the agent’s
authority is effective only upon the principal’s documented incapacity or disability.

An advance directive (or “advance health care directive” or “health care treatment
directive”) usually refers to the combination of a living will and a health care power of attorney
within one document. This document often includes other directions such as organ donation, the
nomination of a primary physician or where and how one prefers to be cared for.

A living will (or “medical directive,” “declaration,” or “directive to physicians”) is
simply a written instruction spelling out any treatments to be performed or withheld in the event
one is unable to speak for himself/herself upon terminal illness or permanent unconsciousness.

A health care power of attorney (or “health care proxy,” or “medical power of
attorney”) is a document that appoints someone of the principal’s choosing to be his/her
authorized “agent” (or “attorney-in-fact” or “proxy”) to make health care decisions.
DURABLE POWERS OF ATTORNEY

I. Elements of the Durable Power of Attorney

A. Execution. The document must be dated, signed by the principal, and duly notarized.

B. Specific Language. In both Missouri and Kansas, in order to be determined “durable,” the power of attorney must be denominated a “Durable Power of Attorney” AND state “in substance” either:

“This is a durable power of attorney and the authority of my attorney in fact shall not terminate if I become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive”; or

“This is a durable power of attorney and the authority of my attorney in fact, when effective, shall not terminate or be void or voidable if I am or become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive.”

C. Duration. Unless otherwise stated in the document, the agent’s power of attorney remains valid until:

1. The principal dies. However, if expressly authorized, both Kansas and Missouri allow a few post-mortem powers:

   a. to give or withhold consent to an autopsy or postmortem examination;

   b. to make or prohibit an anatomical gift of the principal’s body; and

   c. to exercise the right of sepulcher over the principal’s remains.

   Kansas also allows a principal to “pay reasonable expenses incurred for the funeral and burial or other disposition of the body of the principal,” again, if expressly stated.

2. A court appoints a guardian for the principal.

3. The principal terminates his authority with a subsequent power of attorney or revocation.

4. The filing of any action for divorce between the principal and agent. Kansas also terminates the power upon the filing of an annulment or separate maintenance.

5. The agent is not qualified to act. Revisit your forms to determine if you define what this means or how it’s proven. Sample:
“Disability” or “incapacity” for purposes of replacing an attorney-in-fact herein shall be defined to mean a mental or physical infirmity which acts to prevent the individual attorney-in-fact from understanding and carrying out the duties and responsibilities imposed upon the attorney-in-fact hereunder, and so certified in writing by one (1) licensed physician.

II. A Closer Look at the Provisions.

A. The Appointment of Multiple Agents. When possible, counsel your clients and encourage them to appoint agents in succession. If this isn’t an option, both Missouri and Kansas allow the principal to authorize multiple agents to act independently. If not specifically stated, the agents must act jointly. Sample (immediately after naming the agents):

Pursuant to R.S.Mo. §404.707 / K.S.A. 58-653, either one of said individuals is authorized to act independently hereunder, whether or not the other one named is available.

Many financial institutions remain unwilling to cooperate with joint agents.

B. Express Authorizations. Even if a durable power of attorney states that it grants “general powers for all subjects and purposes,” certain actions must be expressly enumerated and authorized within the document. These actions should not be included without careful review and counseling. Common “express authorizations” are the powers:

1. to execute, amend or revoke any trust agreement;
2. to fund with the principal’s assets any trust not created by the principal;
3. to make or revoke a gift of the principal's property in trust or otherwise;
4. to disclaim a gift or devise of property to or for the benefit of the principal;
5. to create or change survivorship interests in the principal’s property or in property in which the principal may have an interest;
6. to designate or change the designation of beneficiaries;
7. to give or withhold consent to an autopsy or postmortem examination;
8. to make or prohibit a gift of the principal's body parts;
9. to nominate a guardian or conservator for the principal (can be agent);
10. to designate one or more substitute or successor or additional attorneys in fact; and
11. to pay reasonable funeral and burial expenses.
C. **Prohibited Authorizations.** Most powers of attorney, whether or not they delegate general powers, may not delegate or grant power or authority to an agent:

1. to make, publish, declare, amend or revoke a will for the principal;
2. to make, execute, modify or revoke a living will declaration;
3. to require the principal, against the principal’s will, to take any action or to refrain from taking any action; or
4. to carry out any actions specifically forbidden by the principal while not under any disability or incapacity.

D. **To Spring or Not to Spring?**

1. If your client requests a springing durable power of attorney that becomes effective only upon his or her disability, consider including the word “springing” within the heading of the document, “Springing Durable Power of Attorney.” This should alert the third-party that written proof of incapacity should accompany the document.

2. Revisit your forms to determine if you clearly define what “disability” means and/or how it’s proven.

Sample language:

*This appointment is effective only upon and during my disability or incapacity (as said terms are hereinafter defined), to become effective at the time and upon the determination as hereinafter more specifically provided.*

*The terms “disability” and “incapacity” as used throughout this Durable Power of Attorney shall be defined for all purposes to mean only that mental or physical condition on my part which will render me unable (because of such physical or mental condition) to take care of my affairs and/or to give informed direction to my affairs, and this Power of Attorney shall not be effective at any time when I am capable of giving informed direction to my affairs.*

*The question of whether or not I am disabled or incapacitated under the meaning of the foregoing provisions and for purposes of determining whether or not this Power of Attorney is in effect shall be determined by two (2) physicians, one of whom is then my attending physician or a physician who is a specialist who has been consulted by my then attending physician.*

*I further direct that any and all persons dealing with my said attorney-in-fact shall be completely protected in relying upon a written certificate*
executed as of a current date by any of the above-named individuals as of the current date that I am in fact disabled or incapacitated in such way that this Power of Attorney is in full force and effect, joined with letters or other written certificates signed by a licensed physician who certifies in writing that he or she is my then attending physician or is a specialist who has been consulted by my then attending physician, and that in his or her best professional opinion, I am disabled or incapacitated under the meaning of the foregoing provisions; and if copies of such letters or certificates are attached to any copy of this Power of Attorney presented to a third person, such third person may rely upon such letters or certificates, and such a person likewise shall be protected in relying on the written certificate of any of the individuals named at the beginning of this Power of Attorney (or by the Law Firm hereinafter mentioned) that I have not previously revoked this Power of Attorney and that it is then in full force and effect; and such persons shall have no obligations to inquire beyond such letters or certificates.

3. Make sure you include language that allows an agent to access medical records to prove your incapacity. Sample:

I waive any physician-patient privilege for the specific limited purpose of determining my competency to continue to manage my affairs. I specifically allow any physician treating me to render in writing a certification of my inability to manage my affairs to my attorney-in-fact. This provision is intended to meet the requirements for authorization for disclosure under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 CFR §160-164 and any successor or similar provisions of said law.

E. Spousal Support. If the client would like the agent to provide for his or her spouse, then make sure this authority is present. Sample:

Said attorney-in-fact is authorized to do and perform for me and in my name, place and stead for the following purposes: (A) To manage my business and financial affairs; (B) To authorize and arrange for my personal care and medical treatment; and (C) To arrange for my support, comfort, housing and welfare; and, if applicable, for the support, comfort and welfare of my spouse, and to use generally any money or property belonging to me in the support, maintenance and care of myself and, if applicable, my spouse.

F. HIPAA Compliance. Sample:

I specifically waive the protection of any law, federal or state, which requires that records and other information pertaining to me and to my care remain confidential to the exclusion of my attorney-in-fact, and my attorney-in-fact shall have full access to all such information. I do this
having full confidence in my attorney-in-fact and knowing that my attorney-in-fact may not be able to carry out the duties imposed upon my said attorney-in-fact by this document without having access to the documents above described. All persons or other entities having control of any personal information concerning me and/or my health care are specifically directed to reveal all such information to or at the direction of my attorney-in-fact whenever requested by my attorney-in-fact. My attorney-in-fact shall be treated as a personal representative for purposes of HIPAA (45 CFR 164.502(g)), with respect to protected health information relevant to such personal representation.

G. Rights of Sepulcher. Unless this power is expressly authorized, a funeral director will take directions from the deceased principal’s “next of kin” in order of statutory priority. If the “next of kin” is different than the agent listed, consider this specific authority. Sample:

My attorney-in-fact shall have the absolute right and first priority to choose and control the burial, cremation, or other final disposition of my remains, as well as any and all services and ceremonies related to said disposition.

H. Instructional Provision. Sample:

My attorney-in-fact shall use the following form when signing on my behalf pursuant to this Durable Power of Attorney:

“CLIENT NAME
By ___________________________, Attorney-in-Fact”

I. Agent Compensation. Discuss the consequences of including this provision with your client. It’s not always acceptable or might want to be limited. Sample:

My attorney-in-fact (whether one or more) appointed pursuant to this Power of Attorney is specifically authorized to be paid reasonable compensation or to pay persons assisting said attorney-in-fact, including reimbursement for expenses paid or incurred by my said attorney-in-fact. Such payments shall be made out of any of my funds which are under the control of my said attorney-in-fact.

J. Long-Term Care Planning. Does your client want to give the agent broader authority in order to qualify for government assistance?

K. Temporary Delegation of Powers by Parent. Remember that a minor’s parent can delegate care and custody powers to another individual, but the period of authority cannot exceed one year in Missouri. Most schools require legal guardianship for enrollment purposes.
HEALTH CARE DIRECTIVES

I. Its Origins. In 1990, the Supreme Court upheld the legal standard that competent persons are able to exercise the right to refuse medical treatment under the Due Process Clause. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261. In light of this decision, Congress passed the Patient Self-Determination Act (PSDA) later that year. As of December 1, 1991, PSDA required hospitals, health care facilities and home health agencies receiving federal funding to give adult individuals, at the time of inpatient admission or enrollment, certain information about their rights under state laws governing advance directives, including:

A. the right to participate in and direct their own healthcare decisions;
B. the right to accept or refuse medical or surgical treatment;
C. the right to prepare an advance directive; and
D. information on the provider’s policies that govern the utilization of these rights.

II. Capacity Issues.

A. Informed Consent. The physician and medical staff will first look to the patient for consent to or refusal of medical treatment. Although they can vary state-to-state, one of the three basic prerequisites for informed consent is for the patient to have the capacity to reason and make judgments. If the patient is able to communicate and consent to medical treatment, his or her advance directive should not be referenced.

B. Capacity to Contract. If the client does not possess the mental capacity described above, he or she might not have the common law mental capacity to contract. In general, a non-testamentary contract can be voidable if the client cannot reasonably understand its “nature, purpose and consequences.”

III. Requirements for Execution.

A. Witnesses. States have varying laws concerning whether the living will or health care power of attorney need to be witnessed and/or notarized. Your client may be executing just a living will, just a health care power of attorney, or a complete directive. In the majority of states, the living will needs to be witnessed by at least two disinterested adults. The health care power of attorney needs to be signed in the presence of a Notary Public. Most estate planning attorneys provide two disinterested witnesses and a Notary Public at every signing.

B. Health Care Facility Concerns.

1. In General. Sometimes clients are unable to leave a health care facility and documents need to be signed out of the office. Your staff may or may not be
acting as the witnesses. If you ever use witnesses that are not from your law office, make sure that they are not:

i. an appointed health care proxy;  
ii. related to the principal by blood, adoption or marriage;  
iii. entitled to any portion of your client’s estate upon his/her death, either through will or under the laws of intestate succession; or  
iv. directly financially responsible for your client’s medical care.

IV. Practice Tips.

A. Co-Agents. Limit the cooks in the kitchen. Recommend that your client nominate one agent at a time, with at least one successor agent. If the client feels strongly about nominating co-agents, suggest that he/she appoint one agent, but require that the agent “seek the advice” of the other friends or relatives before making important decisions. Try to stress the logistical nightmare that multiple agents can pose to health care professionals.

B. Choosing the Right Agent. Clients may believe that certain individuals will be offended if not nominated as the health care agent. Insist they choose an agent they believe will follow through and honor their wishes – not just the oldest or local child.

C. Current Information. Encourage client to update the agent’s contact information.

D. Registration of Advance Directive. Some private entities charge a fee to register a client’s advance directive, but some states offer this service for free (or low cost) for residents of its state (Arizona, California, Idaho, Louisiana, Montana, Nevada, North Carolina, Vermont, Wyoming and Washington). Most estate planning attorneys simply encourage clients to provide copies to their physicians. Dissemination of advance directives among family members and agents can prove to be very problematic.

Helpful Websites:

*Caring Connections* is a program of the National Hospice and Palliative Care Organization created to improve end-of-life care. Their website offers free downloadable state-specific advance directives: [http://www.caringinfo.org](http://www.caringinfo.org)

*Compassion and Choices* (formerly the *Hemlock Society*) provides free downloadable state-specific advance directives on its website: [https://www.compassionandchoices.org](https://www.compassionandchoices.org)

*Jewish Law* provides state-specific halachic advance directives: [http://www.jlaw.com/Forms](http://www.jlaw.com/Forms)


*The Center for Practical Bioethics* website is a good medical ethics resource with a very practical advance care planning form: [http://www.practicalbioethics.org](http://www.practicalbioethics.org)
*End of Life: Helping with Comfort and Care* is provided by the National Institute on Aging and National Institutes of Health: [https://d2cauhfh6h4x0p.cloudflare.net/s3fs-public/end_of_life_helping_with_comfort_care_0.pdf](https://d2cauhfh6h4x0p.cloudflare.net/s3fs-public/end_of_life_helping_with_comfort_care_0.pdf)

*National Healthcare Decisions Day* provides one of the most comprehensive set of resources for addressing the questions associated with advanced care planning: [http://www.nhdd.org/public-resources/#where-can-i-get-an-advance-directive](http://www.nhdd.org/public-resources/#where-can-i-get-an-advance-directive)
What is Elder Law?

Counseling and representing older persons and their representatives about legal aspects of:

- Health, disability, and long-term care planning
- Public benefits – what they are, how to qualify and keep
- Surrogate decision making: DPAs and guardianship
- Legal capacity
- Estate and tax planning
- Conservation, disposition and administration of trusts and estates
- Trusts, including special needs trusts
What is Elder Law?

Being able to recognize, counsel, and assist or refer to appropriate legal or non-legal resources when:

- Abuse, neglect or exploitation is suspected
- Appropriate housing and transportation is needed
- Long-term care needed, at home or in facility
- Insurance issues and questions – health, long-term care, life, property
- Employment and retirement issues

How Estate Planning Attorneys Encounter Elder Law Issues

1. Client, spouse, child or parent needing long-term care
2. Client or family member losing or already lost mental capacity
3. Client or family member with disability
4. Client who wants to gift during life or leave estate assets to child, spouse, or other family member who has a disability
What is “Long-Term Care”?

When a person lacks mental or physical capacity to the extent that the person needs assistance or supervision with normal, everyday daily activities.

1. Cognitive Impairment

Can be caused by:
- Disease
  - such as dementia, Alzheimer's disease, Parkinson's disease, etc.
- Physical event
  - such as accident, traumatic brain injury, stroke, heart attack, etc.
What is “Long-Term Care”?  

2. Functional Impairment

When a person can no longer perform at least 2 of these “activities of daily living” without assistance

1. Eating (feeding yourself without assistance)  
2. Dressing (dressing yourself without assistance)  
3. Bathing  
4. Continence  
5. Toileting  
6. Transferring (Ex: moving without assistance from bed to chair)

Options for Long-Term Care Services & Supports

- In the Home  
  Family, friends, neighbors, home health agency, church, community services, Village Movement

- In the Community  
  Adult day care services centers, Senior Centers

- In Residential or Institutional Settings  
  Living with relatives or friends, Assisted living facilities, Continuing Care Retirement Communities, Nursing homes
Paying for Long-Term Care

Most people think of these options:

- Medicare
- Medicare Supplement Insurance
- Regular health insurance
- Veterans' Administration
- Long-term care insurance
- Current income
- Savings and Investments
- Medicaid

Option 1: Medicare

- Primary government health insurance for those on Social Security
- Covers over 49 Million Americans (in 2012)
Medicare Coverage

Medicare covers:
• Acute medical care
• Limited home care
• Skilled nursing care for short term
• Some rehabilitation

Medicare does *not* cover:
• Custodial care in a nursing home
• Long-term care

Home Health Care
• Available if a Medicare recipient is
  1. “Confined” to home,
  2. Needs “skilled nursing care” on an “intermittent basis,” or physical or speech therapy,
  3. Has a Written Plan of Care by a physician requiring such services, and
  4. Under physician’s care
Medicare Coverage

Skilled Nursing Facility Care
- Available if a Medicare recipient is
  1. Admitted to hospital (not “observation status”) for at least 3 days, and
  2. Within 30 days after discharge enters a “skilled nursing facility”,
  3. For a condition treated in the hospital,

Then Medicare will pay....

What Costs Will Medicare Pay?

For Skilled Nursing Care:
- 1st 20 days: Medicare pays all costs
- 21 - 100 days: Medicare pays all but $157.00 per day (2015)
- After 100 days: Medicare pays nothing
Medicare Coverage

Medicare covers physical diseases, Not cognitive diseases

If have heart attack or illness – Medicare covers
If have cognitive disease – little Medicare coverage
  • No skilled medical personnel needed
  • Health is not expected to improve

High percent of all nursing home patients have cognitive issues - Alzheimer’s, Parkinson’s, etc.

Paying for Long-Term Care

✓ Option 2: Medicare Supp. Ins.

• Not Helpful for Long-Term Care
• Only pays deductibles and co-pays if Medicare covers
• Plans C through N pay the $157/day skilled nursing facility coverage for days 80 through 100
Paying for Long-Term Care

✓ Option 3: Regular Health Ins.

Does not pay anything towards costs of long-term care.

Paying for Long-Term Care

✓ Option 4: Veteran’s Admin.

No long-term care services unless:

• Veteran or spouse of veteran,
• Needing long-term care, and
• Illness is service related, or
  • Served during wartime for 90+ consecutive days,
  • not enough income to pay for care, and
  • low assets
Paying for Long-Term Care

Summary So Far:

- Medicare will not pay
- Medicare Supplement Ins. will not pay
- Regular health insurance will not pay
- Veteran’s Administration will not pay for most people

These options will pay:

- Long-term care insurance
- Current income
- Savings and investments
- Medicaid
Paying for Long-Term Care

✓ Option 5: Long-Term Care Insurance

Purchasing long-term care insurance is like buying “cash flow”.

Will provide money when need long-term care and expenses (cash flow needs) increase.

Paying for Long-Term Care

✓ Option 6: Income

All current income
  • Social Security, pension, investment income

Of person needing long-term care and their spouse
Paying for Long-Term Care

Option 7: Savings & Investments

Liquidating family assets

Investment accounts, savings, retirement accounts, cash, checking, life insurance, vacation homes, time shares, second car

Option 8: Medicaid

- Federal and state funded health insurance for the needy (i.e., welfare)

- More than $129.3 billion spent by Medicaid on long-term care in 2010
Paying for Long-Term Care

✅ Option 8: Medicaid

Source of Long-Term Care Expenditures 2011
- Medicaid: 62%
- Other Public: 4%
- Private: 12%
- Out-of-Pocket: 22%


Random Thoughts About Elder Law and Tips for Estate Planners
Beware of Gifts

ALWAYS consider possible impact of client’s gifts on Medicaid and VA eligibility
- What makes sense from tax or financial planning may be exact opposite of what should be done from long-term care planning perspective.

Beware of Gifts

Most gifts (transfers for less than fair market value) during 5 years before applying for Medicaid will cause a “transfer penalty”
- This will disqualify from Medicaid for a period of time
- Must wait to apply for Medicaid for 5 years after the transfer, or have way to pay for care during penalty period
Medicaid Transfer Penalty

To qualify for Medicaid -

1. Must be 65, blind or disabled
2. Must have low income
   • less than cost of care
3. Must have minimum “available” resources” (assets)
   • Less than $1,000 in Missouri
   • $2,000 or less in Kansas

Medicaid Transfer Penalty

In Missouri, gift of $4,889 causes one month disqualification.

In Kansas, gift of $172.36 causes one day disqualification.
Medicaid Transfer Penalty Example

1. Bob gives away $48,890 on December 25, 2010
2. In 2012 Bob moves to Missouri nursing home
3. January 1, 2015 Bob applies for Medicaid
4. Bob disqualified from Medicaid for 10 months ($48,890/4,889 = 10)
5. Bob not eligible for Medicaid until November 1, 2015
6. Bob would not have been disqualified if he had waited until December 26, 2015 to apply for Medicaid

Plan for Long-Term Care in EP Documents

Coordinate documents so trustee and DPA attorney-in-fact can work together to protect assets and help clients qualify for Medicaid or VA assistance, if needed

Consider this design, if appropriate for client:
1. Put broad gifting power in DPA and Trust
2. Give A-i-F power to establish and fund trusts
3. Waive self-dealing restrictions for A-i-F who is bene.
4. Direct Trustee to follow A-i-F’s instructions
Plan for Long-Term Care in EP Documents
Example: Bill and Mary
50 year marriage
House & $100,000 investments, all in Bill’s name or trust
Bill has stroke and in NH, $5,000/month short
• If can gift all assets to Mary, most can be saved and Bill can qualify for Medicaid assistance
• If can’t transfer assets to Mary, almost all must be spent, leaving Mary with very little and Bill totally dependent on Medicaid

Long-Term Care Insurance
Types of Policies
1. Group
2. Individual – paid by individual or employer
   • Stand alone
   • Combined with annuity, life insurance or investment
3. Long-Term Care Partnership
   • Amount paid by LTC policy can be kept when apply for Medicaid assistance
   • Policy must be “tax qualified” with inflation rider
Long-Term Care Insurance

Long-Term Partnership Policy Example

If person’s LTC Partnership policy pays $100,000 towards LTC, then...

1. Person qualifies for Medicaid with $100,000 plus what State normally allows
   • $2,000 for Kansas; <$1,000 for Missouri

2. When person dies, the $100,000 is not subject to “estate recovery”.  
   • Can pass to family rather than be used to repay the State Medicaid program

Thoughts on Medicaid Planning

• Qualifying for Medicaid should not be your goal in life.
• But when needed, Medicaid can be extremely helpful.

• It is NOT hiding assets for children’s inheritance
• It IS helping people who are struck by accident, disease, or ravages of time and find themselves trapped in situation of needing long-term care while not having enough money to pay for it.
Thoughts on Medicaid Planning

When a person is on Medicaid in a nursing home -

- All income must be spent as follows:
  1. Medicare Parts B and D premiums,
  2. Medicare Supplement Insurance premiums,
  3. Personal Needs Allowance
     - $50 in Missouri; $62 in Kansas
  4. Spousal allotment, if any.
  5. All remaining goes to nursing home
- Medicaid makes up difference to nursing home

Thoughts on Medicaid Planning

Three objectives of Medicaid Planning

1. Enhance quality of life of person needing ltc & spouse
   - Medicaid covers basic care and person's assets can be used to pay for needed items and care not covered by Medicaid
2. Make non-exempt assets “disappear” in way that benefits the person on Medicaid and spouse, if any
3. Maximize assets and income of spouse at home while other spouse is in nursing home

Elder law is not just Medicaid planning, but you have to understand public benefits in order to practice elder law.
Thoughts on Elder Law Practice

1. If you don't like working with clients one-on-one in emotional situations, don't practice elder law.

2. If you want to help people who are often vulnerable and in need of protection, and/or hurting, confused, overwhelmed and scared, and if you have good interpersonal communication skills, they you may like practicing elder law.

3. If you want to explore elder law, join NAELA.

4. Learn and internalize ethical rules relating to
   - Dealing with clients with diminished capacity
   - Conflicts of interest
   - Joint representation
   - When you can or should take protective action for client

   You will need to make quick decisions based on them.
Thoughts on Elder Law Practice

5. Do not dabble in elder law.
   • Jump all the way in or refer the cases out.
   • Rules are too complex and penalties too harsh to play with.

6. The practice of elder law can be very satisfying.
   • Clients and family are often very grateful
   • Unless you focus your practice on litigation aspects of elder law (such as suing others for abuse or exploitation), usually the practice of elder law is a “win-win” situation.
An Introduction to Elder Law

Kansas City Estate Planning Symposium
Estate Planning Fundamentals - 2015

Presented by
Craig C. Reaves, CELA, CAP

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An Introduction to Elder Law

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Estate Planning Fundamentals

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Prepared and Presented By:

Craig C. Reaves, CELA, CAP
Elder and Special Needs Law Attorney
REAVES LAW FIRM, P.C.
4400 Madison Avenue, Kansas City, Missouri 64111
Telephone (816) 756-2100; Fax (816) 756-0333
email: info@ReavesLawFirm.com

ADMITTED TO PRACTICE LAW IN MISSOURI AND KANSAS
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I. What Is Elder Law?

Elder law is an area of the law that is receiving a lot of attention lately. Elder law is defined by the people served, not the area or type of law or problem. Any law that affects a person who is older or has a disability falls under the umbrella of "elder law".

Although it is often associated with the giving of advice concerning qualification for Medicaid and Supplemental Security Income (SSI), elder law is actually much broader than that. According to the National Elder Law Foundation (NELF), the only organization that certifies attorneys to practice elder law, the definition of elder law is:

“Elder Law” is the legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long-term care planning, public benefits, surrogate decision making, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

1 Certified Elder Law Attorney (CELA) by the National Elder Law Foundation. Member of the Council of Advanced Practitioners (CAP) of the National Academy of Elder Law Attorneys (NAELA). Neither the Supreme Court of Missouri, nor the Missouri Bar reviews or approves certifying organizations or specialist designations.

Fellow and Past President of the National Academy of Elder Law Attorneys (NAELA) and Fellow of the American College of Trust and Estate Counsel (ACTEC). Adjunct professor of law at the law schools of the University of Kansas, the University of Missouri at Kansas City, and Stetson University. Member of the Special Needs Alliance, an invitation-only organization of special needs attorneys. Also holds the CLU (Chartered Life Underwriter) and ChFC (Chartered Financial Consultant) designations.
In addition, attorneys certified in elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse neglect, or exploitation of the older person, insurance, housing, long-term care, employment, and retirement. The certified elder law attorney must also be familiar with professional and non-legal resources and services publically and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.”

This is further defined by NELF as follows:

“1. Health and Personal Care Planning, including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.

2. Pre-Mortem Legal Planning, including giving advice and preparing documents regarding wills, trusts, durable general or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.

3. Fiduciary Representation, including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.

4. Legal Capacity Counseling, including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.
5. Public Benefits Advice, including planning for and assisting in obtaining needs-based assistance, such as Medicaid, Supplemental Security Income, food stamps, and Veterans benefits.

6. Public Benefits Advice, including planning for and assisting in obtaining non-needs-based assistance, such as Medicare and Social Security.

7. Advice on Insurance Matters, including analyzing and explaining the types of insurance available, such as health, life, long term care, home care, COBRA, medigap, long term disability, dread disease, and burial/funeral policies.

8. Resident Rights Advocacy, including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.

9. Housing Counseling, including reviewing the options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.

10. Employment and Retirement Advice, including pensions, retiree health benefits, unemployment benefits, and other benefits.

11. Income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.

12. Counseling with regard to age and/or disability discrimination in employment and housing.
13. Litigation and Administrative Advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.”

For more information on the National Elder Law Foundation and how it certifies elder law attorneys, go to the NELF website at www.nelf.org.

A. How Elder Law Started

Many attorneys were actually practicing elder law before it was identified as a separate speciality. The start of elder law as a distinct practice area is directly related to the start of the National Academy of Elder Law Attorneys (NAELA). From 1986 through 1988 a few attorneys would get together at American Bar Association (ABA) meetings and discuss their common issues concerning clients who were elderly or had a disability. In October of 1988 while meeting at the Joint Council on Law and Aging in Washington D.C. twenty-six of these attorneys decided to form a new organization to be known as the National Academy of Elder Law Attorneys. According to urban myth, Michael and Myra Gilfix, two of NAELA’s founding attorneys, are credited with coining “Elder Law” as a description of this type of law practice.

B. The National Academy of Elder Law Attorneys (NAELA)

From those humble beginnings, NAELA quickly became the source for information and education concerning elder law. Today NAELA has grown to an organization of over 4,000 attorneys from every state and some foreign countries. As a practical matter, any attorney who wants to practice elder law or learn anything about elder law needs to become a member of NAELA. Otherwise the attorney is practicing without the information that is
critical to their law practice. NAELA’s formal educational presentations are cutting edge and very high quality. In addition, much of elder law is learned from talking and sharing problems and experiences with other elder law attorneys, and this takes place at every NAELA meeting.

NAELA is not your typical bar association. It has been described as an amalgam of estate planning attorneys (who focus on tax, probate and trust laws and craft strategies and draft trusts and other documents to accomplish clients goals for the protection and distribution of their property) and public interest lawyers (who often represent people who do not have many assets, may need protection from unfair application of laws, and who need the assistance of public benefits in order to survive). Somehow these two diverse groups of attorneys have blended under the umbrella of NAELA and formed a group of lawyers that has a soul. Elder law attorneys often approach their client’s problems from a different perspective and treat their clients in a more holistic manner.

For more information about the National Academy of Elder Law Attorneys visit their website at [www.naela.org](http://www.naela.org).

II. How Estate Planning Attorneys Encounter Elder Law Issues

Even if an attorney wants to focus his or her law practice on traditional estate planning and does not want to practice elder law, the attorney needs to be aware of laws that impact the elderly and people with disabilities. Estate planning attorneys often encounter some of the typical elder law issues in their daily practice. For example, advising a person who has a child or grandchild with a disability, or advising a client who is elderly or has a disability about their personal estate planning. At the least, in order to provide helpful assistance and guidance, estate planning attorneys must be aware of how government entitlement and benefit programs will impact their clients.
Advice that may make good tax or probate avoidance sense may be the exact opposite of what should be done from a government benefits planning perspective. If estate planning attorneys are not careful, they may unknowingly give the wrong advice and disqualify their clients from benefits they may be entitled to. A classic example of this is advising a client to make annual non-taxable gifts to children, or to title assets jointly with children. In either event the client may be making transfers that will disqualify the client from receiving government benefits for a period of time.

To further complicate matters, not only are the Medicaid programs different among the states, but each state has different eligibility criteria and exemptions for those who receive long-term care services and supports as compared with those who have a disability but do not need long-term care assistance. Therefore, extreme care must be taken when reading articles about Medicaid rules and long-term care planning, since they may be discussing different situations or the laws of a state other than where the client resides.

Typically, estate planning attorneys will encounter these issues when a client is in one of the following situations:

1. A client, spouse, child or parent of a client, needing long-term care;
2. A client or family member who is losing, or already lost, mental capacity;
3. A client or family member with a disability, either from accident, personal injury, or natural causes; or
4. A client who wants to gift during life or leave estate assets to a child, spouse, grandchild or other person who has a disability.
III. Introduction to Long-Term Care

Elder law attorneys are often asked to assist people to understand, prepare for, receive, and pay for long-term care services and supports.

A. Definition of Long-Term Care: Despite what many people think, long-term care includes much more than nursing homes. Long-term care is a phrase that is used to describe a variety of services and supports in the areas of health, personal care, and social needs that are provided to people who are "cognitively" or "functionally" impaired.

1. Cognitive Impairment: "Cognitive impairment" means lacking mental capacity to the extent that a person needs assistance or supervision with his or her daily activities. This can be caused by disease, such as dementia or Alzheimer's Disease, or caused by a physical event, such as a heart attack, stroke or traumatic brain injury.

2. Functional Impairment: Usually a person is classified as "functionally impaired" if he or she cannot perform a minimum of two of the normal activities of daily living ("ADLs") without assistance. The basic ADLs are: (1) eating (the ability to feed oneself without assistance); (2) dressing (the ability to get dressed without assistance); (3) bathing; (4) continence; (5) toileting; and (6) transferring (for example, moving from bed to wheelchair without assistance).

B. Statistics: According to the SCAN Foundation (Fact Sheet 3, September 2010):

- At least 70% of individuals over age 65 will have long-term care needs at some point in their lives.
- Adults age 65 are estimated to need an average of three years of long-term care.
• About 67% of individuals receiving long-term care in institutional setting are women.
• The number of Americans needing long-term care is expected to more than double by 2050.
• The number of people who will have Alzheimer’s Disease is expected to increase 259% by 2050.
• The total long-term care spending in the United States in 2006 was $231 billion - 43% paid by Medicaid, 18% by Medicare (for post-acute care), 28% from out-or-pocket expenditures, 7% from long-term care insurance and 4% from other public sources, such as VA).

IV. Options for Receiving Long-Term Care

There are essentially three places where a person can receive long-term care assistance: in their own home, in the facilities of community programs, or in some residential setting other than the person’s own home.

A. In the Home: People usually prefer to remain in their own home for as long as possible. It does not matter whether the “home” is a house, condominium or apartment.

1. Low or No Cost Options: Even if a person is starting to need some long-term care assistance, this can be provided in the person’s home by family members, neighbors, church members, or friends who stop by to check in on the person and provide this assistance. This may be, and often starts out as, informal and random. Or this can be very structured, where the care providers organize and schedule who stops by when and what services each one provides. In addition, some of the needs may be met by community services coming to the home, such as food being delivered by Meals on Wheels or a similar organization.
A subset of this that is gaining momentum is the “village movement”, where neighbors band together to help one another remain in their homes as they grow older. This movement is said to have begun in Boston in 2001 and now has spread across the country and the world. According to the Village to Village Network (www.vtvnetwork.org) there are currently 170 open villages and 160 in development. A “village” is formed when a group of people living in a community join together to assist each other as they age. As described by the Village to Village Network, a village is a membership-driven, grass-roots organization that is run by volunteers and paid staff that coordinate access to affordable services including transportation, health and wellness programs, home repairs, yard work, bookkeeping services, social and educational activities, and trips. Usually services can be obtained at a discounted rate from providers who are vetted by the organization.

2. **Home Long-Term Care:** If the above options do not provide sufficient long-term care, then engaging the services of a home health agency or company is another option for receiving long-term care in a person's home. Also, sometimes an individual is hired directly and moves into the home to provide such care. However, paying for long-term care that is provided in the home can be extremely expensive if a high level of care is required.

3. **Is the Home the Best Option?** Despite the strong desire to stay in their own home, it may not be suitable for such purposes. It may be necessary to climb steps to enter and exit the home, or stairs to get from living to sleeping areas of the home. The bathrooms may not be handicapped accessible, or the doorways too narrow for a walker or wheelchair to pass through. Although it can be done, it may be prohibitively expensive to modify the home to allow the person to continue to live there.
B. In the Community: In many communities there are programs and agencies that provide meals, assistance and oversight for people who live in residential settings and can get out of their home.

1. Senior Centers: The most prolific of these are Senior Centers. In 1965 the Older Americans Act (Pub.L. 89-73, 79 Stat. 218) created the National Aging Network and the Administration on Aging. This provides funding through State Units on Aging and local Area Agencies on Aging for nutrition services, supportive home and community-based services, and other services and supports. Across the United States 11,400 Senior Centers serve more than one million older adults each day. For more information about senior centers either conduct an internet search of the phrase “senior centers” or visit the National Council on Aging website at https://www.ncoa.org/news/resources-for-reporters/get-the-facts and scroll down to the section entitled “senior-center facts.”

2. Shepherd’s Centers: Another organization providing community services is the Shepherd’s Centers or America. This organization is a nationwide network of interfaith community-based centers that provide a variety of necessary and helpful services. See www.shepherdcenters.org for more information.

3. Adult or Senior Day Care: There are also adult or senior day care services that are available. These are facilities that provide care and oversight for adults who can no longer manage independently. They typically are open daily during the work week. They provide a place where a person needing this level of oversight and care can spend the day while the primary care providers (usually family members) are either at work or taking a respite day.
C. In Residential or Institutional Settings

1. Living with Family or Friends: Another option for the person needing long-term care is to move into the home of a family member or friend who will provide such care. As with the person’s home, this may require massive remodeling of the house to allow the person needing long-term care access and maneuverability inside the home. This can also be supplemented with the above-described home health services and community resources.

Unfortunately, in today's American society it is becoming less common for any family members to have the ability to provide comprehensive care for another person. The family members may be living alone or be single parents, and need to work to support themselves. Even if married, often both spouses need to work to support the family or pursue a career, and one cannot (will not?) quit work to provide the care. In addition, full time care for a chronically ill person, especially if mentally infirm or physically disabled, is hard work, and few people will be able to maintain the workload required.

2. Assisted Living Facility: An assisted living facility is often utilized as an interim step between providing long-term care in the home and moving into a nursing home. Assisted living is usually not as expensive as full-time long-term care in the home since the staff providing the assistance is already on site at the facility. In addition, assisted living is usually less expensive than full nursing home care. A person can receive assisted living at a standalone facility or as part of the continuum of services offered in a continuing care retirement community.

3. Continuing Care Retirement Community: A continuing care retirement community (CCRC) is a facility or campus of buildings operated by a single
organization that provides housing and services that range from total independence to nursing home level of care. A person can move into the facility and stay there until death. Although the person may physically change living locations as they move from independent living through assisted living to nursing home level of care, it is all within the same facility or campus. Local examples of CCRC’s in the Kansas City area are Kingswood Manor [http://kingswoodretirementliving.com/], John Knox Village ([www.jkv.org](http://www.jkv.org)), and Lakeview Village ([www.lakeviewvillage.org](http://www.lakeviewvillage.org)).

4. **Nursing Home**: If none of the options described above provide sufficient care, then often moving to a nursing home is the only option.

V. **Options for Paying for Long-Term Care**

There are basically eight sources people look to for payment of long-term care expenses. Many of these are not very helpful.

A. **Medicare - Not Helpful:**

1. **When Medicare May Pay For Home Health Care**: If the services required are medically "reasonable and necessary", Medicare may provide coverage for some home health services when:

   a. Such services are required because the person is confined\(^2\) to his home, and

   b. The person needs:

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\(^2\) The person must be "confined to the home" ("homebound" or "housebound"), which means the person has a medical condition that either: restricts the ability to leave home unless assisted by another person, special transportation services, or supportive devices (such as wheelchair, walker, etc.), or makes leaving home medically unsafe. In addition, leaving the home must require "considerable and taxing effort" and be "infrequent" (five or fewer times per month, not counting visits to medical providers) or of "relatively short duration" (average of three or fewer hours within a calendar month, not counting visits to medical providers).
1) “Skilled nursing care” on an “intermittent” basis,
2) Physical therapy, or
3) Speech therapy; and

c. A written “plan” for such services has been established by the person’s physician and is periodically reviewed by the physician; and
d. The person is under the care of a physician.

2. **Home Health Care Services Medicare May Pay For:** If the above criteria are met, then Medicare may pay for the following services:
   a. Part-time or intermittent nursing care;
   b. Physical, speech and occupational therapy;
   c. Medical social services as directed by a physician; and
   d. A home health aide on a part-time or intermittent basis. This does not include homemaker services.

3. **Medicare Pays Little for Nursing Homes:** A study by AARP (American Association of Retired Persons) found that 79% of those surveyed believed Medicare would pay for nursing home expenses. This is totally incorrect. Medicare only pays for skilled care in a nursing home, which is the highest level of care provided. And even then Medicare only helps pay for a maximum of 100 days. Medicare does not pay anything for non-skilled care, and most people in nursing homes are not at the skilled care level.

4. **What Medicare Actually Pays for Nursing Home Care:**
   a. If an individual is
      1) admitted (as opposed to being on “observation status”)
      2) to a hospital
      3) for at least three (3) days, and
      4) enters a “skilled nursing facility”
5) within thirty (30) days after discharge from the hospital,
6) for a condition that was treated in the hospital,
b. then
1) For the first 20 days, Medicare will pay all "skilled" (sub-acute) nursing care costs, and
2) For the next 80 days, Medicare will pay all skilled nursing costs except $157.00 per day (in 2015).
    A) The patient is responsible for the $157.00 per day,
    B) This may be paid by
       (1) the patient, or
       (2) the patient’s Medicare Supplement Insurance Policy, if one is owned and it has this coverage.
4) After 100 days, or earlier if no longer need skilled nursing care, Medicare pays nothing.

B. Medicare Supplement Insurance - Not Helpful: Plans C through N, described on the chart in the Appendix at the end of these materials, will pay the $157.00 per day (in 2015) that Medicare will not pay towards skilled nursing care for days 21 through 100. Plans K and L pay the percentage shown in the chart. There are no payments after 100 days of skilled care, or for any days of care that are not at the skilled level.

C. Private Health Insurance - Not Helpful: Usually private or group health insurance will not pay anything towards long-term care.

D. Veteran’s Benefits - Often Not Helpful: If the person needing long-term care is a veteran (or surviving spouse of a veteran) of the United States armed services who served during wartime for at least 90 consecutive days, does not have enough income to pay for needed care, and has limited assets, then the Veterans Administration may provide some assistance. This may take the form of monthly income or care in a veteran’s nursing
home. If it is possible a person may qualify, then the VA should be contacted to find out if assistance is available. For anyone else, the VA does not provide long-term care assistance.

E. Long-Term Care Insurance: If there is an adequate long-term care insurance policy in force, it will pay its daily benefit for the policy term. This will provide additional cash flow that can be applied towards the cost of long-term care.

F. Current Income: All current income of the person needing long-term care and his or her spouse will be applied towards the cost of long-term care and all other costs of living. This can be from Social Security, Supplemental Security Income (SSI), retirement income (such as from a pension, 401(k), IRA, or other retirement income), income earned on savings and investments, or earnings from working.

G. Savings and Investments: If income and insurance benefits are not sufficient to cover the cost of long-term care, along with all other expenses of the person needing long-term care and his or her family, then the assets of the person need to be liquidated to generate the money to pay these expenses. This includes all accounts at banks, savings and loans, and credit unions; all investments (such as stocks, bonds, mutual funds, Certificates of Deposit, money market accounts, annuities, treasury bills or notes, investment real estate, partnerships, etc.); life insurance cash values; etc. In other words, basically everything owned by the person must be liquidated (“spent down”), except for a few exempt assets, such as the primary residence, tangible personal property, and a motor vehicle. As these are liquidated and spent, the income from such investments also will decrease.

H. Medicaid: If all of the above methods of payment are exhausted, then only Medicaid is available to help pay for long-term care.
VI. Random Thoughts About Elder Law and Tips for Estate Planning Attorneys

A. Beware of Gifting Strategies: ALWAYS consider the possible impact on a client’s eligibility for Medicaid and Veteran’s assistance when discussing gifting or the use of irrevocable trusts. This is especially true if the client or spouse is older or has a disability.

1. Even though gifting may make perfect sense from a tax or financial planning perspective, it is usually the exact opposite thing to do from a long-term care planning perspective.

2. Virtually all transfers to irrevocable trusts or gifts to people or charities have the potential of causing the donor problems qualifying for long-term care assistance from the Medicaid program for five years following the date of the gift. And, if currently pending legislation passes, similar restrictions for three years following a gift will apply to veteran’s trying to receive pension assistance from the Veterans Administration.

3. A brief description of the Medicaid transfer penalty will help explain how devastating this can be. The Medicaid transfer penalty works like this: in 2015 a person is disqualified for one month of Medicaid assistance in Missouri for every $4,889 that is given away. In Kansas, the disqualification period is one day for every $172.36 given away. These “transfer penalty divisors” normally change annually.

A person cannot apply for Medicaid assistance until three criteria are met: (1) the person needs long-term care (typically nursing home level of care), (2) the person does not have enough income to pay for his or her care, and (3) the person has low “available resources”. This means less than $1,000 in Missouri and no more than $2,000 in Kansas.
When a person satisfies the above criteria and applies for Medicaid assistance, they must disclose any gifts made within the previous five years. The total of such gifts are divided by the applicable “transfer penalty divisor” to come up with the number of months (in Missouri) or days (in Kansas) the Medicaid applicant is disqualified from receiving any Medicaid assistance.

For example, if a Missouri resident gave away $48,890 within the five years before applying for Medicaid assistance, then the person will be disqualified from Medicaid for ten months (48,890/4,889 = 10). This disqualification period begins to run on the day the person would have otherwise been eligible for Medicaid assistance but for being disqualified because of these gifts. If the person qualifies for Medicaid on January 1st, he or she will not receive any Medicaid assistance until ten months later on November 1st. How this person is supposed to pay for the necessary long-term care during this ten month disqualification period is anyone’s guess.

B. Consider Long-Term Care Planning When Designing Your Client’s Estate Planning Documents: If your client is in agreement, design your client's estate planning documents so there are options available to transfer and protect assets if your client needs long-term care and does not have sufficient income to pay for it. This includes coordinating the estate planning documents so attorneys-in-fact and trustees can work together to care for the benefit of your client. For example, often there is authority to make gifts in a durable power of attorney, but this is rarely found in a living trust. If acceptable to the client, the trust document should authorize the trustee to transfer assets out of the trust as directed by the settlor's attorney-in-fact.

If the client agrees and the relationship makes it appropriate, there should at least be the ability to transfer assets to the client's spouse. In addition, there can be authority to transfer assets to the client’s children, descendants and possibly others, and trusts for the benefit of any of them.
As an example for when this will be helpful, consider the following situation. Bill and Mary have been married for 50 years and are living on their Social Security and meager income from their $100,000 of investments, all of which are held in Bill’s revocable living trust. Bill has a stroke and needs to move to a nursing home to receive long-term care assistance. When the cost of Bill’s care and Mary’s living expenses are subtracted from their monthly income, they are $5,000 per month short. At this pace, all of their investments will be gone after 20 months. However, if they act quickly, they can save virtually all of these assets and qualify Bill for Medicaid assistance to pay for his long-term care. This protects all of the assets for Mary, who can not only spend them on herself, but can pay for things Bill needs that are not provided by Medicaid. However, in order to accomplish this, all of the assets must be transferred out of Bill’s trust and put in Mary’s name or living trust. This will be very difficult, if not impossible, to accomplish unless Bill’s financial durable power of attorney and living trust authorize gifts of Bill’s assets to Mary.

C. Long-Term Care Insurance: Paying for long-term care assistance requires cash. If a person does not have sufficient income from sources other than employment (such as Social Security, retirement and investments), consider purchasing long-term care insurance. Although the industry is currently having issues with price increases, this insurance will provide increased cash flow if the person needs to pay for long-term care. This is usually preferred over being forced to liquidate investments to pay for care.

If purchasing long-term care insurance, consider getting a policy that qualifies for the Long-Term Care Partnership Program.

1. Prior to February 8, 2006, only people living in California, Connecticut, Indiana and New York could purchase long-term care insurance policies that qualified for a long-term care partnership program. The Deficit Reduction Act of 2005 (“DRA 2005”) authorized all states, not just these four, to institute similar programs. Both Kansas and Missouri, along with many other states, have
established the requirements and procedures for companies to offer long-term care partnership policies. Essentially, these policies must be “tax qualified” policies with a compound inflation provision. Policies issued before the effective date of DRA 2005 (February 8, 2006) may not qualify as partnership policies even if they have all of the required provisions.

2. These policies are a partnership between the state Medicaid program and the long-term care insurance industry, as regulated by the state insurance department. It allows the person who purchases a policy that qualifies for the program to protect an amount of the person’s assets from Medicaid equal to the amount of potential benefits that are paid out by the policy towards the person’s long-term care.

3. For example, assume a person purchases a partnership policy that will pay up to $100,000 towards the person’s long-term care. If the person requires long-term care and the policy pays the full $100,000 towards the person’s long-term care, then the person will be allowed to keep $100,000 in assets (in addition to any other exempt assets) and qualify for Medicaid assistance for payment of the person’s long-term care expenses. And after the person dies, the $100,000 cannot be taken back by the state’s Medicaid estate recovery program. Therefore, the entire amount that the long-term care insurance policy paid towards the person’s long-term care is protected for the person and the person’s heirs from the state’s Medicaid program.

4. For information on Missouri’s long-term care partnership program see http://insurance.mo.gov/consumers/LongTerm/FAQPartnership.php and for Kansas see http://www.ksinsurance.org/Ltc-partnership-site/index.htm.
D. Medicaid Planning: Qualifying for Medicaid should not be a person’s goal in life. On the other hand, when needed, Medicaid can be extremely helpful.

1. Medicaid planning is not exploiting the Medicaid rules in an attempt to save money for a client’s children.

   • Rather, Medicaid planning is helping people who are struck by accident, disease or the ravages of time and find themselves trapped in the situation of needing long-term care services and supports while not having enough money to pay for it.

   • Unless there is sufficient income to pay for their long-term care they will have to liquidate their assets and “spend down” to below $1,000 (in Missouri; $2,000 in Kansas) before they are eligible to qualify for Medicaid assistance. When they reach that level, they will be totally dependent on the Medicaid program for virtually everything they need.

   • Once a person is living in a nursing home and receiving Medicaid assistance, all of their income goes to the nursing home or their health insurance premiums except for $50 per month if they are in Missouri (and $62 per month if they are in Kansas). This means that if Medicaid does not pay for something the person needs or wants, they only have their $50 personal needs allowance to cover the cost. If this is not enough, then they must either do without or hope someone else will spend their own money to purchase the item or service for them.

   • It is for people caught in this trap that Medicaid planning exists.
2. There Are Three Objectives in Medicaid Planning:

   a. To enhance the quality of life of the person needing long-term care services and supports by allowing the person to utilize Medicaid to provide for basic needs while structuring the person’s assets in such a way that they can be used to pay for items not provided by Medicaid;

   b. To make the person’s non-exempt assets “disappear” in a way that benefits the Medicaid recipient and his or her spouse, if any; and

   c. To maximize the assets and income of the spouse remaining at home (the community spouse), if one spouse is in a nursing home.

3. Elder law is not just Medicaid planning; it is much more. But you have to understand Medicaid, SSI, Social Security, Medicare and Veterans benefits, along with guardianship, dementia, estate planning, trusts, probate, durable powers of attorney and taxes, if you want to practice elder law.

E. Thoughts About Practicing Elder Law

1. Elder law and special needs law are a more holistic approach to the practice of law than most types of law practice. Often the attorney who practices elder law is helping and advising a client about things that are not legal, such as locating a good nursing facility or home health care agency.

2. If you do not like working with clients one-on-one in emotional situations, stay away from elder law. But if you want to help people who are often hurting, confused and scared, and if you have good interpersonal communication skills, then you may
like practicing this type of law. Except for the areas that involve litigation, the practice of elder law usually involves a “win - win” situation.

3. If you are serious about wanting to practice in the area of elder law, then join NAELA (the National Academy of Elder Law Attorneys, see www.naela.org). And also join the NAELA state chapter. It is the best way to understand the world of elder law and keep up with the blizzard of law changes. If you practice in Missouri, joining the Missouri Bar Elder Law Section will also supplement your information about what is happening in Missouri.

4. Ethical rules are the foundation of an elder law practice. Especially those concerning dealing with clients with diminished capacity or losing capacity, conflicts of interest, attorney client privilege, joint and multiple representation and taking protective action on behalf of your client. Learn these rules and have them at your fingertips for quick reference. Often you will not have time to sit back and ruminate over possible courses of action, but will have to make a quick decision. In addition to the Rules of Professional Conduct, NAELA’s Aspirational Standards located at www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf provide excellent guidance for grappling with these issues. These provide a well reasoned analysis of problems elder law and special needs law attorneys confront on a daily basis.

5. Do not dabble in elder law. Either immerse yourself in all aspects of this law, or refer out cases that require an elder law attorney. The rules are too complex and the penalties too harsh to play with.
Appendix

Medicare Supplement (Medigap) Insurance:

1. **Overview:** If a person is enrolled in Original Medicare (Parts A and B), the person will also often purchase a Medicare Supplement Insurance Policy from a private insurance company. These policies are also referred to as Medigap Insurance Policies. This policy will help pay for some deductibles and co-pays that Medicare Parts A and B have. Because there were abuses by some agents and insurance companies in the past, the federal government has set requirements for all Medicare Supplement policies so buyers can easily compare different policies from different companies.

2. **Comparison of Medicare Supplement Policies:** The following chart compares the provisions of the various types of policies allowed at the time these materials were prepared.

<table>
<thead>
<tr>
<th>Plan</th>
<th>Core Benefits</th>
<th>Skilled Nursing</th>
<th>Part A Deductible</th>
<th>Part A Hospice</th>
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Through May 31, 2010 the 12 standardized plans A - L could be purchased. As of June 1, 2010 plans E - J could no longer be sold and new plans M and N were added.

“Core Benefits” for all but plans K and L are: Part A - after the deductible is paid, the plan pays all other coinsurance payments, plus adds 365 lifetime days after the 150 day standard benefits is used. Part B - after the deductible is paid, the plan pays all coinsurance payments.
THE CLIENT WITH DIMINISHED CAPACITY

Kansas City Estate Planning Symposium
University of Missouri-Kansas City School of Law

Presented By:

Stacey L. Janssen

www.staceyjanssenlaw.com
Email: stacey@staceyjanssenlaw.com

Jonathan Klem
County Club Trust Company
As the American population ages, the legal issues that have particular impact on older persons has grown. Success in medicine often mean that persons live much longer than they themselves ever expected and person live long lives even with serious disability. With longer life spans and increasing disability the issue of how to deal with the client who has diminished capacity is an important issue. For attorneys there are ethical issues and for any one who cares about the elderly and disabled there are moral issue of human dignity and respect.

I. THE IMPAIRED CLIENT. DUTY TO MAINTAIN A NORMAL ATTORNEY-CLIENT RELATIONSHIP, Rule 1.14 and Rule 2.1, Attorney as Advisor.

The attorney representing an impaired client still has a duty to maintain a normal attorney-client relationship. This includes the need to advise the client of the full implication of their decision. The attorney should be careful, however, not to exert too much control over the client.

A. Taking Protective Action. If you represent a disabled client who has become a danger to themselves or is being exploited by others, can you take protective action? This is permitted under Rule 1.14(b). In taking protective action, the attorney needs to be concerned with protecting the confidences of the client as provided under Rule 1.6. Disclosure of any confidences may be impliedly authorized within the meaning of Rule 1.6. ABA Ethics Opinion 96-404, page 17, provides a good discussion of an attorney’s options including contacting other persons, such as family, and filing for Guardianship.

B. Factors to Consider in Taking Protective Action.

1. Least Restrictive Alternative. Can you do something besides Guardianship, for example, execution of trust, voluntary conservatorship, a representative payee, complaints to state agencies?

2. Withdrawal from Representation. Governed by KRPC 1.16 (b), attorney may withdraw if withdrawal will not have a material adverse impact on the client.

3. Act as a de facto Guardian. Comments to KRPC 1.14 seem to permit an attorney to act as a de facto guardian, “If the person has no guardian or legal representative, the lawyer often must act as a de facto guardian.” ABA 2002 rule 1.14, removes the ward de facto guardian.

4. Appointment of a Guardian. ABA Ethics Opinion 96-404 discussed the alternative to seeking guardianship:

   - Lawyer may file a petition, may prefer to have someone else do it.
Lawyer should not attempt to represent a third party who is the petitioner, because of conflict of interest.
- Can consider the requests of family members or other interested persons and be responsive to them.
- Lawyer should not seek to be appointed as the Guardian except in extreme circumstances.
- Lawyer may support the appointment of a Guardian. If the lawyer will be hired by the Guardian should disclose to the court.
- Lawyer may tell the court about preference of the client.
- After a Guardian has been appointed, lawyer may represent the Guardian.

C. Confidentiality/Communication with Third Parties. When dealing with disabled persons, a lawyer may come in contact with other persons who have concerns, most of whom want to be helpful. This may include family members, friends and caregivers. How should you respond?

Rule 1.6 provides the duty of loyalty to the client and serves to protect the client’s privacy interests. The obligation extends to all information about a client acquired in the course of representation, regardless of whether disclosure would be embarrassing or detrimental. The obligation of confidentiality encompasses more than the attorney-client privilege (which is an evidentiary rule) since it includes the client’s confidences and secrets discovered from other sources.

Rule 1.4 discourages an attorney from lying even if it is to advance the interests of client. Rule 3.3 (a) requires candor to a tribunal. So when dealing with unrepresented third parties it is best to be truthful in communications, but also be clear about whom you represent so as not to create a de facto attorney client relationship as discussed in Rule 4.3.

II. CAPACITY/COMPETENCY. When dealing with disabled persons the issue of capacity is always in play. The attorney should begin by determining what the legal standard of capacity is. The definition of a disabled person for purposes of a guardianship and/or conservatorship is different than contractual capacity and/or testamentary capacity.

A. Testamentary Capacity. Testamentary capacity is generally a pretty low standard; an adult of sound mind, with an understanding of their property, knowledge of the objects of their bounty and able to articulate a testamentary intent.


B. Guardianship and Conservatorship.

1. K.S.A. 59-3051 Definitions. A person with an impairment, an adult "whose ability to receive and evaluate relevant information, or effectively communicate decisions, or both...is impaired such that the person lacks capacity to manage such person’s estate, or to meet essential needs of physical health, safety or welfare.

2. MO Rev Stat §475.010, “Incapacitated Person”, ....is unable by reason of physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he or she lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur...

C. So what should you do? Given an understanding of the different tests for capacity, what should the practitioner do to evaluate capacity?

1. ACTEC Commentary to MRPC 1.14: If there is doubt about the capacity of the client the lawyer should proceed with caution. If the lawyer is sure the client lacks capacity the lawyer should not prepare the estate plan. This should be balanced with the need for testamentary freedom. The lawyer should take steps to protect evidence of the client’s testamentary capacity

2. Functional Test. One way to determine capacity is to provide a functional assessment. The attorney should undertake some assessment of the client’s reasoning ability. That assessment should take into consideration the context of the decision. For example the ability to balance a checkbook is a different skill than deciding the distribution of the client’s estate at death. Any assessment should also take into consideration the temporary effects of medication or the likely benefit of therapy or rehabilitation.

3. Professional Diagnostician. An attorney may appropriately seek professional assessment from a psychiatrist, phytologist, or family physician. A diagnosis alone will not be as helpful as an evaluation of the client’s ability to make a decision about a particular matter. For example, some clients may not be able to make decisions about money, but may be able to decide where they want to live. An attorney should also consider the different legal standards for competency. An attorney seeking the assistance of a professional should take steps to protect the client’s confidences during the process. A release or other appropriate authorization is desired.
4. Resources to consider

ABA 2002 Model Rule 1.14, and comments

*Restatement of Law Governing Lawyers* (2000), Section 24, A Client with Diminished Capacity

American College of Trust and Estate Counsel (ACTEC), www.actec.org

ABA Formal Opinion 96-404
Drafting the Trust and Avoiding Common Mistakes

Kansas City Estate Planning Fundamentals Program

Susan B. Teson
Senior Vice President
Senior Legal Counsel
Private Wealth Management
UMB Bank, n.a.

October 20, 2015
Getting Started with Drafting Trusts

- Good forms are valuable
- Be careful with forms though (estate planning is not a fill in the blank process)
- Ensure the client understands the Trust is a separate legal entity
- Only truly effective if funding and properly operated
- Disregarded entity for income tax purposes during Grantor’s lifetime for revocable trusts
  - Use client’s social security number as long as grantor is trustee
  - If Trustee other than Grantor, need EIN assigned to Trust
Types of Trusts

There are different types of trusts:

• Inter vivos (created during one’s lifetime) versus testamentary (activated at death)

• Revocable versus irrevocable
  - Irrevocable Trusts: Generally cannot be changed
  - Revocable Trusts:
    » Very flexible
    » Can be changed
    » Can be revoked or terminated
Who are the Parties to a Trust?

- **The Grantor** - the person who creates the trust (sometimes called the Settlor)

- **The Trustee** - the person who handles the property placed in the trust

- **The Beneficiary** - the person who receives the property of the trust

In the typical revocable or living trust, the Grantor serves in all three roles, at least initially.
A trust generally has the following structure:

- **Transfer to the trust**
  - Designates property that will constitute the trust’s original corpus

- **Designation of trustee**
  - Specifies who will serve as the trustee, as well as naming a successor trustee to be appointed if needed

- **Disposition**
  - How the trust will be distributed to primary and contingent beneficiaries

- **Powers**
  - Details the administrative powers that are exercisable by the trustee

- **Trustee’s fees**
  - Provides for a reasonable fee to be paid to the trustee commensurate with responsibilities
Non-Tax Benefits

• Spendthrift Trusts: Limit access to funds for beneficiary other than Grantor
  • During term of trust at discretion of Trustee
  • Final payout may be delayed over period of years

• Asset Protection: Protecting assets from beneficiary’s--
  • Creditors
  • Divorce

• Special Needs Trusts
  • Designed to comply with federal and state laws regarding access/availability of public assistance programs

• Incentive Trusts:
  • Education and work incentives
  • Promoting charitable work or occupations
  • Disincentives for certain behavior
Key Trust Provisions

• **Identify the Grantor and Trustee(s)**
  - If naming a corporate trustee, use the proper name to avoid questions about which entity is being appointed

• **Consider a statement of grantor’s intent**
  - Review RSMo 456.4A-411; 456.4B-411; KSA 58a-411 as to modification and amendment of irrevocable trust, possibly without court approval

• **Refer to schedules of property funding the trusts**
  - Include an additions clause for property later added UMB-2 Article Five
  - *Pitfall*: Relying on the schedules as to funding of trust (especially an issue with titlable property (e.g., motor vehicles, real estate, securities, etc.).)
Grantor’s Power to Amend and Revoke

- Retention of the Grantor’s power to amend and revoke allows:
  - Continued control and flexibility to revise the estate plan
  - But it also causes inclusion of the trust assets in the Grantor’s taxable estate (unavoidable with a revocable trust)
  - Assets are also subject to claims of Grantor’s creditors (again, unavoidable)

- See RSMo 456.5-505.1
- See also RSMo 456.6-601-456.6-604
- Presumption of revocability under RSMo 456.6-602.1
Common Problems with Amendments

- Failure to expressly retain these powers
  - Especially an issue in joint trusts
- Failure to review entire agreement in its entirety
- Inadvertent amendments of incorrect provisions
- Lack of thorough amendments, e.g., not modifying every relevant provision to carry out the client's intent
• Allowing a grantor to "self amend" documents
• Failure to join the trustee when required
  - **EXAMPLE**: Grantor amends her trust instrument to remove corporate trustee but fails to notify trustee and does not request trustee’s execution of amendment; amendment also changes disposition to disinherit a beneficiary named in prior document. Trust instrument required trustee to execute any amendment changing its duties. **QUERY**: Was removal of trustee a change of its duties? Was the amendment valid? What is the impact on the dispositive changes? The disinheritance exceeded $1,000,000.
Common Problems with Amendments, cont’d

• Failure to permit Trustee/Trust Protector to reform mistakes
  - Consider including a power of amendment UMB-2 Article Sixteen
  - Do not require the Trustee to monitor circumstances

• Piece meal amendments when a restatement is necessary or allowing clients to make too many amendments
  - More than one or two is probably too many (we have seen 10 or 12!)
  - Multiple amendments make the trust difficult to administer
Common Problems with Revocations

- Failure to obtain all parties’ signatures required under instrument
- Failure to retitle property in accordance with the revocation (typically back to the Grantor)
  - **EXAMPLE:** Trust was revoked 10 years ago by Grantor; Grantor dies; real estate discovered after death that was titled in the name of the Trust; successor trustee (who had never accepted appointment) of now revoked trust being asked to sign deed to distribute real estate to revoked Trust’s beneficiaries to clear title
Drafting is more than modifying the single grantor trust to change “grantor” to “grantors”

• What is wrong with this example?: “Grantors expressly reserve the right, at any time and from time to time, to alter, amend and revoke this Agreement, in whole or in part, by duly executed instrument delivered to the Trustee…. “

• Common issues
  - Power to amend/revoke
  - Use of community property form in a non-community property state
  - Failure to identify division of assets if separate shares are created at the death of first grantor
The “Heart” of the Estate Plan: The Dispositive Provisions

- The use of a revocable trust provides a wide variety of dispositive schemes during lifetime and after death; the grantor is typically the beneficiary during his or her lifetime.

- The Trust may pay income and principal to the Grantor for life, and to others, if desired (beware of gift implications) UMB-2 Article One Paragraph A.

- After the death of the Grantor the Trust may provide for specific outright bequests, including disposition of tangible personal property by list or otherwise, continue in trust for selected beneficiaries or a combination thereof.
Key Trust Provisions—Dispositive Provisions, cont’d

- Separate shares permit distributions and investments taking into account the needs of that share’s beneficiary. UMB-2 Article One Paragraph D. Alternative 3
- Shares may terminate at a stated age or series of ages or remain in trust for lifetime (beware of the rule against perpetuities). UMB-2 Article One Paragraph D. Alternative 3
- In the alternative, a “Pot Trust” may be created with spray provisions for distributions based on HEMS or some other standard selected by the Grantor. UMB-2 Article One Paragraph D. Alternative 1
  - The use of pot trusts provides broad flexibility to spray income or principal among the class of beneficiaries
Key Trust Provisions—Dispositive Provisions, cont’d

- An ultimate taker should always be selected, such as “heirs at law” or charitable beneficiaries

- Consider whether specifically named individuals will then be living or whether specifically named charities will then be in existence (think worst case scenario)
  - With charities, perhaps the Trustee can select a charitable organization with specific enough guidance

- For a sample heirs at law clause, see UMB-2 Article One Paragraph E
Key Trust Provisions—
Dispositive Provisions, cont’d

- The Trustee may be given discretion to control the timing and extent of distributions even in the event of unknown contingencies, i.e., alcohol and drug addiction
  - The Trustee needs a specific procedure

- Beneficiaries may be granted general or limited powers of appointment, or “Five and Five” rights of withdrawal
  - UMB-2 Article One Paragraph D. Alternative 2

- The Trustee might be directed to consider other resources of the beneficiaries prior to making distributions
  - Trustee would like direction here
  - UMB-2 Article One Paragraph D. Alternative 2
Common Errors in Drafting Dispositive Provisions

The most common and most varied types of errors

• Failure to dispose of all of the trust property
  - Do the percentages add up to 100%?
  - Is both income and principal addressed?

• Does the trust “over dispose” of property? Are the assets sufficient to pay all of the specific bequests?
  - Failure to deal with abatement of specific bequests if trust insufficient to satisfy (lapse issues)
  - **EXAMPLE**: Trust instrument provides for specific bequests of $100,000 to each of six beneficiaries; unfortunately the Trust assets available for distribution after payment of debts, claims and expenses are $400,000 with no direction for abatement—What is the Trustee to do? **SOLUTION**: Use percentages or fractions
Common Errors in Drafting Dispositive Provisions, cont’d

- Failure to clearly define the beneficiaries or defining the beneficiaries too narrowly

  - **EXAMPLE:** “The Trustee shall hold the Trust for the benefit of John Doe for life and then to the children of John Doe” **ISSUE(S):** Do the children have to be living? What if a child has predeceased? What is the Grantor’s intention as to later descendants, especially if a child has predeceased?
  
  - **BETTER:** “to John Doe, if then living, for life, and at the death of John Doe, the Trustee shall divide the principal of the trust into a sufficient number of equal shares to create one share for each child of John who is then living and one share for each child of John who is then deceased; each share created for a deceased child shall be distributed to the then living descendants of such deceased person, per stirpes”
  
  - **Take care with “per stirpes”**
    
    - **EXAMPLE:** “to John Doe per stirpes”
    
    - **BETTER:** “to John Doe, if then living, or if not to the then living descendants of John Doe, per stirpes”
Common Errors in Drafting Dispositive Provisions, cont’d

• Failure to clearly define the beneficiaries, cont’d
  - Are step children included?
  - What if the grantor and spouse divorce?
  - Take care with disinheriting issue or other natural bounties
  - Have you properly identified the charity? Best to confirm directly with charity

    - **EXAMPLE**: “to the XYZ Church for the Permanent Memorial Fund” [and the XYZ Church is no longer in existence at the time the bequest vests or the Permanent Memorial Fund no longer or never existed]. **SOLUTION**: Ask the Court for instructions.
Common Errors in Drafting Dispositive Provisions, cont’d

- Improperly relying on a definition to save it or not taking into account a conflicting definition
  - **EXAMPLE:** “The Trustee shall pay income and principal in its discretion for the benefit of my granddaughter C until there is no living grandchild under the age of 25 when the trust shall terminate and be distributed to Testator’s then living descendants per stirpes.”
  - Definitions include afterborns. **ISSUE:** There is another grandchild born after the execution of the Will not specifically named. The Trust will continue until that grandchild reaches age 25 much to the surprise of C. C and afterborn grandchild will receive final distributions if both are living at such time.
• Failure to clearly define the beneficiaries, cont’d
  - Include definitions and directions regarding per stirpes, adopteds and afterborns UMB-2 Article Thirteen
  - **EXAMPLE:** The Family Trust provides that upon the death of the surviving grantor, the Trustee shall divide the trust into shares for each of Grantor’s children and shall hold the shares as separate trusts, paying the net income to the child for whom each share was created. At the death of each child, the Trustee must distribute the separate share to the child’s descendants then living per stirpes…. “Descendants” is not defined. The child in question was married five times with multiple children, two of who were adopted out. Kansas law is the governing law. **ISSUE:** Under Kansas law, adopteds still inherit. The other descendants dispute the rights of the adopteds to take. Grantor’s intent or knowledge about adoptions is unknown. **SOLUTION:** Ask the Court for instructions.
Common Errors in Drafting Dispositive Provisions, cont’d

• Failure to clearly define the timing of a beneficiary's interest
• Conflicting dispositive provisions
• Failure to determine the method of division of trust property
  - Fractional share or pecuniary formula? UMB Alternate Clause A-1 and UMB-2 Article One Paragraph B.2
  - Beware of tax consequences upon funding depending upon nature of assets
• Failure to provide an ultimate taker which is ascertainable as a failsafe
• Failure to cover all possible contingencies
  - E.g., prior death of a beneficiary, with no contingent beneficiary
  - **EXAMPLE**: The Trust Agreement generally provides for the payment of the Trust income to the Settlor for her life and then for the payment of the income to her only son for his life. Upon the death of the last of the Settlor or her son to survive, the Trust is to terminate and be paid to her son's issue, if any, and if none, to her brothers if they survive or to her brothers' children. **ISSUE**: None of these persons are surviving at the death of the last to die of Settlor and her son. **[Note the narrow use of “children” not descendants]**. **SOLUTION**: Ask the Court for instructions. The Court’s view was that the trust failed and the property needs to pass to the Grantor’s heirs under her Will (which was probated 20 years ago).
Common Errors in Drafting Dispositive Provisions, cont’d

• Typographical errors regarding beneficiaries' names, ages, locations, etc.

• Placing unreasonable requirements upon the trustee as to distributions under the trust (does the beneficiary have to submit to a drug test and pass it before every distribution or does the trustee have to monitor who resides in the beneficiary’s home (e.g., boyfriends, pets) or even the remarriage of the spouse?  
  • Trustee should be able to rely on facts **actually** known to it  
    - UMB-2 Article Two Paragraph D  
    - A sample drug/alcohol testing clause is available upon request
Who can Serve as Trustee? (It might depend)

- The grantor (typical initial trustee for revocable trust)
- The grantor’s spouse
- A child or relative
- Any person chosen by a grantor
- A corporate trustee such as a Bank or Trust Company
- Sometimes co-trustees are used
  - Be sure to deal with decision-making and sensitive trustee issues
  - UMB Alternative Clause A-3
Key Trust Provisions—Successor Trustees

• Succession of trustees is crucial
  - Create clear procedures for appointment of successor and process for smooth transition in event of declination, resignation or removal of the trustee

• A change of Trustees may be merited under any number of circumstances

• It is best to identify the events triggering succession and to set forth a method for appointment of successors in the governing instrument
  - For example, if a trustee dies or becomes incapacitated
Key Trust Provisions—Successor Trustees, cont’d

• Resignation or Removal of a Trustee
  - A Trust Agreement should provide for the Trustee’s right to resign rather than rely on the statutes UMB-2 Article Eleven Paragraph A
  - The Trust Agreement should provide whether removal of the Trustee is permitted and under what terms UMB-2 Article Eleven Paragraph B
    » Max flexibility is provided by giving the power to the beneficiaries or a third party trust protector

• Relief from acts of prior trustee
  - Ideally the successor Trustee should be relieved of the duty to audit the prior trustee’s accounts and should be relieved of liability from the actions or inactions of the prior trustee UMB-2 Article Eleven Paragraph C
Common Errors Regarding Trustee Succession

• Failure to clearly provide for a succession of trustees--may force court action, where it could have been avoided
  - Address separate process for each co-trustee
  - Will a co-trustee always be required?

• Failure to provide for a non-judicial determination of disability (can't a doctor's letter be sufficient?)

• Placing the responsibility for appointment of a successor on the trustee, not the beneficiaries or other party (e.g., Trust protector)

• Failure to clearly provide for all of the contingencies when a succession may be needed (e.g., resignation, removal, death, disability, refusal to serve)
Common Errors Regarding Trustee Succession, cont’d

• Failure to allow non-judicial approval of accounts when the Trustee has resigned or been removed
• Failure to waive bond and other statutory requirements, such as filing court accountings
• Using incorrect names of trustees--creates confusion and ambiguity
  - Call the Bank or Trust Company and confirm the correct name
Other Potential Trustee Issues

Address potential self-dealing by the Trustee
- E.g., borrowing from the corporate trustee’s own bank; dealing with affiliated brokerage, insurance and other operations; dealing with stock in the corporate trustee UMB-2 Article Three Paragraph A
- See RSMo 456.8-802; KSA 58a-802

Allocate duties among co-trustees if duties are not equally shared and provide a backup plan if co-trustees will not always serve

Address decision-making by the co-trustees
- Consider default rules: RSMo 456.7-703; KSA 58a-703

Address delegation issues and third party directions to the Trustee
- See default rules: RSMo 456.8-807, -808
  KSA 58a-807, -808
Other Key Trust Provisions

Spendthrift Clause

• Used to shield trust property from the claims of beneficiaries’ creditors and attempts by beneficiaries to assign their interest in trusts prior to the vesting of interests  UMB-2 Article Two Paragraph B

Holdback Provisions

• Provides the Trustee with the flexibility to make distributions or to hold the property in a continuing trust as the Trustee deems appropriate in its discretion taking into account the circumstances as they exist at the time  UMB-2 Article Two Paragraph A.2
  - Situations include underage, disability, preservation of benefits such as Medicaid, SSI, etc.
Other Key Trust Provisions, cont’d

Facility of Payment Clauses

• Provides flexibility to the Trustee to facilitate the payment of such distributions to a third party for the beneficiary’s benefit  UMB-2 Article Two Paragraph A.1

Grant of Broad Powers to Trustee

• This allows the Trustee the ability to administer the trust with broad discretion and to manage the trust in a manner in which can be responsive to the trust’s objectives and purposes in light of the circumstances as they exist at the time  UMB-2 Article Three
Power to Subdivide and Merge

- Subdivide into fully exempt and non-exempt shares rather than having to calculate a GST tax on every distribution
- Merge similar trusts for ease of administration, cost savings
  » UMB-2 Article Three Paragraph M
  » See default rules in RSMo 456.8-815, 456.8-816; KSA 58a-815,816

The Trust should provide for the payment of the Grantor’s debts, claims against his or her estate, and taxes

- Coordinate these provisions with Will and other trusts, if applicable
- Carefully consider source of payments taking into account outside assets and equitable apportionment
Common Errors in the Drafting of Trusts—Trustee’s Powers

• Trustees may not want all of the powers granted in the instrument if they are burdensome or unreasonable (e.g., drug testing, monitoring beneficiary's circumstances, narrow investment scope, etc.)

• Does the trustee have all of the powers granted trustees under state law or has that been drafted away?

• Failure to provide for or inadequate provision for the payment of the grantor's debts, expenses of administration and death and other taxes owed on account of death
Common Errors in the Drafting of Trusts—Trustee’s Powers

• Address powers relating to unique assets
  - Examples: Closely held stock, concentrations in publicly traded stock, sentimental assets, S corp stock, real estate, tangible personal property

• Clearly identify investment responsibility (if not with Trustee) and exculpate the Trustee if a third party is responsible

• Failure to determine to whom the Trustee must report and provide information regarding the existence of the trust, trust administration and to whom the Trustee must report changes in compensation under RSMo 456.8-813; KSA 58a-813
  - Or, attempting to make the trust a “secret”
Other Key Trust Provisions, cont’d

Applicable Law

• Determine what law governs validity, construction, administration
  UMB-2 Article Twelve
• It is possible to provide flexibility for the Trustee by bifurcating the
  governing law issues of administration from issues of construction and
  validity
• Failure to specify may create confusion on important issues

Change of Situs

• Situs is important to determine taxation of trust and applicable law
• It is possible to provide flexibility by changing the situs of the trust’s
  administration  UMB-2 Article Sixteen Paragraph E
• See also default rules at RSMo 456.1-108; KSA 58a-108
More Key Trust Provisions

Perpetuities Savings Clause

• Necessary to ensure not violating applicable law regarding termination of trust UMB-2 Article Two Paragraph G

Small Trust Termination Clause

• Permits flexibility when trust becomes uneconomical to continue to administer UMB-2 Article Two Paragraph G

Accounting by the Trustee

• The Trustee should keep the beneficiaries informed about trust administration UMB-2 Article Nine
Compensation of the Trustee

• Address how trustee fees and expenses will be paid

• Corporate trustee prefers to be paid in accordance with its published schedule of fees in effect from time to time UMB-2 Article Ten

• See default rules at RSMo 456.7-708; KSA 58a-708
Identification of family

- May assist with clarifying beneficiaries later
- Provides indication of grantor’s intention
- Address effect of later divorce on provisions for spouse
- UMB-2 Article Thirteen Paragraphs A, B

Definitions

- Including disability
- Provide a procedure for determination, preferably without going to court UMB-2 Article Thirteen Paragraph F
Proper signatures and dates

- Ensure all of the proper parties are signing, including special trustees and trust protectors
- Include notary blocks
More Common Errors in the Drafting of Trusts

Failure to obtain all pertinent facts

- Special assets (e.g., closely held stock, favored stock, sentimental assets, S corp stock)
  - Investment responsibility should be addressed

- Special issues concerning a beneficiary's circumstances (age, citizenship, governmental benefits, etc.)

Failure to consider and override the MUTC and other applicable law when needed

- Many opportunities under MUTC, Principal & Income Act, Prudent Investor Act, etc.

- Ascertain client’s intention

- Carefully draft around when appropriate
Common Errors in the Drafting of Trusts--a Potpourri

- Tax problems with the marital trust
- Tax problems with the non-marital trust
- Jeopardizing the charitable deduction
- Allowing the grantor to retain powers/interests in irrevocable trusts
- Including powers in irrevocable trusts that cause grantor taxation/estate inclusion
Common Errors in the Drafting of Trusts--a Potpourri, cont’d

- Failure to provide management provisions and conduit trust provisions for Qualified Retirement Plans or IRAs
- Failure to account for Beneficiary Grantor Trust status under IRC § 678
- Failure to properly use Crummey powers
- Failure to authorize GST sensitive splits and GST issues in general
Common Errors in the Drafting of Trusts – Grammar

• Failure to proofread, failure to review
  • **EXAMPLE**: Client executed draft which omitted the disposition of the Residuary Trust

• Inappropriate use of word search and replacement
  • **EXAMPLE**: Replacing “May” with “June” throughout the document when intending to only update the date

• Typographical errors
  • As varied as you can imagine
Questions?

UMB’s Will & Trust Forms are available for attorneys at umb.com. For a log in and password, please contact Wilma Weddington at 816-860-7487 or at wilma.weddington@umb.com.

Thank you for your attention!
The information provided in this presentation is intended to be educational and informational only and should not be construed as tax or legal advice. Any sample forms provided are for use of attorneys only. As is the case with any form, the attorney must, of course, assume responsibility for the form’s applicability, validity and for the resulting tax and non-tax consequences. An important factor to be considered in determining the applicability of any form is the effect of state or other applicable law on the proposed document. The attorney should also be alert to developments in the law subsequent to the issuance of any form, which might have a bearing on the applicability or validity of the form.
PLEASE NOTE: THIS FORM IS FOR THE USE OF ATTORNEYS ONLY

The UMB Will & Trust Forms (“Forms”) are provided by UMB Bank, n.a., and its affiliates and subsidiaries (“UMB”), in their entirety and free of charge, only to attorneys at law for use in drafting documents for their respective clients. The Forms are designed to assist attorneys in preparing estate plans for their clients. UMB does not guarantee or represent that the Forms effectively accomplish any particular purpose and UMB disclaims all responsibility to any person for the Forms or their use in any particular manner. An important factor to be considered in determining the applicability of any form is the effect of state law on the proposed document. The attorney should also be alert to developments in the law subsequent to the issuance of the Forms, which might have a bearing on the applicability or validity of the Forms. Each of the Forms (except for the Confidential Estate Planning Questionnaire) contains explanatory side notes, which describe some, but not all, of the potential tax and non-tax consequences of the form provisions they accompany. These explanatory side notes are informational only and should not be relied upon for any particular purpose. These explanatory side notes should be deleted from any documents drafted for clients, and the format should be reviewed prior to use. See About Online Forms for instructions on deleting the explanatory side notes. Please also consult the UMB Trust Locations webpage, which lists all of the UMB locations, and choose the appropriate bank name. By using the Forms, you acknowledge and agree that: (a) you are an attorney at law; (b) you have the experience and knowledge necessary to select and use the Forms in a manner that is appropriate for your clients; (c) you have the experience and knowledge necessary to recognize and understand the tax and other estate planning issues and consequences presented by the Forms; (d) you will discuss these issues and consequences with your clients; (e) you will help your clients make appropriate decisions with respect to these issues and consequences; (f) you will edit and complete the Forms as necessary to give effect to these decisions and in a manner that does not contradict or materially modify the Forms, including, without limitation, incorporating appropriate applicable state law; (g) you (and not UMB, nor any of its officers, directors, employees or agents (the “Released Parties”)) are responsible and assume all risk for any document which you prepare based wholly or in part on the Forms; (h) you accept complete responsibility for your use of the Forms and you acknowledge and agree that the Released Parties will not accept any responsibility or have any liability for your use of the Forms and shall have no duty to verify that you comply with the conditions outlined above in (a)-(f); and (i) the Released Parties, in making the Forms available to you, are not engaged in rendering legal or other professional services or advice. By using the Forms, you waive any and all claims against the Released Parties based on or arising out of such use.

THE ATTORNEY SHOULD DELETE THIS INFORMATIONAL NOTE FROM ANY DOCUMENTS DRAFTED FOR CLIENTS

Living Trust with Marital Deduction Provisions
Sole Fiduciary      UMB-2

Revised 7-14
TRUST AGREEMENT

THIS AGREEMENT made this ___ day of ______, ______, between __________, of ________, as Grantor, and UMB Bank, n.a., a national banking association with offices in ___(City)__, ___(State)__ as Trustee;

WITNESSETH:

WHEREAS, Grantor desires to create a revocable Trust for the purposes hereinafter set forth;

NOW THEREFORE, in consideration of the premises and of the mutual covenants herein contained, Grantor* [has designated the Trustee as beneficiary of each of the insurance policies described in Schedule #___ attached] [and] [does hereby transfer, assign, convey and set over unto the Trustee the property described in Schedule #___ hereto annexed];

TO HAVE AND TO HOLD the same and any other property which the

*If initially no property is being transferred to the trust but the trust is named as beneficiary of one or more life insurance policies, use only the first bracketed phrase. If initially one or more assets are being transferred to the trust but the trust is not named as beneficiary of any life insurance policies, use only the second bracketed phrase. If initially one or more assets are being transferred to the trust and the trust is named as beneficiary of one or more life insurance policies, use both bracketed phrases.
Trustee may hereafter at any time hold or acquire from Grantor or otherwise, all of which is hereinafter collectively referred to as the "trust estate," IN TRUST NEVERTHELESS, for the following uses and purposes and subject to the following terms and conditions:

**ARTICLE ONE: TRUST ADMINISTRATION**

A. Administration During Grantor's Life: During Grantor's life, the Trustee shall hold, manage, invest and reinvest the trust estate, collect the income therefrom and distribute all of the net income, if any, to Grantor, in quarterly or more frequent installments, shall distribute such part or all of the principal of the trust estate as Grantor may request from time to time by an instrument or instruments in writing delivered to the Trustee and may distribute to Grantor from the principal of the trust estate such amount or amounts as the Trustee shall from time to time deem appropriate to provide for the health, education, maintenance and support of Grantor, Grantor's spouse or any descendant of Grantor who may be dependent upon Grantor or Grantor's spouse, upon consideration of other resources actually known by the Trustee to be available to such beneficiaries for such purposes. [During any time that Grantor is incapacitated, the Trustee may make gifts to Grantor's spouse or to any one or more of Grantor's descendants as directed in writing by Grantor's duly authorized agent under a Durable Power of Attorney ("DPOA") which permits such agent to direct such gifts to be made by the Trustee, and subject to any limitations and restrictions on the amount or form of such gifts contained in such DPOA. Prior to making gifts pursuant to this provision, the Trustee shall be furnished with a true copy of such DPOA. The Trustee may rely conclusively and without liability on the agent’s written certification that such DPOA is in effect and has not been revoked and that the agent is the duly authorized and then-serving agent.]
make gifts to Grantor’s spouse or descendants in accordance with the direction of Grantor’s duly authorized agent under a Durable Power of Attorney. Care should be taken to coordinate the provisions of the Trust Agreement and the DPOA.

Payment of Grantor’s debts, expenses and taxes.

Marital Trust created.

**NOTE:** This formula reduces the Federal (but not necessarily state death taxes) estate tax liability to zero for married persons. Additional planning may be needed for residents of states that have a stand-alone estate tax. The Marital Trust will be taxable in the estate of the surviving spouse. This formula may not be appropriate for assets causing income in respect of a decedent or if appreciation or depreciation in the value of assets is anticipated; an alternative has been provided. (See UMB-A1).

**NOTE:** UMB is in the process of reviewing

B. **Administration Upon Grantor’s Death:** Upon Grantor’s death, the Trustee shall administer and distribute the trust estate as provided below:

1. **Payment of Debts, Expenses and Taxes:** The Trustee shall pay debts, expenses and taxes as provided in Article Seven of this Agreement.

2. **Creation of the Marital Trust:** The first share, to be created only if Grantor’s spouse, ________, survives Grantor (herein sometimes referred to as "the Marital Trust"), shall be an amount equal to the value for Federal estate tax purposes of the property subject to the provisions of this Article One, provided that this amount shall be reduced by such sum which, after taking into consideration all other property included in the Grantor’s taxable estate, will increase the sum of Grantor’s taxable estate and adjusted taxable gifts to an amount which will fully utilize (a) the Applicable Exclusion Amount, as defined in Section 2010 of the Code, available to Grantor’s estate at the time of Grantor's death; [and] (b) any available State death tax credit to the extent that doing so does not cause an increase in the amount of death taxes payable to any State [; and (c) any other applicable and elected deductions and credits].

In making the computations necessary to determine the amount of the Marital Trust, the Trustee shall be governed by the final determination in the Federal estate tax proceedings in Grantor's estate, as reported in writing to the Trustee by Grantor’s Personal Representative, if any.

In implementing such transfer, the Trustee is directed to distribute assets, including cash, having an aggregate fair market value at the date or dates of distribution amounting to no less than the amount of the transfer so computed, as finally determined for Federal estate tax purposes.
3. **Creation of the Non-Marital Trust**: The second share (herein sometimes referred to as "the Non-Marital Trust"), shall consist of so much of the trust estate as is not included in the Marital Trust or shall consist of all of said trust estate, if Grantor's spouse does not survive Grantor.

C. **Administration of Marital Trust**: The property comprising the Marital Trust, if any, shall be held and administered by the Trustee as follows:

**[MARITAL TRUST ALTERNATIVE 1: MARITAL TRUST WITH GENERAL POWER OF APPOINTMENT]**

1. **Administration During Spouse’s Lifetime**: While Grantor’s spouse is living, the Trustee:

   (a) shall distribute to Grantor's spouse, not less often than quarterly, all the net income; [and]

   (b) may distribute to Grantor's spouse from the principal such amount or amounts as the Trustee may from time to time deem appropriate to provide for the health, education, maintenance and support of Grantor's spouse, upon consideration of other funds actually known by the Trustee to be available to Grantor's spouse for such purposes [; and]

   (c) shall distribute such part or all of the principal to Grantor's spouse, as such spouse may request from time to time by an instrument or instruments in writing delivered to the Trustee.

2. **Administration Upon Spouse’s Death**: Upon the death of Grantor's spouse, the Trustee shall distribute all the assets to such appointee or appointees, including the estate of Grantor’s spouse, outright, in trust or otherwise, in such proportions and amounts as Grantor's spouse shall direct and
appoint by Grantor's spouse's Last Will and Testament referring specifically to this general power of appointment which shall be exercisable by Grantor's spouse alone and in all events; but if Grantor's spouse shall fail in whole or in part to exercise such power, the assets with respect to which Grantor's spouse shall have failed to exercise such power shall be disposed of as follows:

(a) The Trustee shall pay, unless Grantor's spouse shall otherwise direct by Will or trust instrument, the funeral and burial expenses of Grantor's spouse and, with no right of reimbursement, the excess of any estate, inheritance, legacy, succession and transfer taxes (excluding, however, any tax imposed under the Code upon any generation-skipping transfer) imposed by reason of the death of Grantor's spouse, regardless of by whom and from what other sources such taxes would otherwise be payable, over the amount of such tax which would have been payable if the assets of the Marital Trust had not been subject to such tax. The payment of such excess tax may, in the Trustee's discretion, be made either directly to the respective payees or through the Personal Representative, if any, of the estate of Grantor's spouse or any party undertaking the payment of any such excess tax.

(b) The Trustee shall distribute the remaining assets to the Trustee of the Non-Marital Trust, to be added to the principal of the Non-Marital Trust and to be held, administered and distributed as a part thereof, or, if the Non-Marital Trust shall not be in existence, the Trustee shall hold, administer and distribute said property in the manner set forth in this Article regarding the administration and distribution of the Non-Marital Trust as if Grantor had died immediately after the death of Grantor’s spouse.

[MARITAL TRUST ALTERNATIVE 2: QTIP MARITAL TRUST]

1. Administration During Spouse’s Lifetime: While Grantor's spouse is living, the Trustee:

   (a) shall distribute to Grantor's spouse, not less often than quarterly, all of the net income; [and]

   (b) may distribute to Grantor’s spouse from the principal such amount or amounts as the Trustee may from time to time deem appropriate to provide for the health, education, maintenance and support of Grantor’s spouse, upon consideration of other funds actually known by the Trustee to be available to Grantor’s spouse for such purposes [; and]

   (c) shall distribute such part of the principal to Grantor's spouse as Grantor's spouse may request from time to time by an instrument or
qualify under this option, the Personal Representative of Grantor's estate (or the Trustee, if there shall be no such Personal Representative) must make a QTIP election.

This Subparagraph provides an optional 5 & 5 power. The surviving spouse should not have broader withdrawal rights because broader withdrawal rights would effectively curtail the flexibility of making no QTIP election or a partial QTIP election.

Care should be taken in situations where the spouse has a 5 & 5 right of withdrawal over multiple trusts to aggregate such powers in order to avoid potential adverse consequences under Code § 2514(e).

Pay spouse's funeral and burial expenses; pay incremental taxes attributable to elected portion of Marital Trust; distribute remaining Marital Trust to Grantor's then living descendants outright.

2. Administration Upon Spouse's Death: Upon the death of Grantor's spouse, unless Grantor's spouse shall otherwise direct by Will or trust instrument, the Trustee shall pay the funeral and burial expenses of Grantor's spouse and, from the elected portion of the Marital Trust, with no right of reimbursement, the excess of any estate, inheritance, legacy, succession and transfer taxes (excluding, however, any tax imposed under the Code upon any generation-skipping transfer) imposed by reason of the death of Grantor's spouse, regardless of by whom and from what other sources such taxes would otherwise be payable, over the amount of such tax which would have been payable if the assets of the elected portion of the Marital Trust had not been subject to such tax. The payment of such excess tax may, in the Trustee's discretion, be made either directly to the respective payees or through the Personal Representative, if any, of the estate of Grantor's spouse or any party undertaking the payment of any such excess tax. The Trustee shall distribute...
the remaining assets of the Marital Trust to Grantor’s then living descendants, per stirpes. For purposes of this Subparagraph 2, “the elected portion” of the Marital Trust shall mean that portion of the Marital Trust which the Grantor’s Personal Representative or the Trustee, as the case may be, elected to qualify for the marital deduction as Qualified Terminable Interest Property, as defined in the Code ("QTIP"), on Grantor’s Federal estate tax return.

OR

2. Administration Upon Spouse’s Death: Upon the death of Grantor’s spouse, unless Grantor’s spouse shall otherwise direct by Will or trust instrument, the Trustee shall pay the funeral and burial expenses of Grantor's spouse and, from the elected portion of the Marital Trust, with no right of reimbursement, the excess of any estate, inheritance, legacy, succession and transfer taxes (excluding, however, any tax imposed under the Code upon any generation-skipping transfer) imposed by reason of the death of Grantor's spouse, regardless of by whom and from what other sources such taxes would otherwise be payable, over the amount of such tax which would have been payable if the assets of the elected portion of the Marital Trust had not been subject to such tax. The payment of such excess tax may, in the Trustee's discretion, be made either directly to the respective payees or through the Personal Representative, if any, of the estate of Grantor's spouse or any party undertaking the payment of any such excess tax. The Trustee shall distribute the remaining assets to the Trustee of the Non-Marital Trust, to be added to the principal of the Non-Marital Trust and to be held, administered and distributed as a part thereof, or, if the Non-Marital Trust shall not be in existence, the Trustee shall thereafter hold, administer and distribute said property in the manner set forth in this Article regarding the administration and distribution of the Non-Marital Trust as if Grantor had died immediately after the death of Grantor's spouse. For purposes of this Subparagraph 2, “the elected portion” of the Marital Trust shall mean that portion of the Marital Trust which the Grantor’s Personal Representative or the Trustee, as the case may be, elected to qualify for the marital deduction as Qualified Terminable Interest Property, as defined in the Code ("QTIP"), on Grantor’s Federal estate tax return.

3. Provisions Relating to QTIP Election:

(a) If an election is made to qualify part of the Marital Trust as QTIP, the Trustee is authorized to divide the Marital Trust into separate trusts to reflect the partial election. Any such division shall be made using property fairly representative of appreciation or depreciation in value of all assets of the Marital Trust, the appreciation or depreciation in value to be determined from the Federal estate tax value of such assets.
(b) The Trustee shall have no duty to monitor the beneficiaries or their circumstances, applicable tax laws and other laws and changes in such laws, or any trust created hereunder in order to determine whether or not, or to what extent, to make an election to qualify the Marital Trust as QTIP. Whether and to what extent to make such election shall be in the sole and absolute discretion of the Trustee, and shall be binding and conclusive on all persons interested in this trust. The Trustee shall not be liable for the consequences of making said election or deciding not to make said election with respect to any part or all of the Marital Trust, but rather the Trustee shall be exonerated from any and all such liability and from any and all liability for the acts or omissions of any other fiduciary, and any action or decision shall be binding and conclusive upon all persons claiming under this Agreement. The Trustee may conclusively rely on the opinion of legal counsel retained by the Trustee in connection with the decision whether to make said election or may act or not act without seeking the opinion of legal counsel, all in its sole and absolute discretion.

D. Administration of Non-Marital Trust: The property comprising the Non-Marital Trust shall be held and administered as follows:

[ALTERNATIVE PROVISIONS FOR THE NON-MARITAL TRUST DURING SPOUSE’S LIFETIME]

[ALTERNATIVE 1: SPRAY TRUST TO SPOUSE AND DESCENDANTS WITH SPOUSE AS PREFERRED BENEFICIARY]

1. Administration During Spouse’s Lifetime: While Grantor's spouse is living, the Trustee may distribute to such spouse so much or all of the net income and principal as the Trustee, in its discretion, deems advisable to provide for such spouse’s health, education, maintenance and support; and, subject to the foregoing provisions in favor of Grantor's spouse as the preferred beneficiary, may distribute to any one or more or all of Grantor's descendants living from time to time so much or all of the net income and principal not paid to Grantor's spouse as the Trustee deems advisable to provide for their respective health, education, maintenance and support.

In exercising the foregoing discretion, the Trustee shall consider all other sources of income, of which the Trustee shall have actual knowledge, available to each of the beneficiaries above designated and shall have the right, in its discretion, to exclude any or all of them at any time and from time to time.
and to make unequal distributions among them. Any net income not so distributed by the Trustee during any calendar year shall be accumulated and added to the principal.

[ALTERNATIVE 2: SPOUSE AS SOLE BENEFICIARY DURING LIFETIME]

1. Administration During Spouse’s Lifetime: While Grantor's spouse is living, the Trustee shall distribute to Grantor's spouse, not less often than quarter-annually, all the net income. In addition, the Trustee may distribute to Grantor's spouse from the principal such amount or amounts [(a)] as the Trustee may from time to time determine to be appropriate to provide for the health, education, maintenance and support of Grantor's spouse, upon consideration of other funds actually known by the Trustee to be available to Grantor's spouse for such purposes, and (b) shall distribute such part of the principal to Grantor's spouse as Grantor's spouse may request from time to time by an instrument or instruments in writing delivered to the Trustee, but the total of all such payments in any one calendar year shall not exceed [the greater of Five Thousand Dollars ($5,000.00) or] five percent (5%) of the market value of the Non-Marital Trust determined on the first business day of that calendar year. The right of Grantor's spouse to receive distributions under this Subparagraph (b) shall be non-cumulative].

[ALTERNATIVE PROVISIONS FOR THE NON-MARITAL TRUST AFTER SPOUSE’S DEATH (OR GRANTOR’S DEATH IF SPOUSE PREDECEASES GRANTOR)]

[ALTERNATIVE 1: DISTRIBUTE OUTRIGHT TO DESCENDANTS]

2. Administration Upon Spouse’s Death (or Grantor’s Death if Spouse Predeceases Grantor): Upon the death of Grantor's spouse or upon Grantor's death, if Grantor's spouse does not survive Grantor, the Trustee shall distribute the remaining assets to Grantor's then living descendants, per stirpes.

[ALTERNATIVE 2: SPRAY TRUST FOR DESCENDANTS UNTIL]
YOUGEST CHILD REACHES 25, THEN OUTRIGHT TO DESCENDANTS]

2. Administration Upon Spouse’s Death (or Grantor’s Death if Spouse Predeceases Grantor): Upon the death of Grantor's spouse or upon Grantor's death, if Grantor's spouse does not survive Grantor, the Non-Marital Trust shall continue to be held as a separate trust for the benefit of Grantor's descendants. During such period as any child of Grantor under the age of twenty-five (25) years shall be living, the Trustee may distribute to such of Grantor's descendants, as the Trustee shall designate, living on any distribution date, regardless of their then attained ages, all or such amount or amounts of the net income and principal of such separate trust as the Trustee may, without the necessity of observing any precept or rule of equality, from time to time determine to be appropriate for the health, education, maintenance and support of such descendants, upon consideration of other funds actually known by the Trustee to be available for such purposes; any net income not so distributed to be added to the principal of such separate trust. When there shall no longer be living any child of Grantor under the age of twenty-five (25) years, such separate trust shall terminate and the Trustee shall distribute, free from trust, all the assets thereof to Grantor's then living descendants, per stirpes.

[ALTERNATIVE 3: SEPARATE TRUSTS FOR CHILDREN]

2. Administration Upon Spouse’s Death (or Grantor’s Death if Spouse Predeceases Grantor): Upon the death of Grantor's spouse or upon Grantor's death, if Grantor's spouse does not survive Grantor, the Trustee shall divide the remaining assets into a sufficient number of equal shares to create one share for each child of Grantor who is then living and one share for each child of Grantor who is then deceased but has one or more descendants then living. Each such share shall be held, managed, and disposed of by the Trustee as follows:

(a) Each share created for a deceased child of Grantor who has one or more descendants then living shall be distributed to the then living descendants of such deceased child, per stirpes.

[ALTERNATIVE FORMS OF DISTRIBUTION OF SEPARATE TRUSTS FOR CHILDREN (SUBPARAGRAPH (b))]

[ALTERNATIVE 1: TERMINATE AT 35 WITH PRINCIPAL DISTRIBUTIONS AT 25 AND 30]
Share for living child held in trust until 35. Net income to child, discretionary principal distributions to child, with mandatory principal distributions at 25 and 30.

(b) Each share created for a living child of Grantor shall constitute a separate trust, and the Trustee shall distribute the net income, not less often than quarter-annually, to the child for whom the share was created until such child shall attain thirty-five (35) years of age, and, thereupon, or upon creation of the share, if such child has already attained such age, the Trustee shall distribute to such child the remaining assets of such share. In addition, the Trustee may distribute to such child from the principal of such child's share such amount or amounts as the Trustee may from time to time deem appropriate to provide for such child's health, education, maintenance and support, upon consideration of other funds actually known by the Trustee to be available to such child for such purposes. If such child has attained twenty-five (25) or thirty (30) but not thirty-five (35) years of age at the time such child's share is created, then upon creation of the share the Trustee shall distribute to such child one-third (1/3) of such share, as originally constituted, for each of such two ages then attained. If such child is under twenty-five (25) years of age at the time such child's share is created, then when such child attains that age, the Trustee shall distribute to such child one-third (1/3) of the principal of such child's share, as it is then constituted, and, when such child attains thirty (30) years of age, the Trustee shall distribute one-half (1/2) of the principal of such child's share, as it is then constituted. If such child has attained age twenty-five (25) but is under thirty (30) years of age at the time such child's share is created, then, in addition to the distribution made to such child upon the creation of the share as hereinabove provided, when such child attains that age, the Trustee shall distribute to such child one-half (1/2) of the principal of such child's share, as it is then constituted. Upon the death of such child before termination of such share, the Trustee shall distribute the remaining assets of such child's share to Grantor's then living descendants [and the spouses of Grantor's then living or deceased descendants as an optional provision]. Default distribution to child's descendants, if any, otherwise Grantor's descendants, per stirpes.

[ALTERNATIVE 2: IN TRUST FOR LIFE WITH LIMITED POWER OF APPOINTMENT]
(b) Each share created for a living child of Grantor shall constitute a separate trust, and the Trustee shall distribute to the child for whom the share was created all of the net income, not less often than quarter-annually, during such child's life. In addition, the Trustee may distribute to such child from the principal such amount or amounts as the Trustee may from time to time deem appropriate to provide for such child's health, education, maintenance and support, upon consideration of other funds actually known by the Trustee to be available to such child for such purposes. Upon such child's death, the Trustee shall distribute the remaining assets of such child's share to Grantor's then living descendants [and the spouses of Grantor's then living or deceased descendants as an optional provision]. Default distribution to child's descendants, if any, otherwise Grantor's descendants, per stirpes.

[ALTERNATIVE 3: CHILD GRANTED TIERED POWER OF WITHDRAWAL AT SET AGES WITH TESTAMENTARY LIMITED POWER OF APPOINTMENT]

(b) Each share created for a living child of Grantor shall constitute a separate trust, and the Trustee shall distribute all of the net income, not less often than quarter-annually, to the child for whom the share was created during such child’s life or until the share is sooner terminated. In addition, the Trustee may distribute to such child from the principal such amount or amounts as the Trustee may from time to time deem appropriate to provide for such child’s health, education, maintenance and support, upon consideration of other funds actually known by the Trustee to be available to such child for such purposes. At any time after attaining twenty-five (25) years of age, the child may withdraw up to one-third (1/3) of the principal of the share valued as of the date on which such trust was established or the date on which such child attained twenty-five (25) years of age, whichever is later; at any time after attaining thirty (30) years of age, the child may withdraw up to two-thirds (2/3) of the sum of the total of such amounts that had been withdrawn by such child before attaining thirty (30) years of age plus the value of the principal of the share as of the date on which such share was established or the date on which such child attained thirty (30)
that it is available but not exercised, will: (1) cause the child to be taxed as the Grantor of the trust for income tax purposes and (2) cause the trust to be included in the child's taxable estate.

years of age, whichever is later; and at any time after attaining thirty-five (35) years of age, the child may withdraw up to the whole of the remaining assets of the share (thereby terminating the trust). The child may make such withdrawals by written requests from the child to the Trustee, directing the Trustee to deliver a specified part of the trust property free of the trust. Upon the death of such child, the Trustee shall distribute the remaining assets of such child’s share to Grantor’s then living descendants [and the spouses of Grantor’s then living or deceased descendants], in such amounts or proportions and in such lawful interests or estates, whether absolute or in trust, as such child may have appointed by specific reference to this power in such child's Last Will and Testament. If such power of appointment is for any reason not effectively or fully exercised by such child, that part or all of the remaining assets of such child’s separate share not so appointed by such child shall be distributed to such child’s then living descendants, per stirpes, or, if none, to Grantor’s then living descendants, per stirpes.

E. Ultimate Taker: If, upon the termination of any separate trust created hereunder, or if, upon Grantor's death, none of the persons to whom the property of such trust is directed to be distributed is then living, the Trustee, in lieu of such distribution, shall distribute [one-half (1/2) of] the same to the person or persons to whom, and in the shares and proportions in which, the Personal Representative of Grantor's estate would have been required to distribute the same had Grantor died intestate, unmarried, and domiciled in the State of __________and possessed thereof at such time [and the remainder to the person or persons to whom, and in the shares and proportions in which, the Personal Representative of Grantor's spouse's estate would have been required to distribute the same had such spouse died intestate, unmarried, and domiciled in the State of __________and possessed thereof at such time].

F. Miscellaneous Administration Provisions: Irrespective of anything herein to the contrary:

1. Add to Existing Trust: If, upon the termination of any separate trust created hereunder, any part of the principal thereof shall be distributable to a person, and such person is the only person then receiving or entitled or permitted to receive income or principal from any other trust hereunder, the principal so distributable shall be added to and disposed of as a part of such other trust, subject to all the terms and provisions thereafter pertaining thereto.

2. Terminating Distributions Discretionary to Beneficiaries Under Twenty-One Years of Age: Whenever any of the property of any trust
created hereunder shall become distributable to a person who has not then attained twenty-one (21) years of age, as such person's absolute property, the Trustee may, in its discretion:

(a) withhold distribution of such property and invest and reinvest the same, collect the income therefrom, and during the time such person is under twenty-one (21) years of age, may pay to or apply for such person, so much of the net income or principal for the health, education, maintenance and support of such person as the Trustee deems necessary or advisable, without the intervention of any guardian or conservator, and accumulate, invest and reinvest the balance of such income, if any, until such person attains the age of twenty-one (21) years, and thereupon pay over to such person the unexpended principal and income so withheld. If such person dies before attaining the age of twenty-one (21) years, all such principal and income shall be paid over to the estate of such person. The authority conferred upon the Trustee by this Subparagraph shall not operate to suspend or prevent the absolute vesting of any property in such person. With respect to the administration of any such property, the Trustee shall have all the powers, authority and discretion vested in it under the provisions of this Agreement; or

(b) distribute the property to a person or corporation as the Trustee, in its discretion, shall designate, as custodian for the beneficiary pursuant to the applicable Uniform Gifts or Transfers to Minors Law, or any similar law or act. The distribution of trust property to a custodian pursuant to this provision shall constitute a complete release and discharge to the Trustee.

3. Disclaimer by Beneficiaries: In addition to any right to disclaim conferred by law, any person may, by appropriate instrument delivered to the Trustee, disclaim, in whole or in part, any interest or power granted to such person by this Trust Agreement. Any property of the Marital Trust so disclaimed by Grantor's spouse shall be added to the Non-Marital Trust, provided such disclaimer by Grantor's spouse shall not be considered a disclaimer of any interest of the Grantor's spouse in the property added to the Non-Marital Trust, except to the extent Grantor's spouse also disclaims with respect to the Non-Marital Trust.

4. Marital Deduction Savings Provisions: Grantor intends that the property in the Marital Trust shall be available for the marital deduction allowed by the Federal estate tax law applicable to Grantor's estate. Therefore, anything herein to the contrary notwithstanding, including, without limitation, the provisions of Article Two, Grantor hereby directs with respect to the Marital Trust that:
(a) during the lifetime of Grantor's spouse, the Trustee shall not, without the consent of Grantor's spouse, retain beyond a reasonable time any property which may be or become unproductive or invest in unproductive property;

(b) the Trustee, in its discretion, may join with Grantor's spouse in entering into any agreement with the Commissioner of Internal Revenue or other taxing authority in order to qualify the Marital Trust for such marital deduction; [and]

(c) nothing herein contained shall be construed as conferring upon the Trustee of the Marital Trust any power, the existence or exercise of which would prevent the property comprising the Marital Trust from qualifying for the marital deduction to which Grantor's estate would otherwise be entitled under the provisions of the Code. Without limiting the generality of the foregoing and anything herein to the contrary notwithstanding, all administrative powers conferred upon the Trustee shall be subject to the imposition by a court of competent jurisdiction of reasonable limitations upon the exercise of such powers, and the powers herein conferred upon the Trustee to invest in and retain assets shall be subject, as respects any unproductive assets, to the requirement that the Trustee shall use, in the exercise of such powers, the degree of judgment and care which a prudent person would use if such person were the owner of such assets[.]; and

(d) no discretionary distribution of principal shall be made to Grantor's spouse from the Non-Marital Trust unless all the principal of the Marital Trust shall have been distributed free from trust.]

ARTICLE TWO: SUPPLEMENTAL ADMINISTRATION PROVISIONS

The provisions herein contained for the distribution of the income and principal of the trust estate, and of each and every share or part thereof, shall be supplemented by and, when necessary, shall be subject to the following:

A. Distributions to Persons Under Twenty-One Years or Incapacitated Beneficiaries: Whenever the beneficiary of any trust hereunder is under twenty-one (21) years of age or in the judgment of the Trustee is incapacitated, then, with respect to any payments which such beneficiary is entitled to receive hereunder, the Trustee:
1. May make part or all of such payment directly to such beneficiary, or to such beneficiary's Guardian, or to a person with whom such beneficiary resides at the time of such payment for the direct benefit of such beneficiary, or may itself apply the same for the benefit of such beneficiary in such manner as the Trustee shall deem best, and the receipt of such Guardian or person for any payment so made shall be a full and complete discharge to the Trustee with respect to any such payment; and

2. May withhold part or all of such payment (other than principal required to be paid upon termination of any trust in whole or in part, and other than the income of the Marital Trust which shall be payable to Grantor's spouse, while living, in all events) as, in the judgment of the Trustee, shall exceed the amount needed to provide for the health, education, maintenance and support of such beneficiary, taking into consideration all other funds available to such beneficiary of which the Trustee shall have actual knowledge; and any income so withheld shall be added to the principal of the trust estate from which it was derived.

B. Spendthrift Clause: To the extent permitted by law, none of the beneficiaries hereunder shall have any power to dispose of or to charge by way of anticipation or otherwise any interest given to such beneficiary; and all sums payable to any beneficiary hereunder shall be free and clear of debts, contracts, alienations and anticipations of such beneficiary, and of all liabilities for levies and attachments and proceedings of any kind, at law or in equity, and, in the case of a married person, free from the control of such person's spouse. This provision shall not be deemed to be a limitation on any power of appointment herein granted and shall not restrict the exercise of any right of disclaimer. The intent of this provision is to create a spendthrift trust for all beneficiaries other than the Grantor.

C. Income Distribution Upon Death of Beneficiary: Upon the death of any beneficiary, any undistributed net income (which for purposes of this Agreement shall include accrued, accumulated or unpaid net income), which would have been payable to such beneficiary had such beneficiary lived, shall be paid as income to the beneficiary next succeeding in interest, unless otherwise provided herein or unless such net income shall have been validly appointed pursuant to a power of appointment herein conferred.

D. Written Notice of Death: Until the Trustee has received written notice of any death or other event upon which the right to any payment may depend, the Trustee shall incur no liability for any payment made or action taken by it in good faith.
E. Release of a Power of Appointment: Any person upon whom a power of appointment is herein granted may, by an instrument in writing delivered to the Trustee at any time or from time to time during such person's life, irrevocably release such power of appointment with respect to any or all of the property subject to such power and further limit the persons in whose favor such power may be exercised.

F. Assumptions Regarding Exercise of a Power of Appointment: To avoid undue delay, Grantor directs that if, at the expiration of three (3) calendar months after the date of death of any person upon whom a testamentary power of appointment is herein conferred, no Will of such person, of which the Trustee has knowledge, has been offered for probate, the Trustee may find that such person died intestate and did not exercise the power of appointment herein conferred. Similarly, if at the expiration of three (3) calendar months after the date of such person's death, a Will of such person has been offered for probate or has been probated, the Trustee may find that such Will was the Last Will of such person and be guided by the provisions therein in determining whether or not the power of appointment herein conferred has been exercised, and, if exercised, the extent and manner thereof. The provisions of the two preceding sentences relating to findings which the Trustee is permitted to make are intended to protect and acquit the Trustee in making distribution in accordance with any such finding, but are not intended to conclude the rights of persons beneficially interested as between themselves nor as against any others to whom the Trustee may have made any such distribution.

G. Rule Against Perpetuities Savings; Small Trust Termination: Notwithstanding anything in this Agreement to the contrary, no trust created hereunder shall be construed to extend beyond the period permitted by applicable law. If the applicable law would require the termination of any trust within a period of time which is shorter than that contemplated in this Agreement, the trust so affected shall terminate on the last day on which the trust could exist under such applicable law. If the period permitted by applicable law is determined with reference to the death of the last survivor of a group of individuals alive on a specific date, such as the date of Grantor's death, those individuals shall include all the beneficiaries herein named or described who are living at the time said Trust becomes irrevocable by Grantor's death, or otherwise. This Paragraph shall also apply with respect to any asset held in any trust. The Trustee, in its discretion, may terminate at any time any trust created hereunder which shall have an aggregate principal value of One Hundred Thousand Dollars ($100,000.00) or less. Upon termination of any trust, as herein provided, the Trustee shall distribute the trust estate, (including all then remaining principal and accrued and accumulated income), free and clear of any
such as termination if the continued administration of the trust is determined to be uneconomical.

This optional provision has been added if the Grantor determines his or her intent is to override any statutory provisions which might allow a court to terminate a trust solely upon the consent of all of the adult beneficiaries. See, e.g., Uniform Trust Code § 411. Consider that this sentence may not be sufficient to prohibit a modification or termination under the Kansas and Missouri versions of Uniform Trust Code § 411. RSMo § 456.4B-411 features slightly different requirements regarding the necessary consents and also requires at least one additional court finding. Under K.S.A. § 58a-105(b)(4), the court's power to modify pursuant to K.S.A. § 58a-411 cannot be waived via trust instrument.

[H. Restriction on Modification and Termination: Notwithstanding any provisions of this Agreement or any applicable law to the contrary, to the maximum extent not prohibited under applicable law, neither this Agreement nor any provision regarding any trust estate created under this Agreement may be modified or terminated by a court solely upon the consent of all of the adult beneficiaries.]

ARTICLE THREE: TRUSTEE ADMINISTRATION POWERS

By way of illustration and not of limitation, and in addition to any inherent or statutory powers the Trustee may now or hereafter have, any powers conferred upon fiduciaries by statute or general rules of law, the Trustee is expressly authorized and empowered, in its discretion:
A. Investment, Retention and Diversification: To purchase or otherwise acquire, and retain, whether originally a part of the trust estate or subsequently acquired, and to invest in, any and all stocks, bonds, notes or other securities, or any variety of real or personal property, including shares or interests in common trust funds, investment trusts, and mutual funds, including any mutual funds for which a corporate Trustee or an affiliate is acting as an investment advisor or in any other capacity for a fee, and to write call options on securities held by the trust estate, as it may deem advisable, whether such investment utilizes the services of a distributor and/or transfer agent in which the Trustee, [UMB Bank, n.a.,] UMB Financial Corp., and/or one or more of their subsidiaries or affiliates, hold an interest and whether such investments be of the character permissible for investment by fiduciaries or not, with full power, nevertheless, to change and vary the form of any investment from time to time as to it shall deem best. Investments need not be diversified and may be made or retained with a view to a possible increase in value. Grantor expressly acknowledges that certain provisions of applicable law may require the Trustee to diversify the investments of the trust estate. To the extent permitted by applicable law, Grantor waives any duty of the Trustee to diversify the investments of the trust estate under any provisions of applicable law, including, without limitation [RSMo § 469.903][K.S.A. §58-24a03], and Grantor states Grantor’s intention that no such provisions shall apply to any Trustee hereunder. The Trustee may at any time render liquid the trust estate, in whole or in part, and hold cash or readily marketable securities of little or no yield for such period as it may deem advisable. Grantor recognizes that the Trustee, [UMB Bank, n.a.,] UMB Financial Corp. and/or one or more of their affiliates may benefit by realizing a profit, in addition to the Trustee's fees under this Agreement, from furnishing such services, and Grantor authorizes the Trustee, [UMB Bank, n.a.,] UMB Financial Corp. and/or one or more of their affiliates so to benefit. To the maximum extent permitted by applicable law, the Trustee shall not be required to offset or waive any fees received from any mutual fund or the issuer of any other investment described in this Paragraph against the fees charged for serving as Trustee hereunder.

B. Disposition of Assets: To sell, lease, pledge, mortgage, transfer, exchange, convert, convey or otherwise dispose of, or grant options with respect to, any and all property, real or personal, at any time forming a part of the trust
estate, in such manner, at such time or times, for such purposes, for such prices and upon such terms, credits and conditions as it may deem advisable. Any sale may be made by private contract or by public auction, and for cash or upon credit, or partly for cash and partly upon credit, as it may deem best, and no person dealing with the Trustee shall be bound to see to the application of any monies paid. Any lease made by the Trustee may extend beyond the period fixed by law for leases made by fiduciaries and beyond the duration of the trust.

C. Borrowing: To borrow money from others or from the corporate Trustee, in its individual capacity, for any purpose connected with the protection, preservation or improvement of the trust estate whenever in its judgment advisable, and as security to mortgage or pledge any real estate or personal property forming a part of the trust estate, upon such terms and conditions as it may deem advisable.

D. Voting: To vote in person or by general or limited proxy with respect to any shares of stock or other securities held by it.

E. Corporate Interests: To consent to, or to dissent from and to oppose, directly or through a committee or other agent, the reorganization, recapitalization, consolidation, sale, merger, dissolution or liquidation of any corporation or properties in which the trust estate may have any interest upon such terms and conditions as it may deem wise, or to the sale, lease, pledge, or mortgage of any property by or to any such corporation; to accept any securities which may be issued upon any such reorganization, recapitalization, consolidation, sale or merger, and thereafter to hold the same; and to make any payments and to take any steps which it may deem necessary or proper to enable it to obtain the benefit of any such transaction.

F. Manner of Holding Securities: To cause to be registered in its name, individually or as Trustee, or in the name of its nominees, any securities or other property from time to time held by it, or to take and keep them unregistered, and to retain them or any part thereof in such condition that they will pass by delivery.

G. Security Rights: To exercise all options, rights and privileges to convert stocks, bonds, notes, mortgages or other property into other stocks, bonds, notes, mortgages or other property; to subscribe for additional or other stocks, bonds, notes, mortgages or other property; to make such conversions and subscriptions and to make payments therefor; and to hold such stocks, bonds, notes, mortgages, or other property so acquired as investments of the trust.
H. Disposition of Choses In Action: To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts, leases or any other obligations which the Trustee may own or to which the Trustee may be a party or which may be liens or charges against the trust estate, although the Trustee may not be liable thereon, in such manner as it may deem advisable; to pay, compromise, compound, adjust, submit to arbitration, sell, release, and enforce or abstain from the enforcement of, any rights, obligations, claims or demands of the trust estate against others or of others against the trust estate as it may deem advisable, including the acceptance of deeds of real property in satisfaction of bonds and mortgages, and to make any payments in connection therewith which it may deem advisable; to abandon, if in its discretion it shall deem it advisable, any property, real or personal, which may at any time form a part of the trust estate; to make any payments and to take any steps which it may deem necessary or proper to enable it to obtain the benefit of any such transaction; and in general, to protect in every way the interests of the trust estate and of the beneficiaries thereof, either before or after default.

I. Change Interest Rate: To reduce the interest rate any time and from time to time on any note or mortgage constituting a portion of the trust estate, and to continue notes and mortgages upon or after maturity with or without renewal or extension upon such terms as it may deem advisable, without reference to the value of the mortgage security at the time of such continuance.

J. Separate Shares of Trust: To hold and retain the principal of the trust estate and any property subject to a power undivided until actual division shall become necessary in order to make distributions; to hold, manage, invest and account for the several shares or parts thereof by appropriate entries on the Trustee's books of account; and to allocate to each share or part of share its proportionate part of all receipts and expenses; but the carrying of several trusts as one estate shall not defer the vesting in title or in possession of any share or part of share of the trust estate.

K. Manner of Distributions: Except as otherwise expressly provided elsewhere herein, to make any division or distribution in cash or in kind, or partly in cash and partly in kind, on the basis of market values at the time of such division or distribution, or if there be no recognized market value, at the fair value thereof, without regard to the income tax basis of particular assets, and without any requirement of pro rata or homogenous division or distribution. Any determination of recognized market value or fair value of any security or property made by the Trustee for the purposes hereof shall be deemed presumptively correct.

L. Employment of Agents: To employ agents, attorneys and any other
attorney and other agents.

persons whose services may reasonably be required in connection with the administration of the trust estate from time to time, and to pay reasonable compensation therefor. In addition, the Trustee may refer any legal question to legal counsel and the Trustee shall be fully protected for anything done, suffered, or omitted to be done in reliance on advice of such counsel.

M. Subdivision of Trust Property: The Trustee is authorized and empowered in its discretion to divide any trust hereunder which would otherwise have a GST inclusion ratio between one and zero, to the extent possible and before the allocation of GST exemption, into two separate trusts (herein sometimes referred to as “Related Trusts”) representing fractional shares of the property being divided, so as to permit one trust, after the allocation of any GST exemption, to have an inclusion ratio of zero; to make discretionary distributions taking any GST implications into account; to allocate property upon the division or distribution of a trust, to the maximum extent practicable, from a trust having an inclusion ratio of zero to a trust or share which is more likely to result in a generation-skipping transfer, and from a trust having an inclusion ratio of other than zero to a trust or share which is less likely to result in a generation-skipping transfer; and to treat additions or allocations of property to any trust as being made to a separate trust or trusts, so as to segregate property subject to different GST treatment, and if property is to be added or allocated to a separate trust which would result in a change in the inclusion ratio of such separate trust, the Trustee may, prior to the addition or allocation, create Related Trusts in such manner that, following such addition or allocation, one of the Related Trusts shall have an inclusion ratio of zero and the other of the Related Trusts shall have an inclusion ratio of one, each of the Related Trusts having the same terms as such separate trust, except as otherwise provided in this Agreement. Property allocated to the Related Trust with an inclusion ratio of zero shall be at the value of the property at the date of allocation. The Related Trusts shall each receive their proportionate share of any accumulated income. For purposes of this Agreement, “inclusion ratio” shall be defined as provided in Section 2642 of the Code.

N. Principal/Income Determinations: To determine equitably, in the discretion of the Trustee, how any money or other property in the trust estate or received by the Trustee, or any gain or loss realized or incurred, shall be allocated as between income and principal, and how any loss or expenditure in connection with the trust estate shall be apportioned between income and principal, except that:

1. in the case of securities purchased at a discount, the entire subsequent sale price or maturity value shall be credited to principal; and
2. in the case of securities purchased at a premium, the premium shall be charged against principal without amortizing the same.

O. Execution of Instruments: To make, execute, acknowledge and deliver any and all deeds, leases, assignments and other legal instruments in writing, and to do all acts, which it may deem advisable to carry out any of the powers conferred herein. No person dealing with the Trustee shall be obliged to inquire into the validity of any action taken by such Trustee or be bound to see to the application of any money or other property paid or delivered to the Trustee.

P. Real Estate: To improve, manage, operate, protect, repair and subdivide any real property at any time forming a part of the trust estate; to dedicate parks, streets, highways, or alleys; to vacate any subdivision or part thereof and to resubdivide the same as often as desired; to mortgage or lease, or both, regardless of the length of the term, and to grant options to lease and options to renew leases and options to purchase the whole or any part of the reversion and to contract respecting the manner of fixing the amount of present or future rentals; to partition said property, or any part thereof; and to grant easements or charges of any kind, and to release, convey or assign any right, title or interest in or about any easement appurtenant to any property or part thereof.

Q. Life Insurance: To acquire as an asset of any trust a life insurance policy on the life of any person to whom the income of the trust is payable, or on the life of any person in whom such income beneficiary has an insurable interest or to acquire any other insurance products, from such companies and from such agents or brokers, including, but not limited to, UMB Insurance, Inc., and in such amounts as the Trustee may deem advisable; to pay premiums on all such insurance policies or other insurance products, from income or principal, or both (other than income or principal of the Marital Trust with regard to any policy of life insurance unless Grantor's spouse consents to such payment), as the Trustee may determine; and all such insurance shall be payable to, and all incidents of ownership vested in, the Trustee. Grantor acknowledges that UMB Insurance, Inc. is a wholly-owned subsidiary of UMB Bank, n.a., [an affiliate of] the Trustee, and accepts that UMB Insurance, Inc. will be paid a commission from the trust property for any policies of life insurance or other insurance products sold to the Trustee by UMB Insurance, Inc. Grantor recognizes that the Trustee, [UMB Bank, n.a.] UMB Financial Corp. and/or one or more of their affiliates may benefit by realizing a profit, in addition to the Trustee's fees under this Trust Agreement, from engaging in purchases and sales of life insurance policies or other insurance products between or among each
other, and Grantor authorizes the Trustee, [UMB Bank, n.a.,] UMB Financial Corp., and/or one or more of their affiliates so to benefit.

R. Foreclosure of Property: To retain property acquired through foreclosure or taken over without foreclosure for such time as it shall deem advisable, and to dispose of such property by sale, exchange or otherwise upon such terms and conditions as it shall deem advisable.

S. Hazard Insurance: To carry such insurance against such hazards, including public liability, and in such amounts in either stock companies or mutual companies and to acquire insurance against hazards from such agents or brokers, including but not limited to, UMB Insurance, Inc., as it shall deem advisable and to pay the cost thereof. Grantor acknowledges that UMB Insurance, Inc. is a wholly-owned subsidiary of UMB Bank, n.a., [an affiliate of] the Trustee, and that UMB Insurance, Inc. will be paid a commission from the trust property for any such policies of insurance or other insurance products sold to the Trustee by UMB Insurance, Inc. Grantor recognizes that the Trustee, [UMB Bank, n.a.,] UMB Financial Corp. and/or one or more of their affiliates may benefit by realizing a profit, in addition to the Trustee's fees under this Trust Agreement, from engaging in purchases and sales of such insurance policies or other insurance products between or among each other, and Grantor authorizes UMB Insurance, Inc., the Trustee, [UMB Bank, n.a.,] UMB Financial Corp., and/or one or more of their affiliates so to benefit.

T. Reserves: To establish, from rents, profits, or other income received, such reserves for taxes, assessments, insurance premiums, repairs, improvements, depreciation, obsolescence and general maintenance of buildings and other property, and for the equalization of payments to or for beneficiaries entitled to receive income, as it shall deem advisable.

U. Continuation and Participation in Business Interests: To have all powers necessary to deal with any business or enterprise which constitutes an asset of the trust estate, whether such interest is a proprietorship, corporation, partnership, limited partnership, limited liability company or other business entity, including the power: (i) to retain any business interest transferred to the Trustee, as shareholder, security holder, creditor, partner, member or otherwise, for any period of time whatsoever, even though the interest may constitute all or a large portion of the trust principal and to continue or participate in the operation of any business or other enterprise, with full power to act in a fiduciary capacity as partner, joint venturer, member or
otherwise, whether or not the Trustee or any other person affiliated with, employed by or related to the Trustee may also have an interest, in an individual capacity, in such business or enterprise; (ii) to enter into or to comply with and/or carry out the terms of the provisions of any agreement restricting the transfer of such business interest; (iii) to retain and employ the capital of any such business, to participate in the conduct of the related business or rely upon others to do so, and to take or delegate to others discretionary power to take any action with respect to its management and affairs which an individual could take as outright owner of the business or the business interest, including the voting of stock (by separate trust or otherwise regardless of whether that separate trust will extend for a term within or beyond the term of the trust) and the determination of all questions of policy; (iv) to execute and amend partnership, operating or other agreements, to participate in any formation, incorporation, reorganization, merger, consolidation, sale of assets, recapitalization, liquidation or dissolution of the business, or any change in its nature, or in any buy-sell, stock restriction, or stock redemption agreements; (v) to invest in additional stock or securities of, or make secured, unsecured, or subordinated loans to the business with trust funds; (vi) to take all appropriate actions to prevent, identify, or respond to actual or threatened violations of any environmental law or regulation thereunder; (vii) to elect or employ with compensation, as directors, officers, employees, or agents of the business, any persons, including a Trustee of any trust held under this Agreement, or any director, officer, employee, or agent of a corporate Trustee of any trust held under this Agreement, without adversely affecting the compensation to which that Trustee would otherwise be entitled; (viii) to rely upon reports of certified public accountants as to the operation and financial condition of the business, without independent investigation; (ix) to deal with and act for the business in any capacity (including in the case of a corporate Trustee any banking or trust capacity and the loaning of money out of the Trustee’s own funds); and (x) to sell or liquidate the business or any interest in the business. The Trustee shall be free from all responsibility for losses arising in the prosecution of any such business; all profits and losses therefrom shall be those of the trust estate and not of the Trustee.

V. General and Limited Partnership Interests: To retain or acquire partnership interests as an asset of any trust created under this Agreement and to form or participate in the formation of one or more partnerships, by the contribution of trust assets to such partnership in return for an interest in such partnership or otherwise. In addition to the powers granted to the Trustee in the preceding Paragraph, the Trustee shall have the power to: (i) enter into, amend or modify any partnership agreement, as a general or limited partner or otherwise; (ii) participate in the conduct of such partnership or rely upon
other to do so, and to take or delegate to others discretionary power to take any action with respect to the management and affairs of the partnerships which an individual could take as outright owner of the partnership interest and to execute and deliver all instruments authorized or required under any such operating agreement or otherwise, necessary or desirable in the formation or operation of such partnerships; and (iii) make such tax elections or participate in such agreements for tax purposes as authorized under the Code, including (a) requesting any such partnership to file an election pursuant to Section 754 of the Code in the case of a distribution of a partnership property pursuant to Section 734 of the Code or a partnership transfer as provided in Section 743 of the Code, whether such interest is held by the trust or the Grantor’s estate and (b) entering into any such partnership agreement or modification under which taxable income or loss, or any item of taxable income or loss, is specifically allocated to a certain partner or partners pursuant to Sections 702 and 704 of the Code.

W. Limited Liability Company Interests: To retain or acquire limited liability company interests as an asset of any trust created under this Agreement and to form or participate in the formation of one or more limited liability companies, by the contribution of trust assets to such limited liability company in return for an interest in such limited liability company or otherwise. In addition to the powers granted to the Trustee in Paragraph U. above, the Trustee shall have the power to: (i) execute and deliver to the appropriate governmental offices any and all documentation necessary or advisable for the formation and operation of the limited liability company including articles of organization or other instruments related to the formation, organization or operation of a limited liability company and any instruments required in order to register any such limited liability company to conduct business, operate or own or control any interest in any foreign state, nation or territory; (ii) enter into, amend or modify any operating agreements or other agreements related to the formation or operation of any such limited liability company, whether as a member, holder of an income interest or otherwise; (iii) participate in the conduct of such limited liability company or rely upon others to do so, and to take or delegate to others discretionary power to take any action with respect to the management and affairs of the limited liability companies which an individual could take as outright owner of the limited liability company interest and deliver all instruments authorized or required under any such operating agreement or otherwise, necessary or desirable in the formation or operation of such limited liability companies; and (iv) make such tax elections or participate in such agreements for tax purposes as authorized under the Code, including (a) requesting any such limited liability company to file an election pursuant to Section 754 of
the Code in the case of a distribution of limited liability company property made pursuant to Section 734 of the Code or a transfer as provided in Section 743 of the Code, whether such interest is held by the trust or the Grantor’s estate and (b) entering into any such operating agreement or any other agreement related to the formation or operation of any such limited liability company, or any amendment or modification thereto, under which taxable income or loss, or any item of taxable income or loss, is specifically allocated to any one or more members or income interest holders pursuant to Sections 702 and 704 of the Code.

X. **Merger:** To the extent not inconsistent with the provisions regarding the Marital Trust, to consolidate, merge and commingle, in whole or in part, at any time, the funds and property constituting the trust or any separate share thereof with those funds or property of any other trust estate held and administered for the same beneficiary or beneficiaries, provided that the terms of said trust are coincident to such an extent that there will be no conflict in the administration or GST inclusion ratio thereof, and to this end the Trustee may establish a common system of accounting wherein the two or more trust estates shall be treated as one, provided, however, that no trust may be merged with any other trust unless both trusts have the same GST inclusion ratio.

Y. **Rely on Information Received:** To rely upon any information, affidavit, certificate, letter, notice, telegram, facsimile, e-mail or other electronic communication or other document, or upon any telephone conversation believed by it to be genuine and sufficient.

Z. **Lend to Grantor’s Estate:** To lend funds of the trust estate to Grantor’s estate, upon such terms and conditions as the Trustee shall approve.

AA. **Security Transactions:** To buy, sell and trade in securities of any nature, including short sales, on margin, and for such purposes the Trustee may maintain and operate margin accounts with brokers, and to pledge any securities held or purchased by them with such brokers as security for loans and advances made to the Trustee and to place security transactions through any broker of the Trustee’s choice, including but not limited to UMB Financial Services, Inc. and the Investment Banking Division of UMB Bank, n.a., [an affiliate of] the Trustee. Grantor recognizes that, if security transactions are placed through UMB Financial Services, Inc., or the Investment Banking Division of UMB Bank, n.a., [an affiliate of] the Trustee, [UMB Bank, n.a.,] and/or UMB Financial Corp. may realize a profit from such transactions in addition to its fees under this Trust Agreement, and that in certain cases the Investment Banking Division of UMB Bank, n.a., may be an underwriter, either individually or as a member of a syndicate, of securities which may be purchased through such
Division, and Grantor authorizes UMB Financial Services, Inc., the Investment Banking Division of UMB Bank, n.a., [an affiliate of] the Trustee, [UMB Bank, n.a.,] UMB Financial Corp., and/or one or more of their affiliates so to benefit.

These provisions have been added to allow the Trustee to deal with related parties.

Discretion of Trustee is absolute and uncontrolled except as to ascertainable standard for distributions.

Environmental provisions.

BB. Related Party Transactions: To enter into any transaction authorized hereunder with the Personal Representative of Grantor’s estate, with any beneficiary of Grantor’s estate or of this trust, with the Personal Representative of the estate of any beneficiary and with the Trustee of any other trust created by Grantor and any trust created by any beneficiary, even though the Personal Representative, beneficiary or Trustee is also a Trustee under this Agreement.

CC. Exercise of Discretion: If the Grantor has given the Trustee discretion concerning distributions of income or principal, that discretion shall be absolute and uncontrolled, and subject to correction by a court only if the Trustee should act utterly without reason, in bad faith or in violation of specific provisions of this Agreement. If the Grantor has set forth general guidelines (as opposed to directions or dollar limits) for the Trustee in making distributions, those guidelines shall be merely suggestive and shall not create an enforceable standard whereby a distribution could be criticized or compelled. It is the Grantor’s strong belief that the Trustee will be in the best position to interpret and carry out the intentions expressed herein under changing circumstances. This Paragraph shall not, however, apply to any standards framed in terms of health, education, maintenance and support (including support in an accustomed manner of living) as those words shall create an ascertainable standard for Federal tax purposes when applied to a Trustee’s power or a power held individually, although even in those cases the holder of the power shall have as much discretion as is consistent therewith.

ARTICLE FOUR: ENVIRONMENTAL PROVISIONS

A. Pre-Acceptance Review: The Trustee, in its discretion, may require, as a prerequisite to accepting any property, real or personal, to be added to the trust, evidence satisfactory to the Trustee that (i) the property is not contaminated by any hazardous or toxic materials or substances; and (ii) the property is not being used and has never been used for any activities directly or indirectly involving the generation, use, treatment, storage, disposal, release, or discharge of any hazardous or toxic materials or substances.

B. Use of Trust Funds: To the extent not inconsistent with the provisions regarding the Marital Trust, the Trustee shall have the power to use and expend trust income and principal to (i) conduct environmental assessments, audits, and site monitoring to determine compliance with any
environmental law or regulation thereunder; (ii) take all appropriate remedial action to contain, cleanup or remove any environmental hazard including a spill, release, discharge or contamination, either on its own accord or in response to an actual or threatened violation of any environmental law or regulation thereunder; (iii) institute legal proceedings concerning environmental hazards or contest or settle legal proceedings brought by any local, state or Federal agency concerned with environmental compliance, or by a private litigant; (iv) comply with any local, state or Federal agency order or court order directing an assessment, abatement or cleanup of any environmental hazards; and (v) employ agents, consultants and legal counsel to assist or perform the above undertakings or actions. Any expenses incurred by the Trustee under this Article may be charged against income or principal as the Trustee shall determine.

C. Limitation of Liability: No Trustee shall be liable for any loss or depreciation in value sustained by the trust as a result of the Trustee retaining any property upon which there is later discovered to be hazardous materials or substances requiring remedial action pursuant to any Federal, state, or local environmental law, unless the Trustee contributed to the loss or depreciation in value through willful default, willful misconduct, or gross negligence.

D. Ability to Withhold Distributions: Notwithstanding any contrary provision of this Agreement, the Trustee may withhold a distribution (other than the income of the Marital Trust which shall be payable to Grantor's spouse, in all events) to a beneficiary until it receives from the beneficiary an indemnification agreement in which the beneficiary agrees to indemnify the Trustee against any claims filed against the Trustee as an "owner" or "operator" under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq., as from time to time amended, or any regulation thereunder, or under any other Federal, state or local environmental law.

ARTICLE FIVE: ADDITIONS

Grantor or any other person may, at any time and from time to time, transfer, deliver, bequeath or devise to the Trustee additional cash or other property acceptable to it which shall thereupon become a part of the trust estate and shall be held, managed and distributed by the Trustee, in accordance with and subject in all respects to the provisions of this Agreement. Any property, whether originally or subsequently transferred to the Trustee, may be commingled and treated as part of a single trust.
ARTICLE SIX: ALLOCATION OF INCOME ON SECURITIES

The Trustee shall be entitled to all income accrued and unpaid on any securities at the time of their receipt, and subject to the provisions of Article Three, Paragraph N of this Agreement, the same shall be income. No dividend, the record date of which is prior to the delivery to Trustee of the shares on which such dividend is declared, shall become property of the trust.

ARTICLE SEVEN: TRANSACTIONS WITH GRANTOR’S ESTATE/PAYMENT OF DEBTS, EXPENSES AND TAXES

A. Purchases from Grantor’s Estate: The Trustee shall at any time during the administration of Grantor's estate purchase with trust funds at the market value thereof at the time of purchase, any securities or other property tendered to it by the Personal Representative of Grantor's estate. In case of uncertainty as to the market value of any property, it shall be fixed by the Trustee and the Personal Representative of Grantor's estate, and their determination as to such value shall be binding and conclusive upon all persons claiming under this Agreement. If they shall be unable to agree, such value shall be determined by an appraiser to be agreed upon and appointed by them and his or her determination shall be conclusive in like manner. The expenses of any such appraisal shall be borne by the Personal Representative of Grantor's estate.

B. Payment of Debts, Expenses and Taxes:

1. Personal Representative Appointed: If there shall be a Personal Representative of Grantor's estate, the Trustee shall pay such of Grantor's debts, expenses of administration, and any estate, inheritance, legacy, succession and transfer taxes, including penalties or interest thereon, which are to be paid by the Personal Representative of such Grantor's estate under the terms of Grantor's Will or otherwise, and any other lawful charges against Grantor's estate, as the Personal Representative of Grantor's estate shall direct the Trustee in writing, and the determination by the Personal Representative of Grantor's estate of the validity and amount of the same shall be final and binding upon the Trustee. The Trustee shall pay to the Personal Representative of Grantor's estate, or may pay directly to the appropriate creditors or taxing authorities, the amount required for such purposes. The Trustee may rely, without inquiry, upon the written statement of the Personal Representative of Grantor's estate as to the amount of such debts, expenses, taxes and charges and the assets available for payment thereof. The Trustee may distribute such
amount at one time or in installments.

2. **No Personal Representative Appointed:** If there shall be no Personal Representative of Grantor's estate, the Trustee is directed to pay with no right of reimbursement or contribution, all estate, inheritance, legacy, succession and transfer taxes (including any interest or penalties thereon) which become payable by reason of Grantor's death (whether or not property subject to any such taxes are assets of this trust and whether such taxes be payable by the Trustee or by the recipient of any such property) (and Grantor hereby waives payment of the same by any such recipient), except (i) any tax imposed on any Qualified Terminable Interest Property (as defined in the Code) held in trust for the benefit of the Grantor; and (ii) any tax imposed on any generation-skipping transfer, as defined by the Code. The Trustee shall pay Grantor's debts and the expenses of Grantor's last illness, funeral and burial, lawful claims for which are filed with the Trustee by the appropriate creditors. The decision of the Trustee as to the validity of such taxes, debts and expenses shall be binding upon all beneficiaries of the trust.

3. **Allocation:** All of the foregoing payments shall be charged first against the Non-Marital Trust, and to the extent that the Non-Marital Trust is insufficient, against property of the Marital Trust that does not qualify or is not elected to qualify for the Federal estate tax marital deduction, if any, and to the extent that such property of the Marital Trust and the Non-Marital Trust together are insufficient, against other property of the Marital Trust. Further, in no event shall any asset not includable in Grantor's gross estate, assets not subject to the claims of Grantor's creditors or any qualified retirement plan or individual retirement account assets be used to make any of the foregoing payments. The Trustee may delay distribution to beneficiaries of trust principal until the entire amount to be paid under this Article Seven shall have been paid or provided for. The Grantor makes specific reference to the following Code Sections: 2206 (concerning tax on life insurance), 2207 (concerning tax on property included in the gross estate under Code Sec. 2041), 2207A (concerning tax on QTIP property), 2207B (concerning tax on property included under Code Sec. 2036) and 2603(b) (concerning GST tax), and to corresponding provisions of state law, and directs that they shall apply to the extent they are consistent with the foregoing provisions of this Paragraph B and shall not apply to the extent they are inconsistent with such provisions.

[C. Estate Tax Return Preparation:] If there shall be no Personal Representative of Grantor’s estate, to the extent a United States Estate (and Generation-Skipping Transfer) Tax Return, or other similar return, is not otherwise required to be filed due to the size of the Grantor’s estate, the Trustee
shall, upon written direction from Grantor’s spouse (or the Personal Representative of such spouse’s estate if such spouse survived the Grantor but died thereafter and prior to the deadline for filing such return), cause such return to be prepared and filed, provided that [the cost of such preparation and filing shall be paid out of the assets of the Non-Marital Trust to the extent possible, otherwise] the cost of such preparation and filing shall be paid by the Grantor’s spouse (or from the Grantor's spouse's estate, as the case may be) and not from the Trust estate. The Trustee shall conclusively and without liability rely on the written direction provided by the Grantor’s spouse or the Personal Representative of Grantor's spouse's estate, as the case may be, and to the extent the Trustee has not received such written direction from such spouse or Personal Representative of Grantor's spouse's estate, as the case may be, within six (6) months from the date of Grantor’s death, the Trustee may presume that no such return shall be filed and the Trustee shall be relieved of any liability or responsibility for filing such return.]

**ARTICLE EIGHT: SIMULTANEOUS DEATH**

If Grantor's spouse shall die simultaneously with Grantor or under circumstances as to render it difficult or impossible to determine who predeceased the other, said spouse shall be deemed to have survived Grantor notwithstanding the provisions of any law establishing a different presumption or order of death.

If any legatee, devisee or beneficiary other than Grantor's spouse shall die simultaneously with Grantor or under such circumstances as to render it difficult or impossible to determine who predeceased the other, Grantor shall be deemed to have survived such legatee, devisee or beneficiary and the provisions of this Agreement shall be construed upon that assumption.

[The provisions made herein and in Grantor's Will for Grantor's spouse, shall be in lieu of such spouse's marital rights and all other rights in Grantor's estate except for exempt property and the statutory allowance for support, and, in the event such spouse validly elects to take against said Will, then the trust estate shall be administered and distributed in the manner provided herein as though Grantor's spouse had predeceased Grantor].

**ARTICLE NINE: ACCOUNTINGS BY THE TRUSTEE**

The Trustee shall render an account once each twelve months to each beneficiary then receiving or entitled or permitted to receive income or principal
The bracketed material is optional, depending upon Grantor's intent with regard to providing information about the trust estate to beneficiaries other than current beneficiaries. Some jurisdictions may not permit the Grantor to draft around any duty imposed under Uniform Trust Code § 813 to provide information to contingent beneficiaries. Consult applicable law.

NOTE: As of the date of this Form, the Uniform Trust Code has been adopted in Kansas, Missouri, Nebraska and Arizona (in the UMB region), with state-specific modifications. The last optional clause was added to permit the Trustee to utilize Uniform Trust Code § 604 in order to attempt to limit or eliminate the claims of persons as to the validity of a trust that was revocable as of the date of the Grantor’s death.

Court supervision not required.

Trustee’s compensation.

Provisions have been from any trusts hereunder. The account shall show the receipts, disbursements and distributions of principal and income since the last accounting, and the invested and uninvested principal and the undistributed income on hand at the time of the accounting. If no objection shall be made to any account so rendered within ninety (90) days after a copy thereof has been deposited in the mail addressed to any person entitled thereto, as above provided, such person shall be conclusively presumed to have approved or assented to all actions reflected in the account so rendered. [To the extent not prohibited by applicable law, the Trustee shall not account, notify or provide other information concerning the trust estate or any interest in the trust estate (including, but not limited to, furnishing a copy of this Trust Agreement or any amendments thereto), to any beneficiary hereunder other than those who are then receiving or are entitled or permitted to receive income or principal from any trusts hereunder, despite a request for such information, until such time as the beneficiary is entitled or permitted to receive income or principal from the trust estate, notwithstanding any contrary provision of applicable law. It is Grantor's intention to maintain the privacy and confidentiality of this Trust Agreement and the information in connection with the trusts created hereunder until such time as a beneficiary is entitled or permitted to receive income or principal from the trust estate. Provided, however, if the Trustee determines in its sole and absolute discretion that, in order to limit or eliminate the claims of a person who may commence a judicial proceeding to contest the validity of the Trust Agreement and/or any amendments thereto, that were revocable as of the date of the Grantor’s death, it may provide a copy of the Trust Agreement and any amendments thereto, along with a notice informing such person of the Trustee’s name and address and of the time allowed for commencing a judicial proceeding contesting such validity to any person for such limited purpose.]

Notwithstanding any statute or rule of law to the contrary, no Trustee shall be required to qualify or to file inventories or accountings in any probate or other court.

ARTICLE TEN: TRUSTEE COMPENSATION

In addition to reimbursement of expenses incurred in the performance of
its duties under the trusts hereby created, the Trustee shall receive compensation for its services in accordance with its published schedule of fees, in effect from time to time. To the extent not prohibited by applicable law: (i) the Trustee shall not notify any beneficiary hereunder of a change in the Trustee’s compensation other than those who are then receiving or are entitled or permitted to receive income or principal from any trusts hereunder until such time as the beneficiary is entitled or permitted to receive income or principal from the trust estate; and (ii) any deviation from the Trustee’s published schedule of fees in effect from time to time shall be agreed to by the Trustee and those beneficiaries who are then receiving or are entitled or permitted to receive income or principal from any such trust created hereunder, all notwithstanding any contrary provision of applicable law.

ARTICLE ELEVEN: SUCCESSION OF TRUSTEE

A. Resignation: Any Trustee acting hereunder may resign at any time by delivering not less than thirty (30) days' written notice as follows: (1) during Grantor's lifetime, to Grantor, or if Grantor is incapacitated, then to Grantor’s Guardian, if any, otherwise to a majority of the beneficiaries to whom income may then be payable or permitted to be paid hereunder; and (2) following Grantor's death, to a majority of the beneficiaries to whom income may then be payable or permitted to be paid hereunder.

B. Removal: The Grantor may remove any Trustee by written notice delivered to the Trustee not less than thirty (30) days prior to the effective date of the removal. Upon Grantor’s death, [no beneficiary or beneficiaries shall have the power to remove any Trustee. The Grantor has expressly not provided for the removal of the Trustee of any trust created by this Agreement, other than by the Grantor. It is Grantor’s intention that removal of the Trustee not be permitted, notwithstanding any provisions of this Agreement or any applicable law to the contrary.] [OR] [a majority of the beneficiaries to whom income may then be payable or permitted to be paid hereunder may remove any Trustee by written notice delivered to the Trustee not less than thirty (30) days prior to the effective date of the removal.]

C. Successor Trustee: The persons to whom notice of resignation may be given or the persons who may exercise the power of removal, as the case may be: (i) may, without liability to any present or future beneficiary, approve the accounts of, and give a full and complete release and discharge to, any resigned or removed Trustee with the same effect as if the accounts had been approved by a court having jurisdiction of the subject matter and of all necessary parties; and (ii) upon the failure to qualify, declination, resignation,
Protection for a Successor Trustee.

or removal of any corporate Trustee or if a corporate Trustee is not then serving for any reason, shall appoint any bank or trust company having a combined capital and surplus of not less than Fifty Million Dollars ($50,000,000), wherever situated, as successor corporate Trustee hereunder. Notwithstanding any contrary provision of this Agreement or any applicable law to the contrary, no successor Trustee shall be liable or responsible for any act or default of any predecessor Trustee or for any loss or expense resulting from or occasioned by anything done or neglected to be done in the administration of the trust estate prior to its becoming a Trustee nor shall it be required to inquire into or take any notice of the prior administration of the trust estate.

D. Successor by Merger: The name "UMB Bank, n.a.,” shall include its successor and successors and any corporation into which it may be merged or with which it may be consolidated and the successor or successors of any such merged or consolidated corporation and any corporation to which the fiduciary business of said bank may at any time be transferred.

E. Successor Trustee Powers: All the estate, powers, trusts, duties and discretion anywhere herein created or conferred, shall be held, possessed or exercised by and shall extend to any Trustee hereunder, whether such be the Trustee named herein or its successors or substitutes. No bond shall be required in any jurisdiction of any Trustee acting hereunder.

ARTICLE TWELVE: GOVERNING LAW

This instrument shall be construed and administered, and the validity of the trusts hereby created shall be determined, in accordance with the laws of the State of _______________. The Trustee shall have no duty to monitor whether the trusts created herein are being administered at a place appropriate to the trust’s purposes, its administration and the interests of the beneficiaries.

ARTICLE THIRTEEN: DEFINITIONS AND MISCELLANEOUS PROVISIONS

In the interpretation or construction of the provisions of this instrument and in the administration of any trust created under this Agreement, the

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UMB-2 (7-14)
Declaration as to spouse.

Inclusion of afterborn and adopted descendants.

Declaration as to children. It is helpful to include dates of birth if possible.

Gender.

Personal Representative deemed to mean Executor.

Incapacitated defined.

These provisions allow release of confidential medical information which may be restricted under HIPAA. NOTE: This release will likely apply only to information concerning the Grantor. It is possible that any

following shall govern and control:

A. Declaration as to Spouse: The Grantor is presently married to ________________, and all provisions for the Grantor's spouse refer to such spouse. If the Grantor is not married to such spouse at Grantor's death, all provisions for such spouse's benefit under this Agreement shall be null and void and such spouse shall be deemed to have predeceased the Grantor for purposes of this Agreement.

B. Afterborn and Adopted Descendants: All references herein to Grantor's children or descendants are intended to include children and descendants of Grantor born before and after the execution of this Agreement and such after-born children and descendants shall have no rights in the trust other than those granted by this Agreement. If a person (the "Adoptee") is legally adopted by another person (the "Adopter"), then the Adoptee shall be deemed to be a child and a descendant of the Adopter, and a descendant of the Adopter's ancestors, and the descendants of the Adoptee shall also be deemed to be descendants of the Adopter and the Adopter's ancestors, for all purposes of this Agreement, but only if the Adoptee is legally adopted by the Adopter before the Adoptee attains eighteen (18) years of age.

C. Declaration as to Children: As of the date of this Agreement the Grantor has the following living children, _______ (DOB), _______ (DOB) and _______ (DOB), and has no deceased children.

D. Gender: The masculine gender shall be deemed, where appropriate, to include the feminine or neuter, and the singular the plural, and vice versa.

E. Personal Representative: All references herein to the Personal Representative of a person's estate shall also include any Executor and any successor or successors thereto.

F. Incapacitated: A person shall be deemed to be incapacitated for all purposes of this Agreement if (i) such person is a minor; (ii) such person has been duly adjudged an incapacitated person, a disabled person, an insane person or an incompetent person by any court of competent jurisdiction and a legal guardian or other fiduciary for such person's estate has been appointed; or (iii) a person's ability to receive and evaluate information effectively or to communicate decisions, or both, is impaired to such an extent that the person lacks the capacity to manage such person's financial resources, as determined by certification of one licensed physician; or (iv) such person is someone who cannot take any needed actions due to involuntary detention or disappearance,
HIPAA authorization language built into the Trust Agreement itself would not be deemed as meeting the requirements for a valid authorization under 45 CFR § 164.508 (which requires, for instance, that the authorization not be combined with other items). Therefore, consider also requiring Grantor to sign a separate authorization form.

G. Guardian: The term “Guardian” includes a natural or legal guardian of the person and, unless the context requires otherwise, a natural or legal guardian or conservator of the estate.

H. Action by or Notice to Incapacitated Beneficiaries: If any beneficiary is incapacitated, any action to be taken by the beneficiary, or any notice or statement to be given to the beneficiary, may be taken by or given to a Guardian of such beneficiary, if any, or if none, then to a parent or an adult relative of, or other individual who is caring for, such beneficiary, as determined in the sole and absolute discretion of the Trustee. The Trustee shall not be liable or responsible for any action or inaction under this Paragraph.

I. Per Stirpes: Whenever any income is to be paid or property is to be distributed to a person's then living descendants "per stirpes," initial division into equal shares shall be made at the oldest generation level occupied by at least one then living person.

J. Conflicts With State Law: In the event of a conflict between the provisions of this Agreement and any statute or rule of law to the contrary, including, but not limited to, any prudent investor or prudent man law, then the provisions of this Agreement shall control.

K. Captions: The captions of Articles and Paragraphs appearing in this Trust Agreement are for convenience of reference only and shall have no significance in the construction or interpretation of this Trust Agreement.
L. Federal Tax Provisions/Definitions:

1. Determination Based on Federal Estate Tax: Any determination which is based on Federal estate tax value of the assets shall be so determined to the extent such determination is possible. However, if such a determination is not possible (i.e., there is no Federal estate tax) at such time the determination is to be made, the value shall be determined by the Trustee in its sole and absolute discretion.

2. Internal Revenue Code (“Code”) Defined: References to the Internal Revenue Code (the “Code”) shall refer to the Internal Revenue Code of 1986, as amended, and reference to any provision or section of that Code shall be deemed to refer to the provision or section of the Federal tax law, in effect on the date of Grantor's death or other relevant date, that corresponds to the provision or section referred to that was in effect at the time of the execution of this instrument. Notwithstanding the provisions of the previous sentence, if there is no provision or section of the Federal tax law at the date of Grantor’s death or other relevant date that corresponds to such provision or section, then for any purpose (other than for value determinations covered in Subparagraph 1 above), even if not for all purposes or references to a provision or section of the Federal tax law, a reference to a provision or section of the Federal tax law shall nevertheless, in the Trustee’s sole and absolute discretion be deemed to refer either to (i) the provision or section that was in effect at the time of the execution of this instrument or (ii) the provision that was in effect immediately before the provision or reference became inapplicable.

3. Savings Clause: The provisions of this Paragraph L shall not apply if their inclusion in this Agreement would cause any property passing under this Agreement that would otherwise qualify for the Federal estate tax marital deduction, charitable deduction, special use valuation or a qualified disclaimer, to fail to qualify. The Trustee shall not bear any liability for any action taken or nonaction or any decision made by the Trustee pursuant to the power granted to the Trustee under the terms of this Paragraph and the Trustee may, in its sole and absolute discretion, rely on the opinion of legal counsel retained by the Trustee in exercising its discretion under this Paragraph L.

ARTICLE FOURTEEN: TRUSTEE’S ACCEPTANCE

The Trustee [acknowledges receipt from Grantor of the property described in Schedule #___ hereto annexed and] accepts the trust upon the terms herein set forth.
ARTICLE FIFTEEN: GRANTOR’S RIGHTS RESERVED

A. Revocation and Amendment: Grantor expressly reserves the right, at any time and from time to time, to alter, amend and revoke this Agreement, in whole or in part, by duly executed instrument delivered to the Trustee. No amendment shall be made, however, which shall in any way increase the obligations of the Trustee hereunder or change its rights or duties without its written consent. Upon any revocation, the Trustee shall deliver to Grantor, against receipt, any property on hand as to which the Trust has been revoked, together with such supporting instruments as may be necessary to release any interest the Trustee may have in or to such property. The manner provided in this Paragraph for altering, amending and/or revoking this Agreement, as the case may be, shall be the exclusive method for such alteration, amendment or revocation, notwithstanding any contrary provision of applicable law.

B. Duties Owed Exclusively to Grantor: As long as Grantor is living (even if the Grantor is then incapacitated), the Trustee shall owe its duties exclusively to Grantor, notwithstanding any provisions of this Agreement, any statute or rule of law to the contrary.

ARTICLE SIXTEEN: LIMITED POWER OF AMENDMENT

Regardless of any provisions of this Agreement to the contrary, if the Grantor becomes incapacitated, or after any trust created herein becomes irrevocable by Grantor’s death or otherwise, the Trustee may, but need not, from time to time, amend the provisions of this Agreement in order to (i) take into account changes in Federal or state tax laws or other laws, or other changes that may affect any trust hereunder or its beneficiaries, and (ii) take into account trust administration problems or otherwise improve the administration of the trust, all in such manner as the Trustee, in its sole discretion, shall deem appropriate and in accordance with the original intent of the Grantor in light of the then circumstances as such original intent is determined by the Trustee. This power of amendment of the Trustee shall include, but not be limited to, the right to:

A. Power of Appointment: Change the terms of any power of appointment;

B. Rights of Beneficiaries: Change the provisions with regard to any
beneficiary’s right of withdrawal of trust principal following the death of Grantor, including the time when such right of withdrawal may be exercised, and including the right of the Trustee to grant rights of withdrawal of trust principal to a beneficiary following the death of Grantor, and to eliminate an existing right of withdrawal;

C. **Subtrusts:** Provide for the creation of one or more separate subtrusts of any trust or revise the terms of any trust created hereunder to permit trust assets or a trust beneficiary to qualify for any governmental or tax benefit or exemption, or GST tax exemption; permit a beneficiary to disclaim a portion of the trust; or permit shares of “S” corporation stock to be held in a subtrust that satisfies the statutory requirements for a qualifying shareholder;

D. **Restrictions:** Restrict, in any way determined by the Trustee to be beneficial to the trust or a beneficiary, revocably or irrevocably, the future exercise of any power held by any beneficiary or Trustee hereunder; and

E. **Change Situs:** Change the situs of any Trust (and to the extent necessary or appropriate, the trust assets) to a state of the United States (or the District of Columbia) other than the one in which the Trust is then administered and/or to elect that the law of such other jurisdiction shall govern the Trust to the extent necessary or appropriate under the circumstances.

Notwithstanding any other provisions of this Article to the contrary, the Trustee shall not, however, have the power to amend this Agreement in such a manner as to (i) reduce the restrictions or limitations on the limited power of amendment of the Trustee as set forth in this Article; (ii) result in any direct or indirect financial benefit to any individual who is not, at the time of such amendment, already a present or potential future beneficiary of this trust other than merely through the exercise of a power of appointment herein granted; (iii) make any changes that would have the effect of eliminating or reducing any substantial deduction, credit, exclusion or other tax benefit, or significant grandfathered status or a protection from claims of creditors of Grantor, the trust or a beneficiary of the trust; (iv) limit a beneficiary’s rights resulting from transfers from the trust to the beneficiary prior to the time of the amendment; (v) result in any direct or indirect financial benefit to any then acting Trustee, or (vi) suspend or prevent or postpone the absolute vesting of any property in such person beyond the date described in Article Two, Paragraph G of this Agreement. Any such amendment may be made, by an instrument in writing signed by the Trustee and a copy of the amendment shall be delivered to each beneficiary of the trust to whom income may then be payable or permitted to be paid hereunder. The Trustee shall have no duty to monitor the beneficiaries or their circumstances, applicable tax laws and other laws and changes in such
laws, or any trust created hereunder in order to determine whether or not any of the powers and discretions conferred under this Article should be exercised. Any exercise or non-exercise of the powers and discretions granted to the Trustee, including the amending of this Agreement, shall be in the sole and absolute discretion of the Trustee, and shall be binding and conclusive on all persons interested in this trust. The Trustee shall not be liable for the consequences of exercising or not exercising any power or discretion granted under this Article, including exercising or not exercising the power and discretion to amend this Agreement, and, if amended, the terms and provisions of such amendment, but rather the Trustee shall be exonerated from any and all such liability and from any and all liability for the acts or omissions of any other fiduciary. The Trustee may conclusively rely on the opinion of legal counsel retained by the Trustee in the exercise or non-exercise of the powers and discretions granted under this Article or may act or not act without seeking the opinion of legal counsel, all in its sole and absolute discretion.

ARTICLE SEVENTEEN: LIFE INSURANCE

At any time before Grantor's death, Grantor may withdraw any insurance policies deposited hereunder from the possession of the Trustee, pledge or assign them, change the beneficiaries, and receive all dividends, surrender values and other payments on account thereof. The Trustee shall take any steps necessary to enable Grantor to exercise any such rights. The Trustee shall be under no duty to pay, or to see to the payment of, premiums on any policies deposited with it. The Trustee shall have no claim against Grantor's estate by reason of unpaid premiums or loans secured by any such policies or other action of Grantor. After Grantor's death, the Trustee shall make reasonable efforts to collect the proceeds of any policies of insurance payable to it. The Trustee may reimburse itself out of the Trust estate for any advances made in attempting to collect any such proceeds, but it shall not be obligated to bring suit therefor or to compromise, adjust, settle or submit to arbitration any such claim unless and until it shall have been indemnified to its satisfaction for any expense in connection therewith. No insurance company shall be required to see to the application of any money paid to the Trustee.

ARTICLE EIGHTEEN: PERSONS BOUND BY AGREEMENT

This Agreement shall extend to and be binding upon the Personal Representative and assigns of Grantor and upon the successors of the Trustee.
IN WITNESS WHEREOF, this instrument has been executed, as of the day and year first above written by Grantor and on behalf of the Trustee by its officers thereunto duly authorized.

GRANTOR

By

Vice President

UMB Bank, n.a.

TRUSTEE

By

Assistant Secretary

Be sure to update the name if trustee is UMB Trust Company of South Dakota.
STATE OF _________  )
                        ) ss.
COUNTY OF _________  )

On this ___ day of __________, ____, before me, the undersigned, a Notary Public, personally appeared __________, to me known to be the same person described in and who executed the foregoing instrument and acknowledged that [he/she] executed the same as [his/her] free and voluntary act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on the day and year last above written.

____________________ Notary Public in and for ________________County, ________________
My Commission Expires: __________________________

STATE OF _________  )
                        ) ss.
COUNTY OF _________  )

On this ___ day of __________, ____, before me, the undersigned, a Notary Public, personally appeared __________, to me personally known, who, being by me duly sworn, did say that [he/she] is a Vice President of UMB Bank, n.a., a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and was attested by __________, Assistant Secretary of said corporation; that said instrument was signed and sealed on behalf of said Bank as Trustee by authority of its Board of Directors; and they acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on the day and year last above written.

____________________ Notary Public in and for ________________County, ________________
My Commission Expires: __________________________

Notary Public in and for
____________________ County, ________________
My Commission Expires: __________________________
Use this schedule if trust is designated as beneficiary of life insurance policies

SCHEDULE #

The following described insurance policies on the life of ________________, are made subject to the terms and provisions of the foregoing Trust Agreement by designating the Trustee named therein as beneficiary:

<table>
<thead>
<tr>
<th>Company</th>
<th>Policy No.</th>
<th>Face Amount</th>
</tr>
</thead>
</table>

SCHEDULE #

Use this schedule to list assets being placed in trust. Be sure to update the name if trustee is UMB Trust Company of South Dakota

The following described assets of ________________, Grantor, are deposited with UMB Bank, n.a., as Trustee, subject to the terms and provisions of the foregoing Trust Agreement:

Receipt of the above assets is hereby acknowledged this ___ day of ________________, ____.  

UMB Bank, n.a.

By________________

Officer
IRAs and Qualified Retirement Plans

Melinda "Mindy" Ward  
Van Osdol, P.C.  
1000 Walnut, Suite 1000  
Kansas City, MO 64106  
(816) 421-0644  
mward@VanOsdolKC.com

I. OVERVIEW

A substantial portion of the wealth possessed by Americans today consists of tax deferred retirement accounts such as traditional IRAs, 401(k)s and 403(b)s. In 2002, the IRS issued final regulations under IRC Section 401(a)(9) clarifying and simplifying many of the rules applicable to retirement accounts. Treas. Reg sections 1.401(a)(9)-0 through 1.401(a)(9)-9 and Treas. Reg. section 54.4974-2. These rules apply to 401(k)s, 403(b)s and IRAs.

II. RETIREMENT ACCOUNTS PRESENT UNIQUE PROBLEMS

In general, the receipt of inherited property is not subject to income tax. IRC section 102(a). The major exception to this rule is retirement accounts as these accounts represent income that has not been previously taxed. After a taxpayer’s death, income tax will be due on the amounts withdrawn from the taxpayer’s retirement accounts. IRC section 402(a). When dealing with retirement accounts, the primary goal is to allow the taxpayer’s beneficiaries the opportunity to defer this income tax for as long as possible.

An estate planning attorney must deal with all of the following issues regarding a client’s retirement accounts.

- Who will be the primary and contingent beneficiary?
- How long can the beneficiary defer withdrawals from the account and the attendant income tax liability?
- Is there a compelling reason to name a trust as a beneficiary?
- Do any retirement account proceeds passing to a spouse, in trust, qualify for the marital deduction? (See Rev. Rule2006-26)
- What is the most tax efficient source of payment for estate taxes on the retirement account?
III. DISTRIBUTIONS DURING LIFE AND AFTER DEATH

A. Distributions During The Taxpayer’s Lifetime. The required minimum distribution (“RMD”) rules specify how long a taxpayer (and after the taxpayer’s death, the beneficiary) may defer withdrawals from retirement accounts. IRC section 401(a)(9). During life, the taxpayer must generally begin taking withdrawals by April 1 of the year after the taxpayer reaches age 70 ½. This date is referred to as the required beginning date (“RBD”). An IRS table that takes into account the taxpayer’s life expectancy sets the RMD amount the taxpayer must withdraw in each year after the RBD. Treas. Reg. section 1.401(a)(9)-5.

B. Distributions After Death if Spouse is Beneficiary (Spousal Rollovers). A taxpayer can obtain the most favorable income tax results by naming the taxpayer’s spouse directly as the primary beneficiary. A surviving spouse is the only person who has the option of rolling over an inherited retirement account into his/her own IRA and treating the IRA as the spouse’s own. IRC section 402(c)(9) (qualified plans); IRC section 408(d)(3)(C)(ii) (IRAs). Often the simplest way to accomplish the rollover is to retitle the account into the surviving spouse’s name. By rolling over the account, the surviving spouse can defer withdrawals from the account until the spouse turns 70 ½ (any other beneficiary must begin taking withdrawals the year after the taxpayer’s death). In addition, the spouse can name his/her own beneficiaries of the IRA that may use a life expectancy payout. When other beneficiaries die, the RMD continues to be based on the deceased beneficiary’s life expectancy.

C. Distributions After Death if a Non-Spouse is Beneficiary. If someone other than the spouse is the beneficiary, the beneficiary’s RMD depends on whether there is a “Designated Beneficiary” of the account, as that term is specifically defined in Treasury Regulation section 1.401(a)(9)-5. Although individuals are Designated Beneficiaries, estates, states, charities, and business entities are not Designated Beneficiaries. Treas. Reg. section 1.401(a)(9)-4.

If there is a Designated Beneficiary and the taxpayer died before the taxpayer’s RBD, then the beneficiary’s RMD is based on an IRS table that takes into account the beneficiary’s life expectancy. If there is a Designated Beneficiary and the taxpayer died after the taxpayer’s RBD, then the beneficiary’s RMD is based on an IRS table that takes into account the longer of the (i) beneficiary’s life expectancy or (ii) taxpayer’s life expectancy. See Treas. Reg. section 1.401(a)(9)-9 for the IRS tables.

If there is no Designated Beneficiary and the taxpayer died before the taxpayer’s RBD, then the beneficiary must withdraw all of the retirement account within 5 years of the taxpayer’s death. If there is no Designated Beneficiary and the taxpayer died after the taxpayer’s RBD, then the beneficiary’s RMD is based on an IRS table that takes into account the deceased taxpayer’s life expectancy. Treas. Reg. section 1.401(a)(9)-5, A-5(a)(2).
The beneficiary may withdraw more than the RMD, but the beneficiary must withdraw at least the RMD each year to avoid a penalty. When a beneficiary takes his RMD based on his life expectancy it is often referred to as a “stretch.” Although life expectancy payouts in IRAs are common, not all IRAs offer this option. Most qualified plans do not allow a life expectancy payout option, as they typically require a lump sum distribution upon death.

D. Roth IRAs. Due to the elimination of the $100,000 income limitation on who can convert a traditional IRA to a Roth IRA in 2010 and future years, there may be more large Roth IRAs coming soon. IRC section 408A(c)(3)(B). The RMDs explained above do not apply to Roth IRAs while the account owner is alive, but RMDs are required after the account owner dies (i.e. the beneficiaries of a Roth IRA are required to take RMDs). IRC section 408A(c)(5). The RMD rules apply to the beneficiaries of a Roth IRA as if the account owner had died before his required beginning date. Treas. Reg. section 1.408A-6, A-14(b).

Unlike traditional IRAs, qualified distributions from Roth IRAs are not subject to income tax. IRC Section 408A. However, it is still important to optimize how long beneficiaries of a Roth IRA can defer withdrawals. The benefit of deferring withdrawals from Roth IRAs for as long possible is that the assets in the account can continue to grow income tax free. In this regard, the advice herein for qualifying the beneficiary of a traditional IRA as a “Designated Beneficiary” also applies to Roth IRAs.

CAUTION: Clients should think carefully before naming a charity as beneficiary of a Roth IRA, as prepaying income taxes on assets being left to an income tax exempt charity is not tax efficient. Compared to a traditional IRA, it is more tax efficient to name grandchildren as beneficiaries of a Roth IRA, as no part of the account will be wasted on the payment of generation-skipping transfer (GST) taxes (or if the client will allocate GST exemption to the account, no GST exemption will be wasted on assets of the account that must go towards the payment of income taxes – as would be the case with a traditional IRA). The advice for naming beneficiaries of Roth IRAs, described above, also applies to Roth 401(k)s.

E. Separate Accounts and Multiple Beneficiaries. If there are multiple beneficiaries of a retirement account, you are deemed to have no Designated Beneficiary, unless all of your beneficiaries are individuals. Treas. Reg. section 1.401(a)(9)-4, A-3. If all of the beneficiaries are individuals, then the RMD is based on the life expectancy of the oldest beneficiary. Treas. Reg. section 1.401(a)(9)-5, A-7(a)(1). However, if separate accounts are “established” for multiple beneficiaries prior to December 31 of the year after the calendar year of the taxpayer’s death, then the RMD rules will apply separately to each such separate account. Treas. Reg. section 1.401(a)(9)-4, A-5(c); Treas. Reg. section 1.401(a)(9)-8, A-2(a)(2). A separate account allows you to calculate the RMD based on the life expectancy of the oldest beneficiary of such separate account (and allows you to ignore a non-individual beneficiary of a different account). CAUTION: To establish separate accounts the beneficiaries interests must be fractional (i.e. not pecuniary). In addition, some affirmative act must establish the separate accounts, such as a physical division of
a single account into completely separate accounts or using separate account language on the
beneficiary designation form. Whenever possible, it is best to create the separate accounts
with appropriate language directly on the beneficiary designation form.

F. Eliminating Unwanted Beneficiaries Prior To September 30th. The deadline for
determining who are the initial beneficiaries of a retirement account is the date of the taxpayer’s
death. However, between the taxpayer’s death and September 30th of the following year,
troublesome or non-individual beneficiaries may be removed by disclaiming the interest
(pursuant to a disclaimer that satisfies IRC section 2518), creating separate accounts, or
eliminating them as beneficiaries by distributing their benefits outright to them. Treas. Reg.
section 1.401(a)(9)-4, A-4(a).

G. Charities as Beneficiaries. As charities are exempt from the income tax, they are
the ideal beneficiaries of retirement accounts for clients with charitable desires. The retirement
account benefits are actually worth more to the charity than other beneficiaries due to this
exemption from income taxes. At the planning stage, clients have a choice of assets to use to fund
their charitable bequests. Attorneys should structure charitable bequests in an estate plan in the
most tax efficient way, which usually means utilizing retirement accounts.

CAUTION: To avoid adverse tax consequences, charitable bequests of retirement account
assets should almost always be made directly on the beneficiary designation form, as opposed to
under a will or trust. If there will be multiple beneficiaries of the account, then care must be taken
to make sure the charitable beneficiary will not disqualify the other beneficiaries from using a life
expectancy payout. There are three ways to avoid losing the life expectancy payout option. First,
the client may divide his retirement account into separate accounts during his lifetime. One account
would contain the assets that will pass to charity upon death and the other account would hold the
excess. The charity would be named as the beneficiary of all of the first account and would have
no interest in the second account. This would qualify as a separate account and the charity would
not effect the other beneficiaries’ use of a life expectancy payout. Second, separate accounts can
be created after death by either using the proper language on the beneficiary designation form or
physically dividing the assets into separate accounts prior to December 31 of the year after the
calendar year of the taxpayer’s death. To qualify for separate account treatment, the charity must
be a beneficiary as to a percentage of the account, not a pecuniary (i.e. dollar) amount. The third
way to ensure a stretch option is available is to pay off the charity prior to September 30 of the
year after the taxpayer’s death. Note that this third option is available even if the charity is to
receive a pecuniary amount. The drawback to this option is that the September 30 deadline may
be missed.
IV. TRUSTS AS BENEFICIARIES

A. Situations In Which Trusts Are Crucial. Due to the complexity associated with qualifying a trust as a Designated Beneficiary, a revocable trust should usually be avoided as the beneficiary of a retirement account. Avoid naming a trust as the beneficiary, unless (i) one of the reasons to name a trust as beneficiary outweighs the time and costs of establishing a see-through trust, (ii) one of the reasons to name a trust is more important than the lost income tax deferral of naming a typical nonsee-through trust as beneficiary, or (iii) a life expectancy payout option or spousal rollover is not important or not available. It is usually best to name individuals directly as the beneficiaries of retirement accounts.

However, in some situations a trust must be named as beneficiary, such as when (i) the beneficiary is a special needs child that relies on government benefits, (ii) the beneficiary is a second spouse that the client wants to have limited access to the trust principal, (iii) the beneficiary is a minor, (iv) the beneficiary is a spendthrift or has substance abuse problems, and (v) when retirement account assets must be used to fund a credit shelter trust. In these situations, the client may decide the reason for the trust outweighs the lost income tax deferral, or may decide a see-through trust is appropriate.

B. What Are See-Through Trusts. A trust that qualifies as a Designated Beneficiary is often referred to as a “see-through trust.” If a taxpayer names a see-through trust as the beneficiary, then the trust may make withdrawals from the account based on the life expectancy of the oldest beneficiary of the trust (i.e. the trust’s RMD is based on the age of the oldest beneficiary). In essence, the trust is ignored and the beneficiaries of the trust are treated as the beneficiaries of the retirement account.

A trust must satisfy five tests to qualify as a Designated Beneficiary see-through trust. The first four tests are as follows: (i) the trust must be valid under state law, (ii) the trust must be irrevocable or become irrevocable at the taxpayer’s death, (iii) the trust beneficiaries must be identifiable, and (iv) certain documentation must be provided to the plan administrator or IRA custodian by October 31 of the year after the taxpayer’s death. Treas. Reg. section 1.401(a)(9)-4, A-5. If these four tests are met, then the trust is a Designated Beneficiary and the RMD will be based on the oldest trust beneficiary’s life expectancy. Treas. Reg. section 1.401(a)(9)-5, A-7(a)(1). But there is, in essence, a fifth test for the trust to be a Designated Beneficiary, as all of the beneficiaries of the trust must be individuals the oldest of whom can be identified. Treas. Reg. section 1.401(a)(9)-4, A-5(c); Treas. Reg. section 1.401(a)(9)-4, A-3. Therefore, the fifth requirement is drafting the trust so that it is possible to determine the identity of the oldest beneficiary, and ensuring only individuals are beneficiaries of the trust. CAUTION: This fifth test often creates problems. In addition, the requirement that the trust beneficiaries must be identifiable could be a problem with multi-generation dynasty trusts (i.e. perpetuity trusts). However, the IRS has not used this requirement in any published rulings to disqualify a trust.
C. **What are Conduit Trusts.** Fortunately, the regulations do set forth a type of safe harbor trust, a “conduit trust,” that has a beneficiary the IRS will treat as a Designated Beneficiary. A conduit trust requires the trustee to distribute all of the retirement account withdrawals to the beneficiary. *See* PLR 200537044. However, the trustee may use conduit trust assets to pay expenses attributable to such assets. PLR 200620026. As the trust may not accumulate any assets withdrawn from the retirement account, the IRS allows the trust beneficiary to be treated as the oldest beneficiary of the retirement account, irrespective of the identity of the remainder beneficiaries. Treas. Reg. section 1.401(a)(9)-5, A-7(c)(3), Example 2. **CAUTION:** Care should be taken to draft the beneficiary designation appropriately when using conduit trusts. Although conduit trusts have the advantage of certainty as they are specifically described in the treasury regulations, they also have a *major disadvantage.* A conduit trust cannot withdraw retirement account proceeds and accumulate them inside of the trust. This is often contrary to the intent of the client, who may be using a trust to prevent the retirement account assets from being distributed to the beneficiary for one reason or another.

Conduit trusts are useful if the client wishes to defer a child’s ability to withdraw more than the RMD until the child is older than 18 or 21 (Transfer to Minors Act custodianships must terminate at one of these ages). In this situation, an independent Trustee may be named with the authority to withdraw the greater of the RMD each year or an amount needed for the child’s health, support and education. The child may be named to take over as sole Trustee at some age, or the independent Trustee may continue to serve for the child’s lifetime. Conduit trusts do not work in many situations where it is important for the Trustee to have the discretion to accumulate the retirement account withdrawals inside of the trust – such as when creditor protection is at issue. In these situations, an accumulation trust should be considered.

D. **What are Accumulation Trusts.** A trust that allows accumulation of retirement account withdrawals – any trust other than a conduit trust (referred to herein as an “Accumulation Trust”) – may also qualify as a Designated Beneficiary. If a trust is not a conduit trust, then under the treasury regulations it is not entirely clear how remote of a contingent beneficiary the IRS will take into account.

E. **Separate Accounts For Trusts.** Treasury Regulation section 1.401(a)(9)-4, A-5(c) provides that the “the separate account rules under A-2 of section 1.401(a)(9)-8 are not available to beneficiaries of a trust with respect to the trust’s interest in the employee’s benefit.” The IRS now takes the position that separate account treatment is not available when a single trust is named as beneficiary. See PLR 200432029. Under the IRS’s interpretation, if all of the separate trusts created under a revocable trust are see-through trusts, then the RMDs of all such separate trusts will be based on the oldest beneficiary of any of the separate trusts, not the beneficiary of the trust at issue. PLR 200235038. **Therefore, whenever possible, on the beneficiary designation form it is best to directly name the separate trusts to be created, as opposed to naming the funding trust.** See PLR 200537044. Separate accounts for trusts are only an issue if each such separate trust is a see-through trust (a Conduit Trust or Accumulation Trust).
V. CONCLUSIONS

One of the most important areas of estate planning is dealing with tax-deferred retirement accounts. Unfortunately, this is an extremely complicated area of law. Becoming familiar with the issues discussed in this article is crucial for estate planning attorneys.

Attorneys should consider the following points when dealing with retirement accounts:

- Retirement accounts present unique problems as withdrawals after the owner’s death trigger income taxes.
- Be mindful of the reasons when income tax deferral is not at issue.
- Consider making charitable gifts from retirement accounts to avoid income and estate taxes after the client’s death (name the charity directly on the beneficiary designation form as to a fractional, not pecuniary, amount).
- Trusts should typically be avoided as beneficiaries, unless income tax deferral is not at issue.
- Draft tax apportionment clauses in wills and trusts to provide for estate tax payments from funds other than the retirement accounts, if other funds are available.
- Ensure beneficiary designation forms are drafted to create separate accounts when multiple beneficiaries are being named under a trust and a life expectancy payout option is desired.
- If there are substantial funds in an IRA, then make sure to ask the IRA custodian the questions above to avoid problems after the owner’s death.
- Always obtain written documentation from the retirement account administrator confirming the beneficiary designation form was accepted.
Representing Family Business Clients

JOSEPH D. GROWNEY
Lathrop & Gage LLP
10851 Mastin Blvd., Suite 1000
Overland Park, KS 66210
913-451-5105
jgrowney@lathropgage.com
I. Identifying the Client

A. Concurrent Representation

1. Representation of multiple family members. The attorney will frequently represent both spouses for estate planning, while also representing their children/grandchildren.
   
a. The importance of engagement letters.
   
b. The attorney may not withhold information.
   
c. What if one family member asks the attorney to keep a secret or makes a request that clearly affects the others?
   
d. The attorney needs to recognize all possible conflicts of interest.
   
e. Inform the parties of the possibility of a conflict prior to accepting the representation.
   
f. Consider obtaining written consents to the proposed representation from all parties.
   
g. If the attorney anticipates potential issues of representing multiple generations of a family, the attorney should recommend that other generations obtain independent counsel.

2. Representation of the family business. Additional conflicts of interest may exist when the attorney also represents the business.
   
a. Frequently, the attorney will meet primarily (exclusively?) with the senior generation owner/founder.
   
b. The attorney must recognize possible duties to the other owners.
   
c. If the attorney does not represent the other owners of the business the attorney should confirm that fact in writing and encourage the other owners to seek independent counsel.
   
d. Careful consideration should be given regarding whether the attorney should represent both the family business and one or more of the owners. If a conflict exists among the owners (or a foreseeable conflict), the attorney should consider only representing either the business or the owner, and recommend independent counsel for the other.
e. Engagement letters and conflict waivers will be critical.

3. Representation regarding business succession plan.
   a. If all of the owners are not in complete agreement regarding a business succession plan, then it is unlikely that one attorney can represent all parties in negotiating and drafting the business succession plan. Each owner should retain separate counsel.
   
b. Consider the attorney only serving as the “scrivener” of the documents.

4. Rule of Professional Conduct (Missouri Rule 4-1.7 and Kansas Rule 1.7):
   a. Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
      i. the representation of one client will be directly adverse to another client; or
      ii. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
   b. Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:
      i. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
      ii. the representation is not prohibited by law;
      iii. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
      iv. each affected client gives informed consent, confirmed in writing.

5. Consent alone is not sufficient. The attorney must reasonably believe that the attorney can provide competent and diligent representation of each party.
6. **Trust administration.** In the context of fiduciary representation, the attorney will frequently represent the trustee, but also one or more beneficiaries of the trust (such as the decedent's spouse and children). Also, as discussed below, the attorney may already have certain legal and ethical duties to all beneficiaries (such as a duty of impartiality). However, certain transactions may present conflicts so severe that the attorney will determine that one or more beneficiaries need separate counsel.

7. **Duties to former clients.** Additionally, the attorney's duties to the former client may require the attorney to withdraw from representing any of the parties. See Rule of Professional Conduct 1.9.

8. **Representing both spouses.** Often the attorney will jointly represent both spouses, which may present a conflict of interest. The attorney should have both spouses sign an engagement letter that outlines the scope of joint representation, including a conflict waiver, and which permits open discussions between the attorney and each spouse.

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II. **Choice of Entity Considerations**

A. **New Business.** If the client is forming the business, entity choice is important and several issues must be considered, including liability protection, tax treatment, and formation requirements and formalities. Each legal structure has advantages and disadvantages, which are outlined below.

1. **Sole Proprietorship**
   a. **Legal Status.** Not a separate legal entity. If operating a business alone without forming an entity, you are a sole proprietorship.
   b. **Liability.** Owner has personal liability for business debts. The owner and the business are not viewed as separate for liability purposes.
   c. **Tax Treatment.** Income generated by the business is reported on Schedule C of the owner’s Form 1040. Business profits and losses are taxed to the owner on a flow-through basis. Owner pays self-employment taxes on income.
   d. **State Filing Requirements.**
      i. **KS – No fictitious name registration in Kansas.** No annual report is filed.
ii. MO – Although no legal filing is required by the Missouri Secretary of State, it is recommended that a fictitious name be registered with the Missouri Secretary of State. No annual report is filed.

2. **General Partnership.**

   a. **Legal Status.** Automatically formed when two or more persons associate themselves together to carry on a business as co-owners for profit.

   b. **Liability.** Partners have personal liability for Partnership debts. The Partners and the Partnership are not viewed as separate for liability purposes. Creditors of the Partnership can collect from any Partner of the General Partnership. A Partner’s liability can even extend to actions of employees of the business acting as agents of the Partnership. May be possible under State law to elect for limited liability protection (e.g., a Limited Liability Partnership).

   c. **Tax Treatment.** Income generated by the Partnership is reported to the Internal Revenue Service by filing a Form 1065. The Partnership reports profits and losses, but Partners pay taxes based upon ownership percentages. Taxed on flow-through basis. Self-employment taxes paid on Partner’s share of income.

   d. **State Filing Requirements.**

      i. KS – Have the option to file a General Partnership Statement of Partnership Authority with the Kansas Secretary of State. No annual report is filed.

      ii. MO – Although no legal filing is required by the Missouri Secretary of State, it is recommended that a fictitious name be registered with the Missouri Secretary of State. No annual report is filed.

3. **Limited Partnership.**

   a. **Legal Status.** Formed by registration with the State in which the Limited Partnership is located.

   b. **Structure.** A Limited Partnership has two classes of partners, Limited Partners and General Partners. The General Partners
manage the Partnership and are responsible for the day to day operations of the business. Limited Partners have limited control of the Partnership and are generally viewed as passive investors.

c. Liability. General Partners have personal liability for business debts. Limited Partners have limited liability, which means that Limited Partners’ personal assets are generally not at risk to creditors of the business. Capital investment is at risk for both General Partners and Limited Partners.

d. Tax Treatment. Income generated by the business is reported to the Internal Revenue Service by filing a Form 1065. Partnership reports profits and losses, but Partners pay taxes based upon ownership percentages. Taxed on flow-through basis. Self-employment taxes paid on Partner’s share of income.

e. State Filing Requirements.

i. KS – Must file Certificate for a Kansas Limited Partnership with the Kansas Secretary of State upon formation. Annual reports must be filed with the Kansas Secretary of State. Name must include “Limited Partnership” “LP” or “L.P.” to put world on notice of limited liability status.

ii. MO – Must file Certificate of Limited Partnership with the Missouri Secretary of State upon formation. Annual reports not required. Name must include “Limited Partnership” “LP” or “L.P.” to put world on notice of limited liability status.


a. Legal Status. Formed by registration with the State in which the Corporation is located.

b. Structure. Owners of the Corporation are referred to as Shareholders. The Shareholders elect Directors who control the Corporation. The Directors appoint Officers who manage the day to day operations of the business of the Corporation.

c. Liability. Shareholders have limited liability, which means that a Shareholder’s personal assets are generally not at risk to creditors of the business (unless a Shareholder personally guarantees obligations of the business). Capital investment is at risk for Shareholders.
d. **Tax Treatment.** Income generated by the business is reported to the Internal Revenue Service by filing a Form 1120. Income of the business is taxed at the corporate level. Dividends distributed to the Shareholders are taxed at the shareholder level. This results in double taxation.

e. **State Filing Requirements.**

   i. KS – Must file Articles of Incorporation with the Kansas Secretary of State upon formation. Annual reports must be filed with the Kansas Secretary of State. Name must include “Inc.” “Corp.” “Ltd.” “Incorporated” “Corporation” or “Limited” to put world on notice of limited liability status.

   ii. MO – Must file Articles of Incorporation with the Missouri Secretary of State upon formation. Annual reports must be filed with the Missouri Secretary of State. Name must include “Inc.” “Corp.” “Ltd.” “Incorporated” “Corporation” or “Limited” to put world on notice of limited liability status.

f. **Corporate Formalities.** Must prepare Bylaws that outline corporate governing structure (e.g., annual meetings, board of directors, officers, etc.). Annual meetings are required. Should prepare Minutes to record and evidence all meetings. Stock certificates should be issued to the Shareholders. A stock ledger should be kept that lists all outstanding stock of the Corporation, as well as any transfers of such stock.

5. **S Corporation.**

   a. **Legal Status.** Formed as a corporation by registration with the State in which the S Corporation is located. S Corporation status obtained by making a Subchapter S Election with the Internal Revenue Service.

   b. **Structure.** Owners of the Corporation are referred to as Shareholders. The Shareholders elect Directors who control the Corporation. The Directors appoint Officers who manage the day to day operations of the business of the Corporation.

   c. **Liability.** Shareholders have limited liability, which means that a Shareholder’s personal assets are generally not at risk to creditors of the business (unless a Shareholder personally guarantees...
obligations of the business). Capital investment is at risk for Shareholders.

d. **Tax Treatment.** Income generated by the business is reported to the Internal Revenue Service by filing a Form 1120S. S Corporation reports profits and losses, but Shareholders pay taxes based upon ownership percentages. Taxed on flow-through basis. Only one level of taxation, as opposed to a regular Corporation that is subject to double taxation.

e. **State Filing Requirements.**

i. KS – Must file Articles of Incorporation with the Kansas Secretary of State upon formation. Annual reports must be filed with the Kansas Secretary of State. Name must include “Inc.” “Corp.” “Ltd.” “Incorporated” “Corporation” or “Limited” to put world on notice of limited liability status.

ii. MO – Must file Articles of Incorporation with the Missouri Secretary of State upon formation. Annual reports must be filed with the Missouri Secretary of State. Name must include “Inc.” “Corp.” “Ltd.” “Incorporated” “Corporation” or “Limited” to put world on notice of limited liability status.

f. **Corporate Formalities.** Must prepare Bylaws that outline corporate governing structure (e.g., annual meetings, board of directors, officers, etc.). Annual meetings are required. Should prepare Minutes to record and evidence all meetings. Stock certificates should be issued to the Shareholders. A stock ledger should be kept that lists all outstanding stock of the Corporation, as well as any transfer of such stock.

g. **Ownership Restrictions.**

i. Only individuals, charities, certain types of trusts, or estates are eligible to be Shareholders of an S Corporation. Transfers of stock must be closely monitored to ensure that only eligible recipients receive stock.

ii. S Corporation cannot have more than 100 Shareholders.

iii. S Corporation can only have one class of stock.
6.  **Limited Liability Company.**

a.  **Legal Status.** Formed by registration with the State in which the Limited Liability Company is located.

b.  **Structure.** A Limited Liability Company can be managed by the Members (e.g., by majority vote), or the Members can elect a Manager to manage the business. Depending on the State of formation, whether the Limited Liability Company is Member managed or Manager managed will need to be disclosed on the Articles of Organization filed with the State.

c.  **Liability.** Members have limited liability, which means that a Member’s personal assets are generally not at risk to creditors of the business (unless a Member personally guarantees obligations of the business). Capital investment is at risk for Members.

d.  **Tax Treatment.**

i.  If the Limited Liability Company has two or more Members, the Limited Liability Company is treated by default as a Partnership for tax purposes (see below for an election to be taxed as a corporation).

ii.  If the Limited Liability Company has only one Member, the Limited Liability Company by default is “disregarded” for tax purposes and therefore the business is treated like a sole proprietorship (see below for an election to be taxed as a corporation). Please note that a single member Limited Liability Company is still treated as a separate entity for liability and State law purposes.

e.  **State Filing Requirements.**

i.  KS – Must file Articles of Organization with the Kansas Secretary of State upon formation. Annual reports must be filed with the Kansas Secretary of State. Name must include “LLC” “L.L.C.” “LC” “L.C.” “Limited Liability Company” or “Limited Company” to put world on notice of limited liability status.

ii.  MO – Must file Articles of Organization with the Missouri Secretary of State upon formation. Annual reports not required to be filed. Name must include “LLC” “L.L.C.” “LC” “L.C.” “Limited Liability Company” or “Limited Company” to put world on notice of limited liability status.
f. **Company Formalities.** Annual meetings are not required.

7. **“Check the Box” Regulations.** Eligible entities (other than corporations) with at least two members can elect to be treated as a partnership or corporation for tax purposes, instead of having the default classification apply. A disregarded entity (single member LLC, for example) can elect instead to be taxed as a corporation. An entity that wishes to be taxed as a corporation may make an S Corporation election, if otherwise eligible under the S Corporation rules.

B. **Piercing the Corporate Veil.**

1. Regardless of the entity chosen, it is important for the business owner to maintain and follow all entity formalities as required by State law and by the governing documents of the entity (e.g., annual meetings, minutes, ownership certificates, stock ledger, etc.).

2. The owners of the business must treat the business as a separate entity. The owners should open a bank account in the name of the entity, should never co-mingle the owners’ personal assets with the assets of the business, and should document all transactions between the owners and the business. For example, if an owner lends money or other assets to the business, such loan should be documented by the execution of a written promissory note.

3. If the above formalities are not followed, a creditor of the business could “pierce the corporate veil,” and therefore the owners of the business would not be entitled to limited liability, and the owners’ personal assets would be available to satisfy the debts of the business.

C. **Employer Identification Number.** The above entities that are treated as separate entities for tax purposes should obtain an employer identification number (EIN) from the IRS by filing a Form SS4. An EIN for a business is similar to a social security number for an individual, and is required to open bank accounts on behalf of the entity and to file tax returns with the IRS.

D. **Existing Entities.** If the representation begins after the business is formed, the attorney may still advise the client on entity choice. For instance, there may be reasons to convert the entity. Different States have different rules and procedures regarding the conversion of an existing entity from one type of entity to another. In many cases, the conversion will require the filing of a form, together with a fee, with the State in which the entity was originally formed. Please note, however, that while an entity may easily be converted under State law, such conversion could have significant (and potentially adverse) tax consequences to both the
business and to the business’ owners. Consequently, such potential tax consequences should be carefully analyzed prior to any conversion.

III. Governing Documents and Maintenance

A. Governing Documents. The business should have a controlling document to govern operations and management. An attorney often will find that the family business lacks the appropriate governing instruments. Default state statutes will then apply in the absence of a valid partnership/operating agreement.

1. Corporate Bylaws. Bylaws are generally required under State law and set forth the governing structure of the Corporation. Bylaws must be formally adopted by a Corporation. Below is a list of items that should be addressed in a Corporation’s Bylaws:

   a. Name and principal place of business of the Corporation.

   b. Purpose of the Corporation.


   d. Designation of the Officers of the Corporation (e.g., President, Vice-President, Secretary, and Treasurer). The duties, powers, and responsibilities of each Officer. Compensation of the Officers. Procedure to remove and replace Officers.

   e. Annual, regular and special meetings (both for Shareholders and Directors). The procedure for a Director or a Shareholder to call a meeting. Quorum requirements.

2. Corporate Buy-Sell Agreement/Shareholders’ Agreement.

   a. A Buy-Sell Agreement is an agreement among the Shareholders of the Corporation.

   b. Unlike Bylaws, there is no requirement that the Shareholders enter into such an agreement.

   c. Such an agreement provides for a procedure regarding the sale and purchase of a Shareholder’s stock in the Corporation upon the occurrence of certain events (e.g., death, disability, divorce, or bankruptcy of a Shareholder).
d. The agreement can provide that a sale is mandatory upon the occurrence of such an event, or it can provide one or more of the parties with the option to purchase upon such an event.

e. Purchase rights can be given to the Corporation and/or the other Shareholders.

f. Life insurance can be used as a mechanism to provide the Corporation and/or the Shareholders with liquid funds to purchase the stock upon a Shareholder’s death.

g. Often the Buy-Sell Agreement will require an annual valuation of the stock.

3. Operating Agreement. An Operating Agreement is an agreement among the Members of a Limited Liability Company that sets forth how the LLC will be structured and managed. Depending on the State of formation of the LLC, such an agreement may or may not be required; however, it is strongly recommended that such an agreement be created. The following items are generally included in an Operating Agreement:

a. Name and principal place of business of the LLC.

b. Purpose of the LLC.

c. Percentages of ownership of the Members.

d. Capital contributions of the Members.

e. Rights and responsibilities of the Members.

f. Allocation of profits and losses.

g. Distribution of assets.

h. Management of the LLC (whether Manager or Member managed).

i. Meetings of the Members.

j. Buy-Sell provisions (similar to a Corporate Shareholders’ Agreement).

k. Procedure for a Member to transfer his or her ownership interest in the LLC. Consider to whom a Member can transfer the interest. Consider whether a transfer should require the consent of the other Members, and if so, what percentage.
I. Procedure to dissolve and windup the LLC.

4. **Partnership Agreement.** A Partnership Agreement is an agreement among the Partners of a Partnership that sets forth how the Partnership will be structured and managed. Depending on the State of formation of the Partnership, such an agreement may or may not be required; however, it is strongly recommended that such an agreement be created. The items discussed above regarding the Operating Agreement of an LLC should be considered when created a Partnership Agreement for a Partnership.

B. **Maintaining Formalities.** Many family businesses operate in an informal fashion. The attorney must ensure that the business strictly observes certain guidelines, in order to maintain the validity of the entity and to ensure that the entity maintains its limited liability status (as discussed above). This includes the following:

1. Ensure that any distributions from the entity are made among the owners according to their respective ownership interests in the entity, or as otherwise set forth in the entity’s governing document (e.g., the Operating Agreement of a Limited Liability Company).

2. Ensure that the owners of the entity are having periodic meetings to discuss the operations of the business. While it may not be required under State law for all entity types, it is generally recommended that the owners of the business meet at least as often as annually.

3. Minutes should be prepared for each meeting and distributed to all owners of the business.

4. The person responsible for managing the day to day operations of the business (e.g., Manager, President, etc.) may be compensated for any services provided to the entity. Such person should keep a log of the services performed on behalf of the entity.

5. Detailed records should be kept of entity transactions. An accountant should be retained and proper books and checking accounts maintained.

6. Relevant matters to the entity should be carried out in the entity’s name. Periodicals and investment services should be in the entity’s name.

7. The various business reasons for forming the entity should be reflected in the governing document of the entity.

8. An entity’s income tax return must be filed each year. The entity will need a separate employer identification number (unless the entity is disregarded for tax purposes, as described above).
An annual report may be required to be filed with the State, depending upon the State in which the entity is established, and depending on the type of the entity.

### IV. Succession Planning Issues

A. Representing family business clients necessarily involves business succession planning. The business owner will have to transfer his or her interest, either during life by selling the business or transferring to family, or at death.

B. The attorney must understand the business owner’s objectives. Understanding the owner’s goals will allow the attorney to take necessary steps in advance to prepare for the eventual sale, or transfer to the next generation. Communication is key. Regular family meetings may be necessary.

C. The attorney should work together with other professional advisors for the family (tax, financial, life insurance, for example) in all phases of strategic planning.

D. Business succession planning often involves effective estate planning and tax planning.

E. Identifying the roles of family members, and non-family members who occupy key management roles. Who is active in the business?

F. The attorney must always be aware of family dynamics.

G. Representing the next generation. The attorney may ultimately work with several generations of family members who run the family business. Does the attorney have a succession plan?

### V. Transferring Interests in the Family Business – Implementing the Succession Plan

A. Lifetime transfers.

1. **Annual gifting strategies.** The owner may transfer ownership interests (stock, partnership/member units) pursuant to an annual gifting program. The federal gift tax annual exclusion is $14,000 in 2015 ($28,000 if a married couple “gift splits”). Equity in the business is transferred gradually over time, and is an effective transfer tax technique. If there are voting and nonvoting interests, the nonvoting interests may be transferred first (the owner retains control), and voting interests eventually transferred as the owner decides to relinquish control.
2. **Installment sale of interests.** The owner may sell the nonvoting stock/units to a “defective” trust (avoiding income tax consequences), in exchange for an installment note. This is an option for business owners with taxable estates, to “freeze” the value of the transferred interest for estate tax purposes, where the interest is a highly appreciating asset.

3. **Use of GRATs (grantor retained annuity trusts).** Another “estate freeze” technique that can be utilized with non-controlling interests in a family business.

4. **Use of Irrevocable Trusts.** With an irrevocable “spendthrift” trust, the business owner can utilize a vehicle for transferring interests in the business while protecting the interests from the beneficiary’s creditors and restricting the beneficial use of the trust assets.

5. **Exemption planning.** In 2015 the unified estate and gift tax exemption amount is $5,430,000. For business owners with potential estate tax liability, using the unified credit on one or more lifetime transfers can effectively reduce the ultimate tax liability.

6. **Importance of good appraisals.** For the transfers described above, it will be important for the attorney to ensure that the value of the transferred stock/units be determined by a qualified appraisal.

7. **Form 709.** Transfers should be reported (may be required depending on the value of the transfer) on a gift tax return (Form 709), which is subject to the “adequate disclosure” requirements in order to trigger the three-year statute of limitations.

8. **Income tax considerations/basis.** The donee of stock/units during the owner’s life will receive a carryover basis in the property. No “step-up” in basis that would otherwise occur at death.

B. **Creation of Voting and Nonvoting Classes.**

1. The entity may be recapitalized to create a nonvoting class of stock/units.

2. Facilitates transfers of non-controlling ownership interests while allowing the business owner to retain control.

3. Voting interests may ultimately be transferred to those family members involved in the business, while Nonvoting interests can be divided among all family members.
4. Voting Trusts may be particularly useful, to enable the voting control to be consolidated in one trustee (or multiple trustees), with a built-in line of trustee succession.

5. S Corporations. The attorney must be careful to avoid creating two classes of stock under the S Corporation rules. No problem if the only difference is voting power.

C. Use of transfer restrictions. Consider who should be eligible to receive interests in the business. For example, should a child be able to transfer his or her interest in the family business to a spouse at the time of the child’s death, or should the interest be held for the benefit of only descendants. These provisions should be incorporated into the applicable governing instrument (shareholders’ agreement, partnership agreement, or operating agreement).

D. Buy-Sell Agreements. See discussion above for importance of buy-sell agreements among business owners in carrying out the intended succession plan.

E. Sale of the business.

1. Structuring the sale. Asset sale versus stock sale.

2. Preparing for the liquidity event.

3. Tax consequences.


F. Transfers at Death. Coordinating the estate plan with the business succession plan is essential for the business owner.

1. Will or Revocable Trust.

   a. Should reflect the owner’s desired business succession plan.

   b. Attorney should review type of entity to ensure proposed distribution of entity interest does not frustrate ownership restrictions (e.g., S corporation stock, will need to include provisions to facilitate “QSST” or “ESBT” elections).

   c. Attorney should review all entity governing documents.

   d. Often the business owner will specifically bequeath the business interest to one or more family members as part of the owner’s intended succession plan. Typically the owner will want to offset
this gift with equivalent value for the other children/family members, which presents a challenge in many cases.

2. Estate tax issues. Upon the business owner’s death, the estate may be subject to federal estate tax, and may lack liquidity to pay the tax liability.
   a. Graegin loans.
   b. Section 6166 regarding a closely held business.
   c. Section 2032A regarding valuation of farm land.

VI. **Other Legal Issues for the Family Business**

A. The attorney representing family business clients must be able to recognize any number of other legal issues that may arise in connection with the business. Examples include:
   1. Labor and employment matters. The business must comply with state employment laws and regulations.
   2. Real estate and environmental matters. Businesses that own real estate will have specific issues related to such ownership. Often the real estate is owned in an entity separate from the operating entity, and leased to the business.
   3. Intellectual property matters. For certain businesses, there are important intellectual property issues that must be addressed
   4. Insurance coverage.
   5. Employee benefits.

B. The estate planning attorney should refer these matters to other attorneys who specialize in these areas.
Running Your Practice
Two Views – Large Firm and Solo Practitioner

Lynn Cockle from Polsinelli PC and Kim Zellmer from Zellmer Law Firm LLC

Biography of Practice Experience

Lynn:

Practiced with Morris, Larson, King Stamper and Bold from June 1981 through March 1990. Firm numbered approximately 19 when Lynn joined the firm out of law school and reached a maximum of about 35 attorneys during that period.


Lynn practiced in the areas of employee benefits and estate planning at Morris, Larson but shifted to estate planning and related matters at STK.

Kim:

Kim started her career at the mid-sized firm of Morris Larson King Stamper and Bold in 1986 after graduating from law school. In 1990 Morris Larson merged into Hillix, Brewer, Hoffhaus, Whittaker & Wright.

In 1994 Kim joined the large, regional law firm of Husch & Eppenberger, LLC. Husch had over 300 attorneys in seven offices throughout the Midwest. At that time, the estate planning practice group at Husch was the largest in the Kansas City area with about 20 attorneys.

After practicing at Husch & Eppenberger for almost 10 years, Kim opened her own solo estate planning practice in January, 2004, in Leawood, Kansas. She is the sole attorney at Zellmer Law Firm, LLC.

Structure of Departments in Current Firms

Lynn:

There are currently 12 attorneys in the Wealth Planning Department of Polsinelli, 4 in Kansas City, 7 in St. Louis and 1 in Phoenix.

There are three paralegals in the Kansas City Wealth Planning Department. One is primarily a drafting paralegal for estate planning documents, one is primarily a probate paralegal and one does probate and other matters. All three prepare estate tax returns, two prepare gift tax returns
and one prepares trust and estate income tax returns and some personal returns. Lynn works with the paralegals on these returns and the audits of any returns.

**Kim:**

Kim is the sole attorney in her estate planning practice. She shares office space with 6 other solo attorneys (mostly litigation attorneys, with one other attorney who does some estate planning and probate), 1 accountant, 2 legal assistants, 2 secretaries and 1 receptionist in Leawood, Kansas.

**Clients/Marketing/Related Professionals**

**Lynn:**

Many of my clients are referred by other clients. I also have referrals within the firm or from professionals outside the firm including trust officers, accountants and insurance or financial planners. I also work on matters for other attorneys within my department as several no longer draft planning documents for their clients.

One marketing strategy is attending the Kansas City Estate Planning Symposium each spring. It will be on April 21 and 22 in 2016 at the Overland Park Convention center. This event allows completion of the full annual required CLE for Kansas and Missouri and allows each attendee to interact with other attorneys, accountants, trust officers and financial planners. This Fundamentals program is sponsored by the Symposium Committee. Other marketing may include membership in the Kansas City Estate Planning Society which offers monthly meetings with speakers and a chance for socializing with other professionals or taking professionals, existing clients or prospective clients to lunch. Membership on the committees that plan the Symposium, the Fundamentals program and the Society luncheons and speakers also offers opportunities for marketing.

**Kim:**

Virtually all of my clients come from professional referral sources (accountants, financial planners, banks, insurance agents and other attorneys) and from existing client referrals. As a result, most of my marketing efforts have been focused on maintaining good client relationships and networking with other professionals. I am also working on a firm website. I have done some CLE presentations for attorneys and estate planning presentations for the public generally sponsored by different charitable organizations or by employers for employees.

**Initial Meeting with Clients**

**Lynn:**

I am flexible as to my initial planning “meeting” with clients. Sometimes I meet with both husband and wife, sometimes I meet with only one of them. Sometimes we meet in person,
sometimes by phone. Sometimes we exchange multiple emails to clarify issues and provide information.

I ask clients to bring any existing planning documents with them to their first meeting or to send them in advance of the meeting for my review.

I have not traditionally used a planning intake questionnaire. However, my firm is currently working on a form that can be used by all of our attorneys that will allow the clients to provide information about their family and finances. Clients often provide a financial statement they have prepared for themselves or a statement that has been prepared for them by a financial planner.

Prior to or immediately after the meeting, we prepare an engagement letter outlining the fee arrangement and potential conflicts. We ask that the clients sign the engagement letter and return it to us as soon as possible. Before the file can be opened, our conflicts department must check to be certain that we are not conflicted out of representation of the client. This generally only occurs if we are representing an existing client in litigation against the potential new client or any companies owned by the client. If we also represent other family members, such as children or parents or any companies owned the potential new client, we may request conflict waivers from all family members, the companies or the other owners of the companies.

Kim:

My first meeting with a new or potential client is mostly for information gathering. I go through standard questions from a client intake form and obtain basic information. For clients needing estate planning, I request that the client bring a financial statement and any current estate planning documents to the meeting. At the end of the meeting, I will generally make estate planning recommendations, provide a fixed fee or fee estimate for the work and a time frame for completing the work. I prefer to have both spouses at the initial meeting, if possible.

For new clients, I try to send an engagement letter with the fixed fee amount and conflict information. Most of my potential conflicts result from representation of both spouses and from multiple family members and/or closely-held business owners. I may request conflict waivers if there are dealings between the family members or owners of a closely-held business.

Drafting of Documents

Lynn:

Polsinelli has a Forms Committee responsible for drafting and updating all estate planning forms used by our firm. We use HotDocs as our document assembly software platform. This process is constantly being updated and is not yet free of issues due to the complexity of some of the forms used. First drafts prepared for my clients are generally prepared by our drafting paralegal. Any changes are made by her or by me. We provide either an outline of the documents with a short cover letter or a long letter describing the draft documents and other matters to be addressed.

Kim:

While at a larger firm I used HotDocs drafting software. When I moved to a solo practice, I decided that it was not worth the time and expense to purchase, use and maintain document
drafting software. Instead, I have prepared my own forms from various forms I have collected and updated over time. I have created several forms for different types of trust agreements, wills and other estate planning documents. While I have used a part-time paralegal to help with some document drafting, I draft virtually all estate planning documents for clients. I provide outlines of all Wills and Trust Agreements.

**Follow Up**

*Lynn:*

I try to follow-up with clients by email, if possible, if I have not heard anything from them regarding their draft documents within 4 to 6 weeks after forwarding the drafts to the clients. If a client does not have email, I will either call or send a letter.

*Kim:*

If I have not heard anything after sending draft documents, I will follow up by letter or email in about 6-8 weeks. I may also send out an invoice for any fixed fee matters after 3 months. If I still do not hear back from the client, I will call or send a second follow up letter.

**Meeting to Sign Documents**

*Lynn:*

If documents are being signed by a new client, I try to insist that we must meet in person to sign documents if I have not met both the husband and wife in person at any earlier stage in the planning. I want to be sure that both understand the documents and address any questions or concerns. Also, I want to be sure that the documents are signed properly even if I have previously met the clients in person! If documents are being signed by a client who has signed documents prepared by us in the past, we may provide the documents to be signed with a detailed set of instructions for signing each document.

*Kim:*

For any new clients, I require that we meet to sign their estate planning documents. At the meeting, I generally go over the important provisions of the documents and make sure that all questions are answered. We also review trust funding and any other items which need to be completed. If they are an established client, I will sometimes send a document with instructions on how the document must be properly executed. I also require the client to return a copy of the signed document to my office.
Funding of Trusts/Beneficiary Designations

**Lynn:**

Often we will prepare some of the documents necessary to transfer assets into trusts for the clients. We try to have any deeds or assignments prepared to be signed at the meeting to sign the planning documents. Sometimes we also assist in preparation of life insurance beneficiary designations or retirement benefits. We also provide either a letter or a memorandum to the clients with detailed instructions as to the transfer of an asset to either trust or the proper titling for each asset or beneficiary designation for each. We also try to include sample language for each type of ownership including joint ownership.

**Kim:**

I generally include preparation of any necessary deeds as part of the basic estate planning for clients. Also, I often assist with documents to transfer closely-held business interests to their trusts. At the meeting to sign basic estate planning documents, we typically go over each asset on the client’s financial statement to make sure the client understands how the asset should be titled and each beneficiary designated. I will assist the client with beneficiary forms, if requested, and encourage the client to bring the forms to the signing meeting. I also provide a memo to the client that contains instructions and language regarding how to transfer title of assets to their trusts and to complete beneficiary designations.

Binder/Copies of Signed Documents

**Lynn:**

I will prepare a notebook of documents if the client wishes. I have traditionally not done so but either given copies of signed documents to the clients at our meeting or mailed copies after the meeting. We generally keep one original of each signed documents, including the only original of the Will, and provide an original of each signed document except the Will to the client. We provide a photocopy marked as such of the Will to the client. We are also now scanning all signed documents and maintaining a pdf of the signed document. Some clients prefer to have us provide only a pdf of each document for them. Others will request that we send a pdf of their trust agreements or other documents to a title insurance company, a bank or financial planner.

**Kim:**

Except for smaller matters, I prepare an estate planning binder for the client with the client’s copies of signed documents and related information. The binder is usually mailed to the client after the final meeting. I retain one original of each document, except the original Will. The original Will is returned to the client with instructions to keep the Will in a safe place and to notify the successor trustee or executor where the original Will is located. I also scan each of the client’s signed documents and maintain an electronic copy on computer.
Billing

Lynn:

I generally bill on completion of a planning project. However, if the clients do not get back with me promptly to address questions and set a time to sign the documents, I will send a statement for the time incurred and then send additional statements for later fees. Most of our planning is not on a flat fee basis.

Kim:

My initial estate planning consultation with clients is free. If they decide to do nothing, then I am not paid for that time. Most of my work is by fixed fee arrangement. All preparation of basic estate planning documents is done by fixed fee. Other work is done based upon my hourly rate. I try to provide an estimate of the anticipated fee, if possible, at the initial meeting. In order to avoid having to keep track of retainers and trust accounts, I bill upon completion on all fixed fee matters.

Malpractice Insurance

Lynn:

Our firm maintains this insurance for all attorneys in the firm including coverage for any claims which may arise for a retired or departed attorney after the attorney is no longer with the firm. This is essential since estate planning is one of the biggest areas for claims by unhappy family members.

Kim:

I maintain professional liability insurance for myself.
Preparing for Fiduciary-Related Litigation

Prepared and Presented by:

Angela G. Nichols
Stinson Leonard Street LLP
I. Preparing for Fiduciary-Related Litigation

A. The Fiduciary as a Litigant: When Beneficiaries Become Adversaries.

Under both the Missouri Uniform Trust Code (“MUTC”) and the Kansas Uniform Trust Code (“KUTC”), a trustee has a duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries. Mo. Rev. Stat. 456.8-801; K.S.A. 58a-801. Such duty applies regardless if one of the beneficiaries threatens to sue or has already sued the trustee for breach of its fiduciary duties or for other alleged wrongdoings. Complying with those fiduciary duties, as well as other duties, including the duty of candor, can create certain challenges when the trustee and beneficiary become adversaries in litigation, but those challenges are manageable if the trustee understands its ongoing duties.

Even when a trustee faithfully complies with its duties under the MUTC or KUTC and under the applicable trust instrument, litigation between the trustee and the beneficiary is always a possibility. Market changes, family tension and other realities of trust administration often make it ripe for conflict. The best time to prepare for potential conflict is before it happens. As a result, trustees should
familiarize themselves with the sections of the applicable trust code that become particularly relevant in trust litigation.

Litigation involving trusts can be "friendly" or adversarial. "Friendly" or non-contested court proceedings may involve requests for modification, termination or reformation or may seek instructions from the court or a declaratory judgment. Adversarial proceedings often involve claims of breach of fiduciary duties/breach of trust and usually seek removal of the trustee and/or monetary damages.

Under both the MUTC and KUTC, the courts may generally intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law and the trust is not subject to continuing judicial supervision unless ordered by the court. Mo. Rev. Stat. 456.2-201; K.S.A. 58a-201. A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including an action for declaratory judgment/instructions. Id.

An increasingly number of trusts touch more than one jurisdiction with beneficiaries scattered throughout the country and at times, even internationally, and with property located in multiple states. Questions often arise as to which court has jurisdiction over the trust and over any necessary/indispensable parties. Generally, if a trust has its principal place of administration in the state, that
state’s courts will have jurisdiction over both the trustee and the beneficiaries, but only to the extent of their interest in the trust unless there is an independent basis for asserting jurisdiction over the beneficiary. Mo. Rev. Stat. 456.2-202; K.S.A. 58a-202.

The remedies for breach of trust actions are pretty uniform regardless of the jurisdiction. Generally, the court can compel the trustee to perform the trustee's duties; enjoin the trustee from committing a breach of trust; compel the trustee to redress a breach of trust by paying money, restoring property, or other means; order a trustee to account; appoint a special fiduciary to take possession of the trust property and administer the trust; suspend the trustee; remove the trustee; reduce or deny compensation to the trustee; impose a lien or a constructive trust on trust property or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief. Mo. Rev. Stat. 456.10-1001; K.S.A. 58a-1001.

With respect to money damages, a trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; the profit the trustee made by reason of the breach; or if the trustee embezzles or knowingly converts to the trustee's own use any of the personal property of the trust, the trustee shall be liable for double the
value of the property so embezzled or converted. Punitive damages might also be awarded depending upon the alleged misconduct. Mo. Rev. Stat. 456.10-1002; K.S.A. 58a-1002.

Even if the beneficiary cannot show that a breach of a fiduciary duty has occurred, the beneficiary may still be able to recover damages. A trustee is accountable to an affected beneficiary for any profit made by the trustee, other than compensation earned, arising from the administration of the trust, even absent a breach of trust. Absent a breach of trust, a trustee is not liable, though, for a loss or depreciation in the value of trust property or for not having made a profit. Mo. Rev. Stat. 456.10-1003; K.S.A. 58a-1003.

Both the trustee and the beneficiary can seek attorney's fees at the conclusion of the action. The court can order such fees to be paid from the trust or by one of the parties to the action. Mo. Rev. Stat. 456.10-1004; K.S.A. 58a-1004.

B. Preparing for Discovery.

The task of preparing for discovery is much more manageable if the trustee has taken the time and expended the effort to keep a well-organized file. If there are multiple beneficiaries, ideally the trustee should keep communications with each of the beneficiaries separate. The reason for doing so will be discussed
in Subpart C. The trustee should also keep communications with counsel that are relating to general administration matters separate from communications involving the protection of the trustee. The reason for doing so will be discussed in Subpart D.

Once litigation is anticipated, the trustee must use extra care to preserve any documents that may be relevant to the litigation. This obligation includes electronic data. Depending on the circumstances, it may be prudent for a corporate/institutional trustee to work with counsel to ensure that a proper litigation hold is in place and that proper preservation procedures are being followed. Counsel can also assist the trustee to ensure that data is not inadvertently manipulated in any way.

Although preservation obligations generally do not differ based on the type of litigation involved, practically speaking, electronic discovery involving trust litigation is not as common as it is in other areas of the law. One reason for that is the nature of the litigation. Generally, trust litigation involves whether certain conduct or investment was consistent with terms of the trust instrument or applicable law. As a result, although a certain portion of the trustee's file may be relevant to that determination, all communication involving the trust generally is not. The trustee, however, should always assume that all documents relating to
the trust, including communications, will be discoverable. Therefore, trustees should think before they type!

C. **Duty to Disclose vs. Duty to Protect Beneficiary's Confidential Information.**

Although the obligation can be modified by the terms of the trust instrument, both the MUTC and KUTC impose a duty on trustees to keep beneficiaries informed about the administration of the trust. Mo. Rev. Stat. 456.8-813; K.S.A. 58a-813. Thus, unlike in most cases, a beneficiary has a right to obtain certain information relating to the trust without using formal discovery procedure. It’s important to remember this fact when the relationship becomes adversarial.

Complying with beneficiary requests for information becomes complicated when litigation involving claims of breach of the duty of impartiality. In such cases, certain information concerning other beneficiaries of the trust may be relevant to the claims. Trustees, and particularly certain corporate trustees, however, have a duty to protect the beneficiaries’ confidential information. Thus, trustees are sometimes faced with competing duties: the duty to keep the beneficiary informed and the duty to protect the other beneficiaries' confidential
information. When such conflicting interests arise, waivers/consents should be sought or the trustee should seek judicial guidance.

D. Common Privilege Issues.

Deciding what is and is not privileged in trust litigation is often more difficult than in other civil cases. Oftentimes, the trustee will consult with counsel at various times during the administration of the trust. While the attorney-client privilege generally attaches to communications made in confidence between an attorney and the attorney's client made for the purpose of securing legal services, the issue of whether communications between a trustee and its attorney is discoverable becomes complicated.

Some jurisdictions recognize a fiduciary exception to the attorney-client privilege finding that the privilege is inconsistent with the trustee's duties of loyalty and candor. Courts in other jurisdictions consider the purpose of the communications—whether the advice was for the protection of the trustee or part of the administration of the trust. Some of those same courts will consider who is paying the legal fees—the trustee individually or the trust. See Austin Scott & William Fratcher, *The Law of Trusts* § 173 (4th ed. 1988) ("Scott on Trusts") (acknowledging a distinction between opinions of counsel paid for by the trust and obtained to guide a trustee's administration of the trust from opinions of
counsel obtained at the trustee's expense and to guide the trustee in its defense against claims brought by a beneficiary against the trustee). And finally other jurisdictions are attempting to eliminate the uncertainty by legislatively clarifying the protection owed to communications between a trustee and counsel. Missouri legislation has been proposed that would apply the attorney-client privilege to the trustee’s communications with counsel without exception (other than would normally apply) regardless if the services are utilized in the administration of a trust or otherwise.

Because the law is not uniform throughout the country, though, the trustee should be careful to keep communications with counsel for the trustee's protection separate from communications that are a normal part of the trustee's administration of the trust. Doing so will simplify discovery efforts and make it easier to protect the communications that are likely to be most sensitive to the trustee.

E. Avoiding Fiduciary-Related Litigation.

One way a trustee can minimize the uncertainty of litigation is to try to avoid it. Send reports that disclose sufficient information to inform the beneficiary of potential claims. Doing so generally prevents the beneficiary from successfully bringing an action against the trustee for breach of trust more than
one year after the date the beneficiary received such report. Otherwise the trustee could find itself litigating years after the conduct at issue occurred. Mo. Rev. Stat. 456.10-1005; K.S.A. 58a-1005. Although beneficiaries still can file a lawsuit after the statutory period has expired, the trustee should be able to obtain summary judgment based on the expiration of the statute of limitations.

It will not necessarily avoid litigation, but a trustee can successfully defend against a claim for breach of trust/fiduciary duty if the trustee has acted in reliance on the trust. Mo. Rev. Stat. 456.10-1006; K.S.A. 58a-1006. A trustee also may be able to successfully defend against a breach of trust/fiduciary duty claim if the trust instrument contains an exculpation clause. Courts generally will examine the circumstances surrounding such clauses and usually will not enforce a clause that attempts to relieve the trustee for liability for breaches committed recklessly or in bad faith. Mo. Rev. Stat. 456.10-1008; K.S.A. 58a-1008. Finally, a trustee can successfully defend against a claim for breach of trust/fiduciary duty if the beneficiary has knowingly consented to the conduct, released claims relating to the conduct or ratified the conduct. Mo. Rev. Stat. 456.10-1009; K.S.A. 58a-1009.
ETHICAL GUIDELINES

ESTATES AND TRUSTS LAWYERS

RESOURCES

• STATUTES
• CASELAW
• MISSOURI SUPREME COURT
  – RULE 4
• AMERICAN BAR ASSOCIATION
• ACTEC COMMENTS
ADVISORY OPINIONS

• RULE 5.30
• FORMAL OPINIONS
• INFORMAL OPINIONS
  — ORAL
  — WRITTEN
• MOLEGALETHICS.ORG

TERMINOLOGY

• RULE 4-1.0
• “INFORMED CONSENT”
• “WRITING”
COMPETENCY

• RULE 4-1.1
• In re Charron, 918 S.W. 2d 257 (Mo. 1996)
• In re Forck, 418 S.W.3d 437 (Mo. 2014)

SCOPE OF REPRESENTATION

• RULE 4-1.2
• “WHO”
• “WHAT”
• WRITTEN ENGAGEMENT LETTER
• COMMENT (9) – DUTY TO BENEFICIARIES
CONFIDENTIALITY

• RULE 4-1.6
• REQUIRED WITHDRAWAL – 4-1.16
• JOINT REPRESENTATION
• DEATH OF CLIENT
  — ESTATE OF HEBBLER, 875 S.W.2D 163 (Mo. !pp. 1994).

JOINT REPRESENTATION

• HUSBAND AND WIFE
• PERSONAL REPRESENTATIVE AND CREDITOR
• CO-TRUSTEES
• CO-BENEFICIARIES
• TESTATOR – PERSONAL REPRESENTATIVE
• PRINCIPAL – ATTORNEY IN FACT
CLIENT WITH DIMINISHED CAPACITY

• RULE 4-1.14
• CIVIL RULE 52.02(k)
• ESTATE PLANNING
• GUARDIANSHIP/CONSERVATORSHIP
• BENEFICIARY

UNAUTHORIZED PRACTICE OF LAW

• RULE 4-5.5
• NAYLOR, 423 S.W.3D 238 (Mo. 2014)
• MAYER, 453 S.W.3D 307 (Mo. App. E.D. 2014)
FEES

• RULE 4-1.5

WITHDRAWAL

• RULE 4-1.16
• DIFFERENCE BETWEEN MODEL RULE
• CLIENT WITH DIMINISHED CAPACITY 4-1.14
GIFTS TO LAWYERS

- RULE 4-1.8(c)

CASE STUDIES

- PRINCIPAL – ATTORNEY IN FACT
- PERSONAL REP – CREDITOR - DEBTOR
- CO-TRUSTEES
- CO-BENEFICIAIRES
I. What is Trust Funding?

Once a client’s revocable trust has been signed, the trust must be “funded.” Trust funding is the process of transferring assets to a client’s revocable trust or updating beneficiary designations on certain assets to name the trust as a primary or contingent beneficiary.

II. Why does Trust Funding Matter?

Estate planning is a two-step process. Step one is getting the documents prepared and executed. Step two is making sure assets are titled properly and beneficiary designations are properly completed so that the estate plan will work the way in which it is designed. Well-prepared estate planning documents provide little value to a client if the trust is not properly funded. Important goals of estate planning include making sure the client’s wishes are carried out, avoiding probate and minimizing estate and income tax liability. Proper trust funding will ensure that those goals are met. Many practitioners fail to assist their clients with trust funding or simply provide them with general, non-customized instructions and send them on their way. Differentiate yourself and provide real value to your clients by helping them fund their trusts so that their plan will actually work the way in which it is intended.

The reason trust funding is so important is illustrated clearly in a post-death administration matter. When clients contact us after a loved one has died, one of the first things we ask is what assets did the decedent own and how was each asset titled, or how were the beneficiary designations completed. The reason we ask for this information is to determine what happens next. Will a probate proceeding be required? Will assets pass via nonprobate transfers? Will the terms of the decedent’s estate planning documents be carried out? A successful estate plan will avoid probate, possibly use some nonprobate transfers, minimize estate and income tax liability, and certainly carry out a client’s wishes by enforcing the terms of trust agreements. However, all too often, we see post-death administrations where the trust funding was not done at all, not done completely, or not done correctly. The result is often an unnecessary probate proceeding, unnecessary tax liability, and sometimes assets being distributed in an unintended way.
Emphasize to your clients how important trust funding is and how the process is truly an asset by asset exercise.

III. Funding Considerations in the Planning Phase

a. Gathering Information

It is important to request and gather documentation relating to your client’s assets in order to confirm how assets are titled. Do not accept as fact your client’s verbal report about how assets are titled or what beneficiary designations say. Request that they bring you supporting documentation. Often, clients believe that a certain asset is, for example, titled jointly, when it is in fact titled in only one of their names. By requesting and confirming this information up front, you will be able to advise the clients about not only the changes necessary for trust funding, but also any other recommendations relating to asset protection, clearing title to real estate, fixing title errors, etc. It is not uncommon for real estate to require some type of corrective deed to be filed prior to transferring it to a trust. It is also not uncommon to find a child’s name listed as a joint owner of an elderly client’s accounts and other assets, which can cause unintended consequences including exposure to the child’s creditors, “theft” by the child, or making the terms of a Will or trust obsolete because the child will receive the entire asset as the surviving joint tenant, regardless of what the Will or trust says.

In addition to documentation relating to specific assets (account statements, deeds, etc.) request a copy of the client’s most recent tax return to find “forgotten” assets on the various schedules – such as the forgotten E*Trade account or the passive investment in a sibling’s closely held business venture.

A sample list of documentation to request from new estate planning clients is included with these materials.

b. What type of property does the client own?

Some assets are better suited for transferring directly to a trust as soon as the trust is created, such as tangible personal property, non-retirement investment accounts, savings accounts and money market accounts. Others, including retirement accounts and life insurance policies, may generally stay titled in the name of the owner, but the beneficiary designation will need to be updated. Checking accounts used for day-to-day expenses and holding relatively small balances may stay titled in the client’s individual name (or titled jointly for a
couple) with a POD (pay on death) designation added naming the trust as beneficiary.

Further, before determining the best estate plan for a client, it is important to have a clear understanding of what types of assets make up his or her estate. You need this information not only to advise proper trust funding steps, but also to determine if certain provisions are necessary in the trust, such as see-through or conduit trust provisions for retirement accounts or a provision for managing a business.

c. Will all of the client’s property go through the trust?

In some cases, it may make more sense to allow certain assets to pass outside of a trust, directly to the intended beneficiary at the owner’s death via a nonprobate transfer. The most common example is a retirement account with a charitable beneficiary. It is generally simpler and more tax efficient to name the charity (or charities) as the direct beneficiary of the account rather than have it pass through the trust first.

Another common example is real estate owned as tenants by the entirety by a married couple in Missouri (titled “husband and wife”). Tenancy by the entirety ownership provides certain creditor protections, which is especially helpful due to Missouri’s very low homestead exemption ($15,000). Further, if the couple ever plans to sell or refinance the home, mortgage companies often require that the property be transferred out of the trust first before completing the transaction. Thus, it is often appropriate to leave the residence titled in the joint names of the married couple, and then file a beneficiary deed which will transfer the property to the surviving party’s trust (or to a joint trust) at the surviving party’s death. Although Kansas does not have tenancy by the entirety and its residents enjoy an unlimited homestead exemption, this technique can also be appropriate for Kansas clients who want to avoid the hassle of moving their residence in and out of their trust for any sales or refinances. Note that this technique would not be appropriate for clients who do not want the surviving spouse to be able to control the disposition of the property at his or her subsequent death, such as in the situation of a second marriage with beneficiaries who are children of the client’s first marriage.
d. Will you combine trust funding with nonprobate transfers?

Practitioners will often find it works well to combine nonprobate transfers with trust transfers for certain assets for reasons of convenience, creditor protection and income tax planning. Common examples include: (i) leaving a checking account titled jointly but adding a POD designation so that it is payable to the trust at the surviving owner’s death; (ii) leaving residential real estate titled in an individual’s name (or jointly, for a couple) and filing a TOD deed naming the trust as the beneficiary; (iii) naming the spouse as the primary beneficiary of a retirement account (to allow for the option of a spousal rollover) and the trust as the contingent beneficiary. Having a complete and accurate understanding of the client’s assets will assist you to formulate the best trust funding plan, which will likely include some nonprobate transfers.

IV. Initial Trust Funding

a. Real Estate

i. Personal Residence

Personal residences should be transferred to the trust either currently, via a Quit Claim or Warranty Deed, or at the owner’s death, via a Transfer On Death or Beneficiary Deed.

Note that if the property is subject to a mortgage, federal law allows the owner to transfer the property to a revocable trust without the mortgage company’s consent, and it will not trigger a “due on transfer” clause in the mortgage. See the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S. Code § 1701j-3.

Make sure you select the right type of deed for the transfer. This requires that you have a copy of their current deed, and it is often necessary to verify the document provided by the client by checking with the Recorder of Deeds office. For example, if the property was acquired by Warranty Deed, use another Warranty Deed to transfer it to a trust in order to maintain the title insurance coverage.
ii. Vacation Property

Vacation property can also be transferred to a trust currently or at the owner’s death, as appropriate.

iii. Rentals & Commercial Property

If rental or commercial property is owned personally (not through an LLC or other entity), then it is important to point out to the client that they are exposing their personal assets to potential creditors. Often, transferring the property to an LLC is an important asset protection step. If you do not handle that type of work, refer them to a corporate attorney. If the client chooses to forego transferring the property to a corporate entity for liability protection, you could transfer the property to the client’s trust for probate avoidance only. Put your recommendations in writing and make sure the client understands that transferring the property to a revocable trust will provide no creditor protection.

However, if the property is mortgaged, you must first obtain the consent of the mortgage company to transfer the property to either an LLC or to a trust. Many mortgage companies will not provide this consent. In this case, a TOD deed and some carefully selected insurance may be the client’s best alternative for probate avoidance and asset protection.

iv. Out-of-State Property

If your client owns real estate in a state other than where you are licensed to practice law, engage local counsel to assist you with real estate transfers and the preparation of documents. Ask local counsel whether the contemplated transfer to a trust causes any concerns, including marital rights issues, creditor protection issues, homestead exemption ineligibility, etc. Also ask whether the state allows TOD deeds and whether that technique would be preferable to a current transfer.

b. Cars, Boats & Other Water Craft/Trailers

Motor vehicles, boats, trailers and other titled water craft may be transferred to the Trustee by completing a new Application of Title with the appropriate state agency. The application is available at any state licensing agency, and there will be a nominal fee. It may be preferred, however, to use a TOD designation for
vehicles. The TOD beneficiary could be the trust or an individual. Completion of a new Application of Title is also necessary to add a TOD beneficiary.

Note that in Missouri, if a trust is named as the TOD beneficiary, the sales tax credit will be lost if the trust sells the car and then a beneficiary wants to buy a new car. To protect the sales tax credit, cars should be left directly to individuals and not pass through the trust.

Note that for certain small probate estates (less than $40,000 in both Kansas and Missouri), there are very abbreviated procedures available which do not require that a full-blown probate estate be opened. In Kansas, this can be done via a simple affidavit with no court involvement. The small estate affidavit form for a vehicle can be found on the Kansas Department of Revenue’s website. In Missouri, the small estate affidavit must be filed with and certified by the probate court.

c. Bank Accounts

i. Checking Accounts

Checking accounts can be re-registered into the name of the trustee or made POD to the trust at the owner’s death, or at the surviving owner’s death, in the case of a joint account. Following is sample title language for a joint account with a POD designation: Husband and/or Wife, as joint tenants with right of survivorship – Payable on Death (upon the death of the survivor) to the Husband and Wife Trust dated October 1, 2015.

ii. Savings/Money Market Accounts

Savings and money market accounts can be re-registered into the name of the trustee or made POD to the trust at the owner’s death.

iii. CD’s

CD’s can be re-registered into the name of the trustee or made POD to the trust at the owner’s death. The re-registration should not give rise to an early withdrawal penalty, but it is prudent to confirm this with the financial institution prior to re-registration.
d. Investment Accounts (Non-Retirement)

Non-retirement investment or brokerage accounts can be re-registered into the name of the trustee. The financial institution will have the client sign a new account agreement as trustee, showing ownership by the trust. A TOD designation may also be used, but re-registration is preferred because of the possibility of the owner’s incapacity. For whatever reason, it is often easier to work with a financial institution as the successor trustee of a trust than it is as an attorney-in-fact under a durable power of attorney. Further, the identity of the successor trustee may not be the same as the attorney-in-fact (though it often is and in many cases, should be), and if not, give careful consideration as to how assets are titled when thinking about how a client’s incapacity would play out.

e. Retirement Accounts & Annuities

Retirement accounts will stay titled in the owner’s name. Beneficiary designations will need to be updated. For married couples, often the spouse is named as the primary beneficiary (to allow for the option of the spousal rollover) with the trust named as contingent beneficiary. (If the trust is named, make sure it has see-through or conduit trust provisions to ensure the ability of the beneficiaries to stretch out the distribution of the account over the beneficiary’s (or the oldest beneficiary’s) life expectancy.) Alternatively, adult children may be named as the direct, contingent beneficiaries in appropriate circumstances. For single clients, the beneficiary may be the trust, charities, children or other individuals. Again, make sure you understand the income tax consequences of each option and draft accordingly.

In order to update beneficiary designations, a change of beneficiary designation form will need to be requested from the financial institution or employer, as applicable. These forms vary greatly and have different language and options, and it would benefit your client to review the completed form for them. For example, a client may not understand the importance of checking a “per stirpes” box. Also, some forms make it easy to name a trust as beneficiary, while others take some creativity.

In certain circumstances, it may be necessary to prepare a custom beneficiary designation that will be signed by the client and attached to the standard beneficiary designation form. Most financial institutions will accept a well-drafted custom beneficiary designation. Custom designations are necessary when the limits of the financial institution’s form will not accomplish the client’s goals.
f. Life Insurance

If a client does not have any estate tax exposure, then life insurance policies will generally continue to be owned by the client, but beneficiary designations will need to be updated. It is generally best to name the client’s trust as the primary beneficiary. Request a change of beneficiary designation form from the insurance company or send the new beneficiary information to the agent.

Note that if the client retains ownership of the policy, the death benefit will be included in his or her taxable estate. If this causes estate tax exposure, then consider an irrevocable life insurance trust in addition to any other estate tax planning, including marital planning. If a client already has an irrevocable life insurance trust, check to make sure the ownership of the policy is actually in the name of the irrevocable trust. Occasionally, you may find that a policy did not get properly transferred to the irrevocable trust.

In certain cases, you may also want to consider transferring the ownership of life insurance policies to the trust so that the trustee can exercise policy rights. This comes up most often in the context of a client owning a policy insuring the life of someone else, such as a spouse or child. If the client dies, the policy may become a probate asset.

g. Tangible Personal Property

Non-titled, tangible personal property (such as furniture, jewelry, electronics, collections, clothing and other household and personal items) may be transferred to the trust via a simple assignment. A sample assignment is included with these materials.

h. Closely-Held Business Interests

Closely-held business interests may be transferred to the trust or made TOD to the trust. If the ownership is in the form of corporate stock, then review any stock restriction agreement in place, as well as the corporate bylaws, to see if there are any transfer restrictions or other requirements. Generally, transferring the stock will require a stock power, canceling the old certificate and issuing a new one. Sometimes it may also require a corporate resolution, which could require a shareholder meeting or a signed consent.
LLC interests may be transferred to the trust via an assignment, but again, review the operating agreement carefully to make sure transfer is permitted and to comply with any requirements for transfer. For example, a common requirement is the written consent of the other members of an LLC. Another common requirement is a statement by the transferee (the trust) that it agrees to be bound by the terms of the operating agreement.

General and limited partnership interests may be re-registered in the name of the Trustee and a new certificate of partnership interest, or an amendment to the partnership agreement, should be executed to reflect ownership of the interest in the Trustee. In the case of a limited partnership, the new certificate of amendment may have to be filed with the Secretary of State. Again, make sure to review the terms of the partnership agreement to comply with any restrictions or transfer requirements.

Sometimes, governing documents do not permit a transfer to the trust. In that case, see if the governing documents can be amended easily. Alternatively, a TOD designation may be the simplest route. See RSMo § 461.028 and KSA § 17-49a05 for the proper TOD language.

Be careful with closely-held interests in professional entities (professional association, professional corporation or professional limited liability company). In addition to any requirements contained in the governing documents, review the appropriate state statute. Generally, transfers to trusts are permitted, but only if the professional is the primary beneficiary and the sole trustee of the Trust. See RSMo § 356-111 and KSA § 17-2707(d)(3). If it is contemplated that an interest in a professional entity will be transferred to a trust, it may not work to have both spouses as Co-Trustees of each spouse’s trust, for example, or to use a joint trust.

i. **Certificated Stock (Publicly Traded)**

Often, the easiest thing to do with publicly traded stock certificates is to deliver them to the client’s financial advisor and have them deposit the stock into an investment account, thus converting the paper certificates to electronic ownership. Otherwise, you will need to contact the transfer agent (ComputerShare is a common one) and ask them what the requirements are to have the stock re-issued to the trust. It will generally require a stock power and a Form W-9, and the transfer agent will most likely provide these requested documents to you for completion and return with the original certificate. The transfer agent will likely require that these documents be signed with a “Medallion Signature Guarantee”
which can be obtained at most banks for a fee. The signing party will have to provide proper identification.

j. **Savings Bonds & Treasuries**

It is recommended that clients convert paper savings bonds and treasuries to electronic ownership through a Treasury Direct account. Specific instructions for doing this and also for transferring them to a trust can be found on the Treasury Direct website.

k. **529 College Savings Accounts**

Section 529 accounts have owners and successor owners. Each state has its own Section 529 plan and the particulars of the account agreements can vary greatly. Some allow trusts as owners or successor owners, some do not. Some allow multiple successor owners, while others allow only one. Determine what is permitted and then make a recommendation that will meet the client’s needs and result in the smallest risk of probate.

l. **Declaration of Trust Ownership**

Consider using a catch-all document that attempts to transfer all assets to the client’s trust in the event any are missed. A sample Declaration of Trust Ownership is included with these materials. This may or may not be effective, but certainly indicates the grantor’s intent.

V. **Practical Tips**

a. **Providing a Copy of the Trust Agreement**

Financial institutions frequently request a copy of trust agreement when registering an account in the name of the trust or naming the trust as a POD beneficiary. There are generally three options to satisfy this requirement: provide a full copy of the trust, which could include sensitive or private client information; provide the first and signature pages of the trust; or provide a signed affidavit of trust along with certain pages from the trust.
b. Work with the Client’s Financial Advisor

Financial advisors and bank trust departments can be tremendously helpful in completing the funding steps for their clients. They can certainly assist with the accounts and assets that they manage. Many are even willing to help with assets they do not manage. Enlist their assistance! This is often a value-added service provided at no charge to the client.

c. What is the trust’s tax ID number?

A revocable, grantor trust does not need its own tax ID number as long as the grantor is a serving trustee. The trust can simply use the grantor’s social security number. Thus, when financial institutions ask for the trust’s tax ID number, simply tell them to use the grantor’s SSN.

When the trust becomes irrevocable at the grantor’s death, or if the grantor must be removed as a trustee due to incapacity, a new tax ID number will then need to be requested. With elderly clients at risk for incapacity, consider advising them to name a current co-trustee, such as their bank, and allow either trustee to act independently without the consent of the other. Then if the client is later unable to act, the corporate co-trustee can simply act alone without having to obtain a tax ID number for the trust during the client’s life.

For joint trusts, you may use either grantor’s social security number as its tax ID number, just as you would for any jointly owned account.

d. Will the trust have to file its own tax return?

A revocable, grantor trust is disregarded by the IRS and thus does not have to file its own tax return. Clients can continue to file the same Form 1040. When the grantor is no longer a trustee or if the trust becomes irrevocable, it must obtain its own tax ID number and file its own tax return (Form 1041).

e. Make Trust Funding Easy for the Client

During your signing meeting, make a list of specific funding steps that need to be taken and who will take each step (you or the client). Keep a copy of the action list in the client’s file. Follow up with the client a few months later to see if they have completed the steps and if they need assistance.
Always review how assets are titled and beneficiary designations when you meet with clients to review and update their plans. It is common to find that clients have left trust funding steps undone even years later. Encourage clients to keep a schedule of their assets which lists values, ownership and beneficiaries.

VI. Digital Assets

a. What are Digital Assets?

Digital assets include email accounts, social networking accounts, photo and video sharing accounts, online sales accounts, websites, blogs, voicemail accounts, rewards and points, electronically stored books and music, some video games, and digital files found on computers, tablets, phones and similar devices. Digital assets can also include online access to financial institution accounts, which can be especially important if a client or decedent has opted out of paper statements.

b. Inventory

Have clients prepare an inventory of digital assets, which includes how to access accounts, location of files, account numbers, usernames, passwords and answers to security questions. This should be updated frequently and stored in a secure, but convenient, location. There are also online services that will store this type of information. In any event, the fiduciary should know how to access this information.

c. Include the Power to Manage and Control Digital Assets in Estate Planning Documents

It may help to include authority to manage and control digital assets in estate planning documents, such as including a specific power in the general durable power of attorney or in the trustee power provisions of a revocable trust. However, be aware that many terms of service agreements provide that rights to an online account terminate at death, or that allowing a third party to access such accounts is prohibited.

Google and Facebook now permit users to name a third party who is permitted to access accounts after a period of inactivity that may have been caused due to death or incapacity. Yahoo and Apple, on the other hand, have terms of service agreements providing that the accounts terminate at the owner’s death.
d. Include Disposition of Digital Assets in Estate Planning Documents

A client may wish to distribute some digital assets to certain individuals, while other digital assets are to be destroyed, accounts closed or pages taken down. Instructions for digital assets could be memorialized in a separate document or letter, similar to a tangible personal property list, with a reference to the same in the client’s dispositive document.

e. Additional Resources

The source of the information found in this section of the materials is Jennifer A. Davis’ recent article in the Journal of the Missouri Bar, *Counseling Clients for #DigitalDeath*, May-June 2015. For a more in-depth discussion of the topic, please consult this comprehensive and helpful article.

Locally, Bob Kirkland of Kirkland Woods and Martinsen PC has presented nationally on the topic. He is also an excellent resource for any issues or questions that may arise in your practice relating to digital assets.
DOCUMENTATION FOR ESTATE PLANNING CONFERENCE

Please bring the following documentation to your initial estate planning conference, if applicable. If you have difficulty collecting the documentation, do not despair, I can help you once we meet. But please do your best. Having the documentation at our meeting will allow for more productive conference.

You may bring either originals or copies - we will make copies of any original documents and return them to you.

1) Any existing estate planning documents such as Wills, Trusts, Powers of Attorney, Health Care Directives, Living Wills or a Pre/Postnuptial Agreement
2) Your most recently filed income tax return
3) Any gift tax returns you have filed
4) Any prepared financial statement
5) A recent statement from any brokerage accounts
6) A recent statement for each bank account, certificate of deposit or bank IRA account
7) The original certificate (or a copy) for any certificated stocks or bonds
8) A recent statement from the mutual fund company for any interest in a mutual fund
9) A recent statement for any 401K or other retirement plan account
10) Vehicle title certificates
11) The partnership agreement, operating agreement, or corporate papers for any partnership, LLC or closely held corporation
12) The original deed (or copy) for any real estate
13) The actual policy for any life insurance or annuities
14) The note, mortgage and other documentation of any debts owed to you

For any other asset not mentioned above, please bring any documentation you have pertaining to the asset. If you have any questions, please do not hesitate to call me.
ASSIGNMENT OF TANGIBLE PERSONAL PROPERTY

KNOW ALL PERSONS BY THESE PRESENTS:

That I, (CLIENT), of (county) County, (state), in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration to me paid by (TRUSTEE), as Trustee of the (client) Trust dated (trust date), 2015, the receipt of which is hereby acknowledged, do hereby grant, sell, transfer and assign unto the said (TRUSTEE), as Trustee of the (client) Trust dated (trust date), 2015, all right, title and interest in and to all household goods and furnishings, personal effects and other tangible personal property owned or hereafter acquired by me.

TO HAVE AND TO HOLD all and singular the goods and chattels to the said (TRUSTEE), as Trustee of the (client) Trust dated (trust date), 2015, and his/her successors and assigns, to said Trustee’s own use, forever.

And I hereby covenant with said grantee that I am the lawful owner of said property; that said property is free of all encumbrances; that I have good right to sell the same; that I will warrant and defend the same against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, I hereunto set my hand this __________, 2015.

______________________________
(CLIENT)

STATE OF ________________ )
COUNTY OF ________________ ) ss.

Execution of the foregoing instrument was duly acknowledged before me this __________, 2015, by (CLIENT).

______________________________
Notary Public

My commission expires:
DECLARATION OF TRUST OWNERSHIP

The undersigned (client), individually and as Trustee, hereby declares that, solely as a Trustee of and for the benefit of the following Trust:

The (client) Trust executed on __________, 2015 by (client) as Grantor and (client) as Trustee, as such trust may be amended, (hereinafter sometimes referred to as the “Trust”)

that the undersigned is now holding and will hold, solely and exclusively for and in behalf of said Trust, the following:

Except for personal and household articles, any and all properties of all kinds, whether presently owned or hereafter acquired (regardless of the means by which acquired), and wherever situated including, without limitation, except as herein provided to the contrary:

Bank accounts (checking, savings, certificates of deposit, etc.),

Tenancies in safe deposit boxes,

Mutual and money market funds of all kinds,

Securities (stocks, bonds, treasury bills, notes receivable, etc.),

Agency and custody accounts (at banks, brokerage firms, etc.), and

Real estate wheresoever located (mortgages, land contracts, leaseholds, mineral interests, etc.),

which now and at any time after the date of this instrument are either registered or titled in the name of (client) in an individual capacity (regardless of whatever variation of the undersigned’s name may be employed), whether as sole owner or in co-ownership with another.

Any benefits payable to the Trust under any qualified retirement plan, individual retirement account or other retirement arrangement subject to the “minimum distribution rules” of Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (the “Code”), or other comparable provisions of law shall not be considered to be held by the undersigned for and on behalf of the Trust as true owner. It is the intent of the undersigned that all such retirement benefits be distributed to or held for only individual beneficiaries, within the meaning of Section 401(a)(9) of the Code and applicable regulations thereof.

The undersigned hereby further affirms and declares that, from and after the date hereof:
1. All properties described above will be held by the undersigned solely and exclusively for and in behalf of the Trust as true owner (subject to any and all instructions from the then trustee(s) of the Trust),

2. Except to the extent of beneficial interests provided to the undersigned under the terms and provisions of the Trust (as now written and as the same may in the future be amended), the undersigned has and shall have no personal interest in any of the properties described above, and

3. All liabilities which relate in any way to the acquisition of or which are a lien upon any of the properties governed by this Declaration shall be borne by the Trust which, pursuant to this Declaration, owns such properties.

4. To the extent the provisions herein could be discerned in any manner to be outside the powers or authority expressly accorded the trustees by the provisions of the Trust or under other applicable law, this Declaration of Trust Ownership shall be deemed an amendment to the Trust to the limited extent necessary to provide such powers or authority necessary to fully effectuate the provisions herein.

This Declaration of Trust Ownership and waiver of interest is intended to be and shall be binding upon the undersigned’s heirs, administrators, executors and assigns and shall be revocable only by written instrument executed by one or more of the then trustee(s) of the Trust (with or without indicating such fiduciary capacity) with all of the same formalities as accompanied the execution of this instrument. This Declaration of Trust Ownership may be conclusively relied upon by any party to whom it is presented unless and until such party receives written notice of such revocation by the trustees, or with respect to real property, constructive notice under applicable law by virtue of such revocation being filed of public record. Upon presentation by the trustees of this Declaration and a separate affidavit of trust ownership interest or certificate of trust stating the name and address of each of the currently acting trustees, affirming that said trust is currently in full force and effect, all third parties (including transfer agents, title insurance companies, subsequent transferees, successor trustees, etc.), shall conclusively rely on this Declaration and follow all instructions of the trustees without risk of incurring any liability to the undersigned, the trustees of the Trust, the Trust, the beneficiaries of said Trust, the undersigned’s heirs, the legatees and devisees under the Last Will and Testament of the undersigned, the undersigned’s personal representatives and administrators and estate, or any other parties claiming an interest through the undersigned.

This Declaration is intended to revoke all prior declarations of ownership, if any, with respect to any and all properties governed by this Declaration heretofore executed by the undersigned in the event such revocation is necessary for any and all such properties to be held for and governed by the terms of the Trust.

This Declaration shall constitute a transfer, conveyance and assignment to the Trust of all the undersigned’s right, title and interest in and to all of the undersigned’s property governed by this Declaration.
IN WITNESS WHEREOF, the undersigned has executed this instrument this ____ day of __________, 2015.

____________________________________
(client), Individually and as Trustee

STATE OF _____________ )
) ss:
COUNTY OF _____________ )

Before me, the undersigned, a Notary Public, within and for said county and state, on this ____ day of __________, 2015, personally appeared (client), to me personally known to be the identical person who executed the within and foregoing Declaration of Trust Ownership in an individual capacity and as trustee, and such person duly acknowledged the execution of same.

Subscribed and sworn to before me the day and year last above written.

____________________________________
Notary Public

My commission expires:
INSTRUCTIONS FOR FUNDING
YOUR REVOCABLE TRUSTS

This memorandum is provided to assist you with the mechanics of funding and administering your revocable trust. Bearing in mind that the primary purposes of your revocable trust are to (1) avoid the expense, delays and publicity of probate, and (2) create a vehicle for managing your assets in the event of your disability, it is important that you transfer ownership of the types of assets discussed in this memorandum to your revocable trust. With the following instructions, you can make most of such transfers yourself. However, The Counts Law Firm, LLC will be happy to assist you in making such transfers if you wish upon your request.

1. Titling Assets in the Name of Your Trust. Assets transferred to or acquired by (husband first name)’s trust should be titled as follows:

(husband) or his successors, as Trustee of the (husband) Trust dated (trust date), 2015, as such trust may be amended.

Assets transferred to or acquired by (wife first name)’s trust should be titled as follows:

(wife) or her successors, as Trustee of the (wife) Trust dated (trust date), 2015, as such trust may be amended.

2. Assets to be Transferred to Your Trusts. Unless otherwise indicated, the following types of assets should be transferred to your trusts as hereinafter described:

(a) Bank and savings institution accounts and certificates should be re-registered as shown above in Paragraph 1. New account agreements, passbooks and certificates will be issued by the financial institution to evidence the change in ownership. The re-registration of certificates of deposit should not give rise to an early withdrawal interest penalty, but it would be prudent for you to confirm this with each institution prior to re-registering a C.D. For your joint checking account, for convenience, you may continue to own this account in your joint names. You should add a Payable On Death (POD) designation, however, so that the account will not be a probate asset in the event of your simultaneous deaths. The joint checking account would be titled: (husband) and/or (wife), as joint tenants with right of survivorship – Payable on Death (upon the death of the survivor) to the (husband) Trust dated (trust date), 2015. It is not necessary to refer to your trust on checks even if ownership of the account is transferred to the trust, as long as the bank records show the trust ownership or the POD designation.

(b) Certificates representing shares of corporate stocks, mutual funds and registered bond debentures should be delivered to your brokerage firm or mailed (registered mail) to the designated transfer agent along with executed stock or bond powers appointing such institution as your attorney-in-fact to transfer such securities to the Trustees of your revocable trusts. If you will be transferring more than one stock certificate of the same company to your trust, you may want to request that a series of new certificates be issued, each corresponding to your old certificates, rather than one certificate consolidating all of your shares. In this way you will be able to trace your income tax basis in any shares that might be subsequently sold.
(c) Investment and custodial accounts at brokerage firms, investment companies and trust departments, where the underlying assets are being held for your account in nominee or street name, should be re-titled as shown above in Paragraph 1. This can be accomplished by having the institution prepare a new account agreement, to be executed by you, as Trustee, showing ownership in your trust.

(d) Mutual fund shares are most commonly held on account by the mutual fund company or its agent rather than in certificate form by the owner. To transfer your mutual fund holdings to your trust, you should contact each mutual fund company, or the broker through whom you purchased your shares, and request the documentation they require to make a change of ownership.

(e) Certificates representing shares of closely-held stocks and bonds, like their publicly traded counterparts, should be re-registered in the manner described above in Paragraph 2(b). Such certificates, along with the executed stock or bond powers, should be given to the Secretary of the closely-held corporation with instructions to issue new certificates in the name of your Trustee.

(f) General and limited partnership interests should be re-registered in the name of your Trustees and a new certificate of partnership interest, or an amendment to the partnership agreement, should be executed to reflect ownership of the interest in the Trustee. In the case of a limited partnership, the new certificate of amendment may have to be recorded with the Secretary of State. The general partner can advise you about this. Please review the terms of the partnership agreement; you may be required to obtain consent of the general partner in order to properly transfer your interests.

(g) Limited Liability Company interests may be transferred to your Trust if permissible and in compliance with the Operating Agreement. The Counts Law Firm, LLC can prepare the assignment upon your request.

(h) Real estate interests may be transferred to your Trust by means of a deed (usually a transfer-on-death or general warranty deed). The Counts Law Firm, LLC has prepared a transfer-on-death deed which will transfer your residence to the surviving spouse’s trust at his or her death. The Counts Law Firm, LLC will record the deed and the original should then be kept with your other important documents. This deed does not take effect until the survivor’s death, so during your lives, your residence will be continue to be held in your joint names. This should make selling or refinancing your home less complicated. Before transferring any other real estate interest to either of your trusts, please consult The Counts Law Firm, LLC. It should be determined whether, for non-tax reasons, the transfer of all or a portion of the property interest to your trust is desirable. It may be that instead we would suggest a beneficiary deed to transfer the property to your trust upon the death of the owner(s). Furthermore, except for transfers of residential property to your trust, before transferring any real estate interest that is subject to a deed of trust, mortgage or other encumbrance, you may wish to request that the lender release any rights it may have under a “due-on-transfer” provision in the security agreement, or the related promissory note, for such transfer.
(i) **Tangible personal property** consisting of such items as jewelry, art, coin and stamp collections and items of household or personal use may be transferred to your Trusts by executing an “Assignment of Tangible Personal Property.” The Counts Law Firm, LLC has prepared such an assignment for you. It does not need to be recorded, and should be kept with your original estate planning documents.

If you are presently storing certain items of tangible personal property in a safe deposit box, title to the contents of such safe deposit box should be transferred to your Trustees by executing an “Assignment.” A copy of the Assignment should be placed in the box to further evidence the transfer.

Motor vehicles may be transferred to your Trustees by completing an “Application of Title.” This application is available at any state Licensing Agency and there is a nominal fee involved. To avoid changing the title to your car, you may keep your car in your joint names, but probate would not be avoided on the survivor’s death. Fortunately, for certain small probate estates (less than $40,000 in both Kansas and Missouri), there are very abbreviated probate procedures available which do not require that an estate be opened, and only require filing a few pleadings with the Probate Court. Another alternative would be to add a “transfer on death” (TOD) beneficiary to the title. This beneficiary could be your trust or a child. If you do not wish to change the title to your existing automobile, you should certainly keep your trust in mind when purchase a new vehicle so you can get the original title in the form you want – either titled to your trust or TOD to your trust.

(j) **Unregistered or bearer bonds and debentures**, which cannot be registered in the name of the Trustee, should be assigned to your Trustee in the manner described in Paragraph 2(i), and such bearer bonds and debentures should be held by your Trustee in your safe deposit box.

3. **Life Insurance Proceeds** – Because of various estate tax considerations we recommend that you consult us prior to acquiring any new life insurance policies or before changing the ownership or beneficiary designations of policies you have not made known to us. For the life insurance you now own that you have identified to us, the beneficiary designation for the policies insuring (husband first name)’s life should be as follows:

- **Primary Beneficiary:** The then serving Trustee of the (husband) Trust dated (trust date), 2015, as such trust may be amended
- **Contingent Beneficiary:** (wife), spouse

For the life insurance you now own that you have identified to us, the beneficiary designation for the policies insuring (wife first name)’s life should be as follows:

- **Primary Beneficiary:** The then serving Trustee of the (wife) Trust dated (trust date), 2015, as such trust may be amended
- **Contingent Beneficiary:** (husband), spouse
You should contact the insurance company, local agent or employee benefits director and request new beneficiary designation forms. These forms should be prepared with the above-named beneficiary designation and returned to the insurance company, agent, or benefits director.

4. **Qualified Retirement Assets and Annuities** – In order to obtain maximum income tax deferral and allow for a spousal rollover, the beneficiary designation for your qualified retirement assets should be completed as follows:

   **For (husband first name)’s retirement accounts:**
   
   Primary Beneficiary: (wife), spouse  
   Contingent Beneficiary: The then serving Trustee of the (husband) Trust dated (trust date), 2015, as such trust may be amended

   **For (wife first name)’s retirement accounts:**
   
   Primary Beneficiary: (husband), spouse  
   Contingent Beneficiary: The then serving Trustee of the (wife) Trust dated (trust date), 2015, as such trust may be amended

5. **Managing Your Trust After Its Initial Funding** – As Grantors of your revocable trusts, you have full dominion and control over all of your trust assets. You must remember, however, that any time you buy, sell, or in any manner deal with the assets that are owned by your revocable trust, such transactions must be conducted in the name of the Trustee(s).

6. **Taxpayer Identification Number (“TIN”)** – From time to time you may be asked to supply a taxpayer identification number for your trust to any entity that pays income (e.g., interest and dividends) to the trust. While the Grantor of the Trust is living, you should furnish the personal social security number of the Grantor in response to such request. However, upon the death of the Grantor, a TIN will need to be obtained for the trust.

7. **Tax Returns** – While the Grantor of a trust is living, all items of income, all deductions and credits from the trust will be reported on the Grantor’s Form 1040. A separate tax return for your revocable trust will not be necessary. When the Grantor dies, however, a separate tax return will be filed (a Form 1041) by the successor Trustee of the Trust.

PLEASE CALL US IF YOU HAVE ANY QUESTIONS ABOUT THE CONTENTS OF THIS MEMORANDUM OR IF YOU WOULD LIKE US TO ASSIST YOU WITH ANY ASPECT OF YOUR REVOCABLE TRUST.