UNDERSTANDING
ESTATE PLANNING IN MISSISSIPPI

by

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In the minds of many, estate planning conjures up images of a rich old man lying on his deathbed with his heirs gathered around in anticipation as he tells them what provisions he has made for them. Another image that comes to mind is of the heirs gathered in the lawyer's office after the funeral as the lawyer, always a white-haired gentleman with a vest and pocket watch, sits ensconced behind an enormous mahogany desk reading the Last Will of his late client. Death taxes were never mentioned.

Well, things have changed–a lot. Before, a person went to a lawyer to get a will drawn up. Today, he needs an "estate plan," and "estate planning" has become big business, with banks, trust companies, insurance companies, brokerage houses, lawyers, CPA's, financial planners, marketers of living trusts and others all vying for a share of the estate planning "market." A confusing array of estate planning "techniques" abound, and the advice is often conflicting, depending upon what the advisor has to sell. At most any time, you can find a "free seminar" on the subject, usually offering the "living trust" as the solution to all your estate planning problems.

The solution for many clients is to simply do nothing. This is also psychologically satisfying since no one likes to think about death. In fact, death is something our society today has made practically invisible. We rarely see death today because, let's face it, most people are seriously old when they die, and they die quietly and alone in a nursing homes. Unfortunately, it takes a tragedy like the death of John Kennedy, Jr. or an event like September 11 to get most people to focus on the inevitable.

The purpose of this little pamphlet is to try to help the lay person sort out the issues, cut through the hype and understand the estate planning process so that it is not so intimidating. Hopefully, we will spike a few misconceptions along the way as well. So, let's get down to the nitty-gritty.

WHAT IS ESTATE PLANNING?

Estate Planning is concerned with two things–the management of property and its ultimate disposition. The primary goal of estate planning is to make sure that your estate is managed well during your life and after your death and that the right people wind up with your property after you are gone.

If you want to be sure that the right people get your property in the right proportions, it is important to consider who the "wrong" people are. The first "wrong" recipient of your hard-earned wealth,

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unless you are an extreme patriot, is the Federal Government and the State of Mississippi. Another candidate is your current spouse's new spouse. How about this one: a spendthrift, chemically dependent or otherwise undeserving child or grandchild? Or this: your illegitimate grandchild whom you never met. Then there's always the gold digging in-law.

These are egregious cases, but others are more subtle. You may prefer your spouse to inherit, trusting that he or she will take care of your children. But under Mississippi law, without a will, your spouse is only entitled to a child's share of your estate. You may be childless, but would prefer your blood relatives to inherit after the deaths of you and your spouse, rather than your spouse's relatives.

BASIC TOOLS OF ESTATE PLANNING

If you don't say what you want to happen to your property, the State of Mississippi will decide for you. All states have laws regarding *descent and distribution*, or sometimes called *intestate succession*. Each state's laws are different, but generally, they provide that your spouse and children will take to the exclusion of other relatives. In Mississippi, as mentioned, the spouse and children take in equal shares–a counter-intuitive result to the minds of most people, who would prefer the spouse to take all, or at least a *life estate* in the whole. If there is no spouse and there are no children, the estate will go to parents and siblings, equally. If none,` then to "next of kin" according to the civil law (based on Roman law). Also, if any of the recipients are minors or incapacitated, then it will be necessary for the court to establish a legal guardianship for such person, which, in the case of a minor, will terminate at age 21–not always a desirable result. In the meantime, the guardian will be required to file annual accountings with the court, which can be expensive. The guardian may also be

required to post a bond, which requires an annual premium. Likewise, the administrator of the estate may also be required to post a bond and file accountings for the estate. The court will also have to make a determination of heirs, often after publishing process for unknown heirs in the local paper. As you can imagine, intestacy is really something to be avoided if at all possible.

I. Wills and Probate. With some exceptions and alternatives to be discussed later, a Last Will and Testament should be the cornerstone of your estate plan. Your will is simply a written document, executed in the manner provided by law, which states what you want done with your property and whom you want to be in charge of your property after you are gone. The simplest form of will is a hand-written or *holographic* will. Holographic wills are perfectly valid in Mississippi. To be valid, the will must be completely in the handwriting of the person making the will (the *testator*) and be *subscribed* by the testator (which means signed at the end or bottom of the document). The other, more common form of will is a type-written document, usually prepared by a lawyer, and witnessed by two or more attesting witnesses. This is known as an *attested* will. If validly executed, the will is capable of being admitted to *probate*. Until the will is probated, it is fully revocable and amendable, or *ambulatory*. The will does not "speak" until it is probated with the proper court.

*TO PROBATE OR NOT TO PROBATE?
THAT IS THE QUESTION*

Probate is the process whereby an instrument is declared by the appropriate court to be the valid and true last will of the decedent. The decedent's personal representative, known as an *Executor* or *Executrix* depending on his or her gender, is appointed to "execute" the will; that is, to carry out its provisions. But probate is not always necessary. In Mississippi, if the total estate is worth less than

$20,000, banking institutions are authorized to turn over funds to a decedent's successors upon their furnishing an appropriate *affidavit*. Similarly, the title to motor vehicles can usually be changed to a surviving spouse upon furnishing an *affidavit* to the Department of Motor Vehicles. Personal property, such as furniture, furnishings, etc., are often informally divided up among family members shortly after death, often even before a will is read!

Also, it is important to understand that a person's will does not control the disposition of all of his or her property. Some property is disposed of at a person's death by virtue of joint tenancies with rights of survivorship, "pay on death" accounts, beneficiary designations of life insurance or annuities, as well as IRA's and other accounts. Joint bank accounts are very common. In fact, it is not uncommon for a person's entire estate, save for personal effects, to be owned in such a way.

Some people deed their property away prior to death, and reserve a *life estate*. Others transfer their property to a *revocable living trust*. Such property is not controlled by the will either. It is only where a decedent owned property at death that is not otherwise disposed of that the will takes effect and thus needs to be probated.

It is also important to understand that wills are instruments of title, like a deed. So, if real property is not jointly owned with rights of survivorship or transferred prior to death, generally, probate is necessary to establish a clear chain of title. The same is true of cash, stocks, bonds, partnership interests and other financial assets which are not owned in survivorship form.

Probate has another distinct advantage; that is, it provides a method to bring finality and closure to an estate, by cutting off creditors of the decedent, so that their claims do not follow the

property to the beneficiaries' hands. This is especially important with real estate, again, so that a marketable title can be conveyed.

Probate is also a necessity if disagreement exists among the heirs because the court must determine how to distribute the property. Distributing the assets under court supervision also protects the personal representative from criticism and possible legal liability for the actions taken.

SOME PROBATE MISCONCEPTIONS

Many people have heard bad things about the probate process. Most of these things simply are not true. Here are a few.

1. There is no Privacy. While it is true that the will must be filed of record, in most cases the will actually reveals very little personal information. A testator can waive the requirements of inventory and accountings, which has the effect of keeping information about the assets of the estate secret. Of course, the will may contain sensitive information. For instance, you may be disinheriting a child and prefer this information not be public. A will substitute such as a revocable living trust may be a solution.

2. The Probate Court Takes a Big Fee. Not true. In Mississippi the court charges roughly $100.00 to probate a will. Of course, legal fees are more, but often legal fees are unavoidable when a person dies whether the will is probated or not, especially if there is disagreement among the heirs, if there are creditors or if estate taxes are owed. It is true that your Executor is entitled to a fee, but in most cases the Executor is a close family member and will waive any fee. Executor's fees in Mississippi are not based upon the size of the estate. There used to be a fee schedule based on a percentage of the estate, but now by statute and the rules of ethics, the fees charged by Executors and attorneys are based on the value of their services,

usually a product of hours worked times an hourly rate. You should not agree to pay an Executor or attorney a percentage of the estate.

3. By Avoiding Probate, One Can Avoid Estate Taxes. False. Estate taxes are imposed on all the property a person owns at death, not just property passing under the will. Taxes are imposed, for instance, on joint property and property in revocable living trusts.

4. By Avoiding Probate, One Can Avoid Litigation. Not true. Litigation arises because people disagree about money. These disagreements can occur just as easily when probate does not occur.

HOW THE PROBATE PROCESS WORKS

Once it has been determined that probate is necessary, the question is, what is involved? This depends on whether there is to be a will contest or not. Most often there is no contest, and the will can be probated in "*common*" form. This is usually a simple process, as follows:

1. The family locates will and the witnesses to it. If they have not done so, at least one witness gives an affidavit to the due execution of the will.

2. The lawyer draws up papers to present to the court asking that the will be admitted to probate. The lawyer files the papers and meets briefly with the judge for him or her to sign a decree admitting the will to probate and appointing an Executor.

3. The Executor signs an oath. Hopefully, the will waives the requirement of bond, but if not, a fiduciary bond will be arranged for. The oath and bond are filed with the clerk, who issues the *Letters Testamentary* to the Executor. These are the Executor's

authorization to act on behalf of the estate in carrying out the terms of the will.

4. After the letters are issued, the Executor will review the decedent's affairs and compile a list of persons to whom the decedent may have owed money. A letter is written to each of these persons on a pre-printed form notifying them of their right to probate a claim, and if they fail to do so within 90 days of the first date that notice to creditors runs in the local newspaper, their claim will be forever barred. After the letters, if any, are sent, the Executor files an affidavit with the court that the letters have been sent, or that there were no known creditors.

5. After the affidavit is filed, a notice is run in the local paper for three consecutive weeks. As mentioned, 90 days after the first date the notice appears, creditors who have not filed a claim are barred.

6. After the 90 days are run, the claims, if any, are evaluated and either paid or contested. After the claims are thus disposed of, the assets of the estate can be distributed to the beneficiaries.

7. Any time after the 90 days has run, the lawyer goes back to the court with another petition to close the estate and discharge the Executor. If the Executor has paid claims or bequests, he provides receipts. If he has not done so, he requests permission in the decree to do so, and later he may file a "*Statement of Compliance*" that this has been done.

8. For larger estates, an estate tax may be due. If so, the return and the taxes are due nine months from date of death, or with extensions, 15 months. The IRS has three years to audit the return, but usually IRS will examine the return and issue a "closing letter" sooner than that. The Executor can also request an early

determination and discharge from liability. Thereafter, the estate can be closed as mentioned.

II. Will Substitutes. In order to avoid the problems associated with probate, whether imagined or real, people have turned to a variety of other options, sometimes successfully, and sometimes with disastrous consequences.

1. Joint Property: Not Generally the Best Option. Much of the property of most married couples and some single persons is held in joint name, but most people are unaware of the legal consequences. Many couples own their personal residence as “joint tenants with right of survivorship.” However, real estate is sometimes owned by a husband and wife as "tenants by the entirety," a form of co-ownership between husband and wife, which has some unique legal consequences not discussed here. Bank accounts and stock brokerage accounts are probably the most common form of personal property held jointly.

Generally, an account in joint name with right of survivorship gives each joint tenant a one-half interest in the account during his or her lifetime. *Either* joint tenant, however, may withdraw *all* of the property. Unfortunately, the bank or broker has no obligation to monitor withdrawals; if one joint tenant withdraws more than his or her interest, he or she may have an obligation to the other joint tenant, but enforcing that obligation may require costly litigation.

Joint tenancy has some advantages. Joint property escapes probate, and passes to the surviving joint tenant free from the claims of creditors of the deceased joint tenant.

Joint ownership may also allow the creditors of one of the joint tenants seize the entire account to satisfy his claim, leaving it up to

the other joint tenant to recover his or her share from the defaulting joint tenant, who is obviously broke to begin with.

The most significant trait of joint property with right of survivorship may be that when a joint tenant dies, the property passes to the surviving joint tenant by operation of law, despite contrary intentions manifested in the decedent’s will. Under Mississippi law, there is an automatic presumption that a bank account or certificate of deposit in joint names is intended to pass to the surviving tenant, even if the surviving tenant’s name was added simply for convenience, that is, so that the surviving tenant could write checks to pay bills in case of incapacity. In this regard, a convenience account acts a little like a *Power of Attorney*. However, this can result in an unintended disinheritance of those beneficiaries who are not listed on the account.

You may establish a convenience account which is so noted on the bank's records. Most often, however, a convenience account is unknowingly set up as a "joint account" with only an understanding between the tenants as to the true nature of the account, which is difficult or impossible to prove upon the death of a tenant, especially in light of the presumption created under Mississippi law.

Another issue that may arise after one of the joint tenants dies is whether the account is a "true" joint account or an account held as "tenants in common." If the account is a tenancy in common, then on the death of the first tenant the account balance does not pass to the surviving tenant; instead, half the account property will pass in accordance with the will of the deceased tenant. The remaining half belongs to the surviving tenant. The question is, "what did the tenants really have in mind when they set up the account?" The method of opening the account may create doubts as to which type was intended.

Many people intentionally establish multiple joint accounts as a substitute for a Will. A parent who wishes to treat all her children equally may set up a separate joint account with each of her children. Unfortunately, equality requires the parent to monitor each account and keep the same account balance in each account, something that is rarely done.

As you can imagine, litigation on issues involving joint accounts is common, often involving considerable expense, delay and substantial uncertainty during the tenants' lives and on the death of one of the tenants. In fact, the most litigated aspect of estate administration may be over joint accounts.

Finally, there may be a gift tax consequence when joint accounts are set up, or a taxable gift may occur when withdrawals are made from the account. Also, reliance on joint property may occasion unnecessary estate taxes and inflexibility in an estate plan.

2. Pay on Death Accounts. The problems that can be created by the indiscriminate use of joint tenancies as will substitutes have been discussed above. If you truly want a will substitute, there is a better way. There should be relatively little use for the joint tenancy in most cases, and such should be used only where an owner wants both complete co-ownership during life *and* a transfer to the surviving co-owner (and no others) at death, and only where such is consistent with overall estate planning objectives. Many of the problems associated with joint accounts do not apply to Pay (or Transfer) on Death ("TOD") Accounts, and these accounts been called a "poor man's will." In the past, these types of accounts have generally been held invalid because they were not generally executed in conformity with the statutory requirements for a valid will. Mississippi has had a statute validating TOD accounts in one form or another since 1984; unfortunately, it only applied to bank accounts. In 1997 the Uniform Transfer-on-Death Security Registration Act

(the "Act") became law, which extended the law's coverage to securities as well as bank accounts. Under this law, a security may be registered in beneficiary form if it is owned by one individual or multiple individuals with right of survivorship. However, tenants in common may not register a security in beneficiary form.

The form is simple. It is sufficient to name the owner or owners, followed by the words "transfer on death" or the abbreviation "TOD" or by the words "pay on death" or the abbreviation "POD," followed by the name of the beneficiary or beneficiaries. For example, for a single owner and a single beneficiary: "John S. Brown TOD John S. Brown, Jr."; for multiple owners with a single beneficiary: "John S. Brown and Mary B. Brown, JTWROS TOD John S. Brown, Jr."; for multiple owners and multiple (secondary) beneficiaries: "John S. Brown and Mary B. Brown JTWROS TOD John S. Brown, Jr. SUB BENE Peter Q. Brown; or "John S. Brown and Mary B. Brown JT TEN TOD John S. Brown, Jr. LDPS ('living descendants per stirpes')."

During the life of the owner, a TOD beneficiary designation has no effect on ownership and the form can be changed or canceled at any time by the sole owner or all the surviving owners without the consent of the beneficiary. At the death of the sole owner or the last to die of the joint owners, the account, as expected, passes to the beneficiary or beneficiaries who survive all owners. On proof of death, a security may be re-registered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until such time, multiple beneficiaries hold as tenants in common. If no beneficiary survives, it goes to the estate of the last surviving owner.

3. Revocable Living Trusts. The public is inundated with reasons why they must have a "living" trust and why the living trust is the cure for all that is wrong with their estate plan. However, few people really understand how the living trust works. What is the real

story? We will attempt to explain these animals and how they can be used and some dangers associated with their use.

The typical revocable "living" trust is created during the grantor's life and provides for the grantor to act as his own trustee, or co-trustee with his spouse or adult child. The trust agreement specifically reserves the power in the grantor to revoke or amend the trust and to withdraw income and principal from the trust at any time. Unless the revocability is specifically stated, state law will deem the trust irrevocable. The trust also provides for a successor trustee in the event of death or incapacity of the grantor who is authorized to use income and principal of the trust for the grantor's support. The trust should contain a workable definition of incapacity in order for the successor trustee to take over. The trust should also contain provisions for the distribution of the trust property upon the death of the grantor and so is a testamentary document, like a will.

In most cases, the trust is funded immediately upon creation by actually changing the title to assets, e.g., stock, real estate, bank accounts, etc., to the name of the trustee (e.g., "Elmer Fudd, trustee of the Elmer Fudd Revocable Trust u/a dated 12/18/01"). Sometimes the trust will not be funded, but is created as a "standby" trust to be funded upon incapacity by an attorney-in-fact under a durable power of attorney. *It is the failure to properly fund that is the downfall of most living trusts*. Without proper funding, the trust is a worthless piece of paper, and upon death, in the absence of a valid will, the state will direct the distribution of your estate.

(1) Advantages.

(a) Avoidance of Probate. This is the single most commonly offered reason in the marketing hype for having a living trust. It is suggested that the probate process is long and costly. Probate is avoided to the extent assets were transferred to the trust

prior to death. The assets pass to the beneficiaries according to the terms of the trust, without the necessity of probate. As discussed above, however, the probate process is not necessarily lengthy or expensive. The real delays in the estate administration process result from the need to gather the necessary information to prepare and file federal and state estate tax returns, including appraisals, debts and expenses and to receive a closing letter from the IRS and State Tax Commission. Since all the assets in a revocable living trust are included in the estate tax base, this process will be necessary whether assets are disposed of by will or revocable trust. Neither the executor under a will nor the trustee of a revocable trust will be willing to distribute assets from his possession until he is satisfied that the tax liabilities have been finally determined and paid. Otherwise, the executor or trustee will be personally liable for those taxes. The cost of probate has been discussed above. Attorneys fees are frequently about the same for the proper administration of a revocable trust. It should be pointed out that living trusts do reduce the amount of re-titling work the attorney or executor must do at death, but this is not really a savings, since the decedent has pre-paid these costs when setting up the trust.

Where real estate is owned in more than one jurisdiction, a valid reason for a revocable trust exists; that is, to avoid multiple probate proceedings; however, state death tax returns will still need to be filed in those states, if the estate is taxable.

Privacy may be a reason for using a revocable trust. Probate is a public process and all documents associated with it are part of the public record, including the will. Since a revocable trust is a private document, it does not have to become a public record. However, in Mississippi, if the trust is ever to hold *real estate*, the trust, or a certificate summarizing the trust, must be recorded in the public land records. As mentioned, most wills only contain a generic distribution scheme and do not contain specific asset information, and inventory

is generally waived. Still, privacy may be important to a public official or celebrity, or someone who is disinheriting a child, or for other reasons.

(b) Asset Management. A compelling reason for considering a revocable trust is to provide for the orderly management of your financial affairs in case of incapacity. As mentioned, typically, the grantor will serve as his own trustee so long as he is mentally capable. At incapacity, a successor trustee will take over management, without the need for judicial involvement in the form of a conservatorship. A conservatorship may still be necessary if not all assets were previously conveyed to the trustee and there is no power of attorney document in place authorizing someone else to fund the trust. It must be said, however, that similar results can be attained through the appointment of an attorney-in-fact under a general durable power of attorney. However, the authority of the attorney-in-fact will terminate at death. Not so with the successor trustee of a revocable trust.

(c) Do I Still Need a Will? Yes. A will is necessary to distribute at death any assets not previously transferred to the trust, either intentionally or more commonly, through neglect. If there are minor children, a will is needed to appoint a guardian. Usually, when a revocable trust is involved, a "pour over" will is prepared, dumping the rest of the decedent's assets into the trust at death. But, the "pour over" will should contain backup testamentary distribution provisions in case the trust is challenged and defeated in litigation or revoked prior to death.

(2) Disadvantages.

(a) Complexity and Expense. Generally, the revocable trust adds complexity to the life of the grantor, and are more expensive to set up than a will. For these reasons, many

revocable trusts are ignored once they are initially set up–often with disastrous consequences. A badly implemented trust can be worse than the worst will or intestacy. The process of transferring assets can be simple or very complex depending upon the nature of the assets. For instance, the grantor may have to locate hundreds of stock certificates and return them to the issuer with its particular forms completed and "signature guaranteed" signatures. Remembering to title new assets in the name of the trust can also be a hassle and is often overlooked. Also, if the grantor is not a trustee or co-trustee, then a separate income tax return will have to be filed for the trust.

(b) Is Medicaid in Your Future? The assets of a testamentary trust (i. e., one created under a will) are generally protected from the long term care costs of the beneficiary, e. g., a surviving spouse. A revocable trust, even after the death of the grantor, is not considered testamentary for this purpose, and will be counted against the beneficiary for eligibility purposes should the beneficiary need to qualify for Medicaid to pay for a lengthy nursing home stay.

(c) Do You Have Any Creditors? Probate cuts off the claims of any creditor who does not present his claim with the court within 90 days after first publication of notice to creditors in the local paper. There is no such process for a revocable trust, and under Mississippi law, the grantor's creditors can proceed against the trust assets even after the death of the grantor. The general statute of limitations in Mississippi is three years, so the trustee may not feel safe distributing the trust assets before three years after the death of the grantor unless there is a probate. Title insurance companies may also be reluctant to write a policy on land in a revocable trust prior to that time for the same reason.

(d) Income Tax Opportunities Lost. There are some important income tax planning options that are available to an estate that are not available to a living trust. For instance, an estate can elect a fiscal year to defer up to eleven months of income, which is not available to a trust. However, there is a new federal tax law which may eliminate some of these tax disparities between estates and revocable trusts.

(e) Growing Trend. There is a growing trend among state courts and legislatures to subject revocable trusts to some of the same strictures that govern wills. For instance, the majority of states today will give a surviving spouse elective share rights against a revocable trust the same as a will. Some states are requiring the trust to be recorded. Others are requiring trusts to be executed with all the formalities of a will.

(f) The Merger Doctrine. This doctrine is still alive and well in Mississippi. It says that if the trustee and the beneficiary of a trust are the same person, there is no trust; it is said to "merge" into the trustee personally. It is thought that the presence of remainder beneficiaries prevents the trust from "merging" into the trustee/beneficiary. This supposition has not been tested in the Mississippi Supreme Court. Until it has, the use of a co-trustee should be considered, and a revocable trust should probably be executed with the same formalities as a will.

4. Other Assets Not Controlled by Will. These include life insurance policies and annuities, including IRA's and qualified plans, the disposition of which are controlled by a beneficiary designation form prescribed by and filed with the company.

III. Planning for Disability: Powers of Attorney and Advanced Health Care Directives.

1. Durable General Powers of Attorney. These have already been mentioned as an alternative or supplement to a revocable living trust. The appointment of an attorney-in-fact under a power of attorney is a useful strategy in many financial planning situations. It permits spouses, adult children or trusted friends or relatives to act for one another during absence or incapacity and, in the latter case, facilitates post-disability gifting and other business transactions. Even a bank or trust company can serve as attorney-in-fact. In the absence of an effective power of attorney or fully-funded revocable living trust naming a successor trustee, a cumbersome and expensive conservatorship may be the only way handle these matters.

Recognizing the possibility of disability or absence for an extended period, a person (called the *principal*) grants to a third party (called the *attorney-in-fact*) the power to act under general circumstances (a *general power of attorney*) or under limited circumstances (a *special power of attorney*). The power of attorney may be carefully written to remain effective after disability or incapacity of the principal, and this type of power is called *durable power of attorney*.

To be a durable power, the instrument must contain language indicating that the grant and exercise of power will survive the incapacity of the principal. The Mississippi Code describes the language of durability: "This power shall not be affected by the subsequent disability or incapacity of the principal."

Both the principal and the attorney-in-fact must be competent when the power is granted. The attorney-in-fact must, of course, be competent when the power is acted upon.

A durable power of attorney can be drafted so that it will become effective only upon the incapacity of the principal. This is called a "springing power." This may be helpful to persons who want the

protection of a durable power but are reluctant to execute a presently effective power. As with a living trust, it is important to define incapacity. Typically, this determination is made by the principal's attending physician, in consultation with one or sometimes two other physicians.

2. Advance Health Care Directives.

(1) Health Care Power of Attorney. In 1990 and again in 1998, the Mississippi Legislature enacted a law which authorizes a legal document entitled a "Durable Power of Attorney for Health Care." A Durable Power of Attorney for Health Care is a legal document which allows a person (the *principal*) to name another person to make health care decisions for the principal if he or she becomes unable to make such a decision on his own because of a permanent or temporary illness or injury. The law refers to this person as an *attorney-in-fact*. This person does not need to be an attorney. He or she can be a family member or a close friend.

This document allows the principal to provide, in advance, specific instructions concerning the types of treatments, services and procedures he or she *wants* to receive or *does not want* to receive in the event the principal should become unable to make his or her own decisions. These specific instructions will help the attorney-in-fact make health care decisions on the principal's behalf. Some areas in which the principal may want to provide guidance to the attorney-in-fact include whether or not the principal wants: cardiopulmonary resuscitation (CPR), restarting the heart when it stops; artificial feeding through a tube in the stomach; use of artificial breathing apparatuses; electroshock to convert a fatal heart rhythm to a normal rhythm; blood transfusions; drugs to raise blood pressure if the principal is in shock; drugs to correct abnormal heart rhythms; use of antibodies; and use of intravenous fluids (IVs). It is important for the principal to discuss his or her desires with the attorney-in-fact so that

he or she will be able to act in accordance with the principal's wishes. The principal should also talk with his or her primary physician about particular life-threatening illnesses or injuries and the kinds of treatment that might be appropriate for including in a Durable Power of Attorney for Health Care.

The principal should always keep a copy of the Durable Power of Attorney for Health Care and give a copy to each of the persons named to act on his or her behalf. A copy should also be given to the primary physician(s) to make a part of the principal's medical records. If the principal is in a nursing home or hospital, a copy should be included with the principal's medical records. A copy may also be provided to clergy, family members and friends who are not named in this document.

The principal may revoke or cancel the Durable Power of Attorney for Health Care at any time by simply notifying his or her doctor, hospital or attorney-in-fact in writing of the revocation.

(2) Living Wills. As American society has experienced rather rapid lifestyle changes over the past several decades, questions have surfaced that challenge the way individuals plan for the future, especially concerning life-support systems for the terminally ill. Those who would choose death in the face of critical or terminal illness are receiving support. At the present time, nearly all states have passed some form of law dealing with the requirements for living wills or health care proxies. While a health care proxy allows the principal to appoint someone to make decisions on his or her behalf, a living will allows the principal to specify the particular types of treatment he or she would like to have provided or withheld. Each state has its own set of requirements.

A living will is a medical directive written in advance, which sets forth an individual's preference for treatment in the event of his or

her inability to direct care. The document may be drafted to include when the directive should be initiated and who has the decision-making responsibility to withdraw or withhold treatment.

In addition to allowing respect for the wishes of the individual, the living will helps to alleviate feelings of guilt or uncertainty experienced by those faced with the responsibility of making important decisions for loved ones.

Even more far-reaching is a federal law requiring all health care providers that receive Medicare and Medicaid to inform everyone over age 18 of their right to determine how they want to deal with this issue and whether they want to fill out a living will. Known as the Patient Self-Determination Act, the law impacts virtually every hospital, nursing home and health maintenance organization (HMO) throughout the country. It is important to note that law doesn't require health care providers to ensure that their patients have a living will. Instead, it only requires that health care providers ask whether the patient would like to have one. At the present time, it appears as if most of these organizations have determined that the most appropriate time to deal with the question is when a patient is admitted.

The living will is a legal document, and the requirements for its validity are quite specific. Each state has its own laws, and it is important to consult with a legal adviser before making any decisions about a living will. While it can be an uncomfortable subject to confront, taking action in advance is simply good planning that can save a person's loved ones considerable heartache.

Unfortunately, in actual practice, these documents are often being ignored by doctors, and the family's lawyer is sometimes called upon to "probate" the living will. This was confirmed by a recent study published in the AMA Journal.

NOTE: The Mississippi Legislature in 1997 repealed Mississippi's Living Will statute retroactively, effective July 1, 1998. The Act also repeals the earlier Health Care Power of Attorney Act. In its place is a revised Health Care Power of Attorney Act. The New Health Care Power of Attorney Act prescribes a form which includes provisions for making the same essential choices that were formerly made on the Living Will form. The new law does not require health care directives to be filed with the Department of health, so that Department may return previously filed documents to the testator. Existing Health Care Powers of Attorney and Living Wills are *not necessarily revoked* by the Act. One should contact an attorney to be sure his or her existing Living Will or Health Care Power of Attorney is in compliance with the new Act.

In the absence of an advance health care directive, the new Act sets forth a hierarchy of persons, known as surrogates, who are authorized to make health care decisions for the principal. These are, in order, the patient's spouse (unless they are legally separated); an adult child; a parent; or an adult brother or sister. If none of these are available, the surrogate may be an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available to act as surrogate.

DEATH, TAXES AND DEATH TAXES

An in-depth discussion of federal and state transfer taxes is beyond the scope of this discussion; however, a general introduction is in order.

I. Federal Estate and Gift Tax. The estate and gift tax laws as a unified tax system came into existence on January 1, 1977. They are both an excise tax on the transfer of property, as opposed to an inheritance tax, which is a tax on the receipt of property by the beneficiaries of an estate. As a unified tax system, the federal

transfer tax applies to the cumulative total of lifetime and death time taxable transfers. The transfer tax is calculated using a progressive, single-rate schedule which applies to the aggregate amount of post-1976 lifetime gifts and the gross estate at death. There are certain deductions which are taken into account in arriving at the taxable estate or gift. These include expenses, debts, losses and taxes; an unlimited marital deduction for amounts passing to a surviving spouse; a charitable deduction for amounts passing to qualified charities; and a "qualified family-owned business interest" deduction. The unified rate schedule starts at 18% and reaches 55% at estates over $3,000,000.[2] After applying the rate schedule, the estate or gift tax liability is determined by subtracting a variety of credits from the estate tax calculated, including:

1. The Unified Credit. $1,455,800 was the unified credit amount for 2009, which had the effect of excluding from taxation a taxable estate of $3,500,000 (the "applicable exclusion amount"). For 2011, the credit is $345,800, which will "shelter" $1 million of assets.

The applicable exclusion that can be used during life to shelter gifts remains $1,000,000 in 2010.

2. Other Credits. There are also credits for state death taxes, estate tax on prior transfers and for foreign death taxes. Most states, including Mississippi have adopted a minimum death tax equal to the maximum state death tax credit, on the theory that if the state does not otherwise collect this amount upon the death of a decedent, the same amount will be paid to the federal government anyway.

[2] The federal estate tax (but not the gift tax) is inapplicable to estates of decedents dying in 2010, but under current law will be reinstated in 2011 with a $1 million exemption and a 55% top rate.

However, under the 2001 tax law change, the state death tax credit was phased out and was replaced with a *deduction* beginning January 1, 2005. Mississippi has not enacted a separate estate tax; therefore, beginning in 2005, there is no Mississippi estate tax. The state death tax credit and the Mississippi estate tax are both scheduled to return in 2011.

3. Annual Exclusion from Gift Tax. The first $13,000 of money, property or interests in property (other than *future interests*, such as reversions or remainder interests) given to each person is excluded from the computation of the donor's taxable gifts for the year. Husbands and wives can elect on a gift tax return to treat the gifts made by one of them as having come from both of them. This has the effect of doubling the annual exclusion amount.

4. Integrating the Marital Deduction and the Applicable Credit Amount. As mentioned, any property passing to a surviving spouse or to certain trusts for the benefit of the surviving spouse will qualify for the *marital deduction*. However, this simply defers the estate tax until the death of the second spouse. By virtue of the applicable credit amount, the first $1,000,000 of each individual's taxable estate is exempt from federal estate taxes in 2011. If you leave everything to your spouse and claim a marital deduction, the taxable estate is reduced to zero, but the estate tax is simply deferred, and the applicable credit amount is wasted in the estate of the first spouse to die. This is why a properly drafted will or properly drafted and funded revocable trust is so important.

II. The Use of Trusts in Estate Planning. A trust is basically and arrangement whereby legal title to property is held and managed by one person (trustee) for the benefit of another (beneficiaries). A property owner may want to encumber a gift or bequest of his property with a trust for various non-tax reasons. These basically boil down to four: *Creditors, Predators, Inability* and *Disability*. A

trust can protect the beneficiary from his or her creditors by inclusion of a valid *spendthrift clause* in the trust agreement or will. Mississippi recognizes and enforces these clauses, which prevent a beneficiary from assigning or anticipating trust distributions and prevents his creditors from attaching his beneficial interest in the trust. A trust can be a discouragement to those predatory types who may otherwise target the newly wealthy beneficiary and help him spend his wealth. A beneficiary may simply be unable to manage wealth or legally incapacitated to do so, such as a minor child or incapacitated adult. A trust may be the answer to all of these concerns.

There are also many tax-planning benefits from trusts. A detailed examination of the structure of estate planning trusts is beyond the scope of this pamphlet, in which highly technical matters are omitted for ease of reading. What follows is a survey of some basic estate planning trusts and a brief statement of their goals and purposes and when each might be indicated.

1. Credit Shelter or Bypass Trust. We have discussed the importance of not wasting the unified credit in the estate of the first spouse to die. Yet most spouses wish for the survivor of them to have the use and benefit of the entire estate. How can both these goals be achieved? By segregating the applicable exclusion amount in a separate trust for the spouse, which will not be elected to qualify for the marital deduction. This allocation is done by formula in a well-drafted will or revocable trust agreement. The balance of the estate is left to the spouse or to another trust for the spouse which will be elected to qualify for the marital deduction. The *credit shelter trust* can be structured in many different ways, but typically, it will resemble a life estate in the spouse with a gift over to the children upon the death of the surviving spouse.

2. Irrevocable Life Insurance Trusts. It comes as a surprise to most clients to know that the face amount of their life insurance policies is included in their taxable estate. The goal of the life insurance trust is to remove the face value of life insurance policies from the gross estate upon death. A by-product of such a trust is to create an untaxed fund for the support of the spouse and heirs as well as a source of liquidity for payment of administration expenses and death taxes. The trust also protects the funds from creditors of the beneficiaries and provides for management and control of the life insurance proceeds. Generally, this is the first estate tax reduction technique that is recommended because transferring life insurance to a trust has a minimal lifestyle impact during the life of the insured, and because of the relative simplicity and ease and setting up such a trust.

3. Retained Interest Trusts. These are used to transfer wealth to the objects of your bounty at a reduced gift or estate tax cost, and to “freeze” the value of the assets in the estate of the grantor. They work by the grantor retaining an income interest or the use, possession and enjoyment of property such as a home or artwork for a period of years, at the end of which, the designated heirs will take the property. If the grantor survives the term selected, the assets are not included in his estate. The value of the retained interest is determined under IRS tables and is deducted from the value of the property as a whole. Discounts are based on the length of the retained interest of the grantor and the income payout rate selected by the grantor, computed according to IRS-provided tables. The “freeze” effect occurs when the assets transferred out-perform the IRS’s growth rate assumptions. These trusts come in all sorts of acronyms, such as GRATs, GRITs, GRUTs and QPRTs. They are indicated for larger estates or income-rich estates. The grantor must be willing to pass some wealth irrevocably to heirs at a predetermined future date without fear of loss of the income from the assets in the future. This sort of

trust also works well with non-depreciating assets such as a resort home or vacation properties as well as tangibles like artwork and other collectibles which are not generating income.

4. Charitable Trusts. The goal of these trusts is generally to leverage the income of the grantor during his life, to take an income tax deduction for the charity's interest which it receives at death or the expiration of a term of years selected by the grantor, and yes, to actually benefit charity. They are indicated when the estate has highly appreciated assets, but is income-poor. As an alternative to selling a highly appreciated asset in order to reinvest the after-tax proceeds to generate income, the grantor can transfer the appreciated assets to a *charitable remainder trust* and retain an annuity or *unitrust* interest (a payment of a fixed percentage of the fair market value of the trust assets on an annual valuation date). The trust can then sell the assets and pay no capital gains tax due to its tax-exempt status, and reinvest the proceeds pre-tax, thus leveraging the grantor's income stream. Of course, the grantor will pay income taxes on the annuity or unitrust payment. At the end of the term the grantor selects, the balance of the trust assets are paid over to the charity. There is an up-front charitable income tax deduction for the actuarial value of the charity's remainder interest.

A *charitable lead trust* is the reverse of this. The charity gets an income stream on the front end and the grantor's heirs get the remainder. There is usually no income tax deduction for this. The goal is the same as with the retained interest trusts described above, that is, to pass wealth to the heirs with a discounted value (discounted for the value of the charity's lead interest). It is indicated where the grantor does not need the income.

CONCLUSION

The purpose of this little pamphlet is to attempt to "demystify" the estate planning process for the average citizen with the hope that, armed with a sense of confidence, the readers will undertake the estate planning process. We hope that we will be successful, because indeed, estate planning is the responsible and loving thing to do for your loved ones. We have seen first hand the chaos and strife that can occur where a proper plan is not implemented. If you have any questions or comments about this pamphlet, especially if you enjoyed reading it, or about estate planning in general, feel free to contact the author, or visit our web-site at www.wellsmar.com.

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