PLANNING AHEAD, DIFFICULT DECISIONS

Introduction To Estate Planning

Aaron J. Lyttle ~ Cole Ehmke ~ Mary Martin ~ Bill Taylor

UNIVERSITY OF WYOMING EXTENSION

September 2013
B-1250.1

Introduction To Estate Planning

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

Many people tend to avoid the discomfort of issues relating to death and dying, including estate planning. Because of this, more than half of Americans lack basic wills. The subject can be unpleasant, but planning now can prevent painful difficulties down the road. It is often a good idea to deal with the topic sooner, rather than later, so everything is in place when you, a family member or other loved one, and possibly even a very close friend, dies. It is always best to consult an attorney, and possibly an accountant, in creating your estate plan.

Estate planning usually addresses six major questions:

1. Who will make my financial decisions when I can't make them?
2. Who will make my health-care decisions when I can't make them?
3. What will happen to my property after I die?
4. What will happen to my remains?
5. What is the legal procedure for transferring my estate to my heirs?
6. Who will care for my minor children?

Among other important questions are:

1. What are the Wyoming requirements for valid wills?
2. How do you revoke a will?
3. What other tools are available?

Who Will Make My Financial Decisions When I Can't Make Them?

A person can delegate his or her financial decisions via an instrument called the Durable Power of Attorney. This document allows someone to appoint an agent to make financial decisions on his or her behalf.[1] (For more information about Wyoming state laws covering topics discussed in this publication, go to http://legisweb.state.wy.us/titles/statutes.htm.) There exists a broad range of delegable powers, including almost anything that someone could do with his or her finances, or the document could specify only a very narrow range of powers (e.g., the ability to act on behalf of the maker regarding a specific financial transaction). The powers often covered include opening and closing bank accounts, borrowing and lending money, giving gifts, settling lawsuits, etc. Consequently, it's important to choose someone you trust to act as your agent upon your death.

There are two types of Durable Powers of Attorney. An Immediate Durable Power of Attorney goes into effect immediately and is often used by people who have difficulty managing affairs or by couples who own most of their property jointly. A Springing Durable Power of Attorney goes into effect once it's been determined that you are legally incompetent to manage your affairs. A springing power will often specify the circumstances in which it will become effective (e.g., one or two doctors certify that you are incompetent).

Unlike a traditional Power of Attorney, which becomes invalid when you become incompetent, these powers are made "durable" by adding specific text to the document so that they will remain in effect or take effect if you become mentally incompetent. (See *Durable Power of Attorney* Bulletin 1250.11).

Who Will Make My Health-Care Decisions When I Can't Make Them?

You can delegate health-care decisions through an instrument called the Advance Health Care Directive. This document is the modern combination of a health care power of attorney and an advance directive (what used to be called a "Living Will").[2] The advance directive component allows you to make binding decisions regarding a range of end-of-life options. The Health Care Power of Attorney component is like the Durable Power of Attorney but is limited to health-care decisions. It allows someone to make decisions regarding health care on your behalf once you can't do so for yourself. By default, the Health Care Power of Attorney goes into effect once your primary care physician or primary health-care provider determines that you cannot make decisions for yourself. However, the document can specify a different standard (e.g., two or more physicians).

You can make several decisions via an Advance Health Care Directive:

- You may name a guardian in the event that you need one.
- You may direct whether you want your life artificially prolonged if you have a terminal illness.
- You may direct whether you want CPR (it is a good idea to get a "Do Not Resuscitate Order" if you want one).
- You may direct whether you want to donate organs or your body (it is a good idea to indicate on your driver's license if you want your organs donated, and be sure your wishes in the Advance Health Care Directive match your wishes on the driver's license to avoid problems).
- You may name a primary physician to determine your capacity to make decisions for yourself.

To be valid, an Advance Health Care Directive must be in writing, signed, and dated. It must be either notarized or signed by at least two witnesses (witnesses cannot be a

health provider, the agent you're appointing, or the operator of a care facility). An Advance Health Care Directive can be revoked or changed at any time. Most states recognize Advance Health Care Directives, but be aware that different states have different laws.

It is important to distinguish Advance Health Care Directives from euthanasia. The advance directive documents only give power to terminate life-support measures; they don't give power to assist with suicide or euthanize someone. In Cruzan v. Missouri Department of Health, the U.S. Supreme Court acknowledged that people have the right to refuse life-saving medical care, and that states can impose procedures to make sure that the wishes of a person who is incompetent are followed.[3]

An Advance Health Care Directive is a sensitive, but important, document that allows you to make your wishes known and appoint someone whom you trust to carry those wishes out.

What Will Happen to My Property After I Die?[4]

At any given point, most of us know who we would want to receive our property after we die. However, the courts can only determine legal ownership of property based on the provisions of Wyoming law and what they can read in documents that meet standards established by the Wyoming Legislature. So if you have not prepared the proper documents, a court will divide your estate based on the default requirements provided by the Wyoming Probate Code.

Intestate Succession

If someone dies without a will, he or she is considered to have died "intestate." Since the person did not sign legally binding documents regarding his or her intent, Wyoming law will determine the distribution of the person's property and other matters.

An intestate person's property will pass according to the formula created by the Wyoming Legislature.[5] These rules state that if the deceased has a surviving spouse and children, the spouse inherits half of the estate. The surviving children and descendants of non-surviving children inherit the other half. If, on the other hand, the deceased has a surviving spouse, but no children nor descendants of any children, the spouse inherits all of the deceased's property. Otherwise, property passes in the following order:

- Surviving children and the descendants of deceased children.
- Surviving parents, siblings, and descendants of deceased siblings.
- Grandparents, uncles, aunts, and their descendants.

If the deceased leaves no heirs, his or her property will go to the State of Wyoming (a very rare process known as "escheat").

If someone dies intestate while owning property, the court will typically need to appoint someone to administer that person's property (such property is referred to as the person's "estate"). The appointed person is referred to as an "administrator" or a "personal representative." A relative can administer an estate if entitled to receive some part of the estate in the following order: surviving spouse or competent person requested by the spouse; children; parents; siblings; grandchildren; next of kin entitled to a share of the estate; creditors; any other competent person.[6] A non-Wyoming administrator is not allowed unless there is a Wyoming co-administrator.[7]

Testate Succession

If you have a valid will at death, you are considered to have died "testate." A will specifies what is to be done with your property when you die.

Wyoming Statute (W.S.) § 2-6-101 states: "Any person of legal age and sound mind may make a will and dispose of all of his property by will except what is sufficient to pay his debts, and subject to the rights of the surviving spouse and children."

The law provides for a "surviving spouse's elective share." This provision states that the spouse may, at his or her option, take a certain percentage of the deceased's estate instead of what the will provides if the will deprives the surviving spouse of that percentage. The surviving spouse may take half of the estate if there are no surviving descendants or the surviving spouse is the parent of any surviving descendants. Or the surviving spouse may take one quarter of the estate if he or she is not the parent of any of the deceased's surviving descendants.[8]

Other benefits of a will allow the signer (also known as the "testator") to:

- Name a person to act as the personal representative of his or her estate.
- Create a written list of who should receive specific items of tangible personal property.[9]
- Name someone to act as the guardian and conservator of any minor children.
- Name someone to take care of household pets.
- Require that minor beneficiaries' inheritances be held in trust until the beneficiaries reach a certain age.
- Make other decisions regarding the administration and taxation of the testator's estate.

What are the Wyoming Requirements for Valid Wills?[10, 11]

Formal wills must be in writing or typed and must be signed and dated. Two competent, disinterested witnesses must generally witness the document being signed and dated. In some circumstances, it may be appropriate for a will to be witnessed by an interested witness, but attorneys avoid the practice if possible.

A will can be valid even if not signed by a notary public, although notarization significantly eases the process of proving the will's validity after the testator dies. If witnesses sign a notarized affidavit stating that the will was executed by the person signing it, the will is considered "self-proving." This makes it unnecessary for the witnesses to later testify that the will is valid before it can be admitted to probate. Otherwise, the validity of the will must be proven by the written or oral testimony of one of the witnesses (something that could be difficult if the witness does not outlive the testator or has moved away) or through some other evidence. W.S. § 2-6-114(a) states that: "Any will may be simultaneously executed, attested and made self-proven, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate under official seal…." (see a sample of a self-proving clause from statute attached to the end of this document). Further, W.S. § 2-6-204 says, "A will executed in compliance with W.S. 2-6-114 shall be probated without further proof," whereas W.S. § 2-6-205(a) states, "If the will is not self-proving, proof of a will may be made by the oral or written testimony of one or more of the subscribing witnesses to the will…." Finally, W.S. § 2-6-205(c) states, "If all of the witnesses are deceased or otherwise not available, it is permissible to prove the will by the sworn testimony of two (2) credible disinterested witnesses that the signature to the will is in the handwriting of the person whose will it purports to be, and that the signatures of the witnesses are in the handwriting of the witnesses, or it may be proved by other sufficient evidence of the execution of the will."

Wyoming law also allows the creation of certain informal wills that do not comply with the above requirements, known as "holographic wills." Such wills must be entirely in the testator's handwriting and signed by the testator. Holographic wills are not recommended, other than as a stopgap solution for situations in which it is not feasible to consult an attorney regarding a formal will. The validity of a holographic will must nonetheless be proven through some means before it can be admitted to probate.

How Do You Revoke a Will?

A testator is free to revoke a will at any time that he or she is competent. W.S. § 2-6-117(a) declares that a will or any part thereof is revoked by a subsequent will that revokes the prior will or part expressly or by inconsistency, or by being burned, torn, cancelled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator or by another person in his or her presence and by his/her direction.

W.S. § 2-6-118 goes on to explain, "If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator or guardian, unless the will expressly provides otherwise…."

Even a basic will can give individuals and families much more control over who will receive their property and who will represent their estates during the probate process. It is recommended that you compile information regarding your estate planning needs and then consult an attorney regarding the preparation of a will.

What Other Tools are Available?

Common tools and documents to use in accomplishing your estate planning desires include wills, Durable Powers of Attorney, and Advance Health Care Directives, but there are many additional estate planning tools that may be helpful depending on your situation, including:

- **A Living Trust** (also known as a revocable trust) created during your lifetime is used primarily to manage property during life and to provide for the ongoing management and distribution of your estate after death without going through the difficulty and expense of the formal probate process. (These trusts should be funded via transfers during your life and possibly with a pour-over will to catch any property that had not yet been transferred to the trust before your death.)
- **A Pour-Over Will** transfers property owned by you at your death to a trust that existed prior to your death. The intent is to transfer such property through your trust, rather than the cumbersome probate process, by sweeping up any assets that may not have been transferred to the trust during your lifetime.
- **Joint Ownership Documents with Rights of Survivorship,** often called joint tenancy, show that co-owners of property have a right of survivorship, meaning that if one owner dies, that owner's interest in the

property will pass to the surviving owner, rather than to the deceased owner's heirs. For instance, deeds for property and automobiles owned by married couples often show the owners as joint tenants with right of survivorship; however, property can be held in a joint tenancy with anyone. This method is often used to avoid probate (the legal process by which a court settles an estate) because the property automatically passes to the survivor. Property ownership can be converted to a joint tenancy by executing a new deed from the current owner of the property (often called the "grantor") to the desired recipients as joint tenants (typically called "grantees") of the property.

- **Beneficiary Designations** are forms used to transfer life insurance, pension, Individual Retirement Accounts (IRAs), and annuity survivor and death benefits and other pay-on-death proceeds to your designated beneficiaries. Such assets do not pass through probate and are typically unaffected by terms of a will.
- **A Testamentary Trust** is a trust that takes effect upon the creator's death. Such trusts are often created by provisions of a will to provide for the management of property by a trustee, often for minor or incapacitated heirs.
- **A Bypass Trust**, also known as a "credit shelter trust," is designed to allow spouses to take advantage of their lifetime applicable exclusion amounts (the amount of money that can be given away tax-free, which, as of January 1, 2013, was $5 million per person and $10 million per married couple, as adjusted for inflation on an annual basis). The bypass trust is the most universally used method of saving estate taxes in family situations.
- **An Irrevocable Life Insurance Trust**, also known as an "ILIT," is a trust to hold life insurance policies. The creator of the trust regularly transfers funds to the trust equal to the creator's annual gift tax exclusion amount to pay the policy premiums. An ILIT is designed to prevent life insurance proceeds from being subjected to estate taxes.
- **Family Business Arrangements**, including plans for continued ownership, sale, and management under specific situations, including death, should be in the proper form. The terms of a succession plan will typically be fixed by the business's organizational documents and any buy–sell agreements between the owners. The type of business entity involved may affect succession planning (e.g., corporations, partnerships, limited liability companies, etc.).
- **Charitable Gift Designations** incorporated within a will or trust document specify the intent to transfer assets to a charity recognized by the IRS. Often these gifts will be deductible for income and estate tax purposes, although there are additional requirements and limitations that may require consultation with a licensed attorney.
- **Minor's Trust** is an irrevocable trust to move property out of your estate for the benefit of minor children or grandchildren. If you have a taxable estate, such trusts can have complex tax consequences, which may require consultation with an attorney.

What Will Happen to My Remains?

If you leave no instructions, Wyoming statutes provide that the following persons, in order of priority, may consent to treatment of your remains:

- Spouse,
- Adult children,
- Parents,
- Siblings,
- Grandparents,
- Stepchildren,
- Guardians.[12]

W.S. § 2-17-101(a) states, "If a decedent leaves written instructions regarding his entombment, burial or cremation, or a document that designates and authorizes another person to direct disposition of the decedent's body, the funeral director or undertaker to whom the body is entrusted shall proceed with the disposition of the body in accordance with those instructions or the instructions given by the person designated to direct disposition of the decedent's body…"

In some situations, it may be helpful to consider paying for funeral or burial arrangements before your death. Such "pre-need" arrangements can provide certainty and relieve the burden on your family, while serving other estate planning goals.

You may also wish to leave a written document stating whether you want family and friends to hold a funeral or memorial service for you. This is not legally binding but helpful to provide direction.

It is usually advantageous to discuss these wishes with your family and heirs before your death. Often, a deceased person's estate planning documents are not reviewed in significant detail until the funeral is over and the remains have already been disposed of.

What is the Legal Procedure for Transferring My Estate to My Heirs?

Probate is the process of transferring property from a dead person to living person(s). The probate process can

take several months to complete, and the personal representative and attorney of the estate will be entitled to compensation based on a percentage of the probate estate, in addition to further compensation for extraordinary services, unless the personal representative or attorney file a written waiver with the court.[13] The process is also public and subject to mandatory court supervision. Consequently, many people seek to use different means of avoiding formal probate, including summary probate, trust transfers, and other probate alternatives.

Wyoming allows a summary probate process for estates valued at $200,000 or less if an affidavit is filed and certain procedures are followed. W.S. § 2-1-205(a) provides that, if the entire probate estate, including personal property, does not exceed $200,000, the person or persons claiming to be the distributees of the decedent may file an application for a decree in the district court of the county where the property is situated. This application may be filed after 30 days from the date of death of the decedent. Such a procedure is typically less difficult, time-consuming, and expensive than a formal probate. The procedure is available not only to those who have estates of $200,000 or less, but to those who have effectively reduced the size of their probate estates to be worth $200,000 or less by transferring their property through living trusts and other tools, which are often called "will alternatives." Such trusts are more expensive than simple wills and may not be cost-effective for individuals of limited financial means.

It is possible to avoid probate by passing property in a trust, which is a legal concept dating back to Henry VIII. A trust establishes a relationship between a settlor, a trustee, and beneficiaries. The settlor transfers property to the trustee, who then manages the property for the benefit of the beneficiaries. Often, in a living trust arrangement, the settlor, trustee, and primary beneficiary are the same person as long as the settlor is alive and competent. Any property held in a trust avoids probate because probate is only required to pass property from the dead to the living. A trust never dies, so probate is unnecessary.

Typically, the settlor will transfer as much property as possible to the trust during his or her life. The settlor will usually sign a pour-over will as a safety net to catch any property not transferred to the trust during life. W.S. § 2-6-103 allows a person to designate in his or her will that the person's property will pass by trust.

Trusts are more expensive up front (often about $2,000 for a basic trust, depending on who prepares it), but they can reduce costs in the long run by reducing the size of the estate that goes through probate and thus reducing the cost or need for a formal probate. Trusts also have other advantages, such as privacy, increased control over property, and special tools for minimizing the effect of transfer taxes on estates that exceed the applicable federal estate tax exclusion amount ($5 million per person and $10 million per married couple, as adjusted for inflation, as of January 1, 2013[14]).

Equity

One of the biggest hurdles in estate planning is coming to grips with what is fair within the family. UW Extension has resources to help with the situation, as do attorneys.

There are several non-trust means of lowering the value of an estate for the purpose of avoiding a formal probate. These methods are often less expensive than a living trust plan. If property is jointly owned with a right of survivorship, the property passes to the surviving joint tenant without probate and does not count toward the $200,000 property limit. Transfer-on-Death (TOD) and Payable-on-Death (POD) designations can be placed on accounts and investments.[15] Beneficiaries of life insurance policies, 401(k) plans, IRAs, pensions, etc., should also receive distributions without probate.

Drafting a trust raises many complex issues that cannot be adequately addressed here. You should consult an estate planning attorney, possibly in combination with an accountant, to plan a trust that will properly carry out your wishes, including taking into account the most current estate laws.

Who Will Care for My Minor Children?

You may consider drafting a will provision nominating guardian(s) or conservator(s). Those nominees will be given preference by a court in future guardianship or conservatorship proceedings if their appointment is in your children's best interest. (See *Guardianships and Conservatorships* Bulletin 1250.9)

Final Thoughts

A good first step in considering what should be accomplished with an estate plan would be to discuss your estate with loved ones and with trusted family advisers. A discussion about their interests and preferences will help you make decisions about what actions to take, or actions to avoid like not giving unwanted property or responsibility to a certain individual. These conversations will help add to your list of critical issues that should be addressed and goals you would like to accomplish.

At this point you could then meet with an attorney and work to formalize your plans in a set of documents. If you already have documents in place, pull them out of storage and review the terms to see if they meet with your current intentions. Circumstances change, and the current version may not fit your current plans. Perhaps it is a new spouse, children (or children with special needs), divorce, a life-threatening illness, a business venture that could lose value if a tragedy occurred to the owner, and so on.

In the end, property will transfer. Your estate will be divided. Taxes may become due. And you will be remembered. The planning done in advance will make the transition more likely to be successful.

---

[1] W.S. § 3-5-101.

[2] W.S. § 35-22-403.

[3] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990).

[4] See University of Wyoming bulletin 1250.7, A Walk Through Probate

[5] W.S. § 2-4-101.

[6] W.S. § 2-4-201(a).

[7] W.S. § 2-4-201(c).

[8] W.S. § 2-5-101.

[9] W.S. § 2-6-124.

[10] See UW bulletin 1250.4, *Wyoming Wills: Some Suggestions for Getting the Most from Estate Planning*

[11] W.S. § 2-6-112.

[12] W.S. § 2-17-101(b).

[13] The fee schedules can be found at W.S. §§ 2-7-803 and -804. The personal representative and attorney are each generally entitled to receive 10% of the first $1,000 of the estate, 5% of the next $4,000 of the estate, 3% of the next $15,000 of the estate, and 2% of amounts greater than $20,000. In practice, this amounts to a fee of $750 for the first $20,000 of the estate, plus 2% of the amount exceeding $20,000

[14] 26 U.S.C. § 2010(c).

[15] W.S. § 2-16-108.

This brochure is for information purposes only. It does not constitute legal advice.

You should not act or rely on this brochure without seeking the advice of an attorney.

PLANNING AHEAD, DIFFICULT DECISIONS

Estate Planning Checklist:

Information to Assemble Before Consulting Your Attorney

Aaron J. Lyttle

UNIVERSITY OF WYOMING EXTENSION

September 2013
B-1250.2

Estate Planning Checklist:

Information to Assemble Before Consulting Your Attorney

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

Personal Information

Full Legal Name_____
(name most often used to title property and accounts)

Also Known As_____
(other names used to title property and accounts)

Prefer to be called_____ Birth date_____ SS#_____ U.S. Citizen? ____
Home Address_____ City_____ State_____ Zip_____
Home Telephone_____ County of Residence_____ Business Telephone_____
Employer_____ Position_____
Business Address_____ City_____ State_____ Zip_____
Email Address_____ ❑It is okay to communicate with me via my email address.
❑ Married: Date of Marriage_____
Spouse's Full Legal Name_____
(name most often used to title property and accounts)

Also Known As_____
(other names used to title property and accounts)

Prefer to be called_____ Birth date_____ SS#_____ U.S. Citizen? ____
Home Address_____ City_____ State_____ Zip_____
Home Telephone_____ County of Residence_____ Business Telephone_____
Employer_____ Position_____
Business Address_____ City_____ State_____ Zip_____
Email Address_____ ❑It is okay to communicate with me via my email address.

Children/Grandchildren and/or Other Family Members

Use full legal name:

Name	Birth date	Relationship
_____	_____	_____
Comments:_____		
_____	_____	_____
Comments: _____		
_____	_____	_____
Comments: _____		
_____	_____	_____
Comments: _____		
_____	_____	_____
Comments: _____		
_____	_____	_____
Comments: _____		
_____	_____	_____
Comments: _____		
_____	_____	_____

Person to Act for You

GUARDIAN FOR MINOR CHILDREN: If you have any children under the age of 18, list in order of preference who you wish to be <u>guardian.</u>

Name and Address	Relationship
_____	_____
_____	_____

INITIAL TRUSTEE(S): Usually you will be the Trustee of your own trust. This allows you to maintain control over your assets during life.

Name and Address	Relationship
_____	_____
_____	_____

DISABILITY TRUSTEE(S): If you were unable to make decisions for yourself, who would you want to make decisions for you with regard to property and assets? Please name the individuals/entities in the order they are to serve. If they are to serve together, please indicate.

Name and Address	Relationship
_____	_____
_____	_____

SUCCESSOR TRUSTEE(S): After your death, who do you want carrying out your instructions, for distribution to and, if desired, management of property for your beneficiaries? Please name the individuals/entities in the order they are to serve. If they are to serve together, please indicate.

Name and Address	Relationship
_____	_____
_____	_____

PERSONAL REPRESENTATIVE(S): If you would like to name initial and successor personal representatives in your will who are different than those named as trustees above, please name those persons below. Otherwise, the same persons you name as trustees will likely be named as your personal representatives. Please name the individuals/entities in the order they are to serve. If they are to serve together, please indicate.

Name and Address	Relationship
_____	_____
_____	_____

POWER OF ATTORNEY: If you were unable to make financial decisions for yourself, who would you want to make those decisions for you?

Name and Address	Relationship	Instructions of Guidelines

ADVANCE HEALTH CARE DIRECTIVE: If you become unable to make medical-treatment decisions for yourself in any circumstance not covered by your living will, who would you want to make those medical-treatment decisions for you?

Name and Address	Relationship	Instructions of Guidelines

Real Property

TYPE: Any interest in real estate including family residence, vacation home, time share, vacant land, etc.

General Description and/or Address	**Owner**	**Market Value**	**Loan Balance**
	Total		

Bank and Savings Accounts

TYPE: Checking Account "CA"; Savings Account "SA"; Certificates of Deposit "CD"; Money Market "MM" (indicate type below). *Do not include IRAs or 401(k)s here*

Name of institution and account number	**Type**	**Owner**	**Amount**
		Total	

Note: If account is in your name (or your spouse's name) for the benefit of a minor, please specify and give minor's name.

Stocks and Bonds

TYPE: List all stocks and bonds you own. If held in a brokerage account, lump them together under each account. (*indicate type below*)

Stocks, Bonds, or Investment Accounts	**Type**	**Acct. Number**	**Owner**	**Amount**
			Total	

Life Insurance Policies and Annuities

TYPE: Term, whole life, split dollar, group life, annuity. **ADDITIONAL INFORMATION:** Insurance company, type, face amount (death benefit), whose life is insured, who owns the policy, the current beneficiaries, who pays the premium, and who is the life insurance agent.

_____

_____

_____

Total _____

Retirement Plans

TYPE: Pension (P), Profit Sharing (PS), H.R. 10, IRA, SEP, 401(k). ADDITIONAL INFORMATION: Describe the type of plan, the plan name, the current value of the plan, and any other pertinent information.

_____

_____

_____

Total _____

Business Interests

TYPE: General and Limited Partnerships, Sole Proprietorships, privately owned corporations, professional corporations, oil interests, farm and ranch interests. ADDITIONAL INFORMATION: Give a description of the interests, your ownership in the interests, and the estimated value of the interests.

_____

_____

_____

Total _____

Money Owed to You

TYPE: Mortgages or promissory notes payable to you, or other moneys owed to you.

Name of Debtor	Date of Note	Maturity Date	Owed to	Current Balance
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
			Total	_____

Anticipated Inheritance, Gift, or Lawsuit Judgment

TYPE: Gifts or inheritances you expect to receive in the future; or moneys you anticipate receiving through a judgment in a lawsuit.

Description _____

_____

_____

Total estimated value _____

Other Assets

TYPE: Other property is any property that you have that does not fit into any listed category.

Type	**Owner**	**Value**
_____	_____	_____

Summary of Values

	Amount		
ASSETS	You	Spouse/Other	Total Value
Real Property	_____	_____	_____
Furniture and Personal Effects	_____	_____	_____
Automobiles, Boats, and RVs	_____	_____	_____
Bank and Savings Accounts	_____	_____	_____
Stocks and Bonds	_____	_____	_____
Life Insurance and Annuities	_____	_____	_____
Retirement Plans	_____	_____	_____
Business Interests	_____	_____	_____
Money owed to you	_____	_____	_____
Anticipated Inheritance, etc.	_____	_____	_____
Other Assets	_____	_____	_____
Total Assets:	_____	_____	_____

Planning Information

SPECIFIC GIFTS: List any specific gifts of real estate or cash you wish to make to either individuals or charities.

Individual or Charity	**Amount or Property**
_____	_____
_____	_____
_____	_____

Other Items

OTHER ITEMS TO INCLUDE OR DISCUSS: Please list any other items you would like to bring to the attention of or discuss with your attorney:

_____

_____

_____

_____

This brochure is for information purposes only. It does not constitute legal advice.
You should not act or rely on this brochure without seeking the advice of an attorney.

PLANNING AHEAD, DIFFICULT DECISIONS

After a Death:

What Steps are Needed?

Aaron J. Lyttle Cole Ehmke Mary Martin Bill Taylor

UNIVERSITY OF WYOMING EXTENSION

September 2013
B-1250.3

After a Death:

What Steps are Needed?

Authors:

Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:

Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

After a person dies, family members, friends, most likely an attorney, and others must take several steps to close the affairs of that person (known as a "decedent"). Beginning with the funeral and ending with the final distribution of property to the decedent's heirs, someone, or a group of people, must make a series of decisions. The central person responsible for administering the decedent's affairs is often named in the terms of the decedent's will or appointed by a court to become the decedent's official personal representative (also known as an executor or administrator). If the decedent held property in trust, a successor trustee will be responsible for administering the trust estate outside of the probate process. This person must embark on a range of responsibilities. Many of these responsibilities depend on navigating a complex web of state and federal laws, possibly requiring assistance of a qualified attorney. This bulletin describes some of the major tasks often undertaken by a personal representative under a will or a successor trustee of a revocable living trust.

Notifying the Authorities

After a family member or friend dies, the proper authorities should be immediately notified. If the death occurs in a hospital, nursing home, or other institution, the staff will typically notify authorities. If the decedent was in the care of a hospice program, a member of the program will often instruct family members regarding appropriate procedures. Otherwise, emergency personnel should be contacted.

Initial Information-Gathering

The weeks, days, and even hours after a death are important times to collect information relevant for financial and personal affairs. Review the decedent's papers to determine the identity of the estate planning and tax advisers. This will include the attorney who drafted the will or trust, the accountant who has been completing tax returns, the life insurance agent for any life insurance coverage, and any stock broker or other financial planner who may have been familiar with, and possibly even has custody of, assets of the decedent. The employer/sponsor, trustee, or other custodian for any retirement plan benefits [such as an individual retirement account (IRA) or 401(k) plan] should be determined. Each of these should be notified of the death and dealt with as further described below. The local U.S. Post Office should be notified to forward the decedent's mail to the personal representative or the address used for estate-administration purposes.

An initial list of information concerning assets should be compiled, including identifying account numbers, certificate numbers, policy numbers, exact form of ownership (i.e., sole name, joint names with or without right of survivorship, Payable-on-Death, trust, etc.), and approximate values, if known. A list of unpaid bills should be assembled. Look for a list of user identification and passwords for all types of online financial, shopping, social media, and other accounts. Finally, the location of estate planning documents, including wills, trusts, and lists of tangible personal property, should be determined in preparation for the ultimate distribution of the decedent's property to his or her heirs.

If the funeral expenses have not been prepaid, funds may be needed immediately to pay for funeral and related expenses. Depending on the type of arrangements, this may total many thousands of dollars. See below for details on availability of funds and payment of bills.

Create An 'Important Papers' File

When a family member becomes seriously ill or dies, others must step in and manage affairs and make decisions. Unfortunately, much of the information needed may only have been known by the family member or may be hard to find.

An "important papers" file helps by collecting important information and instructions into a central place. It contains legal documents (or copies) of documents like wills, trusts, life insurance policies, living wills, and powers of attorney. It also contains information needed in the management of affairs such as the name and contact information of family members and advisers (lawyers, accountants, bankers, doctors, and so on), a list of assets (bank accounts, investment accounts, retirement accounts, property), and preferences for funeral arrangements or the distribution of personal property. It may also contain information that would help survivors better understand the family member's background and life, such as childhood memories, values, and lessons learned in life. Numerous workbooks are available to help collect all of this information.

In short, an important papers file will make decision making and information gathering easier, particularly at emotional and hectic times.

Funeral and Burial

Paying for the Funeral

The estate (e.g., the property he or she owned at death) will likely need to pay for the decedent's funeral service expenses, including services provided by a funeral director or embalmer, as well as burial or cremation expenses.[1] An individual may have entered into a prearranged funeral contract (also known as a pre-need arrangement) or have funeral service benefits stemming from a life insurance contract. Often, an insurance company will reimburse family members for funeral expenses after it has received the decedent's death certificate. The U.S. Department of Veterans Affairs may provide financial assistance if the decedent was a veteran of the U.S. military (National Cemetery Administration at http://www.cem.va.gov/). It may be helpful to identify joint owners of the decedent's bank accounts to authorize payments.

Funeral and Burial Plans

In many cases, the personal representative (the person appointed by a court to administer the decedent's estate) is a close family member or friend. Although planning a funeral in many cases may not be the responsibility of a personal representative (in some cases the personal representative may not be identified until well after the funeral), the personal representative is often closely involved because of his or her involvement with the decedent and the estate's assets. At the very least, a known personal representative will have authority to pay for funeral expenses from the decedent's estate.

To begin, locate funeral, memorial, burial, or cremation instructions. In some circumstances burial and cremation instructions may be binding under Wyoming law.[2] Often, these may be stored in the same place as the decedent's estate planning documents, which can create problems if the estate planning documents are not located until after the funeral and burial or cremation have already occurred. If no instructions can be found, check with family members, friends, funeral directors, and church officials about any wishes the decedent might have shared. If such information can't be located, then the decedent's religious or fraternal groups should be consulted to determine an appropriate service.

The funeral director (also known as a mortician or undertaker) will typically guide the family through steps from the death to the burial. A funeral director is a person or entity called to take charge of a body, possibly determine the cause of death, prepare the body for burial or cremation, and direct or supervise the funeral. The decedent's family will usually have a range of options when selecting a funeral director, depending on the family's location in Wyoming. The funeral director may have been previously chosen or indicated by family or the decedent, and the funeral may have even been prepaid by the decedent. If a funeral director has not yet been contracted, consider comparing prices and services before choosing one. If the funeral has not been prepaid, the funeral director may want someone to enter into a contract obligating that person to pay for the decedent's funeral expenses. Unless that person wants to be personally liable for these bills, survivors should determine the availability of reimbursement from the estate, trust, or an insurance policy. The funeral director can often provide assistance regarding various other decisions, including those involving the handling of the remains and the development and writing of an obituary.

Death Certificates

The funeral director should assist in ordering death certificates. It is likely that most institutions with which the decedent had accounts will want to see the decedent's death certificate. Many will require a certified copy issued by the Wyoming Department of Health's Vital Statistics Services. The state charges a fee for each certified copy of the death certificate. In estimating the number needed, consider the number of life insurance policies (one death certificate needed for each), the number of counties in which real property is located (real property consists of land, buildings, and other improvements attached to the land), the number of states outside of Wyoming in which real property is located (one for each property), the number of pension accounts, and the number of financial institutions where accounts are held. If there are minor children, a death certificate will be needed to enroll in Social Security survivor benefits. Order another for each of the individuals who may want one for historical or genealogical purposes. Two additional certificates should be ordered for unknown contingencies. Death certificates can take a few days to several weeks to be processed. Because the number

of certificates needed can be significant, and fees for reordering them can be considerable, it will likely be less expensive and easier to order a sufficient number the first time. More information, including a form for obtaining certified copies of death certificates, can be found on the Wyoming Department of Health's website at http://www.health.wyo.gov/rfhd/vital_records/index.html.

Bank Accounts

After appointment by the probate court, the personal representative must take possession of the decedent's property and collect outstanding debts.[3] This usually requires the personal representative to take charge of existing checking and savings accounts and to maintain a new account to hold the estate's cash during administration.

It is often necessary to open a new checking account in the name of the estate. This ensures that the estate's property is not improperly commingled with assets owned by the personal representative. However, banks are unable to open an account for the estate or trust until a tax identification number (TIN) [also known as an employer identification number (EIN)] has been issued to the estate. An attorney or accountant can help the personal representative obtain a TIN from the Internal Revenue Service (IRS). Some banks will also do it as a matter of customer service. Many personal representatives find it convenient to apply for a new TIN online (www.taxid-gov.us/). Along with the TIN, the bank will require a copy of the death certificate (often certified) and "Letters Testamentary," which are documents issued by the court identifying the personal representative and giving the representative the power to act on behalf of the estate. Funds held in the new account can then be used to pay the estate's expenses and bills.

If a surviving person (often a spouse) is a joint owner of the account with survivorship rights, then the survivor may continue to use the account (including paying bills) without any limits. However, if the account was owned by a parent with a child having signing privileges, but not with rights of survivorship, the decedent's account must be closed because the owner of the funds is no longer alive and the child will have to open an estate account to transact the business of the estate. The bank will typically write a check for the balance of the account, which can then be deposited into the designee's own account, or an estate account, to deal with estate expenses.

In the situation of a trust, the trustee produces documentation that proves he or she has been named as the person who is administering the trust. This person is known as the "successor trustee."

A personal representative, joint owner, or successor trustee should take care to do the following:

- Note all checks written before death but clearing after death.
- Use deposit slips to clearly identify the source of all deposits made after death. This information will assist in identifying deposits as income or principal for estate accounting purposes.

An estate's assets consist of two parts: income and principal. Generally, principal is the property set aside for ultimate distribution to the heirs or distributes (i.e., a bank account in the decedent's name) while income is property derived from the use of principal (i.e., interest). These are simply rules of thumb: there may be additional complexities in characterizing an estate's assets as income or principal, which could require assistance from and attorney.

If money needs to be added by the personal representative to the account to pay bills, this should be noted as a "loan" on the deposit slip, and the loan can then be repaid without interest as soon as is feasible. All estate bills must be paid through this one checking account, not paid separately by the personal representative out of a personal account or paid out of some other account belonging to the decedent. All deposits of post-death receipts should occur in this account as well. This will allow the bank statements for this one account to form the primary basis for future estate accountings.

Probate Administration

Probate and settlement are the court-supervised processes for distributing assets of the estate to proper recipients after a person's death. These processes include:

1. Proving the will to admit it to probate;
2. Appointing the personal representative;
3. Determining assets of the estate;
4. Paying all claims against the estate, including taxes;

What is Probate?

Probate is the legal process of supervised administration of the estate of a deceased person. A probate court:

1. Determines the validity of a deceased person's will
2. Appoints a person to act as personal representative of the deceased person's estate
3. Adjudicates claims against the deceased person's estate
4. Authorizes distribution of the deceased person's property as provided by the terms of a valid will and Wyoming law.[21]

District Courts handle Probate in Wyoming

5. Administering estate property (such as overseeing the sale of estate assets);
6. Distributing the remainder of the property according to the terms of the decedent's will (if it exists and is valid) or the default provisions of Wyoming law.

If the real and personal property owned by the decedent's estate have a value of $200,000 or less, a person claiming part of the estate property may file an affidavit for summary distribution without probate in the district court of the county where the property is located.[4]

If the decedent's estate owns Wyoming property worth more than $200,000 in his or her sole name [i.e., property that was not jointly owned, held in an account with a Payable-on-Death (POD) or Transfer-on-Death (TOD) designation, held in trust, or subject to a beneficiary designation, such as a 401(k) or a life insurance contract], that property must generally be distributed through the probate process, with mandatory court supervision. This process entails proving a will's validity, having the personal representative receive authority to act by the court, providing notice to creditors, hearings, and reports to the court before the property can finally be distributed to the decedent's heirs.

The probate process includes a number of deadlines and other requirements that may dilute the value of the estate or "trip up" unprepared personal representatives. It is, therefore, a good idea to hire an attorney who is familiar with the probate process if you have been appointed personal representative by the terms of someone's will or order of the court. Choose an attorney licensed to practice in the state in which the probate will be handled. It is always wise to check the credentials, references, and reputation of any attorneys before hiring one, especially if the estate is complicated or holds significant assets. In Wyoming, you can find out if any attorneys have been disciplined for whatever reason by going to the Wyoming State Bar webpage at www.wyomingbar.org/. Click on the "News & Publications" link on the left side of the main page, and then go to "Disciplinary Actions."

Bill Paying

Any bills that are particularly pressing should be paid. If the personal representative needs to lend money to the estate to do so, this can and should be done if the representative is confident that there will eventually be funds available from the estate to repay the loan. The personal representative should make a loan to the estate's bank account as noted above, rather than a direct payment of the bill out of the personal representative's personal account.

Administering Estate Property

Generally, legal title to the decedent's estate is held by the personal representative until the estate is closed and final distributions are made. Before that time, creditors' claims, tax bills, funeral expenses, final expenses, and administrative expenses must be paid according to the priority provided by Wyoming law.[5] The Probate Code provides a number of rules regarding management of the estate's property during probate.[6] In some situations, the decedent's surviving spouse and minor children may be entitled to property allowances during estate administration.[7]

Claims Against the Estate

Probate provides an opportunity for all people and companies to whom the decedent owed debts at the time of death to file and settle those claims against the decedent's estate in court. The personal representative must publish a statutory notice in a newspaper of general circulation in the county where the probate has been opened. In Wyoming, the notice must appear once a week for three consecutive weeks after the will has been admitted to probate. The personal representative must also provide certain notices to the decedent's surviving spouse, heirs, beneficiaries named in the decedent's will, reasonably ascertainable creditors, and (if the decedent received Medicaid) the Wyoming Department of Health. Creditors generally must file claims within certain time limits after notice has been mailed or first published. The personal representative is then required to accept or reject

each claim and rank the accepted claims according to Wyoming law.[8] A creditor has 30 days to file a suit against the personal representative to assert a rejected claim.[9] If the assets of the estate are insufficient to pay the estate's creditor claims, the creditors may recover from the assets of a trust created by the decedent that was revocable when he or she died.[10]

Wyoming law provides a priority list for the payment of claims against the estate:

a. Court and administration costs,
b. Reasonable funeral and burial expenses,
c. Property allowances for a surviving spouse and minor children,
d. Debts and taxes to the U.S. government,
e. Final medical expenses,
f. Certain state taxes,
g. Debts owed to employees who worked within 90 days preceding the decedent's death,
h. Repayment of public assistance, and
i. All other claims allowed.

Certain types of property, such as a surviving spouse's homestead exemption or property that was transferred by a completed, non-fraudulent gift during life, may be exempt from creditor claims.

As people live longer, medical and living expenses tend to take up a greater portion of a decedent's final debts and expenses. As outlined above, final medical expenses take priority over some types of creditor claims (i.e., administration and expenses and U.S. taxes), but not others. Often, the estates of older individuals are subject to claims for repayment of public assistance received in the form of Medicaid benefits during life.[11] These claims by the Wyoming Department of Health take priority over general creditor claims but not other specialized claims, such as administration expenses, state taxes, etc. These claims also do not take priority over estate property that is necessary for the support, maintenance, or education of the decedent's surviving spouse, minor children, or other dependents.

Another common source of debt of the decedent's estate comes from loans secured by mortgages on the decedent's real property. The death of the borrower often constitutes a default event under the terms of a mortgage, which may allow the lender to declare the unpaid debt immediately due. When the creditor files a claim against the estate, it may provide a general description of the mortgage in its claim.[12] The personal representative may request permission from the court to sell the property if doing so benefits the estate.[13] The lender may purchase the property at sale and apply the purchase price to the amount of the outstanding debt.[14] Sometimes, the sale proceeds may be insufficient to pay off the relevant debt because the property is not worth the amount of debt. This is called "negative equity" or an "upside-down" mortgage and has become a more prominent problem following the 2007 collapse of the U.S. housing market. If the personal representative sells the mortgaged property, the probate court, with the lender's consent, may order that the sale be subject to the mortgage, releasing the estate from liability for a deficiency.

Final Distribution

After debts, claims, and tax liabilities are settled, the personal representative will file a final report and accounting with the probate court.[15] The decedent's remaining property will then be distributed according to his or her wishes (if a valid will exists) or per state law. The court will issue a final decree of distribution, discharge the personal representative, and close the estate.[16] The estate can later be reopened to provide for the distribution of property discovered after the estate has closed or to correct erroneous property descriptions.[17]

Life Insurance Collection

All life insurance applications will require a death certificate (possibly certified) and a copy of the original policy. The life insurance agent, if known, should be contacted to obtain a death benefit claim form. When a claim for life insurance death benefits is made, a request for Form 712 should be made to the insurance company if it is expected that the estate must file IRS Form 706 federal estate tax return (i.e., if the value of the decedent's assets exceed $5.25 million [as of 2013, although this amount is indexed for inflation and there may be other reasons for filing an estate tax return, such as to take advantage of the deceased spouse's unused exemption for the surviving spouse's benefit]).

Social Security Notification

The U.S. Social Security Administration should be notified as soon as possible when a person dies. In most cases, the funeral director will report the person's death to the administration. The funeral director will need the decedent's Social Security number to make the report. Deaths can be reported to the Social Security Administration by calling its toll-free number 800-772-1213. It does not currently accept death reports by email or through the internet.

Some of the decedent's family members may be able to receive Social Security benefits if the deceased person worked long enough under Social Security to qualify for benefits. Contact a Social Security office as soon as possible to ensure the family receives all of the benefits to which it may be entitled. The Social Security Administration website is http://www.ssa.gov/

Tax Issues

The Wyoming Probate Code does not allow entry of a final decree of distribution until the probate court is satisfied that all federal, state, county, and municipal taxes levied on the estate's property or due because of the decedent's death have been fully paid.[18] For some estates, this might include estate taxes owed to the U.S. government. For others, it might include outstanding property taxes.

A TIN (tax identification number) should be applied for early-on for a revocable trust (which became irrevocable at death) or for the estate, if there is going to be a probate. This can be done by either the attorney or the accountant. A determination needs to be made regarding whether the prior year's income tax return has been filed if death occurs between January and April 15. Income earned between January 1 and the date of death needs to be determined and will be reported on the decedent's final Form 1040, which will be due the following April 15. A determination also needs to be made as to whether any gifts have been made for which a Form 709—Gift (and Generation-Skipping Transfer) Tax Return—is required, either for the prior year or for the year of death. Care should be taken to keep separate all post-death income and expenses for proper reporting by the estate or trust.

A copy of IRS Publication 559—Survivors, Executors, and Administrators—should be consulted for additional information on tax reporting: http://www.irs.gov/uac/Publication-559,-Survivors,-Executors,-and-Administrators . If the decedent had assets (combined with lifetime gifts) having a value exceeding $5.25 million (the tax-free amount for 2013, indexed for inflation), an estate tax return Form 706 will be due within nine months after death (extensions are available if needed). Assets to be considered in determining whether the threshold amount is owned by the decedent include life insurance death benefits (if the decedent had the ability to change the beneficiary), one-half of assets owned jointly by decedent and his or her spouse, all assets owned jointly with another person to the extent the original source of the asset was the decedent, all assets owned in a revocable trust or in the decedent's sole name, and all assets held in an IRA or other type of retirement plan. Estate and gift taxation is a complicated area of the law. A personal representative should consult a qualified estate planning or tax attorney if estate taxation is a reasonable possibility.

Special Types of Property

Vehicles with Certificates of Title

In Wyoming, the offices of county clerks issue certificates of title to establish legal ownership of vehicles. This includes motor vehicles, trailers, snowmobiles, watercraft, and mobile homes. Transferring title to these types of vehicles requires obtaining a new certificate of title from the county clerk's office.

Similar to bank accounts with Transfer-on-Death designations, if the vehicle is jointly titled—e.g., the certificate of title clearly states that two or more persons own the property as joint tenants with right of survivorship (often abbreviated JTWROS)—the surviving joint owners (called "joint tenants") succeed to the deceased owner's entire interest in the property. The survivors can transfer title to the vehicle by filing an application for a new certificate along with a certified copy of the deceased owner's death certificate.[19] But if the vehicle is titled in the decedent's sole name, then it may be necessary to transfer the title though the probate process.

Often, the vehicle must be transferred to an heir of the decedent or the successor trustee of a trust. In these cases, the county clerk will likely require more information to transfer title to the recipient's name. Possible documents required by the clerk may include certified copies of letters testamentary and the order of distribution (in the case of a probated vehicle), a certified copy of the death certificate, the original title, or the affidavit of collection and distribution (for summary proceedings). You or your attorney may want to contact the relevant county clerk's office to determine what documents will be necessary to effectively transfer title.

Personal Property

Personal property represents the most unregulated matter involving the settlement of a decedent's final affairs. This category includes everything the decedent owned at death other than cash and titled property (e.g., property with a formal document stating ownership, such as for a vehicle, house, and/or land). Tangible personal property includes those items of tangible property that have a physical existence, such as a decedent's furniture, silverware, dishes, a signed Marlon Brando poster, jewelry, firearms, etc. Sometimes, these items disappear after a visit by the first one or two family members, which can create very hard feelings for other family members.

The first step is to check the decedent's will, if one is available, to determine if it provides for the distribution of personal property to specific recipients. Some items may be listed within the text of the will, but it is also possible for a decedent to create a signed list providing for the distribution of specific items of personal property (which will be mentioned in the will).

Care should be taken to have a second person (or more) along when safe deposit boxes, jewelry boxes, and other private areas are viewed after a death, so that there will be at least two people who can vouch for what was, or was not, there at the time.

Most personal items, like family photographs, can be difficult to distribute since more than one person may be interested in an item. Because it is impossible to guess what another person may find valuable and there may be many opportunities for frustration, proceed cautiously. Begin with making an inventory if there is any risk that more than one person may want the same thing—a listing of each item in each room would be excellent, accompanied by photos or video.

Even if the decedent planned carefully, there may be some belongings that more than one heir will desire. Consider developing a system for resolving such disputes. It might be as simple as having the parties involved draw straws or flip a coin for desired items. Or, you could give heirs equal quantities of Monopoly money or marbles, and have them bid on the personal items they want in an auction-type setting. To identify items of conflict, have each heir indicate their interest by initialing the item on the personal property inventory. Often, a will or trust will designate a method of resolving conflicts or simply give the trustee discretion to make the required distribution.

Usually it is difficult to tell if a decedent owned the item or if it had previously been given to a child or a spouse and was simply retained in the decedent's home for storage. The only documents of title, if any, tend to be casualty insurance policy schedules. Nevertheless, these items need to be reported to the IRS on Form 706 if the decedent's estate exceeded $5.25 million in value (the 2013 unified exemption amount). If clothing or other items are given to charity, a receipt should be obtained to claim a charitable deduction. If these items are to be moved to a different location, a determination should be made as to whether they continue to be insured pending a final division.

Final Thoughts

A person who knows in advance that he or she will be appointed personal representative of someone's estate can take steps to make his or her eventual duties more straightforward. For instance, it may be helpful to discuss a number of topics as soon as you learn that you have been appointed personal representative and that the person you are representing is mentally capable of having such a discussion. Among the things to visit about are 1) the person's wishes for funeral planning, including whether there will be a funeral or memorial service and whether the body will be buried or cremated, 2) the location of important documents, assets, and contact information for family, friends, and advisers, and 3) the coordinating of responsibilities with other people who will be involved in disposition of the estate and final affairs.

Talking about matters involving our inevitable mortality can be uncomfortable; however, these conversations can prove invaluable to a person's surviving loved ones and provide that person with a measure of assurance regarding the management of his or her final worldly affairs.

Wyoming State Statutes dealing with wills, decedents' estates, and probate code are available online at http://legisweb.state.wy.us/statutes/dlstatutes.htm .

---

[1] Wyo. Stat. Ann. § 2-7-101(a)(iii).
[2] Wyo. Stat. Ann. § 2-17-101.
[3] Wyo. Stat. Ann. §§ 2-7-103 and 2-7-401.
[4] Wyo. Stat. Ann. § 2-1-205.
[5] Wyo. Stat. Ann. § 2-7-701.
[6] Wyo. Stat. Ann. §§ 2-7-301 to -627.
[7] Wyo. Stat. Ann. §§ 2-7-501 to -509.
[8] Wyo. Stat. Ann. § 2-7-712.
[9] Wyo. Stat. Ann. § 2-7-718.
[10] Wyo. Stat. Ann. § 4-10-506(c).
[11] Wyo. Stat. Ann. § 2-7-707.
[12] Wyo. Stat. Ann. § 2-7-704(b).
[13] Wyo. Stat. Ann. §§ 2-3-501 to -504, 2-7-612 to -626.
[14] Wyo. Stat. Ann. § 2-7-618.
[15] Wyo. Stat. Ann. § 2-7-811.
[16] Wyo. Stat. Ann. §§ 2-7-813 and 2-7-814.
[17] Wyo. Stat. Ann. § 2-8-101.
[18] Wyo. Stat. Ann. § 2-7-812(a).
[19] Wyo. Stat. Ann. § 31-2-104(j).
[20] S.B. 54, 77th Leg., Reg. Sess. (Or. 2013); S.B. 279, Gen. Assemb. 2013–2014 (N.C. 2013).
[21] Adapted from Farlex, The Free Dictionary, http://encyclopedia.thefreedictionary.com/probate.

Checklist

1. Report the death to the appropriate authorities if this hasn't already been done.
2. Determine if there is a safe deposit box, and locate the key. If all persons listed as owners on the box are deceased, then the bank may demand to view a certified copy of the death certificate and court-issued documentation called "Letters Testamentary," appointing the person as personal representative of the estate. Original wills, trust documents, life insurance policies, and vehicle titles must be located if not found at the decedent's home or safe deposit box.
3. Arrange with the post office that delivers mail to the address of the decedent to re-route mail to the address of the personal representative or to another location.
4. Locate the decedent's Social Security number.
5. Cancel prepaid items and attempt to seek refunds (i.e., magazine subscriptions, health insurance premiums, etc.).
6. Take steps to protect the assets of the decedent: notify bank and credit card issuers, change locks on the doors, remove valuable personal property to someone else's custody, and take other actions to keep the estate intact until it can be settled.
7. Make arrangements to secure the decedent's household and vehicles, including possible changing of locks, moving of cars to storage areas, etc. Care must be arranged for household pets. The decedent's refrigerator and freezer should be cleaned out sooner rather than later. If death occurs shortly before the end of the year, an investigation should be undertaken to determine whether the decedent paid that year's real property taxes. It should be determined that adequate homeowner insurance covers the decedent's residence and that all other significant assets are insured.
8. Take care of final payroll deposits and tax reporting if there were domestic helpers, nurses, or other caregivers who continued to work up to the date of death. Severance pay can be given as the personal representative deems appropriate and can be treated as an estate expense. The manner in which payments were being made to domestic employees should be reviewed because often payments were in cash or there otherwise was no withholding or contributions to Federal Insurance Contributions Act or Federal Unemployment Tax Act taxes. Professional advice should be sought early if payments to such individuals exceeded $1,000 in any recent calendar quarter. Create W-2s for employees for the current and previous year, if needed.
9. Obtain names, addresses, and telephone numbers, if available, and eventually Social Security numbers, for all parties who inherit under the will or trust. In addition, if a probate is required, the law will obligate the personal representative to give notice to all individuals who would have inherited had there been no will, and the names and addresses of these individuals must be gathered as well. The persons who would inherit include a husband or wife, children (grandchildren born of a deceased child taking the deceased child's share, great-grandchildren born of a deceased grandchild taking the grandchild's share, etc.). If there is no husband or wife and no children, then the persons who would inherit are the parents, brothers and sisters (nieces and nephews born of a deceased brother or sister taking the share of the deceased brother or sister, great-nieces and great-nephews born of a deceased niece or nephew taking the deceased niece or nephew's share, etc.).
10. Return any Social Security benefits that were paid for the month in which the person dies. Before doing this, however, visit with a U.S. Social Security Administration representative regarding this issue as well as potential benefits available depending upon family structure at that time. If the decedent was a veteran, a U.S. Department of Veterans Affairs burial benefit may be available (you will likely need a copy of the death certificate and the decedent's discharge papers). The issue of checks not cashed prior to date of death is covered at http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/349/~/checks-not-cashed-prior-to-date-of-death
11. Make a list of all debts. This includes accounts for outstanding bills, charge cards, property taxes, utilities, loan payments, outstanding leases, mortgages, vehicle payments, alimony, etc. If you are working with a trust document, advertisement for creditors isn't necessary. Reasonably ascertainable

creditors of the estate must be notified of facts required by Wyoming law. A weekly notice should also be published in a newspaper of general circulation for three consecutive weeks in the county in which probate takes place. These notifications start time limits within which creditors must file claims against the estate.

12. File a petition to admit the will to probate (if necessary) or an affidavit of summary distribution (if necessary and available).
13. Allow the required three months from the time of death to give creditors time to respond if you are settling an estate through probate. The debts and assets are compiled by the personal representative and reported to the court, giving creditors an opportunity to object.
14. Check to determine if a deceased person's surviving spouse and minor children are entitled to allowances authorized by Wyoming law (i.e., the homestead and other exempt property, furniture and apparel, and court-ordered support) during probate.
15. Settle all of the decedent's tax debts, creditor claims, final expenses, administration expenses, funeral expenses, etc., before distributions of whatever remains to the decedent's heirs or beneficiaries.
16. Close or manage online accounts and assets: social media, merchants, email, domain names, gaming, utility, financial, banking, and other accounts found in the decedent's bookmarks or browser history. This should preferably be done using the user identification and password information found earlier. This relatively recent development is often overlooked by surviving family members. Some states, like Oregon and North Carolina, have begun to adopt legislation providing for the inheritance of online accounts and assets.[20]
17. File a final report and accounting after the estate has been settled if you are the personal representative. The court will then release the personal representative and close the estate.

PLANNING AHEAD, DIFFICULT DECISIONS

Wyoming Wills

Some Suggestions for Getting the Most from Estate Planning

Aaron J. Lyttle

UNIVERSITY OF WYOMING EXTENSION

September 2013
B-1250.4

Wyoming Wills
Some Suggestions for Getting the Most from Estate Planning

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

Background

Creating and signing a will often constitutes the central step in planning one's estate. Studies indicate that almost half, if not more, of Americans lack basic estate planning documents, including simple wills.[1] This bulletin provides a broad overview of how wills operate and suggests some ideas for taking full advantage of them under Wyoming law.

What Happens to the Estate of Persons Dying Without a Will?

Wyoming law considers a person who dies without a will to have died "intestate."[2] The default rules provided by Wyoming law govern the management and distribution of such a person's estate. These default rules represent the Wyoming Legislature's attempt to guess an intestate person's probable intent. The Wyoming Probate Code is somewhat old and may not reflect a testator's actual desires regarding his or her estate. If someone dies without a will, property will tend to pass to the person's legal heirs in the following order:

- All to surviving spouse (if no children)
- Half to surviving spouse and half to surviving children and their descendants
- All to surviving children and the descendants of deceased children
- Parents, siblings, and children of deceased siblings
- Grandparents, uncles, aunts, and their descendants

An intestate estate will be subject to other default rules, including the appointment of an administrator. If you want input into how your estate is managed, you should consider drafting a will.

What is a Will?

A "will" (also called a "testament" or "last will and testament") is a document that describes the last wishes of an individual after his or her death, including how property should be distributed and who should manage the estate of the deceased person (the "decedent").[3] The person who creates a will is known as a "testator." The testator's property, assets, and obligations are known as the "estate."

What Does a Will Do?

A will's primary functions can be divided into two categories: (1) those directing the distribution of the decedent's estate and (2) those nominating individuals to represent the decedent and his or her estate.

Distributing Property

The terms of a will can direct who should receive your property after you die. After payment of the decedent's funeral expenses, administrative fees, outstanding taxes, and creditors' claims, the will can provide who should receive the rest of the decedent's estate.[4] The will can also provide for how certain estate liabilities, such as taxes, should be paid (i.e., does every heir pay his or her own share of estate tax?). Note that certain important pieces of property will not pass according to the will's instructions, such as jointly owned property, trust property, and other kinds of non-probate property discussed below.

Nominating Representatives

A will is also commonly used to nominate persons to certain positions necessary for administration of the decedent's estate. The testator will usually nominate a person to act as the "personal representative" (also known as an "executor") of the estate. This person should be chosen with care. The estate's personal representative is considered a "fiduciary," which is a person who is in a relationship that confers a substantial degree of trust. The personal representative's legal duties may require consultation with an attorney.

Many wills provide for successor personal representatives to serve in the event that a named representative is unable or unwilling to serve. While Wyoming law provides default persons to administer the estate of someone who has not appointed a personal representative,[5] the will provides an effective way of ensuring that the estate is administered by someone trusted by the testator. This power can make the will a very useful tool, even for testators who lack significant probate estates (whether because most of the property will pass outside the will [see below] or because the person has very modest financial means).

A will may nominate other types of fiduciaries. For example, if a will provides for the creation of trusts upon the testator's death, it will usually nominate individuals who or institutions (including successors) that should act as trustees of those trusts. A will may

also name a guardian or conservator for a minor child in the event that the child's parents have passed away.

Formal Will Requirements

Drafting a will often requires a balance between simplicity and more complex measures that may be needed to carry out the testator's intent. Many attorneys will have a particular style for drafting and structuring wills and trusts, which is likely based on their experience of what has proven successful for their clients in the past.

Regardless of personal style, the general requirements of a will must be satisfied if it is to be effective in passing property at death. Specifically, the will should

- Be in writing or typewritten,
- Signed by the testator, and
- Witnessed by two competent, disinterested witnesses.[6]

The will may also contain a "self-proving clause," which is a notarized affidavit executed by the witnesses and containing language provided by Wyoming law. Such a clause greatly simplifies the process of proving the will's authenticity if it is later admitted to probate.[7]

A qualified attorney should be aware of these requirements and will guide you through the steps to ensure the validity of your will and other estate planning documents.

Consulting a Qualified Attorney

Beyond simply signing a will, it is important that the will meet requirements of Wyoming law and adequately reflect the testator's wishes. An inexperienced draftsperson may not use the proper formalities, placing the will's validity in doubt. Even if the will is enforceable, poor drafting or the omission of important provisions may fail to reflect the testator's intent or increase estate administration costs.

Drafting a will likely constitutes the practice of law, which requires a license from the Wyoming Supreme Court. Unauthorized practice of law is illegal[8] and can subject the draftsperson to civil and criminal court proceedings brought by the court's Unauthorized Practice of Law Committee.[9] Consequently, it is usually not advised to seek assistance from anyone other than a licensed Wyoming attorney in drafting your will.

What about Holographic Wills?

Unlike many other states, Wyoming law continues to allow testators to create enforceable informal wills known as "holographic wills." A "holographic will" is a will that is enforceable despite not being properly witnessed, because it is entirely in the testator's handwriting and signed.[10] Such wills are used not only by testators who are reluctant to hire an attorney but by individuals who are simply unable to consult a lawyer due to exigent circumstances, such as limited financial means or impending death. In one famous case, an unfortunate farmer trapped under a tractor wheel managed to scratch the following holographic will in the tractor's fender: "In case I die in this mess, I leave all to the wife. Cecil George Harris."[11] This case illustrates the preferable use for holographic wills: as a stopgap measure when legal advice is not feasible, rather than a practical estate plan.

Holographic wills create special validity problems. A holographic will not written entirely by the hand of the testator and signed may be considered invalid. Thus, a tape recording, a video recording, or a typewritten will does not meet the requirements of a holographic will. There are countless examples in Wyoming and other states of unwary testators who made errors that resulted in the invalidation of their holographic wills. For example, in 1985, the Wyoming Supreme Court held in In re Estate of Dobson that a holographic will was not entirely in the testator's handwriting (and thus invalid) because the testator had allowed a trust officer to write words and marks on the will.[12] Even if a holographic will is deemed valid, the testator's heirs may still be forced to prove the will's validity to the probate court, which can be difficult with unwitnessed holographic wills.

Blank Forms and Electronic Services

Several resources provide default forms for wills and other estate planning documents. Traditionally, these were found in printed books or pamphlets but are now available on the internet or through computer software. Many of these services have been the source of intense legal disputes regarding whether they constitute the unauthorized practice of law. [13]

This bulletin does not advise or endorse the use of any formbook, service, or software for the creation of wills or other estate planning documents. As noted by a popular book regarding estate planning and other

legal issues for non-lawyers, "Self-help books compress life's complexity into three or four choices."[14] Often, such choices will be no more well adapted to a particular testator's goals than the default rules provided by Wyoming's intestate succession statute.

Choosing the Right Attorney

Not all attorneys are the same. While there is typically no requirement that an attorney obtain a special license to engage in estate planning, you should exercise judgment in selecting an attorney who is capable of creating your estate plan based on his or her education and experience. Your attorney will have significant access to very important decisions regarding your property and other affairs, so you should make sure to retain someone with whom you are comfortable and are able to place a great deal of trust.

If you are looking for an estate planning attorney, you may be able to obtain a referral from the Wyoming State Bar at http://www.wyomingbar.org/directory/need_lawyer.html. Attorneys participating in the Lawyer Referral Service have selected the practice areas in which they would like to receive referrals. They have not been certified by the Wyoming State Bar as specialists or experts in any area of law.

Your Part in the Attorney–Client Relationship

As a client, you will play a critical role in the estate planning process. Your attorney should know the law and how to accomplish estate planning objectives but can't do that effectively without your active participation. In addition to questions raised in this section, the University of Wyoming Extension has provided a questionnaire designed to elicit information that can help you in informing your attorney of your estate planning needs (see *Estate Planning Checklist: Information to Assemble Before Consulting Your Attorney* Bulletin 1250.2).

These details can be sensitive and private, but you should be frank with your attorney. Attorneys have a strong duty to maintain the confidentiality of communications with potential, actual, and former clients.

Gathering Basic Information

Before consulting an attorney to draft a will and other estate planning documents, it is often a good idea to consider your current personal and financial circumstances. No matter how talented your attorney, he or she may not be able to create an effective estate plan without knowing important details about you and your family. At a basic level, your attorney will want to know about your family and financial situation, including spouses, children, stepchildren, and other family members and their respective ages and general health status.

While basic family information can help an attorney fit you into a basic plan that he or she tends to provide clients in your situation, additional information can ensure that the plan meets specific needs. Your attorney will want a complete picture of your financial status, including businesses, real estate, life insurance policies, retirement plans, and other assets and liabilities. You should obtain copies of all relevant documents, including deeds, titles, account numbers, policy documents, etc. Your attorney will also want to see any prior estate planning documents that may need to be updated or replaced.

Your attorney will need to know where you intend to live for the indefinite future (e.g., your residence). This affects which laws will govern your estate plan. Each U.S. jurisdiction—including the 50 states and District of Columbia—has its own laws regarding the requirements and effect of wills and trusts, and you should ensure that your planning is done by a competent attorney who is licensed in the jurisdiction in which you permanently reside.

Selecting the Personal Representative

Take care to consider who should act as your personal representative or the trustee of any trusts created by your estate planning documents. Many individuals choose their spouses, with their children to serve as successors, but you may have a different person you would trust to manage your affairs. Is there anyone that you do not want to serve as personal representative? Additionally, you may want to consider waiving the requirement that the personal representative file a bond or surety with the probate court to reduce estate administration costs.

Distributing Your Property

One of the most important parts of your estate planning discussion involves who will inherit your property after death. This part of the conversation can be roughly divided into two phases.

First, the testator will determine if any heirs should receive specific items of property (often called "specific bequests"). For example, a testator may want a family home, business interests, or a sum of cash (whether a specific amount or percentage) to be set aside for particular friends, a child or children, groups of people, or charities. This phase can include a Personal Property Memorandum providing for specific recipients of a testator's tangible personal property. (See *Personal Property Memorandum* Bulletin 1250.8.) It can also be used to determine who should take possession of a testator's pets (and any associated property) after the testator's death.

Second, the testator will usually determine how the rest of his or her estate should be distributed (often called the "residue" or "residuary estate"). This often takes the form of equal distributions of property based on the closest surviving generation. In a typical "per stirpes" or "right of representation" arrangement, property will be divided equally among the testator's children, but if any child predeceases the testator, then that child's share will be divided equally among his or her children or, otherwise, be distributed to the testator's other surviving children in equal shares.

Other common options include the following:

- Leaving property to descendants "per capita," which gives each descendant an equal share, regardless of whether his or her parent has survived the decedent.
- Leaving property to non-family members, such as friends or charities.
- Requiring property to be held for a spouse's or descendants' benefit in trust. For example, special types of marital trusts (called "QTIP trusts," short for "qualified terminable interest property") can help ensure that children from previous marriages are not disinherited while taking maximum advantage of the federal estate tax exemption for the first spouse who dies.

You should inform your attorney if you envision a special distribution scenario. This is often the case for individuals who have non-traditional family arrangements. For example, a will's default pattern of distribution often excludes stepchildren. You may also want to be careful about children from prior marriages, they may end up losing their inheritance if you pass away and leave everything to your second spouse, who may have children of his or her own from a prior marriage. Additionally, estate planners often assume property should pass to a person's surviving descendants. But some people may wish to benefit friends, significant others, charities, and other people to whom they are not related by blood or marriage.

Disinheritance

Testators are generally free to exclude certain individuals from receiving an inheritance. This process is called "disinheritance." Family disagreements, substance abuse, and other factors can contribute to the decision to remove someone from a will. With that said, spouses are typically entitled to an "elective share" of an estate, which can be one-quarter to one-half of the estate.

Minor Children

Do you have minor children who may need someone to take care of them after their parents die? You may consider drafting a will provision nominating guardian(s) or conservator(s). Those nominees will be given preference by a court in future guardianship or conservatorship proceedings if their appointment is in your children's best interest.

Business Interests

Do you own any business interests in closely held businesses, such as corporations, limited liability companies, or partnerships? How these interests get disposed of may depend on the terms of the entity's organizational documents or a buy–sell agreement. If you have these interests, you should discuss optimal succession planning with your attorney.

Trusts for Heirs with Special Needs

Do you have heirs who may be unable to handle property for themselves? This category can include children who are under a certain age, people who engage in substance abuse, spendthrifts, and persons with special needs. Property can be held in trust under certain conditions, ensuring that a separate trustee manages the property in a prudent fashion on behalf of the beneficiary. Wyoming law provides a number of tools (including discretionary and spendthrift trusts) to protect property from such individuals' creditors as long as it remains held in trust. Other types of trusts can simplify the process of qualifying for government benefits, such as Medicaid.

Testamentary trusts (e.g., trusts created by a will, which become effective when the testator dies) can provide substantial benefits to individuals who have children or grandchildren who may inherit before they are capable of independently managing property. Often, the terms of a will provide for the creation of testamentary trusts to hold property for anyone who is under a certain age (often 21, or even older). The assets will then be held in trust by a selected trustee for the person's benefit until he or she reaches the designated age. This can provide for creditor protection and prudent management of assets that would not be available if property were transferred directly to a recipient. Testamentary trusts are usually simpler and less expensive to create than a full revocable trust plan (discussed below).

One possible alternative to testamentary trusts is to provide for the creation of accounts under the Uniform Transfers to Minors Act. While these accounts may not provide all of the same flexibility and control that someone may have over a trust, they are simple to set up and administer through a financial institution.

Will Substitutes and Non-Probate Property

Many types of property will pass without regard to the terms of a will. These devices are sometimes referred to as testamentary- or will-substitutes. Such property typically passes without the need for probate, which can reduce the size of someone's probate estate and possibly minimize estate administration costs. These include the following:

- Payable-on-Death (POD) and Transfer-on-Death (TOD) designations on checking and savings accounts.
- Retirement accounts with beneficiary designations, such as 401(k)s and IRAs.
- Life insurance policies.
- Jointly owned property.
- Property held in trust.

When using such tools, it is important to ensure that your beneficiary designations remain current. Unlike in a will, an ex-spouse may not be automatically "disinherited" as a beneficiary eligible to receive one of these types of property upon divorce. Some states provide varying levels of protections for this type of property, but it is safer to consult your attorney about the applicable law.

Do You Need More Than a Will?

In addition to a will, other documents may be created to ensure an effective estate plan, such as an Advance Health Care Directive, Durable Power of Attorney, and trusts.

In some cases, it may be worth the expense of using revocable trusts, rather than wills, as the primary means of distributing property to a testator's heirs. A trust is a relationship in which a property owner, known as the "settlor," transfers property to a person, known as the "trustee," who holds legal title to property for the benefit of one or more beneficiaries. A trust is revocable if it can be amended or cancelled. Revocable trusts have become very popular estate planning tools in the U.S. because of their ability to act as "will substitutes" by passing property to one's descendents without going through the expense and difficulty of probate. Trust property is not subject to probate, which has the potential to minimize the costs and difficulties of distributing property to a person's heirs.

Whether the cost of creating and administering trusts is justified usually depends on whether a testator's assets are in excess of the limit over which state law will require an estate to be subject to a full blown probate. For example, Wyoming law allows probate estates worth $200,000 or less to use the less expensive, less formal summary distribution method.[15] You should discuss this issue and the possibility that your estate will be forced to undergo a standard probate, as opposed to a less strict procedure, with your attorney.

Communicating with Your Family

Estate planning can be a sensitive process involving issues regarding a person's personal finances and relationships with family and friends. As noted before, the attorney–client relationship requires candor and is entitled to a high degree of confidentiality. You do not need to allow family and friends to participate in the conversation or even inform them of how you have drafted your estate plan. You are the client and your attorney will want to make sure that the estate plan reflects your wishes, not those of people who may be able to exercise undue influence over you.

Nonetheless, many families can benefit from some amount of open communication regarding the estate plan. This can help ensure that your family knows

how to locate important documents after you die. It can also ensure that the person or people you intend to nominate as personal representative(s), trustee(s), guardian(s), conservator(s), etc., is/are able and willing to carry out your wishes. Finally, discussing your plan can help explain why you have made certain decisions and possibly resolve disagreements while you are still alive, competent, and able to express yourself.

Maintaining Your Plan

After your estate plan has been completed, the original documents, as well as photocopies, should be stored in a safe place (it's always wise to have a second set in a separate location that's also considered "safe"). Many estate planning attorneys have fire-rated rooms and electronic servers that can be used to store documents. It can be helpful to let family members know that the documents exist and inform them of where they can be found.

When circumstances change, a will may need to be amended or changed. Thus, constant attention should be given to changing family and financial interests. Specifically, divorces, deaths, births, and other events may change the interests and desires of the testator of a will. In these cases, a will amendment (called a "codicil") or a new will may need to be executed. In these circumstances, special care may need to be taken to ensure that contradictory provisions are not created or important provisions are not deleted.

It can also be helpful to revisit your estate plan from time to time to take advantage of or respond to changes in the law. Your attorney should be aware of changing laws and rules, particularly those concerning probate and taxes.

Things to Consider Before Meeting with Your Attorney

1. Where is your permanent residence?
2. What is your family situation?
    a. Spouses, ex-spouses, children, stepchildren, and other possible heirs, including friends and extended family.
    b. Charities you may wish to benefit
    c. Births, deaths, disability, incompetency, divorce
    d. Do any heirs have special needs? Will any of them need to qualify for Medicaid in the future?
    e. Would any heirs benefit from having their property shielded from creditor claims?
    f. Have any family members already received property?
3. Do you have any past documents that need to be reviewed or updated?
    a. Wills
    b. Trusts
    c. Living wills, Health Care Powers of Attorney, Advance Health Care Directives
    d. Durable Powers of Attorney
4. Have you ever lived in a community property state?
5. What are all of your assets and liabilities?
    a. Assets
        i. Real estate
        ii. Furniture and personal property
        iii. Bank and savings accounts
        iv. Stocks and bonds
        v. Life insurance policies and annuities
        vi. Retirement plans
        vii. Business interests
        viii. Money owed to you
        ix. Anticipated inheritances, gifts, and lawsuit judgments
        x. Other assets
    b. Liabilities and debts
        i. Credit cards
        ii. Mortgages
        iii. Vehicle loans
        iv. Student loans
        v. Outstanding medical bills
    c. How are assets held? In your own name? Jointly with someone else? In trust?
    d. Where are the assets located?
    e. Are any family members or friends holding assets that you own?
    f. Do you have non-probate assets?
        i. Jointly titled property
        ii. Accounts or securities with TOD or POD designations
        iii. Transfer-on-Death deeds
        iv. Policies and accounts with beneficiary designations
    g. Do you have any powers of appointment over property?

i. Who can they be exercised in favor of?
ii. Do they need to be exercised during life or at death?

6. Do you have children who will need a guardian or conservator?
7. Should the interest of a minor or any other person, including a spouse, be directly transferred to that person or held in trust? For how long?
8. Who should manage your estate or act as trustee for any trusts that may be created?
   a. Who should be successors?
9. Who should make medical or financial decisions for you when you can't?
10. Who do you want to leave your property to?
    a. Specific items of tangible personal property for specific people
       i. Use of the Personal Property Memorandum
    b. Other specific bequests
    c. How to distribute the rest of your estate (in equal shares?).
11. Do you have any closely held business interests that require succession planning?
    a. What form is the business in? Sole proprietorship? Partnership? Corporation? LLC? LLP?
    b. Buy–sell agreements?
12. Does the size of the probate estate justify the need for trust planning (e.g., in Wyoming, more than $200,000 in assets)?
13. Tax planning
    a. Does the size of your estate justify gift and estate tax planning (e.g., valued at $5 million or more per individual [as of 2013])?
    b. If so . . .
       i. Are you married?
          1. What is your spouse's citizenship status?
       ii. Are you in a position to start an annual and lifetime gift-giving program?
       iii. Do you want to take advantage of charitable deductions?
14. Where are you going to store your documents?
15. Do you want family or friends involved in the planning process?

---

[1] "Lawyers.com Survey Reveals Drop in Estate Planning," Lawyers.com, http://press-room.lawyers.com/2010-Will-Survey-Press-Release.html. While 49% reported having some type of estate planning document (whether a will, trust, or Durable Power of Attorney), only 35% reported having a will.

[2] Wyo. Stat. Ann. § 2-4-101.

[3] See Black's Law Dictionary, 2009, 9th edition. ("The legal expression of an individual's wishes about the disposition of his or her property after death; esp., a document by which a person directs his or her estate to be distributed upon death.")

[4] Wyo. Stat. Ann. § 2-6-101.

[5] Wyo. Stat. Ann. § 2-6-202.

[6] Wyo. Stat. Ann. § 2-6-112.

[7] Wyo. Stat. Ann. § 32-6-114.

[8] Wyo. Stat. Ann. § 33-5-117.

[9] See John M. Burman, "Ethically Speaking—Who May Practice Law in Wyoming?," Wyoming Lawyer, October 2005, http://www.wyomingbar.org/bar_journal/article.html?id=43.

[10] Wyo. Stat. Ann. § 2-6-113.

[11] Elmer M. Million, 1960, "Wills: Witty, Witless, and Wicked," Wayne Law Review, v. 7.

[12] 708 P.2d 422 (1985).

[13] Brandon Schwarzentraub, "Electronic Wills & the Internet," Estate Planning and Community Property Law Journal v.5:1, http://www.estatelawjournal.org/site/wp-content/uploads/2013/02/Schwarzentraub.pdf.

[14] Kenney F. Hegland and Robert B. Fleming, 2007, Alive and Kicking: Legal Advice for Boomers, Carolina Academic Press.

[15] Wyo. Stat. Ann. §§ 2-1-201 to -204.

LAST WILL OF JOHN DOE

1. I, John Doe, a permanent resident of the state of Wyoming, being of somewhat sound mind, and having insufficient time or desire to prepare my own will, hereby adopt the will provided me by the State of Wyoming as follows:

Part A
Personal Representative

2. I don't care who is appointed as my personal representative (the person in charge of carrying out my will), and the court and my survivors can pick anyone they choose (but not a non-resident of Wyoming). I declare that my personal representative must buy an expensive fidelity bond, and the annual premiums for this bond will be paid out of my property so that my family will inherit less from me. If my personal representative dies before the administration of my estate is completed, I don't care who is appointed as a successor, and I direct that my estate be subject to the delay and expense involved in going through the appointment procedure all over again.

Part B
Powers of Personal Representative

3. My personal representative shall not be given the flexibility to deal with any problems in administering my estate as they arise, but, rather, the person shall be required to request court approval before taking any major actions. My personal representative cannot sell my assets to pay my bills without giving notice to my heirs and creditors and getting permission from the court. If the court determines that a sale of my assets must be by public auction, I direct that notice of the sale be published in a newspaper once a week for three consecutive weeks and that the expenses of this notice and the auction be paid out of my estate so that my family will receive less of an inheritance.

4. I do not wish to give my personal representative any specific or special authority to carry on any business owned by me at the time of my death. It is my instruction that my personal representative and the court be more concerned with the rights of my banker and other creditors for three months after I die than with the needs of my family or my business. I do not wish my personal representative to have any specific authority to make distributions to minors, but rather I direct that my personal representative require expensive and time-consuming guardianship and conservatorship proceedings before any distribution to a minor is made. I do not grant my personal representative any authority to resolve disputes in a manner that would be binding on my heirs, but rather I direct that all disputes between or among my heirs be resolved in court upon full hearing with each side being fully represented by attorneys who should feel free to request payment of their fees out of my estate if the court will allow it.

Part C
Personal Representative's Fees

5. I hereby declare that I made no particular plans for avoiding probate, and, therefore, I insist that my personal representative and personal representative's attorney be paid the full probate fee for all assets of mine that I did not try to keep out of probate.

Part D
Provisions for My Wife

6. Although I dearly love my wife, I don't believe she should have all of our property if I die before her. If I have any children or grandchildren surviving me, then my wife can only have half of my property.

7. If my wife and I die in a common accident or disaster or under circumstances creating any doubt as to which of us survived the other, I do not wish to exercise my right to provide for a distribution of property to take advantage of any tax deductions. I direct that my property not be distributed to my wife at all, so that I will not receive a "marital deduction" from federal estate taxes. Thereby, I can ensure that the federal government will get as much as it can from my assets and my family will get as little as possible from my assets.

Part E
Provisions for Children

8. If my wife dies before I do, I do not care who will be named guardian to take care of any children I have who are minors at the time of my death.

9. If my wife survives me, then I direct that my children get half of my property, regardless of how many children I have or how old they are. If my wife does not survive me, I direct that my children get all of my property. My property will be divided equally among my children (the grandchildren dividing equally the share of any deceased child), regardless of whether I have one child who has greater needs than the others. I do not care which of my children gets family keepsakes or heirlooms, and I leave this up to my personal representative (and I do not care who my personal representative is). If my children take this occasion to fight with each other over the rights to inherit any special items because I failed to let my wishes be known, I direct that any such disputes be resolved in court upon full hearing with as many lawyers as my children want to hire, with as much in legal fees paid out of my estate as the judge will allow. It is further my preference that the loser or losers in any such family fight hold a grudge against the winner or winners for the rest of their natural lives if they so desire.

10. If my wife dies before me and if any of my children are minors, I direct that an expensive conservatorship be established for handling their money, in addition to the simple guardianship for the purpose of raising them to adulthood. I direct that the conservator of a child's money reports to the court every year and incurs the expense of hiring an accountant to prepare annual accountings and an attorney to prepare a report and obtain an order from the court. Of course, all of this expense should be paid out of the child's money so that the lawyers and accountants can get more and my child can get less. I also direct that each child receive full control of his or her share of my estate when they reach age 18, regardless of how sensible they may be at that time. I direct that the inheritance of each child age 18 or older be subject to attachment by any creditor, and I direct that the inheritance be freely transferable, whether in poker games or otherwise.

Part F
Miscellaneous Provisions

11. I direct that my personal representative does nothing to save me any federal estate tax, it being my desire to make the U.S. government one of the bigger heirs of my estate.

12. I have made no effort to simplify things for my personal representative, and I hereby state that the personal representative has received no help from me in determining the inventory of assets owned by me or the value of each asset.

13. I direct that my personal representative refrain from creating any trusts and taking advantage of any tax-savings, professional money management, and capital preservation benefits that a trust could provide for my heirs.

14. I direct that my personal representative refrain from utilizing any available procedures for distributing the assets of my estate by affidavit, and I insist that my estate be probated no matter how small it is and that my heirs be subjected to the resulting delay and expense.

15. If I don't tell somebody before I die whether I have any special wishes about my funeral or about donating any body organs to science, they will just have to guess about it like everything else and do what they wish.

16. If I have property located outside Wyoming, then my survivors shall have to tolerate another probate proceeding according to the terms of the will drafted for me by the state in which that property is located.

_____

John Doe

This mock will is provided courtesy of Tom Long, Attorney-At-Law, of Long, Reimer, Winegar, Beppler, LLP, Cheyenne, Wyoming.

This is not a real will, but it illustrates what can happen when you do not have a will and the state of Wyoming's intestary statute takes affect.

PLANNING AHEAD, DIFFICULT DECISIONS

Death Certificates

Aaron J. Lyttle

UNIVERSITY OF WYOMING EXTENSION

September 2013
B-1250.5

Death Certificates

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

Filing a Death Certificate

A death certificate is a necessary step once a death has occurred. Vital Statistics Services, an office established by the Wyoming Department of Health, administers this process in Wyoming. Section 35-1-418 of the Wyoming Statutes Annotated requires the filing of a death certificate within three days after a death or the date on which a body is discovered. The certificate is filed with the local registrar of the registration district in which (1) the death occurred, (2) the body was found, or (3) the body was removed from a moving conveyance (if death occurs in a moving conveyance). The local registrar is a person appointed by the state to promote and supervise vital registration in a given district.

A death certificate should contain the deceased person's Social Security number, among other information required on the form. This information must be completed before the body can be transferred to another state and before the remains can be disposed of. Typically, the funeral director who first assumes custody of the body must ensure that this process is completed. To obtain this information, the funeral director will ask the deceased person's family or anyone who is the most qualified to provide the information.

Before a death certificate can be filed, it must contain a medical certification of time, date, place, and cause of death. This will usually be completed by the physician in charge of a patent's care unless a post-mortem examination is required (which is often the case if the cause of death is unknown). Furthermore, if the cause of death is thought to be due to unnatural causes, the coroner and a qualified physician will investigate the cause of death. If someone is presumed dead, but a body cannot be located, the state registrar may prepare a death certificate after receiving a court order.

While the funeral director is required to ensure that the death certificate is filed, the "personal representative" of the deceased person must ensure that the medical certification is completed and submitted to the coroner. A personal representative is a person who is given the responsibility to ensure that a deceased person's final affairs are taken care of after death. It includes an executor or administrator appointed by a court to manage the deceased person's estate.

Obtaining a Death Certificate

It is often necessary for family members and others to obtain certified copies of a death certificate. For example, a certificate may be necessary in the following situations:

- Filing and recording an affidavit of survivorship to establish title to jointly owned property;
- Transferring ownership of jointly owned vehicles;
- Filing estate tax returns;
- Demonstrating the authority of a successor trustee;
- Proving death to a life insurance company;
- Proving death to a creditor;
- Providing evidence of death for a wide variety of litigation purposes.

It is often a good idea for the personal representative to obtain numerous (10 or more) certified and regular photocopies of a deceased person's death certificate. Many different entities, such as banks and brokers, may require a certified copy. It may be easier and less expensive to order more copies initially than to request more official copies later.

The state registrar of vital records may not disclose information from or permit inspection of a death certificate unless authorized by the rules and regulations of Vital Records Services (also known as Vital Statistics Services). The following parties may obtain a death certificate:

i. A member of the immediate family;
ii. A lawyer representing the immediate family;
iii. A bank, an executor of the estate, an insurance company, or anyone requiring a death certificate to pay a policy or death benefit on the decedent;
iv. A funeral home acting for the immediate family;
v. The judicial branch or a department of the federal, state, or local government if needed in the performance of their duties. The state registrar may require the signature of a member of the immediate family.

In addition, other individuals and organizations may obtain certified copies of a death certificate if they demonstrate that the information is necessary to determine a personal or property right. For instance, an unmarried person who jointly owned real property with a deceased person may need a certified copy to establish her or his status as sole owner of the property.

Parties not named on the death certificate may be required to prove their relationship to the deceased or their identity. As of August 2013, the fee for obtaining a death certificate was $10. Vital Records Services will charge a $13 search fee for every five years searched if the date of death is unknown. Fees must be paid in advance. Vital Records Services offers printable application forms and other directions for obtaining death certificates and other vital records: http://www.health.wyo.gov/rfhd/vital_records/deathrequest.html.

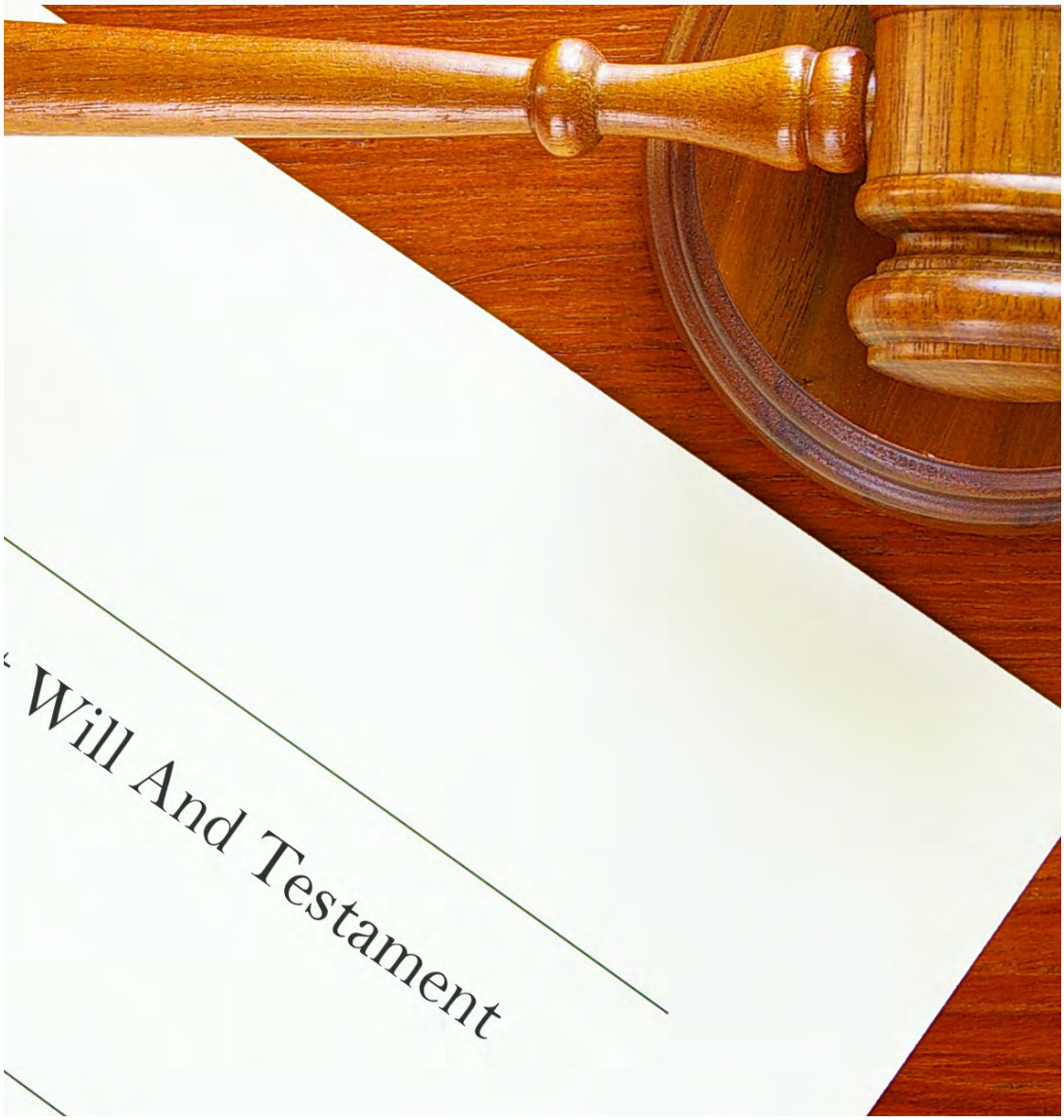
Death certificates that are at least 50 years old should be obtained from the Wyoming State Archives at http://wyoarchives.state.wy.us. Certified copies of such records must be made available to any person who provides the required application and enough information to locate the certificate.

Approximate Timeline

Event	Timing	Person(s)	Required Information
Pronouncement of death	After death	Attending physician	
Medical certification of time, place, and cause of death	After death unless a post-mortem exam is required	Licensed physician certifies cause of death and delivers signed or electronically authenticated copy to funeral director, who files it with state Attending physician certifies cause of death unless unavailable to certify at time of death If cause of death is not natural, then notifies county coroner for investigation and completion of death certificate	Any knowledge of circumstances of death
Funeral director assumes custody of body	After death pronouncement, when family, hospital, or authorities contact funeral director	Funeral director	
Funeral director collects information to complete and files death certificate	Certificate must be filed with registar within three days of death or discovery of body, but before body is transported out of state or disposed of.	Funeral director completes certificate in consultation with family and others who have information.	• Full Name • SSN • Dates of birth and death • Place of birth and death • Marital status • Names of parents • Person providing information • Armed forces status • Method and place of disposition • Funeral home or facility • Cause of manner of death
Obtaining certified copy of death certificate from Vital Statisitics Service	Any time after available	Immediate family, lawyer representing immediate family, bank, personal representative, insurance company, or person with required interest	• $10 fee and form • Full name • Date of death • City or county of death • Relationship to deceased • Purpose • Signature • Mailing address • Current photocopy of driver's license, state ID card, or passport or notarized signature
Obtaining death certificate from Wyoming State Archives	Fifty or more years after year of death	Publicly accessible through state archives	Enough information as possible to help locate the record

PLANNING AHEAD, DIFFICULT DECISIONS

A Walk Through Probate



Aaron J. Lyttle

UNIVERSITY OF WYOMING EXTENSION

September 2013
B-1250.6

A Walk Through Probate

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

Albert is a resident of Grand Junction, Colorado. His mother, Catherine, an unmarried woman, died while a permanent resident of Sheridan, Wyoming. She appears to have left behind an estate largely consisting of a large house, the items in the home, a car, and a checking account holding some cash. She also appears to have some credit cards with an outstanding balance.

After the funeral is over, Albert and his siblings discover that their mother signed a will before she died naming Albert as personal representative of her estate. What will Albert likely go through to ensure that Catherine's estate is properly managed and transferred to its intended recipients?

What is Probate?

"Probate" generally refers to the court-supervised process of legally transferring property from a dead person to a living person. Probate proceedings typically involve several features:

- Proving the authenticity of the deceased's will,
- Appointing someone to administer the deceased's affairs,
- Identifying and inventorying the deceased's property,
- Adjudicating payment of debts and taxes,
- Identifying heirs, and
- Distributing the deceased's property according to the terms of the deceased's will or, if no will exists, state law.[1]

Property held in a person's sole name will generally be transferred to his or her heirs according to the Wyoming Probate Code, which can be found in Title 2 of the Wyoming Statutes Annotated. However, the estate must first satisfy the individual's final debts, expenses, and tax liabilities. Certain interests fall outside the probate process, such as jointly titled assets, which are discussed below.

Some Basic Terms

Bequest and Devise. The act of giving property to someone by will. Technically, a bequest refers to a gift of personal property, while a devise is a gift of real property. However, this distinction is often disregarded. "Bequeath" is a verb referring to the act of making a bequest.

Competency. A person who has the requisite legal capacity to do something, such as execute a will or act as personal representative, because he or she is of legal age and sound mind.

Creditor. A person or company to whom the estate has outstanding debts.

Decedent. A person who has died.

Elective Share. The portion of a deceased spouse's probate estate that a surviving spouse is entitled to claim according to Wyoming law.

Estate. All personal and real property owned by the decedent at the time of death.

Fiduciary. A person who must act for the benefit of another. Many roles can be considered "fiduciary," ranging from the personal representative of an estate to the director of a corporation, the general commonality being that the relationship is marked by a number of duties, including good faith, trust, confidence, and candor.

Heir, Distributee, and Beneficiary. A person or entity entitled to receive portions of a decedent's estate. Technically, an "heir" is a person, other than the surviving spouse, who would receive a portion of an intestate estate if the decedent had died without a will; a "distributee" is a person entitled to receive property under the terms of a will; a "beneficiary" is a person entitled to receive the benefit of property held by a trust. The terms, however, are often used interchangeably.

Joint, Common, and Entireties Property. Property can be owned by multiple persons in three forms:

- **Tenancy in Common.** Ownership by two or more persons with no right of survivorship. In other words, if one owner (called a "tenant in common") dies, his or her share of the property does not immediately pass to the other tenants in common.
- **Joint Tenancy with Right of Survivorship.** Ownership by two or more persons with a right of survivorship. When one joint tenant dies, the other joint tenants automatically receive the deceased owner's share of the property.
- **Tenancy by the Entirety.** A special form of tenancy that provides, among other features, a right of survivorship and applies only between married persons.

- **Life Estate.** An interest in property measured by the length of a person's life.

Letters Testamentary. Documents issued by the probate court giving the personal representative authority to act on behalf of a decedent's estate.

Personal Representative. The person tasked with administering a decedent's estate. Personal representatives include those appointed by the terms of a decedent's will (also known as "executors") and those appointed by a court to administer the estate of an intestate decedent (also known as "administrators"). At times, people may use these words interchangeably.

Personal Property. Property other than real property (see "Real Property" and "Tangible Personal Property").

Petition for Letters of Administration. A document filed by an applicant requesting letters testamentary regarding the estate of a person who died without a will (see "Testacy").

Petition for Probate. A document filed with the probate court by an estate's prospective personal representative requesting that a will be admitted to probate.

Probate Estate. Property owned by a decedent at death that is transferred by will or intestacy statutes through the probate court.[2] The probate estate does not include certain types of property that do not change ownership through a will (see "Will"), including property held by a revocable trust, joint tenancy property, life insurance death benefits, etc.

Real Property. An interest in land (also known as "real estate"), as well as certain interests closely associated with land, such as fixtures, growing crops, and minerals that have not yet been extracted from the earth.[3]

Self-Proving Will. A will that meets requirements of Wyo. Stat. Ann. § 2-6-114 and does not require additional proof to be admitted to probate because it includes a notarized affidavit signed by two witnesses.

Tangible Personal Property. Personal property that has physical form and can be seen, weighed, measured, felt, or touched, such as furniture, silverware, and books.[4]

Transfer on Death Deed. A deed that automatically transfers real property upon the death of its owner in accordance with Wyoming law.

Surviving Spouse. The decedent's surviving husband or wife.

Testacy. A decedent who dies with a valid will is considered to have died "testate." A decedent who dies without a will is considered to have died "intestate." A person who creates (or "executes") a will is called a "testator."[1*]

Will. A legal document that a competent adult may create before his or her death indicating how his or her estate should be divided, as well as other matters.

How Does Probate Work?

Filing the Will

After learning of the death of Albert's mother, whoever had custody of the will (i.e., Catherine's estate planning attorney or live-in boyfriend) has 10 days to deliver the will to either (1) the clerk of district court in the county where she lived (in this case, the Sheridan County Clerk of District Court) or (2) the named personal representative, Albert.[5] After receiving the will, the clerk of court will notify the person named as personal representative, as well as the distributees named in the will who can be readily located.[6]

Albert has 30 days after learning his mother died and that he has been named personal representative to bring a petition to probate the will. Otherwise, the court may find that he has renounced his rights and appoint a different person as personal representative unless Albert shows good cause for his delay.[7]

To Probate or Not?

Initially, Albert and his siblings may need to decide whether their mother's will should be probated. A Wyoming probate will likely be necessary to transfer Catherine's estate to her heirs if Catherine owned assets that were:

- located in Wyoming,

[1*] Some documents may refer to a testator who is a woman as a "testatrix." This term (along with its "-ix" suffixed cousins, "executrix" and "administratrix") has fallen out of popularity.

- worth more than $200,000 (not counting mortgages and other encumbrances),
- held in Catherine's sole name, rather than in a trust or joint tenancy, and
- did not pass through a non-probate transfer, such as a beneficiary designation on a 401(k) plan, IRA, life insurance contract, etc.[8]

If Catherine had Wyoming property worth $200,000 or less, the intended recipients of her property could use the alternative summary procedure to distribute her property rather than using probate. The summary procedure is discussed in more detail later in this bulletin.

Albert discovers that all of his mother's property was held in her sole name and that her property (particularly, as is often the case, her house) definitely exceeded the $200,000 threshold. He will, therefore, need to use the probate process to administer his mother's estate.

Appointing the Personal Representative

The person who will be appointed personal representative depends on whether Catherine's will effectively named someone to act as personal representative.

Like most decedents who die testate, Catherine's will nominated someone to act as the estate's personal representative. As the person named in his mother's will, Albert has first preference to be named personal representative of the estate if he is found to be competent.[8] If no one named by the will is available to serve, the court can appoint a different person in the following order:

- A beneficiary named in the will or a person nominated by the beneficiaries,
- A creditor of the decedent or someone nominated by a creditor, or
- A different person found to be qualified by the court.

If Catherine had not executed a will, then Wyoming law requires the court to appoint someone to act as personal representative. A court-appointed personal representative will typically be a relative of the decedent, such as a spouse, child, or parent. However, if a spouse, child, or parent is not available, the court will utilize the Wyoming Probate Code to determine an appropriate representative. The process for appointing a personal representative of an intestate decedent is often initiated by the decedent's surviving relatives who are entitled to receive part of the estate, although Wyoming law allows a number of individuals to request authority to act as personal representative in the following order:

- A surviving spouse or other competent person nominated by the decedent,
- A child,
- A parent,
- A sibling,
- A grandchild,
- A next of kin entitled to part of the estate,
- A creditor, or
- Any legally competent person.[9]

Deciding Whether to Accept the Appointment

Before accepting his nomination as personal representative, Albert should ensure that he has the necessary skills and resources to properly administer the estate according to the terms of his mother's will and Wyoming law. If Albert accepts the appointment, he will have a number of powers and responsibilities with serious potential legal consequences.

Stated simply, the personal representative's primary duty is to administer a decedent's estate during the probate process. Specific duties may include paying the estate's final expenses, filing tax returns, making tax elections, and ensuring that property is transferred to the proper recipients. A personal representative must act with care and prudence when administering the estate. A person interested in receiving a portion of the estate, including creditors and distributees, may contest inappropriate or bad-faith actions of the personal representative. In some cases, the responsibilities of a personal representative can be relatively small, but in other cases the duties may be quite complex and rigorous. The personal representative is, therefore, entitled to reasonable compensation for his or her services based on the size of the estate. As a fiduciary, the personal representative is required to act in a way that is beneficial to and not against the interests of the decedent and the distributees or heirs receiving portions of the estate. Thus, the personal representative must follow the wishes of the testator and adhere to the provisions in the will, unless otherwise directed by the court. For example, unless the will provides otherwise, Albert will not be allowed to

favor one sister over another if each is entitled to an equal share of the estate, regardless of his personal feelings about his sisters. During the probate process, the personal representative will be required to file certain reports and accountings with the court, as well as notices to creditors of the estate. The process has a number of deadlines, which requires diligence on Albert's part. Due to the complex nature of the probate process, it is often beneficial for a personal representative to retain representation from a licensed attorney. This is especially true if the estate has a sizeable value. Given Catherine's assets and creditors, it is probably advisable for Albert to hire an attorney to assist in guiding him through the process. If Albert is unfamiliar with local probate attorneys, he can seek a referral from the Wyoming State Bar's Lawyer Referral Service at https://www.wyomingbar.org/directory/need_lawyer.html. Attorneys participating in the Lawyer Referral Service have selected the practice areas in which they would like to receive referrals. They have not been certified by the Wyoming State Bar as specialists or experts in any area of law.

Does It Matter that Albert isn't a Wyoming Resident?

Albert may serve as personal representative despite not being a Wyoming resident. Wyoming law allows Catherine to name any person who is a resident or citizen of the United States or any bank or trust company organized in the United States and doing business in Wyoming to act as the personal representative of her estate.[10] However, Albert, as a non-Wyoming resident, must designate a Wyoming resident, bank, or trust company to act as his agent or designate an attorney licensed to practice law in Wyoming to receive orders, notices, and other documents issued by Wyoming courts. Failure to designate a Wyoming agent or attorney will cause revocation of his authority to act.

Albert could also be appointed personal representative if his mother had not left a will, although it would be necessary for the court to appoint a co-representative who is a Wyoming resident.[11]

The Petition for Probate

If a testator having a valid will dies, the will must be admitted to the probate court. The will must be submitted to the court along with other required documentation by way of an official legal form. This is called a "petition for probate" and may require additional notices and evidentiary support. The petition must be signed and include information required by Wyoming law.[12]

Unless the will is a self-proving will, it must be "proven" or verified by the court.[13] A will that is not self-proving must be sworn to by the witnesses to the will, or other evidence must be produced to prove its authenticity. In contrast, a "self-proving" will does not require further proof to begin the probate process, but it still must be submitted to the court.[14] A will is "self-proving" if it uses the proper language, is signed before a public notary, and is witnessed by at least two people.

Albert looks to the end of his mother's will and sees a clause that matches the self-proving will clause provided by Wyo. Stat. Ann. § 2-6-114. It is, therefore, unlikely that he will need to prove the will's validity to the probate court.

Before the probate process begins, the personal representative must file an "oath" regarding the personal representative's duties with the probate court. The court will then grant "letters testamentary" to the personal representative and admit the will to probate. The order admitting the will to probate triggers a number of deadlines. The letters testamentary constitute a legal document that gives the personal representative authority to administer the decedent's estate. For example, Albert could use the letters to help prove to his mother's bank that he is entitled to administer the estate.

Albert may be required to submit a "bond" to the court to serve as personal representative. This bond is a monetary deposit that serves as a promise to act according to the direction of the court. Many decedents' wills waive the bond requirement.

After Catherine's will has been admitted to probate, any interested person may contest the will or its validity by filing a petition within the required time asking the court to revoke the probate.[15] This often occurs when there are multiple wills or it is unclear whether the testator was competent or was subjected to undue influence in executing a will. For example, if Catherine's will appears to conflict with a second will that disinherits her children and leaves everything to her boyfriend, the boyfriend may be interested in contesting the will filed by Albert.

The Process

As personal representative, Albert will have a certain amount of time after his appointment to collect all of his mother's property and file an inventory of the property with the court. He then has a certain amount of time to file an appraisal of property listed in the inventory with the court. Items listed in Albert's inventory should include his mother's house, checking accounts, vehicle, and other property. If new estate property is later discovered, he will need to file additional appraisals.

While legal title to Catherine's property is considered to have passed at the moment of her death, the estate's assets are subject to possession by Albert, as personal representative, and control by the court during the probate process. The personal representative holds the assets subject to payment of the estate's administration fees, funeral expenses, debts, and tax liabilities.

During probate, the decedent's surviving spouse and minor children will be entitled to certain property rights, known as "allowances." Since Catherine's children are adults and she was unmarried, this is not relevant to Albert's administration.

The personal representative may be authorized or required to convey, sell, or otherwise dispose of the estate's property during probate, depending on terms of the will and a range of provisions in the Wyoming Probate Code. For example, if the estate has insufficient cash assets to pay its bills, it may be prudent under the circumstances for Albert to sell his mother's car.

The personal representative will be required to provide a number of notices to different people, including the estate's heirs and creditors. These notices trigger deadlines within which creditors must file claims against the estate.

Estate Expenses, Claims, and Taxes

During probate, the estate will be subject to a number of administrative expenses. These include filing fees, personal representative fees, attorney fees, travel fees, the costs of selling and managing property, etc. The fees Albert is entitled to claim as personal representative, as well as those of his probate attorneys, are typically based on a fee schedule fixed by Wyoming law based on the size of his mother's probate estate (often $350 plus 2 percent of the value of the probate estate), although additional fees may be requested for "extraordinary expenses or services" provided to the estate. Albert must request court approval before paying extraordinary fees. The estate will also generally be liable for the decedent's other final expenses, such as the costs of the funeral.

As personal representative, Albert may be required to obtain taxpayer identification numbers, file his mother's final individual income tax return, file an income tax return for the estate, and file an estate tax return. If the estate owes debts or taxes, these obligations typically need to be satisfied before the distributees or heirs can receive any portions of the estate. Thus, some property may need to be sold or otherwise disposed of before distributions can be made.

The estate's creditors have a certain amount of time to file claims against the estate. Albert can decide to accept or deny the claims. Denial will generally give a creditor an opportunity to file an action against the estate. Late claims may be forever barred. Wyoming law provides for a priority list for determining which creditor claims, taxes, and estate administration expenses will be paid first from an estate that has insufficient assets to pay all claims and expenses. If Albert accepts the claim of his mother's credit card company, that claim must be satisfied before final distribution of Catherine's property to her named distributees.

Final Report, Accounting, Distributions, and Discharge

After funeral expenses, administration expenses, timely creditor claims, and taxes have been paid, Albert will be able to file his final report and accounting with the probate court. The estate's remaining assets can then be distributed to the estate's heirs and distributees.

The final report should contain a recitation of all of the probate steps completed up to that time, a detailed accounting of estate assets and the disposition thereof (if not waived by all distributees and the surviving spouse), and the proposed distribution of the estate assets. The court will hold a hearing regarding the final report and will address timely objections filed by interested parties. After the court is satisfied that all of the required steps of the probate have been

taken, that the proposed distribution of estate assets is valid, and that any objections have been resolved, it will issue an order approving the final report and authorize distribution of the assets as proposed in the final report. After the court has approved the final report, Albert can distribute the remaining assets of his mother's estate according to the distribution approved by the court.

The probate process can take up a large part of a year, although Wyoming law requires that probate be completed within one year of the personal representative's appointment unless there is good cause for delay. The process can take even longer if there are disputes between the estate's personal representative, heirs, distributees, creditors, or other interested persons. If the estate is not ready for final distribution within one year, a verified interim report and accounting may be filed requesting the court allow continuance of administration for another year for good cause shown.

Since Catherine died with a valid will, final distributions will generally be directed according to the terms of that will. If Catherine had married her boyfriend and deprived him of more than the share of her estate to which he was entitled under Wyoming law (called the "elective share"), he has the right to claim his minimum portion of her estate (see *Disinheritance* Bulletin 1250.7). If Catherine had used a trust as the primary means of administering her estate, it is likely that her will would have simply provided for all of her remaining property to be transferred to the trustee of her trust. The terms of the trust would then determine the final distributions or ongoing management of her property.

If Catherine had died intestate, the court would order distribution of her estate to her heirs according to the default rules provided by Wyoming law. Typically, the spouse and children will receive a majority of an intestate estate, but other relatives may be selected as heirs by the court depending on the situation.

If no heirs exist, the state may acquire the estate through a rare process called "escheat."

Once Albert has paid all administrative expenses and distributed the assets of the estate to the distributees, he signs a petition for final discharge with the probate court. The petition would have receipt forms signed by the distributees (or other type of proof of distribution) attached to it. The court would then discharge Albert as personal representative if proper proof had been given regarding distribution to the distributees. Once the court has entered the order of final discharge and it has been filed with the court, the probate is closed.

Wyoming law provides special provisions for the administration of estates involving foreign wills, missing persons, simultaneous deaths, wrongful deaths, missing beneficiaries, and estates that need to be reopened.

Probate Disadvantages

The Wyoming Probate Code is somewhat old and has not been thoroughly updated to take advantage of many of the innovations introduced by the Uniform Probate Code. Possible disadvantages of a formal probate in a state like Wyoming include:

- **Large expenses:** In addition to filing fees, the Wyoming Probate Code provides a fee schedule, entitling personal representatives and attorneys to fees based on the size of the estate.
- **No privacy:** Unless a court seals filings for good cause, probate proceedings are public records, potentially subjecting a family's private dealings to public scrutiny.
- **Delays and interference:** The probate process can take considerably longer than simpler forms of post-death administration and can be slowed by the process of mandatory court supervision. While the Wyoming Probate Code allows for temporary administration and allowances for the decedent's surviving spouse and minor children, trust administration is generally faster than a probate.

Some people mistakenly believe that a will is sufficient to avoid probate. While a will can give testators a great deal of control over how their estate is administered and distributed after death, it does nothing to avoid probate. Devices for avoiding a full probate are discussed in the next section.

Probate Alternatives

Summary Procedures.

Wyoming law offers an informal distribution procedure for certain small estates, known as the "summary

procedure." This procedure is available for probate estates worth $200,000 or less.

In the summary procedure, a person who claims to be a distributee of the descendant files an application in the district court of the county where property is located at least 30 days after the decedent's death. The application is accompanied by a sworn affidavit that states certain facts, including that the decedent's estate did not have a value greater than $200,000. After mandatory notices have been provided, the court can enter a decree distributing the property. This process is much faster and less expensive than a formal probate.

Property Forms Transferrable Outside Probate.

Often, the small estate process is available because a testator simply owns property worth $200,000 or less. But many individuals have more than $200,000 in assets, often due to real estate. These individuals can still take advantage of the summary procedure or avoid probate altogether by using a variety of methods for reducing the size of their "probate" estates. While probate is the formal process for transferring many types of property after someone's death, many types of property can pass without going through probate. Not all property in which a decedent has an interest is included in the decedent's "probate" estate. If property is excluded from a decedent's probate estate in some fashion, that property's value is not included in the decedent's probate estate. Such types of property are often referred to as "non-probate assets." If enough property is transferred according to one of these methods, a formal probate (or any probate at all) may be unnecessary.

Property Forms: Joint Tenancy

Two or more people who own property through a joint tenancy have what is called a "right of survivorship." This means that when one owner dies, the surviving owner (also known as a "joint tenant") obtains the decedent's entire interest. Such an interest does not pass according to the decedent's will and does not go through probate. Joint tenancies can provide a convenient means of passing property—often real estate—to one's surviving spouse or children, although their utility is somewhat limited by the fact that probate may be necessary when the surviving joint tenants die.

While joint tenancy is often used to transfer real property outside the probate process, personal property can also be owned as a joint tenancy. For example, the certificate of title to a motor vehicle or boat may indicate that two or more people own the property as "Joint Tenants with a Right of Survivorship." If Albert's mother had owned her home or car as joint tenants with her boyfriend, that property would not pass according to terms of her will. The boyfriend would be entitled to receive her entire interest in the property after her death. Albert or his attorneys would need to examine the deed conveying the home to his mother and her boyfriend or the car's certificate of title to determine whether the property was held as a joint tenancy.

Property Forms: Tenancy by the Entirety.

Unlike many states, Wyoming continues to recognize the concept of "tenancy by the entireties," which is an old way for a legally married husband and wife to own property with a right of survivorship. A tenancy by the entireties is similar to a joint tenancy in many ways, except that entireties property cannot be sold without the consent of both spouses and may entitle the spouses to protection from each individual spouse's creditors.

Property Forms: Life Estates.

A life estate (also known as an "estate for life" or "life tenancy") is a form of ownership in which a person owns property for the duration of his or her life.[16] The owner of the life estate (the life tenant) has the right to enjoy the property (subject to certain restrictions, such as against causing permanent harm to the property) as long as he or she lives. When the life tenant dies, the property is usually transferred to a specified person (called a "remainderman") without going through probate.

Property Forms: Transfer on Death Deeds

Governor Matt Mead signed the Nontestamentary Transfer of Real Property on Death Act during the Wyoming Legislature's 2013 general session. Effective July 1, 2013, the act permits individuals to sign deeds that automatically transfer an interest in real property upon death.[17] This statute has the potential

to greatly simplify non-probate transfers of Wyoming property without the use of revocable trusts.

Property Forms: Other.

Not all property owned by multiple people carries a right of survivorship. If property is owned by the entireties or as a joint tenancy, that fact should be indicated on the deed passing the property. Sometimes, the designation will be indicated with an acronym, such as "JTWROS," short for "Joint Tenancy With Right of Survivorship." If there is no designation, then it is possible that the property is owned as "tenancy in common," which does not avoid probate.

Property Forms: Transferring Joint Tenancy, Entireties, and Life Estate Property

Since property owned in these forms does not need to go through probate, the surviving joint, entireties, or life tenant need to undertake different procedures to properly reflect their ownership of the property. The surviving tenant must file a petition in the district court of the county in which the property is located and publish notice in a newspaper of general circulation in the county. If the court determines that the surviving tenant is entitled to receive the interest, it will enter an order to that effect. A certified copy of the decree would then need to be recorded with the county clerk.[18]

If Catherine had owned her home or vehicle jointly with her boyfriend, he would likely need to be the person to file the petition, not Albert. Whoever had survivorship rights regarding her car would likely be required to provide the county clerk with a certified copy of the death certificate and the original title to obtain a new certificate of title reflecting that person's interest in the car.

Trusts

Revocable trusts have become one of the most popular ways of avoiding probate in the United States. Some assets can be put in what is called a "trust" before the deceased person dies. A "trust" is typically a legal agreement in which a person, called a "settlor," appoints a "trustee" to manage the property in the trust for the benefit of the settlor or a third party, either of which is also called a "beneficiary." Any property held by the trust does not need to be probated. Often, the settlor will transfer most, if not all, of his or her property to the trust during life. The settlor will typically execute what is called a "pour-over will," which acts as a safety net to "catch" any property not transferred to the trust and place it in the trust at the time of death. Property held in trust is not subject to the probate process. It can thus be distributed free of mandatory court supervision and public scrutiny if no one institutes a will contest or litigation that requires court intervention.

For example, if Catherine had executed a revocable trust during her life, property held by the trust (possibly all of her property) would not require probate or judicial supervision to be passed to the beneficiaries named by the trust. If she had signed a pour-over will, Albert's primary task as personal representative would simply be to distribute whatever property had not yet been transferred to the trust to whomever the trust named as successor trustee.

Trusts have other benefits. They can provide a useful tool for flexibly managing property while the settlor is alive. If the settlor becomes incompetent, trusts can provide a more private alternative to a guardianship or conservatorship (see *Introduction to Estate Planning* Bulletin 1250.1).

The major downside of using revocable trusts to avoid probate is that trusts generally take more time and cost to create. A family may benefit from consulting an attorney regarding whether trusts are justified by the family's amount of wealth.

POD and TOD Accounts

"TOD" (Transfer-on-Death) or "POD" (Payable-on-Death) designations allow owners of savings and checking accounts to designate who will receive assets held in such accounts when the owner dies. The designated person receives cash upon the owner's death without going through probate. Different banks have different forms and procedures for using such designations, but they are a low-cost way of distributing property outside the probate process. Joint accounts held by the testator and another person may be eligible to avoid probate. The Wyoming Legislature has adopted a statute called the Uniform TOD Security Registration Act, which authorizes similar designations for securities, such as stocks and bonds.

Albert should confer with his mother's bank to determine whether her checking account had such

a designation. If it did, then the cash held by the account may pass to the named beneficiary without going through probate.

Other Assets with Beneficiary Designations

Certain contracts, accounts, and policies may pass from a deceased person to another person without the need of probate if the documents and accounts have an appropriate beneficiary designation. This is often the case with life insurance, pension plans, 401(k)s, IRAs, and annuities, the proceeds or ownership of which often pass directly to the designated beneficiary without going through probate.

Conclusions

Probate is usually necessary in Wyoming to transfer assets held by a decedent in his or her sole name at death worth more than $200,000. If a full probate is needed, the person designated as personal representative (or who may be appointed personal representative in the absence of a designation), may expect to go through the following steps:

1. Filing the will with the court and notifying the named personal representative and readily ascertainable distributees.
2. Petitioning the probate court for appointment as personal representative.
3. Filing Petition for Probate with certified copy of death certificate and required information.
    a. Proving validity of will if necessary.
    b. Litigating items in will that are contested, if necessary.
4. Filing oath of personal representative.
5. Receiving Letters Testamentary from the court clerk.
6. Mailing and publishing required notices.
7. Accepting or rejecting creditor claims.
8. Filing inventory and appraisal with probate court.
9. Making required tax filings.
10. Filing Interim Reports and Accountings if necessary.
11. Filing Final Report, Accounting, and Petition for Distribution.
12. Filing Petition for Final Discharge.

Probate can be a difficult and complex process but is often necessary to effectively transfer title to a deceased person's Wyoming property. Probate includes a variety of mandatory deadlines, notices, reports, and requirements, which can confuse someone like Albert who is not familiar with Wyoming's century-old probate code. It may, therefore, be a good idea to consult with a qualified Wyoming attorney to ensure that his mother's property is transferred to its intended recipients while complying with other laws regarding the rights of Catherine's heirs, the estate's creditors, and applicable taxing authorities.

---

[1] Adapted from Nolo's Plain-English Law Dictionary, Probate, http://www.nolo.com/dictionary/probate-term.html.

[2] In re Ogburn's Estate, 406 P.2d 655, 660 (Wyo. 1965).

[3] Restatement of the Law of Property § 8 (1936).

[4] Black's Law Dictionary, "Tangible Personal Property," 2009, 9th edition.

[5] Wyo. Stat. Ann. § 2-6-119(a).

[6] Wyo. Stat. Ann. § 2-6-120.

[7] Wyo. Stat. Ann. § 2-6-202.

[8] Wyo. Stat. Ann. § 2-6-208.

[9] Wyo. Stat. Ann. § 2-4-201(a).

[10] Wyo. Stat. Ann. § 2-11-301.

[11] Wyo. Stat. Ann. § 2-4-201(c).

[12] Wyo. Stat. Ann. § 2-4-205.

[13] Wyo. Stat. Ann. § 2-6-205(a).

[14] Wyo. Stat. Ann. § 2-6-204.

[15] Wyo. Stat. Ann. § 2-4-206.

[16] This brochure does not address the unusual situation of someone who owns a life estate measured by the life of another person.

[17] H.B. 201, 62nd Leg., Gen. Sess. (Wyo. 2013) (to be codified at Wyo. Stat. Ann. § 2-18-101 to -106)).

[18] Wyo. Stat. Ann. § 2-9-101.

Example of Statutory Self-Proving Will Clause

WILL OF (testator)

[*Substance of will*]

I, _____, the testator, sign my name to this instrument this _____ day of _____, (year), and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am an adult person, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____, _____ the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that he executes it as his free and voluntary act for the purposes therein expressed, and that each of us, in the presence and hearing of the testator, hereby signs this will as witnesses to the testator's signature and that to the best of our knowledge the testator is an adult person, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

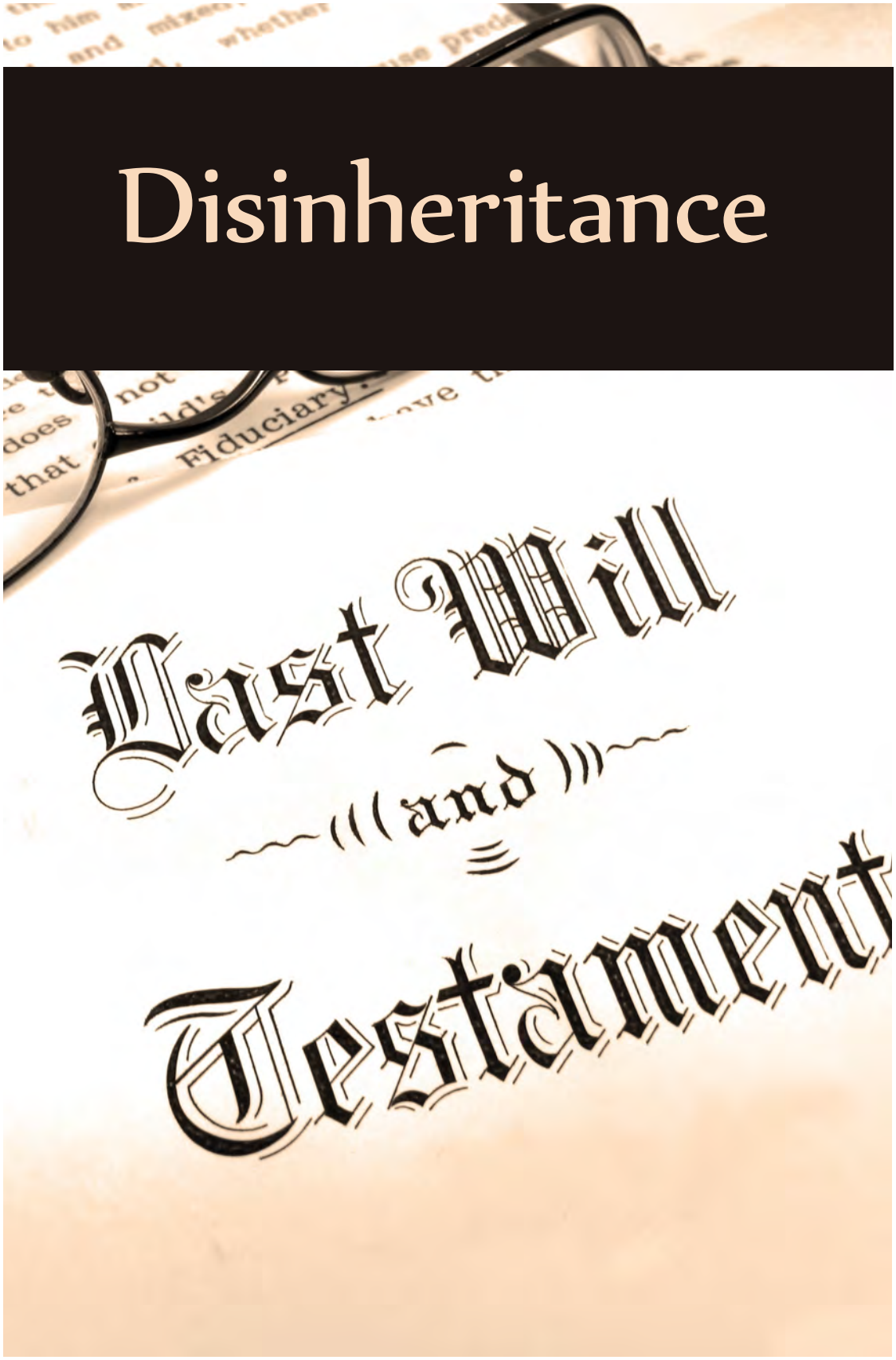
STATE OF WYOMING)
) ss
COUNTY OF _____)

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____.

(Signed) _____
(SEAL)

(Official Capacity of Officer)

Disinheritance



Aaron J. Lyttle

University of Wyoming Extension

September 2013
B-1250.7

Disinheritance

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

Inheritance

The Wyoming Probate Code provides the default manner in which property will pass from a deceased person (also known as a "decedent") to his or her surviving spouse and heirs. An "heir" is a person who may be entitled to receive the property of a person who dies without a "will." A "will" is a document that describes the wishes of a deceased person with respect to the distribution of his or her "estate" and other arrangements, including funeral arrangements. A person's "estate" consists of all property, possessions, belongings, and obligations held in that person's name at the time of death. Wyoming law describes a person who dies without having executed a valid will as having died "intestate."

Wyoming law provides a default pattern of inheritance for the property of decedents who die intestate.[1] After the estate has paid the decedent's debts and funeral and estate-administration expenses, the decedent's property typically passes to his or her surviving spouse or children, or his or her children's descendents, depending on who is living at the time of the decedent's death. If the decedent has a surviving spouse, but no surviving descendents, then the surviving spouse receives what remains of the decedent's estate. If the decedent has a surviving spouse and surviving descendents, then the surviving spouse will receive half of the deceased's estate and the surviving children (or their descendants) will receive the other half. If there are no surviving spouse or children, then other relatives may receive the deceased's estate, including parents, siblings, nieces, nephews, grandparents, uncles, aunts, and so on.

Wills and the Right to Disinherit

If a decedent has executed a valid will, then property will generally pass according to the instructions provided in the will, subject to the decedent's valid debts and final expenses. A person who has executed a valid will is known as a "testator." While a woman who executes a will has traditionally been referred to as a "testatrix," some people view such language as archaic and use the term "testator" to refer to persons of either sex. A person who is entitled to receive property under a will is known as a "distributee."

"Disinheritance" generally refers to the practice of drafting a will in a manner that prevents another person from becoming an heir or distributee of an estate. A testator is generally free to draft the terms of a will in the manner of his or her choosing.[2] This effectively allows decedents to draft their wills in a manner that disinherits possible heirs by depriving heirs of the share they would have received if the testator had died intestate. Typically, a testator disinherits an heir by intentionally excluding the person from the right to receive property under the testator's will. The testator will usually include language acknowledging the disinheritance of unnamed or specified individuals. It is common practice to list the names of a testator's spouse and children in order to clarify that the testator was aware of such persons' existence when drafting the will. The will may also provide the reason for the heir's disinheritance. It is often a good idea to expressly acknowledge the disinheritance in some fashion to clarify that someone was not mistakenly omitted from the terms of the will.

For example, a mother who is dissatisfied with the manner in which her son lives his life may expressly provide for distributions of her estate to her other children, but not to her son. In another example, a grandfather may provide that a granddaughter is not entitled to receive any of his estate because he has otherwise provided for her care during his life.

One approach to disinheritance is for the testator's will to provide for the distribution of a nominal sum to an heir, such as $1. Many clients mistakenly believe that this is necessary to disinherit an heir. You should carefully discuss with your attorney the advisability and possible drawbacks (such as increased notification duties) of leaving a nominal sum to an heir.

Disinheritance Through Trusts

Some people may elect to use a trust as the primary means of distributing their property after death. A "trust" is usually a legal agreement in which a person, known as the "settlor," appoints a certain individual or individuals, known as "trustees," to hold and distribute particular property for the benefit of specified third parties known as "beneficiaries." It is increasingly common for individuals to use revocable trusts as "will substitutes" in order to avoid costly probate proceedings. Such a person will typically transfer the bulk of his or her property to the trust during life and execute what is known as a "pour over will" to transfer any property remaining in his or her name to the trust at death.

Like wills, trusts can be used to disinherit heirs. In this situation, the settlor will simply not name specified individuals as beneficiaries of the trust. The trust may also describe the reasons for not naming a specified individual as a beneficiary.

No Contest Clauses

Litigation can result from situations in which it is unclear which heirs or distributees are entitled to receive the decedent's estate. There may be questions about the proper interpretation of a will or whether it is even valid in the first place. Such challenges (called "will contests") are sometimes brought by heirs or distributees who are unhappy

with their share of the estate, some specific aspect of the will, or the manner in which the personal representative or trustee has managed the estate. These contests can interfere with the decedent's intended plan of distribution, delay final settlement, strain family relations, and require the payment of costly court costs and attorneys' fees from the estate.

Some individuals place "no contest clauses" (also known as "in terrorem clauses") in their wills and trusts to discourage will and trust contests. Such clauses seek to deter challenges by effectively disinheriting an heir, distributee, or beneficiary who unsuccessfully challenges the deceased's estate plan.

No contest clauses are generally enforceable in Wyoming. However, the law varies in different states and you should consult an attorney regarding the effectiveness of specific will and trust clauses.

While many form books will provide formulaic no contest clauses, it is important to consult with an attorney when drafting the clause's language to carry out the client's specific goals. What precise behavior should be enough to trigger disinheritance? Must the heir directly challenge the validity of the will in court? What if an heir conspires with another heir to indirectly challenge the will's terms? What about challenges to the bad faith conduct of a personal representative or trustee?

Individuals desiring to use no contest clauses in their estate plans should carefully consider their overriding goals when reviewing their estate plans with their attorneys. One of the major issues with no contest clauses is whether a testator is giving an heir a sufficient inheritance to deter a potential will or trust contest. Heirs who successfully contest a will or trust may receive a larger share of the estate than they would have originally received. An heir may be more willing to risk losing a small inheritance to create the possibility of receiving a larger share of the estate.

There are alternative ways of avoiding costly will contests, including binding arbitration and effective communication with one's heirs. While nothing is guaranteed, it may be easier (not to mention cheaper) for family members to explain their estate plans to each other and address any resulting hurt feelings or family divisions while they are still alive.

Limitation: The Surviving Spouse's Elective Share

Like many jurisdictions, Wyoming places limits on a testator's right to disinherit a surviving spouse. Traditionally, this took the form of dower and curtesy, which entitled a surviving wife or husband to a lifetime interest in the deceased spouse's estate. Practically all states have repealed such sex-based inheritance statutes.

Wyoming law provides a surviving spouse of any sex to claim a right to receive an "elective share" of the deceased spouse's probate estate.[3] An "elective share" is a specified fraction of the deceased spouse's property, normally one-half or one-quarter of the estate, depending on whether or not the spouse has surviving children. There are time limits within which a spouse must claim his or her elective share. Furthermore, a spouse may waive his or her right to take an elective share before or after marriage, often through a prenuptial (also known as premarital) agreement.

In late 2011, in the groundbreaking In re Estate of George case, the Wyoming Supreme Court ruled that property transferred to a deceased spouse's trust is not included when determining a surviving spouse's right to an elective share.[4] Unless the Legislature amends the statute, this decision may allow Wyoming testators to use trusts to sidestep the elective share statute. However, Wyoming may be in the minority of jurisdictions on this question and the law is subject to change. Disinheritance through a trust can raise a variety of complex questions that may require the advice of a licensed attorney.

Do You Need an Attorney to Disinherit Someone?

While it is possible for a person to draft and execute a will or trust without legal assistance, these documents, including disinheritance provisions, can raise complex legal questions. It is, therefore, advisable to employ a licensed attorney to assist in drafting and executing wills, trusts, and other legal instruments.

---

[1] Wyo. Stat. Ann. §§ 2-4-101 et seq.

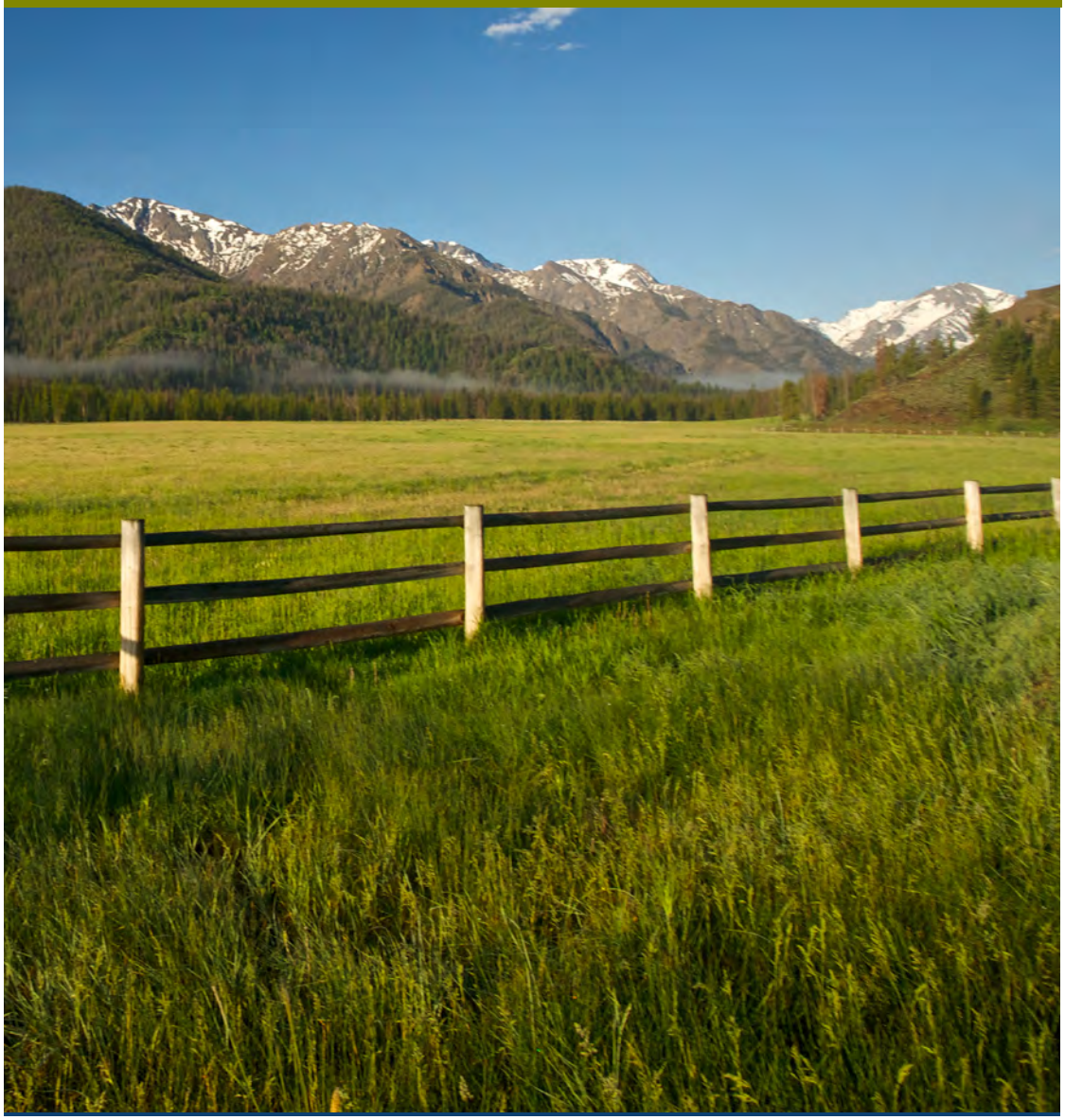
[2] Wyo. Stat. Ann. § 2-6-101.

[3] Wyo. Stat. Ann. § 2-5-101.

[4] 2011 WY 157.

PLANNING AHEAD, DIFFICULT DECISIONS

The Personal Property Memorandum



Aaron J. Lyttle

UNIVERSITY OF WYOMING
EXTENSION

September 2013
B-1250.8

The Personal Property Memorandum

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

Wills and trusts can be useful tools for determining who should receive your property after you die. Unfortunately, consulting an attorney to draft and sign these documents can be time-consuming, dull, and expensive. Even after you have finalized your estate plan, these difficulties can arise anew as family circumstances, wishes, and laws change over time.

Some situations, including major changes in tax law or the size of an estate, demand formal revisions to an estate plan. The language in the will and the terms of Wyoming law can also provide flexibility regarding a number of matters (i.e., automatic disinheritance of ex-spouses after divorce).[1] But what about minor changes regarding who should receive your personal property? Is it really worth racking up new bills simply to ensure that Joel, rather than Ethan, gets his grandmother's collection of antique glasses? What if you change your mind next year? It just doesn't seem practical to draw up new documents every time this happens.

Like many states, Wyoming offers a flexible alternative. While wills generally should be self-contained and final when signed,[2] Wyoming law allows a person who has signed a will (called a "testator") to use a separate document commonly known as a "Personal Property Memorandum" to direct who will receive certain pieces of tangible personal property after the testator's death.[3] Such a list provides a great deal of flexibility to people who want to formalize their wishes regarding the legal recipients of certain items of property without having to constantly update their wills.[4]

A Basic Introduction to Different Types of Property

Property passing to a deceased person's heirs can include both real property and personal property.[5] The term "real property" (often called "real estate") refers to land and certain things attached to it (such as buildings).[6] "Personal property" (also known as "personalty") is the generic term for all types of property other than real property.

Personal property falls into two major categories. Intangible property has no physical existence. It includes things like stock options and business goodwill (an accounting concept meaning the value of an asset owned that is intangible but has a quantifiable "prudent value" in a business). In contrast, tangible personal property can be seen, weighed, measured, felt, touched, or otherwise perceived by the senses. Examples of tangible personal property include furniture, jewelry, china, and books. These types of tangible personal items can be important to a testator but may be too voluminous to justify specific references in a will. Often, they are best handled after death with a Personal Property Memorandum.

What is a Personal Property Memorandum?

A person may wish to ensure that specific items of tangible personal property pass to specified people upon his or her death. For instance, a person may desire to transfer jewelry, family heirlooms, clothes, collectables, furniture, and other valuable or sentimental items to certain family members or others. If the person dies without having executed a will, these items will pass according to the default standards provided by Wyoming law,[7] which may not correspond to what the person intended. A valid will changes the default rules, generally allowing the testator to control who receives the testator's real and personal property (other than the testator's final expenses and the estate's administration fees, debts, and taxes).[8]

Most people have much tangible personal property. It can, therefore, be cumbersome to specify who will receive each book, necklace, sculpture, and so on in the terms of a testator's will. People's relationships and tangible property change over time, and it may be unreasonable to expect someone to formally amend his or her estate plan in response to these constant changes.

Wyoming law provides a solution to this problem by allowing a will to incorporate the terms of an external document commonly known as the "Personal Property Memorandum" (the statute itself uses the phrase "written statement referred to in will disposing of certain personal property").[9] In contrast to a will, which can only be changed through the execution of a will amendment (called a "codicil") or new will (along with all of the cumbersome execution formalities),[10] the testator can change the memorandum at any time before his or her death.

Take the example of Edward, who has a valuable collection of albums by the late "high priestess of soul," Nina Simone. First, Ed will sign a will referring to the existence of the memorandum. Ed can then change the memorandum as needed over the course of his life. The memorandum will list specific items Ed owns and the specific individuals who should receive them after he dies. Today, Ed might want his records to go to his grandson, Dusty. To ensure that intent is carried out, he will write a reasonably certain reference to his albums next to Dusty's name, date the memorandum, and make sure the designation is either in Ed's handwriting or signed by Ed.[11] He is free to prepare the memorandum either before or after signing the will.[12] If Ed needs to execute a new will in the future, he can include a provision referring to the preexisting memorandum. Ed can alter the memorandum's provisions after it has been prepared if each alteration is signed and dated. So, if Ed starts to doubt whether Dusty will fully appreciate the nuances of Ms. Simone's voice, he can simply edit the memorandum to leave the records to someone with "better taste" in music.

The memorandum **cannot** be used to transfer real estate, money, evidences of debt (i.e., promissory notes and bonds), documents of title (i.e., title documents to a vehicle), securities (i.e., stocks), or property used in a trade or business.[13]

A memorandum will have no effect unless accompanied by a will, which will likely require consultation with a licensed attorney. If there is a conflict between how a specific item is distributed under the terms of the will and the memorandum, the provision in the will takes priority.[14] This typically results in the estate's items of tangible personal property passing as follows:

- Specific gifts of tangible personal property in the will take priority.
- Specific gifts of tangible personal property referred to in the memorandum pass next, to the extent that they have not passed by specific reference in the will.
- Finally, the rest of the testator's tangible personal property passes according to the remaining terms of the will.

It is common for property to pass through a trust at death, rather than via a will. But Wyoming law does not specifically authorize incorporation of a memorandum into a trust. It is, therefore, common for someone who has executed both a will and a trust to refer to the memorandum in both documents.

The drafter of a Personal Property Memorandum should ensure that the document is kept in a safe place so that it is not altered, destroyed, or lost. It is often a good idea to ensure that one's personal representative, trustee, and heirs know the document's location.

Below is a sample of a Personal Property Memorandum:

Personal Property Memorandum of Jane Doe

Article X of my Will dated 00/00/00, and Article Y of the Z Revocable Trust under agreement dated 00/00/00, as amended 00/00/00, refer to the disposition at my death of certain items of tangible personal property in accordance with a memorandum signed by me. I, Jane Doe, do hereby make this memorandum for that purpose and to comply with the provisions of Wyoming law (Wyo. Stat. Ann. § 2-6-124).

If the recipient of a particular item of personal property does not survive me, such item shall be disposed of as though it had not been listed in this memorandum.

Description of Tangible Personal Property	**Person to Receive Property Address and Relationship**
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Date _____ Signature _____

[1] Wyo. Stat. Ann. § 2-6-118.

[2] In re Estate of Zelikovitz, 923 P.2d 740, 743 (Wyo. 1996) (requiring that will amendments conform to Wyoming rules for formal execution of wills).

[3] Wyo. Stat. Ann. § 2-6-124(a).

[4] While Wyoming has not adopted the Uniform Probate Code, this model law explains the rationale and function of the Personal Property Memorandum. Uniform Probate Code § 2-513 (2010), http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf.

[5] Wyo. Stat. Ann. § 2-6-102; see also id. § 2-1-301(a)(xxix) (defining property as including real and personal property).

[6] Black's Law Dictionary, 2009, 9th edition.

[7] Wyo. Stat. Ann. §§ 2-4-101 et seq.

[8] Wyo. Stat. Ann. § 2-6-101.

[9] Wyo. Stat. Ann. § 2-6-124(a).

[10] Wyo. Stat. Ann. § 2-6-112.

[11] Wyo. Stat. Ann. § 2-6-124(a).

[12] Wyo. Stat. Ann. § 2-6-124(b).

[13] Wyo. Stat. Ann. § 2-6-124(a).
It is not entirely clear what the statute means by "property used in a trade or business." The statute's exception language appears to have been derived from an older version of the Uniform Probate Code. Many state statutes and the Uniform Probate Code no longer use that language because it is redundant (evidence of indebtedness, documents, of title, and securities are not tangible personal property) and confusing. Uniform Probate Code § 2-513 cmt. (1990). See Brukett v. Mott, in which an Arizona appellate court arrived at the counterintuitive conclusion that an insurance policy could be considered an item of tangible personal property under Arizona's statute because it was not expressly excluded from the memorandum statute. 733 P.2d 673 (Ariz. Ct. App. 1994).

[14] Wyo. Stat. Ann. § 2-6-124(a) (allowing the memorandum to distribute items "not otherwise specifically disposed of by the will"); Restatement (Third) of Property: Wills & Other Donative Transfers § 3.9 cmt. e (2012).

PLANNING AHEAD, DIFFICULT DECISIONS

Guardianships and Conservatorships

Aaron J. Lyttle

UNIVERSITY OF WYOMING
EXTENSION

September 2013
B-1250.9

Guardianships and Conservatorships

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

One of a parent's greatest fears involves what will happen to his or her minor children in the event of the parent's premature death or incapacity. Competent adults may also wonder who will ensure their own welfare if they become incompetent. Similar problems can arise when family members and friends lose the ability to take care of themselves due to age or physical or mental infirmity.

These diverse situations can provoke intense anxiety based on the realization that there may come a time when we lose control over our ability to take care of our loved ones and ourselves. While this possibility can be difficult to contemplate, it does not typically arise as a matter of choice or convenience. These traumatic situations must often be addressed on short notice by establishing legal guardianships or conservatorships. It may, therefore, be a good idea to think about what you would like to happen in a true "worst-case scenario" and undertake legal steps to plan for that situation before it happens.

Take the example of a young married couple with one daughter. In addition to traditional forms of financial estate planning, the couple may benefit from guardianship and conservatorship planning, both to protect the welfare of their child and to maintain their own sense of dignity and fulfillment during the late years of their lives. Now imagine what happens if the couple experiences a freak automobile accident, which leaves the mother dead, leaves the father in a coma, and injures the daughter. This bulletin seeks to explain some of the guardianship and conservatorship possibilities available in such a situation. This information can also apply to Wyoming residents in other stages of life and who face other situations.

What is a Guardian?

A "guardian" is a person who has been approved by a court to care for a minor or an adult who needs assistance due to incompetence (the term for a subject in this condition is referred to as a "ward"). This care involves a) providing the least-restrictive and most-appropriate residence for the ward (often the guardian's home, but an institutional facility may be appropriate for certain wards, such as those with special needs), b) facilitating the ward's education, socialization, and other activities, c) providing for medical care, and so on.[1]

Who Needs a Guardian?

Guardianships and conservatorships fall into two categories: those for minor children and those for incompetent adults.

Guardianships for Children

If a parent can no longer care for his or her minor child, someone else must fulfill that role. This situation typically results from the death, unfitness, or termination of the parental rights of the child's parents. A "minor" is an unemancipated individual who is under 18 (an emancipated minor is person who is at least 17 and has successfully petitioned a court to be recognized as an adult). If one parent dies and the minor child still has a living, fit parent, the surviving parent will typically take custody of the child (a fit natural parent is considered a child's natural guardian). But the court must appoint a new guardian if neither parent is available.

In our example, a guardian must be appointed to ensure the safety and well-being of the couple's daughter because neither parent can fulfill that role. Without a properly appointed guardian, an individual who seeks to take care of the daughter (i.e., a grandmother) may be unable to access medical care, educational opportunities, public assistance, and other important needs and opportunities for the daughter's benefit.

The couple may have benefitted from clarifying their preferred guardians for their daughter or other minor children while they were still alive and competent. An attorney could have assisted in making such a designation in their will. While a court will not appoint a guardian that it does not believe will provide for a child's best interests, a nomination in a will carries great weight in determining who will act as a minor child's guardian. Often, this will be the most important decision someone makes in planning an estate. The decision should be made in light of the parents' physical, educational, financial, social, and spiritual goals for their children. It should also be made in light of the proposed guardian's physical and mental ability and willingness to take care of the parents' children to achieve these ends.

Guardianships for Incompetent Adults

Wyoming law also permits a court to appoint a guardian for adults who have been found incompetent. This has become an issue of heightened urgency as advances in medical technology and methods can substantially extend the average American's natural lifespan.[2]

Under Wyoming law, a person is incompetent if he or she is unable, while unassisted, to properly manage and take care of him/herself or his/her property as a result of the medical conditions of advanced age, physical disability, disease, the use of alcohol or controlled substances, mental illness, mental deficiency, or intellectual disability.[3] Additionally, people can be found "mentally incompetent" if they can't properly manage or take care of themselves or affairs without assistance because of mental illness, mental deficiency, or intellectual disability.[4] Incompetency can result from a wide variety of factors, including mental illness, genetic conditions, Alzheimer's disease, the effects of old age, etc. In some cases, these conditions can make it difficult or impossible for people to take care of themselves or manage their affairs, making it necessary for a court to appoint a guardian or conservator, whether with or without the person's consent.

Appointing a guardian for an adult can be a challenging process, particularly for individuals who have been accustomed to independently managing their own affairs. If a guardianship is contested, the court may find itself in the difficult position of balancing a person's liberty interests against the threat the person poses to himself or herself and the general community.

In our example, the couple may have benefited from planning for the possibility of their own incompetence. The father will obviously be unable to make decisions for himself while comatose. If he had signed an effective Advance Health Care Directive or Durable Power of Attorney before the accident, those documents would allow his agent(s) to make a number of medical and financial decisions on his behalf. Otherwise, it may be necessary for a guardian or conservator to be appointed to manage the father's affairs.

What is a Conservator?

A "conservator" is appointed by a court to manage a ward's property. In contrast, guardians are appointed to manage their wards' person. Like guardians, conservators are fiduciaries in carrying out their responsibilities. The court will appoint a conservator when a child or incompetent person is in need of someone to manage his or her property and the appointment is in the ward's best interest. While the conservator takes possession of the ward's property, the ward retains legal title of the property. A petition for a guardianship and conservatorship may be combined into a single petition.

In our example, a conservator may be necessary if the father or daughter has significant assets in need of management. A conservatorship may not be necessary for a minor child who lacks significant assets (a person may transfer $5,000 or less to a minor's guardian if no conservator has been appointed),[5] but it can be difficult to predict whether this will be the case. It may have benefitted the couple to nominate a conservator in the terms of their will.

What is a Guardian *Ad Litem*?

A guardian ad litem (GAL) is a person appointed by the court to represent a ward's best interests during court proceedings. Among other situations, the court may appoint a GAL to represent a child's interests during a guardianship or conservatorship proceeding. The GAL does not have the powers of a guardian or conservator and does not act as the child's attorney, but the person will provide a report to the court regarding the child's condition and make recommendations to the court. The Wyoming Office of the State Public Defender maintains a program that supervises and manages attorneys acting as GALs (http://gal.state.wy.us/).

How is a Guardian or Conservator Appointed?

A guardian or conservator must be appointed by a court. Such an appointment requires adherence to legal procedures, which likely will require assistance of a licensed Wyoming attorney.

In our example, a grandmother seeking to act as guardian or conservator for her son or granddaughter would need to "petition" or ask the court to become a guardian or conservator. First, the court would

determine whether an appointment is necessary. If so, the court would then use a statutory priority list and the best interests of the child to select and appoint a guardian. Preference may be given to a guardian appointed in a parent's will or some other document taking effect at the parent's death. A guardian may also be selected by the potential ward in some circumstances. Alternatively, a person who can demonstrate a genuine interest in the potential ward's well-being may request to be the guardian. Generally, a court will not appoint a person as a guardian unless he/she has shown a strong desire and an ability to care for the individual in need, regardless of any presumed obligations and requests. Typically, a spouse, a parent, an adult child, a relative, a friend, a person appointed by the court, a person with a guardianship program, or any other person who can act in the best interests of a person in need can be appointed as a guardian.

Guardianship and conservatorship petitions can be voluntary or involuntary. An adult may insist on his or her own competence and contest whether a guardian is necessary. Parents may also object to the appointment of a guardian. A child's natural parents are presumed to be his or her natural guardians unless they consent to terminate their parental rights. The court may also determine that they are unfit parents and terminate their rights as parents. Natural parents have a powerful constitutional right to prevent the involuntary appointment of a guardian unless a court determines that the natural parents are unfit.[6]

If the grandmother's guardianship or conservatorship petition is granted, she would sign a sworn oath and undertake the statutory rights and responsibilities of a guardian or conservator.

What are the Powers and Duties of a Guardian?

As a fiduciary (e.g., a person required to act for another's benefit),[7] a guardian must act in the "best interests" of the ward. Courts will consider many factors—including social and economic factors—when determining the best interests of a person.

A guardian of a ward has the powers and responsibilities that a parent would have for a child in his or her custody. Some guardianship duties include:

- Ensuring that the ward has appropriate living arrangements,
- Facilitating the ward's education, social, and other activities,
- Authorizing or withholding consent for medical treatment (with certain exceptions),
- Protecting the ward's property, and
- Spending funds received from a conservator for the ward's benefit.

A guardian may also perform other duties as directed by the court. Certain extraordinary powers require court authorization. A court may limit the responsibilities of a guardian depending on the circumstances and needs of the ward.

These powers and duties indicate the importance of obtaining a proper guardianship order when a non-parent takes care of a minor child. In our example, the daughter will likely need someone to make medical, educational, and other decisions because one parent is dead and the other lies in a coma. For instance, someone might need to consent to a surgical procedure to repair a torn tendon. Someone seeking to make these decisions (for example, the daughter's grandmother), would need to petition the district court in the county where the daughter lives for authority to act as a guardian. The court would then be tasked with determining that the daughter needed a guardian and that appointing the grandmother would be in the daughter's best interest.

The parents could have had some control over this process if they had nominated the grandmother—or someone else—as guardian of their daughter in their will, which would give that person priority over certain other family members seeking to act as guardian. Otherwise, the court would look to other factors to determine who should be appointed guardian. Ultimately, though, the court's decision will be based on the daughter's best interests.

A guardianship appointment order would help ensure that the grandmother or other person acting as guardian can make medical and other necessary decisions to protect the daughter's well-being. This person could generally make such decisions over the objection of other family members, although certain types of medical treatment require court authorization (i.e., psychosurgery, electroshock therapy, etc.), and any person who believes a guardian is not prop-

erly discharging his or her duties can file a complaint with the court.[8]

Guardians are normally required to file regular reports with the district court to ensure that the guardianship remains in the best interests of the ward.

What are the Powers and Duties of a Conservator?

Like a guardian, a conservator is a fiduciary who must act in the ward's best interests. The conservator must protect, preserve, spend, and prudently invest the ward's property for the ward's benefit. A conservator can take a variety of other actions on behalf of the ward, such as suing or defending claims, voting at corporate meetings, and applying the conservatorship funds for the child's maintenance, education, support, and care. Like a guardian, a conservator must receive court approval for certain actions, such as settling civil lawsuits and executing trusts. At the end of the conservatorship, the conservator must deliver the ward's assets to whomever is entitled to receive them, which may be a child who has turned 18 or the child's guardian.

While the same person may be both the guardian and conservator, this is not necessarily the case if a different person has been nominated by the parents or the court simply determines that a different conservator would better ensure protection of the child's best interests. If the child required funds for a medical procedure, the conservator could direct those funds in a variety of ways, including to the medical provider or the ward's guardian. Like a guardian, a conservator may be subject to a court complaint from someone who believes the conservator is not acting appropriately in managing the ward's estate. For example, if the conservator refused to release funds for the granddaughter's treatment, a family member could bring a court claim challenging the conservator's failure to conduct his or her duties.

During the conservatorship, the conservator must file regular reports and accountings of the conservatorship assets, including changes in the inventory of the conservatorship property, according to a schedule established by the district court.

Conservatorship Alternatives

It is not always necessary to appoint a conservator for a ward. In some situations, a guardian may be capable of managing the ward's property. This is particularly true of many children who have no significant assets of their own. If no conservator has been appointed, a person who has a duty to pay money or property to a minor may pay amounts of less than $5,000 per year to an emancipated or married minor, the minor's guardian, or a financial institution holding an interest-bearing account in the minor's name.[9] Persons other than the minor or a financial institution must apply the money or property for the minor's benefit. Wyoming's Uniform Transfers to Minors Act governs many transfers of property or money to or for the benefit of minor children.

Assets may have been set aside in a trust for the benefit of the father or daughter. The parents could have created these trusts while they were living and competent or instructed the trust be created upon their deaths in their will. The creation of a trust by a third party commonly involves the proceeds of a wrongful death lawsuit on the child's behalf, or insurance policies on a parent's life, being held in trust. It is also common for a deceased person's will to provide that any property distributable to a minor be held in trust until the minor reaches a certain age. The father could have also transferred his property during his life and provided for a standby trustee to manage the property if he becomes incapacitated. If assets are held in trust for the ward's benefit, then the trustee—rather than a conservator—will manage the assets. A trusteeship provides flexibility that is not available to a conservator and may save the administrative difficulties and expenses associated with requesting court permission to apply funds for the ward's support. Trusts can be more expensive to set up than simple wills, Durable Powers of Attorney, and Advance Health Care Directives. Because of this, consider discussing the cost-effectiveness of different options, based on your situation.

How Long Does a Guardianship or Conservatorship Last?

A person can act as another person's guardian or conservator on an emergency, temporary, or permanent (also known as "plenary") basis, depending on the needs of the specific person. In addition, a court may terminate a guardianship or conservatorship if the relationship is no longer necessary, is no longer in the best interests of the person, or if the guardian, conservator, or person who is being cared for no longer desires to continue the relationship. Conversely, the guardianship may also be extended, if necessary.

Getting Started

If you are interested in beginning the process of planning for the appointment of a guardian or conservator for yourself or a loved one, consider consulting an attorney. If you are simply planning for the future possibility of appointing a guardian for a minor child, it may be sufficient to nominate guardians and conservators in your will, which can typically be accomplished as part of a standard simple estate plan. It may be a good idea to consider someone's finances, values, time, health, and willingness before nominating them. Wills and trusts can also be drafted to plan for the management of assets in the event that a child becomes entitled to receive property or a parent becomes incapacitated.

If it becomes necessary to appoint a guardian or conservator at the present time, the process will require court filings and possibly litigation if there is a dispute over who should be appointed or whether a guardian or conservator is necessary in the first place. Consultation with an attorney is often a good idea, especially if there is a possibility of a dispute. Attorneys' fees and court costs vary widely depending on whether the guardianship is voluntary or not. A dispute may require hearings and the testimony of witnesses, which can be time-consuming and expensive.

For this reason, it is often a good idea to plan for future guardianships and conservatorships (including the possible use of trusts) as soon as possible (think back to our example of the automobile crash). Your friends, relatives, and the courts may not know what you intended for the care of yourself or a child if you do not make your wishes known.

Other Resources

- Wyoming Guardianship Corporation, http://www.wyomingguardianship.org/guardianship-program.html
- Legal Aid of Wyoming Inc., http://www.lawyoming.org/legal_forms/family-law/guardianship/
- AARP Legal Services Network, http://www.aarplsn.com/lsn/jsp/legalInfo.jsp
- National Guardianship Association Inc., http://www.guardianship.org/

---

[1] Wyo. Stat. Ann. § 3-2-201.

[2] A. Kimberley Dayton et al., 2012, Advising the Elderly Client, Westlaw, v. 32.

[3] Wyo. Stat. Ann. § 3-1-101(a)(ix).

[4] Wyo. Stat. Ann. § 3-1-101(a)(xii).

[5] Wyo. Stat. Ann. § 3-3-108.

[6] In the Matter of the Guardianship of MEO, a minor child, 2006 WY 87, ¶ 21.

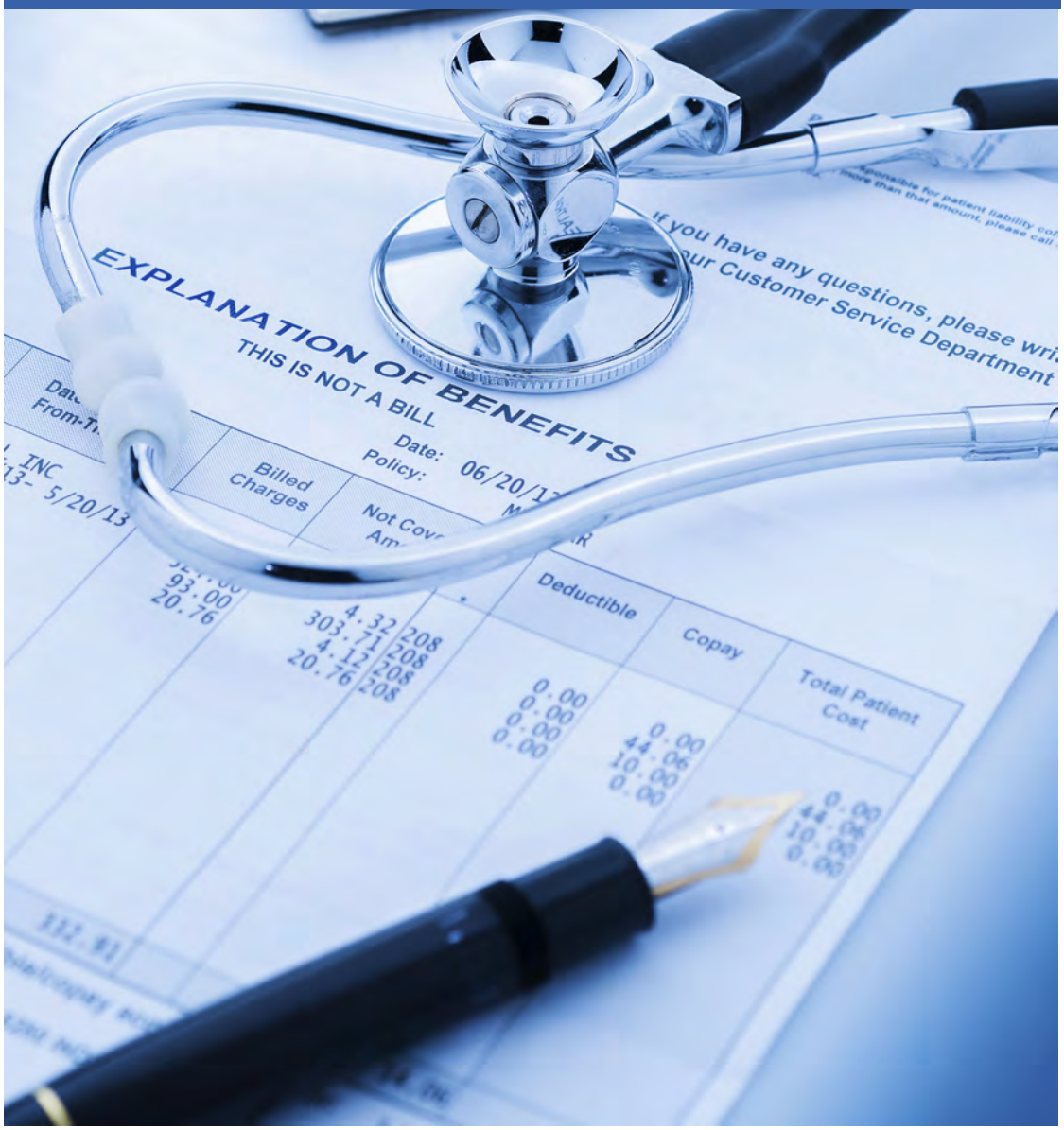
[7] Black's Law Dictionary, 2009, 9th edition.

[8] Wyo. Stat. Ann. §§ 3-1-111, 3-2-202.

[9] Wyo. Stat. Ann. § 3-3-108.

PLANNING AHEAD, DIFFICULT DECISIONS

Advance Health Care Directives



Aaron J. Lyttle

University of Wyoming Extension

September 2013
B-1250.10

Advance Health Care Directives

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

The term "living will" became a household word in 2005 due to events surrounding the acrimonious dispute in Florida over Terri Schiavo, the woman who was in a persistent vegetative state and had left few directions to her family regarding her end-of-life care. As medical care has made enormous advances, it is now possible to keep many people alive for very long periods. Individuals may wish to place limits on the extraordinary possibilities of modern medical care, particularly if they have little chance of recovery or the burdens outweigh the possible benefits of continued treatment. At some point, a person may wish for his or her health-care providers to switch over to palliative care, helping the patient live as comfortably as possible while going through the inevitable process of dying. It has become more and more common for people to die from the withdrawal of some form of technological support.

Unfortunately, it is often impossible to determine a person's wishes once that person no longer has capacity to express him or herself. While there appears to be a societal consensus that individuals have the right to refuse life-sustaining medical interventions—including artificial nutrition and hydration—there is less clarity regarding how to make such decisions when patients cannot speak for themselves. This often forces loved ones to make hard and divisive health-care and end-of-life decisions. It can also interfere with their ability to make more routine health-care decisions on behalf of an incapacitated loved one. Despite these concerns, data indicate that a majority of Americans have not completed some form of living will or health-care proxy and that family members continue to have a difficult time predicting their loved ones' wishes regarding life-sustaining care.[1]

While planning for your health-care decisions during what may be the last days of your life seem macabre, such documents provide an important means of helping you, your family, and possibly others to plan for your medical treatment, particularly when you are chronically ill and can no longer speak for yourself.

What is it?

The Wyoming Health Care Decisions Act[2] allows adults and emancipated minors to execute Advance Health Care Directives or AHCDs. An AHCD has two primary purposes:

First, an AHCD can provide an advance directive (also known as a "living will," "individual instruction," "personal directive," "directive to physicians," or "advance decision").[3] An advance directive provides instructions to medical professionals regarding the signer's medical treatment and end-of-life care. The main purpose of creating an AHCD is to communicate the principal's intentions and wishes to medical doctors and loved ones, so that they may have guidance when making health-care decisions for the principal (the person granting the power).

Second, an AHCD can act as a power of attorney for health-care (also known as a "health-care proxy").[4] It does so by allowing the principal to appoint an agent (the person receiving the power) to make health-care-related decisions on the principal's behalf when he or she can no longer do so. Such decisions must be made according to the terms of the principal's known wishes, whether made orally, made in writing, or stated in the advance directive. This function is similar to a Durable Power of Attorney, but it specifically relates to the principal's health-care decisions rather than financial decisions. (See Durable Power of Attorney Bulletin 1250.11 for information about Durable Powers of Attorney).

In addition to the above tools, a principal can use an AHCD to name his or her primary physician and to nominate a guardian in the event that the principal becomes incapacitated.

When Does the Agent's Authority Become Effective?

Unless the AHCD indicates otherwise, a health-care agent's authority becomes effective when the principal becomes legally incapacitated. Incapacity is an individual's inability to understand the significant benefits, risks, and alternatives to proposed health-care decisions and to make and communicate those decisions to health-care providers.[5] What qualifies as legally incapacitated depends on the state where the person lives and how his or her AHCD defines the term. If the AHCD does not specify what constitutes incapacity, the principal's primary care physician or the primary health-care provider will make the decision.[6]

Unless the AHCD specifies otherwise, the agent's power ends when the principal regains capacity.[7]

Individuals may fear the loss of control that occurs when a power of attorney for health-care becomes effective. This is understandable. The thought of not having control over one's most basic personal decisions can be troubling. But individuals should recall that the power becomes effective only in situations in which the individual would be unable to act on his/her own behalf in the first place.[8] An AHCD can allow someone to retain a modicum of choice by making decisions and designating agents while he or she still has the power to do so. The alternative may cause a much more severe loss of control, such as in the case of guardianship proceedings, or the appointment of an agent, or authorization of medical procedures that are not in accord with the individual's wishes.

Why Do I Need One?

Without an AHCD, health-care decisions can be difficult for family and loved ones to make on their own. The case of Terry Schiavo is a tragic example of the difficulties that can arise.[9] In Terry's case, her husband made a decision to remove her life support after several years of incapacity. Her parents, however, wanted to keep Terry on life support for as long as possible. The result was years of legal battles, attorney fees, medical bills, and heartache. Had Terry created an AHCD before her incapacity, she would have been able to declare her wishes and allow her designated agents to make health-care decisions on her behalf without court approval. Even in less controversial situations, an AHCD can provide the principal's loved ones with a sense of direction, taking part of the decision-making burden off family members.

The Surrogate Alternative

Wyoming's surrogate consent statute provides an alternative means of having someone make health-care decisions on one's behalf, even if no AHCD exists. A person without an AHCD may appoint a surrogate by personally notifying his or her primary health-care provider that the person has been selected to act as a surrogate.[10] The statute does not specify the precise contents of this notification, but it likely needs to be specific enough that the provider knows that the patient wants the surrogate to make decisions on his or her behalf.

A surrogate, much like an agent, has the power to make decisions on behalf of an incapacitated person[11] without court approval.[12] The primary health-care provider may require the surrogate to provide an affidavit swearing to his or her authority.[13] A patient can revoke a surrogate's authority through a signed writing or by informing the primary health-care provider.[14]

Even if an incapacitated person has not appointed a surrogate or his or her surrogate is not reasonably available, Wyoming Statute § 35-22-406 lists potential surrogates in order of priority, beginning with the person's spouse (unless legally separated). If the person has no spouse or the spouse is unwilling or unable to act as surrogate, then the next person in line becomes the surrogate. After spouses, the priority passes to an adult child, a parent, a grandparent, an adult brother or sister, and, finally, an adult grandchild, in that order. If none of those individuals is reasonably available, a reasonably available adult who has shown special care and concern for the person and is familiar with his or her values may act as surrogate.[15] The list of succession is only suggested, and not binding on the family members.

A person who claims authority to act as surrogate must notify the patient's readily accessible family members named by the statute as soon as practicable.[16]

The statute requires a surrogate to make health-care decisions based on the patient's individual instructions and any other wishes known by the surrogate.[17] If no specific wish is known, the surrogate must act in the patient's best interests based on the patient's personal, philosophical, religious, and ethical values known to the surrogate, as well as reliable oral and written statements to the patient's family members, friends, health-care providers, or religious leaders.

The surrogacy statute appears to be an attempt to create legally enforceable health-care agency relationships based on how many people actually select their agents. For example, it may be more common for a patient to simply say, "Doc, if anything happens to me, talk to my daughter, Mary. I trust her,"[18] rather than sign a formal AHCD.

But the surrogacy process may create complications. For example, a surrogacy appointment may have assisted in resolving the Terry Schiavo dispute since a spouse is generally given priority over parents and can give one person the authority to make a decision.[19] But a surrogacy would have done little to quell disagreements regarding whether Ms. Schiavo's husband was carrying out her wishes. While Florida

law permitted the automatic appointment of a spouse as health-care proxy, it allowed family members to file lawsuits contesting decisions that they did not believe followed the patient's wishes.[20] While Wyoming law may not provide the same complications, it does require consideration of the patient's wishes based on written and oral instructions given to other family members, which can simply reinforce uncertainty if those wishes were never written down.

Additionally, if multiple individuals in a class of potential surrogates are appointed, they may not agree about specific medical decisions. If the primary health-care provider is informed that multiple members of a class of surrogates (for example, multiple sisters of the patient) disagree regarding a health-care decision, the provider must comply with the decision made by a majority of surrogates. This can cause problems because family members could have conflicting opinions about what should happen, especially if some family members may benefit economically from a certain result. Unlike the statute on which it is modeled, Wyoming's law does not require disqualification of surrogates in the event of a surrogate deadlock. It may be necessary to resort to courts to resolve surrogate deadlocks,[21] although there do not appear to be reported Wyoming cases regarding how a court would resolve the disagreement.

Powers that a Principal May Delegate Through an AHCD

Many people who prepare an AHCD select an agent or multiple agents who can act once they become incapacitated. The agent or agents can be loved ones, relatives, physicians, or anyone the principal chooses. If the principal's wishes are unknown, the agent must make decisions in the principal's best interests and based on the principal's known personal values. Depending on the other provisions of the AHCD, the principal can give the agent complete control over health-care decisions or specify certain powers such as those listed below. The agent's authority is usually set by terms of the AHCD and can include discretion to make any decision the principal could have made if he or she had capacity.[22]

If not selected by the principal, the agent has the power to choose or release a health-care provider or primary care physician for the principal's benefit. Principals may also elect whether they want paramedics and E.M.T.s to administer life saving techniques such as CPR. Typically, emergency medical responders will administer these procedures unless the AHCD specifically states that the principal does not want these procedures. If the principal elects not to have these procedures, it may be beneficial for the principal to obtain a Do Not Resuscitate Order (also known as a "DNR" or "Cardiopulmonary Resuscitation Directive"),[23] which can be placed on file with the Wyoming Department of Health's Office of Emergency Medical Services. The Department of Health also operates the Comfort One® program, which provides bracelets notifying E.M.S. personnel of the wearer's status. For more information, see the department's website at http://health.wyo.gov/sho/comfortone/index.html.

The AHCD also allows principals to choose whether they want their life prolonged by artificial means if a doctor diagnoses them with a terminal illness. Most AHCDs allow principals to specify exactly what treatment they are willing to accept as well as those that they refuse. This includes specifying certain procedures, tests, or programs that the principal does or does not want. The principal may even limit the agent's ability to authorize pain relief through medications. Some principals choose this option for religious or personal reasons that prevent them from being able to accept medication.

Unless otherwise provided by the AHCD, the agent can refuse to accept medical care—even over a physician's objections—to the same extent that the principal could if he or she had capacity.[24] There are limited situations in which a health-care provider may decline to comply with an instruction that interferes with his or her conscience or requires medically ineffective health-care or health-care contrary to generally accepted health-care standards.[25] A provider who refuses to comply must promptly inform the patent and agent and provide continuing life-sustaining care until the principal can be transferred to another institution.[26]

Often, the AHCD will provide that the agent and health-care professionals not be held liable for good-faith reliance on the AHCD. Wyoming law provides that health-care providers are immune from civil or criminal liability for acting in good faith in complying with an apparent agent's decision to withhold or withdraw treatment, declining to comply based on

the provider's belief that the agent lacks authority, and other circumstances.[27]

Organ Donation

At any given time, more than 115,000 people are on waiting lists for life-saving or healing organ, eye, or tissue transplants.[28] An AHCD can be used to state the signer's wishes regarding organ donation (also known as anatomical gifts). However, if someone desires to be an organ donor, he or she may want to consider putting the designation on his or her driver's license or ID card or registering with the Donor Alliance, since the AHCD may not be immediately available when a health-care provider needs to determine someone's donor status. See http://www.donoralliance.org or http://www.dot.state.wy.us for more information.

Right to Refuse Treatment

In the case *Cruzan v. Director, Missouri Department of Health*,[29] the U.S. Supreme Court held that people have a constitutional right to refuse life-saving medical care. This means that principals can choose whether to receive life-saving treatment through their AHCD. However, the court still allows states to impose procedures and safeguards to ensure that the agent follows the principal's wishes.

The other important case in this area is *Washington v. Glucksberg*,[30] which states that a person does not have a constitutional right to receive help from a physician to aid in dying or committing suicide. Because of this, it is important to understand that an AHCD does not give an agent the power to euthanize the principal or engage in assisted suicide. While the document does allow a principal to choose whether to have life-sustaining treatment such as food and water tubes (in other words, when to "pull the plug"), most states refuse to recognize any provision of the AHCD that expresses wishes related to euthanasia. Wyoming's AHCD and CPR directive statutes both expressly state that they do not authorize euthanasia.

Things to Consider When Choosing an Agent

When choosing an agent, the principal should consider many factors that will affect the nature and effectiveness of the relationship. Some factors to consider include 1) the agent's agreement with or respect for the principal's decisions and values, 2) potential friction within the family that may result if certain members are appointed, 3) whether different powers should be split and assigned to different agents, 4) whether to have one agent with sole discretion or multiple agents that must act in unison, 5) who will become successor agent should the original agent be unable to fulfill the role, and 6) whether a physician would be better able to make decisions than family or friends.

It is often a good idea to name successor agents in case the primary agent is unavailable.

Be careful about selecting agents based on family relationship alone. A child may not have the maturity to deal with a parent's difficult end-of-life decisions.

Many principals provide copies of their AHCD to hospitals or primary physicians providing them with health-care. Hospital staff members routinely ask patients if they have AHCDs or a living will upon admission and offer to provide forms if patients desire them.

While AHCDs contain very private decisions, it can be a good idea for the principal to let his or her agents know that they have been appointed, where they can obtain the original document, and the nature and reasoning of the principal's wishes. Legal paperwork is important, but it is impossible to plan every specific scenario. Communication can put agents in a better position to act on the principal's behalf in unanticipated situations.

Considerations for Drafting an AHCD

At a minimum, the AHCD document must be in writing and signed by the principal.[31] The principal will also need a notary public to notarize the document, and at least two witnesses must sign the document. There are certain people who may not act as witnesses, including health-care providers, the agent or agents named in the agreement, or the operator of a care facility. It is also important that each AHCD include a consent and release for HIPAA (Health Insurance Portability and Accountability Act) so that the agent may have access to the principal's medical information. Without this release, the agent will have to make health-care decisions without necessary

information that doctors and health-care providers can normally supply to a patient. This is because HIPAA[32] regulations require very strict confidentiality for medical records.

Another important consideration is the portability of an AHCD. Portability is the term given to describe whether states outside of the state where the principal creates it will recognize the document. A non-Wyoming AHCD is valid if it complied with the law of the state in which it was executed.[33] In the case of a Wyoming AHCD, it is difficult to predict where someone may become incapacitated. If the principal is injured while in another state and needs medical attention, the principal will want to ensure that doctors in that state will recognize their AHCD. Thus, the document needs to specify the principal's wishes without stating anything that would be too controversial for the laws of a foreign state. Wyoming AHCDs often specify that the principal intends for it to be honored by other states.

Like other legal documents, it is advisable to consult an attorney rather than attempting to assemble an AHCD for yourself. While Wyoming once provided a statutory form, it no longer does so. Forms printed from the Internet may also create ambiguities that can result in confusion in the event that you are no longer able to express your wishes. AHCDs should be periodically reviewed to ensure that they continue to reflect the principal's wishes.

An AHCD is practically useless if no one is aware of its existence.[34] It is, therefore, advisable for the principal to inform his or her primary physician and agents of the document's existence and location and possibly provide them with photocopies. Many hospitals now ask for copies when admitting patients. Some states also provide registries for this purpose. Wyoming does not have an AHCD registry. However, the Department of Health has an AARP form and information on its website that may prove useful. This information can be found at http://www.health.wyo.gov/aging/resources/advance.html.

Revocation and Revision of an AHCD

An individual is presumed to have capacity to make health-care decisions, to give or revoke an Advance Health Care Directive, and to designate or disqualify a surrogate unless the individual's primary physician certifies in writing that the person lacks such capacity.[35] An AHCD becomes ineffective when the principal revokes the power in writing or creates a new AHCD that supersedes the old one. Keep in mind that principals may only create or revoke an AHCD if they have capacity. The appointment of a spouse as agent is revoked upon divorce, annulment, or legal separation. Additionally, if the incapacitated principal regains capacity, the agent's power is revoked until the principal becomes incapacitated again.

Example of an AHCD: Old Wyoming Statutory AHCD Form

Statutory language providing this form was repealed in 2007. Consequently, any form consistent with the act's requirements is valid in Wyoming. This form is provided for information purposes only.

Explanation

You have the right to give instructions about your own health-care. You also have the right to name someone else to make health-care decisions for you. This form lets you do either or both of these. It also lets you express your wishes regarding donation of organs and the designation of your supervising health-care provider. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

Part 1 of this form is a power of attorney for health-care. Part 1 lets you name another individual as agent to make health-care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now, even though you are still capable.

You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. Unless related to you, your agent may not be an owner, operator, or employee of a residential or community care facility at which you are receiving care.

Unless the form you sign limits the authority of your agent, your agent may make all health-care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the author-

ity of your agent if you wish to rely on your agent for all health-care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

(a) Consent or refuse consent to any care, treatment, service or procedure to maintain, diagnose, or otherwise affect a physical or mental condition;

(b) Select or discharge health-care providers and institutions;

(c) Approve or disapprove diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and

(d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health-care.

Part 2 of this form lets you give specific instructions about any aspect of your health-care. Choices are provided to express wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, including the provision of artificial nutrition and hydration, as well as the provision of pain relief.

Space is also provided for you to add to the choices you have made, or for you to write any additional wishes.

Part 3 of this form lets you express an intention to donate bodily organs and tissues following death.

Part 4 of this form lets you designate a supervising health-care provider to have primary responsibility for your health-care.

After completing this form, sign and date at the end. This form must either be signed before a notary public or, in the alternative, by two (2) witnesses.

Give a copy of the signed and completed form to your physician, any other health-care providers you may have, any health-care institution at which you are receiving care, and any health-care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health-care directive or replace this form at any time.

[1] Robert S. Olick et al., 2009, "Taking the MOLST (Medical Orders for Life-Sustaining Treatment) Statewide," Pace Law Review, v. 29.
[2] Wyo. Stat. Ann. §§ 35-22-401 et seq.
[3] Wyo. Stat. Ann. § 35-22-403(a).
[4] Wyo. Stat. Ann. § 35-22-403(b).
[5] Wyo. Stat. Ann. § 35-22-402(a)(iv).
[6] Wyo. Stat. Ann. § 35-22-403(e).
[7] Wyo. Stat. Ann. § 35-22-403(d).
[8] Wyo. Stat. Ann. § 35-22-403(d).
[9] See Denis Dillon, October 17, 2011, "Making Healthcare Decisions – Advanced Directives," Mondaq Business Briefing.
[10] Wyo. Stat. Ann. § 35-22-406(b).
[11] Wyo. Stat. Ann. § 35-22-406(a).
[12] Wyo. Stat. Ann. § 35-22-406(g).
[13] Wyo. Stat. Ann. § 35-22-406(k).
[14] Wyo. Stat. Ann. § 35-22-406(h).
[15] Wyo. Stat. Ann. § 35-22-406(c).
[16] Wyo. Stat. Ann. § 35-22-406(d).
[17] Wyo. Stat. Ann. § 35-22-406(f).
[18] Charles P. Sabatino, 1994, The New Uniform Health Care Decisions Act: Paving a Health Care Decisions Superhighway?, Maryland Law Review, v. 53.
[19] See Rebecca C. Morgan, 2009, "The New Importance of Advance Directives," Estate Planning and Community Property Law Journal, v. 2.
[20] Fla. Stat. § 765.105 (2000).
[21] Uniform Health Care Decisions Act § 5 cmt. (2005).
[22] Uniform Health Care Decisions Act § 2 cmt.
[23] Wyo. Stat. Ann. §§ 35-22-201 et seq.
[24] Wyo. Stat. Ann. § 35-22-408(d).
[25] Wyo. Stat. Ann. §§ 35-22-408(e), (f).
[26] Wyo. Stat. Ann. § 35-22-408.
[27] Wyo. Stat. Ann. § 35-22-410.
[28] U.S. Department of Health and Human Services, Office of Minority Health, Organ Donation Data/Statistics (2013), http://minorityhealth.hhs.gov/templates/browse.aspx-?lvl=3&lvlid=555.
[29] 497 U.S. 261 (1990).
[30] 521 U.S. 702 (1997).
[31] Wyo. Stat. Ann. § 35-22-403.
[32] See Health Insurance Portability and Accountability Act, Pub. L. 104–191, 110 Stat. 1936 (August 21, 1996).
[33] Wyo. Stat. Ann. § 35-22-403(j).
[34] Susan E. Hickman et al., 2005, Hope for the Future: Achieving the Original Intent of Advance Directives, The Hastings Center Report, v. 35.
[35] Wyo. Stat. Ann. § 35-22-404.

This brochure is for information purposes only. It does not constitute legal advice.

You should not act or rely on this brochure without seeking the advice of an attorney.

PART 1
POWER OF ATTORNEY FOR HEALTH-CARE

(1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health-care decisions for me:

_____

(name of individual you choose as agent)

_____ _____

(address) (city) (state) (ZIP code)

_____ _____

(home phone) (work phone) (cell phone)

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health-care decision for me, I designate as my first alternate agent:

_____

(name of individual you choose as first alternate agent)

_____ _____

(address) (city) (state) (ZIP code)

_____

(home phone) (work phone) (cell phone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health-care decision for me, I designate as my second alternate agent:

_____

(name of individual you choose as second alternate agent)

_____

(address) (city) (state) (ZIP code)

_____

(home phone) (work phone) (cell phone)

(2) AGENT'S AUTHORITY: My agent is authorized to make all health-care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health-care to keep me alive, except as I state here:

_____

_____

_____

(Add additional sheets if needed.)

(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my supervising health-care provider determines that I lack the capacity to make my own health-care decisions unless I initial the following box. If I initial this box [ ], my agent's authority to make health-care decisions for me takes effect immediately.

(4) AGENT'S OBLIGATION: My agent shall make health-care decisions for me in accordance with this power of attorney for health-care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent that my wishes are unknown, my agent shall make health-care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my

agent shall consider my personal values to the extent known to my agent.

(5) NOMINATION OF GUARDIAN: If a guardian of my person needs to be appointed for me by a court, (please initial one):
[ ] I nominate the agent(s) whom I named in this form in the order designated to act as guardian.
[ ] I nominate the following to be guardian in the order designated:

_____

_____

_____

[ ] I do not nominate anyone to be guardian.

PART 2
INSTRUCTIONS FOR HEALTH-CARE

Please strike any wording that you do not want.

(6) END-OF-LIFE DECISIONS: I direct that my health-care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have initialed below:
[ ](a) Choice Not To Prolong Life

I do not want my life to be prolonged if (i) I have an incurable and irreversible condition that will result in my death within a relatively short time, (ii) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (iii) the likely risks and burdens of treatment would outweigh the expected benefits, OR
[ ](b) Choice To Prolong Life
I want my life to be prolonged as long as possible within the limits of generally accepted health-care standards.

(7) ARTIFICIAL NUTRITION AND HYDRATION: Artificial nutrition and hydration must be provided, withheld, or withdrawn in accordance with the choice I have made in paragraph(6) unless I initial the following box. If I initial this box [ ], artificial nutrition must be provided regardless of my condition and regardless of the choice I have made in paragraph(6). If I initial this box [ ], artificial hydration must be provided regardless of my condition and regardless of the choice I have made in paragraph(6).

(8) RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times:

_____

_____

(9) OTHER WISHES: (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

_____

_____

(Add additional sheets if needed.)

PART 3
DONATION OF ORGANS AT DEATH (OPTIONAL)

(10) Upon death (initial applicable box):
[ ](a) I give my body, or
[ ](b) I give any needed organs, tissues, or parts, or
[ ](c) I give the following organs, tissues, or parts only

_____

(d) My gift is for the following purposes (strike any of the following you do not want):
(i) Any purpose authorized by law;
(ii) Transplantation;
(iii) Therapy;
(iv) Research;
(v) Medical education.

PART 4
SUPERVISING HEALTH-CARE PROVIDER

(11) I designate the following physician as my primary physician:

_____
(name of physician)

_____
(address) (city) (state) (ZIP code)

_____
(phone)

If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following as my primary physician:

_____
(name of physician)

_____
(address) (city) (state) (ZIP code)

_____
(phone)

(12) EFFECT OF COPY: A copy of this form has the same effect as the original.
(13) SIGNATURES: Sign and date the form here:

_____
(sign your name) (date)

_____
(print your name)

_____
(address) (city) (state)

(Optional) SIGNATURES OF WITNESSES:
First witness

_____

(print name)

_____

(address)

_____

(signature of witness) (date)

Second witness

_____

(print name)

_____

(address)

_____

(signature of witness) (date)

_____

(Signature of notary public in lieu of witnesses) (date)

PLANNING AHEAD, DIFFICULT DECISIONS

Durable Power of Attorney

Aaron J. Lyttle

University of Wyoming Extension

September 2013
B-1250.11

Durable Power of Attorney

Author:
Aaron J. Lyttle, *attorney with Long, Reimer, Winegar, Beppler, LLP Cheyenne, Wyoming*

University of Wyoming Extension Financial Literacy Issue Team:
Cole Ehmke
Mary Martin
Bill Taylor

Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

Lifetime financial planning frequently poses the issue of how to ensure effective management of property and financial affairs after you become incapable of managing them on your own. Important events affecting a person's finances and property should not be put on hold simply because the person is unconscious or lacks the mental or physical capability of acting on his or her own. Durable Powers of Attorney provide a flexible and relatively low-cost option for planning for such situations.

Background

At its most basic, a power of attorney is a document that gives another person the authority to take some action on the signer's behalf.[1] Powers of attorney have long been used for a variety of purposes. For example, a woman who travels out of the country on business can appoint an agent to sign a real estate purchase contract on her behalf. The power of attorney gives the agent the right to bind the purchaser to the contract, as if the purchaser had signed it herself.

Traditionally, powers of attorney have not provided an effective means of planning for a person's incompetence (also known as "incapacity"). This is because traditional (or common law) powers of attorney become ineffective when the person who signs the document becomes incompetent.[2] A person is generally considered incompetent when he or she is unable, while unassisted, to properly manage and take care of his or her property as a result of a variety of factors, including physical and/or mental illness, advanced age, and disability.[3] A common law power of attorney, therefore, provides few opportunities for disability planning. Consequently, many states, including Wyoming, have adopted some form of Durable Power of Attorney statute to fill the gap; this provides individuals of all backgrounds with a greater degree of flexibility in planning for financial affairs in the event that they become incompetent.[4]

What is it?

A Durable Power of Attorney, or DPOA, is a document that allows the principal (the person granting the power) to appoint an agent (the person receiving the power) to make decisions on his or her behalf. Unlike a common law power of attorney, a DPOA does not terminate when the principal becomes incompetent,[5] hence the addition of the word "durable." A DPOA may also be known as a Power of Attorney for Finances, a Letter of Attorney, or a Power of Attorney with Durable Provisions.

Why Do I Need One?

Without a DPOA, court appointment of a guardian or conservator for the incompetent person (known as the "ward") may be the only real option available to manage a person's property and financial affairs when the person becomes incompetent or disabled (see *Guardianships and Conservatorships* Bulletin 1250.9 for more information about guardianships and conservatorships). Obtaining appointment of a guardian or conservator can have several drawbacks when compared with a DPOA.

1. Appointment of a guardian or conservator can be costly due to legal fees and costs of complying with court procedure. A DPOA, on the other hand, is a one-time fee paid when an attorney creates the document.
2. Court appointment can be a slow and cumbersome process, especially when the court disagrees with the parties or requires them to do extra work. Court-appointed guardians and conservators must file regular reports with the court and remain subject to its jurisdiction.[6] With a DPOA, the powers are active at or before the time of incapacity, so there is no wait time between incapacity and the ability of the agent to act (See Types of DPOA below).
3. A court-appointed guardian or conservator is given all powers that the court sees fit,[7] while a principal can limit what powers are given to the agent through a DPOA.
4. Obtaining an appointment through the court can be embarrassing for the ward. A majority of court records are public,[8] meaning that anyone can obtain copies of a petition or other documents associated with a guardianship or conservatorship action. When creating a DPOA, the only people who have access to the principal's personal information are the attorney creating the document and those whom the principal provides copies.

Overall, a DPOA allows the same financial and property powers conferred by a traditional guardianship or

conservatorship without the stress, hassle, or cost of going through the court system.

DPOAs vs. Revocable Trusts

Individuals of somewhat more substantial wealth often use revocable trusts (also known as "standby trusts") for disability planning.[9] In a typical standby trust arrangement, the trust's creator (called the "settlor") will cease to act as trustee once the settlor becomes incompetent. A successor trustee will then manage property held by the trust while the person is alive and incompetent according to directions provided by the document creating the trust.

Like a DPOA, a revocable trust can prevent the need for assets to be managed by a guardian or conservator. Unlike a DPOA, a trust continues to exist after the settlor dies, making it a possible tool for distributing the settlor's property after death. Trust planning can be expensive, however, and may not be a feasible option for individuals with limited financial resources. In such situations, a DPOA can be a more cost-effective means of disability planning. Even individuals who have executed revocable trusts can benefit for DPOAs to provide for the management of property not yet transferred to their trusts. If a DPOA and trusteeship are both in effect, the principal and trustee will need to coordinate regarding management of the principal's property.

Powers Granted Under a DPOA

The agent's authority is generally determined by the terms of the DPOA.[10] Generally, a principal can give an agent power to carry out any act that the principal would normally be able to do on his or her own. Since every person's situation is different, the drafter of the DPOA should be very careful to include only the specific powers that the principal is willing to transfer to the agent. These powers can include almost any power that a person would normally have.

For example, the principal may consider giving the following powers to an agent:

- Property collection,
- Real and personal property management,
- Contracts,
- Banking,
- Tax returns,
- Safe deposit box access,
- Employment, such as hiring and dismissal of accountants, attorneys, financial advisers, etc.,
- Motor vehicle title and transfer powers,
- Settle debts, claims, and disputes,
- Commence, enforce, answer, and settle lawsuits and other judicial or administrative proceedings,
- Stock and other interests in business entities,
- Insurance,
- Governmental benefits,
- Borrowing, lending, debt, and expenses,
- Investments,
- Gifting,
- Annuity and retirement accounts, and
- Disclaimers.

Many principals also desire to expressly indicate certain powers that their agent does not possess under the DPOA. For example, the document may specify that the agent cannot execute or amend wills or trusts on the agent's behalf, divert the principal's property for the agent's benefit, or exercise the powers of appointment held by the principal.

Principals are free to grant as much or as little power as they see fit, and a court will generally recognize any limitation a principal puts on the DPOA. However, because of the vast amount of control a DPOA can give the agent, it is important to choose someone in whom the principal has complete confidence and trust. The principal might consider his or her personal and business affairs when granting powers to an agent. For instance, the person may have closely held business interests requiring ongoing management during his or her incompetence. It may be prudent in such situations, for example, to give the agent power to receive dividends, vote at shareholder meetings, and transfer shares of stock.

In addition, there are certain powers that a principal may not grant an agent in a DPOA because most courts consider them too personal to be assignable. These powers include, but are not limited to, making a will for the principal, voting in a government election, entering into a marriage or obtaining a divorce, and making health-care decisions unless specifically authorized (see *Advance Health Care Directives* Bulletin 1250.10 for information about Advance Directives and Health Care Powers of Attorney).

Certain DPOA powers may raise federal transfer tax consequences, such as the agent's power to make gifts. Individuals with large estates that may be subject to the federal estate tax will often seek to utilize lifetime and annual gift exemptions to pass as much property as possible free of federal transfer taxes. This strategy can be interrupted if a person becomes incompetent and has not executed a DPOA. The IRS has advised in a non-binding, private-letter ruling that powers of attorney should expressly authorize the ability of the agent to make gifts.[11] Tax considerations in drafting a DPOA can be complex and should be discussed with a licensed tax attorney.

Things to Consider When Choosing an Agent

When choosing an agent, the principal should consider many factors that will affect the nature and effectiveness of the principal–agent relationship. Paramount concerns involve the agent's skill, time, willingness, and ability to carry out tasks and powers assigned by the DPOA. Other relevant factors include a) potential friction within the family that may result if certain members are appointed, b) whether different powers should be split and assigned to different agents, c) how appointing one's spouse may be affected by potential divorce or separation, d) whether to have one agent with sole discretion or multiple agents that must act in unison, e) who will become successor agent should the original agent be unable to fulfill the role, and f) whether a commercial agent (i.e., a bank or corporation) or an individual person would better serve you.

Considerations for Drafting a DPOA

At a minimum, the DPOA document must be in writing and signed by the principal. The document must provide language demonstrating that the principal intended for the agent's power to exist while the principal is incompetent:

i. "This power of attorney shall not become ineffective by my disability"; or

ii. "This power of attorney shall become effective upon my disability"; or

iii. Words showing the intent of the principal that the authority conferred by his/her power of attorney instrument shall be exercised notwithstanding his/her disability.[12]

Often, banks and other financial institutions will not accept a DPOA unless the agent provides a written copy. In addition, having the document signed by witnesses and notarized by a notary public can increase the chances of having the DPOA recognized and decrease the likelihood that a third party will be able to challenge what the document says. Notarization may also be necessary if the DPOA ever needs to be recorded, such as to provide notice that the agent had authority to convey real property on the principal's behalf.[13] The document should be simple and concise, and it should state the principal's intentions plainly and clearly. The instrument should clearly describe all of the powers given to the agent, conditions under which the agent can exercise those powers, and powers reserved by the principal. To the extent that any portion of the document does not comply with local law, a court may hold the offending portion or the entire document as void.

Wyoming is one of the few states that has not adopted the Uniform Durable Power of Attorney Act.[14] Consequently, it may be necessary for a DPOA to specify a number of powers and requirements that would be considered to exist by default in other states. Issues not currently addressed by Wyoming law, which you may consider discussing with your attorney, include:

- Whether an affidavit is necessary to trigger a "Springing" DPOA (see Types of DPOA below);
- Whether the agent has gift-giving authority;
- Whether the agent must provide notice of his or her resignation;
- Protection of third parties for reliance on the DPOA; and
- The effect of divorce on the authority of an agent who is a spouse.

Types of DPOA

A principal can execute two types of DPOA.

The first is an Immediate DPOA, which becomes effective the moment the principal signs the document. People often use this type of DPOA when

they already have difficulty managing their affairs, or for couples who own all of their assets jointly. Additionally, some people may use this type of DPOA to grant an agent temporary power to act for them, such as when they leave the country for a period.

The second type is a Springing DPOA. A Springing DPOA only comes into effect once a specific condition is met, such as on a certain date or when the principal has been declared legally incompetent to manage his or her own affairs. In other words, the agent may not act on behalf of the principal until the condition has been satisfied. A person cannot sign a DPOA once he/she has been declared incompetent. It is, therefore, important to create one before such a situation arises.

Implementing a DPOA

As discussed above, a DPOA becomes effective either immediately or upon the occurrence of conditions rendering the principal incompetent. Often, the document will require a certification by one or more physicians that the principal has lost capacity. Those requirements should be closely followed to ensure that the agent has the required authority to act.

The document should be accessible to the people who need it, including the agent and his or her attorneys. Many institutions will accept photocopies as evidence of the agent's powers under the instrument. The agent may be expected to show the document to the principal's banks, investment companies, stock transfer agents, insurance companies, accountants, etc. It may also be necessary to record the document with the county clerk to demonstrate the agent's authority to buy and sell real estate.

Depending on the terms of the document, there may be provisions for the replacement, removal, or resignation of the agent.

Revocation and Revision of a DPOA

There are at least three ways that a DPOA can become ineffective. First, a DPOA becomes ineffective when the principal revokes the power or creates a new DPOA that supersedes the old one.[15] Keep in mind that principals may only create or revoke a DPOA if they have capacity. This, however, assumes that a condition precedent has not activated the DPOA. If an agent is currently acting under the authority of a DPOA, the principal may need to communicate to all third parties that the old DPOA is no longer effective before a revocation or revision will be considered valid. Second, like any agency agreement, a DPOA terminates upon the death of the principal.[16] Note, however, that acts undertaken by the agent without knowing whether the principal is alive or dead may be effective.[17] Third, Wyoming law permits a principal to revoke a DPOA by recording a revocation document, attached to the original DPOA, with the county clerk of the county in which he or she resides.[18]

If the court appoints a guardian or conservator, one of two results can occur. In some states, the appointment of a guardian or conservator immediately terminates the DPOA. In others, including Wyoming, the DPOA remains in effect, but the agent must report to the guardian or conservator. Wyoming law gives a conservator the same power to revoke or terminate any power under a DPOA that the principal would have had while competent.[19]

Do I Need an Attorney?

A variety of resources exist for drafting and executing a DPOA for yourself; however, DPOAs are legal documents with substantial effects on your rights. A generic DPOA form may be inappropriate if the principal has specific issues not addressed by the form. It is, therefore, advisable to consult a licensed attorney before drafting and executing a DPOA.

[1] Corpus Juris Secundum: Agency § 37 (2013).

[2] Restatement (Second) of Agency § 122 (1958).

[3] Wyo. Stat. Ann. § 3-1-101(a)(ix), (xii).

[4] Wyo. Stat. Ann. §§ 3-5-101 et seq.; Uniform Durable Power of Attorney Act, (1979), http://www.uniformlaws.org/Shared/Docs/Durable%20Power%20of%20Attorney/UDPAA%201979%20with%201987%20Amendments.pdf.

[5] Wyo. Stat. § 3-5-101.

[6] Wyo. Stat. Ann. §§ 3-1-102, 3-2-109, 3-3-901 to -902.

[7] Wyo. Stat. Ann. §§ 3-2-201, 3-3-606.

[8] See Wyoming Rules Governing Access to Court Records, https://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=AccessCourtRecords.xml.

[9] Sidney Kess and Bertil Westlin, 1989, CCH Estate Planning Guide.

[10] Wyo. Stat. Ann. § 3-5-101(b).

[11] See IRS Private Letter Ruling 199944005.

[12] Wyo. Stat. Ann. § 3-5-101(a).

[13] Wyo. Stat. Ann. § 34-1-104.

[14] In re Guardianship and Conservatorship of Parkhurst, 2010 WY 155, ¶ 24.

[15] Restatement (Third) of Agency § 3.10 (2010).

[16] Restatement (Third) of Agency § 3.07.

[17] Wyo. Stat. Ann. § 3-5-101(c).

[18] Wyo. Stat. Ann. § 3-5-103.

[19] Wyo. Stat. Ann. § 3-5-101(c).
