

ESTATE AND DISABILITY PLANNING

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PLANNING FOR DEATH AND DISABILITY

I. INTRODUCTION

Contrary to popular belief, every individual needs an estate plan. By this I mean that each one of us needs to take stock of his or her present financial and physical situation and look ahead to what the future might bring. Additionally, this analysis should take place on a frequent and ongoing basis so that, as "changes" in your life situation occur, your estate plan can be modified to deal with those changes.

There are a variety of factors to be considered in developing an estate plan. These factors include: (i) the size of the estate, (ii) the impact of estate taxes, (iii) a person's goals regarding his or her estate during his or her lifetime, (iv) a person's desires regarding the distribution of assets upon his or her death and (v) what can be done to minimize the devastating impact if an individual becomes disabled.

This outline is intended to serve as an introduction to the considerations which must be given in developing an estate plan for an individual or a husband and wife. Accordingly, this outline will briefly summarize what constitutes a person's "Estate" and what is involved in probating that estate. The impact of the Federal estate tax system will also be discussed insofar as the minimization of such taxes is one goal in estate planning. Finally, this outline will discuss steps which can be taken to eliminate or minimize the impact of a person's disability including a limited discussion of nursing home issues.

This outline is only intended as a brief summary of some of the more important concepts involved in developing an estate plan. As such, the outline only scratches the surface of the topics discussed and does not address at all various additional concepts which may be applicable to your specific situation. Therefore, if you decide that it is time to develop or revise your estate plan, I strongly urge you to seek the assistance of an attorney and perhaps other professionals in doing so.

II. ESTATE PLANNING AND PROBATE OVERVIEW

A. BASIC ESTATE PLANNING ISSUES.

1. Probate Property. "Probate Property" refers to those assets which are included in a person's probate "estate." Probate Property may consist of either complete or partial ownership of the asset in question. Examples of Probate Property include stocks, bank accounts, real estate in the name of the person at the time of death and the proceeds from life insurance policies and retirement benefits payable to the person's estate.
2. Non-Probate Property. Property which is not included in a person's probate estate is known as "Non-Probate Property." Examples of Non-Probate Property include property owned in joint tenancy with another individual or individuals, proceeds from life insurance policies or

retirement benefits not payable to the individual's estate and property held in trust.

3. Probate/Estate Tax Distinction. People are often confused by two concepts: (i) "What is meant by probating my estate?" and (ii) "What is my estate for estate tax purposes?"
 - a. Probating a person's estate refers to taking the legal steps necessary to collect and distribute a person's probate property in accordance with the terms of the person's will or if the person dies without a will, in accordance with state law. As will be discussed in a later portion of this presentation, there are ways of avoiding the need to "probate" a person's estate.
 - b. However, the Internal Revenue Service's determination of the size of a person's "estate" for tax purposes does not depend on whether or not that person owns any probate property or has a will relating to his or her assets. For estate tax purposes, a person's "estate" consists of the value of all property actually owned by that person or which, by reason of the Internal Revenue Code, is attributed to, that person. For example, in addition to stocks, bonds, real estate, etc. owned in a person's sole name, that person's estate will include the value of any partial interest (including joint tenancy interests) the person owns in such assets. Additionally, the person's taxable estate will also include the value of life insurance proceeds with respect to any insurance policies in which the person has any ownership rights, such as the right to change beneficiaries, borrow against the policy, etc. Further, the person's estate will also include the value of any assets held in a revocable trust established by that person as a grantor. Thus, while steps can be taken to avoid the need to probate a person's estate (and these steps will be discussed in a later portion of this presentation), this does not necessarily eliminate the possibility that the person will have a taxable estate.
4. Intestate. If a person dies leaving a valid will, he or she is said to have died "testate." The provisions of the person's will then control the disposition of the person's probate property. If a person dies without a will, that person is deemed to have died "intestate" and Minnesota law will govern the disposition of that person's assets.

B. HOW THE ESTATE TAX SYSTEM WORKS

1. No Federal Estate Taxes for Estates of Less Than \$1,500,000.00. At present, if a person's estate as described above, has a value of \$1,500,000.00 or less, there is no federal estate or death tax payable to the

IRS. In 2006 to \$2,000,000.00, and in 2009 to \$3,500,000.00. However, in 2011 this amount will reduce back down to \$1,000,000.00. Additionally, Minnesota does not completely follow the Federal System and currently taxes estates over \$950,000.00, since at least at present, Minnesota approximates the federal estate tax threshold by basing the tax on “the amount equal to the proportion of the maximum credit computed under Section 2011 as amended through December 31, 2000, for state death taxes as the Minnesota gross estate bears to the value of the federal gross estate” Minn. Stat. § 291.03.

2. Annual Lifetime Gift Tax Exclusion. Federal law currently allows any person to make gifts of up to \$11,000 per year per recipient of such gift without such gifts resulting in the payment of any income or estate taxes. Thus, a husband and wife with three children could each make annual gifts of \$11,000 to each of their three children or a total of \$66,000 in gifts on an annual basis. As will be discussed later, such gifts are useful in those situations where a person or couple wish to reduce the size of their estates and are not concerned about parting with the funds or other assets which constitute the gift.
3. Unlimited Marital Deduction. A person can make lifetime gifts or distributions at death to their surviving spouse in any amount without any estate tax consequences. Thus, even if a husband died with an estate having a value of \$10,000,000 and left the entire estate to his wife, there would be no estate tax payable on the husband's death. It should be kept in mind, however, that on the death of the surviving spouse, there will be a significant estate tax payable and, therefore, it is important to analyze the estates of both the husband and the wife while both are still living in order to take any steps reasonably necessary to minimize the estate tax payable on the death of the surviving spouse.
4. Estate Tax Rates. As indicated above, there no is federal or Minnesota estate tax payable for estates of \$1,500,000.00 or less or Minnesota estates of \$950,000.00 or less. However, for estates whose value exceeds \$1,500,000.00 the estate tax rates escalate as the size of the estate increases. The escalating federal estate tax rates are summarized below:

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Calendar Year	Estate and GST Tax Exemption	Gift Tax Exemption	Highest Estate, Gift, and GST Tax Rate
2005	\$1.5 million	\$1 million	47%
2006	\$2 million	\$1 million	46%
2007	\$2 million	\$1 million	45%
2008	\$2 million	\$1 million	45%
2009	\$3.5 million	\$1 million	45%
2010	N/A	\$1 million	Estate tax repealed for one year. Gift tax rate is 35% (top individual rate under EGTRA)
2011 and later	\$1 million	\$1 million	55%

Thus, at present, the maximum federal estate tax rate for large estates is 47%. Further, Minnesota imposes an additional state estate tax on estates in excess of \$950,000.00 and the state tax rates also follow an escalating scale. In 2009 the Minnesota amount will be \$1,000,000.00.

C. WHY HAVE AN ESTATE PLAN?

1. In General. A properly designed estate plan is essential to insure that a person's estate is distributed to those individuals, in those amounts and at such times as the person desires. Additionally, an estate plan provides the flexibility to allow a person to change the disposition of his or her estate as his or her family situation changes through birth, death or other event. Further, for those persons with minor children, a will, drafted as part of the estate plan, is the primary mechanism for a person to nominate guardians to care for the minor children if both parents die. Finally, depending upon the size of the person's estate, an estate plan can be invaluable in eliminating or minimizing any federal and/or state income or estate taxes payable on that person's death.
2. With vs. Without an Estate Plan. The following table illustrates some of the differences between the treatment afforded a person who dies with an estate plan versus a person who dies without such a plan. The table also emphasizes the reason why an estate plan is important for every person.

With a Plan

- a. You decide who receives a share of your assets
- b. You decide when and under what circumstances your beneficiaries will receive their respective inheritances.

- c. Estate taxes and administrative expenses can be reduced and in some cases eliminated.
- d. You are able to nominate a guardian for your children.
- e. You can provide for the orderly continuance or sale of a family business.
- f. You can help insure and preserve family harmony by setting out in writing your intention regarding the distribution of your estate assets.
- g. You can make gifts to non-relatives or charities only through the use of an estate plan.

Without a Plan

- a. State laws determine who inherits your assets without any concerns for your specific desires
- b. The terms and timing are established by state law. Thus, even minor children or very young adults could be left fairly sizeable sums of money or other assets outright with no control over the use of such money or assets.
- c. Generally more expensive with little ability to control costs and taxes.
- d. The court appoints the guardian without any input from you.
- e. Financial loss and family hardships may result from an untimely forced sale of the business.
- f. Your personal representative and/or other family members may have to deal with dilemmas which could easily have been avoided through the use of an estate plan.
- g. No such gifts are available under the state intestacy laws.

D. BASIC ESTATE PLANNING TECHNIQUES

- 1. Overview. At a minimum, one or both of the following two factors are taken into account in developing a person's estate plan:
 - a. The desires of the person with respect to the distribution of his or her estate; and

- b. The avoidance of some or all of the estate taxes payable on the person's death.

Thus, an estate plan requires an analysis of a person's intentions and the size of the person's estate.

- 2. Estates Under \$1,500,000.00. Generally, estates of under \$1,500,000.00 in total net value do not require sophisticated estate planning since there are no federal estate tax implications relating to such estates. Therefore, with such estates, the estate plan may involve any one or more of the following items:
 - a. Placing title to certain assets in joint tenancy between spouses in order to avoid probate;
 - b. Nominating a guardian or guardians for minor children;
 - c. Providing for gifts to other persons or charitable entities; and
 - d. Establishing a trust or trusts so that the children's' ability to utilize their estate share is regulated in accordance with the desires of the parent.
- 3. Estates In Excess of \$1,500,000.00. As noted earlier, presently, once a person's estate exceeds \$1,500,000.00 in value, federal estate tax will be imposed unless steps are taken to minimize or eliminate that tax. Thus, in addition to the factors previously discussed, a person with an estate having a value over this amount may involve one or more of the following:
 - a. Equalization of the respective estates of husband and wife prior to the death of either in order that each may take advantage of the \$1,500,000.00 federal estate tax exclusionary amount;
 - b. The establishment of a disclaimer trust so that the first person to die can take full advantage of his or her \$1,500,000.00 federal exclusionary amount and yet provide for his or her surviving spouse; and
 - c. The reduction of a person's estate through the use of lifetime gifts as discussed above and/or irrevocable trusts as discussed below.

E. CONCLUSION

Based on the above, I hope I have demonstrated that every person can benefit from an estate plan. Estate plans can range from a relatively simple plan which can be developed at a

fairly modest cost to more complex and expensive estate plans. The type of estate plan used depends upon the size of a person's estate and his or her desires with respect to the disposition of that estate. The utilization of a properly designed estate plan can save the person significant administrative and tax costs thereby leaving a larger estate for distribution to his or her beneficiaries.

III. AVOIDANCE OF PROBATE AND MINIMIZATION OF ESTATE TAXES

A. INTRODUCTION

For a variety of reasons, many persons today, no matter how large or small their estate, wish to avoid the need for having their estate submitted to probate. As discussed earlier, probating a person's estate involves some type of court proceeding which ultimately results in the disposition of a person's probate property in accordance with the terms of the person's will or if the person died without a will, in accordance with the state laws relating to intestate estates. Generally, people express a desire to avoid probate because of the expense, delay and lack of privacy involved in such a proceeding. There are a variety of ways to avoid the need to probate a person's estate and these methods will be discussed in more detail below. However, it should be kept in mind that the avoidance of probate is not necessarily cheaper than a probate proceeding and may not be the best type of estate plan for a given person.

Additionally, while some people are not concerned about avoiding probate, everyone wishes to minimize (or eliminate) the amount of estate tax payable on their death. Since every dollar of estate tax which is saved increases the size of a person's estate which is available for distribution to the person's beneficiaries, it is clearly in a person's best interest to take such steps as will accomplish this goal while still meeting a persons' overall estate planning objectives. Therefore, various methods for reducing the size of a person's estate (and therefore, the estate taxes payable on that estate) will also be discussed.

B. AVOIDANCE OF PROBATE BY REDUCING OR ELIMINATING ALL PROBATE PROPERTY

Obviously, if a person dies without possessing any probate property, that person will have no estate which needs to be probated. A person can remove property from his or her probate estate through a variety of mechanisms which can be used alone or in combination. The most common of these mechanisms are discussed below.

1. Title to Assets. All property, whether personal property or real estate, which is owned by a person and another person or persons so that on death, the property so owned will automatically pass to the survivor is not considered probate property.

Therefore, all property owned in a manner so as to provide that title to the property will automatically revert to the survivor is not considered part of a person's probate estate. Examples of this type of ownership include joint

tenancy or P.O.D. ownership. Thus, for example, if a person owned real estate in joint tenancy with another individual, that real estate will not be part of the person's probate estate on death. Similarly, jointly or P.O.D. owned bank accounts, stocks and bonds will similarly be excluded from the person's probate assets. Joint ownership, with rights of survivorship, must be distinguished from ownership interests where each person owns an undivided portion of a particular asset. As to this type of asset ownership, the person will have his or her respective ownership share as part of the probate estate.

2. Outright Gifts. One often overlooked tool for reducing the size of a person's estate is through the use of lifetime gifts to third parties. As discussed above, a person can make annual gifts of up to \$11,000 per recipient without any negative estate tax consequences. Thus, if a person plans sufficiently in advance of his or her death, the person's estate can be reduced (preferably below the \$1,500,000.00 threshold level) through the use of such gifts. The obvious drawback to this mechanism is that a person must give up all rights in the property constituting the gift and, therefore, that property will no longer be available for use by the person during his or her lifetime. Note, however, that gifts made with the specific intent of becoming eligible for medical assistance violate federal law. Furthermore, if gifts are made or assets transferred within a certain number of months before an application is made for medical assistance, it is an improper transfer. Currently, the look-back period is 36 months. For gifts to or from certain trusts the look back period is 60 months.
3. Irrevocable Living Trust. Another mechanism for reducing the size of a person's estate is through the use of an irrevocable living trust. These trusts, established during the person's lifetime will, if properly drafted, remove the assets remaining in the trust on the person's death from that person's estate since title to the assets is held in the name of the trustee of the trust. Further, such trusts are generally designed so that during the person's lifetime, he or she is entitled to the income earned from the trust assets and, generally, also provide for discretionary payment of principal to the person. Thereafter, on the death of the person, the trusts generally provide that the trust assets are distributed to the person's beneficiaries in the same fashion as the person would have set forth in his or her will. Since these trusts are irrevocable and the assets contributed to the trust no longer available to the person during his or her lifetime, these trusts are generally utilized only in relatively large estates where the lack of flexibility of the trust and the reduction in size of the person's estate will not cause a hardship to the person during his or her lifetime.
4. Revocable Living Trust. The current trend being followed by financial and estate planners whose clients wish to totally avoid probate is the use of revocable living trusts. These trusts, established during a person's lifetime,

are intended as "will substitutes" in that the trusts contain ultimate provisions disposing of a person's assets on his or her death which, for all intents and purposes, are identical to the provisions which would be contained in that person's will. To utilize such trusts properly, a person (the grantor) must, at the time the trust is established, transfer all of his or her property to the trust and must continue to see that all property acquired after the trust is established is properly titled in the name of the trust. Generally, the person who creates the trust names himself or herself as trustee of the trust so that he or she can manage and invest the assets during his or her lifetime. The trust generally provides that the trustee will make payments to the person creating the trust of income and/or principal as that person directs. The trust further provides for a successor trustee on the death of the person who created the trust and provides for written directions to the trustee for the distribution of the assets remaining in the trust on the person's death. Revocable trusts provide for flexibility since they can be modified or completely revoked at the discretion of the grantor. However, revocable trusts are not for everyone.

a. Tax Status of Revocable Trusts.

- (1) The income earned on trust assets is taxed to the grantor of the trust during his or her lifetime; and
- (2) Where the grantor names himself or herself as trustee, gifts to the trust are not taxable since they are not completed gifts because the trusts can be revoked at any time and the assets returned to the grantor.

b. Advantages of Revocable Trusts.

- (1) Avoidance of probate.

Easier administration; (b) Perhaps lower distribution related costs; (c) Confidential; (d) Less chance of being contested by third parties; and (e) Distribution of assets may be quicker.
- (2) Avoids the need for establishing an ancillary probate with respect to real estate owned outside of Minnesota. If such real estate is owned by the revocable trust, the trustee can distribute title to that real estate on the death of a grantor without the need for establishing a probate proceeding in that state.
- (3) Grantor retains control of the investment and other management of the trust assets. Such control can, in a

properly drafted revocable trust, be maintained even if the grantor becomes disabled, thereby eliminating the need for the establishment of a guardianship or conservatorship to do so.

c. Disadvantages of Revocable Trusts.

- (1) Does not eliminate the need for a will since a will is needed in addition to the trust document to cover those assets which are not held by the trust at the death of the grantor.
- (2) In order for the revocable trust to properly accomplish its task, it is essential that all assets owned at the time the trust is created or acquired thereafter, be properly transferred into the revocable trust. If even one asset is not so titled, a separate probate proceeding may be required for that asset, thereby eliminating the benefits available through the use of such trusts.
- (3) Administrative problems may result where more than one trustee is named in the trust document. This problem arises because, unless the trust contains other provisions, any transfers of assets from the trusts will require the signatures of all of the trustees. Additionally, particularly with respect to real estate, the confidentiality sought by those creating revocable trusts may be lost since, in order to transfer title to such real estate, the trust document itself must be recorded.
- (4) Does not reduce estate taxes to any greater extent than a will.
- (5) Generally involves a higher initial cost than a will since two documents need to be drafted initially and because there are costs associated with the initial transfer of assets into the trust.
- (6) Revocable trusts may cause problems where one of the assets to be transferred to the trust is stock in a small business or "S" Corporation.

d. Who should choose a revocable trust over a will?

- (1) Elderly clients who need help in managing assets.
- (2) Clients who face disability.

- (3) Clients concerned about probate costs and the lack of privacy relating to probate proceedings.
- (4) People who own property in more than one state.
- e. Who Should Choose a Will Over a Trust?
 - (1) Persons with modest estates since it may be cheaper to probate an estate on death than to establish and maintain a revocable trust.
 - (2) Those who wish to avoid the ongoing need to transfer assets to the trust.
- f. General Operation of Revocable Trusts
 - (1) Income and principal to grantor during his or her lifetime as directed by the grantor.
 - (2) Sale, investment and reinvestment of trust assets by the trustee during the grantor's lifetime at the direction of the grantor.
 - (3) On the death of the grantor, distribution of trust assets (either outright or in trust) for the benefit of the grantor's intended beneficiaries.

IV. DISABILITY PLANNING

A. OVERVIEW

1. Disability. Mental incapacity or physical handicap may occur prior to one's death. There are affirmative planning steps which a person can take to better prepare for such disability. This portion of the presentation will discuss the effect of disability upon the person's management of his or her assets and some steps available to that person to provide for the care of the person during such disability in a smooth, cost effective and dignified manner.
2. Common Assumptions and Problems.
 - a. People contemplating the prospect of disability assume that their spouse or children (or perhaps other relatives) will have the ability to care for and look after the person and his or her affairs in the event of disability. However, there are some problems with this

assumption.

- (1) Generally, the spouse of a disabled person is approximately the same age as that person. Therefore, he or she may not be physically or emotionally able to take over in the event of the other spouse's disability. Additionally, if the nondisabled spouse has not been closely involved in the business and/or financial dealings of the disabled spouse, he or she may not be capable of the tasks of managing the disabled person's affairs.
- (2) Children and other relatives may, due to distance, economic or other factors, not be able or willing to handle and care for the disabled person and his or her affairs.
- (3) Even if one family member does step forward to care for a disabled person, because that person is thereafter directly involved in managing the disabled person's affairs, disputes between family members regarding the management and ultimate disposition of the disabled person's assets can arise.
- (4) Further, in the best of all worlds, i.e. when a spouse or other person is willing and able to care for the disabled person, the caretaker may not be aware of the personal desires of the disabled person with respect to his or her care and the management of his or her affairs. Therefore, if steps are not taken prior to disability to set out these desires, a disabled person will, in all likelihood, have no further opportunity to do so.

B. GUARDIANSHIPS AND CONSERVATORSHIPS

1. Overview. Guardianships and conservatorships (which are nearly identical) are legally supervised proceedings in which the court appoints a person to manage the person and/or affairs of a disabled or otherwise incapacitated person. As such, guardianships and conservatorships require the payment of professional fee, attorneys' fees and fees relating to the services of the guardian or conservator, thereby reducing the disabled person's estate. Additionally, the proceedings require that notice be given to the disabled person and that that person be given a chance to object to the proceeding, thereby increasing the cost of the proceeding. Finally, there are specific rules which deal with the transfer of a disabled person's assets by his or her guardian or conservator. These rules reduce the flexibility with respect to such transfers and add additional cost to the transfer.

2. Distinction Between Guardian/Conservator of the Person and Guardian/Conservator of the Estate.
 - a. Guardian/Conservator of the Person.
 - (1) Makes personal care decisions.
 - (2) Responsible for the incapacitated person's clothing, furniture, vehicles and other personal effects.
 - (3) Can admit the disabled person to a nursing home or make other appropriate changes to the disabled person's living arrangements.
 - b. Guardian/Conservator of the Estate.
 - (1) Manages the disabled person's assets.
 - (2) Responsible for paying the reasonable expenses incurred in supporting the disabled person.
3. It is possible to nominate a proposed guardian/conservator of the person and/or estate of a person prior to disability.
 - a. Must do so in a written instrument that is signed in accordance with certain legal requirements.
 - b. The written instrument can contain certain specific instructions for the guardian/conservator, e.g. personal care decision and management of certain assets, etc.
 - c. It is possible to name a "proxy" in a "living will" which constitutes a nomination of that person as a guardian/conservator of the person.
4. Pros and Cons of Guardianships/Conservatorship.
 - a. Guardianship/Conservatorship of the person is the only sure way to know that someone can make personal decisions on behalf of the disabled person that will be respected by others.
 - b. Court supervision provides protection for the disabled person from improper actions by the guardian/conservator, e.g., misappropriation of funds, etc.

- c. On the other hand, the fact that the court is involved in the guardianship/conservatorship inevitably means that there can be significant delays with respect to various actions on the part of the guardian/conservator and that there will more expense involved in utilizing this approach.

C. ALTERNATIVES

1. Living Will and Durable Power of Attorney for Health Care Decisions.

- a. A health care declaration or "Living Will" and a Durable Power of Attorney for Health Care Decisions "Health Care POA" permits a person to state his or her wishes about health care decisions before he or she is rendered unable to do so by a medical condition. A person's statement of wishes and the naming of a "proxy" in a Living Will is effective only when he or she is in a "terminal condition," i.e. a condition that is directly terminal or is irreversible and where "the administration of medical treatment will serve only to prolong the dying process." On the other hand a Health Care POA does not require the individual to be in a terminal condition but only unable to communicate health care decisions.
- b. A Living Will does not exist just to limit medical treatment. If a person desires that all possible medical measures be taken to keep him or her alive when he or she is in a "terminal condition," that desire can be set forth in the Living Will.
- c. Since no one can foresee every possible terminal condition, a Living Will permits a person to state his or her specific wishes as to foreseeable matters and to designate a "proxy" with respect to making other decisions. The proxy will then have the authority to make health care decisions for the person who makes the Living Will when the person is in a terminal condition and cannot make such decisions for himself or herself.
- d. Whenever a Living Will is silent as to a particular type of treatment, the physician is to use "reasonable medical practice." Generally speaking, this will include appropriate care to maintain comfort and hygiene, and to alleviate pain and oral (not intravenous) food and water.
- e. If you want a Living Will or Health Care POA:
 - (1) Obtain the statutory forms. They are available from your attorney or certain public interest organizations.

- (2) Consult with your advisors, including your physician, your spiritual advisor, your attorney, and other family members. Be sure to ask your physician specific questions about specific apprehensions or concerns and how best to complete the Living Will and Health Care POA forms to address these concerns.
 - (3) Complete the forms and sign them in accordance with their instructions. In this regard, it may be advisable to have the Living Will and Health Care POA completed by your attorney and signed in his or her office so that you can be sure that all statutory requirements are met.
 - (4) Keep the original Living Will and Health Care POA in a safe place, not a safety deposit box (unless others also have access to the box), but with important personal papers that can be obtained by your "proxy" or other person in the event of your disability. Be sure to give a signed copy to your physician, your spiritual advisor, your attorney, the person who is named as "proxy" in your Living Will and Health Care POA and perhaps to certain family members or others who would have a key interest in your health care decisions.
- f. A Living Will or Health Care POA can be revoked at any time. A revocation can apply to the entire Living Will, or just certain instructions in the Living Will, and can be verbal or in writing. If you intend to revoke the Living Will or Health Care POA completely, it is important that you clearly communicate this to and get back from all of the persons aware of or in possession of a copy of the Living Will or Health Care POA. If you wish to revoke only certain instructions, it is even more imperative that you be very clear as to what you are revoking and what you wish to leave in effect. In this instance, it may be best to execute an entirely new Living Will or Health Care POA.

2. Powers of Attorney.

- a. Overview. A power of attorney is a grant by a person to another individual of the power to act on that person's behalf either as to all matters which arise or with respect to certain specific matters, e.g. real estate transactions, etc. There are generally two forms of powers of attorney
a statutory short form document which has been approved by the state legislature and separately drafted powers of attorney drafted for a specific person.

- (1) Statutory Short Form.
 - (a) Inexpensive.
 - (b) Generally accepted by third parties, at least within the State of Minnesota.
 - (2) Separately Drafted Instrument.
 - (a) Generally more expensive to draft.
 - (b) May not be accepted by third parties.
 - (c) Generally easier to draft so as to meet the requirements of a specific situation or the laws of a state other than Minnesota.
- b. Alternative to Guardianship or Conservatorship of the Estate of a person.
- (1) No loss of rights of the "principal," i.e., the person who grants the power of attorney.
 - (2) No delay.
 - (3) The person, prior to his or her disability chooses the "attorney in fact," i.e. the individual to act on that person's behalf.
 - (4) Provide greater flexibility for the attorney in fact since no court supervision is required.
 - (5) However, the power of attorney does not operate as an alternative to a guardianship or conservatorship of the person.
- c. Informality.
- (1) Annual accountings are not required, although the principal may require them in the instrument itself.
 - (2) No court supervision.
- d. Drawbacks/Limitations.

- (1) The power of attorney must be executed before disability.
- (2) Requires a great deal of trust in the attorney in fact since they are generally given very broad powers (although these powers can be limited by the instrument creating the power of attorney).
- (3) Problems of acceptance in other jurisdictions.
- (4) Automatically terminates on the death of the principal and unless the power is a "durable" power, will also terminate on the disability of the principal.
- (5) Requires notice of revocation of the power if the principal determines that an attorney in fact is no longer necessary.

3. Nursing Home Insurance. Since Minnesota and Federal laws are closing off the availability of asset transfers in order to qualify for medical assistance to pay for nursing home care, many individuals are insuring against same or all of this cost by obtaining a nursing home insurance coverage.

V. CONCLUSION

As stated at the outset, every individual can benefit from the development of an estate plan. A properly designed and implemented estate plan can carry out a person's desires regarding his or her personal care and the management of his or her assets during his or her disability so that the person's estate will not have been used up by unnecessary and avoidable costs.

Additionally, an estate plan can be used to minimize or eliminate the payment of estate taxes and can also carry out a person's desires regarding the manner and type of distribution of the person's estate. Therefore, strong consideration should be given to the development and implementation of such an estate plan.

Finally, due to time and space constraints, this outline did not address any of the more complicated estate planning techniques, which are extremely useful in given situations. These techniques are best explained during the meetings held to develop an estate plan.