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# Estate Planning for the Non-Taxable Estate.

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# ESTATE PLANNING FOR THE NON-TAXABLE ESTATE

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## I. INTRODUCTION

Papa was a rolling stone,
Wherever he laid his hat was his home, . . .
And when he died
All he left us was alone.[1]

Before Papa died, it appears as though he had no need for estate planning. According to Professor Shaffer,[2] Papa's fortune would amount to a "nonestate" of children and debts.[3] Indeed, the very definition of estate planning does not contemplate someone whose circumstances are similar to Papa's.[4] In his widely-adopted casebook on

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1. Temptations.

2. Professor Thomas L. Shaffer is the Robert E. Short Professor of Law at Notre Dame University.

3. Shaffer, *Nonestate Planning*, 42 NOTRE DAME L. REV. 153, 153 (1966)(discussing estate plan for persons without traditional planning assets); *see also* T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 191-93 (2d ed. 1979)(discussing property settlement procedures for non-wealthy client).

4. Estate Planning is "that branch of law which, in arranging a person's property and estate, takes into account the laws of wills, taxes, insurance, property, and trusts so as to gain maximum benefit of all laws while carrying out the person's own wishes for the disposition of his property upon his death." BLACK'S LAW DICTIONARY 493 (5th ed. 1979).

estate planning, James Casner defines estate planning as the process which brings into existence an arrangement for the disposition of *wealth*.[5] Moreover, since virtually all the literature on estate planning focuses upon a substantial accumulation of wealth,[6] there exists the notion that estate planning is solely within the domain of the wealthy,[7] and that little can be done for the client who lacks such wealth.[8]

Although the estate which does not exceed $600,000 presents few tax problems,[9] a good deal of planning can be done in the preparation of such an individual's testamentary and other related documents.[10] The three most common additional documents are: the power of attorney that either becomes effective or does not terminate when the principal becomes incompetent (the so-called durable power of attorney); a gift instrument under the Uniform Anatomical Gift Act; and the living will.[11] Indeed, because the vast majority of all estates escape the imposition of the federal estate tax, planning for the average estate does not require an in-depth knowledge of the federal estate tax,[12] the state inheritance tax,[13] the state credit estate tax,[14] the state

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5. A.J. CASNER, ESTATE PLANNING § 1.02, at 1 (5th ed. 1984)(many people acquire and control wealth despite high living costs and taxes).

6. Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C.L. REV. 277, 277 (1976). Most articles, institutions and books deal with plans for large estates. *Id.*

7. *Id.* (attention not placed upon modest estate planning); *see also* S. Leimberg, *Choosing Estate Planning Software For Your Practice: Eight Programs Compared*, 14 ESTATE PLANNING 322, 324-31 (1987). The entire evaluation of the software was based solely on "crunching" numbers and rearranging them to add up to the client's total wealth. *Id.*

8. J. Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C.L. REV. 277, 277 (1976)(average testator neglected in estate planning practices).

9. Section 6018(a) of the Internal Revenue Code provides that if a citizen or resident dies with an estate valued at greater than $600,000, her executor must file an estate tax return. I.R.C. § 6018(a) (1982). However, no estate tax is payable by the estate if the surviving spouse receives the property exceeding this value in a manner that qualifies for the marital deduction under I.R.C. § 2056. *Id.* Thus, in the estate exceeding $600,000, perhaps the single most important consideration is arranging ownership of the client's assets so that all assets exceeding $600,000 qualify for the marital deduction.

10. *See* J. PRICE, CONTEMPORARY ESTATE PLANNING 213-23 (1983)(discussing additional documents attorneys may wish to execute following preparation of client's will).

11. For a discussion on the interpretation of the durable power of attorney statute as enacted in South Carolina see Moses & Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C.L. REV. 511, 512-13 (1979). For a view of a testators statutory right to donate body parts for charitable purposes or for cash upon death see Best, *Transfers of Bodies and Body Parts Under the Uniform Anatomical Gift Act*, 15 REAL PROP. PROB. & TR. J. 806, 806-22 (1980).

12. Section 2001(a) of the Internal Revenue Code imposes a federal tax upon the "estate of every decedent who is a citizen or resident of the United States." I.R.C. § 2001(a) (1986).

It was enacted in 1916 as a levy on the privilege of passing property at death. Act of Congress of September 8, 1916, ch. 463, §§ 200-212, 39 Stat. 777, 777-80. The determination of the tax due by the decedent's estate involves a five step process. First, the value of all assets subject to the tax is aggregated. I.R.C. § 2031 (1982). This total is called the Gross Estate under section 2031 of the Code. Second, the value of deductions permitted by the Code is aggregated. *Id.* § 2051. These deductions include: (1) administration expenses; (2) losses with respect to estate assets; (3) qualified transfers to charity; and (4) qualified transfers to the decedent's surviving spouse. *Id.* §§ 2053-2056. The sum of these deductions is subtracted from the gross estate leaving what is called the Taxable Estate under section 2051 of the Code. *Id.* § 2051. Third, the tax tables are applied to the sum of the Taxable Estate and an amount equal to the taxable gifts made by the decedent during lifetime but after 1976. *Id.* § 2001(b). The result is called the Tentative Tax under section 2001(b)(1) of the Code. Fourth, the gift tax payable amount generated by the inclusion of the adjusted taxable gift above is subtracted from the tentative tax. The remainder is called the tax due. Fifth, a variety of credits must be subtracted from the tax due. *Id.* §§ 2010-2016. Of greatest importance is the unified credit under section 2010 of the Code. *Id.* § 2010. This credit amounts to $192,800 for estates of decedents who die after 1986. *Id.* § 2505. In terms of assets comprising the taxable estate, the unified credit of $192,800 is equivalent to $600,000 of assets. Other credits are permitted for foreign death taxes paid and state death taxes paid. *Id.* §§ 2011, 2014. The Estate Tax payable is the amount due after subtracting the available credits. *Id.* § 2505(a).

13. *See* J. HELLERSTEIN, STATE AND LOCAL TAXATION 539 (3d ed. 1969). The state inheritance tax is one of four forms by which a state may subject property transferable at death to the state's death tax. In 1826 Pennsylvania enacted the first inheritance tax statute in the United States as a levy upon a beneficiary's right to receive property by inheritance. *Id.* The structure of the inheritance tax emphasizes the share of the take of estate's assets and imposes the tax upon that share. Thus, for a Pennsylvania estate, the law classifies takers of assets from an estate into two categories:

(1) The decedent's grandparents, parents, surviving spouse, and lineal descendants. These takers are taxed at a rate of 6 percent.

(2) All other takers of property from a decedent. These persons are taxed at a rate of 15 percent. PA. STAT. ANN. tit. 72, § 1716 (a)(1), (2) (Purdon Supp. 1989).

Although these rates (and those in all jurisdictions) are much lower than the federal estate tax rate of 18 - 50 percent, the minimum estate subject to the state death tax is lower than that subject to the federal estate tax. Thus, a state inheritance tax is often payable when no federal estate tax is payable. Besides Pennsylvania, the following jurisdictions impose the inheritance tax: Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Rhode Island, South Dakota, Tennessee, and Wisconsin. Classification of State Inheritance, Estate and Gift Tax Laws, [Inher. Est. & Gift Tax Rep.] State Taxes ¶ 1100 (May 1988).

14. I.R.C. § 2011 (1982). A second type of state taxation triggered by death is the credit estate tax. Every estate is permitted a dollar for dollar reduction of the federal estate tax payable up to a maximum of sixteen percent of the value of the federal taxable estate for payments made toward the state death tax. *Id.* § 2011(a),(b). Thus, where a state imposes the credit estate tax as its sole method of death taxation, the decedent's estate pays part of the federal levy to the state treasury rather than to the federal treasury. Since the decedent's estate pays the same amount of death taxes as if the state tax were not imposed and the imposing state receives death tax revenues, the tax is commonly referred to as the sponge tax — i.e., "sponging" from the federal estate tax. Most state legislatures view this tax as a painless method of raising revenue. Some twenty-six jurisdictions have imposed this levy as its sole method of death taxation: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Dis-

estate tax[15] or any other form of state taxation imposed at death.[16]

Professor Westfall has identified the various stages in the lives of estate planning clients as follows: (1) young singles, (2) adult singles, (3) young couples, (4) middle-aged couples, (5) single parents, and (6) seniors and the elderly.[17] This article focuses upon the estate planning considerations for individuals within these stages with estates of $600,000 and less.[18]

## II. YOUNG SINGLES

In both England and the United States, a male child at least fourteen years old and a female child at least twelve years old had the common-law right to dispose of personal property by will.[19] However, the age capacity to make a will is now governed by statute in every jurisdiction—and the minimum age ranges from fourteen to twenty-one, depending upon the jurisdiction.

A majority of the states now require that a person reach the age of

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trict of Columbia, Florida, Georgia, Hawaii, Illinois, Maine Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Classification of State Inheritance Estate and Gift Tax Laws, [Inher. Est. & Gift Tax Rep.] State Taxes ¶ 1100 (May 1988).

15. Classification of State Inheritance Estate and Gift Tax Laws, [Inher. Est. & Gift Tax Rep.] State Taxes ¶ 1100 (May 1988). A third form of the state death tax system is the state estate tax which has a structure akin to the federal estate tax. Eight jurisdictions—Massachusetts, Minnesota, New York, Ohio, Oklahoma, Puerto Rico, Rhode Island, and South Carolina impose the estate tax. *Id.*

16. *Id.* A fourth form of the state death tax levy is the use of the federal credit as an umbrella to increase the tax imposed by an inheritance tax system or an estate tax system. The typical statute provides that if the tax revenue generated as a credit against the federal tax is greater than the amount generated by the inheritance or state estate tax, the tax due is the credit estate tax. Some twenty-five jurisdictions impose this levy: Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, and Wisconsin. *Id.*

17. D. WESTFALL & G. MAIR, ESTATE PLANNING LAW AND TAXATION 2-5 (2d ed. 1981).

18. Shaffer, *Nonestate Planning*, 65 NOTRE DAME L. REV. 153, 153-75 (1966)(estate plan for client earning $9,200 annually before taxes); Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C.L. REV. 227, 277-315 (1956)(plan for estate less than $60,000 in value). These two authors addressed the nontaxable estate at a time when the federal estate tax was imposed upon estates which exceeded $60,000. However, very little has been written since the nontaxable estate has increased to $600,000. This article seeks to fill this void.

19. Holzman v. Wager, 79 A. 205, 206-07 (Md. 1911)(American court allowed male infants over fourteen years and female infants over twelve years to make testamentary bequests of personal property). *See generally* T. ATKINSON, WILLS § 50, at 229-30 (2d ed. 1953)(discussing historical development of age capacity to make will under English and American law).

eighteen in order to make a will—as does the Uniform Probate Code (UPC).[20] As of January 1989, the following jurisdictions have adopted the UPC with relatively few additions or deletions: Alaska,[21] Arizona,[22] Colorado,[23] Florida,[24] Hawaii,[25] Idaho,[26] Maine,[27] Michigan,[28] Minnesota,[29] Montana,[30] Nebraska,[31] New Mexico,[32] North Dakota,[33] South Carolina,[34] and Utah.[35] In addition, the following jurisdictions have also established eighteen as the minimum age for making a will: Alabama,[36] the Canal Zone,[37] Connecticut,[38] Delaware,[39] the District of Columbia,[40] Illinois,[41] Kansas,[42] Kentucky,[43] Maryland,[44] Massachusetts,[45] Mississippi,[46] Missouri,[47] Nevada,[48] New Jersey,[49] New York,[50] North Carolina,[51] Ohio,[52] Oklahoma,[53]

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20. UNIF. PROB. CODE § 2-501, 8 U.L.A. 102 (1983)(persons of at least eighteen years of age and sound mind may execute wills).
21. ALASKA STAT. §§ 13.06.005 - .36-300 (1985).
22. ARIZ. REV. STAT. ANN. §§ 14-1101 to -7308 (1975 and Supp. 1988).
23. COLO. REV. STAT. §§ 15-10-101 to -17-101 (1973).
24. FLA. STAT. ANN. §§ 731.005 - 735.302, 737.101 - .512 (West 1976).
25. HAW. REV. STAT. §§ 560:1-101 - :8-102 (1985 & Supp. 1987).
26. IDAHO CODE § 15-1-101 to -7-307 (1979 and Supp. 1987).
27. ME. REV. STAT. ANN. tit. 18-A, §§ 1-101-8 to -401 (1981 & Supp. 1988).
28. MICH. STAT. ANN. §§ 27.5001 - .5993 (Callaghan 1980 & Supp. 1989).
29. MINN. STAT. ANN. §§ 524.1-101 to .8-103 (West 1975 & Supp. 1989).
30. MONT. CODE ANN. §§ 72-1-101 to -5-502 (1987).
31. NEB. REV. STAT. §§ 30-2201 to -2902 (1985).
32. N.M. STAT. ANN. §§ 45-1-101 to -7-401 (1978).
33. N. D. CENT. CODE §§ 30.1-01-01- to -35-01 (1976 & Supp. 1989).
34. S.C. CODE ANN. §§ 62-1-100 to -7-603 (Law. Co-op. 1976 & Supp. 1988).
35. UTAH CODE ANN. §§ 75-1-101 to -8-101 (1978 & Supp. 1989).
36. ALA. CODE § 43-8-130 (1982).
37. C.Z. CODE tit. 7, § 2 (1963).
38. CONN. GEN. STAT. ANN. § 45-160 (West Supp. 1989).
39. DEL. CODE ANN. tit. 12, § 201 (1974).
40. D.C. CODE ANN. § 18-102 (1981).
41. ILL. ANN. STAT. ch. 110 1/2, para. 4-1 (Smith-Hurd 1978).
42. KAN. STAT. ANN. §§ 38-101, 59-601 (1983).
43. KY. REV. STAT. ANN. §§ 391.010 - 396.205 (Michie/Bobbs-Merrill 1972 & Supp. 1988).
44. MD. EST. & TRUSTS CODE ANN. § 4-101 (1974).
45. MASS. ANN. LAWS ch. 191, § 1 (Law. Co-op 1981).
46. MISS. CODE ANN. § 91-5-1 (1972 & Supp. 1989).
47. MO. ANN. STAT. § 474-310 (Vernon 1956).
48. NEV. REV. STAT. § 133-02 (1987).
49. N. J. STAT. ANN. § 3B:3-1 (West 1983).
50. N.Y. EST. POWERS & TRUSTS LAW § 3-1.1 (McKinney 1981).
51. N. C. GEN. STAT. § 31-1 (1984).
52. OHIO REV. CODE ANN. § 2107.02 (Baldwin 1987).
53. OKLA. STAT. ANN. tit. 84, § 41 (West 1970).

Pennsylvania,[54] Tennessee,[55] Virginia,[56] Washington,[57] West Virginia,[58] and Wisconsin.[59]

Further, several other jurisdictions have established eighteen as the general rule, but they will allow exceptions where certain criteria have been met. In Texas, the minimum age is eighteen, but members of the armed forces and married persons may make a will at any age.[60] New Hampshire and Oregon have also established the minimum age at eighteen, but married persons may execute wills at any age.[61] In Indiana, the exception from the age eighteen requirement applies to members of the armed forces.[62] In California and Idaho, an emancipated minor who is under eighteen may also make a will.[63]

A minority of jurisdictions have established the general rule for testamentary age capacity below eighteen. Thus, a testator in Louisiana[64] may execute a will at age sixteen, while a testator in Georgia[65] or Puerto Rico[66] may execute a will at age fourteen. On the other hand, many jurisdictions do not require a numerical testamentary age capacity. They require a person to be the age of majority to execute a will. Iowa,[67] Vermont,[68] and Wyoming,[69] for example, require that a person be "of full age," "of age," and "of legal age," respectively.

This survey of the age requirements for the execution of wills demonstrates that an overwhelming number of jurisdictions restrict the capacity to execute wills to adults. This non-age disability means that a minor's probate estate[70] must be distributed according to the laws of

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54. PA. STAT. ANN. tit. 20, § 2501(a) (Purdon 1975).
55. TENN. CODE ANN. § 32-1-102 (1984).
56. VA. CODE ANN. § 64.1-47 (1987).
57. WASH. REV. CODE ANN. § 11.12.010 (1987).
58. W. VA. CODE § 41-1-2 (1982).
59. WIS. STAT. ANN. § 853.01 (West 1971).
60. TEX. PROB. CODE ANN. § 57 (Vernon 1980).
61. N.H. REV. STAT. ANN. § 551 (1974); OR. REV. STAT. § 112.225 (1981).
62. IND. CODE ANN. § 29-1-5-1 (Burns 1972).
63. CAL. PROB. CODE § 20 (1945 & Supp. 1989); CAL. CIV. CODE § 63(b)(5) (Deering 1971 & Supp. 1989); IDAHO CODE § 15-2-501 (1979).
64. LA. CIV. CODE ANN. art. 1476 - 77 (West 1987).
65. GA. CODE ANN. § 53-2-22 (1982).
66. P.R. LAWS ANN. tit. 31, § 2112(1)(1967).
67. IOWA CODE ANN. § 633.264 (West 1964).
68. VT. STAT. ANN. tit. 14, § 1 (1974).
69. WYO. STAT. § 2-6-101 (1977).
70. The probate estate (property) consists of assets of a decedent which are subject to administration by the estate's personal representative. *See* UNIF. PROB. CODE § 3-711, 8 U.L.A. 328 (1983)(personal representative given authority to act for benefit of estate); *see also*

descent and distribution.[71] Thus, the jurisdiction has statutorily planned the probate estate and little variation from this arrangement seems possible. Consequently, if the minor is unmarried and without children, one-half of her probate property will pass to her mother and the other half to her father.[72] However, if only one parent survives the minor, the UPC gives all assets to the surviving parent.[73] Some jurisdictions give one-half to the surviving parent and the other half passes to the siblings of the deceased minor.[74] But if the minor has any children, all the property will go to her children to the exclusion of her parents and siblings.[75]

On the other hand, the non-probate property[76] of the minor affords some opportunity for planning. For insurance proceeds, retirement plans, and death benefit proceeds, the minor can name beneficiaries and bypass the estate administration process.[77] Likewise, if the property's title is held in joint tenancy with right of survivorship, the title to the property vests automatically in the surviving co-tenant without passing through estate administration.[78]

A minor's ownership of a checking or savings account is perhaps the best example of a case for the creation of a joint tenancy with right of survivorship.[79] This can be readily accomplished by having both

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§ 3-715, at 334-36 (personal representative may conduct transactions to dispose of estate's assets).

71. *See* UNIF. PROB. CODE §§ 2-101 to -114, 8 U.L.A. 57-752 (1983)(intestate distribution and succession statutory enactments).

72. TEX. PROB. CODE ANN. § 38(a)(2) (Vernon 1980).

73. UNIF. PROB. CODE § 2-103(2), 8 U.L.A. 60 (1983).

74. TEX. PROB. CODE ANN. § 38(a)(2) (Vernon 1980).

75. UNIF. PROB. CODE § 2-103(1), 8 U.L.A. 60 (1983).

76. *See id.* §§ 6-101 to -113, at 519-33 (requirements for non probate transfers). Non-probate property consists of the assets of a decedent which, by their nature, are not subject to administration by the estate's personal representative. *Id.* §§ 3-711, -715, at 328, 334-36. The major types of non-probate property are: (a) property passing by right of survivorship (joint bank accounts, jointly-owned real estate, etc.); (b) property passing by contract (life insurance, employee survivor benefits paid to a beneficiary other than decedent's estate); (c) property held in trust; and (d) property over which decedent held power of appointment. *Id.* §§ 6-102 to -113, at 523-33.

77. *Id.* §§ 6-103 to -105, at 523-528 (governing beneficial ownership between parties).

78. *Id.* § 6-104, at 525-26 (sums on deposit at death of party automatically pass to surviving party).

79. *See* UNIF. PROB. CODE § 6-104, 8 U.L.A. 525-26 (1983)(joint tenancy with survivorship provision). The obvious benefit of this arrangement is that it would avoid court supervised administration of these assets. In the absence of a survivorship account, a bank will refuse to release the funds from a deceased minor's account without some form of court administration.

parties sign the bank's signature card which expressly states that the account is owned by the parties as joint tenants with right of survivorship.[80] Alternatively, the minor may establish a savings account trust by depositing money in the account in his name as trustee for another person who may withdraw the balance of the account at the minor's death, assuming he survives the minor.[81]

When an individual reaches age eighteen, and thus acquires the legal ability to make a will, he often lacks the motivation to do so. The person who contemplates making a will must face the idea of his own death, and young people often view the prospect of their immediate deaths as farfetched.[82] They are more inclined to view death as an issue for their grandparents and great-grandparents.

## III. ADULT SINGLES

Adult single people make up a sizable portion of the current population,[83] and therefore, appropriate planning steps should be undertaken for them. Many of these individuals are prosperous professionals or entrepreneurs whose busy careers postponed marriage.[84] Essentially, these are persons born after World War II and commonly referred to as the "baby-boom" generation.[85] Unlike their parents who knew firsthand of the stock market crash, bank failures, loss of federal guarantees, and 25 percent unemployment, this generation of Americans does not understand the need for the establishment of a savings program.[86] In a 1975 survey on attitudes of persons between the ages of twenty-five and thirty-nine regarding their financial affairs, the *Wall Street Journal* found that less than one-half of these

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80. *Id.* (right of survivorship arises from express language of agreement between parties).

81. *In Re Totten*, 71 N.E. 748, 752 (N.Y. 1904). The court held that a person may deposit money in an account in his own name as trustee for another. This action creates a revocable trust in favor of the designated beneficiary. *Id.*

82. T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS & TRUSTS 14 (2d ed. 1979)(young and professionally educated people tend to focus on living rather than on prospect of death).

83. Gamble, *Estate Planning for the Unmarried Person*, 125 TR. & ESTS. 25, 25 (April 1986). The percentage of Americans between 25 and 35, who have never been married, has more than doubled since 1970. *Id.*

84. *Id.* at 25, 28. An unmarried career man or woman between the ages of 25 and 34 is no longer considered an oddity by society. *Id.*

85. Westin & Teahan, The Greening of the Baby Boomers, [Fin & Est. Plan.] ¶ 24,401 (Feb. 1986)

86. *Id.*

persons with incomes over $30,000 had established IRA accounts.[87] This suggests that as a group the so-called "baby-boom" generation is less likely to be savers than their parents or grandparents. Thus, this group might not be engaging in accumulating disposable income. This is the prerequisite for conventional estate planning. Thus, any plans single adults have for disposition of their assets tend to be coincidental. At work or at a seminar, the annuity salesperson or financial planner is likely to suggest the manner in which to hold a retirement fund and provide for its disposition. This is not an adequate estate planning opportunity for this group.

Some commentators[88] suggest wealth-building assistance as a prerequisite to conventional estate planning. Westlin and Teahan suggest saving strategies for the accumulations necessary for the purchase of a residence or starting a business.[89] Thus, even without a savings component, the client can engage in rudimentary planning. According to these commentators, planning should involve the creation and funding of tax-favored cash accumulation instruments such as cash value life insurance and deferred annuities.[90] However, even if no substantial accumulation has occurred, a plan for the disposition of assets should be put in place for such individuals.

Single persons who live together are often considered unmarried household couples under the law. Planning for such individuals is difficult because the property laws and the transfer tax laws presume conventional family arrangements.[91] According to the Census Bureau, there were some two and one-half million unmarried household couples in the United States[92] in 1986.

In the event of death, the surviving member of this household arrangement does not enjoy the typical benefits provided to a surviving

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87. Otten, *Young Professionals' Retirement May Be Brighter Than They Think*, Wall Street J., Dec. 10, 1985, at 33, col. 3. The article goes on to report that three-fourths of these persons expect to eventually rely on IRA's, but less than one-half of this group has made plans for them.

88. Westin & Teahan, The Greening of the Baby Boomers, [Fin & Est. Plan.] ¶ 24,401 (Feb. 1986)

89. *Id.*

90. *Id.*

91. Gamble, *Estate Planning for the Unmarried Person*, 125 TRS. & ESTS. 25, 26 (April 1986)(estate planners must face challenge of protecting wealth of unmarried cohabitants).

92. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 46 (108th ed. 1987).

spouse and children.[93] One basic protection denied to the surviving member of a household couple, but afforded to a surviving spouse or family member, is the right to have the residence[94] set aside for occupancy and use of the surviving family members.[95] This presents problems for unmarried co-habitants because the homestead right originates in constitutional and statutory provisions of the various states.[96] Thus, the homestead protections are limited to those persons defined as "family" by statute.[97]

Texas has offered the broadest homestead protection in the form of constitutional and statutory guarantees since 1845.[98] It exempts from general creditors[99] up to one acre of urban real estate or one-hundred acres of rural realty held by a single person.[100] However, the decedent must be survived by a family member who is a spouse or minor child in order for survivors to benefit from the right to occupy rule.[101]

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93. Gamble, *Estate Planning For the Unmarried Person*, 125 TRS. & ESTS. 25, 25-26 (April 1986)(additional complications cohabitating couples encounter may include illegitimate children, tax penalties, family hostility).

94. 40 C.J.S. *Homestead* § 1 (1944 & Supp. 1989)(defining homestead as dwelling house of family, land on which residence is situated and any appurtenances connected to land).

95. *Id.* § 239. This right to occupy is called probate homestead. *Id. See* Carey v. Carey, 43 S.W.2d 498, 499-500 (Tenn. 1931)(right to use and occupy homestead realty is guaranteed).

96. 40 C.J.S. *Homestead* § 2 (1944 & Supp. 1989)(homestead rights originate in constitutional and statutory law and not in common law).

97. *Id.* § 16 (constitution and statutes limit homestead rights to named claimants).

98. *See* TEX. CONST. art. XVI, §§ 50-52 (constitutional provisions governing homestead rights); TEX. PROP. CODE ANN. §§ 41.001 - .024 (Vernon 1980 & Supp. 1989)(statutory property exemption provisions); TEX. PROB. CODE ANN. § 271 (Vernon 1980)(creates homestead exemption for survivors).

99. TEX. CONST. art. XVI, § 50. A Texas homestead is not subject to attachment, execution, or forced sale from creditors claims except in the following cases:

(1) *Purchase Money Liens.* A secured creditor in the form of:
  (a) a mortgagee who gives the mortgagor money to purchase property or
  (b) a vendor whose credit secures the purchase of a home;
(2) *Property Taxes on the Homestead.* A lien for property taxes on the homestead, but not for a betterment assessment.
(3) *Mechanic's or Materialmen's Liens.* where (i) contract is written, (ii) signed by both spouses and (iii) recorded.

*Id.*

100. TEX. CONST. art. XVI, § 51 (1 acre of urban real estate property exempted); TEX. PROP. CODE ANN. § 41.002 (Vernon 1980)(100 acres of rural real estate property exempted). In terms of the amount of acreage exempted, the Texas Constitution does not differentiate between a single adult and a family. TEX. CONST. art XVI, § 51. The amount of exemption according to the constitution is 200 acres for both. *Id.*

101. TEX. CONST. art. 16, § 52 (homestead exemption for surviving spouse and minor children); TEX. PROB. CODE ANN. § 271 (Vernon 1980)(homestead exemption includes un-

Thus, the survivor of a Texas unmarried co-habitant couple cannot benefit from this "most liberal" homestead provision.

Moreover, although the state also recognizes common law marriages,[102] the typical Texas unmarried co-habitant does not benefit from this provision. Thus, the surviving co-habitant, being neither a spouse nor minor child does not have the right to continued occupation of the homestead. Additionally, the laws of intestacy do not treat the surviving unmarried co-habitant in the same manner as the surviving married co-habitant.[103] Indeed, because the decedent in the former case is considered single, all property owned by that decedent goes to the next of kin rather than to the surviving co-habitant.[104]

Furthermore, a plethora of other legally protected benefits are unavailable to the unmarried surviving co-habitant: community property rights,[105] elective share,[106] personal property set-aside,[107] employee benefits based upon employment of the deceased co-habitant,[108] the unlimited marital deduction on gratuitous transfers between spouses,[109] favorable income benefits (i.e. lower rates and a high

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married children living at home). *See* Woodward & Smith, *Probate and Decedents' Estate*, 18 TEXAS PRACTICE SERIES §§ 841-69 (1971 & Supp. 1985).

102. *See* Smith v. Smith, 257 S.W.2d 335, 337 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.)(recognizing common law marriages). Texas recognizes common law marriages where there is proof that the parties between whom the marriage is sought to be established "(1) entered into an agreement to become man and wife; (2) that such agreement was followed by cohabitation as man and wife; and (3) that they held each other professedly and publicly as their respective spouses." *Id.*

103. UNIF. PROB. CODE §§ 2-101 to -103, 8 U.L.A. 57-61 (1983); TEX. PROB. CODE ANN. § 38 (Vernon 1980)(under descent and distribution statute surviving spouse and minor children take upon intestacy).

104. *Id.* § 2-103, at 60-61 (intestate succession provisions when no surviving spouse).

105. ARIZ. REV. STAT. ANN. § 25-211 (1976); CAL. CIV. CODE §§ 4800, 4803 (Deering 1977 & Supp. 1989); IDAHO CODE § 32-906 (1983); LA. CIV. CODE ANN. arts. 2334, 2338-2339 (West 1985); NEV. REV. STAT. §§ 123.220, 123.225 (1984); N.M. STAT. ANN. § 40-3-8(B) (1978); TEX. FAM. CODE ANN. § 5.01 (Vernon 1975); WASH. REV. CODE ANN. § 11.02.090 (1987).

106. *See* N.Y. EST. POWERS & TRUSTS LAW § 5.1-1 (1981 & Supp. 1988). In common law (non-community property) states, a surviving spouse may elect to take property from the decedent spouse's estate where the property left by decedent for the surviving spouse falls below a certain threshold. *Id.*

107. TEX. PROB. CODE §§ 42.001 - .004 (Vernon 1980).

108. I.R.C. § 401(a)(9)(B)(iv) (Supp. V 1987). An employee's surviving spouse often enjoys the many benefits upon the death of the deceased employee: survivorship payments from an employer-maintained pension plan and employer provided life, accident, and health insurance plans. *Id.*

109. I.R.C. §§ 2056(a), 2505 (1982).

standard deduction) for the surviving spouse who files jointly with the decedent,[110] social security survivor benefits,[111] and veterans benefits.[112] This lack of protection for the unmarried surviving co-habitant emphasizes the need for proper planning. The beginning point is the basic testamentary document—the will. However, even a validly executed will might be insufficient to transfer assets in the face of a challenge by the next of kin of the single decedent. In *In re Moses*, the Supreme Court of Mississippi found that a bequest by a fifty-seven year old woman to her forty-three year old male lover was invalid due to undue influence in the execution of the will by her lover.[113] Similarly, in *In re Kelley's Estate*, the will of a testator was held to be invalid due to the undue influence of his mistress.[114] The court admitted evidence of the testator's involvement with his nurse because "the relationship . . . may provide favorable opportunities for the exertion of undue influence."[115]

These decisions are not unique.[116] In essence, they raise two problems: (1) Would the next of kin initiate a will contest if the beneficiary were a surviving spouse rather than a lover?; and (2) Why is evidence of a sexual relationship admissible in undue influence cases? In view of the hostility of relatives toward this type of relationship, and the court's apparent prejudice in the two cases cited above, a simple will leaving assets to the surviving co-habitant or a lover might be insufficient to ensure that the assets reach the intended beneficiary. This family hostility and apparent court disfavor is even more pronounced in the case of a homosexual relationship where the decedent has left assets to a homosexual lover by will. As indicated above, evidence of a sexual relationship is admissible to show that a bequest was

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110. *Id.*

111. 42 U.S.C. § 402(b)-(g) (Supp. V 1987).

112. 38 U.S.C. § 103 (Supp. IV 1986).

113. *See* Holland v. Traylor (*In re* Moses), 227 So. 2d 829, 835-36 (Miss. 1969). The court found that circumstances surrounding the intimate relationship between the testatrix and her attorney gave rise to the presumption of undue influence. The testatrix had left her entire estate to the attorney under a will prepared by his office. *Id.* at 832-33.

114. *See* Roehr v. Kelly (*In re* Kelly's Estate), 46 P.2d 84, 92, 95 (Or. 1935)(court found undue influence in execution of will where meretricious relationship existed between testator and his nurse).

115. *Id.* (court admitted evidence of intimate relationship between testator and his nurse).

116. *See* Annotation, *Existence of Illicit or Unlawful Relation Between Testator and Beneficiary as Evidence of Undue Influence*, 76 A.L.R 3d 743, 743-50 (1977)(discussing cases in which will contest was based upon illicit personal relationship between testator and beneficiary).

procured by undue influence.[117] Thus, a jury is permitted to utilize its own moral judgments in the decision as to whether the decedent's will should be voided. In *In re Kaufmann's Will*, a testator left virtually all of his large estate to his homosexual roommate of ten years.[118] The decedent's brother successfully sued to void the will.[119] Although much of the evidence centered on the susceptibility of the decedent in his business transactions,[120] the apparent homosexual relationship could not be missed by the jury or the appellate court.[121]

The attorney who must draft testamentary documents that give the bulk of an estate to a friend of the decedent, or to a charity, rather than natural relatives, should anticipate a contest. The excluded persons who seek legal advice may soon be informed of the tendency of juries to rewrite wills in accordance with their notion of a fair disposition. In order to preserve such a will, the attorney should take the following action:

(1) all discussions with the testator should occur in the absence of the beneficiaries;
(2) after the initial conference, the testator should write a letter in his own handwriting to the drafting attorney outlining the dispositions to be made and the reasons making the disposition;
(3) a first draft of the will accompanied by a cover letter outlining the "unnatural dispositions" should be sent to the testator and a reply requested;
(4) the reply should be made in the testator's own and writing; and
(5) the will should then be placed in final form and four persons should

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117. *Id.* at 750-831 (discussing state court holdings where contestant claimed undue influence because of relationship between deceased and proponent of will).

118. Weiss v. Kaufman (*In re* Kaufman's Will), 247 N.Y.S. 2d 664, 667 (N.Y. 1964), *aff'd*, 205 N.E.2d 864 (N.Y. 1965). The decedent, an unmarried millionaire, disinherited his family and made a substantial bequest to his male roommate of ten years. *Id.* at 667-66. The bequest included stocks, interests in family enterprise, a large monetary gift, and real estate. *Id.*

119. *Id.* at 686. The decedent's brother contested the will on the ground that the unrelated proponent had destroyed the close family relationship with the proponent. This relationship, according to the contestant, progressed to the point where the decedent became susceptible to the proponent's influence which led to the execution of a new will in the proponent's favor. *Id.* at 679.

120. *Id.* at 666-82 (testimony related to personality and actions of decedent before and after involvement with proponent).

121. *Id.* at 690 (Witmer, J., dissenting)(jury should not consider issues involving morality of homosexual men). *See generally* Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 239-48 (1981)(analyzing opinion in *In re* Kaufman's Will); T. SHAFFER, DEATH, PROPERTY AND LAWYERS 243-57 (1970)(discussing *In re* Kaufman's Will).

be selected to witness the execution of the will.[122]

In addition, a videotape of the execution ceremony, along with the discussion between the testator and witnesses, is advisable. If the formidable obstacles of introducing the videotape in evidence can be overcome,[123] the videotape can be used to defend the will against contests regarding lack of due execution, testamentary capacity, and the presence of undue influence.

A second precaution which may protect the unmarried co-habitant is the contractual will. The benefit of this type of arrangement, in which a single person gives assets to a non-family member beneficiary, is that it provides the beneficiary with an enforceable interest in the will.[124] Although the contractual will is disfavored under the law,[125] the benefits of this binding arrangement might outweigh the difficulties involved as the testator cannot easily change his mind on the provisions in the will.[126]

A third arrangement is the inter vivos trust because it is less susceptible than a will to a challenge on the ground of undue influence. There are two advantages to this arrangement over the testamentary transfer. First, the inter vivos trust involves an independent third party trustee in a business arrangement.[127] This arrangement demon-

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122. Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 91-93 (1958)(discussing steps attorney can take to prevent contest). The four witnesses are not all attesting witnesses. *Id.* at 93.

123. *See* Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 24-27 (1983)(foundation for admitting videotape of will execution into evidence).

124. *See* Mutz v. Wallace, 29 Cal. Rptr. 170, 175 (Cal. Dist. Ct. App. 1963). In *Mutz*, decedent had entered into a contract under which Mutz promised to render personal services throughout the life of the decedent in exchange for decedent's promise to execute a will leaving property to Mutz. *Id.* at 173. Although the decedent died before the will was executed, the court held that the contract was enforceable because Mutz had performed the promised services prior to the decedent's death. *Id.* at 178.

125. *See* UNIF. PROB. CODE § 2-701, 8 U.L.A. 155 (1983). A contractual will may be established only by "(1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract." *Id.*

126. *See* Henderson v. Fisher, 46 Cal. Rptr. 173, 179-80 (Cal. Dist. Ct. App. 1965)(plaintiffs entitled to performance of land transfer contract where personal services had been performed for decedent prior to death). *See generally* Kramer, *Estate Planning for the Stable and Not-So-Stable Marriage and Non-Marital Cohabitation*, 39 INST. ON FED. TAX'N § 56.07 (1981)(discussing meretricious relationships and contractural agreements by cohabitatants); Gutierrez, *Estate Planning for the Unmarried Cohabitant*, 13 U. MIAMI INST. ON EST. PLAN § 1600 (1979)(discussing legality of cohabitants contractual obligations).

127. J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS AND ESTATES 525-28 (3d ed.

strates the capacity to contract on the part of the parties. A challenge to this arrangement after the death of a party is less convincing than in the case of a testamentary disposition. Second, the longer the trust continues, the greater the likelihood that a jury will find that there was valid transaction devoid of undue influence. The drawback of this arrangement is that it is costly.[128] The fees associated with drafting the agreement, and maintaining the trust, may make the arrangement unlikely in small estates.[129]

A fourth and more effective approach is the conversion of the single person's probate property into non-probate property.[130] Under this approach, all bank accounts should be converted into survivorship accounts.[131] All securities should also be placed in survivorship arrangements.[132] Real estate should be converted into joint tenancy with right of survivorship where the circumstances warrant such an arrangement.[133] Life insurance beneficiaries and beneficiaries of employee benefits should be updated on a regular basis.[134] In some cases, tangible personal property can be identified as to ownership by a survivor through the use of a lifetime agreement.[135]

Attorneys may also want to consider drafting living wills and durable powers of attorney for single clients. A living will can authorize the discontinuance of life support systems for terminally ill persons.[136] A durable power of attorney may prove to be important to the client

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1984)(property is transferred by settlor to third party trustee). One benefit of this agreement is that the settlor is no longer burdened with the responsibility of the financial management of the property. *Id.*

128. *Id.* at 521 (inter vivos trust may trigger additional legal expenses). An attorney who charges a nominal fee for the preparation of a will may charge a substantially higher fee for the preparation of an inter vivos trust. *Id.* at 526-27.

129. *Id.* at 525, 527 (property management by fidicuary trustee may be expensive).

130. *See* UNIF. PROB. CODE §§ 6-102 to -113, 8 U.L.A. 523-33 (1983)(defining non-probate property).

131. *In re* Totten, 71 N.E. 748, 752 (N.Y. 1904)(deposit made in one's name for the benefit of another creates a revocable trust). The deposit will pass to the beneficiary upon death of the trustor). *Id.*

132. *See* Hilley v. Hilley, 342 S.W.2d 565, 568-69 (Tex. 1961)(discussing survivorship arrangements involving stock securities).

133. UNIF. PROB. CODE § 6-104, 8 U.L.A. 525-26 (1983).

134. *See* McDonald v. McDonald, 632 S.W.2d 636, 637, 640 (Tex. 1982)(ex-spouse received the life insurance proceeds despite the divorce).

135. The use of purchase receipts are useful to establish initial ownership.

136. *See generally* Akers, *The Living Will: Already a Practical Alternative*, 55 TEX. L. REV. 665, 668-70 (1977)(discussing effects of estate plan under which terminally ill patient is allowed to decline life prolonging treatment).

with no family to rely on for assistance in the event of long term illness.[137]

## IV. YOUNG COUPLES

Typically, young married persons possess little disposable assets suitable for the establishment of a formal estate plan.[138] However, the birth of children often provides the incentive to consider making wills. The rudiments of an estate plan are likely to be in place because much of a young couple's assets revolve around their employment.[139] Employee benefits such as life insurance and retirement plan death benefits will provide for automatic payouts to a designated survivor.[140] Similarly, bank accounts and real estate automatically pass to the surviving spouse if owned in joint tenancy with right of survivorship.[141] Thus, the bulk of a young couple's assets will likely pass to the surviving spouse without the use of a will.

However, another scenario is possible. The couple could die simultaneously or the property could be owned outside of survivorship arrangements. In both circumstances, the couple's property will pass to minor children under the typical intestacy statute.[142] The presence of minor survivors presents three estate planning needs: (1) a person to care for the minors; (2) a person to care for the minor's property because of their legal incompetence; and (3) in some situations a person to protect the interests of minors, unborns, and unknowns in litigation.[143] Most jurisdictions respond to these needs by providing for a

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137. *Id.* at 700. Many courts have ordered that an incapacitated patient must receive medical treatment in the absence of a power of attorney that survives the patient's incompetency. *Id.* at 700 n.206.

138. *See* Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C.L. REV. 277, 278-79 (1976). The hypothetical couple owned the following assets: a small equity in a home, a small amount of savings, an unimproved lot, an automobile, life insurance and an employee retirement plan. *Id. See* Shaffer, *Nonestate Planning*, 42 NOTRE DAME L. REV. 153, 153-55 (1966)(proposed estate plan for couple whose assets were similar).

139. *See* Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C.L. REV. 277, 279-80 (1976)(discussing earnings of couple with modest income); Shaffer, *Nonestate Planning*, 42 NOTRE DAME L. REV. 153, 153 (1966)(income from employer includes salary, retirement plan, hospital insurance, and life insurance).

140. UNIF. PROB. CODE § 6-104, 8 U.L.A. 525-26 (1983).

141. *Id.* A joint account with survivorship rights provides that any sums which remain on deposit after the death of one party pass to the other party to the account.

142. N.C. GEN. STAT. § 29-15(2) (1984 & Supp. 1987); N.Y. EST. POWERS & TRUST LAW § 4-1.1 (McKinney 1981 & Supp. 1988) TEX. PROB. CODE ANN. § 38 (Vernon 1980).

143. *See* J. DUKEMINIER AND S. JOHANSON, WILLS, TRUSTS AND ESTATES 116-19 (3d

court to appoint an individual as "guardian of the person."[144] Typically, this individual is given the responsibility to take custody of the child and to provide for his or her maintenance and education.[145] A court may also appoint the same person to the position of "guardian of estate" of the minor.[146] In this position, the guardian manages the property of the minor. The third type of guardian—the "guardian ad litem,"—protects the interest of minors, unborns, and unknowns in litigation.[147] If a parent is living and competent, that parent is the natural guardian of the minor's person.[148] However, this guardianship does not confer any authority upon the surviving parent to deal with the minor's property.[149] Thus, a will is necessary in the case of young parents who desire to name a guardian[150] of the person of a minor child.

A failure to name the guardian in the will may result in an appointment by the court.[151] The guardianship administration procedures in many jurisdictions are inefficient, cumbersome, and expensive with respect to the management of property which passes to a minor.[152] Several court appearances and procedures are necessary and court approval is often required for the sale and the investment of the minor's assets as well as the payment of creditor's claims because guardianships are subject to court supervision.[153] If there is more than one

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ed. 1984)(discussing necessity for guardian to protect minor children in event natural parents are killed).

144. N.C. GEN. STAT. § 28A-13-3 (1984 & Supp. 1987). In some jurisdictions a guardian is called a custodian. UNIF. PROB. CODE § 5-404(a), 8 U.L.A. 486 (1983).

145. UNIF. PROB. CODE § 5-401, 8 U.L.A. 478 (1983)(guardian is to provide support and education); Fraser, *Guardianship of the Person*, 45 IOWA L. REV. 239, 247 (1960)(custody of child necessary for guardian to provide for support and education of minor).

146. TEX. PROB. CODE § 116 (Vernon 1980). One person may be appointed to act as guardian of the person and his estate. *Id.*

147. *See* Kossar v. State, 179 N.Y.S.2d 71, 73 (1958)(guardian ad litem appointed as personal representative of infant).

148. *See* Daniels v. Metropolitan Life Ins. Co., 5 A.2d 608, 611 (Pa. Super. Ct. 1939)(custody of child arises as natural right of parent).

149. *Id.* (authority to manage estate of minor separate from authority to manage person of minor).

150. *See* UNIF. PROB. CODE § 117 (Vernon 1980)(parent may name any qualified adult as guardian of person of minor).

151. *See* UNIF. PROB. CODE § 501, 502, 8 U.L.A. 441-42 (1983)(person may become guardian by court appointment).

152. *See* Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 264 (1960)(confusion and complication due mainly to intervention of federal government).

153. *Id.* at 271-72 (states vary widely in amount of control exercised over guardian).

child, a separate administration must be undertaken for each child.[154] The guardian must give a separate fiduciary bond, keep separate books and file separate accountings for each guardianship.[155] Furthermore, guardianship investments are often limited to a legal list of conservative holdings.[156]

In jurisdictions that have adopted the Uniform Gifts to Minors Act, testamentary gifts can be made to a custodian for the benefit of a minor[157]—thus avoiding guardianship administration. Recent statory enactments have further liberalized these procedures.[158] Under the UPC, the guardian (renamed conservator) has been given broad powers of management, exercisable without court approval, to act like the trustee of a private trust rather than as a functionary of the court.[159] The trusteeship approach is superior to the guardianship approach in that the trustee has greater powers and her actions are not supervised by the court.[160] Thus, another reason for the execution of wills by young couples is to avoid the costs of guardianship administration.[161] Because many jurisdictions still utilize the guardianship approach, however, rather than the trusteeship approach, it is appropriate that young parents include in their wills statements requiring that the estate assets be held in trust for minor children should both parents die.[162] Furthermore, the non-probate assets (e.g. life insurance) should be added to this trust by naming the trustee as a contingent beneficiary of the assets. The draftsperson would be well-advised to

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154. J. DUKEMINIER & S. JOHANSON, WILLS TRUSTS AND ESTATES 117 (3d ed. 1984)(each child must have separate administration if 2 or more children are involved in guardianshp plan).

155. *Id.* The same person may act as guardian for several minor children, however, separate documents must be maintained for each child. *Id.*

156. *Id.* States have restricted investments to first mortgage on land, savings accounts maintained at a bank and local, state and federal government bonds. *Id.*

157. UNIF. GIFT TO MINORS ACT § 2, 8A U.L.A. 416-17 (1983 & Supp. 1989)(procedures for gifts of securities or money to minors).

158. *See* UNIF. PROB. CODE §§ 1-201(6), 5-101, 5-424, 5-425, 8 U.L.A. 31, 434, 501-03 & 504 (1983 & Supp. 1989)(statutory rules governing gifts made for benefit of minor children).

159. *Id.* §§ 5-424, 5-425, at 501-04 (1983 & Supp. 1989). The powers of conservators may be enlarged, or limited, under statutory regulations. *Id.*

160. *See*, Weatherly v. Byrd, 566 S.W.2d 292, 293 (Tex. 1978)(court held guardian may not revoke trust without consent of court.

161. *See* H. WREN, CREATIVE ESTATE PLANNING § 4.02, at 270 (1970)(court costs may cause problem in guardianship plan).

162. *See* J. DUKEMINIER & S. JOHANSON, WILLS TRUSTS AND ESTATES 526 (3d ed. 1984).

include as additional documents the living will and the durable power of attorney as part of the plan of the young couple.

## V. MIDDLE-AGED COUPLES

Planning for the middle-aged couple without a federally taxable estate is seldom undertaken because the estates are too small for taxes to become a significant concern.[163] It is estimated that because "unified credit" is fully phased in, just three percent of all estates are subject to the federal estate tax.[164] Because the estates involved are non-taxable, there is no need for a lifetime gift program. The concern more likely would be in the area of accumulating sufficient funds for the college education of children and the rudimentary outline of a retirement plan.[165]

According to the College Board, annual costs for tuition, room, and board for sending a child to the most expensive American colleges (e.g. Bennington College) exceeded $16,000 in the 1986 academic year.[166] Moreover, tuition increases are still averaging over 7 to 8 percent.[167] In the face of this type of cost, the person who does not have a taxable estate will be unable to afford the cost of Bennington College. Thus, if the child does not get a scholarship to attend an expensive college, the public college is often a bargain at less than fifty percent of the price.[168]

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163. *See* D. WESTFALL & G. MAIR, ESTATE PLANNING LAW AND TAXAATION ¶ 1.03, at 1-8 (2d ed. 1989)(federal wealth transfer tax applies to taxable estate over $600,000).

164. D. WESTFALL, ESTATE PLANNING LAW AND TAXATION ¶ 1.02, at S1-7 to -8 (1984). The author defines "unified credit" as the federal tax credit which "offsets estate and gift tax liability of $192,800 for decedents dying after 1986, thus exempting $600,000 from estate tax unless there have been lifetime gifts that in effect absorb all or part of the exempt amount." *Id.* at S1-6; *see also* I.R.C. § 2010 (1982)(unified credit provision).

165. *See* Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C.L. REV. 277, 278-79 (1976)(outline of retirement plan for working couple); Shaffer, *Nonestate Planning*, 42 NOTRE DAME L. REV. 153, 153-55 (1966)(estate plan for modest income family).

166. Cuff, *Paying for School Costs, No Easy Task*, N.Y. Times, Sept. 14, 1986, § 12 (Personal Finance, A Planning Guide), at 48, col. 1 (expense of education makes it imperative that parents plan early for child's tuition).

167. *Id.* (college costs increasing ahead of inflation rate).

168. *See* Moll, *Eight Great Bargains in a College Education*, CONSUMER DIGEST, March/April 1987, at 19-20 (public colleges and universities offer prestige and low tuition costs). According to Consumer Digest, many public colleges offer the same quality education as the expensive colleges, but at a fraction of the cost. *Id.* at 20. Among the recommended institutions are the eight campuses of the University of California. The University of California undergraduate campuses include Berkely, Davis, Irvine, Los Angeles, Riverside, San Diego, Santa Barbara, and Santa Cruz. Californians with the requisite SAT scores paid

For the middle-aged parents who have not set aside money for their children's education early, the costs must be borne from current income. Federal loans and grants are available to those whose adjusted gross income is less than $30,000, or to those who pass a needs test.[169] The current interest rate is about 8 percent, and undergraduates may borrow up to $2,500 a year to a maximum of $12,500.[170] The government pays the interest while the student is in college and there is a six-month grace period for post graduation repayment.[171]

For middle-aged parents with younger children, the custodial account is often recommended as a savings vehicle.[172] However, there are two drawbacks to this arrangement. First, all investment income over $1,000 to children under fourteen is taxable at the parents' tax rate.[173] Second, all money deposited in the child's custodial account becomes the property of the child when the child reaches eighteen.[174] Thus, this arrangement can provide funds for a child who has no interest in pursuing a college education. For this reason, the custodial account might be inappropriate. The more appropriate type of investment may be a time deposit plan that is scheduled to mature when the

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approximately $1,600 annually in tuition and fees in 1987 to attend Berkely. *Id.* at 20-21 (this figure does not include room, board, books, or personal expenses). This is certainly a bargain in comparison with the eastern private schools. For out-of-state students, the cost is approximately twelve times the cost of the in-state student. Even so, this cost is a bargain in comparison with the private universities. However, because the percentage of out-of-state students is limited to approximately one-quarter of the student body, the out-of-state applicant must often present a stronger academic record than the in-state applicant. *Id.* at 23.

Consumer Digest also lists the following institutions as good substitutes for private colleges: Miami University at Oxford Ohio, The University of Michigan at Ann Arbor; the University of North Carolina at Chapel Hill; the University of Texas at Austin; the University of Vermont at Burlington; the University of Virginia at Charlottesville; the College of William and Mary at Williamsburg. *Id.* at 21-22. The magazine also recommends: University of Colorado at Boulder; Georgia Institute of Technology, Atlanta; the University of Illinois at Urbana-Champaign; Indiana University at Bloomington; New College of the University of South Florida at Sarasota; Pennsylvania State University at University Park; University of Pittsburgh; State University of New York at Binghamton; University of Washington at Seattle; and University of Wisconsin at Madison. *Id.*

169. 34 C.F.R. § 682.301 (1988).

170. *Id.* § 682.202(a)(C) (1988). The interest rate charged depends upon the year in which the loan was granted. *Id.*

171. *Id.* § 682.102(c)(2) (1988).

172. Cuff, *Planning for Schools Costs, No Easy Task*, N.Y. Times, Sept. 14, 1986, (Personal Finance: A Planning Guide), at 48, col. 1, 2. Investment earnings from custodial accounts are taxed at the child's rate, provided the child is at least fourteen years of age. *Id.*

173. I.R.C. § 1(i)(2) (Supp. V 1987). Earnings of up to $1,000 are taxed at the child's rate. Earnings of over $1,000 are taxed at the parent's marginal tax rate. *Id.*

174. UNIF. PROB. CODE § 5-429, 8 U.L.A 508 (1983).

child enters college.[175]

After the childrens' educational needs are met, the middle-aged parent should plan for retirement. With respect to the early stages of a retirement plan, the middle-aged moderate income person is advised to defer the maximum amount of contributions available up to $7,000.[176] Deductions for Individual Retirement Account contributions are limited to employees who are not covered by company pension plans, or for individuals whose income is $25,000 or less, or for joint filers whose income is $40,000 or less.[177]

Wills and revocable living trusts are appropriate planning vehicles for the middle-aged couple.[178] In addition, living wills and durable power of attorney documents are also advisable. According to the American Medical Association, only nine percent of Americans have made living wills, despite enabling legislation in seventy-five percent of the United States.[179]

## VI. SINGLE PARENTS

The number of single-parented families had grown to 6.9 million of 31.1 million of the nation's households in 1985, from 1.5 million of 19.9 households in 1950.[180] In 1985, 900,000 men were single parents as compared to 200,000 in 1950.[181] Over six million women were single parents in 1985 as compared to 1.5 million in 1950.[182]

Estate building by the single parent is severely limited by the fact that the median income of households headed by women is $12,803, roughly half the $23,325 median income of households headed by men.[183] This precarious financial position is further diminished by

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175. Cuff, *Planning for School Costs, No Easy Task*, N.Y. Times, Sept. 14, 1986, § 12 (Personal Finance: A Planning Guide), at 48, col. 3 (university developed plan for child's education using zero coupon treasury bonds which matured at time child entered college).

176. I.R.C. § 402(g)(1) (Supp. V 1987).

177. *Id.* § 219(b),(g)(3)(B) (1982 & Supp. V 1987).

178. *See* D. WESTFALL & G. MAIR, ESTATE PLANNING LAW AND TAXATION ¶ 11.01, at 11-02 (2d ed. 1989)(wills and revocable living trusts may be used to dispose of bulk of estate upon death of client).

179. Emmanuel & Emmanuel, *The Medical Directive, A New Comprehensive Care, Document*, 261 J.A.M.A. 3288, 3288 (1989)(living wills rarely used by community).

180. Daniels, *A Plan for the Single Parent*, N.Y. Times, Sept. 14, 1986, § 12 (Personal Finance: A Planning Guide), at 49, col. 2 (quoting figures released by the Census Bureau).

181. *Id.* (number of single parent households is on the increase).

182. *Id.* (number of households headed by women acting as single parents is growing).

183. *Id.* (women who are single parents face larger financial obstacles than male counterparts).

high child care costs. The single parent lives with the everpresent concern of "If I were to die tomorrow what would happen to my children?"[184] This concern is more likely to give rise to the development of an estate plan than in the case of a couple parent situation.

Several lifetime financial planning strategies should be undertaken to ensure a proper estate plan for the single parent. First, an adequate amount of disability insurance should be purchased so that in the event that the sole income generator is disabled an adequate amount of income can be maintained and assets already accumulated can be preserved.[185] Second, an adequate amount of life insurance must be purchased to assure that sufficient assets remain for the support of minor children if the single parent dies.[186]

The single parent also has a particular need to name guardians for their minor children in a will.[187] For the minor's property, a trusteeship arrangement is more efficient and cost effective than the guardian arrangement[188] and should be considered. Care must be taken to ensure that qualified persons are designated as beneficiaries of the life insurance policies and employee benefit plans.[189] Property should not be passed directly to the minor children since they are classified as legally disabled in their ability to transfer such assets.[190] The benefits should be paid to an adult representative of the child, to avoid guardianship administration. The single parent should also execute additional documents such as a living will and durable power of attorney.[191]

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184. *Id.* at col. 1 (child care costs place economic burden on single parents).

185. *Id.* at col. 2 (estate plan for single parent should include disability insurance coverage).

186. *Id.* (estate plan for single parent should include life insurance coverage which provides for child's welfare in the event of death of parent).

187. *Id.*; *see also* D. WESTFALL & G. MAIR, ESTATE PLANNING, LAW AND TAXATION, ¶ 11.01[1], [2], at 11-3 to -8 (2d ed. 1989)(single parent's will should provide guardian for children).

188. *See* H. WREN, CREATIVE ESTATE PLANNING § 402[3][b], at 269-70 (1970)(trust concept promoted by concern over cost of court supervised administration).

189. *See* UNIF. PROB. CODE § 6-104, 8 U.L.A. 525-26 (1983)(competent adult may serve as minor child's custodian).

190. *Id.*, UNIF. GIFT TO MINORS ACT, § 2, 8 U.L.A. 328 (1983 & Supp. 1989).

191. *See* Akers, *The Living Will: Already a Practical Alternative*, 55 TEX. L. REV. 665, 668-70 (1977)(parent should plan for terminal illness which may render him incompetent to refuse life prolonging medical care); D. WESTFALL & G. MAIR, ESTATE PLANNING LAW AND TAXATION ¶ 107[2][a], at 1-33 (2d ed. 1989)(trusted individuals should be given power of attorney to act in event client becomes incompetent).

## VII. SENIORS AND THE ELDERLY

A plan for the elderly should include the use of a will and a durable power of attorney.[192] A growing number of practitioners also recognize the need for additional documents, such as a contingent trust arrangement and a living will.[193] Furthermore, the increased need by the elderly for professional assistance has expanded the legal disciplines involved in this area beyond estates and trusts to include such specialties as civil rights law, health law, and poverty and public interest law.[194] In addition, as the aging population grows, the need for professionals to provide services for the elderly increases.[195] The Census Bureau estimates that the population of Americans age sixty-five and over will more than double from 31 million in 1990 to 65 million in 2030.[196] This projection estimates that the elderly will exceed twenty percent of the United States population by the year 2025.[197]

With the increase in the elderly population comes an increased dependence upon government assistance for those who have outlived their retirement and/or medical benefits.[198] There is also an increasing number of the elderly persons who are poor.[199] This phenomenon has given rise to lawyers, known as elder law specialists,[200] who have developed an in-depth familiarity with the social security, Medicare, and Medicaid regulations.

The most important part of the elder law specialist's estate plan for

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192. *See* D. WESTFALL & G. MAIR, ESTATE PLANNING LAW AND TAXATION ¶ 1.07[2][a], at 1-33 (2d ed. 1989)(client willing to anticipate incompetency can provide for trusted individuals to exercise client's power of attorney in event of incompetency).

193. *See generally Elder Law Rewards: Emotion, Financial*, Nat'l L.J., Aug. 15, 1988, at 22, col. 1. (quoting Peter J. Strauss of the New York law firm Fink, Weinberger, Fredman, Berman & Lowell)("I feel professionally irresponsible if I let a client walk out of my office with only a will"). *Id.*

194. *See* J. REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY § 1.02, at 1-3 to -4 (1986)(government programs, legal and financial issues prompt elderly to seek professional estate planning advice).

195. *Id.* (elderly need legal assistance in coping with complex programs and laws).

196. *Elder Law Rewards: Emotional, Financial*, Nat'l L.J., Aug. 15, 1988, at 1, col. 2 (Census Bureau predicts that population of elderly Americans increase in future).

197. *See* J. REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY § 1.02, at 1-3 to -4 (1986)(demographics account for increased need to assist elderly).

198. *Id.* (elderpersons rely on government programs supplemented by pension plans).

199. *See* H.R. Rep. No. 631, 100th Cong., 1st Sess. 1 (1987)(seven out of ten elderly persons who live alone have income at or below federal poverty level).

200. *Elder Law Rewards: Emotion, Financial*, Nat'l L. J., Aug. 15, 1988, at 22, col. 4 (elder law specialists strive to understand changing laws).

a client is generally the will and its codicils.[201] Furthermore, even though the estate involved is non-taxable, giving rise to the drafting of the so-called simple will, special care must be taken to avoid drafting errors and a defective execution.[202] The requirements for the execution of wills varies.[203] Some states devised their statutes from the English Statute of Frauds (1677), while others copied the stricter Statute of Wills (1937).[204] It is clear from the requirements of the latter, as codified in New York,[205] that an execution "ceremony" is contemplated by the statute. Thus, the lawyer who does not undertake the "ceremony" risks defective execution.[206] Several commentators have developed recommended methods for the execution of wills in order to avoid defective execution.[207] They recommend the execution of wills through the use of a procedure[208] set forth below.

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201. Pierson, *Steps A Practitioner Can Take To Facilitate The Planning And Probate Of a Client's Estate*, 14 EST. PLAN. 88, 91 (1987)(preparation of will is important part of estate plan).

202. *Id.* at 91, 93 (administration and settlement of estate made easier through careful preparation of testamentary documents).

203. J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS AND ESTATES 186 (3d ed. 1984)(discussing history of requirements for execution of wills).

204. *See* UNIF. PROB. CODE § 2-502, 8 U.L.A. 106-07 (1983). The code sets forth the requisites for a formally attested will as follows:

> Every will shall be in writing; signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgement of the signature or of the will.

*Id.*

205. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 1981 & Supp. 1989) N.Y. law requires the following ritual for a formally attested will: (a) a writing; (b) signed at the end; (c) signed by the testator or in the testator's name by another person in his presence and by his direction; (d) signed or acknowledged by the testator in the presence of each of at least two witnesses; (e) in addition, the witnesses must within a thiry day period, both attest to the testator's signature, sign their names and affix their addresses at the end of the will; (f) the testator must, during the execution and attestation ceremony declare to each of the attesting witnesses that instrument to which his signature has been affixed is the will of the testator. *Id.*

206. *See* Jefferson v. Moore, 349 So. 2d 1032, 1034-36 (Miss. 1977)(will not executed in presence of testator invalid); *see also In re* Heaney, 347 N.Y.S. 2d 922, 923-25 (Surrogate's Ct. 1973)(presence of testator necessary for proper execution of will).

207. *See* J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 204-07 (3d ed. 1984)(suggests method to insure execution of will is valid); *see also* Pierson, *Steps a Practioner Can Take To Facilitate the Planning and Probate of Client's Estate*, 14 EST. PLAN. 88, 94-95 (1987)(plan for valid execution of will).

208. *See* J. DUKEMINIER & S. JOHANSON, WILLS TRUSTS AND ESTATES 205-07 (3d ed. 1984). This procedure is based upon the approach developed by Professor Leach and subsequently refined by Professor Casner (citations omitted). *Id.* at 205 n.18.

(1) If the will consists of more than one page, the pages should be fastened securely. The will should specify the number of pages of which it consists.
(2) The lawyer should be certain that the testator has read the will and understands its contents.
(3) The lawyer, the testator and three persons,[209] having no interests whatsoever in the property disposed of by the will, are brought together in a room from which everyone else is excluded. (If the will is to be self proved, a notary public is also present.) The door to the room is closed. No one enters or leaves the room until the ceremony is finished.
(4) The lawyer asks the testator the following questions:
(a) "Is this your will?"[210]
(b) "Have your read it and do you understand it?"
(c) "Does it dispose of your property in accordance with your wishes?"
(5) The lawyers asks the testator the following question, "Do you request Mrs. _____, Ms. _____ and Mr. _____ (the three witnesses) to witness the signing of your will?" The testator should answer "yes" in a voice audible to the three witnesses.
(6) The witnesses should be standing or sitting so that all three can see the testator sign. The testator initials or signs on the margin of each page of the will. The testator then signs his name at the end of the will.[211]
(7) One of the witnesses reads aloud the attestation clause,[212] which attests that the foregoing things were done.
(8) Each witness then signs and writes his or her address next to the signature. The first witness to sign writes under the spaces provided for the witness' signatures. "The foregoing attestation clause has been read by us and is accurate," and places his or her initials immediately below

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209. Louisiana requires three witnesses to the execution of a will of a domiciliary. LA. REV. STAT. ANN. § 9.2442 (West Supp. 1989). One witness must be a notary public. A foreign will shall have the same effect as a Louisiana will, so long as it complies with the laws of Louisiana, the laws of the state where executed, or the laws of the testator's domicile at the time of execution. *Id.* § 9.2401 (West 1965). New Hampshire requires two witnesses. N.H. REV. STAT. ANN. § 551:2-a (Supp. 1988).

210. This satisfies the publication requirement for a jurisdiction such as New York. N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(c)(3) (McKinney 1981).

211. The signature at the end satisfies the requirement of a jurisdiction that requires the testator's signature be affixed at the end of the will. N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(1) (McKinney 1981).

212. *See* J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS AND ESTATES 206 (3d ed. 1984). No state statute requires an attestation clause. Yet, its use constitutes prima facie case that the will was duly executed. *See* Estate of Farnsworth, 176 N.W. 2d 247, 248-49 (S.D. 1970)(attestation clause recommended, but not required).

this line, as do the other witnesses when they sign. The testator and the other two witnesses watch each witness sign.

(9) In states permitting the self-proving affidavit, either the attestation clause should be in affidavit should be signed by the testator and witnesses after the will has been executed. The affidavit is read aloud to the testator and the attesting witnesses by or in the presence of a notary public. The notary takes the oath of the testator and the attesting witnesses, all of whom then sign the affidavit.[213]

(10) The ceremony is finished. The door to the room is opened.

In addition, practitioners recommend that only "one copy of the original will should be executed since duplicate originals can create a revocation question later if one of the originals is lost or fails to show up at the time of probate."[214] The attorney should provide conformed copies or photocopies of the original will for clients who desire additional copies of the will.[215] Lawyers should also advise the testator procedures to safeguard the will and to provide access to the will in the event of death.

The drafting attorney must take special precautions when a will contest is a possibility.[216] Typically, the testator makes one of three types of dispositions that gives rise to a contest.[217] The first is the case of the unnatural disposition where the testator excludes her heirs and gives her assets to a charity or friend.[218] Second, the testator may give one child more of her property than she gives her other children.[219] Third, there exists a "divided family" in which there is a second spouse and children by a previous marriage.[220]

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213. *See* J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS AND ESTATES, 207 (3d ed. 1984). The self-proving affidavit permits the will to be admitted to probate without the testimony of attesting witnesses. *Id.*

214. *See* Pierson, *Steps a Practitioner Can Take to Facilitate the Planning and Probate of a Client's Estate*, 14 EST. PLAN., 81, 94 (1987)(creation of duplicate wills may cause probate problem).

215. *Id.* (conformed copies and photocopies of original should be made when client requests copies of will).

216. *See* J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS AND ESTATES 168-69 (3d ed. 1984)(discussing situations in which will contest may arise).

217. *Id.* (will contest usually brought on ground of unnatural disposition due to undue influence or lack of testamentary capacity).

218. *Id.* (hurt relative may question circumstances of testators gift to non-relative or charity).

219. *Id.* (disappointed children may become convinced favored sibling exerted undue influence over parent).

220. *Id.* (embittered children may challenge disposition to step parent).

Due to the increased likelihood of a will contest, the drafting attorney is advised to take special execution precautions to ensure that the requisite soundness of mind is preserved for the court challenge. Several precautions are recommended: (1) the testator writes the disposition in a letter in her own handwriting and set forth her reasons for making an unnatural disposition; (2) all discussions with the testator must be done in the absence of the favored beneficiary; and (3) the attorney should utilize an increased number of witnesses, perhaps four.[221] A videotape of the ceremony may prove to be an additional evidentiary aid.[222] The videotape can convincingly establish the testamentary capacity and intent of the testator, as well as refute possible claims of undue influence or fraud.[223]

In addition to the will, the attorney must direct the disposition of the testator's assets which pass outside the will.[224] This process is referred to as "coordinating the estate plan".[225] Thus, if the will establishes a trust to contain employee benefit or life insurance proceeds, the trustee must be made the beneficiary of these assets.[226] The attorney should stress to the client that the estate plan simply looks to the client's situation at the current time. The plan must be reviewed after any significant change in the client's personal situation.[227] The occurrence of events such as births, deaths, change of domicile, change of financial situation and changes in state or federal law will

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221. Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 93 (1958)(recommended execution procedure to insure facts preserved).

222. *Id.* (film of will execution may be helpful in event of will contest); *see also* Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 5-7 (videotape of will execution may be used to show due execution, testamentary capacity, testamentary intent, contents of will, lack of undue influence and to assist in interpretation and construction of will).

223. *See* Pierson, *Steps a Practitioner Can Take to Facilitate the Planning and Probate of a Client's Estate*, 14. EST. PLAN. 89, 94-95 (1987)(tape can prove proper execution and validity of will).

224. *See* UNIF. PROB. CODE. § 6-101 to -113, 8 U.L.A. 520-33 (1983)(trust accounts payable on death, and accounts with right of survivorship encompass assets that pass outside the estate).

225. *See* Pierson, *Steps a Practitioner Can Take to Facilitate the Planning are Probate of a Client's Estate*, 14 EST. PLAN. 89, 94-95 (1987)(non probate items should be coordinated with estate plan following execution of will).

226. *See* Wren, *The Role of Life Insurance in Estate Planning*, 41 ST. JOHN'S L. REV. 6, 14 (1966)(designation of trustee as beneficiary of life insurance trust provides flexibility in handling of proceeds).

227. *Id.* at 11 (plan should be altered where client's personal or professional life undergoes change).

often necessitate a change in the estate plan.[228]

The attorney must always present the elderly client with property management and health care planning options because chronic diseases tend to make one incompetent and unable to make such decisions prior to death.[229] Thus, the planning lawyer should present three options to an elderly client: the durable power of attorney, a living will, and anatomical gifts.[230]

The durable power of attorney is a written instrument whereby a person (the principal) appoints another person as his agent (or attorney-in-fact) to act in place of the principal even during the principal's incapacity for the purposes stated in the instrument.[231] The American Bar Association's Section of Real Property, Probate and Trust Law Committee on Special Problems of the Aged and Persons Under Disability opines that the durable power of attorney is a "minimal precaution for estate management and avoidance of the expense and humiliation of a guardianship in the event of incapacity."[232]

The Committee recommends that the following powers be conferred on the attorney in fact, including:

> the power to buy and sell property, collect income, deal with the SSA and other agencies, sign the tax returns and represent the principal before the IRS, contract for professional services (including health care services) and pay for them, make a valid disclaimer of gifts, make gifts to charity or family members, and fund a standby trust or complete funding of a partially funded trust.[233]

Moreover, the principal should give the attorney the power to make Medicaid qualifying transfers.[234] The Committee points out that the durable power of attorney for health care is preferable to the living will because the latter simply instructs the physician on the limitation of medical care whereas the durable power of attorney has a much

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228. *See* Pierson, *Steps a Practitioner Can Take to Facilitate the Planning and Probate of a Client's Estate*, 14 EST. PLAN. 89, 95 (estate plan should be revised periodically).

229. Ross, *Documents of Life and Death*, The Nat'l Notary, Nov. 1988, at 10.

230. *See* J. PRICE, CONTEMPORARY ESTATE PLANNING 213-21 (1983)(discussing documents which attorneys should include in estate plan).

231. 2A C.J.S. *Agency* § 44 (1944 & Supp. 1989)(proper execution necessary for durable power of attorney clause to be valid).

232. Mooney, *Alzheimer's Disease—Planning For Dementia*, 2 PROB. & PROP. 7, 11 (Nov./Dec. 1988)(durable power of attorney operates upon incompetency of principal).

233. *Id.*

234. *Id.* (power of attorney may be needed to effect necessary Medicaid services).

broader scope in the area of health care.[235]

By summer 1989, forty jurisdictions had enacted living will legislation.[236] This widespread acceptability of the document, however, belies its very limited scope.[237] Most living will statutes place two limitations on the device. First, the patient can use the living will only to refuse extra-ordinary health care procedures.[238] Second, the device can only be used when the patient has become terminally ill or near death.[239] Thus, the living will does not provide a directive by which a patient can refuse or limit general medical treatment.[240] Nevertheless, the general language of a living will is effective to withhold artificial respiration and cardiopulmonary resuscitation.[241] Such extraordinary procedures as dialysis, transfusions and transplant surgery, however, are not considered as merely extending life under the statutes and thus may not be refused by the patient.[242]

The drafting attorney should review the statute of her jurisdiction to ensure that the living will prepared for the client mirrors the state statute. One notable exception is the Tennessee statute, under which a patient may refuse "surgery, drugs, transfusions, mechanical ventilation, dialysis, cardiopulmonary resuscitation, artificial or forced feeding, radiation therapy, or any other medical act designed for diagnosis, assessment, or treatment to sustain, restore, or supplant vital body function."[243] Nutrition and hydration, however, must be con-

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235. *Id.* (durable power of attorney may be used to transfer property and assets).

236. States currently without living will legislation are Kentucky, Massachusetts, Michigan, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, and South Dakota.

237. *See* Johnson, *Sequential Domination, Autonomy, and Living Wills*, 9 W. NEW ENG. L. REV. 113 (1987)(discussion of limitations of living wills in fostering patient/physician dialogue).

238. *See* Note, *A Patient's Last Rights—Termination of Medical Care—An Analysis of New York's In re Storar*, 46 ALBANY L. REV. 1380, 1402-11 (1982)(discussing termination of medical care legislation); *see also* VA. CODE ANN. § 54.1-2984 (1988)(statutory living will provision and form for terminally ill patient).

239. *See* Francis, *The Evanescence of Living Wills*, 24 REAL PROP. & PROB. TR. J. 141, 145 (1989)(only terminally ill patient may rely on living will to reject medical care).

240. *Id.* (patient must require life prolonging medical treatment).

241. *See* Youngner, *Do-Not-Resuscitate Orders: No Longer Secret, But Still A Problem*, 17 HASTINGS CENTER REP. 24, 24-25 (1987)(discussing the difference between life saving and life sustaining medical procedures).

242. *Id.*at 31-32 (patient may ask doctor to withhold certain critical care treatment but accept other medical procedures based upon his personal experiences).

243. *See* TENN. CODE ANN. § 32-11-103(5) (Supp. 1988) (defining medical care as used in living will statute), § 32-11-105 (living will statute).

tinued under virtually every living will statute.[244] Only Utah permits the maker of a living will to refuse hydration, nutrition, or antibiotics by specifically designating these procedures as life-sustaining.[245]

Despite its limitations, the living will is important in communicating the wishes of the patient to health care providers. The right of a patient to informed consent is protected at the physician's risk of malpractice and the administration of medical care without consent is a battery.[246] Moreover, the right of privacy also gives a patient the right to refuse medical treatment.[247]

The planning attorney should also discuss with the client the desirability of making an anatomical gift. Organ transplants are hampered by the scarcity of donors,[248] and the planning attorney is well suited for raising the question with the estate planning client. An anatomical gift document, represented by a card to be carried by the organ donor,[249] is preferable to an anatomical gift made by will because the organ donor card is readily accessible to health care personnel who may be treating the client.

Another important part of the estate planner's job is to advise the elderly client regarding the interplay of government benefits, such as Medicare and Medicaid, with the retention and preservation of assets.[250] The proportion of elderly people in the population continues to increase due to declining birth and mortality rates.[251] Moreover, elderly persons who need long-term care can become impoverished in order to meet nursing home and health care costs.[252] In 1975, 47.5%

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244. Youngner, *Do-Not-Resuscitate Orders: No Longer Secret, But Still a Problem*, 17 HASTINGS CENTER REP. 24, 25-26 (1987).

245. UTAH CODE ANN. § 75-2-1104(4) (Supp. 1989)(allowing maker of living will to classify provision of sustenance and/or medication as life sustaining procedures and therefore refuse consent).

246. *See* Canterbury v. Spence, 464 F.2d 772, 782-83 (D.C. Cir. 1972)(physicians failure to provide informed consent exposes him to liability for battery or medical malpractice).

247. *See In re* Farrell, 529 A.2d 404, 411 (N.J. 1987)(terminally-ill patient's right to order disconnection of respirator based in part on privacy interest).

248. *See Overcast: Problems in the Identification of Potential Organ Donors*, 251 J.A.M.A. 1559, 1559 (1984)(discussing shortage of organs suitable for transplant).

249. UNIF. ANATOMICAL GIFT ACT § 2(b), 8 U.L.A. 6-7 (Supp. 1989)(discussing power to make, amend, revoke and refuse to make anatomical gifts).

250. R. FEIN, MEDICAL CARE, MEDICAL COSTS: THE SEARCH FOR A HEALTH INSURANCE POLICY 122 (1986).

251. *See* Aaron, *When Is A Burden Not A Burden? The Elderly In America*, THE BROOKINGS REV. 17, 17 (Summer 1986)(elderly population increasing).

252. *See* H.R. Rep. No. 631, 100th Cong., 1st Sess. 1 (1987)(seven in ten elderly persons

of all nursing home residents who received Medicaid were not poor when they entered a nursing home, but had become so while in the nursing home.[253] Thus, the planner should be knowledgeable of the extraordinarily complex nature of government programs as they are applied by state and local authorities.[254]

Medicare[255] offers health insurance to persons who are sixty-five or older and who receive social security and railroad retirement benefits, and to disabled persons under sixty-five without regard to the personal income of the beneficiary.[256] Medicare is administered in two parts: Part A provides hospital benefits and short-term post hospital nursing care, while part B provides coverage for the physician's bills.[257] Enacted by Congress in 1965, the Medicare health insurance program underwent a significant "facelift" in 1988 with the enactment of the Medicare Catastrophic Coverage Act of 1988.[258] Under the new Medicare Plan, the beneficiary receives almost total protection for the costs of a hospital stay.[259] The only out-of-pocket cost is a single annual deductible. Many elderly persons meet the cost of this deductible by the use of so-called medigap coverage — private policies that supplement Medicare coverage.[260] Although Medicare fails to provide insurance protection for the cost of long-term care in a nursing home, it does pay for 150 days per year in a skilled nursing facil-

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have spent income down to poverty level due to high cost of medical care and other essential necessities).

253. Congressional Budget Office, Long Term Care for the Elderly and Disabled (Feb. 24, 1977).

254. *See* Palmer, *Estate Planning for Public Welfare Recipients*, 2 PROB. & PROP. 43, 43-44 (March/April 1988)(explaining complexity of welfare regulation application to Medicaid and SSI recipients); *see also* Letter from Harriett P. Prensky to James Palmer, 2 PROB. & PROP. 4, 4 (July/August 1988)(further clarifying application of federal regulations to welfare recipients); Dobris, *Medicaid Asset Planning for the Elderly: A Policy View of Expectations Entitlement, and Inheritance*, 24 REAL PROP. TR. J. 1, 1-2 (1989)(implementation of federal Medicaid regulations varies greatly by state).

255. Health Insurance for the Aged and Disabled, 42 U.S.C. § 1395 (1982 & Supp. IV)(Medicare provisions).

256. *See* J. REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY § 9.02(1) (1989)(overview of Medicare program).

257. *Id.* (discussing specific Medicare provisions involving benefits and post-hospital care).

258. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 102, 102 Stat. 683 (1988) (repealed, November 1989)(Editor's note—while this issue was in the final stage of publication, the Medicare Catastrophic Coverage Act of 1988 was repealed).

259. H.R. REP. NO. 105(I), 100th Cong., 2nd Sess. 4, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 803, 804.

260. *See id.* at 811 (70 percent of elderly purchase Medigap policies).

ity.[261] Because custodial care in a nursing home is less intensive than skilled nursing care, it is not covered under the new Medicare plan.[262] Under Part B, the Medicare beneficiary pays $28.80 per month.[263] In addition, the beneficiary pays eighty percent of the reasonable costs of doctor fees.[264] However, a cap (currently $1,370) is placed on the out-of-pocket expenses for Medicare-approved doctor services.[265] Another cost is the Part A premium of $22.50 per $150.00 of tax liability (in 1989) up to a maximum of $800.00 for each beneficiary.[266] This provides some planning opportunities associated with shifting income from taxable to non-taxable instruments.

Medicaid,[267] unlike Medicare, pays for nursing home or other long-term custodial care in a skilled nursing facility. It is a combined federal-state program that offers medical assistance to eligible needy people.[268] In order to receive Medicaid, a person's resources and income must fall below certain levels.[269] Variations in eligibility requirements from state to state add to the difficulty of the planner.[270] In Alabama, for example, a family of four, with an annual adjusted income of $1,764, earns too much to qualify for aid and Medicaid.[271] An identical family in California, however, would qualify for the same benefits with an annual adjusted income of $8,808.[272]

Increasingly, the estate planner is faced with devising a mechanism by which an elderly person with moderate assets can meet the Medicaid eligibility requirements. The planner must know what assets can be exempted from the eligibility determination. The principal exempt

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261. *Id.* at 815.

262. *See* J. REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY § 15.02[1] (1989)(describing difference between skilled nursing care and custodial care).

263. *Id.*

264. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 201, 102 Stat. 683, 700.

265. *Id.* This premium tax and beneficiary payment cap increases each year. *Id.*

266. *Id.* 102 Stat. at 690-91.

267. Grants to states for Medical Assistance Programs, 42 U.S.C. §§ 1396-1396s (1982 & Supp. IV 1986)(Medicaid provisions); 42 C.F.R. §§ 430.0-.104 (Medicaid regulations).

268. *See* REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY § 10.02[1] (1989)(Medicaid overview and definition).

269. Financial Requirements for Categorically Needy, 42 C.F.R. §§ 435.700 -.852 (1988).

270. *See* Woodside, *Health Care for the Poor: How To Pay For It*, Wall St. J., May 29, 1987, at 16, col. 13 (estate may be difficult to plan due to state variations in eligibility requirement).

271. Dobris, *Medical Asset Planning by the Elderly*, 24 REAL PROB. & PROB. TR. J. 1, 1 (1989)(discussing variations in Medicaid eligibility requirements).

272. *Id.*

property is the primary residence of the recipient.[273] Thus, several planning ideas regarding the principal residence are in order.[274] First, the elderly person should use nonexempt assets to buy exempt assets. Second, a renter should purchase a home. Third, a home owner with a mortgage can use nonexempt cash to pay off the mortgage. Fourth, the immediate family should retain the home even if the recipient is in a nursing home.[275] For the recipient who is in, or who may enter a nursing home, the planner must take special precautions to preserve the homestead as a family inheritance, rather than causing it to be applied towards the beneficiary's resources payable to the government.[276] If one spouse remains in the residence; the homestead exemption continues.[277] Moreover, it is unlikely that the elderly couple will have minor children who will occupy the residence; thus the exemption continues by virtue of the "homesteading" spouse. Therefore, if this spouse dies and the property is owned jointly with a right of survivorship between spouses, the exemption is lost and the government can apply the homestead exemption to the cost of maintaining the spouse in the nursing home resident.[278] Thus, care must be taken to avoid the loss of the exemption by operation of law. A solution to this problem is the transfer of the homestead to the children, with the elderly parent(s) retaining a life estate.[279] Moreover, since the homestead is exempt, the transfer will not violate the two year and one-half prior to eligibility asset transfer prohibition.[280]

A second Medicaid qualifying planning technique is the asset di-

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273. Grants to States for Medical Assistance Programs, 42 U.S.C. § 1396 p(a)(2) (1982); 42 C.F.R. § 433.36(g)(3) (1988).

274. *See* Dorbis, *Medical Asset Planning by the Elderly*, 24 REAL PROP. & PROB. TR. J. 1, 16 n.85 (1989)(citing Woodside, HEALTHCARE FOR THE POOR: HOW TO PAY FOR IT, Wall St. J., May 29, 1987, at 26, col. 1).

275. 42 U.S.C. § 1396p(a)(2) (1982); 42 C.F.R. § 433.36(g)(3) (1988).

276. *See* Coffey, *Preserving the Homestead in the Age of Medicaid and Nursing Homes*, 60 N.Y. ST. B.J. 18, 20 (Feb. 1988)(special precautions necessary to preserve family assets).

277. *See* 42 C.F.R. § 433.36(g)(3)(i) (1988); *see also* Coffey, *Preserving the Homestead in the Age of Medicaid and Nursing Homes*, 60 N.Y. ST. B.J. 18, 20 (Feb. 1988)(discussing Medicaid's "homestead" exemption).

278. Coffey, *Preserving the Homestead in the Age of Medicaid and Nursing Homes*, N.Y. ST. B.J. 18, 20 (Feb. 1988)(Medicaid recipient must take steps to avoid loss of homestead).

279. *Id.* (discussing the transfer of assets).

280. *See* J. REGAN, TAX ESTATE & FINANCIAL PLANNING FOR THE ELDERLY 10.05[5], at 10-23 to -30 (1989). *But see id.* § 15.04, at 15-16 to -20 (transfer of assets may result in temporary disqualification).

vestment approach—otherwise called the "spend down" process.[281] Under this arrangement, the elderly person gives away nonexempt property in contemplation of qualifying for Medicaid. This approach has several drawbacks. First, assets transferred up to two and one half years before the donor applies for Medicaid will still be classified as owned by the applicant.[282] Second, the donee might be an ingrate who has little appreciation for donor's wishes.

## VIII. CONCLUSION

Unlike other materials written in the estate planning area, this article has focused primarily on clients without a taxable estate. Although these persons appear to lack any real need for comprehensive estate planning, it has been demonstrated that these individuals have unique, independent, and legitimate concerns that need to be addressed. Young singles who have reached the age of testamentary capacity need a will to avoid the laws of decent and distribution. Minors, who lack testamentary capacity, need to plan for the distribution of non-probate assets through the use of survivorship accounts. A single adult, involved in a meretricious relationship, will want to insure that a testamentary transfer to a non-family member will withstand a contest on the ground of undue influence. Young and middle-aged couples need to plan for their children's education and for their own retirement; as well as execute traditional testamentary and related documents. Single parents need to devise a guardianship plan for minor children in the event of the parent's death. The elderly must overcome special problems with regard to government benefits programs. For all of these persons, estate planning is far more encompassing than the simple disposition of assets, and therefore, the appropriate attention and expertise of a competent estate planning attorney is a necessity. Dependence on mutual fund and annuity salespersons is clearly misplaced.

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281. *See* Mooney, *Alzheimer's Disease—Planning for Dementia*. 2 PROB. & PROP. 7, 11 (Nov./Dec. 1988)(discussing Medicaid qualifications).

282. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 303, 102 Stat. 683, 760; *see also* Medicare & Medicaid Guide (CCH) § 557, at 287-89 (June 14, 1988).