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Estate Planning BULLETIN

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ESTATE PLANNING LEGISLATIVE UPDATE

By Kaitlin Pals
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It's been an exciting year for Minnesota legislation affecting estate planning. Though several notable bills, including estate tax reform, did not become law, the new laws that did pass create many interesting new possibilities for estate plans.

Eliminating Mandatory Bonds in Conservatorships. The Legislature repealed a law requiring a conservator who is managing personal property of a protected person valued at more than $10,000 to post a bond with the court. The court still has the ability to require a bond, but the conservator can forego the bond if he blocks himself from access to certain assets, such that the conservator cannot access the assets without an additional court order or the assets are otherwise held in a sufficiently protected manner.

Uniform Deployed Parents Custody and Visitation Act. Though primarily a family law statute, the new Minnesota Uniform Deployed Parents Custody and Visitation Act affects estate planning by creating a new kind of Power of Attorney. Among other things, the Act allows a single parent who is being deployed for more than 90 days but less than 18 months to sign a Power of Attorney giving parental authority to another person for the term of their deployment.

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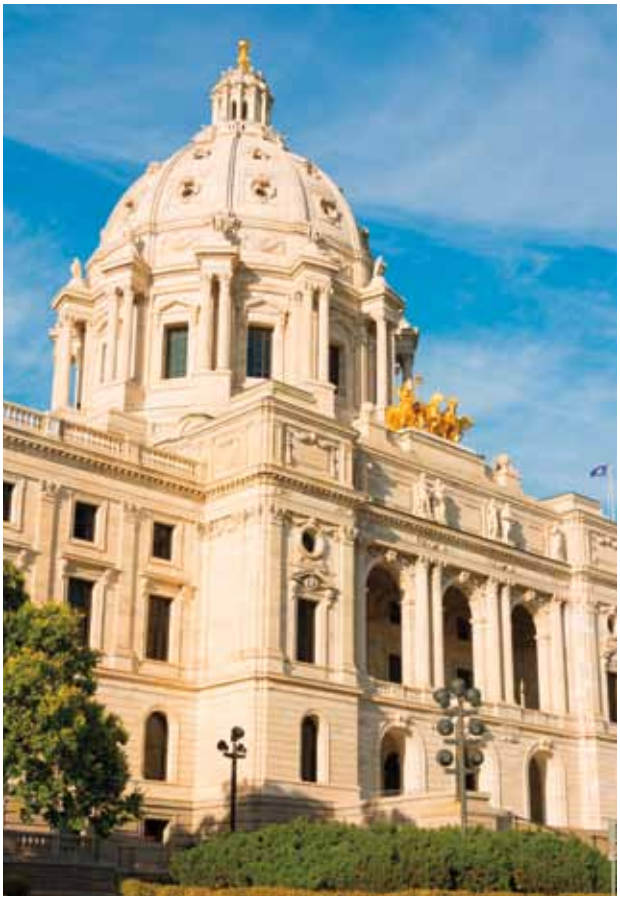

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Summer/Fall 2015

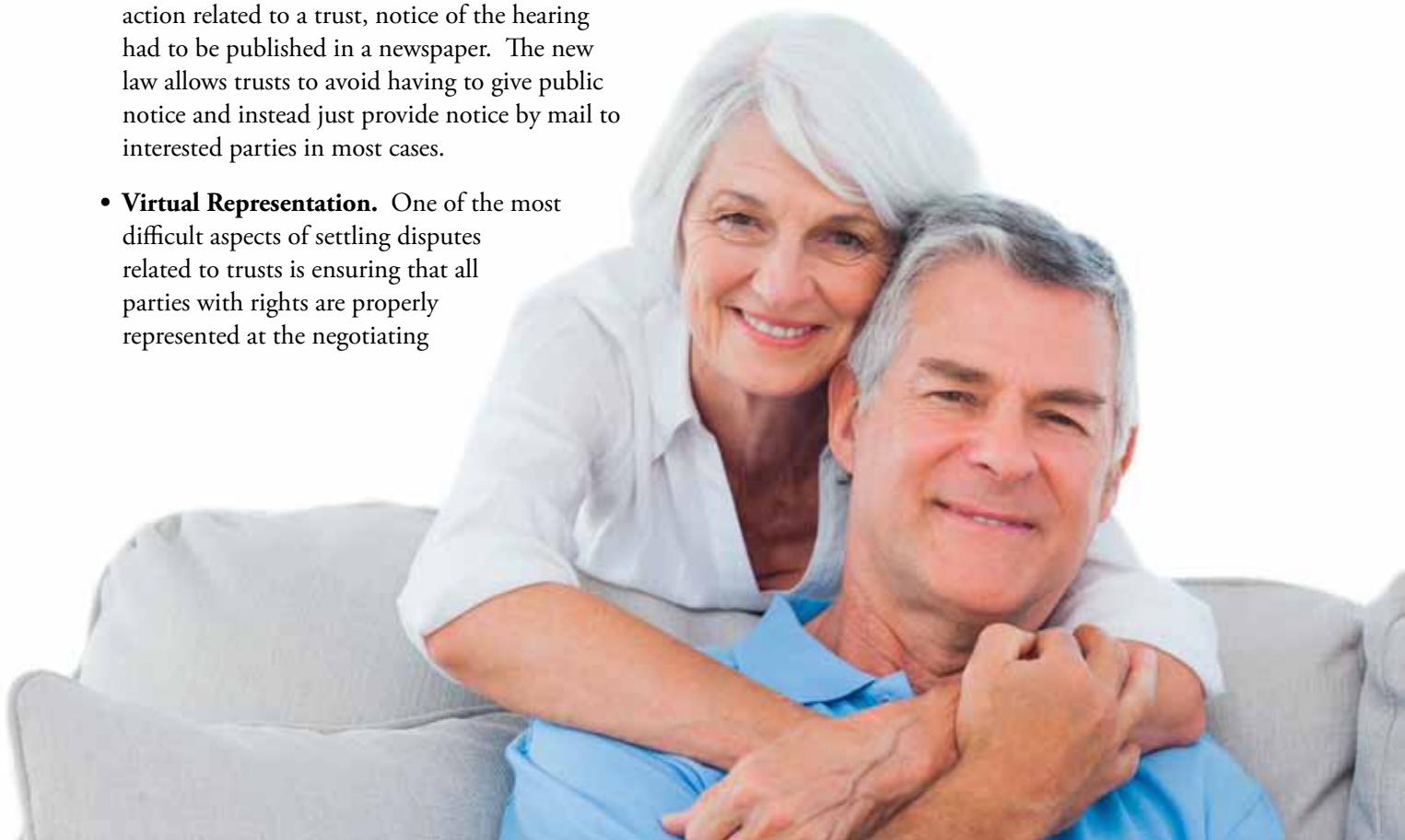
Uniform Trust Code. This year, Minnesota completely overhauled its trust statutes. The new law is based in large part on the Uniform Trust Code, which is a model set of laws that many states have adopted in whole or in part. These new trust provisions clarify existing law in many ways, and add several new tools to the estate planning tool box. Highlights include:

- **Non-Judicial Settlements.** Minnesota's old trust law allowed the trustee and beneficiaries of a trust to enter into legally binding agreements to settle a handful of matters related to trust administration. Other kinds of settlements usually required court approval. Minnesota's version of the Uniform Trust Code expands the scope of matters that can be resolved in a non-judicial settlement agreement, including interpreting a term in the trust, directing a trustee to refrain from performing a certain act, or giving the trustee a new, additional power.

- **Notice Not Always Required to Be Published.** Under the old law, in order to bring any court action related to a trust, notice of the hearing had to be published in a newspaper. The new law allows trusts to avoid having to give public notice and instead just provide notice by mail to interested parties in most cases.

- **Virtual Representation.** One of the most difficult aspects of settling disputes related to trusts is ensuring that all parties with rights are properly represented at the negotiating table or in court. This is because it is common for trusts to involve minors, unborn potential beneficiaries, and people who might become beneficiaries if certain events occur. The new law clarifies who can represent such beneficiaries and enter into binding agreements on their behalf. It also explains when the court can represent such beneficiaries and when it can appoint a neutral third party as a Guardian Ad Litem to represent them instead.

- **Non-Charitable Trusts without Ascertainable Beneficiaries.** Usually, a trust must either have a charitable purpose or have at least one beneficiary who is certain to receive a benefit from the trust within a certain period of time—called an "ascertainable beneficiary." Now, Minnesota law allows you to set up a trust without an ascertainable beneficiary, so long the trust's assets are paid out within 21 years. For example, a person could set up a trust to give all children at a certain school gifts each year regardless of their financial need, to have flowers regularly



placed on a loved one's gravesite, or for any other benevolent but not necessarily charitable purpose. This provision also allows a person to create a trust that gives the trustee the power to choose the beneficiaries.

- **Decanting.** Decanting is a trendy new concept in trust law that allows a trustee to remove property from an old trust and put it into a new one with terms better adapted to meet the beneficiaries' needs—like taking wine out of its original bottle and pouring it into a new one. For example, the decanting power may allow a trustee to shorten the length of a trust or to turn a normal trust into a supplemental needs trust for a disabled beneficiary. Unless the trustee has very broad discretion, the new trust cannot change who the beneficiaries are.

- **Directed Trusts.** Before, the only kind of trust fiduciary (person with a duty to manage the trust in the beneficiaries' best interest) recognized in Minnesota statutes was the trustee. Minnesota's new trust code creates three new kinds of fiduciaries with narrower duties but even greater power than a typical trustee: investment trust advisors, distribution trust advisors, and trust protectors.

Investment trust advisors have the power to make the trustee invest and manage the trust's property as the advisor directs, but has no say in when and how distributions are made to beneficiaries. On the other hand, distribution trust advisors can require the trustee to make (or not make) distributions to beneficiaries, but has no involvement in trust management.

Trust protectors are like trustees with super powers. They generally are not involved in the day-to-day management of the trust, but the trust instrument can give them the power to take certain extremely significant actions, like remove or appoint a trustee, veto or direct trust distributions, modify the trust to take advantage to certain changes in laws, or even increase or decrease the respective shares of each beneficiary's interest in the trust.

2015 ESTATE TAXES: NUMBERS TO KNOW

Estate tax law hasn't changed much this year. Bills to repeal estate tax made their way through Congress and the Minnesota Legislature, but neither has passed. However, certain important numbers in the estate tax world adjust automatically each year. Here are the estate tax numbers you need to know for 2015:

Federal Estate Tax Numbers to Know

- $5.43 million: The Federal "unified credit" for 2015, meaning each person can make gifts during their lifetime or at death up to this amount without paying Federal estate tax.

- $14,000: The "annual gift exclusion" amount for 2015, meaning a person can make gifts to an unlimited number of people, each up to this amount, without filing a Federal gift tax return.

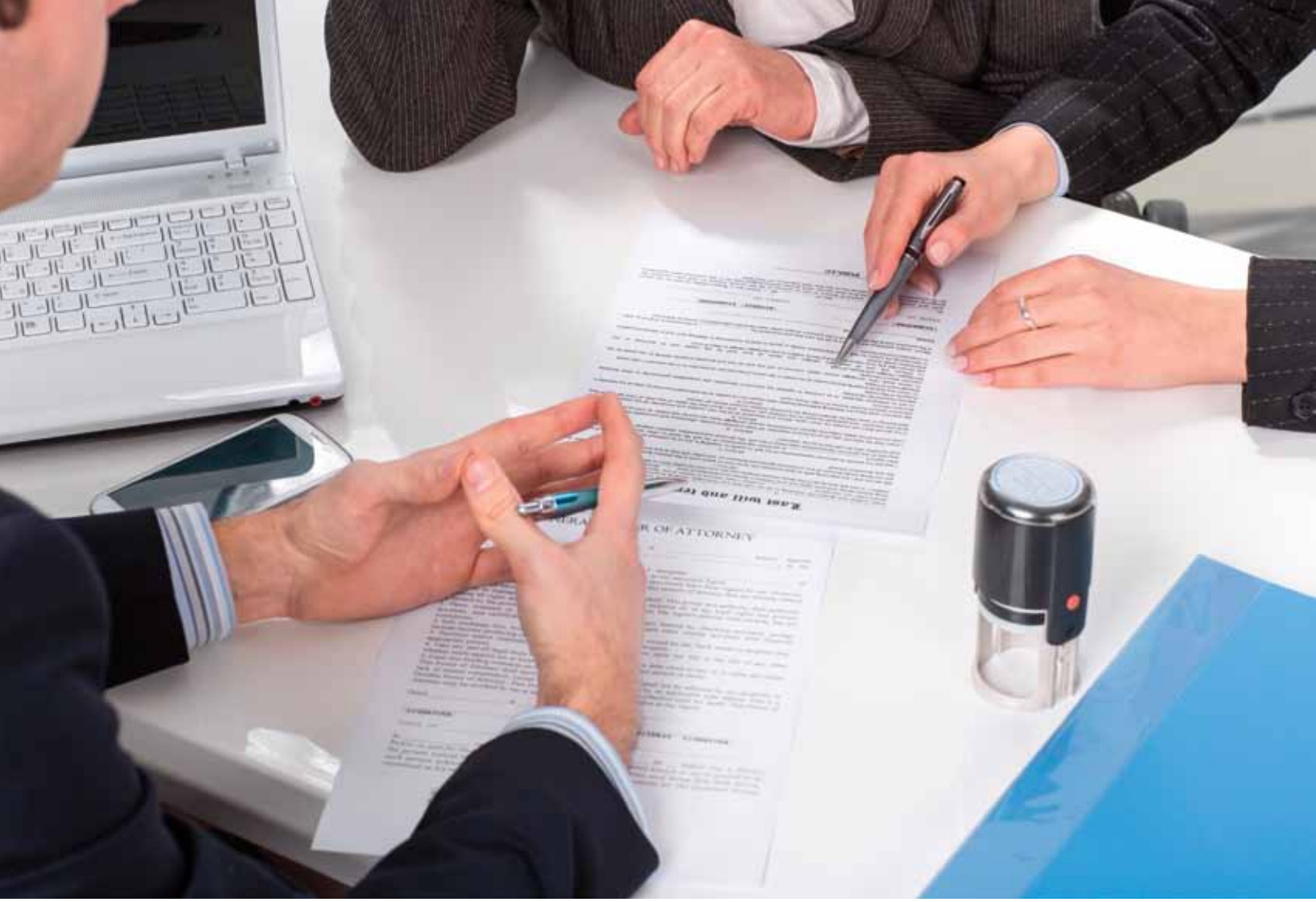
- 40%: The current Federal estate tax rate.

Minnesota Estate Tax Numbers to Know

- $1.4 million: The amount each Minnesotan dying in 2015 can leave to heirs other than a spouse without paying Minnesota estate tax.

- $3.6 million: Minnesotans with eligible small business or farm property may be able to leave an additional $3.6 million to certain "qualified heirs."

- 10% to 16%: The current Minnesota estate tax rate.



POWER OF ATTORNEYS AND TRUSTS

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Powers of Attorney and Trusts are two frequently used estate planning instruments. One of the most difficult decisions to make in relation to the drafting of a Power of Attorney or Trust as part of an estate plan is who shall handle your personal and financial decisions. This article is meant to provide ideas to guide this important decision.

A Power of Attorney is a legal document that allows you to officially designate someone as your attorney-in-fact. Your attorney-in-fact can handle financial and legal matters on your behalf in the event that you become physically or mentally incapacitated and their ability to act terminates upon your death. With an attorney-in-fact, you never know when the need for someone to have the capability to act on your behalf will arise. An attorney-in-fact may only need to pay bills for a short period of time or may need to make key financial decisions. A Trust is a legal document which specifies how trust assets will be managed by a trustee. A trustee is named in a trust agreement and is authorized to carry out your objectives as written under the express terms of the trust. A trustee's obligation to act can begin upon your death, or at a time when you may be unable to unwilling or unable to act as trustee. With a trustee, they will be called upon to carry out your wishes typically over a much longer period of time. Attorneys-in-fact and trustees are fiduciaries, or people who are legally obligated to act in your interests. The following are a number of considerations to keep in mind when making the decision of whom to appoint as your fiduciary.

First, your fiduciary should be someone who knows and understands your wishes, someone you trust to act in your best interests and those of your beneficiaries, and someone who is qualified to make decisions in such a position. Your fiduciary will typically take control over your financial assets at a time when you are unable to oversee what is being done with those assets. It is therefore advisable to discuss your fiduciary's appointment with them and have ongoing discussions with them regarding how you want your financial assets managed.

Second, choosing someone with expertise is necessary only if your financial assets involve a specific business. In such an instance it is important for the fiduciary to have expertise managing the type of business involved, such as a family member involved in the business, a business associate or professional advisor. Otherwise, you should choose someone with good judgment and a business sense who will know when to seek expert help. There are common characteristics of a successful fiduciary: (1) someone who pays attention to details; (2) someone who has the time and inclination to devote to the position; (3) someone who has an understanding of his or her duties and responsibilities; (4) someone who takes their responsibility seriously; (5) someone who has the ability to collaborate with attorneys, accountants and other professionals, if necessary; (6) someone who is honest and loyal; and (7) someone who is able to make decisions. The last characteristic is important in that fiduciary decisions are not always based solely from knowledge but also involve maturity, wisdom and the ability to remain impartial in the face of disagreement.

Third, because your fiduciary will conduct regular banking and other financial and legal transactions, consider choosing someone who lives close to you. Doing so will allow them to handle their responsibilities in a timely fashion and with the least amount of difficulty for the fiduciary.

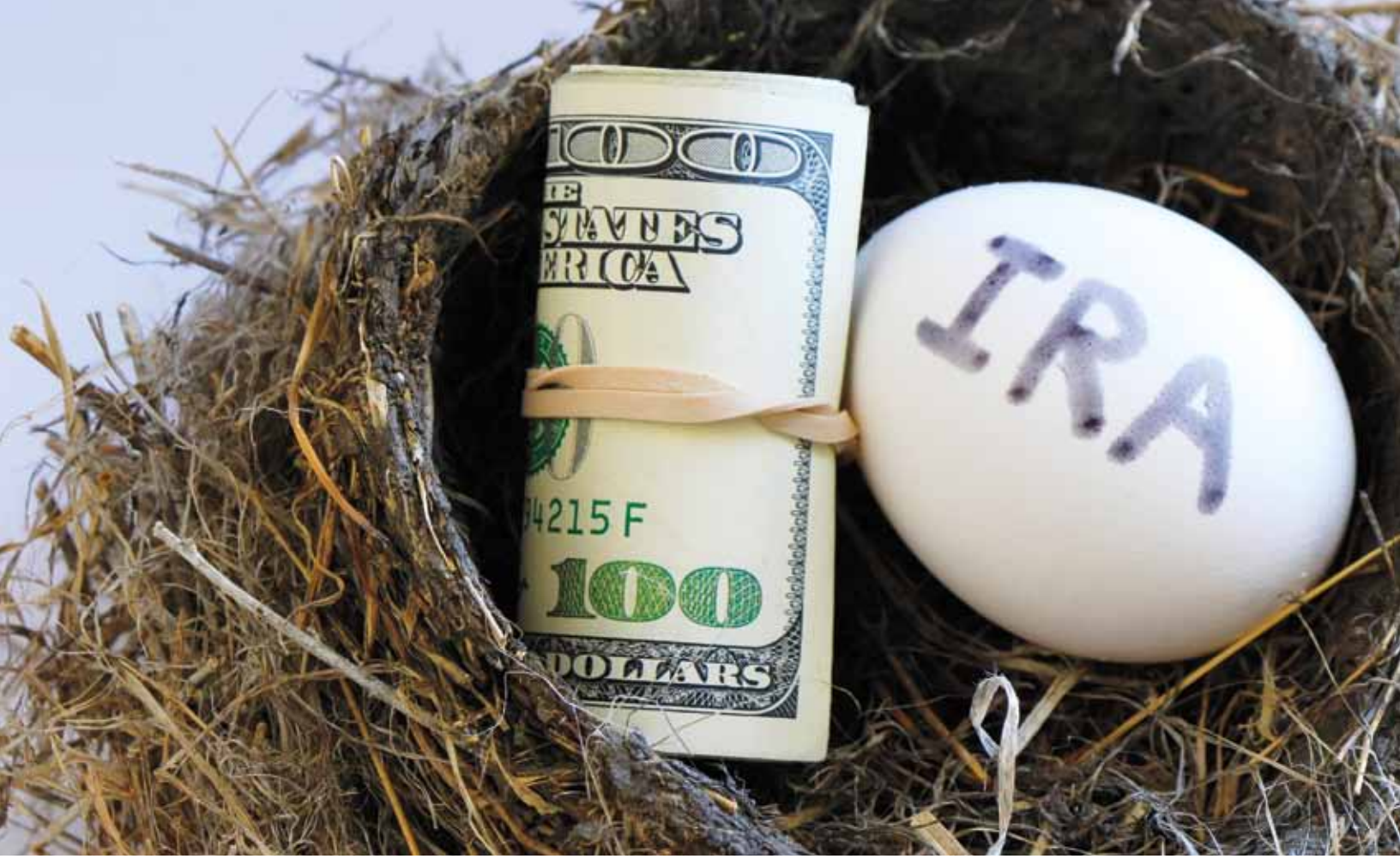
Fourth, make sure your fiduciary will be available to act. The age and health of a potential fiduciary should be considered in that your chosen fiduciary may be unwilling or unable to act for personal reasons, disability or death. Potential disadvantages of choosing a relative are their lack of expertise, disability or mortality, and an inability or unwillingness to confront family conflicts.

Fifth, we are often asked about appointing co-fiduciaries. The primary advantage of choosing more than one fiduciary is they serve as a check and balance to the other and are not left to make difficult decisions alone. The primary disadvantage can be a failure to agree on what is seemingly an easy or insignificant decision. This can lead to decisions being delayed or derailed altogether if the fiduciaries cannot agree.

Sixth, while it is understandable to look first to a family member to serve as fiduciary, there are circumstances for which a corporate fiduciary such as a banking institution or investment firm is the best choice. The first advantage a corporate fiduciary can provide is expertise. Corporate fiduciaries have the ability to use educated, impartial and reasoned decisions regarding financial matters. Corporate fiduciaries are also more likely to provide consistent accounting, reporting and ongoing communication with beneficiaries as a regular part of their duties. The second advantage a corporate fiduciary can provide is an assurance that the institution will be available to serve in a fiduciary capacity and manage assets for a long period of time. The third advantage a corporate fiduciary can provide is that in families that are prone to disagreement or involve blended families with potential conflict, a corporate fiduciary is a neutral party making decisions that treat all beneficiaries equally. They are objective and have no potential or perceived conflict of interest. The disadvantages to using a corporate fiduciary are that they typically cost more than an individual fiduciary. In addition, they can sometimes be more conservative or inflexible because of their increased liability, regulations and corporate infrastructure.

Finally, your thoughts about an appropriate fiduciary may change over time. It is advisable to revisit your choice after major life changes to you or your nominated fiduciary.

The decision regarding who to name as your fiduciary should be weighed and considered with your attorney. Decisions can involve personal, family, business, investment and tax considerations. Our attorneys are available to work with you to help make the best decision for you as part of your estate planning.



DON'T PLAN IN A VACUUM: INTEGRATING YOUR RETIREMENT AND ESTATE PLANS

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You've probably put a great deal of thought into planning for your retirement, but have you considered what will happen to your hard-saved retirement assets when you die? For many people, retirement assets make up a large portion of their estate. There are several different options you have when determining how to direct those funds upon your death, and it is important that you understand your choices so you can make the best decision for your overall estate plan.

The most-straight forward option for controlling your retirement assets after your death is through the beneficiary designation. If you don't name one or more beneficiaries, your assets will be distributed through the plan's default system, which may or may not result in a desirable

distribution. It is easy enough to name primary and contingent beneficiaries and keep those elections up to date. If you've gotten married, divorced, or welcomed a new child since the last time you updated your beneficiaries, it may be time for another look.

Many retirement accounts will name your spouse as default beneficiary. Some plans will default to your estate if you are unmarried or if your spouse predeceases you. Leaving retirement assets to your estate will likely cut short many of the benefits of your plan, so it is important to consider your beneficiary designations carefully and name contingent beneficiaries.

The most common beneficiary choice is to leave the entire account to a spouse. In fact, in some instances your spouse must give written permission to designate someone else as a beneficiary, so it is important to understand your particular plan's structure. There are sometimes specific benefits available only to your spouse. For example, your spouse may have the option of rolling over your IRA into a new or existing IRA in their own name, delaying the distribution of the assets and retaining the benefits of the tax-advantaged IRA account for longer. If your spouse needs to access your IRA funds and hasn't yet reached 59 ½, they may also establish an inherited IRA and use your life expectancy to make withdrawals. However, your spouse may also disclaim, or refuse to inherit, all or some of the retirement assets. In the event your spouse disclaims your retirement assets, it is very important that you've thought ahead and named contingent beneficiaries.

You may want to leave a portion of your assets to your children, or to a favorite charity, either as primary or contingent beneficiaries. Most plan documents will allow you some flexibility to name your beneficiaries according to your specific preferences, so you can work with your estate planner and financial advisors to make sure that you have completed the right paperwork to direct your assets according to your wishes.

A trust can also be a retirement account beneficiary. You may want to consider designating a trust as a beneficiary to add protection from the creditors of a child or other beneficiary. Through the structure of a trust, you can set up scheduled payments, specify required uses for distributions, such as education, or set conditions for distributions. Trusts are also a good way to provide for children from a previous marriage while ensuring that your current spouse also receives income from your retirement assets. Directing your retirement assets through a trust can be an effective way to add control to the distribution process and ensure that your assets are used exactly when and how you wish them to be, while also taking advantage of tax benefits and creditor protection that is not available through the ordinary beneficiary process.

That being said, the rules for trust beneficiaries can be complex, and if a trust is not structured properly, the assets will lose the very benefits the trust was intended to provide and may even become fully taxable as of the date received by the trust. The IRS has specific rules for non-person beneficiaries of retirement assets, and they must be strictly complied with. If the trust does not comply with those rules, you may end up sticking your heirs with a big, unintended tax bill.

In answering the question of where and how your retirement assets should be distributed after your death, there is a lot to consider. The tax consequences of your decisions are an important piece of your estate plan. Individuals and trusts generally receive more favorable tax treatment than estates, and your spouse can receive specific tax-favorable treatment with certain rollover options. Through the use of trusts, charitable giving, and other estate planning tools, you can reduce your taxable estate and allow your heirs and beneficiaries to get the most out of the gifts you give. If you'd like to learn more about integrating your retirement and estate planning, the attorneys at Gislason & Hunter can help.

Gislason & Hunter Estate Planning Services

Estate Planning is important to ensure the orderly transfer of family assets, as well as to protect those assets from unnecessary taxation. The Gislason & Hunter Estate Planning Practice Group offers a variety of services to assist you in creating the best plan for you, your family, your business or your farm.

Some of the many services our attorneys offer include the following:

- Drafting wills, trusts, codicils and powers of attorney
- Preparing health care directives and living wills
- Creating family business succession plans with emphasis on each family's particular goals and values
- Farm estate and succession planning
- Evaluating estate and gift tax issues and structuring planning options to minimize tax obligations
- Administering and assisting clients with probate proceedings, conservatorships and guardianships
- Advising on Medicaid, Medicare, nursing home and elder law issues
- Handling disputed estate and probate matters in litigation, arbitration or mediation formats

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