

# ESTATE PLANNING: MORE THAN DEATH AND TAXES

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*“Nothing can be said to be certain except death and taxes.”*  
Benjamin Franklin

Traditional estate planning has certainly focused upon death and taxes. However, now clients are demanding answers to many, dare we say, more important issues, such as protecting quality of life, insuring self-determination, and facilitating family harmony and problem-free life transitions as much as possible. For this reason, more estate planners are looking at the whole picture; they are looking for tools and methods to meet this growing need.

This outline will focus upon not only the traditional estate planning topics related to death and taxes, but also upon the next generation of estate planning issues including:

- planning for incapacity and long-term care;
- planning for blended families (second marriages);
- planning for minor children;
- planning for family members with special needs; and
- planning to avoid family fights

## I. INCAPACITY

### A. INTRODUCTION

Planning for incapacity is often overlooked, and yet there is a 65% chance that each of our clients will experience some period of incapacity and a 25% chance of suffering a long period of incapacity. The best method of planning is to use the appropriate legal tool to appoint a **surrogate** or **substitute decision-maker** to assist the client when, and if, the time comes.

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## **B. INCAPACITY**

When is a spouse, parent, or loved one no longer able to make decisions for himself or herself? Legally, the issue is one of **capacity**. Oregon law defines “incapacitated” as:

*“a condition in which a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person's physical health or safety or to manage that person's financial resources.”*

*“Manage financial resources,” means “those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.”*

“Incapacitated” persons who are unable to make decisions about their health and safety may require a court-appointed guardian. An inability to manage financial resources may require the appointment of a conservator. In both instances, the rights and the decision-making abilities of the person are substantially reduced.

## **II. PLANNING FOR HEALTH CARE DECISIONS**

### **A. THE OREGON ADVANCE DIRECTIVE**

If a person becomes sick and unable to make health care decisions, someone else may be required to make those decisions. If he or she does not have the appropriate legal tool in place, it may be necessary for a court to appoint another person (a guardian) to make health care and medical decisions.

The Oregon Advance Directive form allows a person to choose someone to make health care and medical decisions when he or she is unable to make those decisions. A spouse, partner, family member, or friend (called "health care representative") can be designated to act legally to make health care decisions. This document has no effect until the person signing the Advance Directive is incapable of making health care decisions.

The health care representative will be authorized to make most health care decisions necessary. This can include the authority to withdraw life support procedures, such as respirators or artificial nutrition and hydration. The Advance Directive is a statement to the family and the doctor regarding life support. This is an opportunity to direct that if death is imminent because of a terminal disease or injury, a person does or does not want artificial life support procedures used to postpone the natural moment of death.

The Advance Directive replaces the Directive to Physicians and the Health Care Power of Attorney. In 1993, Oregon combined the two different documents into one document, the Advance Directive. The Durable Power of Attorney for Health Care expired automatically after seven years, unless the person was unable to make health care decisions at the end of the seven-year period. Therefore, we strongly recommend that people update their planning by using the Advance Directive form.

The Advance Directive form has two main parts, which correspond to the documents used prior to 1993. Under Part B of the Advance Directive, a health care representative may be appointed to make health care decisions in the event of temporary or permanent incapacity. An alternate health care representative may also be appointed. Health care representative(s) must act in accordance with the desires of the person appointing them, to the extent those desires are known.

Part C of the Advance Directive gives an opportunity to give instructions to the health care representative and physician about tube feeding or life support.

The law governing Advance Directives allows the person signing it to make additional instructions beyond what is set out in the form itself. Some people give specific instructions about matters such as hospice care, pain control, visitors, and home death.

## **B. DECLARATION FOR MENTAL HEALTH TREATMENT**

Another document utilized in Oregon is the Declaration for Mental Health Treatment. This document allows someone, in advance, to select a representative to make mental health treatment decisions, and/or to give specific directions regarding future mental health treatment. The Advance Directive does not cover mental health treatment.

## **C. POLST**

The Physicians Order For Life-Sustaining Treatment is an order signed by the doctor at the direction of the ill individual, or his or her health care representative or guardian. The POLST is a tool to *implement* the ill individual's desires regarding life-sustaining measures.

## **D. GUARDIANSHIP**

A guardian is a person named by the court who has the authority and duty to make personal and health care decisions for a minor (under 18 years) or adult incapacitated person (the "protected person"). A guardian may determine where the protected person will reside and what medical care he or she will receive. The court may appoint a guardian either with unlimited authority, or only for specific actions. If the protected person previously executed an Advance Directive naming a health care representative who is not the guardian, the health care representative will have the authority to make many health care decisions instead of the guardian.

A guardian generally does not make financial decisions. The court may appoint a conservator to manage the finances of the protected person.

### III. PLANNING FOR FINANCIAL DECISIONS

#### A. POWER OF ATTORNEY FOR FINANCES

A “Power of Attorney” usually refers to a Durable Power of Attorney for Finances. This is a legal document in which the signer delegates to another (“agent” or “attorney-in-fact”) the authority to deal with finances and assets. Usually a Power of Attorney becomes effective when it is signed, although the signer may indicate that it is not to be used unless the signer asks the agent to use it, or unless the signer becomes incapacitated.

The Power of Attorney document describes the powers being given to the agent, and the agent does not have any authority to act outside the scope of such powers. Sometimes a Power of Attorney only allows the agent to deal with a specific matter, such as the sale of a particular piece of real estate, or with a specific asset, such as a bank account. This is known as a “Limited Power of Attorney.” In contrast, a “General Power of Attorney” gives the agent very broad authority to deal with assets and finances.

In Oregon, a Power of Attorney for Finances is “durable” unless specifically stated otherwise in the document. This means that the Power of Attorney remains valid even if after the person who executed it becomes incompetent. However, a Power of Attorney is only valid during the signer’s lifetime. When the signer dies, the Power of Attorney dies with him or her.

Clearly some of these provisions give broad authority to the agent, and the signer will want to give such broad powers only to someone he or she absolutely trusts.

Most standard forms of General Powers of Attorney do not include optional provisions, such as the right to make gifts, that in certain appropriate situations might be very useful. Some of the optional provisions to be considered are described below.

1. Support of Spouse/Partner. If the person making the Power of Attorney wishes to allow the spouse or partner to have the funds available for his or her own needs, then this should be specified.

2. Gifting. If gifting provisions are not included, any gifts made by the agent may be treated as a breach of fiduciary duty. Therefore, a person should consider including gifting provisions.

For instance, spouses might consider giving each other a Power of Attorney that includes provisions allowing assets to be transferred into just one of the spouse’s names. Then, if one spouse becomes ill and needs Medicaid to assist with his or her long-term care expenses, the healthier spouse can use the Power of Attorney to transfer assets into the healthier spouse’s sole name. This could be very helpful later if planning is done to preserve assets for the healthy spouse, while allowing the ill spouse to receive Medicaid.

As another example, if an individual has a taxable estate and has been making annual gifts in order to reduce the potential for estate taxes upon his or her death, the individual’s agent could continue to make

such annual gifts on his or her behalf if such gifting power were specifically granted in the Power of Attorney.

3. Authority to Change Estate Planning Provisions. The client should consider provisions to change beneficiary designations, create or modify Trusts, and disclaim assets. An agent named in a Power of Attorney cannot modify a Will.

4. Nomination of Fiduciaries. Despite good planning, a client sometimes becomes involved in a court proceeding such as a conservatorship, guardianship, family law proceeding, or other litigation. The client can name whom he or she would like to serve if a conservator, guardian, or guardian-ad-litem is appointed by the court.

## **B. CONSERVATORSHIP**

A conservator is a person appointed by the court with the authority and duty to manage the financial affairs of a person needing protection, such as a minor (under 18 years) or an adult incapacitated person (the “protected person”).

The conservator becomes the sole financial decision-maker for the protected person. The protected person loses all control of his or her property and assets, except for a few limited powers in certain situations. Sometimes a protected person may be competent to make a Will, or change beneficiaries of life insurance and annuity policies, but this should not be done without the advice of an attorney. The conservator may also give the protected person access to a limited amount of funds for personal use.

## IV. PLANNING FOR LONG-TERM CARE

### A. WHAT ARE THE TYPES AND COSTS OF LONG-TERM CARE?

Long-term care needs can range from around the clock medical treatment to simply requiring assistance with the daily activities of life. In the past, a nursing facility was the only option for care outside the home. Today, Oregon leads the nation in providing alternatives to the traditional nursing home-type care.

1. Nursing Home Care. Nursing homes, licensed by the State, provide several different levels of nursing care to residents. These range from intensive nursing and rehabilitative care for people with unstable medical conditions, to routine care for people with chronic medical problems. Current estimated costs for nursing home care range from **\$4,000** to **\$7,500** per month, depending on the level of care needed.

2. Adult Foster Care. An adult foster home provides care to five or fewer residents. The operator or resident manager lives in the home. Personal care, cooking, and cleaning are provided. Other types of care depend upon the qualifications and license of the provider. Estimated costs range from **\$2,500** to **\$4,000**.

3. Residential Care. Residential care facilities serve six or more residents and have staff on duty around the clock. Meals and housekeeping services are provided, but the amount of personal care and supervision varies.

"**Assisted Living**" is a particular type of residential care, with its own administrative rules. The focus is on providing care through a social model that emphasizes independence. Estimated costs for residential care range from **\$1,500** to **\$5,000**.

4. In-home Services. A range of services can be provided at home, from a short visit to meet a particular need for assistance, to live-in help. In-home services, generally, are not licensed by the State, although some providers carry their own license. Estimated costs vary according to the hours of service and the type of provider used.

5. Adult Day Care. Adult day care is available in a variety of settings ranging from freestanding programs to nursing homes or senior centers. It often functions as respite care, to allow a regular caregiver, such as a spouse, to have a break or to continue working. Daily charges are now about **\$50** to **\$100**.

## **B. WHO PAYS FOR LONG-TERM CARE EXPENSES?**

1. Health Insurance and Medicare. Health insurance, including Medicare, is primarily focused upon the payment of hospital and physician care for illness or accidents. Few health insurance carriers cover long-term care expenses. If they do, it is usually only for **skilled** care (the services of a doctor or nurse available 24 hours a day). Even if the insurance covers long-term care, it is often limited to a certain number of days (often only 100 days or less).

2. Long-Term Care Insurance. This is a relatively new form of insurance that can provide benefits for all levels of care including nursing homes, adult foster care, assisted living facilities, and in-home care services. People should shop wisely and compare several policies. Most companies provide excellent coverage. However, some long-term care policies contain limitations or exclusions that prevent them from being an effective mechanism for funding care over an extended period of time. (Policies sold in Oregon must now include coverage for alternatives to nursing home care.) We recommend that you seek the assistance of an insurance agent who specializes in long term care and can compare the rates and coverage of several different plans.

3. Private Pay. Long term care is often paid from personal or family funds. The funds of both spouses are considered available to pay for care. The assets of adult children are not available assets unless they have signed as a guarantor for the nursing home expenses.

4. Medicaid. Medicaid is a joint federal and State program. Medicaid covers the long-term care services for persons needing substantial assistance with activities of daily living in nursing and adult foster homes.

## V. PLANNING FOR DEATH

### A. LAST WILL AND TESTAMENTS

**WHAT IS A WILL?** A Will is a signed, written document that describes how to divide an individual's estate after death. In Oregon, anyone of at least 18 years of age can make a Will. The maker of a Will must follow certain important formalities for the Will to be valid.

#### WHAT ARE THE ADVANTAGES TO HAVING A WILL?

1. Decide who is in Charge. A Will allows a person to appoint a personal representative. This person or financial institution will gather the assets and distribute them according to the instructions.
2. Save Money. In a properly drafted and signed Will, the personal representative can be excused from posting a bond, thereby reducing estate expense. Often, the expense of a bond exceeds the cost of a Will.
3. Care for Minor Children. In a Will, a person can name a guardian to care for minor children in the event of the death of both parents.
4. Provide for Dependents. A Trust can be set up in a Will for the benefit of minor children or other relatives unable to manage their financial affairs. A trustee can be named to be responsible for making financial decisions, as well as determine when the Trust should end.
5. Plan for Estate Tax. Married couples with estates in excess of \$1,500,000 can include a Trust to minimize or eliminate estate and gift tax. The value of an estate includes most life insurance.

#### WHAT IF I DON'T HAVE A WILL?

If a person dies without a valid Will or Revocable Living Trust, the court distributes the property to relatives by following a strict formula called "intestate succession," set out in Oregon law.

- If a person is married when they die, their spouse will receive the entire estate if there are no children or if all of the children belong to both of spouses.
- If the children are not also the spouse's children (e.g., from a previous marriage), the spouse receives one-half of the estate and the children share equally in the other half.
- If there is no living spouse or children, the property may go to decedent's parents, siblings, nieces, nephews, or to aunts, uncles, and cousins, depending on the family situation.
- The estate will go to the State of Oregon only if there is no relative to take the property under the formula set out in the law.

The intestate laws do not reflect the desired distribution plan for many individuals. For example, part of the estate could pass directly to a minor child. This could require a court-appointed conservator to manage the minor's funds. A Will with a Trust for minors or directions to give the minor's share to a custodian under the Uniform Transfers to Minor's Act would avoid this expense.

In addition, the law of intestate succession does not recognize any relationships outside of blood, marriage, or legal adoption. This means that unmarried partners, close friends, and charities are completely excluded.

If a person does not have a Will, the personal representative must post a bond. The bond can be waived in the Will and save this expense, as cost of a bond can exceed the cost of the Will.

**DOES A WILL AVOID PROBATE?** A Will does not avoid probate; rather, a Will directs who receives the estate at the end of the probate process. Probate is the court proceeding that settles a decedent's estate and distributes a decedent's property. Probate also cuts off creditors' claims. This is especially important for business owners and professionals who may have unknown future claims against them.

**DO I NEED A WILL IF I HAVE A MODEST ESTATE?** Any amount of property, such as a home, constitutes an estate, so almost everyone can benefit from having a Will. If there are minor children, disabled dependents, relatives with spending issues, or if a person wishes his or her estate to go to anyone other than a spouse and children, a Will is beneficial.

**CAN'T I JUST WRITE MY OWN WILL?** A properly drafted Will involves decisions requiring professional judgment acquired by years of study, training, and experience. Only a knowledgeable lawyer can help avoid the many pitfalls of preparing a Will and advise the course best suited to an individual. If a person makes a mistake drafting a Will, the family will likely not know until it is too late.

**HOW OFTEN SHOULD A WILL BE REVIEWED?** It is important to have an attorney review a Will every three to five years, or if there is a change in life such as the birth of a child, marriage, divorce, or a significant change in assets. It is especially important to have a Will reviewed if a person marries or divorces because a Will is automatically revoked by a subsequent marriage and partially revoked by a divorce. In addition, it may be important to update the Power of Attorney or Advance Directive.

## **B. REVOCABLE LIVING TRUSTS**

A Revocable Living Trust is an estate planning document that allows assets to be managed and distributed in the manner desired, both during lifetime and upon death. It is referred to as a "living" Trust because it is established during lifetime and, in most cases, goes into effect immediately. It is a "revocable" Trust because it is free to be revoked or amended at any time as circumstances change.

**HOW DOES A REVOCABLE LIVING TRUST WORK WHILE I AM ABLE TO MANAGE MY FINANCES?** A Revocable Living Trust is created during a person's lifetime, and the assets are placed in the Trust while he or she is alive. The person making the Trust ("trustor") can name himself or herself as trustee. This means that he or she can manage the income and assets much the same as always, and file individual tax returns like before. The trustor can revoke or amend the Trust at any time, and can entirely determine the terms of the Trust.

If the trustor wants help in managing the estate now, even though he or she still has mental capacity, the Trust document allows the trustor to name a trustee or co-trustee to handle the Trust. Further, he or she has an opportunity to appoint someone to serve as trustee or co-trustee and then see if he or she handles things responsibly and according to the trustor's wishes. If the trustor is dissatisfied with the way the trustee or co-trustee handles the Trust, the trustor can take over as trustee, name a new trustee, modify the powers given to the trustee, or revoke the Trust altogether.

**WHAT HAPPENS IF I BECOME INCAPACITATED?** In the Revocable Living Trust, a person can specify under what circumstances a successor trustee takes over management of the Trust. This is usually when the trustor becomes incapacitated. He or she can spell out in the Trust how incapacity must be established. Typically, a determination of incapacity requires one or two letters from a physician. Once incapacity is established, the successor trustee, who has been named in the Trust, can take over management of the assets.

A Revocable Living Trust avoids the need for a court order establishing a conservatorship if at some time in the future the trustor becomes unable to manage his or her own financial affairs, either temporarily or permanently. While naming an agent in a Power of Attorney for Finances can often accomplish this, Powers of Attorney are not as reliably recognized by financial institutions.

**HOW DO I KNOW MY TRUSTEE WILL PAY FOR MY HIGHEST QUALITY OF LIFE AND SUPPORT MY VALUES?** A Revocable Living Trust is flexible and can be tailored to an individual's specific needs, desires, and financial resources. Recently, we are seeing an evolution in the drafting of Revocable Living Trusts. The primary purpose of the Trust is no longer simply probate avoidance. Now, more focus is being placed upon the beneficiary's "quality of life." One alternative is to draft, as part of a good living Trust, language that provides direction and assurance that the trustee will use Trust funds to promote the highest quality of life.

Specific instructions about care and comfort are particularly important when the successor trustee is an institution (bank or Trust company), or when a family member is very busy or geographically remote. It is important that the Trust is clear that the needs of the lifetime beneficiary take precedence over any remainder beneficiaries.

Examples of provisions that can be included are the following:

- specifying that a person prefers to be cared for at home (even if the cost of such care would be significantly greater than the cost of nursing or other long-term care);
- authorizing the trustee to provide additional services and care monitoring if a person becomes hospitalized or requires placement in a long-term care facility; and
- the continuance of contributions to a person's Church or charitable organizations.

### **ARE THERE OTHER PROVISIONS THAT SHOULD BE INCLUDED FOR FLEXIBILITY?**

Often it is critical to include additional provisions to allow for future flexibility, particularly if the Trust is a joint Trust between spouses or partners. Examples are the following:

1. Exercise Reserved Powers. Often the terms of a joint Trust will allow the Trust to be amended only by both trustors. The option of allowing one trustor to exercise reserved powers should be discussed. Further, the trustor should consider whether an agent in a Power of Attorney for Finances should be given the authority to exercise certain powers reserved in the Trust for an incapacitated person.

2. Flexibility for Purposes of Medicaid Planning. The standard Revocable Living Trust specifies that if a trustor becomes incapacitated, the trustee will provide for the trustor's needs. However, in some instances this traps the trustor into a situation in which Medicaid planning is not allowed. For example, if one spouse is incapacitated, then a Medicaid plan might involve transfer of the couple's assets to the name of one spouse. A client who anticipates a possible future need for Medicaid should consider not doing a Revocable Living Trust, or, if a Trust is created, to incorporate flexible provisions allowing withdrawal in the event of planning. The Power of Attorney should also be carefully crafted in this situation.

3. Successor Trustee Provisions. The trusteeship is a critical role, but the successor trustee provisions are often not given much thought. The trustors in a joint Trust may want to consider giving authority to one trustor to change the successor trustees, or to give successor trustees the ability to name a new trustee or successor trustee. In some cases it is appropriate to give the beneficiaries the ability to name a new trustee, but the trustee should be cautious about giving unfettered authority.

**HOW DOES THE REVOCABLE LIVING TRUST WORK AT MY DEATH?** A successor trustee will have the authority to take over management of the Trust and follow the instructions as spelled out in the Trust. Assets that are owned by the Trust will avoid probate entirely, which, in turn, can avoid significant costs and delays at death. People with real property in more than one State can avoid multiple probates with the use of a Trust.

Another advantage of a Trust is that the financial affairs are kept completely private. A Trust eliminates the need for a court proceeding, and other than tax returns, there is no public record.

**DOES A REVOCABLE LIVING TRUST SAVE ON TAXES?** Spouses with large estates can incorporate a tax savings plan to eliminate or minimize estate taxes. A tax savings plan can also be incorporated into Wills, but in most cases this ultimately requires a probate when each spouse dies. Therefore, use of a joint Revocable Living Trust or separate Revocable Living Trusts for each spouse will avoid two probates instead of one.

**WHAT OTHER DOCUMENTS WILL I NEED?** In addition to the Revocable Living Trust, a person will need a Pourover Will and Powers of Attorney for Finances. Also, typically the attorney who assists the person will prepare deeds to transfer real property to the Trust and provide an Advance Directive for Health Care.

**WHO SHOULD BE MY SUCCESSOR TRUSTEE?** A successor trustee should be someone who is trustworthy, responsible with investments, good with paperwork, and preferably a good communicator. This can be an adult child, other relative, friend, or professional fiduciary.

**WHAT ARE THE DISADVANTAGES OF A REVOCABLE LIVING TRUST?** A Revocable Living Trust is not necessary in every case. It typically costs \$800 to \$1,200 more for a Trust package than a comparable Will package. It may not be necessary to incur this additional cost for people who are younger, healthy, and do not have large estates. However, some people in these circumstances still choose a Trust because they want to make things easier for their families in the event of an untimely death.

There is more paperwork involved in finalizing a Revocable Living Trust than a Will because title to most of the assets is transferred into the Trust. Some people find this cumbersome and confusing.

In short, a Revocable Living Trust, while often very helpful and cost-effective, is not always necessary. An experienced attorney can help decide if it meets a person's individual needs.

## **C. TRUSTS FOR MINOR CHILDREN**

Parents of minor children have special estate planning considerations. Statistically, it is unlikely that a person will die while their children are minors, but it does happen, even though no one likes to consider the possibility. In a Will or Revocable Living Trust, a person can establish a Trust for minors that answers all of these questions.

**HOW WILL A PERSON PROVIDE SUPPORT FOR THEIR CHILDREN IF ONE OR BOTH PARENTS DIE?** A Trust for minors often takes effect after both parents die. The Trust can provide for the support, care, and education of children until they reach a specified age. A Trust will assure that the children benefit from the Trust assets right away but not have control over them until they are mature enough to handle the responsibility.

A Trust provides flexible control of assets for the benefit of minor children. In the Trust document, a person decides how the money will be spent. For example, parents who want to encourage their children to attend college should include provisions for the payment of higher education costs.

Without a Trust for the minor children, the court may have to appoint a conservator to manage assets for minor children. A conservator is restricted by law, must be bonded, and is required to file annual accountings with the probate court. This is an expensive and time-consuming option.

**WHO WILL BE IN CHARGE OF MANAGING THE ESTATE FOR THE CHILDREN?** A person would select a trustee to manage and control the Trust for the benefit of the children (the beneficiaries). The trustee follows the directions spelled out in the Trust, using the assets for the beneficiaries. The trustee should be someone who is financially responsible and knows the children's needs. If there is not a Trust for minors and a fiduciary is necessary, the court will have to appoint someone without the parent's guidance.

**WHO WILL CARE FOR THE MINOR CHILDREN SHOULD BOTH PARENTS DIE?** In a Will or Revocable Living Trust, parents can also nominate a guardian to care for their minor children if both parents die. A guardian has the power and responsibility of a parent and makes decisions about the children's upbringing such as schooling, religious training, and medical treatment. The nomination of a guardian does not guarantee that this person will be appointed. However, it lets the court know the maker's wishes, and Oregon law requires the court to carefully consider the maker's named preferences.

**HOW WILL A PERSON PROVIDE FOR THEIR DISABLED CHILD?** Parents of a disabled child can use a special Trust called a Supplemental Trust or Special Needs Trust to manage assets after their deaths. This Trust can ensure that the disabled child will continue to be eligible for government programs. They can also nominate a guardian for their disabled child.

## **VI. TAX PLANNING ESTATE AND GIFT TAXATION AND INHERITANCE TAXES**

### **A. WHAT IS THE FEDERAL ESTATE TAX?**

The federal estate tax is a tax assessed at a person's death on the transfer of assets to their heirs or beneficiaries. While the federal estate tax is assessed at a person's death, there is also a tax on lifetime transfers of wealth called the federal gift tax.

The federal estate tax is charged if the value of the estate is **above** a certain threshold, often called the applicable exclusion amount. The applicable exclusion amount for the year 2009 is \$3,500,000. This means that each person can transfer up to \$3,500,000 without incurring paying the federal estate tax. Under current legislation, the applicable exclusion amount is change as follows:

Jan. 1, 2010	repeal of the estate tax
Jan. 1, 2011	\$1,000,000

As can be seen from the above chart, the estate tax is currently scheduled to repeal. However, on January 1, 2011, this legislation will expire, and the applicable exclusion amount would automatically revert back to \$1,000,000. See below for a further discussion of this issue.

### **B. WHAT ASSETS ARE INCLUDED IN MY ESTATE?**

The federal estate tax is computed on the net worth of the assets in the **taxable estate**. It is also important to understand that the taxable estate is different than the probate estate. The probate estate only contains assets that are subject to probate, while the taxable estate includes every asset a person owned, or exercised control over, upon time of death. Thus, assets that are owned outright, as well as assets in a Revocable Living Trust, are included in the taxable estate. Some people are surprised to learn that the following assets are also included in the taxable estate:

- the death benefit value of any life insurance policy that is owned; and
- the value of a retirement account, even if there is a designated beneficiary.
- any assets you own jointly (with right of survivorship) even with your spouse.

### **C. DO I HAVE TO WORRY ABOUT FEDERAL ESTATE TAX?**

The assets in the taxable estate will be subject to federal estate tax if their combined fair market value on the date of death is greater than the federal applicable exclusion amount. The current applicable exclusion amount is \$3,500,000.

#### **D. DO I HAVE TO WORRY ABOUT TAXES IF I HAVE A REVOCABLE LIVING TRUST?**

While a Revocable Living Trust may protect assets from probate, it will NOT shield assets from estate tax without further tax planning. A person should contact an experienced estate and tax planning attorney who can discuss other techniques to reduce the exposure to estate taxes.

#### **E. ISN'T THE ESTATE TAX GOING TO BE REPEALED?**

Under current law, the estate tax is scheduled to be repealed for one year, beginning on January 1, 2010. However, the scheduled repeal automatically expires on December 31, 2010, and the estate tax will come back into effect on January 1, 2011. There have been discussions by the President and Congress about permanently repealing the estate tax, but this does not seem likely. Most observers believe Congress will pass legislation this year continuing the estate tax. The changing estate tax picture emphasizes the need for flexibility in your estate planning documents. The use of a disclaimer trust may help. (See *Building Flexibility into Estate Planning*, below.)

#### **F. OREGON INHERITANCE TAX LAW**

The State of Oregon will also assess a tax (called the Oregon Inheritance Tax) on the transfer of assets to your heirs and beneficiaries at your death. An Oregon resident will pay Oregon inheritance tax if the value of the gross estate exceeds the Oregon applicable exclusion amount.

While the Oregon inheritance tax has traditionally been linked to the federal applicable exclusion amount (See what is the Federal Estate Tax? above), in 2003 a new Oregon inheritance tax law came into effect. Under the new law, Oregon creates its own applicable exclusion amounts which no longer track the federal law. The current Oregon applicable exclusion amount is **\$1,000,000**.

Thus a decedent dying in Oregon in 2009 with a gross estate of \$1,500,000 will not have to pay any federal estate tax (because the federal applicable exclusion is \$3,500,000 for 2009) but will owe Oregon inheritance tax

#### **G. BUILDING FLEXIBILITY INTO ESTATE PLANNING.**

The future changes in the federal estate tax exemptions and the disconnected Oregon Inheritance tax exemptions highlight the importance of building as much **flexibility** as possible into good estate planning documents. With the use of **disclaimer planning**, often referred to as a "Disclaimer Trust," taxpayers can wait until the death of the first spouse to see what the tax rules and exemption amounts are **at that time** and make a decision whether to fund a Credit Shelter Trust.

(Note: If you are unsure whether your will or trust contains disclaimer planning and flexibility, contact Fitzwater Meyer and ask for a member of our Estate Planning and Tax Team to review your estate planning documents.)

## VII. PLANNING FOR DISABLED CHILDREN

### A. INTRODUCTION

**WHAT PLANNING SHOULD A PARENT DO FOR A CHILD WITH A DISABILITY?** Parents of an adult or minor child with disabilities need to plan for personal and financial assistance and management for their child.

1. Personal Assistance. Very severe disability can often result in the inability to make personal and health care decisions. For minor children, these decisions are most often made by their parents. For adult children with disabilities, the parents have often become the court-appointed guardian for the disabled person and can make all the necessary decisions about the person's care, placement, personal and medical needs.

The important planning issue is "*what will happen when the parents die?*" Who will become the personal decision-maker (guardian) for the child with disabilities? Ultimately, the decision to appoint a successor guardian (for a minor or an adult child with disabilities) is made by a court. However, the court places great weight in the choice of the deceased parent and guardian. Therefore, it is very important for the parent to make his or her wishes known to the court. The most common method is to include language in the parent's Will recommending the appointment of the parent's first choice (and at least one alternate) as successor guardian for the child. (Important Note: this is one reason why Wills are so important for parents with minor or disabled children.)

2. Financial Assistance. As mentioned above, a person with a severe disability may be unable to manage his or her own financial matters. Financial assistance is often provided by a parent or trusted family member serving as a Power of Attorney or as a court-appointed conservator. If a conservator has been appointed, the parent needs to take steps to let the court know the parent's wishes regarding the appointment of a successor conservator upon the parent's death.

Many parents wish to leave an inheritance to their disabled child. We recommend establishing a Trust for the benefit of the child. The two most common Trusts for a disabled child are a Discretionary Support Trust and a Special Needs Trust.

### B. DISCRETIONARY SUPPORT TRUST

**WHAT IS A DISCRETIONARY SUPPORT TRUST?** A Trust for a (minor or adult) child with a disability can be established by the parents during their lifetime (Living Trust) or it can take effect after both parents die (Testamentary Trust). A Testamentary Trust would be included as a part of the parent's own Will or Revocable Living Trust.

The Trust can provide for the support, care, education, and assistance needed by the disabled child for the remainder of his or her lifetime. The parent appoints a trustee who will have the discretion to make (or refuse to make) payments for the benefit of the disabled child. This is commonly called a

“Discretionary Support Trust.” This arrangement will adequately provide for a person who cannot manage his or her own financial affairs.

**WHAT CAN HAPPEN WITHOUT A TRUST?** Without a Trust for a child with disabilities, the funds left by the parents could be quickly dissipated or misused by the child. Also, the disabled child might become the victim of undue influence and/or financial abuse. A Discretionary Support Trust is one of the best methods of preventing financial harm to the child.

Upon the parent’s death, the court may require the appointment of a conservator to manage the assets of the disabled child. A conservator is restricted by law, must be bonded, and is required to file annual accountings with the probate court. This is an expensive and time-consuming option. Again, the Trust may be able to prevent this.

**WHAT ABOUT PUBLIC BENEFITS AND SPECIAL NEEDS TRUSTS?** Often a person with a disability is receiving some form of public assistance and/or benefits. There are several government programs that provide assistance to people with disabilities. This help may take the form of cash, medical assistance, housing, or food.

Some of these programs, such as Supplemental Security Income (SSI) and Medicaid, have financial eligibility requirements. There may be resource requirements that limit the amount of assets a person can own and still be eligible for the program. Similarly, if monthly income is too high, it may affect eligibility for benefits.

A person with a disability who is also receiving public assistance benefits may require the establishment of a Special Needs Trust both to provide financial management and to ensure that the person will continue to be eligible for government programs. See below for a discussion of Special Needs Trusts.

### **C. SPECIAL NEEDS TRUSTS**

**WHAT IS A SPECIAL NEEDS TRUST?** A Special Needs Trust is a planning tool to benefit people who receive government benefits. This type of Trust preserves eligibility for government benefits and establishes a separate fund that can pay for things over and above basic needs that improve the beneficiary’s quality of life.

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