

ESTATE PLANNING

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1) Introduction

- a) Possibly the most important part of the estate planning process is the initial interview.
- b) This outline will first summarize some important general guidelines for that initial interview, and will then separate the estate planning process into two categories: the "simple" estate, not involving federal estate tax or business continuation issues, and the "complex" estate, to which are applied all of the guidelines of the simple estate, as well as the guidelines for those estates involving potential federal estate taxes or issues pertaining to the continuation of a family farm or business.

2) Initial interview for both "simple" and "complex" estates.

- a) It is important to develop a rapport with the clients, to try to get to know them, to help them feel comfortable with you and to trust you. You will likely have an extended relationship with them, because estate planning is frequently a continuous process. To effectively help him, you must develop a comfortable relationship, a relationship of trust. These are not arms length business transactions. The estate planning process involves that which the clients hold most dear, the security and protection of their family, the passing of their property to their loved ones, and possibly the protection and continuation of a business or a farm they worked decades to build. You should not just go into the room and start going through your checklist, but should get to know the clients, encouraging them to talk about themselves, their family, their farm or their business. You should try to elicit their concerns, fears and anxieties.
- b) Every client is unique, and presents unique issues. An estate planner cannot simply fill out checklists and crank out forms.
- c) At the same time, you must gather the facts about the clients and their estates that will allow you to help them plan effectively. This fact gathering process is essential to effective estate planning. The more information you can obtain, the more effective your estate plan is in meeting the goals of the client. Typically, I try to maintain a conversational attitude with the clients, and do not take verbatim notes. I then dictate a comprehensive memo after our conference.
- d) I try to let the clients to most of the talking, but I do try to explain to them the purpose of the planning process, the many things that a well-thought-out estate plan can do for them and for their families. This helps the client, and emphasizes the value he gets for your services. I explain that the primary purpose, of course, is to achieve the desired disposition of their property throughout their lives and at their deaths at the least cost with the fewest delays and complications. However, I explain that the process can do so much more for clients and their family. I try to emphasize these benefits, including the following, both to make a client aware of the importance of these decisions and to enhance the client's appreciation for the value of my services: provide guardians to care for minor children; provide trustees to manage the estates of minor children; provide for the incremental distribution of an estate to children or grandchildren

who should not get their full inheritance at age 18; addressing the client's available income upon retirement.

- e) The client should be urged to ask questions if they do not understand something. Many have read information about estate planning, especially farmers. The estate planning process is both an implementing and an educational process. Your goal should be to implement the appropriate strategy and to achieve client understanding of that strategy. The better the client understands it, the more effectively the process is implemented, and the more sensitive the client is to necessary modifications.
- f) Usually, in our conversation setting up the appointment, I will ask the client to bring with him copies of any prior Wills, Trusts, or Powers of Attorney that the client has signed, and I will briefly review those at our initial conference.
- g) If the client has a pre-prepared financial statement, I like to get that before the first client meeting. That will give me a good idea as to the whether their situation involves federal estate tax planning.
 - i) However, I only ask for this if it is pre-prepared for some other purpose, such as bank financing. I usually do not ask the client to prepare a financial statement for our planning process, because if they have to prepare specifically for our meeting, they will procrastinate, and may never even come in at all. I will prepare a financial statement based upon our interview.
 - ii) I will usually have a form with me entitled Family Estate Record (form 1). Depending on the client, I will usually attempt to fill that out during our session, or will just discuss the assets generally, and give it to my client to complete and send or bring back to me. This inventory of assets asks for an estimated value of the property, together with dates and cost of acquisition, which helps in estimating the cost basis of the property.
 - iii) This form also asks how the property is held or owned. Real property (land) and personal property (accounts, stocks, bonds, livestock, machinery, household goods, bank accounts, bonds, etc.) will generally be involved. The manner in which title to property is held will determine whether it is part of the estate for probate purposes and will have ramifications for federal estate tax planning. Among the forms of ownership are sole, fee simple, ownership; life estate with remainder (right to use during life, and transfers automatically to remainder man at death); joint tenancy with right of survivorship (each own undivided interest, which passes by law to surviving joint tenants at death); tenancy in common (each own an undivided interest, and the interest of each passes by virtue of that owner's Will); partnerships, regular or limited; limited liability companies; corporations; transfer on death accounts.
 - iv) I will ask the client about life insurance on the client or the client's spouse, and will ask for copies of those policies, if I think a review of those policies would be necessary in the planning process.
 - v) I will make sure to ask the clients about both assets and expectancies that may not normally appear on a financial statement, including general powers of appointment, interests as

beneficiaries of trusts, contingent interests, and expectancies of inheritances from estates of others. Sometimes, these can make a huge difference in the future value of the estate.

- vi) If I know there is going to be federal estate tax planning, I will ask the client for copies of the past five years' income tax returns, which may give rise to further question of the client. Sometimes, financial statements are incomplete.
 - vii) Again, if there is a likelihood of estate tax planning, if the client has filed prior gift tax returns, I will request copies of the returns.
 - h) The first thing I will do is to get an idea of their net worth, the value of their assets and debt, and their current income. This will give me a general idea as to the overall nature of the estate plan, and whether we have to develop a more complex plan, to minimize federal estate taxes, for example, or to provide for the continuation of a business or a family farm.
 - i) If there are minor children, the choice of guardians and trustees are perhaps the most important decision the client makes. I discuss with the clients the characteristics of an appropriate guardian for their children and trust to manage their assets, for the benefit of their children.
 - j) I also like to get some idea as to the family relationships. Usually, the clients desire to divide their assets equally among their children. If this is not the case, I try to explore the reasons for this with the client, and sensitize them to the fact that grossly unequal divisions can create bitter and permanent divisions among their children. I urge them to think that through carefully, and, if a relationship exists, to talk to the child about the reasons for his reduced distribution.
 - i) I will attempt to explore relationships with children from former marriages.
 - ii) I will want to review prenuptial or postnuptial agreements.
 - iii) I may even want to review divorce decrees, to see whether they in any way restrict the clients' ability to distribute their assets.
 - k) If the clients own a business or a farm, I will generally discuss their desires regarding the disposition of the business or the farm upon their retirement or at their deaths.
 - l) I will generally explain the various documents that could be helpful in their estate planning process. If the planning will involved federal estate tax or business or farm continuation planning, I will commonly follow up with a comprehensive summary of their options.
 - m) Sometimes, depending upon the situation, it may be a good idea to attempt to schedule a family meeting at which you explain the estate plan to the client's children and promote their understanding of the plan.
 - n) I will also review their options regarding long-term care planning.
- 3) Simple estates
- a) Intestate succession (SDCL 29A-2-101 through 114)
 - i) Sometimes, a possible option for a client would simply be to do nothing.

- ii) I explain to that client that the State has set up an estate plan for someone who dies without a will. If the decedent leaves a spouse and no descendants, the spouse receives 100% of the estate. If the decedent leaves a spouse and children of a prior marriage, the spouse receives the first \$100,000 and 1/2 of the balance of the estate, and the children equally succeed to the other 1/2 of the estate.
- iii) If there is no spouse and no children, the decedent's father and mother share the estate equally. If there is no spouse, no descendants, and no father or mother, the brothers and sisters share equally in the estate, by right of representation (if there is a deceased sibling, that sibling's children share equally their parent's share--which is referred to as "by right of representation"). If there is no spouse, no descendants, no father or mother, and no brothers and sisters, the maternal grandparents and the paternal grandparents each receive one-half of the estate. If there are no beneficiaries, the estate escheats to the common school fund.

b) Elective share (SDCL 29A-2-202)

- i) On occasion, a client wants either to disinherit his or her spouse, or to curtail any distribution to the spouse. In that event, you obviously cannot represent both spouses, even with a signed "Waiver of Conflicts" form. If I continue to represent the disinheriting spouse, I will explain the elective share statutes to my client.
- ii) The surviving spouse of a decedent who dies domiciled in this State has a right of election to take an elective share equal to the value of the elective share percentage of the augmented estate, or \$50,000, whichever is greater, determined by the length of time the spouse and the decedent were married to each other. The schedule is set forth in the statute, and allows from 3% of the augmented estate, for a spouse married between one and two years, to 50%, for a spouse married fifteen or more years. The "augmented estate" is basically the value of all of the assets owned by either the husband or the wife, including decedent's non-probate transfers to others (for example, transfers with a reserved life estate), the decedent's non-probate transfers to the surviving spouse, and the surviving spouse's property and non-probate transfers to others, and further including gifts made within two years of the decedent's death.

4) Homestead and family allowances

- a) In addition to the elective share, the spouse is entitled to certain other statutory exemptions.
 - i) The spouse or minor children are entitled to a homestead exemption as provided in SDCL Chs. 43-31 and 45. Their home cannot be taken by a creditor until after the death of the spouse or the time the youngest child turns 18. If the homestead is sold, \$60,000 of the proceeds is exempt. Further, the homestead of a single person, over seventy, is exempt up to a value of \$170,000.
 - ii) In addition to the homestead allowance, the decedent's surviving spouse is entitled to the property and cash described as exempt property in SDCL 43-45 as follows: Family pictures; Pew in church; Burial lot; Family Bible, all school books, and other books in the family library not exceeding in value \$200.00; wearing apparel and clothing of decedent; all provisions for family on hand or growing (food) and fuel for one year; and household and kitchen furniture.

- b) In addition to the exemptions, the surviving spouse, and the children whom the decedent is required to support, shall be allowed a reasonable family allowance in money out of the estate for their maintenance during the period of administration, as follows:
- (1) Without the necessity of court approval, the personal representative may determine the family allowance in a lump sum not exceeding \$18,000 or in installments not exceeding \$1,500 per month for one year.
 - (2) The family allowance shall be payable to the surviving spouse, if living, for the use of the surviving spouse and any minor or dependent children; otherwise to the children, their guardian, conservator, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or the guardian, conservator, or person having the care and custody of that child, and partially to the spouse, as their needs may appear.
 - (3) The family allowance is exempt from and has priority over all claims except the homestead and exempt property allowances. (SDCL 29A-2-403)
- c) Prenuptial or postnuptial agreements.
- i) In the case of a second marriage, especially where both parties have significant assets, there are often very legitimate reasons for a desire to distribute assets to someone other than a client's spouse.
 - ii) In that event, or in the event of a client's desire to disinherit his spouse, I explain that the only way to evade the provisions of the Elective Share statutes, or any other statutory allowances, is to have a valid and enforceable prenuptial or postnuptial agreement. There must be a written agreement, upon full disclosure of all assets (SDCL 29A-2-213), and it is advisable to have the spouse obtain the assistance of counsel before signing the agreement.
- d) Will
- (1) Decision to use a Will
 - (a) Property can be transferred during the life, or at the death, of the individual. A Will, trust, gift, annuity, insurance policy, sale, creation of co-ownership, or other strategies can be used, usually in combination, to develop an estate plan for the disposition of property that will most nearly fit your client's particular needs and situation. Of course, the most common is the Will.
 - (2) Most clients cannot afford to diminish their estates by gifting assets during their lives. For most clients, their inter-vivos provision for their children is limited to the purchase of life insurance, which secures both the spouse and the children. Thus, the Will is the instrument by which they dispose of their assets.
 - (3) The basic decision is whether to proceed with a Will or to proceed with a Revocable Trust, which avoids probate. There are some advantages to probate:
 - (a) Proceeding with a Will can be simpler, because it does not involve any initial and ongoing transfers into trust. Managing your assets as a trustee, in a Living Trust,

necessitates the execution of repeated, timely Certificates of Trust to verify that the trustee can act on behalf of the trust.

- (b) The probate process can cut off claims of creditors, who must file claims within four months of first publication.
 - (c) The probate process, to one degree or another, dependent upon the type or probate selected, provides some degree of supervision. A lawyer is involved, and the parties know that there is recourse to the Court if there are issues among heirs or with creditors. The mere idea that a Court is overseeing the process can prevent problems (e.g., self-dealing) with the administration of the estate.
- ii) The probate process can be tailored to the complexity of the estate, and, can be relatively inexpensive, and can be relatively inexpensive.
- iii) Distributions under a Will
- (1) How does your client wish to divide his property at his death? Generally, there are "special bequests," or distributions of specifically described property or in specifically delineated amounts, and "residuary bequests," which divides the "rest and residue" of the estate in given percentages.
 - (2) Are there any special bequests, or does he simply want his residuary estate distributed to his spouse, or if deceased, divided equally among his children?
 - (3) Does he desire to disinherit any of his children? If so, he must do so expressly, and probably should include a brief explanation, either in the Will, or to be maintained for the attorney's file.
 - (4) Does he desire to provide for his parents, either during his life or at his death?
 - (5) Would he like to make any charitable bequests?
 - (6) Whom would he like to serve as trustee for any minor children or grandchildren who may survive him?
 - (7) At what ages would he like the trust principal to be distributed to the minor children or grandchildren? Typically, clients like to distribute 1/3 at age 22, 1/2 of the balance at age 24 or 26, and the entire balance at age 26 or 30.
 - (8) Are their children or other beneficiaries who are disabled, and who qualify for Medicaid or SSI or other property or income-based benefit programs? If so, the client might need to make a distribution to that children in a special needs trust, which provides benefits in a fashion that will not disqualify the child from the program.
- iv) Personal Representative.
- (1) Who does he desire to act as Personal Representative and a successor?

v) Guardians

- (1) One of the most important decisions, for a client who has minor children, is the choice of a guardian or guardians for the client's children.
- (2) Because of the importance of this decision, the choice of guardians should be revisited periodically to assure that there have not been any changes of circumstance.
- (3) You can also insert standards and conditions that govern the exercise of the guardians' duties, such as raising the children in a certain faith, sending them to certain schools, and providing them with certain types of lessons.

vi) Trustees

- (1) The ideal situation is where a single individual or couple can serve as both Guardians and Trustees. This best simulates a parental situation. Often, that is not possible, and the clients choose one couple as co-Guardians and one as co-Trustees. If you name a couple, you should include a provision for what should happen in the event of divorce. The Trustees should have some experience in managing and investing money. You can also include directions and guidelines as to the amount of money to be spent in support of your children, the types of colleges they are authorized to attend, and similar matters.

vii) Codicil

- (1) A will can be easily amended by a document called a "codicil," which must be executed with the same formalities as a will.

viii) Abatement issues.

- (1) If there are excessive debts, so that there are insufficient assets to pay all testamentary bequests, the bequests are "abated" to pay those debts. The "order of abatement" is as follows: property not disposed of by the will; property devised to a residuary devisee; property not specifically devised; and all other property. If the client wants to alter that "abatement" order, it must be done in the Will.

e) Revocable (Living) Trust

- i) Using the Revocable trust to dispose of assets will remove the necessity of probate.
- ii) All assets must be transferred to the Trust, with the possible exception of a checking account or a vehicle, of an aggregate value of less than \$50,000, which can be administrated without probate under the "small estate" procedure, requiring a simple affidavit to transfer assets.
- iii) With the Revocable Trust, there are no delays in the empowerment of the fiduciary to act on behalf of the Estate. The fiduciary can act immediately after death, or at least as soon as a death certificate is available.

- f) Pour-over Will
 - i) Where a Revocable Trust is utilized, I usually recommend that a "Pour-over Will" also be executed. If the clients forget to transfer an asset to the Revocable Trust, the "Pour-over Will" distributes it to the Trust, rather than allowing it to pass intestate.
- g) Testamentary Trust for Spouse
 - i) Sometimes, there is a concern that the surviving spouse does not have the ability to manage the decedent's estate, if it were left outright to the spouse. A spousal trust may be advisable, whereby a trustee is appointed to make investment and management decisions, for the spouse. The trust can also give the trustee discretion as to the distribution of trust income or principle.
- h) Testamentary Trusts for minor children or grandchildren.
 - i) For clients with minor children (and even if the children are grown, there is always the possibility that one of the client's children will predecease the client, leaving minor grandchildren), I recommend a trust for minor children or grandchildren in the Will. The trust allows the trustee discretion as to distributions for the support, health and education of the children. Clients usually opt for an incremental distribution of the trust principal (1/3 of the child's share at age 22, 1/2 of the balance of the child's share at age 24, and the entire balance of the child's share at age 26), rather than the distribution of the entire share when the children reaches majority (age 18).
- i) Q-tip Trust
 - i) Sometimes a married couple will have a concern that, after the death of the first to die, the survivor will remarry, and the new spouse will get control of the assets, at the expense of the spouse and the children. To avoid that eventuality, property can be left in trust for the surviving spouse, and the surviving spouse can receive the income from the trust for his or her life, can invade the principle for her support, and can appoint the principle, but only to the couple's children or grandchildren. This trust can also be utilized to minimize federal estate taxes through the marital deduction and the use of the "credit shelter trust."
- j) Joint tenancy with right of survivorship.
 - i) This is a very simple, cost effective way for a married couple to distribute real property to their surviving spouse at the death of the first to die, without probate. It does not work at the death of the survivor, however, and so it must be used with other planning strategies. It is usually not an effective way to distribute to children. If you name your children as joint tenants, and one of your children predeceases you, that child's children, your grandchildren, are disinherited. Further, the clients cannot sell their property without the consent of the joint tenants, and judgments against your clients' children could attach to the property.
- k) Life estate with remainder interests.
 - i) Deeding property to oneself and one's spouse for life, and the remainder to one's children, also avoids probate. It has the same deficiencies as joint tenancy, however.
- l) Analyze the liquidity of the estates to pay estate costs.

- i) At the first death, if property is in joint tenancy, there probably will not be extensive costs. However, there will be funeral expenses and other related costs. There will be greater costs at the death of the survivor. You should review with your client the availability of funds, through life insurance or otherwise, to pay these expenses at the death of both the first to die, and the survivor.

- m) Durable Power of Attorney
 - i) A Durable Power of Attorney allows you to name the person who will handle your business affairs and make your health care decisions if you are unable to do so. I prefer the Durable Power to the Living Will, because it authorizes a chosen power-holder to make these often very personal health care decisions, including end of life decisions, rather than being directed "to whom it may concern," as is a Living Will. Further, the Durable Power can cover both financial and medical decision-making, and will avoid the necessity of the appointment of a guardian, if you do become incapacitated. Your client will want to make a decision as to whether the Durable Power is effective immediately, or only upon your client's becoming incapacitated, and, if the latter, how that incapacity is to be determined. Our Durable Powers (form 2) provide that the determination can be made either by the Grantor of the power (if the incapacity does not prevent it) or by the concurrence of three physicians.

- n) Christian preamble.
 - i) Clients will sometimes express a desire to make reference to their religious beliefs in their Wills. We have therefore prepared a Christian preamble, which can be offered to the client. (Form 3).

- o) Personal property clause.
 - i) Our statutes (SDCL 29A-2-513) permit a client to include a provision in their Wills that will allow them to write out, or type, date and sign a list of personal property bequests and place them with their Wills. There is no necessity of witnesses. This permits the clients to make these decisions around their kitchen table, and to change the list, from time to time, without recourse to a Codicil.

- p) Retirement income issues
 - i) Generally, I will attempt to help the client determine whether the client, and the surviving spouse, upon the first death, has sufficient income throughout the working life and after retirement. This will entail a discussion and review of disability policies, retirement plans and of life insurance policies. This falls more in the area of financial planning, but, by my review, I can get the client to a financial planner to help them address these issues.

- q) Life insurance and annuities.
 - i) Life insurance is extremely important for younger clients who have not accumulated significant assets. The death of either of the spouses can leave a significant deficit in the income of the family, leaving the family at risk. Usually, the couple starts with the less expensive term insurance, then gradually reduces the amount of the insurance, and converts it to whole life, as they grow more financially secure. The clients may also want to consider a

second-to-die policy (which is relatively inexpensive for younger clients) for their minor children, in the event both are deceased.

- ii) At the other end of the age spectrum, annuities are often attractive to older clients, where they can count on a monthly payment, without having to make investment decisions. Annuity policies should be examined by the estate planner, because there are policies that are too expensive, and are not sufficiently productive, for the client. Annuities can also be attractive to older clients because they can provide a stream of income for their care in a long-term care facility.
- r) Long-term care planning.
- i) In recent years, there have been increasing overlaps between estate planning and "Elder law." Older clients are concerned about the diminishment of their estates if the client or their spouse is confined to a long-term care facility. It will arise in your practice with a client who will soon need to go into a facility. This is not usually a concern with clients whose estates are larger, and will produce sufficient income to sustain one or both of them, for a period of time, in a facility. The planner should also inquire about there is long-term care insurance and urge the clients to contact an insurance agent about its availability.
 - ii) For concerned clients, I usually review their eligibility for long-term care assistance under the Medicaid program.
 - iii) An unmarried individual is generally ineligible if his income exceeds \$2,022 per month, although there are some exceptions to that. He is ineligible if his resources exceed \$2000 in value, excluding a funeral trust and a small amount (\$1500 cash value) of life insurance.
 - iv) A spouse of a married client ("community spouse"), who applies for long-term care assistance, is ineligible if his or her income exceeds \$2022 per month. Further, the client must qualify from a "resource" perspective. Generally, the married couple's assets are added together, and 1/2 of the combined asset value is exempt, with a minimum of \$21,042 and a maximum of \$109,000. Further exempt is the couple's home, as long as the community spouse resides in the home, a car, a funeral trust with a funeral home, and a life insurance policy with a cash value of \$1500. Those numbers change periodically, and can be obtained through the South Dakota Department of Social Services.
 - v) Retirement plans are not exempt unless they are in payment and the client is over 70, in which event, the retirement payment itself will be paid to the facility.
 - vi) If the client's resources exceed the resource limit, the client must "spend down" the estate, by making payments to the facility, to the resource limit to qualify.
 - vii) Given the current cost of long-term care, clients are often interested in planning strategies that address this problem. Obviously, long-term care insurance is the preferred option, but it is frequently cost prohibitive for older clients. An annuity is another option, either a commercial or a private annuity. The client exchanges a sum of money or an asset for an agreement to pay the client a specified monthly payment for life or for a term of years. If the client goes in a facility, the annuity payment does not render the client ineligible for Medicaid, but the entire annuity payment will be paid to the facility.

viii) The other option is to gift the client's assets to a child or children. The gift must be unconditional. There is also a "look back period." If the client makes a gift, and then applies for Medicaid long-term care assistance within five years, the value of the gift must be "spent down" to the above referred to resource limits before the client is eligible for assistance.

5) Simple estate: follow-up

- a) For the simple estates, without any federal tax planning, I will then draft the proposed documents (Wills, Living Trusts, Pour-over Wills, Warranty Deeds, Durable Powers of Attorney) and send copies to my clients for their review.
- b) In my cover letter, I will ask the client to carefully review these drafts, and either to call in changes or modifications, where they are fairly simple, or make an appointment to modify the drafts or to sign the documents.
- c) For husband and wife clients, I will also send along a Waiver of Conflicts form (form 4) explaining the potentiality of conflicts between spouses, and asking them to consider signing the Waiver.
- d) When the clients come in, I will visit with them about modifications, and then proceed to make the changes, both those discussed in our personal session, and those made by phone. I will give them a final copy, with the modifications tracked, so they do not have to re-read the entire document.
- e) Once they have approved the documents, I will give them the originals. If they do not have a safe or safety deposit box in which to put the originals, I will offer to keep the originals for them in an office safe. I will give them one original of the Durable Power, and keep an original in our safe, and as many copies as they will need, advising them to provide their doctors with a copy. If the sign Warranty Deeds transferring property to a Revocable Trust, I will then send the Deed for recording.
- f) I will then send a closing letter to the clients (form 5).

6) Complex estates

- a) Planning to avoid or to minimize federal estate taxes and other costs of administration.
 - i) The estate tax laws are in a state of flux. In 2001, Congress provided for the gradual increase of the exemption equivalent (the unified tax credit translated into the amount of taxable estate which is exempt) to \$3.5 million in 2009, the elimination of the estate tax entirely for the year 2010, and, unless Congress acts in the interim, the return of the exemption to \$1,000,000 in 2011 and thereafter.
 - ii) Congress also eliminated the "stepped up basis." The "basis" is the client's "cost" for the property, and the difference between the cost and the purchase price is the gain that may be taxable upon sale of the property. The "stepped up basis" refers to the fact that the basis is "stepped up" to the fair market value at the date of death. For the year 2010 and beyond, although it allows the taxpayer to allocate up to \$1.3 million in stepped up basis to certain

assets, and \$3 million for transfers to a surviving spouse, the beneficiaries receive a "carry-over basis", that is, the cost basis of the testator. This can have huge ramifications, given the significant increases in the value of farmland over the years. There are farmers who have a cost basis of under \$100 per acre. With these changes, death has become an event with significant income tax consequences, rather than estate tax consequences, and the planning process will have to adjust.

- iii) Most "experts" in the field are of the opinion that Congress cannot leave the exemption equivalent at \$1 million (with the inflation in land prices, there are too many business and farm clients who would be picked up in that tax regime), and that there will be Congressional action before the end of 2010 providing for an exemption at or above \$3.5 million. What Congress will do with basis rules is less predictable. If Congress does not act, however, the estate planning practice will become very hectic.
- iv) For that reason, for purposes of this presentation, we will assume that there will be a federal estate tax after 2010, and that the unified credit equivalent will be at or above \$3.5 million.
- v) It is very important to eliminate or minimize federal estate taxes. Not only is the estate tax rate confiscatory, the necessity of paying federal estate taxes could result in the forced sale of valuable assets of the estate, yielding less than fair market value, and possibly even creating federal income taxes on the sale.
- vi) The first step is to determine the value of the decedent's gross estate. The federal estate tax is computed by reducing the gross estate by certain deductions, and arriving at the tax by applying a rate schedule. The tax is then reduced by the "unified credit."
 - (1) Gross estate--generally the value of the following items are included in the determination of your client's gross estate: property owned solely by the decedent; decedent's share of property owned as a tenant-in-common; property owned in joint tenancy with right of survivorship (less the value of any portion proven to have originated in another co-owner); life insurance policies on decedent's life over which decedent has any incidence of ownership, or which are payable to decedent's estate; value of gifts of life insurance in "Contemplation of death" (3 years); value of property transferred to others if decedent has reserved the right of use, income or the power to alter, amend, revoke or terminate the transfer; property which decedent has the power to appoint to decedent, decedent's estate, or creditors; value of property transferred during decedent's lifetime to the extent that this property was transferred for less than adequate consideration (except those transfers with come within the annual gift tax exclusion, which, in 2009, was \$13,000 per year, per beneficiary, per donor); certain joint life and survivor annuity contracts; and IRA and pension and profit sharing plans.
 - (2) Deductions--the principal deductions are: funeral expenses; expense of administration in probate (personal representative's and attorney's fees); debts of the estate; casualty losses suffered during settlement period; money or property left to charities; and marital deduction--value of property passed to surviving spouse as a non-terminable interest.
 - (3) Exemption and rates. The unified credit exemption equivalent (the credit translated into the equivalent exempted net estate) for 2009 was \$3,500,000, and the top tax rate was

45%. For 2010, there is no federal estate tax. That tax regime is "sun-setted" at the end of 2010, and, if Congress does not act in the mean time, the exemption falls to \$1,000,000 and the top tax rate is 55%.

vii) Gifting is a potential strategy for avoiding federal estate taxes.

- (1) Assuming that Congress acts, there will likely be a gift tax exclusion. Prior to 2010, the exclusion was \$13,000 per donor, per beneficiary. A married couple could gift \$52,000 per year to each son and daughter-in-law.
- (2) Care must be taken to assure that the gifting strategy does not deprive the clients of adequate retirement income. Prior to 2010, the Donee took the Donor's basis in the property, which was a disadvantage of gifting. We will wait to see what Congress does with the "basis rules."

viii) Credit Shelter Trust.

- (1) This trust can be used to shelter up to double the amount of the exemption equivalent. Each spouse's Will or Revocable Trust leaves the value of the exemption equivalent to a "credit shelter trust." The income is paid to the survivor, and the survivor can invade the principle for his or her health, education, maintenance or support. Because the survivor does not have complete ownership, the trust escapes federal estate tax at the death of the survivor. The survivor also gets the benefit of his or her own unified credit, and so this strategy ultimately "shelters" from federal estate tax, up to double the amount of the unified credit. In 2009, the unified credit equivalent (the credit translated into terms of the value of the taxable estate protected) was \$3,500,000, allowing the couple to protect \$7,000,000 of asset value.
- (2) In order to effectuate this strategy, the married couple must "equalize" their assets. Each must own approximately one-half of the value of the assets, so that each, at his or her death, can "fund" the credit shelter trust.
- (3) The typical way to "equalize" real estate is to deed it to the married couple as tenants in common. Joint tenancy will not work, because the disposition is automatic to the survivor, and the asset cannot be used to fund the credit shelter trust.

ix) Irrevocable life insurance trusts.

- (1) If life insurance is owned by the client, or proceeds payable to his estate, the proceeds of the policy are included in the client's gross estate, which can significantly increase the size of the estate. A client can adopt an irrevocable life insurance trust to own the policy, and the policy proceeds will not be includible in the client's estate. The premiums are usually paid by making gifts to the trust, within the annual gift tax exclusion. The trust is usually drafted to give the spouse the income, for the spouse's life, and to allow the spouse to invade the principal for the spouse's health, education, maintenance and support. This provision will keep the proceeds out of the spouse's estate. The trust then distributes the trust principal to the children or grandchildren at the spouse's death.

- (2) For younger clients with potential estate tax problems, the "second-to-die" life insurance policy is a fairly simple strategy to address potential estate tax liabilities. The policy premiums are usually very reasonable. The use of an irrevocable life insurance trust is essential here, to keep the proceeds out of the decedents' estates. The trust agreement has a provision permitting the trust to loan assets to the estate to pay the estate tax.
- x) Charitable Remainder Trusts.
- (1) The charitable remainder trust can be very effective for minimizing estate taxes for a client who has a charitable bent. It can be used with an irrevocable life insurance trust to basically eliminate federal estate taxes without depriving the heirs of their inheritance. An example would show the benefits of this strategy. A client is getting older, and wants to sell a business worth \$2 million with a very low cost basis. He creates a charitable remainder trust, which provides for the payment of either all the income or a specified percentage of the principal (e.g., 8%) to the client and spouse for the rest of their lives, and the remainder to the charity or charities at the death of the last to die. He gifts stock in the business corporation to the trust, and takes a substantial charitable deduction in the amount of the actuarial value of the remainder. The trust sells the business, and the capital gain is not taxable, because the trust is a charitable entity. With the income from the trust, he purchases a \$2 million second-to-die life insurance policy on the client and the client's spouse, which he places in an irrevocable life insurance trust, naming his heirs as beneficiaries. The proceeds escape estate taxes, and replace the \$2 million business that would have been inherited by the heirs. The principal of the trust escapes estate taxes at the death of the survivor, because it is distributed to the charity. The client has the satisfaction of getting a charitable deduction for the gift of his business to charity, saving capital gains tax on the sale of his business, escaping estate taxes at the death of the survivor, and significantly benefiting a charity or charities of his choice, without cost to his heirs.
- xi) Charitable Lead Trusts.
- (1) In the charitable lead trust, the charity receives the "income" interest during the joint lives of the client, or for a period of years, and the property reverts to the clients' family after their deaths or after the expiration of the period of years. This yields a substantial charitable deduction, and keeps the gross estate from growing, thus saving federal estate taxes.
- xii) Family limited partnerships.
- (1) Family limited partnerships (LP) are coming into increasing use in the estate planning process. They are especially effective for farm estates or estates involving development real estate. The clients, husband and wife enter into a limited partnership agreement that significantly limits transferability of the shares. The clients then gift the farmland to the LP. The clients own all of the general partnership shares (2%), which controls the partnership, including decisions on the distribution of profit, and the limited partnership (98%) shares, at the outset. Because of the limits on transferability and the limits upon control, the partnership shares are appraised at a substantial discount to the value of the underlying asset, from 25% to 45%. This allows the clients both a substantial estate tax

benefit, and allows them to gift more value through the use of the annual exclusion. It also facilitates the making of gifts to beneficiaries, of limited partnership shares, without relinquishing control of the business, which is controlled by the general partners. In order to get the valuation discount, both the underlying asset, and the limited partnership shares, must be appraised by a certified appraisal. As gifts are made, those appraisals must be updated.

xiii) Intentionally defective grantor trusts.

- (1) The family limited partnership can be used effectively with the intentionally defective grantor trust to effectively freeze the value of the clients' interest. After the formation of the family limited partnership, the clients would execute an intentionally defective grantor trust. The trust would be income taxable to the clients, but would escape tax in their estates. They would then sell their limited partnership shares to the trust for a promissory note at the minimal interest rate allowed by the IRS. This effectively passes the "growth" in the land value to the trust, which escapes estate tax at the death of the clients.

xiv) Generation skipping trusts.

- (1) It had been an effective estate-planning tool to leave assets in trust, giving descendants a right to income only, for continued generations. Thus, each successive generation, because they could not control the disposition at their deaths, escaped estate taxes. In 1976, Congress eliminated this strategy by imposing a generation-skipping tax on the transfer by the second generation to the third generation at a confiscatory rate. Congress left the donor with an exemption of \$1 million; so that a donor could make "skip" gifts (gifts that skip tax in the second generation) totaling \$1 million without the generation skipping tax. A trust can be used to take advantage of this generation skipping transfer tax exemption.

xv) Installment payment of estate tax.

- (1) The estate tax can be minimized if a closely held business or a farm owner qualifies for the installment payment of the federal estate tax. The estate tax can be deferred for up to 14 years, with interest only the first five years. Generally, the business interest must constitute more than 35% of the gross estate.

xvi) Apportionment of estate taxes.

- (1) By statute, any federal estate tax will be apportioned among all those interested in the estate in proportion to their interest. SDCL 29A-3-916. If the client wants to apportion it otherwise, for example, if he wants the residuary devisees to pay all estate taxes, according to their proportional interest in the residuary, the client must so provide in the Will.

b) Planning to minimize federal income taxes.

- i) Forming an LLC to operate the business could save federal self-employment taxes.

- ii) There are limited income tax exclusions from capital gain for the sale of a residence, and these can be advantageous for individuals or couples nearing retirement.
 - iii) I usually work with a CPA, who has been doing the clients' tax returns, and who is more aware of the income tax benefits available for our mutual client.
- c) Planning for continuation and protection of a business or family farm.
- i) This is where business and estate planning overlaps. For example, the spouse of a business owner may not be equipped to manage the business upon the death of the owner.
 - (1) This may require a buy-sell agreement to sell the business to children involved in the business or to employees.
 - (a) The business can be sold in installments, at a low interest rate, to ease the financial burden upon the child.
 - (b) The buy-sell agreement is often funded by life insurance on the life of the business owner.
 - (2) If the spouse is going to retain an interest, it may require the creation of a trust to hold and vote the stock of the deceased business owner.
 - ii) Oftentimes farmers have a strong interest in keeping the farm in the family, which entails both tax planning and other strategies to accomplish that objective, while achieving an equitable division of assets between "on-farm" and "off-farm" children.
 - (1) I usually emphasize to the clients that they should aim at an "equitable", and not necessarily equal, division of assets, since the on-farm child has usually put in a good deal of uncompensated time and has a good deal of "sweat equity" in the farming operation. While an on-farm child was working to build up the value of the farming operation, the off-farm children may have been getting an education, partially paid for by the parents, to provide for a secure future.
 - (2) The usual way of accomplishing this is to distribute the farming assets to the on-farm child, and other assets to the off-farm children.
 - (3) The farmer can also make periodic gifts of farming assets to the on-farm child, both as an estate planning tool, and as an incentive, and thus transfer a portion of the farm to the on-farm child while the parents are still alive.
 - (4) Obviously, the use of a limited partnership or a limited liability company to hold the land would make it easier to make such gifts. With the use of a limited partnership, the clients can gift equity in the business without gifting control. It is only at the point when the clients think that the on farm child is fully ready to manage that they can make the decision to gift the general partnership shares, and thus control of the farm, to the on-farm son. Sometimes, the clients will want to retain "official" control (they can still defer most of the actual decision-making to the on-farm child) until death, leaving the on farm son the general partnership shares in their Wills

- (5) The farmer can also combine the gifting of assets with the sale of assets to the on-farm child. The sale can be an installment sale, at a low interest rate, to ease the financial burden, especially with the high real estate prices we have been seeing.
 - (6) If there are not sufficient "other assets" for an equitable division, farmland can be distributed to off-farm children, and option to buy and option to rent provisions, or provisions for rights of first refusal, can be used to assure that the on-farm child has the opportunity to purchase the farmland.
 - (7) One potential problem with the holding of the land in a limited partnership or a limited liability company is that, if a off-farm child receives a distribution constituting an interest in either an LP or and LLC, there is no guaranty that the on-farm child will make any income distributions to the off-farm children, and their interests would only provide value upon sale. For that reason, I have put provisions in planning documents whereby the on-farm child must make a mandatory distribution to the off-farm children, in lieu of the rent they would have received had the land not been in an LP or an LLC and had the on-farm exercised an option to rent.
- iii) The same issue presents itself to the owner of a small business. If there are children involved in the business, and some who are not, how does the business owner treat all equitably?
- (1) Again, a buy-sell agreement with the child involved in the business could provide the liquidity to provide for the non-business children.
 - (2) A business owner could also transfers shares of common stock to the child involved in the business both as compensation for services and as an incentive for the child to work hard to assure the success of the business.
 - (3) The business owner could equally divide the stock of the corporation among his children, and could provide for an option for the child involved in the business to buy out the other children. Here, however, the children not involved in the business are minority shareholders, which diminish the value of the stock and its income productivity.
 - (a) To resolve this, the client could create two classes of stock, common and preferred. The non-business children could get the preferred stock, with a specified return on investment, coupled with an option for the children involved in the business to buy out the non-business children.
- d) Follow-up letter process.
- (1) After analyzing the estate and the planning options, I write a comprehensive letter to the clients setting forth their options and my recommendations. I encourage them to note questions for a follow-up meeting, at which they will hopefully make decisions on the various recommendations. It will then prepare the documents and send them to the client for their review.
 - (2) I will follow up the execution of the planning documents with a letter (form 5) which advises the client of the current status of the federal estate tax law, and the potential

changes for 2011. The letter urges the client to periodically review their estate plan and their documents. It urges the client to contact the office for an appointment if there is any significant change in their family or financial situation.

7) Probate procedure

- a) Although the assigned topic is estate planning, the probate process is so integral to the estate planning process, that a brief summary of the probate process is appropriate.
- b) As indicated, the Uniform Probate Code now permits the attorney to tailor the probate process to the nature and complexity of the estate. The first decision that must be made is whether to opt for a formal or informal probate, and whether to pursue a supervised or unsupervised probate.
 - i) If there is real estate, or if there is any possibility of a Will contest, I will recommend a formal probate. In the formal probate, parties must object to the Will at or prior to the hearing on the Petition, whereas, in an informal probate, they can do so within two years of the date of death. This possibility will cloud the title, and argues in favor of a formal probate.
 - ii) If the estate is contentious, I will often recommend a supervised probate.
- c) Within thirty (30) days after death, the petition for probate of Will or in the absence of a Will, petition for administration of decedent's estate, should be filed, and arrangements should be made for publication and mailing of proper notices.
- d) Pending court appointment of the personal representative, conferences should be had with a representative of the estate with regard to the following: application for federal identification number; application for Social Security allowance; application for veteran's benefits; filing Proof of Claim (life insurance information); and making arrangements for fiduciary bond in the event bond was not waived by the Will.
- e) The Personal Representative should attend the hearing on the appointment of the Personal Representative and approval of Will. If someone appears to object to the admission of the Will to probate, the Court will usually continue the hearing until after discovery can proceed on the Will contest.
- f) Promptly after the appointment of the Personal Representative:
 - i) A conference should be scheduled with the fiduciary (Personal Representative or Trustee of a Revocable Trust) to arrange for cash requirements and other proper management of probate assets of decedent's estate, including the opening of an estate checking account;
 - ii) Assist the Personal Representative in making claims for insurance, veteran's and Social Security benefits;
 - iii) Assist the Personal Representative in preparing an accurate inventory of all decedent's assets; and
 - iv) Assist the Personal Representative in preparing a complete list of decedent's debts.

- g) Two months after the first publication of notice of petition for probate of Will and administration of estate, the following should be checked:
 - i) Check with the Clerk of Courts, and review your file, for any creditor's claims, and make list of those claims (a creditor's claim need not be filed with the Clerk, but can be sent to the Personal Representative of the estate attorney);
 - ii) Investigate creditors' claims to see if they are enforceable;
 - iii) Make arrangements to pay enforceable debts;
 - iv) If necessary, make application for hearing on claims to which fiduciary has some objection or disputes, and prepare for that hearing.
- h) Within three months after appointment:
 - i) Contact and see to the appointment of a qualified appraiser;
 - ii) Prepare and file the inventory;
 - iii) Make sure the fiduciary has control of all assets of the decedent;
- i) After filing the inventory, the following should be considered:
 - i) Necessity for petition for widow's allowance;
 - ii) Necessity for petition for homestead allowance;
 - iii) Necessity for petition for additional family allowance pending probate; and
 - iv) Necessity for sale of property, in which event, sale proceedings should be considered.
- j) Within nine months after decedent's death:
 - i) Determine whether a federal estate tax return must be filed. You must file a return if the value of the taxable estate exceeds the exemption equivalent (\$3.5 million in 2009).
 - ii) If so, investigate whether the estate tax alternate valuation should be used. The estate has the election to value the estate as of the date of death, or as of a date six months after the date of death.
 - iii) Prepare and file the Federal Estate Tax Return and pay the tax.
- k) Within one year after appointment of personal representative or administrator:
 - i) The Personal representative should prepare and file an accurate and complete account of his administration of the estate for the year of his appointment;
 - ii) Fiduciary Income Tax Returns should be filed for the year in which decedent died, subject to fiscal year considerations;
 - iii) Make transfers of securities and other properties to heirs, legatees and devisees, and obtain receipts accordingly.

- iv) Prepare and file final decree and record personal representative deeds if there is real property owned by the estate.
 - v) Provide for discharge of personal representative or administrator immediately upon completion of the audit of the federal estate tax return and/or receipt of the estate tax closing letter.
 - vi) If an estates tax return has been filed, the last two items, above, will have to await the receipt of the estate closing letter, usually within about six months of filing the return, or the completion of the audit.
- l) On or before April 15 of the year following the year of the decedent's death:
- i) The decedent's final income tax return should be filed.

LIST OF FORMS

1. Family Estate Record
2. Durable Powers
3. Christian Preamble
4. Waiver of Conflict
5. Closing Letter

Name	Address	Birthdate	SSN
Child 1:			
Spouse:			
Grandchildren:			

Name	Address	Birthdate	SSN
Child 1:			
Spouse:			
Grandchildren:			

Name	Address	Birthdate	SSN
Child 1:			
Spouse:			
Grandchildren:			

5. Marital Status.

- Married
 Date of marriage to present spouse _____
 Domicile at time of marriage _____
- Widow or widower
 Name of deceased spouse _____
 Date of death of deceased spouse _____
- Single
- Legally separated
 Name of legally separated spouse _____
- Divorced
 Date divorce decree became final _____
 (Attach a copy of the Final Decree of Divorce)

6. Pretermitted Heirs (for wills dated after 7/1/95 this information is voluntary)

If in your Will you unintentionally fail to mention or make provision for one of your natural children or for the issue of any deceased child, such child or the issue of a deceased child may make a claim against your estate. Therefore, we ask for the following information on any of your children from previous marriages or born out of wedlock:
 (If the child is married, give married name)

Name	Address	Birthdate	SSN
Child 1:			
Spouse:			
Grandchildren:			

Name	Address	Birthdate	SSN
Child 1:			
Spouse:			
Grandchildren:			

Name	Address	Birthdate	SSN
Child 1:			
Spouse:			
Grandchildren:			

7. Where are the following papers kept?
- a. Marriage Certificate _____
 - b. Armed forces papers _____
 - c. Birth Certificate _____
 - d. Income tax returns _____
(Copies of tax returns for the last two years are helpful in estate planning)
 - e. Give tax accountant's name and address:

8. Which members of the family have a Will?

a. Husband--Yes _____ No _____

Attorney _____, _____, _____
Name City State

Where kept _____

b. Wife--Yes _____ No _____

Attorney _____, _____, _____
Name City State

Where kept _____

c. Other: _____

Attorney _____, _____, _____
Name City State

Where kept _____

9. Would you like to make anatomical gifts? Yes _____ No _____

10. Where is the family burial plot? _____

11. Do you have important papers belonging to someone else? Yes _____ No _____

Name _____

What papers? _____

Where kept? _____

Name _____

What papers? _____

Where kept? _____

12. Are you a trustee or guardian? Yes _____ No _____

Describe property held, persons involved and court which supervises.

13. Describe the state of health of yourself, your spouse, and any other family member requiring above normal needs. _____

II. **BANK ACCOUNTS**

1. Checking Accounts:

a. Bank _____
Name Address

In whose name(s) _____
Average amount \$ _____

b. Bank _____
Name Address

In whose name(s) _____
Average amount \$ _____

c. Bank _____
Name Address

In whose name(s) _____
Average amount \$ _____

2. Savings Accounts:

a. Bank _____
Name Address

In whose name(s) _____
Average amount \$ _____

b. Bank _____
Name Address

In whose name(s) _____
Average amount \$ _____

c. Bank _____
Name Address

In whose name(s) _____
Average amount \$ _____

3. Where are bank books kept? _____

4. Where is safety deposit box? _____
Where is key kept? _____

III. **STOCKS, BONDS, NOTES & MORTGAGES**

*Names of owners should be taken directly from the face of the stocks and notes. Show such language as "and/or" to indicate how title is held.

1. U.S. Savings Bonds

Owner(s)*	Date Purchased	Serial No.	Maturity Value

If more, attach sheet.

Total \$ _____

2. Corporate or Municipal Bonds

Owner(s)*	Issuer	Number	Amount Paid

If more, attach sheet.

Total \$ _____

3. Stocks

Owner(s)*	Company	No. of Shares	Common or Preferred	Value

If more, attach sheet.

Total \$ _____

4. Notes and Mortgages held for loans you made to others.

Name of Person in Debt to You	Name of Person Note is Made Out To*	Date Due	Amount

IV. **AUTOMOBILES, FARM EQUIPMENT, LIVESTOCK, AND HOUSEHOLD GOODS**

1. Automobiles and Trucks (If necessary, please attach a list.)

Registered Owner(s)	Make	Year	Where titles kept?	Present Value

Total Automobiles & Trucks \$ _____

2. Farm Machinery and Livestock
(Use the depreciation schedule from your income tax return)

Is there an inventory? Yes _____ No _____

Where is it kept? _____

Present value of machinery \$ _____

Present value of livestock \$ _____

3. Household Goods

Is there an inventory? Yes _____ No _____

Where is it kept? _____

Owner(s) _____

Present value of household goods \$ _____

4. Other items, such as grain inventory and special items of equipment (Detail or attach list)

Present Value \$ _____

5. Other items of more than sentimental value, such as silver, jewelry, libraries (Detail or attach list)

Present Value \$ _____

c. Household Goods

Type of Coverage _____

Company _____

Address _____

Name of Agent _____

Premium \$ _____ Date _____

d. Other

Type of Coverage _____

Company _____

Address _____

Name of Agent _____

Premium \$ _____ Date _____

Where are all policies, including life insurance, kept?

X. MORTGAGES AND DEBTS

1. Real Estate Mortgages and Amounts Owed on Real Estate Purchase Contracts:

Property	Name of Creditor/Seller	Date Due	Amount Due

If more, attach sheet.

Total \$ _____

2. Chattel Mortgages

Property	Name of Creditor/Seller	Date Due	Amount Due

If more, attach sheet.

Total \$ _____

3. Contracts

Property	Name of Creditor/Seller	Date Due	Amount Due

If more, attach sheet.

Total \$ _____

TOTAL, ALL DEBTS \$ _____

XI. SUMMARY OF INCOME

INCOME SUMMARY	Husband		Wife		Joint	
	Last Year	Est. Next Year	Last Year	Est. Next Year	Last Year	Est. Next Year
Salaries						
Partnerships						
Proprietorship						
Pensions						
Income from Trusts						
Social Security						
Capital Gains						
Interest & Dividends						
Net Income from Real Estate						
Real Estate Mortgage	()	()	()	()	()	()
Interest Expense	()	()	()	()	()	()
TOTALS	\$	\$	\$	\$	\$	\$

XII. INFORMATION ON BUSINESS INTERESTS

- Name of business, if any _____
- State plans for the distribution of business at death or retirement _____

- Are there any agreements to buy or sell? Yes _____ No _____
(Attach copies)

4. Are there any family members capable of continuing business? Yes _____ No _____
Name(s) _____

5. Are there key men to continue the business? Yes _____ No _____
Name(s) _____

XIII. FUTURE INTERESTS

If you, your spouse or children have any potential inheritances, enter the appropriate amounts, when and from whom

XIV. DISPOSITION OF YOUR ESTATE

Please attach copies of current Wills, Trusts and all gift tax returns of you and your spouse. If you or your spouse are trustees or beneficiaries of other trusts, please attach copies.

1. Do you contemplate making any bequests to relatives, friends, or charitable or educational organizations? If so, what, when and to whom? _____

2. If your spouse survives you, do you wish to provide for the maximum marital deduction?
Outright? _____
In trust? _____

3. Indicate any specific desires in distribution of estate assets to children, relatives, friends and organizations _____

4. Will your spouse/s desires for distribution of his/her estate be different from yours?
Yes _____ No _____
How? _____

5. If both you and your spouse should die prematurely, at what ages should your children receive their inheritance? _____
If they are minors, who shall be their guardian and/or successor guardians in the event the first named guardian(s) cannot act? (Please state names and addresses)

6. Will your spouse need assistance in handling the assets of your estate?
Yes _____ No _____

7. Indicate whether your children will need assistance in handling their inheritance from you and whether they are self-sufficient or dependent on their inheritance?

Form Two (02)

Prepared by: Rory King
Bantz, Gosch & Cremer, L.L.C.
Attorneys at Law
305 Sixth Avenue SE, P.O. Box 970
Aberdeen, SD 57402-0970
(605) 225-2232

DURABLE POWER OF ATTORNEY

STATE OF SOUTH DAKOTA

SS

COUNTY OF BROWN

KNOW ALL MEN BY THESE PRESENTS, that I, **Jane Doe**, a _____ person, the undersigned, of _____, Aberdeen, Brown County, South Dakota 57401, do hereby make, constitute, and appoint **John Doe**, of _____, Aberdeen, Brown County, South Dakota 57401, my true and lawful attorney-in-fact for me and in my name, place, and stead, and on my behalf, and for my use and benefit:

BUSINESS POWERS

1. To exercise or perform any act, power, duty, right or obligation whatsoever that I now have or may hereafter acquire the legal right, power, or capacity to exercise or perform, in connection with, arising from, or relating to any person, item, transaction, thing, business property, real or personal, tangible or intangible, or matter whatsoever;
2. To request, ask, demand, sue for, recover, collect, receive, and hold and possess all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension and retirement benefits, insurance benefits and proceeds, any and all documents of title, choses in action, personal and real property, intangible and tangible

property and property rights, and demands whatsoever, liquidated or unliquidated, as now are, or shall hereafter become, owned by, or due, owing, payable, or belonging to, me or in which I have or may hereafter acquire interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to make, execute, and deliver for me, on my behalf, and in my name, all endorsements, acquittances, releases, receipts or other sufficient discharges for the same;

3. To sell, lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the sale, lease, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any real or personal property whatsoever, tangible or intangible, or interest thereon, on such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper;
4. To maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgage, subject to deeds of trust, and hypothecate, and in any way or manner deal with all or any part of any real or personal property whatsoever, tangible or intangible, or any interest therein, that I now own or may hereafter acquire, for me, in my behalf, and in my name and under such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper;
5. To conduct, engage in, and transact any and all lawful business of whatever nature or kind for me, on my behalf, and in my name;
6. To make, receive, sign, endorse, execute, acknowledge, deliver, and possess such applications, contracts, agreements, options, covenants, conveyances, deeds, trust deeds, security agreements, bills of sale, leases, mortgages, assignments, insurance policies, bills of lading, warehouse receipts, documents of title, bills, bonds, debentures, checks, drafts, bills of exchange, letters of credit, notes, stock certificates, proxies, warrants, commercial paper, receipts, withdrawal receipts and deposit instruments relating to accounts or deposits in, or certificates of deposit of, banks, savings and loan or other institutions or associations, proofs of loss, evidences of debts, releases, and satisfaction of mortgages, liens, judgments, security agreements and other debts and obligations and such other instruments in writing of whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted; and
7. My attorney-in-fact shall have the power to exercise any right with regard to any retirement plan or individual retirement account I may have or entered

into by my attorney on my behalf, or with regard to any retirement plan or individual retirement account as to which I am a beneficiary including but not limited to, the power to:

- a. Create and contribute to an individual retirement account, an employee benefit plan, or other retirement plan.
- b. Change the form of the plan as may be permitted by law such as to convert a traditional IRA into a Roth IRA.
- c. "Roll over" plan benefits.
- d. Receive distributions from such plan, and to endorse and deposit checks from such plans.
- e. Borrow money from any such plan.
- f. Select options with respect to any such plan.
- g. Make or change the beneficiary designation of any such plan provided that my attorney cannot be designated beneficiary unless my attorney is my spouse or my issue.

The following clause was added because Wells Fargo Bank will not allow the attorney-in-fact access to the safe deposit box without it.

8. To conduct business with any bank, financial service agency, or investment firm with whom I do or have done business including but not limited to the right to control all investments, accounts, deposits and safe deposit boxes. This includes the right to enter my safe deposit box and remove any or all of its contents.

DURABILITY

9. Pursuant to SDCL 59-7-2.1 this power of attorney shall become effective only upon the disability of the principal.

or

9. Pursuant to SDCL 59-7-2.1 this power of attorney shall not be affected by the disability of the principal. The rights, powers, and authority of said attorney-in-fact herein granted shall commence and be in full force and effect as of the date of this document, and such rights, powers and authority shall remain in full force and effect thereafter until terminated by me by written notice attached hereto and delivered by first class mail to John Doe, _____, Aberdeen, SD 57401.

NOMINATION OF GUARDIAN/CONSERVATOR

10. Pursuant to SDCL 29A-5-304, I hereby nominate John Doe as guardian of my person and conservator of my estate in the event that a guardianship and/or conservatorship is required or preferred.

POWERS RELATED TO HEALTH CARE

11. Pursuant to SDCL 59-7-2.5 to 2.8, my attorney-in-fact may consent to, reject, or withdraw consent for medical procedures, treatment, or intervention. My attorney-in-fact may make any health care decision for me, which I could have made individually if I had decisional capacity. Such decisions shall be made in accordance with accepted medical practice considering the recommendation of my attending physician, the decision I would have made if I had decisional capacity, and the decision that is in my best interests.

Artificial nutrition or hydration shall not be given unless my attorney-in-fact believes it to be in my best interests.

Artificial nutrition and hydration shall not be withdrawn if it is needed for my comfort or the relief of pain.

12. My attorney-in-fact shall be considered a personal representative under privacy regulations related to Protected Health Information [PHI] and shall be entitled to all health information in the same manner as if I personally were making the request.
13. My attorney-in-fact shall be treated as my personal representative for all purposes as provided by Regulation Section 164.502(g) of Title 45 of the Code of Federal Regulations and the medical information privacy law and regulations generally referred to as "HIPPA". I authorize my attorney-in-fact to make inquiries of or consult with my physicians or others rendering medical assistance and such medical advisors are expressly authorized to provide my attorney-in-fact with any documentation or records as he/she may request orally or in writing.

POWERS RELATING TO TAX PLANNING AND ASSET MANAGEMENT

14. Dealings with Internal Revenue Service. To handle any and all federal tax matters and to perform any and all acts which the grantor could have performed including but not limited to the right to prepare, sign and file federal, state, or local income, gift, or other tax returns of all kinds, claims for

refund, requests for extensions of time, petitions to tax court or other courts regarding tax matters any and all other tax related documents, including, without limitations, receipts, offers, waivers, consents (including, but not limited to consents and agreements under IRC 2032A, or any successor section thereto), powers of attorney, and closing agreements; to exercise any elections I may have under federal, state or local tax law; and generally to act in my behalf in all tax matters of any kind and for all periods before all persons representing the Internal Revenue Service and any other taxing authority, including receipt of confidential information and the postings of bonds to represent me in all such proceedings.

15. Dealings with Social Security. I hereby appoint my attorney-in-fact as a personal representative payee to assist me with any and all matters managing the money I receive or may be entitled to receive for Social Security or SSI benefits.

FUNERAL

16. To make all advance or contemporaneous arrangements for my funeral and burial. My attorney-in-fact may also make suitable arrangements for anatomical donations.

RELEASE AND INDEMNIFICATION PROVISIONS

17. I specifically and expressly release any and all financial institutions, stock brokers, transfer agents, attorneys, accountants, and investment counselors from any liability on behalf of myself, my heirs and assigns, which would otherwise accrue as a result of any action taken or not taken, pursuant to this instrument.
18. On behalf of myself, my estate, my heirs and assigns, I agree to indemnify and hold harmless from any loss incurred by any person or entity from any action taken or not taken, based upon that person's or entity's reasonable reliance upon the terms of this instrument.
19. My attorney-in-fact shall not be liable to me or my heirs or assigns for any action taken or not taken in good faith, but shall be liable for any willful misconduct or gross negligence.

DETERMINATION OF COMPETENCY

20. The determination of mental or physical competency shall be made by agreement between the attorney-in-fact and the grantor. If they cannot agree, then the determination shall be made by majority decision of three doctors. The three doctors shall be the grantor's then treating physician, a physician chosen by the attorney-in-fact, and a third physician chosen by the first two physicians.

SUCCESSOR ATTORNEY-IN-FACT, GUARDIAN AND/OR CONSERVATOR

21. In the event John Doe is unable or refuses to act as attorney-in-fact, guardian, and/or conservator, then I hereby nominate and appoint **Baby Doe** of _____, Aberdeen, South Dakota 57401 successor attorney-in-fact, guardian and/or conservator in his place and stead.

TRANSFER OF ASSETS

(#22 may or may not be inserted, depending on situation—have atty decide whether or not to use)

22. Nothing contained herein shall allow my attorney-in-fact or conservator to transfer any of my assets to his or her own use or benefit without full and adequate consideration therefore unless such transfer is consistent with my Last Will and Testament.

ANATOMICAL GIFTS

23. My attorney-in-fact is hereby given all of the rights that I have under SDCL 34-26, specifically including the right to direct the manner in which my body or any part thereof shall be disposed of after death, and the manner in which any part of my body which becomes separated therefrom during my lifetime shall be disposed, and the right to consent to an autopsy after my death.

GENERAL PROVISIONS

24. I grant to said attorney-in-fact full power and authority to do, take, and perform all and every act and thing whatsoever requisite, proper, or necessary to be done, in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney-in-fact, or his substitute or substitutes, shall lawfully do

or cause to be done by virtue of his power of attorney and the rights and powers herein granted.

25. This instrument is to be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts, or powers herein is not intended to, nor does it, limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to said attorney-in-fact.

Executed in duplicate this ____ day of _____, 2010.

Jane Doe

STATE OF SOUTH DAKOTA
SS
COUNTY OF BROWN

On this the ____ day of _____, 2010, before me, the undersigned officer, personally appeared **Jane Doe**, a _____ person, known to me to be the person whose name is subscribed to the within instrument and acknowledged that s/he executed the same for the purposes therein contained.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

(Seal)

Notary Public, South Dakota
My Comm. Expires: _____

Name **Jane Doe**
Address:

DOB:
SSN:

Form Three (03)

CHRISTIAN PREAMBLES

I realize the uncertainty of this life, place full confidence and trust in my Lord and Savior Jesus Christ, who promised: "I am the resurrection and the life. He who believes in me will live, even though he dies; and whoever lives and believes in me will never die" (John 11: 25-26). I know that the wages of sin is death. I believe that Jesus Christ, the only Son of God, suffered and died for the forgiveness of all my sins, which I neither deserve nor merit, but receive as a free gift of God, who is rich in grace and mercy. I urge my heirs not to set their hopes on uncertain riches, but to take hold of the life which is life indeed through faith in Jesus Christ.

I commit myself to God's care, secure in His love for me and trusting in the salvation purchased for me through Christ's suffering and death. I leave those who survive me the comfort of knowing that I have died in this faith and have now joined my Lord in eternal glory. I commend my loved ones to the protecting arm of God, knowing that He will continue to provide for them despite my absence; and I encourage them to place their faith and trust in Him alone.

Form Four (04)

Re: Estate Planning

Dear _____ :

Enclosed for your review are the following documents:

1. Last Will and Testament for each of you; and,
2. Durable Power of Attorney for each of you

After you have had an opportunity to review these documents, please call my assistant to arrange for a time to come in and discuss the same, make any necessary changes, and execute the originals.

The estate planning process generally involves the joint representation of both husband and wife. However, in certain circumstances, it may be necessary or desirable for each spouse to obtain separate legal counsel in creating and implementing each of their estate plans. This may be appropriate in cases where there are children of prior marriages, where the separate property of one or both spouses constitutes a sizable portion of the estate, the spouses differ in their intended dispositions of their estates, or any number of other possible scenarios. Furthermore, certain estate planning techniques may be beneficial to the estate of the husband and wife as a whole, while at the same time adversely affect or limit the potential future use and disposition of estate assets by either or both spouses.

With this in mind, it is my ethical duty to inform you of the possibility that conflicts of interest may now exist or may come to exist at some time in the future as to your estate plans. In order to proceed with the planning process, it is necessary for me to obtain your written consent to represent both of you in implementing your plans.

You have the option of having me represent you jointly or separately. If you choose to have me represent you jointly, then I will be under the legal duty to immediately tell the other spouse anything that one of you later tells me in confidence, which relates to your estate planning. Failure to reveal such information to the other spouse would be a violation of the attorney-client joint relationship. On the other hand, if you choose to have me represent each of you separately, then I must keep anything later told to me in confidence from the other even though it may prejudice what the other had relied upon in making his or her own estate plan.

This written explanation is designed to make it certain that each of you fully understands the duties imposed by such joint representation. If it is your desire to retain me to represent you jointly, and in order that the file can reflect this, each of you will be asked to sign, prior to the execution of your documents, statements in the form provided below. These statements will be provided at the time of signing; therefore, return of this letter is not necessary.

If you have questions about these matters, I would be happy to consult with you as necessary.

Yours very truly,

RORY KING

RPK:wjm

Enclosures

CONSENT TO JOINT REPRESENTATION BY HUSBAND

I hereby agree to have Rory King and the law firm of Bantz, Gosch & Cremer, L.L.C. represent my wife and me jointly with regard to our estate plan. While everything that either one of us reveals to the attorney or the law firm agents or employees is to be kept in strict confidence as to others, I hereby authorize and direct the attorney or his agents or employees to tell my wife anything that I reveal to him/them about my estate plan while we are married, even information I reveal to him/them outside of my wife's presence. I understand that my wife will be giving Rory King and the law firm of Bantz, Gosch & Cremer, L.L.C. the same authorization and direction.

Date _____

CONSENT TO JOINT REPRESENTATION BY WIFE

I hereby agree to have Rory King and the law firm of Bantz, Gosch & Cremer, L.L.C. represent my husband and me jointly with regard to our estate plan. While everything that either one of us reveals to the attorney or the law firm agents or employees is to be kept in strict confidence as to others, I hereby authorize and direct the attorney or his agents or employees to tell my husband anything that I reveal to him/them about my estate plan while we are married, even information I reveal to him/them outside of my husband's presence. I understand that my husband will be giving Rory King and the law firm of Bantz, Gosch & Cremer, L.L.C. the same authorization and direction.

Date _____

FORM FIVE (05)

Re: Estate Planning

Dear:

With the execution of your Wills and Durable Powers of Attorney on _____, 2010, we have completed our estate planning services. We sent with you the original and one copy of each of your Wills, and one duplicate original of each of your Durable Powers of Attorney. You should keep your Wills in a safe, fireproof location. We have retained in our office file a copy of each of your Wills, and a duplicate original of each of your Durable Powers of Attorney.

You should review your wills any time there is a significant change in your family, any time you hear of changes in the federal or state law regarding estate and inheritance taxes and related issues or at least every five years.

South Dakota does not have a state inheritance tax. Because the federal government no longer has a state death tax credit there is no longer a South Dakota estate tax. The federal government, however, imposes an estate tax. Life insurance, if owned by the decedent is a part of the taxable estate. Unless Congress retroactively changes the law, in the year 2010, there is no death tax. In the year 2011, however, the exclusion is scheduled to go back to \$1 million and the top tax rate is scheduled to increase from 45% to 55%. Please monitor any changes Congress makes to the tax laws and contact us to see how it may affect your estate. If Congress does nothing and your estate exceeds \$1,000,000, changes may be advisable.

If you have any questions, feel free to call. Thank you for the opportunity to be of service.

Sincerely,

RORY KING

RPK:wjm