ESTATE PLANNING IN
— UTAH —

Estate planning is a process through which a person examines and implements the many ways to provide for the disposition of property to others during lifetime or at death. The process includes planning for the transfer of property, as well as providing for the management, conservation and enhancement of a person's assets. Estate planning also may involve minimizing or avoiding income, gift and estate taxes. This summary discusses some of the basic components of estate planning. Unless otherwise indicated, the discussion is limited to Utah law and federal tax law as it existed on January 1, 2024.

WILLS

An individual who dies (hereafter the *"Decedent"*) having made and signed a Last Will and Testament (hereafter a *"Will"*)—which is distinct from a *Living Will (*see below)--is said to have died *Testate.* A Will is a legal document by which a person, called a *Testator*, directs how his or her property will be distributed at death. A person must be at least 18 to execute a Will. Utah law requires that a typewritten Will be signed in the presence of two witnesses, who must sign the Will within a reasonable time after either witnessing the signing of the Will or witnessing the acknowledgment of the signing by the testator. The witnesses must understand that a Will is being signed, but they do not need to know its contents. Utah also recognizes the validity of a holographic Will, where the signature and the material portions of the Will are in the testator's handwriting.

The most important part of a Will is to name the *Beneficiaries* who will receive property at death. Alternate beneficiaries should be named to receive the property if the primary beneficiary dies before the testator. A Will designates a person or institution, called a *Personal Representative* under Utah law (and sometimes referred to in other legal jurisdictions as an *Executor*), to administer the property during probate of the Will. A parent with minor children may name a person to have custody of the children, called a *Guardian*, and to manage the minors' property, called a *Conservator*.

Funeral and burial instructions usually are not included in a Will. A Will often is not read until after these arrangements are completed. Therefore, it is better to communicate funeral and burial preferences to family members. The same is true with respect to donating parts of one's body, and these wishes may currently be reflected and indicated on a driver's license, an Organ Donor Card, and/or as part of an individual's indicated preferences on Utah's current form of the Advance Health Care Directive. Finally, wishes concerning the continuation of life support during last illness and other medical decisions are not expressed in a Will, but rather, are expressed in a separate document, currently part of Utah's Advance Health Care Directive, and sometimes referred to as a *Living Will.*

Executing a Will does not avoid probate. Rather, the triggering of a probate proceeding following an individual's death is based on several factors, including but not limited to, whether property is owned at death in the decedent's sole name and whether there is a desire to cut off the claims of creditors using the statutorily prescribed manner and time periods of the probate process. As part of the probate process, a decedent's Will must be presented to a court for the purpose of officially appointing the *Personal Representative* who is charged with carrying out the decedent's wishes, as expressed in the Will, regarding the disposition of property and other matters. Probate is a court proceeding to prove the validity of the Will, to establish the legal rights of the beneficiaries to receive property owned by a decedent, and to provide a method for establishing and paying claims of creditors. In Utah, proceedings to probate a Will must generally be started within three years of the decedent's date of death, or the court will disregard the decedent's Will and order the property distributed as if the decedent had not made a Will.

Wills should be reviewed periodically, particularly if there is a change in a person's personal or financial situation. A marriage may significantly alter the way an existing Will disposes of property. If a marriage is dissolved after a Will is executed, the Will is interpreted as if the former spouse died before the testator. The birth of a child or death of a beneficiary after the Will is signed may result in automatic, and perhaps unintended, changes in the Will.

A Will does not become effective until death. It may be changed or revoked at any time as long as a person is legally competent. A Will can be changed by a separate document, called a *Codicil*, which is an amendment to a Will, or by executing a new Will. The original Will should be kept in a safe, fireproof place. A person should not attempt to change a Will by writing on the original Will since that writing may have the effect of revoking the Will.

INTESTACY

A person who dies without having made and signed a Will is said to have died *Intestate.* If a person fails to make and sign a Will, Utah law supplies, in essence, a default Will for that individual directing the disposition of his or her property. This "default" Will is known and referred to as the laws of *Intestacy,* and such rules are found in Utah's Uniform Probate Code. Under Utah's laws of Intestacy, a decedent's property will be divided and distributed as follows:

1. If the Decedent is survived by both a spouse and descendants, and all of the descendants are also the biological or adopted children of the surviving spouse, then all of the Decedent's property goes to the surviving spouse.

2. If the Decedent is survived by both a spouse and descendants, and one or more of those descendants is not the biological or adopted child of the surviving spouse, the first $75,000 plus one-half of the intestate estate goes to the surviving spouse, and the balance of the intestate estate goes to the Decedent's descendants, per capita at each generation (certain nonprobate transfers to the surviving spouse are taken into account).

3. If the Decedent has surviving descendants but no surviving spouse, all of the intestate estate passes to the descendants, per capita at each generation.

4. If the Decedent has a surviving spouse, but no surviving descendants, all of the intestate estate passes to the spouse.

5. If the Decedent has no surviving spouse and no surviving descendants, then the intestate estate passes to the following individuals, in the order listed:

    a. all to parents;

    b. if no parents, all to the descendants of the parents, per capita at each generation;

    c. if no parents, and no descendants of parents, one-half to the paternal grandparents and one-half to the maternal grandparents and, if the grandparents are deceased, to their descendants (including aunts, uncles and cousins).

6. If the Decedent is not survived by any of these family members, the property in the intestate estate will be transferred to the State of Utah for the benefit of its school trust fund.

JOINT PROPERTY

Many people plan for the disposition of property at death by owning their property jointly (*Joint Tenancy)* with rights of survivorship. Bank accounts and securities frequently are owned in this manner. Also, a husband and wife may purchase a residence or vacation property in both of their names with rights of survivorship. In this form of ownership, the property will automatically pass to the surviving joint tenant. Property owned in joint tenancy with rights of survivorship will not, on the death of the first joint tenant, pass according to the provisions of the Will or the laws of intestacy, but instead, passes according to the laws of joint tenancy and rights of survivorship. However, on the death of the surviving joint tenant, the property would pass according to the terms of the Will, or if none, the laws of intestacy, because there are no other named and surviving joint tenants.

Joint ownership of property is an easy way to plan for the disposition of property at the death of the first party. The survivor automatically owns the property when the first party dies. A death certificate, and perhaps an Affidavit of Surviving Joint Tenant, may be the only documents needed to establish the survivor's right to the property. However, probate is not avoided on the death of the last to die of the joint tenants. Furthermore, joint ownership should not be selected unless a person intends for the survivor to own the property at death. Finally, it should be understood that during lifetime, joint ownership may expose the property to claims of the creditors of any one of the joint tenants.

Joint ownership also may result in unanticipated income, gift and estate tax problems. A transfer of property to joint ownership may shift part of the income to the other owner. If there have been unequal contributions to the purchase of the joint property, there may be a taxable gift.

Furthermore, when either joint owner dies, the joint property is reportable for estate tax purposes. Finally, joint ownership may result in overfunding the estate of the surviving spouse, although the pitfalls associated with this overfunding problem have largely been eliminated by recent congressional legislation allowing a surviving spouse to use the unused estate tax exemption of his or her deceased spouse on the surviving spouse's subsequent death (known as *Portability*)(For more, see below discussion under "Tax Planning.")

LIFE INSURANCE, RETIREMENT BENEFITS, AND PAYABLE ON DEATH ("P.O.D.") ACCOUNTS

Life insurance and death benefits payable under a retirement, pension or profit sharing plan or IRA account generally pass directly to a designated beneficiary outside of the will or intestacy. Utah Code Annotated, §75-6-201. Insurance policies and retirement plans frequently have default provisions that apply if no beneficiary is designated. In that event, a spouse, child or the estate may be entitled to the proceeds. Similarly, a P.O.D. account is payable to one or more persons during lifetime and then upon death directly to one or more P.O.D. payees. If there are no survivors, the account usually becomes a part of the decedent's estate. Utah Code Annotated §75-6-103 and §75-6-104. Good estate planning includes careful consideration of beneficiary designations and default provisions. These should be reviewed frequently because people often fail to change the beneficiaries when their personal situation changes.

TRUSTS

A trust is a legal entity, recognized under state law as being separate and distinct from the person who created it, by which a person or institution, called a *Trustee*, holds title and manages property for the benefit of others. The person who creates the trust is referred to as either the *Trustor, Settlor or Grantor.* All three terms are synonymous. It may be helpful to think of a trust as a contract between the Trustor and the Trustee for the benefit of named beneficiaries.

A person may establish a trust during lifetime. Such a trust is known and referred to as an *inter vivos* or *living trust*. The trust may be *revocable*, which means the trustor may change or terminate it, or the trust may be *irrevocable*, which means the Trustor gives up the right to change or terminate the trust. A trust also may be established in a Will. This type of trust is called a *testamentary trust*. Because a testamentary trust does not come into existence until the Decedent's death, it can be modified or revoked by changing or revoking the Decedent's Will at any time prior to his or her death. However, a testamentary trust does not avoid probate and may in fact lengthen the probate process.

A trust can serve a variety of purposes. The most common types of testamentary trusts are a *marital trust* established for the benefit of a surviving spouse and a trust established under a parent's Will for the benefit of his or her children. The Will states how the property held in the trust will be managed for the spouse and children, when distributions will be made and when the trust will terminate. A type of inter vivos trust that is often established as a convenient method of making annual gifts to minor children is called a *minor's trust*.

Revocable living trusts are trusts established to provide for management of property by a trustee during the trustor's lifetime and to avoid probate of the trust property at the time of the trustor's death. The trustor will continue to report all income and deductions from the trust property on his or her personal income tax return. The trust property is subject to estate tax on the death of the trustor. Even when a trust is used as part of an estate plan, a Will is still a necessary document in the estate plan, although it takes on a lesser role. When a trust is used in the estate planning process, the Will is often referred to as a *Pour Over Will* because the Will directs all of the Decedent's assets to be transferred to (or "poured over") to the trust for division and disposition of property.

POWERS OF ATTORNEY AND MEDICAL DIRECTIVES

1. Financial Power of Attorney. A financial power of attorney is a written instrument by which a person, called a *principal*, confers upon another, called an *attorney-in-fact*, the authority to perform certain specified acts on behalf of the principal. A power of attorney can be a useful estate planning device to provide for the management of the assets of the principal during periods of incapacity without the necessity of guardianship proceedings, conservatorship proceedings or other court involvement. A power of attorney is valid only during the life of the principal and must be properly drafted to avoid being invalidated by the incapacity of the principal. If properly drafted it can either be valid from the beginning and continue during incapacity (durable) or only become effective upon incapacity (springing). Utah Code Annotated §75-5-501 and §75-5-502.

2. Advance Health Care Directive. Utah's current Advance Health Care Directive was approved by the Legislature in 2008. It consists of both a *medical power of attorney* and a *Living Will.* In the medical power of attorney portion of this document, a person, called the *principal*, authorizes another person, called the *attorney-in-fact*, to make medical decisions if the principal is unable to do so. In the Living Will portion of this document, an individual is permitted to give direction and instruction to care providers regarding the application or withholding of life-sustaining procedures that unnaturally prolong the dying process. Utah Code Annotated §75-2a-101 et seq.

TRANSFER TAXES

1. Estate Tax. When a person dies, both Utah and federal law may impose tax on the property that the person owns. Property that a person owns at the time of death, as well as certain property in which the person had an interest during his or her lifetime, is included in the person's estate for estate tax purposes. Certain other property, including jointly owned property, life insurance and death benefits payable under retirement plans, is also subject to estate tax.

The federal estate tax is paid from the decedent's property. A marital deduction and charitable deduction are available for qualifying transfers to a spouse or to charity. If the surviving spouse is a non-citizen, the marital deduction is available if a specialized type of trust, known as a *Qualified Domestic Trust* ("QDOT") is used to hold the Decedent's property. The tax rates are graduated but the highest marginal rate in 2024 and later years has been set at 40 percent. Because the tax rate schedule is graduated, an estate's effective rate of tax may be less than the highest

marginal rate depending on the value of the taxable estate plus the value of gifts made during the decedent's lifetime.

To the extent not used for transfers made during a person's lifetime, a tax credit referred to as the *applicable credit amount* is available to reduce the estate tax. The applicable credit amount, which is the amount of tentative tax determined under the unified estate and gift tax rate schedule based on an *applicable exclusion amount* is as follows:

In the case of estates of decedents dying during:	*The applicable exclusion amount is:*
2002 and 2003	$1,000,000
2004 and 2005	$1,500,000
2006, 2007 and 2008	$2,000,000
2009	$3,500,000
2010	unlimited
2011	$1,000,000
2012 and through 2017 (adjusted for inflation).....	$5,000,000
2018 through 2025 (adjusted for inflation) …….	$13,610,000
2026 and beyond	$6,030,000

The result in any given year is that transfers during lifetime or at death are not subject to federal estate tax until the total value of those transfers exceeds the applicable exclusion amount. There also may be a prior transfer tax credit available to reduce federal estate tax if any assets in the estate were subject to estate tax in another person's estate within the previous 10 years.

Historically, the Utah inheritance tax has been a *pickup* tax equal to the amount of the maximum state death tax credit. Usually there is no Utah tax unless there is a federal tax. For individuals dying after 2005, the *pickup* tax for Utah inheritance tax has been phased out. Thus, unless the Utah legislature enacts a separate inheritance tax for Utah residents, there will be no *pickup* tax in Utah. However, this does not mean that the overall estate tax paid will be reduced; rather, it simply means that any estate tax due on death will all be paid to the Internal Revenue Service and none will be paid to the State of Utah.

Both the federal estate tax return and the Utah inheritance tax return must be filed within nine months after the date of death. If the value of the decedent's gross estate is less than the applicable exclusion amount, neither return is required.

2. Gift Tax. All gifts are potentially subject to federal gift tax. (Utah does not currently tax gifts made during lifetime.) A person, called a *donor*, who makes a gift is liable for any gift tax that may be due. Most gifts are minimal and below the value that must be reported. Under federal law, a donor may currently give $18,000 each to any number of other persons each year without incurring any adverse gift tax consequences. (There is an exception for gifts of future interests, which includes most gifts to irrevocable trusts.) The $18,000 amount is called the *annual exclusion*. The annual exclusion amount is adjusted for inflation. By making separate gifts or filing gift tax returns, both spouses can use their annual exclusions. Thus, a married couple can currently give $28,000 a year to any number of other persons.

To determine when the $18,000 limit is reached, a donor must include *all* gifts made to an individual during the year. This includes birthday, holiday and other gifts. As long as the total gifts to each individual do not exceed $18,000 during the year, no federal gift tax return must be filed.

The taxable part of a gift for federal gift tax purposes is the amount in excess of (1) the annual exclusion, (2) the marital deduction for transfers to a citizen spouse, and (3) the charitable deduction for transfers to charity. If tax is due, the current effective highest marginal rate is 40 percent. The marginal rate will be determined by including all taxable gifts made in prior years.

The gift tax also is reduced by the available applicable credit amount. It has historically been the same credit discussed above regarding federal estate tax. To the extent the applicable credit amount is used to reduce the tax on lifetime transfers, it is not available to offset the tax on future gifts or on transfers at death.

Gift tax returns are due, and any gift tax owing is payable, on April 15th of the year following the year the gift was made.

3. Generation-Skipping Transfer Tax. There is also a federal tax on certain *generation-skipping transfers*. This tax applies to generation-skipping transfers made either during a transferor's life or upon death. A generation-skipping transfer occurs when property is transferred to persons in a generation two or more below the generation of the transferor. Thus a direct transfer from a grandparent to a grandchild is a generation-skipping transfer. Also, a transfer to a trust that benefits a child during the child's lifetime and eventually passes to a grandchild is a generation-skipping transfer. Such a transfer will be subject to generation-skipping tax unless the trust property is subject to estate tax when it passes to the grandchild.

Transfers that qualify for the annual gift tax exclusion generally are not subject to the tax. Also, current law allows an exemption from the generation-skipping tax equal to the applicable credit amount (*see foregoing table*). This exemption allows each person to make generation-skipping transfers during lifetime or at death equal to the estate/gift tax exemption amount without paying the tax on generation skipping transfers. However, this estate/gift tax exemption amount which can be used for generation skipping transfers is not separate from regular estate/gift tax transfers. Any gifts which are generational skips count against an individual's overall estate/gift tax exemption amount (*see foregoing table of exemption amount)*. The top estate tax rate applies to the amount of the generation-skipping transfer subject to the tax. The generation-skipping transfer tax

is very complex. The application of this tax should be carefully reviewed before making any transfer to a generation at least two generations below the generation of the transferor.

TAX PLANNING

An important objective of estate tax planning is to reduce transfer taxes. One way to reduce transfer taxes is to make maximum use of the $18,000 annual exclusion from gift taxes. When gifts under the annual exclusion amount are made, no gift tax is paid, the person's taxable estate is reduced, and the full amount of the applicable credit amount is still available to reduce estate taxes. Gifts of certain assets may be better than others. For example, there is a disadvantage in making lifetime gifts of appreciated property because, unlike transfers at death, the donee does not get a new basis (known as a *stepped-up basis)* in the property for income tax purposes.

Effective use of the federal estate tax marital deduction and applicable credit amount is also important in estate planning. If the first spouse to die gives all of his or her property to a surviving citizen spouse, there is no federal estate tax due because of the availability of the unlimited marital deduction. However, the applicable credit amount available to the first spouse to die will not be used. As a result, when the surviving spouse dies, the entire combined estate will be subject to estate tax. Historically, this *overfunding* of the surviving spouse's estate potentially resulted in a substantial increase in transfer taxes. However, given the recent enactment of *Portability* (see above), the surviving spouse is now permitted, at the time of his or death, to use the unused applicable credit amount of his or her previously deceased spouse, along with whatever remaining applicable credit amount the surviving spouse has. The rules of *Portability* are complicated by remarriage, which could cause the overfunding issue to reappear, so care should be given not to rely wholly upon portability as the main planning technique without careful thought and advice being given to the potential consequences. Historically and currently, the preferred estate plan uses the applicable credit amount available to the first spouse to die by providing for a gift of an amount equal to the applicable exclusion amount to a *credit shelter trust*. Upon the death of the surviving spouse, the full amount in the credit shelter trust will not be taxable in his or her estate. Using this technique, a married couple could pass assets worth $27,220,000 to their descendants, friends, and extended families free of estate tax at the end of 2024.

Another useful estate planning device is a *disclaimer*. A disclaimer is a refusal to accept property. If timely and properly executed, a disclaimer will be treated for tax purposes as if the person disclaiming died before the transferor and never received the property. A disclaimer may be used to avoid overfunding the estate of a surviving spouse or another beneficiary. It may be used when tax planning was not done prior to death. By planning for a disclaimer, a beneficiary can decide at the time of death whether he or she needs or wants to receive the property.

Gift, estate and generation-skipping transfer taxes also may be reduced or eliminated by transfers to charity. Charitable transfers may be outright or in trust and may be of partial or entire interests in property.

For single persons whose estates exceed the applicable exclusion amount and for married couples whose estates total more than their applicable exclusion amounts combined, other estate planning techniques are available to decrease federal estate taxes. These include methods of

making gifts that will reduce the taxable value of both the gift and the portion of the property not given, such as family limited partnerships, limited liability companies, personal residence trusts, grantor-retained annuity trusts and charitable remainder trusts.

CONCLUSION

This is a very brief overview of the estate planning process. For some, a simple will, the laws of intestacy, joint ownership of property and the designation of proper beneficiaries may be all that is necessary for an appropriate estate plan. For others, more elaborate estate planning may be required to minimize transfer taxes and to create trusts for the management of assets for a surviving spouse and for children.

This summary was prepared by the following lawyers at HALE & WOOD, PLLC, whose practices emphasize estate and tax planning and the administration of estates and trusts:

Michael K. Garrett
A. Craig Hale
David Headley
Paul W. Jones
Tiffany Sato
Greg Steed
James F. Wood

Holladay
4766 South Holladay Blvd.
Holladay, Utah 84117
Phone (801) 930-5101