

What Every Lawyer Should Know About Estate Planning

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Utah State Bar
Spring Convention
March 20, 2010

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¹ The author wishes to acknowledge and give thanks to David R. York, Scott M. McCullough and Mark J. Morrise in the preparation of this outline.

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LAW PRACTICE

Andrew is a Shareholder with the law firm of Callister Nebeker & McCullough. Andrew represents clients with respect to estate planning, probate and estate administration matters, charitable giving, and sophisticated business and tax planning matters, as well as representation of financial institutions. He has continued to develop his practice in this area of specialty, including assisting clients in the preparation and review of trusts and wills, instruments for charitable giving, and various other estate and family planning documents. Andrew assists in planning and structuring business organizations, stock and asset sales and purchases, buy-sell and shareholder agreements, and other business buy-out and business succession planning.

EDUCATION

S.J. Quinney College of Law (University of Utah) J.D. (2002)

University of Utah, B.S. (1999)

Rowland Hall St. Marks (1994)

Mr. Howell has earned his life and health insurance license in 1999 and maintains them in good standing although is not active in the sale of life or health insurance.

PERSONAL

Andrew was born and raised in Salt Lake City, Utah where he still resides with his beautiful wife Candice. They have two boys, Thomas and Harrison and recently had their newest arrival of a beautiful baby girl named Madeline. In addition, they have two dachshunds, Morgan and Molly and, Charlie, a black Labrador adopted through Lab Rescue, a non-profit organization located in Utah. Andrew is an avid fly fisherman, hunter, skier and loves all things outdoors. Time away from the office is spent in two of his favorite areas, Dillon, Montana and Del Mar, California.

1) What Every Lawyer Should Watch Out For Regarding Estate Planning

a. The risks of “dabbling” in estate planning:

- i. When times are tough, everyone becomes an estate planning attorney.
- ii. The area of estate planning is a leader in the law in the number of malpractice claims. Why?

1. The Concept of “Privity” has eroded over the years and courts are increasingly willing to allow for malpractice claims against a lawyer brought by a beneficiary who was never a client.

2. Report published by the American Bar Association in 2003 states that Estate, Trust and Probate accounted for 9% of all malpractice claims.

3. The risk of making a mistake?

- a. Attorneys practicing in estate planning and probate are held to the common standard of care. The attorney must exercise the skill and knowledge ordinarily possessed by an attorney under similar circumstances.

- i. Duty of Care: The Rules of Professional Conduct and the Model Code of Professional Responsibility make it clear that if the matter is relatively complex or specialized in nature then the lawyer must consider if he or she has the training, experience, and ability to handle the matter. If not, then the

attorney must consult with other attorneys more experienced to handle such matters.

- ii. Estate planning is a highly technical area of the law and requires extensive knowledge in not just state law regarding Wills, Trusts and Probate matters, but also highly complex areas of the federal internal revenue code. There is no such thing as a “simple will” and comprehensive estate planning cannot be adequately addressed by software or fill in the blank documents.
- iii. Clients’ sophistication is ever increasing. Clients are more demanding, more educated and can easily spot mistakes. Clients are also increasingly litigious and the traditional concept of loyalty has continued to erode. The lawyer is no longer viewed as an advisor but as a means to an end.
- iv. Potential claims against an attorney can range from malpractice, conflict of interest, breach of duty, fraud, negligence and/or infliction of emotional distress.

b. Breakdown of Claims:

- i. 40% of all malpractice claims in the area of estate planning involve the preparation of documents.

16% of the claims are characterized as related to the giving of “advice.”

1. 9% of claims result from a failure to adequately understand the substantive law. These are the “dabblers.” Especially risky are the attorneys doing planning for family and friends as a favor.

a. Personal experience with clients who had their planning prepared using the “Suzy Orman Will and Trust Kit.” It really does exist. See http://www.suzeorman.com/igsbase/igstemplate.cfm?SRC=SP&SRCN=protectionhelp_login&GnavID=95&SnavID=113.

b. In Sum. Be careful and when even in slight doubt it is prudent to speak with an expert.

2) What is Estate Planning?

a. Definition: Over the years, the term “estate planning” has become the most popular phrase to describe the activities of planning for family security. What a broad topic! One prominent experts practicing in the area of estate planning for 50 years described the process of estate planning as “a preconceived and orderly plan of (a) arranging a client’s assets for the most effective use and enjoyment

during his or her life; (b) providing for the transfer to the client's family, or others, during the client's lifetime or upon his or her decease, strictly in accordance with his or her personal wishes; and (c) accomplishing (a) and (b) with the least possible loss because of income taxes, death taxes and costs.”²

- b. Estate planning is never complete. Documents may be up to date for a given period of time, but they need to be consistently updated to account for changes in a client's personal circumstances as well as changes in the law.
- c. Basic Estate Planning: What a general practice attorney traditionally thinks of when discussing the topic of estate planning.

Essential Estate Planning Documents (Each to be discussed in more detail below)

- 1. Last Will and Testament
 - 2. Trust
 - 3. Power of Attorney Documents covering healthcare decisions as well as business, financial and transactional decisions.
 - 4. Advanced Medical Directives: End of life planning decisions.
- d. Proper Titling of Assets: One of the first steps in estate planning (after a comprehensive discussion of the client's goals and family issues) needs to be a complete review of a client's current assets and how each is titled. In essence, a disclosure and examination of the relevant facts. The facts disclose problems. Once problems have been identified, a comprehensive plan of solutions can be developed. The most common issue that I see, even in a situation when a client

² The author wishes to thank Max B. Lewis, L.L.B., JD (1918-2006) for this definition and for being a wonderful mentor, confidant and grandfather.

has an existing estate plan, is very little attention has been given to the correct titling of assets. As a result, a brief refresher regarding various titling issues is warranted. Please note that this list does not include all possible types of title, but probably the most common.

- i. Sole Ownership. This is the simplest form of ownership. Only one name appears on the title document. At the owner's death, the entire value of the property is included in his/her gross estate. A will should include instructions on the distribution of any solely owned property. If there is no will, then state law will govern the distribution of the asset. Example: a bank account with only one name on the account.
- ii. Tenancy in Common. This covers property owned by several people. Each owner has a fractional, undivided interest in the entire property. Again, a will governs the transfer of property owned by tenancy in common, and if there is no will or if the will makes no provision for the property, it will be distributed according to state law. *See* U.C.A. §§ 75-2-205(1)(b),(c).
- iii. Joint Tenancy With Rights of Survivorship (JTWROS). A common form of ownership for property held jointly by a husband and wife is joint tenancy. A parent and child, siblings, or business partners may also own property jointly with rights of survivorship. The distribution of this property takes place outside the will, meaning it avoids the probate courts. At the time of death, a person's share of the property transfers to the other joint tenant(s). Different rules apply in community property states.

Tenancy by the entirety is similar to joint tenancy (yet different, the main difference being that Tenancy by the entirety is done only by husband and wife and each owner gives up their ability to transfer their ownership interest without consent of the other owner), but Utah is not one of the states where tenancy by the entirety applies. *See* U.C.A. §§ 75-2-205(1)(b), 75-2-206(1)

1. Probate avoidance vs. probate delay.
2. Asset protection issues.
3. Unintentional omission of heirs.

iv. Beneficiary Designations: (Non-Probate Transfers)

1. Life Insurance: Insurance policy proceeds, including life and accident insurance death benefits: *See* U.C.A. §§ 75-1-201(3), 75-2-205(1)(d).
2. Retirement Benefits: Death benefits of annuities, pension plans and retirement accounts, including IRAs and 401(k)s. *See* U.C.A. § 75-1-201(3).
3. Bank Accounts – POD: *See* U.C.A. §§ 75-6-10 through 75-6-115
4. Brokerage Accounts – TOD: *See* U.C.A. §§ 75-6-301 through 75-6-313.

e. How Property Transfers: There are three (3) basic ways all assets transfer ownership from one person to another.

- i. By Law. Assets held jointly with rights of survivorship automatically go to the surviving joint tenant, as previously discussed. The law holds that

a jointly owned asset with rights of survivorship automatically goes to the surviving co-owner. Even if a will governs the distribution of an estate, some property may still be transferred by law. For example, if an estate ends up in probate, the courts may distribute some of the estate's assets to the heirs as a family allowance which would provide for the surviving family's support during the probate process. In addition, many states grant a homestead allowance, which exempts real estate such as a home and, in some states, some personal property from probate, keeping these assets beyond the reach of creditors. *See* U.C.A. § 75B-5-503.

- ii. By Contract A second means of transferring assets to heirs is by contract. Many people most likely have already entered into this kind of arrangement — with life insurance, for example. The proceeds from life insurance go to the named beneficiary no matter what the directions of a will. If there is a desire to change the beneficiary, the contract must be amended. The same is true for any other type of account that has a beneficiary designation.
- iii. By Will A will is probably the best known estate planning instrument. It is a legal document that governs the distribution of assets at death (more fully described below). The will also names executors/ personal representatives appointed to carry out a testator's wishes. Although there are three ways that assets can transfer, the will is, for most people, the cornerstone of their estate plan. Assets passing by will, if over the exemption of \$100,000 most likely will pass by probate.

f. Probate:

i. What is it? Probate is the legal process for insuring that a decedent's property is collected and properly preserved; the decedent's debts and taxes are paid; and the remaining property is distributed to the devisees named in the decedent's Will or, if the decedent died without a valid last will and testament, to the decedent's lawful heirs. Technically, the term "Probate" refers only to a court's validation of a decedent's Will. However, for purposes of this discussion, the term "Probate" is used more generically to describe the entire probate process. If a person dies without a valid Will then they are deemed to have died "intestate." This situation will be discussed more fully later in the presentation.

ii. Steps in Probate: (To be discussed quickly)

1. Opening Documents are Prepared and Filed. U.C.A. §§ 75-3-301, 75-3-401.
2. Notice of the Probate is given to the decedent's surviving heirs and devisees. U.C.A. §§ 75-3-306, 75-3-310, 75-3-403.
3. Personal Representative Is Appointed. U.C.A. §§ 75-3-307, 75-3-414, 75-3-704. As evidence of the Personal Representatives' authority, the court issues *letters testamentary* (if decedent had a valid will) or *letters of administration* (If decedent did not have a valid will) to the Personal Representative

- a. The Letters Testamentary or Letters of Administration are needed to prove to the third parties that a probate has been initiated and that the Personal Representative has the authority to gather and otherwise deal with a decedent's assets.
4. Will is Validated. Will is "probated" U.C.A. §§ 75-3-302, 75-3-409.
5. Notice is Given to Creditors. The PR mails written notice of the probate to all known creditors and publishes notice of the probate in a local newspaper for the benefit of all unknown creditors. Creditors must file their claims with the PR or their claims are barred. Creditors who receive actual notice have until 60 days from when the notice was mailed or three months after notice in the newspaper was first published, whichever is later, to file their claims. Other creditors have until three months after notice was first published. U.C.A. §§ 75-3-801, 75-3-803.
6. Notice Is Given to IRS. The personal representative notifies the IRS of his or her appointment. *See* Internal Revenue Code (IRC) § 6903; Treas. Reg. § 301.6903-1.
7. Estate Checking Account Is Opened. The PR applies with the IRS for a federal employer identification number (FEIN) for the estate. After the FEIN is issued, the PR opens an estate checking account.

8. Inventory Is Prepared. The PR prepares an inventory of the decedent's property owned at death. U.C.A. § 75-3-705.
9. Creditors' Claims Are Paid or Disallowed. After the deadline for creditors to file their claims has expired, the PR pays valid claims and mails notice of disallowed claims. U.C.A. §§ 75-3-805 through 75-3-807.
10. Tax Returns Are Filed and Taxes Paid. The PR files the decedent's final income tax return and pays the income tax due. The PR also files tax returns and pays any tax due for any applicable estate tax, gift tax, estate income tax, and generation skipping transfer tax.
11. Estate Assets May Need to Be Sold. If necessary, the PR sells estate assets for cash to pay debts and taxes.
12. Accounting Is Prepared. Unless waived (*see* U.C.A. § 75-3-1003(3)), the PR prepares a final accounting for the estate. U.C.A. § 75-3-1001 through 75-3-1003.
13. Final Distributions Are Made; Estate Is Closed. After all applicable creditors' claims and taxes are paid and the accounting is prepared, the PR is ready to make final distributions and close the estate. In connection with the final distributions, the legal documents necessary close the estate are prepared and filed with the probate court. U.C.A. §§ 75-3-1001 through 75-3-1003.

14. **Personal Representative Is Discharged.** When the estate has been fully distributed, the PR can obtain an order from the probate court discharging the PR from any further liability to the decedent's beneficiaries, heirs, and creditors. U.C.A. §§ 75-3-1001 through 75-3-1002. If the PR closes the estate "informally," then the PR can obtain a certificate from the court stating that the personal representative appears to have fully administered the estate.
- iii. Informal vs. Formal Probate: The opening of a probate can be either *formal* or *informal*. The closing can also be either formal or informal. Generally speaking, a formal opening or closing always involves a court hearing, results in a court order, and costs more and is harder to contest than an informal opening or closing. A client should obtain professional assistance in deciding which type of opening or closing to file.
- iv. Avoiding Probate: As part of his or her estate plan, a client may wish to avoid probate. Some common ways to do this are to (1) transfer titled property to a revocable living trust (to be discussed in detail below), or (2) hold property in joint ownership. In addition, if the decedent's probate estate is less than \$100,000, then a full probate can be avoided using a small estate affidavit (with some exceptions). U.C.A. §§ 75-3-1201, 75-3-1202.
- v. When Not to Avoid Probate: Despite its nasty reputation, there are reasons to go through the probate process. Some are outlined below:

1. Cut off Creditor's Claims. It may be desirable to extinguish potential claims if the decedent died with unpaid debts.
2. Cut off Potential Claims by Clients or Customers. If the decedent engaged in a business in which a client or customer could assert a claim personally against decedent for damages. Physicians, attorneys, accountants, or a person engaged in business as a sole proprietor, certainly fall in this category.
3. Resolve Family Disputes. A probate may be necessary in the event heirs are disputing an inheritance.
4. Make Tax Election. Often times, a Personal Representative needs to be appointed as the correct person to make appropriate income and/or estate tax elections.
5. Obtain Discharge of Liability on Behalf of Personal Representative. The person(s) who has taken charge of dealing with a decedent's estate may want to make sure that no suits may be brought against them in the future after property has been distributed. Probate can offer a discharge of that liability.

g. The Last Will and Testament:

- i. Who needs a Will? Everyone! Unfortunately, only half of all adults have taken the time to prepare a Will.
- ii. What is a Will? A will is simply a legal document that says who gets what when a person dies. There are several ways to approach developing a will. A person could buy a "fill in the blanks" type at a local office supply store,

as previously mentioned there are computer programs that can help develop one, or a person can have an estate planning attorney assist. Any will (in Utah) requires the witness signatures of two people who are not your relatives or beneficiaries, and those signatures must be notarized. A person must be at least 18 years old and “of sound mind” to make a will. U.C.A. § 75-2-501.

iii. Holographic Wills. A Client can also write what is referred to as a "holographic will" which is simply writing the instructions for distribution of their assets on a piece of paper. The four basic requirements for a holographic will are as follows: (a) Use a clean sheet of paper with absolutely no other writing, logos, or markings on it; (b) Make sure that the entire will is entirely in the client’s handwriting and is dated and signed by the client; (c) If there is a mistake made, don't cross it out — start over; and (d) Don't have anyone else witness a holographic will.

1. A Will also includes:

- a. Naming a Personal Representative
- b. Appointing Guardians for minor children and Conservators of the property of minors.
- c. Controlling the timing and manner of distribution of assets.
- d. Discussion of a “Pour-Over Will.”
- e. Other Common Provisions: Payment of Debts, Waiver of Bonds, Distributions to Minors, Lapse, Penalty Clause for Contest, Survivorship Requirement, Right to Disclaim, Tax

Apportionment Clause, Self Proving Language. Detailed and experienced knowledge of each of these provisions, when they apply and how they apply is necessary to competently draft a will and shows that there really is no such thing as a “simple” will.

2. What happens in the event of having no Will at the time of death?
 - a. If a person dies without a valid will, that person is deemed to have died “intestate.”
 - b. Disadvantages of dying intestate:
 - i. Estate May Not Be Distributed According to Client’s Wishes. The client’s property will not be distributed according to the client’s wishes, unless those wishes coincide with the rules of intestate succession.
 - ii. Titled Property Must Pass Through Probate to be Distributed. The client’s titled property cannot be distributed to the client’s heirs until the property has passed through probate. (The same disadvantage applies to wills.)
 - iii. Personal Representative May Not Be Chosen in Accordance with Client’s Wishes. The personal representative of the client’s estate will not be chosen in accordance the client’s wishes, unless

those wishes coincide with the statutory priority set forth in U.C.A. § 75-3-203. Furthermore, if more than one person has equal priority (such as the client's children), then all of those persons will serve as co-personal representatives except for those who renounce their right to serve or who fail to object to the appointment of a personal representative. U.C.A. § 75-3-203(3).

- iv. Formal Opening May Be Required. If the client dies intestate, then the personal representative must file a formal opening if more than one person has priority to serve as personal representative and if all other persons with equal priority do not renounce their right to serve. U.C.A. § 75-3-203(3) (“When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them or in applying for appointment in informal proceedings”). In contrast, if the client has a valid will, the personal representative nominated in the will can file an informal probate without the concurrence of any other person.

- v. Distributions to Minors May Require a Formal Guardianship or Conservatorship. A distribution of over \$10,000 per year to a minor heir may require the filing of a formal conservatorship or guardianship. *See* U.C.A. §§ 75-5-102, 75-5-423.
- vi. Minors Will Inherit at Age 18. Any minor heirs will inherit their full share when they reach age 18. *See* U.C.A. §§ 75-5-210 (guardianship terminates at age of majority) & 75-5-425(4) (conservator of a minor who is not disabled must distribute funds when the former minor reaches majority).
- vii. Guardians of Client's Minor Children May Not Be Chosen in Accordance with the Client's Wishes. If the client and the client's spouse both die and leave any minor children, then a court will appoint a guardian based on the court's decision as to who will act "in the best interests of the minor." U.C.A. § 75-5-206(1). Obviously, a judge's impression of who would be the best guardian may not coincide with the client's wishes.
- viii. Increased Possibility of Family Disputes. The client's failure to decide how his estate is distributed or who serves as personal representative

increases the possibility of disputes among family members over control and distribution of the estate.

- ix. Increased Settlement Costs. The cost of settling the estate may be increased, especially if family disputes arise.

h. Trusts:

- i. What is a Trust?: A Trust, despite all the fancy labels that are used (“Revocable Trust,” “Living Trust,” “A/B Trust,” etc.) is simply an agreement between three parties. The grantor (sometimes referred to as the “Settlor” or “Trustor”), the trustee and the beneficiary. Despite how fancy a trust looks, it can be boiled down to this simple arrangement. The grantor gives property to the trustee to hold, manage and administer for the benefit of the beneficiary. Transferring property to a trust severs the ownership of the property. It is no longer an asset of the grantor for probate purposes.

ii. Types of Trusts:

- 1. Revocable Trust: This type of trust leaves the power to revoke the trust at the discretion of the grantor and is the most common type of trust used in a basic estate planning package. Often times, revocable trusts turn into irrevocable trusts upon the death of the grantor.
- 2. Irrevocable Trust: This type of trust does not allow for revocation or amendment by the grantor. This type of trust is often used to

move an asset out of the grantor's estate for estate tax reasons or for creditor protection reasons.

3. Inter vivos Trust: Is simply a trust that has been established and takes effect during the grantor's life.
4. Testamentary Trust: Conversely, a testamentary trust takes effect only upon the death of the grantor. Typically a testamentary trust is created within a last will and testament and most likely will result in a probate.
5. Many others beyond the scope of this presentation.

iii. Uses of the Revocable Living Trust (Inter vivos): The revocable living trust is the most common form of trust in a basic estate planning package. There are limitless reasons for creating a trust of this sort, but generally these reasons can be boiled down to a simple few.

1. Avoiding Probate: When an asset has been **properly** transferred to the trust (to be discussed in more detail below) the grantor is no longer the owner. Accordingly, the assets owned within the trust will be able to avoid the probate process. A trust is a private document and transfers made according to the trust are not publicly disclosed. This is in direct contrast to the probate of a last will and testament.
2. Asset Management: A trust can provide a central ownership location for a person's assets. This can help simplify controlling and managing assets and can also allow for a corporate trustee to

assist in the management of the assets. The trust will also typically provide for back up trustees to be able to act in the event of a person's disability or incompetency. This allows for continued effective management of the assets within a trust without having to get guardian or conservatorship appointment.

3. Controlling the Timing and Manner of Distribution of a Person's

Assets: As previously mentioned, if a person passes away intestate then all assets will pass to the appropriate devisees at the time they reach the age of 18. A trust can be drafted to delay the time in which a beneficiary will receive access to their share of the trust assets. A Grantor can be very detailed as to the circumstances in which a beneficiary would receive the assets and what the assets need to be used for.

4. Tax Planning: Trusts are often used to ensure that both spouses fully utilize each of their estate tax unified credits. (Brief discussion of the current status of the estate tax)

5. Estate Liquidity: As assets within a trust are not subject to the probate process, there can be immediate access to trust assets.

6. Asset Protection?: Revocable trusts are subject to the revocation rights of a grantor. Accordingly, assets within a revocable trust are often subject to claims of creditors of the grantor. Increasingly I am hearing of magical asset protection that can be achieved through the use of a trust. Asset protection can be gained through

the use of a trust, but this type of asset protection trust needs to be drafted very carefully and also needs to be governed under the laws of a jurisdiction favorable to this type of planning.

i. Power of Attorneys:

i. What is a Power of Attorney? A Power of Attorney is a written document that appoints an attorney-in-fact who can make certain decisions on behalf of another.

ii. Types of Power of Attorneys:

1. Durable: A durable power of attorney is effective upon signing. Meaning, that as soon as the durable power of attorney is executed, it acts to give the attorney in fact the power to make the described decisions on behalf of the giver of the power of attorney. A durable power of attorney will continue unless and until it is formally revoked.

2. Limited: A limited power of attorney has limitation put on either the time in which the power of attorney is effective or the types of decisions that can be made, or both.

3. Springing: A springing power of attorney will typically “spring” into effect upon a person’s incapacity.

iii. Power of Attorney for Healthcare: Traditionally a power of attorney for healthcare has been drafted as a separate document. However, in 2008 Utah enacted the new Utah Advanced Healthcare Directive. The new directive serves two main purposes; (a) to appoint a healthcare agent who

is someone that can make healthcare decisions on behalf of another and (b) to allow a person to express their own desires regarding life sustaining procedures that may need to be provided to them. As a result, many estate planning practitioners have discontinued drafting a separate power of attorney for healthcare. This author still prepares a separate power of attorney for healthcare for his clients. The power of attorney for healthcare can be durable, limited and/or springing.

iv. Financial Power of Attorney: This document covers decisions that can be made on another's behalf regarding business, financial and transactional matters. The financial power of attorney can be durable, limited and/or springing.

1. Financial Powers of Attorneys have been under scrutiny of late and where in the past a power of attorney may make a very general statement allowing another to make any decision a person may otherwise be able to make. Due to the potential ambiguity of such a general statement, a better practice is to specifically identify the various powers that are being given to the attorney in fact.

v. Living Wills / Advanced Directives: As previously mentioned Utah has adopted and embraced the Utah Advanced Healthcare Directive (the "UAHD"). The UAHD combines the Power of Attorney for Healthcare and the Living Will. The UAHD acts to prepare for an event of medical incapacity, allows for a person to express their own desires in regard to issues such as organ donation, appointment of guardian, the ability for a

healthcare agent to authorize medical research, and most importantly what that person's desires are in the event that life sustaining procedures are necessary to keep that person alive.

3) **Other Estate Planning Concepts / Issues:**

- a. Use of Family Partnerships / LLCs:
- b. ILITs:
- c. Asset Protection Concepts
 - i. Self Settled Trusts
 - ii. Lifetime trusts for children
- d. **Comments on Wills for Heroes program:**