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UNTYING THE KNOT– UNTIL DEATH AND TAXES DO US PART SUBTITLED: THE PART RELATING TO PRACTICAL ISSUES RELATED TO PROPERTY OWNERSHIP, ESTATE PLANNING, AND THE RANGE OF UNIQUE OPPORTUNITIES AND CHALLENGES THAT ARISE IN PLANNING FOR THE NON-TRADITIONAL FAMILY: DOCUMENTS THAT ALL NON-MARRIED COUPLES MUST CONSIDER

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Please note that all observations contained in this article are those of the author and prepared for the panel discussion at the American Bar Association's Joint CLE meeting of the Taxation and Real Property, Probate, and Trust Law Sections; these observations are not legal advice and are meant to encourage, educate, and in many instances aid in the review of knowledge of areas already known by legal professionals; these materials are not meant to substitute in any way for due consideration by all such legal professionals. Thank you.

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In 1988, Stanley M. Johanson (The Fannie Coplin Regents Chair at The University of Texas School of Law and an excellent trusts and estates educator) and I penned a short article for the *Texas Bar Journal* entitled "Estate Planning for the Client with AIDS," 52 Texas Bar J. 217-223 (Feb. 1989). This was before the pharmaceutical cocktails that have significantly slowed the deadly effects of AIDS. At the time, many men under the ages of 40 and even 30 were dying. Our premise was that, sadly, many persons with AIDS must focus on estate and disability-related questions at a much earlier age than most of our clients. (Often, the median age of our clients is significantly greater than 30.) As counselors called upon to help clients deal with these issues, we hoped our research and thoughts would be helpful to others when they were called upon to advise their clients on such issues. Thankfully, AIDS no longer seems to be, at least in the United States, the death sentence it once was.

Those initial thoughts and research have progressed over the years. This paper contains ideas and "to dos" that, hopefully, will be of use to you when your clients face these situations, calling on you for assistance.

We all have, or will have during our careers, clients who are in long-term, committed relationships and who are not married, either because they have chosen not to be or, legally, are unable to be married, or whose marriage is not recognized by all jurisdictions, including that all-important Federal one. Attorneys counseling clients about estate and disability planning matters will probably discuss with all clients the following "tools:"

(1) a will where “probate” property passes to specified beneficiaries upon the client’s death;

(2) a durable power of attorney that is, essentially, "general" where an agent is appointed to manage the client's daily business affairs and perhaps make gifts;

(3) a power of attorney that is "special" where the agent is authorized only to take specific actions, perhaps transferring assets to a revocable management trust;

(4) a revocable management trust that can be used to manage the client's assets and pass on property to specified beneficiaries at the death of the client;

(5) beneficiary designations, joint tenancy with right of survivorship, and payable on death

designations for non-probate assets, like IRAs, 401ks, life insurance, and in some cases bank and investment accounts, and even real estate, which can be treated as "non-probate;"

(6) a designation of guardian/nomination of conservator in the event one is ever needed;

(7) advanced directives -- directive to physicians, family, and surrogates, either to refrain from taking measures that delay the moment of death or to take such measures;

(8) a medical or health care power of attorney authorizing another person to make health care decisions in the event the client is unable to communicate; and

(9) a funeral directive (called in Texas an "appointment of agent to control disposition of remains" – Tex. Health & Safety Code § 711.002 (West 2003 & Supp. 2006).). (Some clients who are gravely ill and whose state statute allows such a document may also want to do an out-of-hospital DNR – "do not resuscitate"; those are not addressed in this article. Tex. Health & Safety Code §§ 166.081 - .102 (West 2001 & Supp. 2006). Although the official citation may still be "Vernon's," since West publishes the Texas statutes, the author is citing to West.)

While there is still an estate tax (and hope springs eternal), attorneys will discuss tax minimization techniques with our clients: (1) gifting, (2) limited partnerships, (3) GRITS, (4) GRATS, (5) CRATS, (5) CRUTS, (6) life insurance trusts with Crummey-demand powers, (7) annuities , (8) installment sales, including SCINS, (9) private annuities, (10) split purchases, (11) sale of remainder interests, and (12) QPRTs. As these tax minimization techniques are the same for any person who is legally single or married, they are not going to be discussed in this paper. The minimization of potential conflicts and taking steps to insure that a client's wishes are honored and observed are the primary foci of this article.

There are definitely issues that we as legal counselors should be aware of when working with an individual who is in a committed relationship with a member of the same sex, i.e., a "same-sex" couple. Many of these apply when you have an opposite sex, unmarried couple. Much of the 1988 Johanson & Bay article, as well as a paper done in 2004 for ACTEC and a joint presentation with Professor Jeffrey G. Sherman of Chicago-Kent College of Law, appears (re-appears) in this article. I also want to express my appreciation again to Barbara J. Klitch, Stanley Johanson's able attorney research assistant (and lovely daughter) who helped us in 1988 substantiate with extensive footnotes our observations. (I still have the 1978 edition of Dukeminier and Johanson, Family Wealth Transactions, Wills, Trusts and Estates (Little Brown and Company, 1978), as supplemented by the sixth edition (Aspen Law & Business 2006)).

I. OVERVIEW.

Persons who share their lives together without being married (either because they simply choose not to marry or they are not eligible to be married under the law) have non-tax estate and lifetime and disability planning questions similar to those of other clients: Who will get my property when I die? Who will manage my assets and my affairs if I become unable to do so? What will happen if I am no longer able to write checks, pay bills, or carry out other similar activities that are part of my every day life? Who will handle my funeral and decide how to dispose of my body? Who will the funeral home talk to? Who gets to know what's happening to me when I'm ill and who will the doctors and other medical care professionals listen to – who will be in control of my fate?

Often, state and Federal laws incorporate for married couples automatic default protocols that allow the spouse a number of rights to obtain information and to give directions; for example, the right, unless the other spouse has designated differently, to give instructions about medical care and to handle funeral arrangements. (For example, see Texas Health & Safety Code §§ 313.004, "Consent for Medical Treatment," and 711.002, "Disposition of Remains; Duty to Inter" (West 2001, 2003 & Supp. 2006).) This simply is not the case with unmarried couples unless the state *where the individual is physically in the hospital or where his or her body is located has enacted a statute that gives a companion rights under certain circumstances*.

Same-sex couples reportedly often face hurdles, including emotional animosity, to a greater extent, at least to a more publicly reported extent, than traditionally married couples. While some daughter-in-law, mother-in-law situations are strained, under the law, unless the husband has specified otherwise, the wife has the right to control funeral arrangements, not the mother. If the husband did not leave a will, the wife will have rights under intestacy statutes as well and those rights are typically more than the mother's. However, with unmarried couples, the companion enjoys no such legal rights*, again, unless that state where the individual is physically in the hospital or where his or her body is located has enacted a statute that gives the companion rights*. So, the blood relatives have control. Even if the deceased companion made a will and left everything outright to the surviving companion, there appears a greater likelihood of a will contest than would be the case if the surviving companion were a legal husband or wife. "AIDS Victims' Wills Under Attack," by Kirk Johnson, *The New York Times*, p. B-1 (Feb. 19, 1987) (noting that AIDS research had indicated possible effects on the brain before other symptoms occur; a "brain impairment" argument can be made by blood relatives seeking to prove the testator lacked capacity when the will was signed). (If you're really interested, you can purchase the *New York Times* article on line at www.nytimes.com -- go to archives.)

In many of these cases, it has been reported, the money involved was secondary. The will contest was seen as a means of vindicating the blood relatives' values which looked askance at the gay and lesbian lifestyle that the blood relatives simply did not understand or accept, and certainly did not condone. All will contests are bitter; these particularly, as often

the blood relatives view the companion as the cause both of their child's (sibling's) lifestyle and perhaps even of the disease resulting in death. Even if the contest is unsuccessful, the client's testamentary wishes will have been effectuated only after an ugly, lengthy, and costly battle in which the client's companion and friends are pitted against the client's father, mother, brothers, and sisters. ("Legal Challenges to AIDS Patients' Wills Seen on Rise," *Los Angeles Daily Journal* (August 16, 1988): "Attorneys in those cities [New York, San Francisco, and Los Angeles] are seeing a growing number of will contests and other fights between blood relatives of AIDS victims and the victims' friends and lovers. The challenges are usually based on the victims' competency when the will was made out, since loss of mental capacity is a common occurrence in AIDS cases.")

If the contest is successful (and success can include making the surviving companion spend lots of money on it), the client will have been denied a right that is fundamental to our property system: ***the right to designate who will succeed to ownership of his or her property at death.***

Even if the will is not attacked by blood relatives, the lawyer grapevine reports that blood relatives sometimes "swoop" in after a death and take control of the body and of the funeral. If the home is owned by the deceased family member, sometimes the blood relatives "evict" the companion until such time as the will is probated and they, in turn, are evicted. (A lot of the moveable tangibles in the home may no longer be in the home upon the companion's return.) As we all know from practicing for many years in this area, most wills in the United States are probated without contests being filed. However, the likelihood of disgruntlement and a contest of some sort – over property and/or over the person's health or body – is simply far greater with the same sex-couple or with an opposite sex, unmarried couple, than it is when there is a marriage recognized in all states and even in other countries as being valid. Planning should and can be done to minimize those risks. (Rosenfeld, "Legacies of Aging and Social Change," in Inheritance and Wealth In America 173 (Robert K. Miller, Jr. & Stephen J. McNamee, editors 1998): the changing family dynamic in the U.S. – lots of divorces and multiple marriages (sometimes just because of a long life) and domestic partnerships sans marriage, have resulted in more litigation.)

II. ASSUME THAT THERE WILL BE AN ATTACK ON THE WILL.

With an unmarried couple, especially a same-sex one, typically the attorney should assume that there is going to be at least one dispute and perhaps a series of them. Planning to insure the viability of the client's desires, both during life and after death, must be undertaken and perhaps a road map prepared for the client, a road map that can be used by the surviving companion.

A. Elicit a Candid Assessment of the Client's Relationship with Blood Relatives.

Determine whether the blood relatives have accepted the client's lifestyle and the relationship with the companion. Even when the client states that the relationship with blood relatives is satisfactory, assume that the planning is going to be contested and recommend strategies that reduce the likelihood not only of a successful challenge, but also of a contest even being filed. The client can then decide how much effort (including cost) should be incurred.

B. A Person Must Have a Will in Order to Leave Probate Property to the Companion -- Do the Will Sooner Rather than Later: Intestacy and Elective Shares.

Intestacy laws generally only recognize blood relatives, including those who are adopted. (Some states are changing their intestacy statutes as they recognize the registration of a domestic partnership or even a same-sex marriage. West's Cal. Probate Code Ann. §§ 37(b) & 6401 (c) (2002, 1991, Supp. 2007); *Goodridge et al. v. Department of Public Health (Massachusetts),* 440 Mass. 309, 798 N.E. 2d 941 (Nov. 18, 2003), a 61-page decision available on line at

http://www.masslaw.com/signup/opinion.cfm?page=ma/opin/sup/1017603.htm

With opposite sex couples who are not married in a traditional, licensed manner, there might be a common law marriage, still recognized by some states, although stringent restrictions as to "proof" of the marriage tend to apply. (For more about common law marriages, look on the WEB at http://www.ncsl.org/programs/cyf/commonlaw.htmns-- National Council of State Legislatures. Under a relatively new addition to Texas law, a lawsuit to prove the common law marriage must be commenced within two years of the time the parties stopped living together, Texas Family Code § 2.401(b) (West 2006). However, do not rely upon any such common law marriage laws unless you find yourself and your client in a post-death world where no will was done; if you have the opportunity to do a will for a client, do so.

Reportedly, one person in a couple sometimes adopts the other, but this is certainly not going to be the norm, may result in legal disputes over whether or not the "adoption" works to make the adoptee a descendant of both the adopter and the adopter's ascendants, and may be subject to challenge as violating public policy. (*In re Adult Anonymous II*, 452 N.Y.S.2d 198 (App. Div. 1982) (same-sex adult adoption of older by younger man permitted), but *see a different view from the same state, In re Adoption of Robert Paul P.,* 63 N.Y.2d 233, 471 N.E.2d 424 (1984 (petition for same sex adult adoption where there was a sexual relationship denied as violating public policy).) Adoption unlike marriage, generally cannot be revoked. (*See, however,* West's California Family Code Ann. § 9340 (West 2004) allowing an adult adoptee to revoke the adoption.) Most states allow a parent to choose not to give property on death to a child; the situation is different for spouses where an elective share statute may be in place. If one adult adopts another adult and then there is a sexual relationship, this could also result in criminal violations for incest. (*See* Texas Penal Code § 25.02 (West 2003 & Supp. 2006) stating that "A person commits an offense if the person engages in sexual intercourse … with another person the actor knows to be, without regard to legitimacy: (1) the actor's

ancestor or descendant by blood or adoption …".) Ironically, if there has been an adoption, then the couple may later be prevented from benefiting from the laws in a state that recognizes that there can be a legal solemnization of the couple's relationship. For example, you may not be able to marry your "child" by adoption. (*See* Texas Family Code § 6.201 which states that a "marriage is void if one party to the marriage is related to the other as (1) an ancestor or descendant, by blood or adoption".)

Thus, while a husband and wife who do not do wills just might end up with a testamentary plan under intestacy statutes similar to what they would have done with wills, a same-sex couple clearly will not, *unless they and all their property are subject to a state's laws that have been changed in order to grant certain intestacy rights to their relationship*. (*See* ACTEC Study 10 by Robert B. Joslyn entitled "Surviving Spouse's Rights to Share in Deceased Spouse's Estate," and Study 21 when it is published entitled "Forced Heirship/Family Protections.")

Some states are beginning to include registered domestic partners as intestacy takers. (California Probate Code §§ 37(b) & 6401(c) (2002, 1991 & Supp. 2007).)

On a case-by-case basis, some courts have recognized common law survivorship relationships. (*See Concourse Village Inc. v. Bilotti*, 509 N.Y.S.2d 274 (1984) (re a woman and man who lived together 10 years and the woman then had a survivorship interest in the coop).)

Apparently, all separate property jurisdictions except Georgia provide spouses with the right to elect a statutory share of the decedent's estate, even if not left anything under the will. (Dukeminier & Johanson, Wills, Trusts and Estates 480 (Aspen Law & Business 2000); McLoughlin, Annot., "Statutory or Constitutional Provision Allowing Widow but not Widower to Take Against Will and Receive Dower Interests, Allowances, Homestead Rights, or the Like as Denial of Equal Protection of Law," 18 A.L.R. 4th 90 (1982); Volkmer, Dept., "New Fiduciary Decisions: Judicial Change of Elective Share Rules," 3 Estate Planning 49 (Jan. 2004).)

Elective share statutes do not embrace the "partnership theory" of marriage to the extent found in community property states: "Under typical American elective-share law, including the elective share provided by the pre-1990 Uniform Probate Code, a surviving spouse may claim a one-third share of the decedent's estate - not the 50 percent share of the couple's combined assets that the partnership theory would imply." (Uniform Probate Code, Art. II, Part 2, "General Comment, The Partnership Theory of Marriage" (1990).)

The 1990 Uniform Probate Code suggested various percentages of an "augmented estate" would go to the surviving spouse depending on the length of the marriage; for example, 3% if less than a year, 30% if married 10 but less than 15 years, and finally 50% if married 15 years or more. (The 1993 amendments did not change the percentages, but changed the definition of "augmented estate.") Unless there is a marriage whose venue, essentially, is in a

community property state or at one time during the marriage was in a community property state, there can be no community property of the couple. (Johanson, Stanley J., "The Migrating Client: Estate Planning for the Couple from a Community Property State," 9 U. Miami Inst. Est. Plan ¶¶ 800 *et seq.* (1975).)

Legal contests have a greater likelihood of success when no planning has occurred or the planning has been done later and in a hurry rather than sooner and with, arguably, greater thought. The *New York Times* article cited above indicates that many wills of AIDS patients were being done in the hospital, shortly before death. Such wills are likely to be more vulnerable to challenge because of the circumstances surrounding the will's execution and the client's weakened position. Curiously, studies have indicated that juries often support the person contesting the will if the jurors (or the court in a non-jury trial) think that the decedent's "deviation from normative values" is not morally justifiable. (Leslie, "The Myth of Testamentary Freedom," 38 Ariz. L. Rev. 235 (1996).) Juries, more than judges, will find for the contestant; the result, where there's an appeal there is often a reversal of the jury's finding. A 1953 report on California cases where the will contest was based on incapacity or undue influence found that 77% of the jury cases held for the contestant; over 50% of those were reversed on appeal. (Note, "Will Contests on Trial," 6 Stanf. L. Rev. 91 (1953).) Some commentators have proposed abolishing jury trials for undue influence cases. Comment (Athanas), "The Pros and Cons of Jury Trials in Will Contests," 1990 U. Chi. Legal F. 529.)

C. Will Signing in a Hospital, if Unavoidable -- And Same Considerations Apply Where Will is Signed Outside of the Hospital if Client is Ill, Physically or Mentally; Always Use a Self-Proving Affidavit .

If the will must be signed in the hospital, ask the attending doctor to make notes in the chart as to the client's condition, especially his mental condition and alertness. Examine the charts maintained by the attending nurses and read their comments before the will is signed, not once you have a court date. Arrange for attendance by a notary public, for the self-proving affidavit. (*See* ACTEC Study 1, by George Gordon Coughlin, Jr., entitled "Will Requirements of Various States," for reports on whether or not a state allows a self-proving affidavit and citations to the statute in each state regarding self-proving affidavits.)

Even if your jurisdiction does not currently accept self-proving affidavits done at the time of the will signing, you still should use one -- your client may move to a jurisdiction that accepts them or the local judges may decide to start accepting them. The author served as a "Miscellaneous Documents Examiner" in a JAG office in Germany when her husband was a first lieutenant there, in 1975. Serving soldiers from almost every state and doing wills on an old mag card machine, the author and her supervisor, attorney Nathan Mann, now of New Mexico, used *Martindale Hubbell Legal Digests* for self-proving affidavit forms. A number of soldiers were from New York and they got self-proving affidavits. Upon graduation from law school and starting with Sullivan & Cromwell in New York City, the author discovered that self-proving affidavits were being done only after death because the "surrogates don't accept them." Following a harrowing ride on both a subway and train out to and back from New

Jersey with an original will because one of the witnesses lived and practiced law in New Jersey, the author decided to query the surrogates as to whether or not they would accept contemporaneous self-proving affidavits, and to include her reasons for accepting them. An overwhelming number of surrogates responded to the questionnaire and, after some conversations with staff, all of the boroughs of surrogate's courts in New York City indicated that they would accept the affidavits. The results of the survey were published in the *New York Bar Journal* and Sullivan & Cromwell began to use contemporaneous self-proving affidavits. (Bay, "Self-Proving Affidavits," 55 N.Y.S.B. J. 13 (1983 – this is the citation in the comments to the New York statutes, but I think it was 1980 or 1981 and the title has been changed to "Affidavits of Attesting Witnesses"); s*ee* N.Y. Surrogate's Court Procedure Act § 1406 (West 1995).)

Although the hospital may have a notary on staff, some hospitals do not allow staff to notarize or serve as attesting witnesses to wills. Even though the notary is not a formal "witness" to the will, the notary will definitely be a witness in the court room. The author settled a case a few years ago where the decedent, while ill and dying, signed a will including his only child's first name, omitting her last name, and referring to her as "illegitimate." No one knew who drafted the will (at least that's what everyone said); the decedent did not have a typewriter or computer and no one knew if he had ever seen an attorney. The decedent took the "will" to an office which offered notarial services and the notary, who had notarized few wills, read through the entire will and then questioned him about it, including "don't you know your daughter's last name?" The witnesses with the decedent chimed in that he didn't know the last name. (He did; he'd used it on all of the non-probate assets designating her as beneficiary.) Curiously, the document offered for probate included the last name, leading to speculation that the original will had been destroyed, at least that page, and that undue influence had been exerted. However, because the notary was ready to testify that the first page had been altered, and no last name had been on the one that the decedent signed, there was no "will" at all and neither undue influence or lack of testamentary capacity had to be investigated any further.

Arrange for attesting witnesses who are articulate and who will, in your opinion, make a good impression when testifying. Use more than two attesting witnesses even if the state only requires two. Why? It's easier to find two out of three instead of two out of two. Also, it is better to choose those people who may end up being called to testify, rather than use someone unknown to you. Should you prepare the witnesses? Perhaps not, unless you always prepare witnesses in the same way. Otherwise, doing so could raise issues in the minds of the fact-finder which may sound strange when elicited at a trial and you may also be questioned vigorously as to why you prepared these witnesses and never did so with others in your long years of practice. (*See* Stone and Ross, "Bombproofing the Estate Plan to Anticipate and Avoid Litigation," 1 - 5 for an excellent discussion on steps to be taken to minimize the threat of a lack of capacity argument, ACTEC Annual Meeting 2001 -- it's available on the ACTEC website for downloading, free; you must know an ACTEC member who you can ask to help you get the article.)

D. No-Contest, In Terrorem Provision.

Should you include an *in terrorem* provision, providing that if any one contests the will, he will forfeit any gift made by it? Under many states' laws, such provisions are narrowly construed and may trigger a forfeiture only if the contestant did not have probable cause for filing the contest. The Uniform Probate Code provides that: "A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." (§§ 2-517, 3-905, entitled "Penalty Clause for Contest" (1990); *see also* Jack, "No-Contest or In Terrorem Provisions in Wills -- Construction and Enforcement," 19 Sw. L.J. 722 (1965); and Restatement (Second) of Property, Donative Transfers § 9.1 (1983).) In *Kirkbride et al., Executors v. Hickok et al.,* 155 Ohio St. 293, 296, 98 N.E.2d 815, 817 (1951), the pleading filed to "contest" the will was held not to violate the *in terrorem* provision: defendants further say "that such affirmative action [if needed to void the will provisions] on the part of the defendants … is necessary in order to make invalid the provisions… defendants further say that such affirmative action may be had and taken by the defendants… and the same shall, and will not, constitute an effort or attempt to break, change, or set aside the will…." The court agreed and held that the *in terrorem* provision had not been violated.

While such provisions can be useful, unless the contestant is actually in danger of losing something, they are of absolutely no value. Thus, the client would have to provide for gifts to possible contestants that are large enough to tempt them for, otherwise, they risk nothing if they receive nothing. (*See Lipper v. Weslow,* 369 S.W.2d 698 (Tex. Civ. App. - Waco 1963, *writ ref'd n.r.e*) which had an *in terrorem* provision, but no gifts to the disinherited relatives, so the provision was useless.) Unless, therefore, the client is inclined or willing to make to potential contestants more-than-modest gifts (in relationship to the size of the probate estate), a no-contest provision probably does nothing more than give a totally false sense of security.

E. Choosing the Executor.

Consider naming someone other than the companion as executor or at least as a co-executor. If the companion is the executor, it can conjure up visions of undue influence. It also places the companion in the unenviable position of being a target. It is more prudent to name a neutral person as executor.

F. Should You Represent Both Companions?

Be careful about representing both companions. While it is still fairly typical in estate planning for married couples for the attorney to represent both the husband and wife, there is considerable discussion in literature and on list serves that there is an inherent conflict in doing so. *See* ABA Model Rules of Professional Conduct, Rule 1.7 entitled "Conflict of Interest, Current Clients," and comment and general principles 27: "[C]onflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for

several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present." In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved. Even though the companions could waive any conflict, they are not the ones you are concerned about -- you are concerned that, if you represent both, blood relatives would then argue that you were really not the decedent's attorney but were acting on behalf of the surviving companion.

When do husband and wife need separate lawyers? (*See* Collett, "And the Two Shall Become as One…Until the Lawyers are Done," 7 Notre Dame J.L., Ethics & Pub. Poly. 101 (1993); Am. Bar Assn. Special Committee Report, "Comments and Recommendation the Lawyer's Duties in Representing a Husband and Wife," 28 Real Prop, Probate & Tr. J. 763 (1994); Pearce, "Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses," 62 Fordham L. Rev. 1253 (1994); Price, "Ethics in Action not Ethics in Inaction," 1995 U. Miami Inst. Est. Plan. ¶ 700; and ACTEC, *Commentaries on the Model Rules of Professional Conduct* 65-71 (2nd ed. 1995).)

G. Maybe Tackle Any Illnesses Head On.

When doing a will for a client who is not leaving property to all of the children, the attorney may include a provision similar to the following: "I have 5 children, being A, B, C, D, and E. I am aware that I am not leaving anything to D and E in this Will and that I am not leaving anything to them outside of this Will either." If the client is so ill that death is anticipated, you may want to consider including a reference to the impending death, perhaps something like the following which is based on Stone and Ross' 2001 paper cited above:

> Because I have been diagnosed as being HIV-positive and have experienced many medical problems related to this condition in the last few years and because I am not leaving my estate to my birth family, I realize that there may be a lot of disappointment and that some members of my birth family may want to believe that I left them out because my mind was not working right or I had been persuaded or influenced to do so by someone else. However, my illness has not progressed to the point that my judgment about my assets, my loved ones, and my estate plan have been materially impaired. I have given very careful consideration to my testamentary affairs, and I affirm that the dispositions made in this will and in the beneficiary designations I have done on property that does not pass under my will reflect my decisions which I have carefully and unequivocally reached after seeking and receiving the advice of my legal counsel who prepared this my will in the manner I directed . Both my counsel and I are initialing here _____ to reflect my attention to and understanding of this provision in my will. I ask members of my birth family to honor my wishes and to not challenge the validity of this will or seek to overturn it on any grounds, including that I lacked capacity or was unduly influenced.

H. Be Careful About Giving Reasons for not Including Blood Relatives -- The Specter of Testamentary Libel.

When preparing a will that leaves all or substantial amounts of property to a non-married companion, should the client make a statement as to why he is doing so and why he has not made gifts to blood relatives? Such an approach may be ill-advised, for several reasons. First, any factual statements made in the will must be absolutely, positively correct, because, if not, the false statement may support the blood relatives' grounds for a challenge. Where "facts" in the will can be shown to be, or are just arguably, incorrect, the lawyer representing the contestants can ask the jury, "who really wrote that statement -- the testator or someone else?" Factual misstatements can also be used to suggest that the testator's mental faculties "must have been impaired."

A will is a probated, public document, accessible to any one who wants to read it. If negative comments are made in the will in order to justify not giving property to blood relatives, those relatives may feel a need to vindicate themselves and so file a lawsuit when otherwise they might have simply accepted, with ill grace perhaps, the decedent's wishes. Further, testamentary libel is always a possibility. (S*ee* Annot., *Libel by Will*, 21 A.L.R.3d 754 (1968); Fuson, "Testamentary Libel, The Case of the Vindictive Testator," 57 Ill. B.J. 840 (First Installment), 938 (Second Installment) (1969); Hudak, "The Sleeping Tort: Testamentary Libel," 27 Mercer L. Rev. 1147 (1976).) In *Brown v. Du Frey,* 1 N.Y.2d 190, 193, 134 N.E.2d 469, 470-471 (1956), case decided by the New York Court of Appeals (that state's highest court), the testator said: "I am mindful of the fact that I have made no provision for John H. Browne [sic], my husband. I do so intentionally because of the fact that during my life time he abandoned me, made no provision for my support, treated me with complete indifference and did not display any affection or regard for me." The testator died in 1951. Though she had married Mr. Brown in 1901, they were divorced in 1917 (she was at fault -- back when divorce was not, essentially, a no fault process -- the husband had sued her on the ground of her adultery). Her ex-husband married another woman after the divorce. Mrs. Browne then changed the spelling of her last name. Mr. Brown, the ex-husband, sued the estate for testamentary libel; he recovered damages.

Query whether the German poet Heinrich Heine who died in the 1850s would be held liable for testamentary libel for saying in his will: "I leave all my estate to my wife on the express condition that she remarry. I want at least one person to sincerely grieve my death." (Dukeminier and Johanson, Family Wealth Transactions: Wills, Trusts, and Estates 627, footnote 145 (Little, Brown and Company 1978).)

Consider, instead, making positive statements about why the testator is leaving property to the companion; for example, "Sadly, under the laws as they exist at the time I am doing this will, my loving companion and I may not be able to be legally married and I certainly wish we could be. My loving companion is truly the natural object of my bounty. We have been together since 19xx and even gone through a ceremony to celebrate our union. (If you're in California, say, "we registered our domestic partnership on _____.") That is why I am

making substantial provisions for my loving companion in this my will and why I have made him/her the beneficiary of my non-probate assets."

I. Preserve Evidence of Testamentary Capacity, Intent, and Freedom from Undue Influence.

Also, consider preserving evidence of the client's testamentary intent, capacity, and freedom from undue influence outside the will, perhaps in a video and in an affidavit. These then can be produced if and only if there is a legal dispute after death. Take extra precautions in selecting attesting witnesses -- you do not want the witnesses to say, "well I really do not remember this particular will, but this is how we do wills in our office." (For an illustration of how this might be done, see the excellent blueprint set forth in Jaworski, "The Will Contest," 10 Baylor L. Rev. 87 (1958); Jaworski, "The Will Contest," 17 Sw. L. J. 371 (1963).)

Consider using a psychiatrist as one of the attesting witnesses; consider soliciting a psychiatrist's report on the testator's mental condition at the time the will is signed. (But Leon Jaworski questioned such an idea: "I doubt the wisdom of this suggestion, even in instances of past mental trouble. The very presence of a psychiatrist may be seized upon by the contestant as indicative of doubt as to testamentary capacity and, by adroit handling, may be caused to operate adversely to the proponent." Jaworski, "The Will Contest," 10 Baylor L. Rev. at 93.) If a recording is made at or near the time of the signing of the will, its existence probably must be revealed. If one side moves to have it introduced into evidence, and it is excluded, that could constitute reversible error. (*See Belfield v. Coop*, 8 Ill. 2d 293, 134 N.E.2d 249 (1956), holding that where the will had been challenged on the ground of lack of capacity, it was reversible error to exclude a sound recording taken at the time of the will's signing.)

You can consider videotaping the will signing ceremony too, but this may have mixed results. Many people do not come across well on videotape and if you rehearse the ceremony on film, the other side will undoubtedly want to see the entire video, not just the polished product. Also, if you only videotaped this one will-signing, then you may be called upon as a witness to explain why. Do you see challenges related to the attorney-client privilege and do you think you won't be representing the executor? (*See* Beyer, "Videotaping the Will Execution Ceremony - Preventing Frustration of the Testator's Final Wishes," 15 St. Mary's L.J. 1 (1983); Nash, "A Videowill: Safe and Sure," 70 A.B.A.J. 87 (Oct. 1984); Beyer & Buckley, "Videotape and the Probate Process: The Nexus Grows," 42 Okla. L. Rev. 43 (1989), McGarry, "Videotaped Wills: An Evidentiary Tool or a Written Will Substitute," 77 Iowa L. Rev. 1187 (1992).)

Videotapes have, in some cases, provided convincing evidence of mental capacity and the lack of undue influence. (*See In Re Estate of Peterson v. Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989); *Hammer v. Powers*, 819 S.W.2d 669 (Tex. Civ. App. - Fort Worth 1991, *no writ*).)

J. Follow Your Standard Will-Signing Formalities and Make Sure the Required Testamentary Formalities are Observed .

If you have not done so already, you may want to memorialize in writing the way in which you oversee a will signing. Then, if you are ever deposed or examined, you will have your protocol in writing and you and the other witnesses can attest that this protocol was followed.

Because you are assuming that a will contest is more likely than not, be sure that the will is signed in your office or at least signed at a time and place where an attorney can supervise the ceremony. Should the client insist on signing the will without your supervision or that of another attorney, then provide your client with a memorandum that sets forth the steps to be followed and ask the client to sign and return that memorandum after the will is signed. (For a comprehensive, step-by-step guide to the will signing ceremony, *see* Beyer, "The Will Execution Ceremony," dated in 1999; available at

http://www.professorbeyer.com/Articles/Will_Ceremony.htm

Again, as stated earlier, consider using three witnesses, even if only two are needed under state law.

K. Pre-Probate Will if State Allows It.

Some states allow a will to be probated (by a declaratory action) while the client is alive, in a "living probate" or "ante-mortem" probate proceeding. Typically, the testator will be proving capacity and the absence of undue influence. Also, heirs at law (by intestacy) and those named in the will are necessary parties. (*See* Arkansas Code Ann. § 28-40-202 (Lexis Nexis 2004 & Supp. 2007); North Dakota Code Ann. § 30.1-08.1-01 (Michie 1996 & Supp. 2005); and Baldwin's Ohio Rev. Code Ann. § 2107.081 (West 2005 & Supp. 2007); *see also* Leopold & Beyer, "Ante-Mortem Probate: A Viable Alternative," 43 Ark. L. Rev. 131 (1990).)

Of course, goodbye privacy. (Query, if the client changes the will, do beneficiaries under the "first" will have to be made parties the second time? What if there have been no changes as to those beneficiaries—are they bound by the earlier declaratory action?)

III. NON-PROBATE PROPERTY MUST HAVE BENEFICIARY DESIGNATIONS IN ORDER TO MAKE SURE IT GOES TO THE COMPANION; COORDINATION WITH DURABLE POWER OF ATTORNEY.

Non-probate property will pass to the decedent's probate estate unless a beneficiary designation directing that it pass otherwise is made (life insurance, annuities, IRAs, pension benefits, and the like are non-probate generally for they pass to beneficiary designated by

contract outside of the will). Financial accounts can be non-probate property if a contract is made to pass title to another upon the death of the account holder); for example, joint tenants with right of survivorship, a Totten trust account (i/t/f), or payable on death account (POD).

Be aware of the possibility (and in some instances, absolute probability) that blood relatives, if they possess a durable power of attorney, may attempt to change the beneficiary designations on non-probate property. Can they do so? Here's where reality does not always necessarily follow the law; that is, the blood relatives may attempt to make the change and the third party may allow them to do so and then those actions must be legally challenged as a breach of fiduciary duty and/or as being unauthorized under the power of attorney. Where the client is not leaving property to his birth family, perhaps birth family members should not serve as agents under a financial power of attorney.

An illustration should help: Over a decade ago, a same-sex couple in Austin, Texas faced the agony that one of them had been diagnosed with AIDS and was not responding to treatment. During one of the many stays at the hospital, a social worker suggested that a power of attorney be done. She even provided a form; not a statutory form, but a one-page, fill-in-the blank form which literally gave the agent "all of the powers of the principal as if the principal were personally present," without any specific details on those powers. The companion, in an attempt (a totally misguided one as it turned out) to repair strained relations with the blood relatives, refused to be named as the agent; instead, he personally wrote in the name of his best friend's mother as agent. The form was signed and acknowledged in front of a notary public and given to the mother.

The companion noticed that the mother and sisters had been through papers in the home office, but thought little of it. On his best friend's last visit to the hospital, literally while the best friend was in a coma and within three hours of his death, the mother and sisters visited the best friend's employer and filled out a beneficiary designation changing all benefits from the companion to "X and Y," the mother's children, the best friend's sisters.

A lawsuit ensued. Naturally. Clearly, the mother as agent should not have changed the beneficiary designation. The power of attorney did not specifically authorize such a change. Had she used the Texas statutory form and included the short list powers, then she might, *legally*, have been able to give directions to change the beneficiary. For example, in Texas, if the short form power "Retirement plan transactions" is included, Texas Prob. Code § 503(a)(3) (West 2003 & Supp. 2006) allows the agent to designate or change the beneficiary on any plan, but the agent can designate himself only to the extent he was named as a beneficiary before the power of attorney was signed. *Does the statutory power to make a change translate into the fiduciary authority to make that change or does it only protect third parties who accept the agent's authority?* The company allowed the mother as agent to change the beneficiary from her son's companion to her daughters. For months, the company delayed responding to discovery requests, including a request for the internal policies related to such benefits.

The legal authority of the mother as agent was never reached, for when the company finally produced its policies and procedures, those written policies contained a direction that only the employee may change a beneficiary designation and agents under a power of attorney may not do so. There was then a hearing to set attorneys' fees payable by the mother and the company. The company's lawyers had participated in the legal proceedings to such an extent that one of the expert witnesses (moi) called to testify as to attorneys' fees opined that it was the company that was the engine pulling the entire lawsuit. Would the mother and sisters have engaged in protracted proceedings without the backing of the company? Had the company simply paid the proceeds into the Registry of the Court, admitting that it owed the monies to someone, but would let the court decide who, would the lawsuit have ended more quickly?

So, the companion won, but at a tremendous cost, both in terms of monies actually paid out and the emotional trauma.

It is the author's opinion that even if state law purports to allow the agent to make a change in beneficiaries, the agent under a power of attorney violates fiduciary duties by doing so unless specifically authorized to do so by the power of attorney, and, thus, any beneficiary designation change made by an agent without specific authority can be rescinded. Below are some brief summaries of cases where agents under powers of attorney took actions that were questionable.

In th*e Matter of the Trust of Jameison v. Bolich*, 8 P.3d 83 (Montana 2000), is a Montana case decided by its Supreme Court, where, since the decedent had no will, her estate would have passed by intestacy, but for the actions of her agent under a power of attorney. The agent created a trust agreement designating the agent as trustee, the decedent as the income beneficiary for life, and the decedent's daughters as income beneficiaries during their lives after the decedent's death. Corpus could be distributed in the trustee's discretion for the then income beneficiary's health, maintenance, and welfare. On the death of the last income beneficiary, the remainder would go (surprise, surprise) to the trustee/agent or her estate. The agent then transferred all of the decedent's real property and personal property (including CDs and promissory notes) to the trust.

The decedent died and the daughters, understandably, challenged the revocable trust's distribution plan. At trial, the agent made assertions regarding the decedent's intentions, but the court found them to be "purely speculative and [that the agent]… had failed to produce any evidence substantiating her claim that Jameison [the decedent] intended to create the trust." The court held that the power of attorney did not authorize the creation of the trust, the agent exceeded her authority in creating it, and that the trust should be terminated and its assets distributed by intestacy.

Query: If the trust had been used solely as a management vehicle and had not changed the disposition of the decedent's estate, would that have been o.k.? Answer: Probably. The problem arose not only because the power of attorney did not specifically authorize the creation of a trust, but also and primarily because the agent changed the way the property

would pass on the decedent's death and then argued that the decedent had authorized and intended that the agent ultimately get all the property, on the death of the decedent's two daughters.

In *Fort Dearborn Life Insurance Co. v. Holcomb*, 736 N.E.2d 578 (Ill. App. [1st Div] 2000), an Illinois appellate court decision, the deceased husband gave his wife a "durable" power of attorney using a statutory short form. The wife as agent then changed the beneficiary on two life insurance policies from her husband's companion, Janet Holcomb, to herself. (The husband and wife were, obviously, separated.) The exact issue was whether or not the power of attorney was an Illinois short form power for, if it was, the wife "would have been statutorily precluded from changing the beneficiary on Paul's [the husband's] life insurance policies as such authority was not expressly granted in the power." If the power of attorney was not on the short form, the court would still need to determine if the language therein granted the wife "full plenary powers that would include authority to change Paul's beneficiary designation."

The court's decision was that the short form was used and therefore that the wife was precluded from changing the beneficiary.

The Illinois' statute allows one to add the following and this language was not included:

"In addition to the powers granted above, I grant my agent the following powers (here you may add any other delegable powers including, without limitation, power to make gifts, exercise powers of appointment, name or change beneficiaries or joint tenants or revoke or amend any trust specifically referred to below) _____."

(See *Smith-Hurd Ann*, 755 Illinois Compiled Statutes Ann. §§ 45/1-1 *et seq*. and 45/3-3 for the short form (West 1992 & Supp. 2007.)

In the Matter of Cohen, 335 N.J. Super. 13, 760 A.2d 1128 (N.J. App. 2000), is a New Jersey appellate court case where Henrietta had a revocable trust agreement under which she divided her estate (approximately $5 million) between the two sides of her family, after making bequests to various charities and bequests of personal property. A member from one side of the family, after being stopped when he tried to have her sign new documents, sought the court's permission to implement "more appropriate testamentary and inter-vivos documents" for Henrietta; Henrietta's agent resisted this motion. Henrietta was found to be incapacitated.

The judge appointed an expert tax advisor whose report included some of the suggestions made by the family member who wanted to change the estate planning. The trial court then recognized a family settlement agreement which contained different terms than Henrietta's current estate planning documents, including immediate, large gifts.

On appeal, the appellate court determined that there had never been a hearing regarding the appropriateness of implementing a new testamentary plan and no inquiry as to Henrietta's probable intent had ever been made. There was also in evidence an indication that the changes agreed to in the settlement agreement were contrary to Henrietta's clear testamentary intent.

In the Matter of the Estate of Amundson v. Amundson, 621 N.W.2d 882, 890 (S.D. 2000), is a decision by South Dakota's Supreme Court. South Dakota has an elective share policy. Husband created a living trust for his incapacitated wife (getting her agent under a power of attorney to sign the trust and convey property into it). The trust gave the wife a general power of appointment and, upon her death, to the extent not exercised, distributed $60,000 to some relatives, and directed distributions for the husband for his proper care, support, and maintenance, and then upon the death of both, directed all to David, the son of the husband's brother and the agent under the power of attorney. Also, the trustees could make annual $10,000 gifts.

The husband died before the wife and he added funds of his own to the trust before he died. There was no thought given to the fact that the wife might survive and be able to assert an elective share. The wife's brother as her personal representative asserted it on her behalf and also moved to set aside the trust. (Obviously, the beneficiaries of her estate differed from those of the husband's; she had no will): "In purposely bypassing Margaret's knowing participation in the distribution of marital assets, the trust Howard [her husband] created for her violated South Dakota's spousal elective share policy. Therefore, the trust is invalid and must be terminated."

In *Amundson,* the court never determined whether or not the agent had the authority under the power of attorney to create the trust; instead, the court invalidated the trust on the rather narrow ground that its creation defeated her right to an election without her consent. (Query: did her agent have the power to defeat her right to an election?) Basically, this and the other cases can be read as meaning that, without specific, very specific, authority, the agent has no ability to change the estate plan of the principal.

Kline v. Utah Department of Health, 776 P.2d 57 (Ut. 1989), concerns Utah law. There was no evidence that the settlor of a revocable trust intended that his agent under a durable general power of attorney have the power to amend or add to the trust and the power of attorney did not specifically confer authority upon the agent to make any changes to the trust. Even had the settlor delegated those powers to the agent, because the trust agreement was not ever amended and it specifically provided that the reserved powers lasted only until the settlor's death or incapacity, the settlor could not exercise the powers upon his incapacity and, thus, neither could the agent.

IV. WHO SHOULD THE CLIENT APPOINT UNDER A FINANCIAL POWER OF ATTORNEY? REMEMBER AN ATTORNEY-IN-FACT IS A FIDUCIARY.

Article V, Part 5, of the Uniform Probate Code (corresponding to the Uniform Durable Power of Attorney Act) does not specifically address the fiduciary issue. Texas case law, like that of many other states, has always recognized that an attorney-in-fact who is acting under a power of attorney is a fiduciary as a matter of law (*Sassen v. Tanglegrove Townhouse Condominium*

Ass'n, 877 S.W.2d 489, 492 (Tex. App. – Texarkana 1994, *writ denied*): "A fiduciary owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability" and "Even when the exercise of an agent's duties is placed in the agent's absolute discretion, the agent still must use good faith and act reasonably in discharge of them, or it can be held liable to the principal for the resulting damages." (*State v. Durham*, 860 S.W.2d 63 (Tex. 1993) s*ee also Southland Lloyd's Ins. Co. v. Tomberlain*, 919 S.W. 2d 822 (Tex. App. – Texarkana 1996, *writ denied*)*; Swanson v. Schlumberger Tech. Corp.*, 895 S.W.2d 719 (Tex. App. – Texarkana 1994), *rev'd on different grounds*, 959 S.W.2d 171 (Tex. 1997); *Stum v. Stum*, 845 S.W.2d 407 (Tex. App -- Fort Worth 1992). *Smiley v. Johnson*, 763 S.W.2d 1 (Tex. App. – Dallas 1988, *writ denied*).)

A fiduciary owes to his principal loyalty, good faith, integrity of the strictest kind, fair and honest dealing, and the duty not to conceal matters. (*Kinzbach Tool Co. v. Corbett-Wallace Corp.,* 160 S.W.2d 509 (Tex. 1942); *American Indemnity Co. v. Baumgart*, 840 S.W.2d 634 (Tex. App. – Corpus Christi 1992, *no writ*).) An attorney-in-fact is like a guardian who does not need to account to court, post a bond, or obtain court approval, but, if challenged, must be able to convince a court that the actions taken were justified and in accordance with his fiduciary duties. There are obviously some personal rights of an individual that can be delegated to an agent: the right to make gifts, for example. There are other personal rights which are non-delegable: an agent may not rewrite the will of the principal – the will must be in writing and "signed by the testator in person or by another person for him by his direction and in his presence." (Texas Probate Code § 59(a) (West 2003 & Supp. 2006); *see also* Uniform Probate Code § 2-502. Check the particular state, of course. However, what is not at all crystal clear is whether the agent has the power to make other changes, like changing the beneficiary on insurance contracts, and on retirement plans, and transferring the principal's interest in real property, stocks, bonds, accounts with financial institutions, insurance, and other property to a revocable trust created by the principal (or, perhaps, to a trust created by the agent, and does the agent have the power to create a trust?). Broad powers over accounts with financial institutions, such as the power to terminate an account, may be part of what the agent can do.

The Durable Power of attorney Act adopted in Texas does specifically states that the attorney-in-fact is a fiduciary. (Texas Probate Code § 489B (a) (West 2003 & Supp. 2007).) Further, the statutory form provides, in all caps, "The attorney in fact or agent, by accepting or acting under the appointment, assumes the fiduciary and other legal responsibilities of an agent." (Texas Probate Code § 490(a) (West 2003 & Supp. 2006).)

If the agent has the legal power vis-à-vis a third party to close joint tenancy with right of survivorship, payable on death, and "in trust for (Totten trust)" accounts and to change the beneficiary of life insurance, then the third party which follows the agent's instructions should bear no liability, any more than a bank which pays out to one survivor the monies in a joint account (even if the account is a true "convenience account," the bank may, under the particular state's statute, bear no liability for payments to a co-signer after the death of the owner unless the bank has received written notice of the owner's death). (Texas Probate Code § 438A(g) (West 2003 & Supp. 2006).) Where an account is held jointly, for example in the names of three individuals after the death of the first, each has the authority to withdraw all the monies and the

"ownership" of those monies needs to be resolved between them, not by the bank. (Texas Probate Code § 445 (West 2003 & Supp. 2006).)

If the attorney-in-fact changes beneficiary designations or closes an account which has the effect of changing a beneficiary designation made by the principal while competent, has the attorney-in-fact breached his fiduciary duty to the principal and perhaps to the designated beneficiary? This author says the answer is clearly yes. Some states, such as Texas, may have formalized in their statutes that breach of fiduciary duty is a crime. (In Texas, a person commits an offense if he/she intentionally, knowingly, or recklessly misapplies property he/she holds as a fiduciary in a manner that involves substantial risk of loss to the owner of the property. The offense is a Class C misdemeanor if the property misapplied is worth less than $20; a Class B misdemeanor if $20 but less than $500; a Class A misdemeanor if $500 but less than $1,500; a state jail felony if $1,500 but less than $20,000; a third degree felony if $20,000 but less than $100,000; a second degree felony if $100,000 but less than $200,000; and a first degree felony if $200,000 or more. Further, if the crime is against an "elderly person" (defined as being over 65) (Texas Penal Code § 22.04(c)(2) (West 2007), the offense jumps up one level. (Texas Penal Code 32.45(a)(1) (West Supp 2007). If there is more than one fiduciary, it is possible that the conspiracy statutes in the criminal code may be held to be broad enough to make the co-fiduciary guilty of the same crime and thus subject to the same criminal and civil liability.

Due to the possible problems with legal right to change beneficiary designations as compared to fiduciary duties not to change them, consider adding the following to powers of attorney:

> "CANNOT CHANGE BENEFICIARY DESIGNATIONS. Nothing herein shall authorize my attorney-in-fact to change beneficiary designations for my insurance, IRA, pension plans, and the like if the beneficiary designation my agent wishes to make would result in changing the person or persons who would under the designation made directly by me enjoy the benefits from the property. For example, if a beneficiary designation currently reads 'my children' and my agent wants to change that to 'the trustee of the trust under my Will for the benefit of my children,' my agent has authority under this power to do so."

The client must absolutely trust the person named as agent; otherwise, the agent should never be appointed, either under a currently effective or springing power. One way of building in checks and balances is for the client to consider appointing co-agents under a financial power of attorney. The co-agents can be directed "to act together" instead of unilaterally". *See* ACTEC Study 17 entitled *Durable Powers of Attorney* by Shale D. Stiller and Sandra P. Gohn for states' requirements regarding execution, recording, durability (i.e., continues to be effective in the event the principal becomes incapacitated), and whether or not the power of attorney can be "springing," i.e., become effective only upon the incapacity of the principal. While springing powers of attorney appear attractive at first blush, consider how one "proves" that the principal is incapacitated so that third parties will let the agent act. With many states enacting doctor-patient confidentiality rules, will a doctor really be willing to sign a statement that his patient is "under a disability?" Consider that the agent or co-agents who are appointed should always be, in the view

of the principal, trustworthy, completely trustworthy. If they are, then they will not act under the power of attorney unless and until needed. Making the power of attorney springing could result in a mini-guardianship proceeding where a court must find the principal to be under a disability and thus determine that the power of attorney is now effective.

If you have a client who insists on having a springing power, consider adding the following language in an attempt to address concerns a doctor (and the doctor's attorney) may have regarding release of information about mental capacity and whether he is authorized to release that information:

"COMPLIANCE WITH PHYSICIAN-PATIENT CONFIDENTIALITY RULES: I understand that the Federal Government and Texas *[insert name of state where principal is residing,]* and any other state where I may be residing from time to time, all have strong physician-patient confidentiality rules intended to protect me from unauthorized disclosure of information relating to my health. I specifically provide that each medical and health care provider of mine and each pharmacy that fills prescriptions for me is authorized to share with each of _____ [add names] (and also anyone named in a Medical or Health Care Power of Attorney I have signed) all information about my health and medical care and prescriptions, and to authorize the release of such information to others, regardless of my mental condition and this statement shall be deemed to meet all the requirements of HIPAA (Federal law) and state law needed to authorize release of such information. I confirm that each of such individuals shall be treated as my personal representative for all purposes relating to my PHI ("Protective Health Information") as provided in 45 C.F.R. § 164.502(g)(2)."

Note, that some commentators think that there "is no good reason why a holder of a durable power cannot be authorized by the principal to make, amend, or revoke a will inasmuch as similar authorization can be given a holder of a durable power with respect to a revocable inter vivos trust." (Dukeminier and Johanson, Wills, Trusts and Estates 403 (Aspen Law & Business 6th ed. 2000); Restatement (Third) of Trusts § 11, Comment f and Reporter's Notes (2003); McGovern, "Trusts, Custodianships, and Durable Powers of Attorney," 27 Real Prop., Prob. and Tr. J. 1 (1992).) The author sees such inroads as a slippery slope indeed. Even with a power of attorney, the legal right to change a disposition that would end up being testamentary does not translate into an unqualified power to do so and the transaction may be able to be set aside if the fiduciary is found to have violated his charge. (Bay, "Drafting Powers of Attorney (POAs) with Medicaid in Mind, including Fiduciary and other Issues Regarding a Financial Power of Attorney," at 20 - 23, 5th Annual intermediate Estate Planning, Guardianship and Elder Law Conference (University of Texas School of Law, August 14 and 15, 2003).)

V. MINIMIZING THE POSSIBILITY OF A LEGAL DISPUTE: USE A REVOCABLE MANAGEMENT TRUST.

The grounds typically asserted in contests are (1) lack of capacity and/or (2) undue influence. (Comment, "Rethinking Oregon's Law of Undue Influence in Will Contests," 76 Or. L. Rev. 1027 (1997); Volkmer, Dept., "New Fiduciary Decisions," 22 Est. Plan. 252

(July-Aug. 1995); Comment, "A Case Against Admitting Into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Incapacity," 2 Conn. L. Rev. 616 (1970); Note, "Testamentary Capacity in a Nutshell: A Psychiatric Re-valuation," 18 Stanford L. Rev. 1119 (1966); Note, "Will Contests on Trial," 6 Stanford L. Rev. 91 (1953); *In re Estate of Clark*, 461 Pa. 52, 334 A.2d 628 (1975).) The rules for proving undue influence are going to differ from jurisdiction to jurisdiction, but are likely to involve a presumption of undue influence if the beneficiary (i.e., the surviving companion) (a) is in a confidential relationship to the testator, (b) receives the bulk of the testator's property, and (c) the testator's mental capacity is weakened, in some way; for example, the testator is ill, is not in communication with blood relatives and the companion is the "gatekeeper" who is seen as preventing contact. Sometimes, if the testator hired an attorney on his own (rather than the attorney being interviewed and even hired by the accused undue influencer), this may rebut the presumption of undue influence. (*In re the Matter of the Estate of Wood v. Hall*, 374 Mich. 278, 132 N.W.2d 35 (1965).) Clearly, an attorney should be extremely careful about drafting a will for an unmet client with whom the attorney has not even talked, following the instructions of the companion or friend. Certainly, the attorney should talk to the testator about the will before it is signed if it is drafted based on another's instructions, and, if at all possible, oversee the signing of the will. (*Bracewell v. Bracewell*, 20 S.W.3d 14 (Tex. App.—Houston [14th Dist.] 2000, *no writ*); *also In re Estate of Blakes*, 104 S.W.3d 333 (Tex. App.—Dallas 2003, *no writ*), where the attorney had not met the decedent and prepared the will based on another's instructions, and it was signed without the attorney's presence, in the hospital, 12 hours before death -- the decedent was determined to be without capacity.)

If planning is taking place while the client is healthy, consider using a pour-over will and a funded revocable management trust. An attack on a trust after the death of the settlor, when that trust has operated during the settlor's lifetime, is less likely to succeed than an attack on a will that has made no legal appearance prior to death.

According to legal treatises, a revocable trust is every bit as subject to challenge as a will on the grounds of lack of capacity and undue influence. (Restatement (Third) of Trusts § 25, comments (a) & (d) (2003).) However, that's theory. In practice, a contestant faces formidable hurdles when challenging a trust on such grounds *(and the author, practicing since 1979, has never seen such a challenge)*. Further, research reveals that there are surprisingly few cases where trusts have been challenged on the grounds of undue influence and capacity, much less successful challenges. (And some of these definitely deal with the settlor challenging in order to revoke the trust while alive, not his blood relatives.) Further, even in the absence of a declaratory judgment action that allows the grantor to have a court declare the trust to be valid and him to have capacity (and you need more capacity for a contractual trust than to do a testamentary will), the grantor may be able to have a court declare the trust valid, without having to make "heirs" parties. (*See Daugherty v. McDonald*, 407 S.W.2d 954 (Tex. Civ. App. - Fort Worth 1966, *no writ*). It takes more capacity, in a sense, to enter into a contract and to sign a valid power of attorney than it does to make a will. To enter into a valid contract, one must understand the business relationship and the terms of the contract; there must be a "meeting of the minds." ***Contractual*** capacity is clearly not the same as ***testamentary*** capacity.

In Estate of Teel, 483 P.2d 603 (Ariz. App. 1971) is a case where a 54-year-old man had the mental capacity of a 10-to-12-year old. Right after he signed his will, a court appointed a guardian for him. His will was challenged on the ground that he lacked testamentary capacity. The "fact" that he had a guardian, it was argued, proved this lack of capacity. (In Texas this type of guardianship would be a "full guardianship," as contrasted with a "limited" or "tailor-made" guardianship.) The court held that the ward had testamentary capacity and that his will was valid. The difference between testamentary capacity and contractual capacity is even clearer in the case of *Lee v. Lee*, 337 So.2d 713 (Miss. 1976). The ward had a conservator/guardian when he *made both a will and signed a deed to real estate*. Prior to his death, the deed had been challenged and invalidated due to his lack of capacity; *Lee v. Lee*, 275 So.2d 851 (Miss. 1973). After death, his will was challenged on the ground that he lacked capacity. Noting that the capacity to make a will differs from contractual capacity and that the appointment of a conservator does *not* cut off the ability to make a will, the court found the will to be valid.

A revocable trust is virtually immune from challenge during the client's lifetime. First, someone would have to know the trust exists. It is not a public document. Its creation is a matter between the settlor and the trustee. In this regard, it is better to have a neutral third party be the trustee or at least a co-trustee.

If blood relatives somehow learn about the trust, how can they challenge it? They, in all probability, have no standing. They may have an "expectancy" under the laws of intestacy, but this is not sufficient. (*Davis v. Hunter*, 323 F. Supp. 976 (D. Conn. 1970).) Only the client or the client's agent (a guardian, an agent under a power of attorney, perhaps, if the authority granted is seen to include this) has standing to challenge the trust while the settlor is alive.

So, what if the blood relatives go to court to seek a guardianship? See below for a discussion about Declarations of Guardian (or a similar document authorized by the laws of the state where you and your client are located) to make sure that those blood relatives are prohibited from being appointed. If the client still has capacity, he can hire an attorney and vigorously contest a guardianship proceeding. Unlike a will contest, where the absent testator's personality and traits are depicted (some might say "conjured up") by the lawyers, in an incompetency proceeding the client is present in the courtroom and defends himself and can show his capacity. Moreover, those blood relatives have to look the client in the eye and say, "you are incompetent;" "you didn't know what you were doing and you were unduly influenced."

Even if a guardian is appointed, that guardian probably cannot revoke a trust without court approval. (*Weatherly v. Byrd*, 566 S.W.2d 292 (Tex. 1978).)

After the client's death, the blood relatives will face not only the trust, but also a will that leaves the residuary probate estate either to the companion or to a spendthrift trust for the companion. (Spendthrift so creditors cannot reach it. Assume the blood relatives will sue the companion for something and if there's a judgment, the spendthrift language can help protect the trust.) The blood relatives' objective in challenging the trust would be so that its assets

would become part of the probate estate. Once a personal representative is appointed in probate proceedings, generally only that personal representative has standing to bring actions to collect assets that belong to the estate. (*See Davis v. Hunter,* previously cited.) If you make the executor the same person as the trustee, what is the likelihood that the executor will challenge the validity of the trust?

Case law indicates that it is difficult, if not impossible, to bar the appointment of the executor named in the will unless the will can be shown to be invalid. (*Boyles v. Gresham*, 309 S.W.2d 50 (Tex. 1958). Perhaps showing that the named executor is a felon may work, especially if the state's statutes prevent a felon from serving as an executor. Or if the state's statute requires an individual to be a "resident" of the state, then the individual if a resident of another state may not be able to qualify. (*See* West's Florida Statutes Ann., §§ 733.302 (2005).) Even if the relatives are able to get the court to appoint a temporary administrator pending the outcome of a will contest, that person may be loathe to file a suit contesting the validity of the trust.

Even if the trust is set aside, the assets can pass via the probate estate, the will, to the same companion. The blood relatives have no standing unless they can set aside both the will and the trust. In *Davis v. Hunter*, a 1970 case from Connecticut, the settlor created a revocable trust naming a friend as trustee. Income went to the settlor for life and on death the trust went to his wife. His will gave all property to his wife as well. He named his wife as executor. After his death, his two daughters attempted to invalidate the trust on the grounds of incapacity and undue influence. The court held that the daughters had no standing unless and until the will was declared to be invalid. So, perhaps it is wise to do a revocable living trust and put almost all assets into it and then have the residuary probate estate go directly to the companion, instead of the revocable living trust; a disclaimer can be used so that property the companion disclaims goes into the trust.

To find a trust invalid, a court would have to find it was invalid from the moment of its inception. This would, in practice, require an unwinding of all actions taken by the trustee during its operation. A court would likely view the unwinding of a trust that had been operating for many years as unattractive. The setting is quite different with a will contest where the issue is whether ownership passes at death to the beneficiaries named or heirs at law; no unwinding is necessary.

Selection of the trustee can enhance the credibility of the trust. If the trustee is a respected third party, such as a corporate fiduciary, officers of the bank or trust company should make excellent witnesses for rebutting arguments of undue influence and lack of capacity. The continuing contact of the client with the fiduciary after the creation of the trust can constitute persuasive evidence of the client's capacity to deal with his affairs and can corroborate the position that decisions were made by the client and not by someone else. Of course, fees must be paid to a corporate fiduciary; however, those fees will undoubtedly be far less that the fees incurred in a legal dispute.

Although we may wish otherwise, many clients will not have sufficient assets to justify naming a corporate fiduciary. In those cases, help the client choose a respected friend, preferably someone other than the companion, or name the companion and the respected friend as co-trustees. The client can self-declare the trust, with himself as trustee. This does not provide evidence of a third party's continuing involvement with the client and ability to testify as to capacity and lack of undue influence, but it does make the assets non-probate unless the trust is successfully challenged.

With a self-declared trust, the client must understand that more than a "paper transfer" is required. The client must segregate trust assets, at least in a bookkeeping sense, and keep appropriate accounts and records on behalf of the trust. The client should transfer legal title to the majority of his assets to the trust (cash, bank accounts, securities, house, etc.) The client should give a special or limited durable power of attorney to a trusted friend or relative so that any property remaining in the client's name can be transferred to the trust later, while the client is alive. (Powers of attorney are revoked at death, except for funeral powers of attorney.) The trust should be revocable and name the beneficiary or beneficiaries who will receive property upon the settlor's death. In general, the creation of a revocable trust has no tax consequences to the client. All trust income is taxed to the settlor and the gift or transfer to the trust is incomplete for estate and gift tax purposes. (I.R.C. §§ 676, 2511 & 2038; Treas. Reg. § 25.2511-2(b).) Assets in a revocable trust are generally still subject to the claims of the settlor's creditors, as the trust is simply an alter ego of the settlor. Even if the trust is irrevocable, spendthrift protection may not be available for the settlor/beneficiary; for example, Texas law provides "If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of his beneficial interest does not prevent his creditors from satisfying claims from his interest in the trust estate." (Texas Property (Trust) Code § 112.035(d) (West 2007).) Commentators differ on whether or not a settlor/beneficiary who places his property in a trust and retains the income or grants to the trustee to power to make distributions per an ascertainable standard can prevent his creditors from reaching anything other than his "income" interest or "ascertainable standard interest" in the trust. However, the Fifth Circuit has ruled that the amount the settlor places into the trust can be reached by his creditors, even if he ostensibly has only an income interest, but the spendthrift provision is effective with regard to property contributed by other settlors. *Armstrong v. Texas Commerce Bank – San Angelo, N.A.*, 115 F.3d 333 (5th Cir), *reh. denied en banc,* 124 F.3d 1195 (5th Cir. 1997) (this is sometimes referred to as the *Shurley* case); *see* 2A Austin W. Scott, The Law of Trusts § 156 (Wm. Frachter 4th ed. 1987).)

In some jurisdictions, spendthrift provisions in self-settled trusts with discretionary distribution powers will protect the assets while they are in trust. (How about creating an off-shore trust in a jurisdiction, like the Caribbean, that does not let creditors force payment from the trust? LoPucki, "The Death of Liability" 106 Yale L.J. 132 *et seq.* (1996). Some states recognize spendthrift clauses in self-settled irrevocable trusts, provided there was no intent to defraud creditors at the time the trust was created. Alaska Stat. § 34.40.110 (Lexis Nexis 2006); Del. Code Ann., Tit. 12, §§ 3536 & 3570-74 (Michie 2001; Supp. 2006); Sullivan,

"Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts," 23 Del. J. Corp. L. 423 (1998).)

Note, get insurance on assets changed to the trust.

VI. CONSIDER LIFETIME GIFTS OF TANGIBLE ITEMS WITH GREAT SENTIMENTAL VALUE.

Blood relatives have been known to seize possession of personal effects during illness or after death. (The author has no citation for this statement. It is just based on clients' oral reports over the years.) If this is a concern, consider discussing with the client the possibility of making lifetime gifts of these items and delivering possession to the donee and keeping them somewhere out of the range of the relatives. While as a legal matter lifetime transfers are as subject to challenge on undue influence or incapacity grounds as testamentary gifts, as a practical matter, such gifts are not easily challenged. The claimant would have to bring an action, outside of the probate process, in order to establish ownership rights. If the items involved are of relatively modest value, or less value than anticipated legal fees, the claimant is likely to conclude that the fight is not worth the effort.

For items of untitled tangible personal property, mere delivery of the items with the intent to pass title constitutes an effective gift. However, to be safe, have a notarized "Deed of Gift" that lists the items being given. If the value exceeds the annual gift tax exclusion, file a gift tax return. Even if the marital deduction is going to be claimed, file a gift tax return with the marital deduction and also, as a back-up, claim the annual gift tax exclusion and part of the unified credit, if needed. If not already "off-site" as it were, the client should make sure that the companion has access to the items so he can retrieve and protect them after death.

If the client does not want to give all tangibles to the companion, the client should consider memorializing what is his and what belongs to his best friend with whom he resides. The issue normally does not arise in a marriage because items like the big-screen TV and computers belong to "them." Where, however, unmarried parties have purchased a TV or DVD player and these are not given explicitly to the companion, the decedent's blood relatives may appear and claim ownership of things that actually belong to the surviving companion. A written agreement that specifies which items belong to whom can be helpful in such circumstances.

VII. THE HOME; OTHER REAL ESTATE.

If the client wants the companion to have the home or there is other real estate that the clients wants to make sure the companion will own, the client may want to consider gifting such real estate to the companion before death, reserving a life estate, or perhaps placing the real estate in a revocable trust. A *joint tenancy with right of survivorship* could be considered as well, though title companies, reportedly, are not receptive to such arrangements in most jurisdictions. (Some states, like Florida, actually allow title to real estate to be taken as "joint

tenants with right of survivorship" – West's Florida Statutes Ann. § 689.15 (1994).) Remember, when a valid joint tenants with right of survivorship deed is recorded, if one person contributed more to the purchase of the property (or if one already owns it and is retitling the ownership), the IRS considers that to be a completed gift. (I.R.C. § 2511; *see also Whitt v. Comr*, 751 F.2d 1548 (11th Cir. 1985), *aff'g* 46 T.C.M. 118 (1983), *cert. denied*, 474 U.S. 1005 (1985).) Some states have homestead protection from creditors and also for reducing *ad valorem* property taxation. Consider transferring a small percentage of the home to the companion in order to secure these.

However, be cautious, for once the companion is an owner, he can probably force a disposition of the property unless there is an agreement that he will not do so. Joint owners can generally force a division or partition of property -- if the property cannot be divided fairly, then the division is made by a forced sale, followed by a division of the proceeds. (Texas Property Code §§ 23.001 *et seq.* (West 2000 & Supp. 2006).)

Note, with real estate, be sure that, if there is a mortgage, the "due on transfer" clause in the loan papers will not be triggered by a transfer to a revocable trust. You may need to spend some additional time getting the mortgage company's permission. To be really cautious, if you are in a state with title insurance, get the title policy reissued in the trust's name. Get the insurance on the home reissued in the trust's name. Not only do these steps protect the trust's interest, they show that the owner really knew what he was doing and was not just "tricked" into signing a deed to the home one day.

VIII. BENEFICIARY DESIGNATIONS; LIFE INSURANCE.

Beneficiary designations on forms often ask what the beneficiary's relationship is to the maker. There is no legal requirement that this question be answered. Just unambiguously identify the beneficiary by name.

You may recall the mantra that "the purchaser must have an *insurable interest* on the insured's life." However, if the client purchases the policy himself, he is deemed generally to have an insurable interest on himself and can name whoever he wishes as beneficiary.

It is not when the client buys a policy on his life, but when the companion purchases and owns the policy that "insurable interest" rule may need to be reviewed. Unfortunately, some courts may interpret the insurable interest rule so as to exclude the companion even when designated as the beneficiary by the insured owner. Make sure the insurance company accepts the designation. (*Wagner (Ex'r Estate of Nellesen) v. Nat'l Engraving Co.,* 307 Ill. App. 509 (1940) where court stated, citing cases from other states, that if the beneficiary (in this case, a corporation in which the insured owned stock and where he worked) did not have an insurable interest, even though the beneficiary received the insurance proceeds, the beneficiary was a "trustee" for the probate estate.) Though cases on insurable interests are generally old, they could be revived today, so check to make sure the client's state and the insurance company

recognize an insurable interest in a friend/companion who is not related by blood. In states that recognize the relationship by statute, or case law, if an insurance company refuses to pay – or pays into the registry of a court when there's a fight brewing with the blood relatives, there may be some interesting, and for the client involved quite stressful, negotiations and legal wranglings ahead.

See http://www.insurance.com/life.aspx? And do a "search" for "insurable interest" and you will find articles that address the insurable interest issue:

"If you want to buy a life insurance policy on someone else's life, you must have an interest in that person remaining alive, or expect emotional or financial loss from that person's death. This is called an insurable interest. Without this requirement, it would be very easy to make a living by purchasing life insurance policies on elderly strangers, and then collecting the proceeds when they died. The insurable interest requirement also prevents people from buying a life insurance policy on someone and then causing or hastening that person's death.

"When you buy insurance on your own life, you are assumed to have an insurable interest. If you are buying a policy on someone else's life, an insurable interest can typically be established if you have a sufficiently strong relationship with that person based on blood, marriage, or monetary interest. To put it simply, they have to be worth more to you alive than dead!

"Husband-wife relationships and parent-child relationships are almost always sufficient to create an insurable interest. In addition, grandparent-grandchild relationships and sibling relationships are frequently considered sufficient for establishing an insurable interest. The ties between cousins, aunts/uncles and nieces/nephews, and other more distant relatives don't automatically give rise to insurable interests because their emotional and financial bonds are less strong.

"Certain relationships founded on monetary interests can also create insurable interests. For example, a creditor is considered to have an insurable interest in a debtor's life. Even though death doesn't extinguish the debtor's obligation to repay a loan, the creditor faces potential harm if the debtor's estate cannot repay the loan. Other examples include the relationship between a business and a key employee, or the relationships among partners in a partnership or stockholders in a closely held corporation. The death of a CEO, general partner, or active stockholder can cause financial disruption to the business and harm the other business owners.

"The insurable interest must exist at the time you enter into the life insurance contract, not at the time of the loss or harm. In other words, you must have an insurable interest at the time you take out the policy. However, the insurable interest generally doesn't have to remain at the time of that person's death."

If your client purchases a policy on his companion's life, make sure that the insurance company agrees that the client has an "insurable interest." Consider getting that commitment in writing. (Most states allow the owner insured to name as beneficiary anyone he wants.

Hartnett & Lesnick, The Law of Life and Health Insurance (Matthew Bender 1995), *See* New York Insurance Law § 3205(b)(2) (West 2006 & Supp. 2007) which prohibits the purchase of a policy on another with the designation of someone other than the insured or his personal representative "unless there is an insurable interest in the person insured." However, to have an insurable interest, the beneficiary must either be "related by blood or by law" or have "a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured." § 3205(a) & (b).)

If your client has a policy which he transfers to his companion, again, make sure the company will not challenge it on the basis of "no insurable interest." Of course, you might be able to make arrangements for the companion to be a creditor and thus have an insurable interest.

In some states, divorce results in the designated spousal beneficiary being treated as having died before the principal. With an unmarried couple, this is not the case, unless the state has a statute that changes this treatment. Therefore, if there is a "divorce," a separation of the domestic partners, unless the state's law has been changed, the client-owner must physically change beneficiary designations should he not want assets to go to the ex-partner, for there is no automatic state revocation. This is true with respect to a will as well. (*See* Texas Probate Code §§ 59 (West 2003 & Supp. 2006 (re a will, divorce treats ex-spouse as having died before the testator); 485A (West 2003 & Supp. 2006) (re a financial power of attorney being revoked as to the appointment of the ex-spouse as agent); Texas Family Code §§ 9.301 (re life insurance, divorce revokes ex-spouse as beneficiary unless otherwise designated as part of divorce decree or beneficiary designation is done after the divorce) & 9.302 (re retirement benefits, divorce revokes ex-spouse as beneficiary). (West 2006, no Supp.)

Remember, however, that federal law (ERISA) preempts state law, so if the retirement plan is subject to ERISA, the forfeiture will <u>not</u> be automatic regardless of what state law directs. (See *Egelhoff v. Egelhoff*, 532 U.S. 1242, 121 S. Ct. 1322, 147 L.Ed.2d 960 (2001) (Washington forfeiture statute re former spouses failed to control an ERISA plan); *Heggy v. American Trading Employee Ret. Acct. Plan*, 56 S.W.2d 280 (Tex. App. -- Houston [14th Dist.] 2001, *no writ)* (Texas statute and waiver in divorce decree re ERISA plan both ineffective and former spouse took as beneficiary of pension plan).)

Further, if an ERISA plan is transferred in part to the "divorced" companion, income tax deferral under a qualified domestic relations order (QDRO) is not available. (I.R.C. § 414(p)(8).) Also, a rollover to the companion's IRA is unavailable sans a marriage. (I.R.C. § 408(d)(3).)

Finally, even though the "insurable interest' should apply only at the time of purchase, if you have a client who keeps a policy on the life of an ex-companion, you may want to make sure the insurance company accepts that and so <u>will</u> <u>not</u> challenge a payment after the ex's death.

IX. MEDICAL OR HEALTH CARE POWERS OF ATTORNEY; ADVANCED DIRECTIVES: DIRECTIVE TO PHYSICIANS, FAMILY, AND SURROGATES.

There is, under construction as it were, an ACTEC Study 16 entitled "Living Wills and Health Care Proxies." *See* Hortter, "A Survey of Living Will and Advanced Health Care Directives," 74 N. Dak. L. Rev. 233 (1988) for information (a little dated, still useful) about the laws on these in all the states.

Forms are available on a number of WEB sites, including that of Partnership for Caring. Typically, blood relatives have the right, under state laws, to provide direction on the type of care a sick relative should receive, if that sick relative is unable to communicate his desires and unless that sick relative has provided otherwise. If a client wants his companion to be the decision maker in such an event, he should definitely complete the Advance Directives and medical or health care power of attorney form for the state in which he resides. (*See* Texas' Consent to Medical Treatment Act, in chapter 313 of the Tex. Health & Safety Code (West 2001 & Supp. 2006) which provides that if a patient in a hospital or nursing home is incapacitated or otherwise mentally or physically incapable of communication, unless the patient has pre-designated a health care agent, an adult surrogate, as follows, may consent to medical treatment: spouse; adult child who has the waiver and consent of all other adult children; majority of patient's reasonably available adult children; parents; or individual clearly identified by patient before incapacity (other than by a signed medical power of attorney), nearest living relative, or member of clergy. Any dispute is to be resolved by a court with probate jurisdiction.)

Congress enacted the Patient Self-Determination Act in 1990 requiring that hospitals which receive federal funding must provide each and every patient with information about advanced directives. (P.L. 101-508, § 4751, 104 Stat. 1388, 1388-204 (101st Congress, 2d Sess. 1991), in 2 U.S. Cong. & Admin News, appearing in different parts of 42 U.S.C.) Under health care decisions laws, the appointed agent is supposed to follow the desires of the patient. (*See* Uniform Health-Care Decisions Act first released in 1993 (West 2005 & Supp. 2007); *also Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261 (1990), recognizing that there is a constitutional right to make health care decisions and refuse medical treatment.)

X. DECLARATION OF GUARDIAN/NOMINATION OF CONSERVATOR.

Some state's laws provide that the appointment of a guardian automatically revokes a financial power of attorney (and perhaps other powers of attorney, such as a medical power) or that the court must determine whether to revoke the power of attorney as part of the guardianship proceedings. (Texas Probate Code § 485(a) (West 2003 & Supp. 2006 provides that the appointment of a guardian of the estate terminates the financial power upon the guardian's qualification (i.e., oath and posting of a bond).) See if your state provides that the individual may designate who will be his guardian or conservator in the event that any one ever starts guardianship proceedings. (Texas Probate Code §§ 679, 689 (West 2003 & Supp. 2006); West's Ann. California Probate Code § 1810 (2002 & Supp. 2007).) Obviously, the

court will still exercise its discretion when appointing a guardian, but will override the individual's wishes only if there is great evidence that the person designated as guardian is simply and completely inappropriate and unsuitable. The client may also be able to "black ball" certain people by stating that in no circumstances does he ever want them to serve as his guardian.

Should the client name the companion as both the guardian/conservator and as agent under a power of attorney? Doing so reduces the possibility that blood relatives will start a guardianship/conservatorship proceeding, for they will either not be named as designated guardians/conservators in the document, or will be named but prohibited from serving. There is a risk, however, because an agent under a financial power of attorney acts free of court control. By naming the companion as both agent and guardian/conservator in the event a guardianship/conservatorship is ever sought, there may be no one with standing who can complain of the agent companion's actions. Some attorneys draft into the financial power of attorney either a co-agent or a provision that requires the agent to account (informally) to certain named people upon their written request. The client can also appoint as special co-agents named people who have the power to remove the companion agent. (*See* Johanson, Johanson's Texas Probate Code Annotated, Commentary to § 481 (West 2004).)

XI. FUNERAL DIRECTIVE: APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS.

State laws generally address who will control a dead person's body; for example, Texas law provides that the following persons, in the following order, control the body: person designated in a writing in substantially the form set forth in the statute; spouse; surviving adult child; either surviving parent; any adult in the next degree of kinship in the order named by law to inherit the estate of the decedent. (Texas Health & Safety Code § 711.002 (West 2003 & Supp. 2006).) Interestingly, the Texas statute seems to require that the agent sign and accept his appointment before the designation is effective. Apparently, sometimes the agent does not know the legal effect of the various disability and funeral directive documents that have been signed. The author dealt with a situation in Texas where the companion died and the survivor first presented to the funeral home the financial power of attorney. When told that it was revoked by death, he demanded his money back and said, “let his parents pay for the cremation." Later, after the parents had given instructions for cremation and the sending of the urn to them out of state, and paid for the services, the companion returned with a funeral directive, albeit unsigned by him. A compromise was eventually worked out, avoiding the need to go to court. (Query, if the directive is not signed until after death, is it effective?)

Different states have different rules about who has the right to give instructions about the disposition of the body. California provides that, prior to death an individual may direct, in writing, the disposition of his remains and "funeral goods and services to be provided. (West's Ann. Cal. Health & Safety Code § 7100.1 (West 1970 & Supp. 2007).) If the Californian does not do this, then the "duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon": (1) an agent under a power of attorney for

health care who is given the right of disposition; (2) the competent surviving spouse; (3) the sole surviving competent adult child (and there's a protocol to follow if there is more than one child); (4) the surviving competent parent or parents; (5) the sole surviving competent adult sibling (and there's a protocol if there's more than one); (6) those in the next degree of "kinship"; and (7) the public administrator when the deceased has sufficient assets. (West's Ann. Cal. Health & Safety Code § 7100 (West 1970 & Supp. 2007).) Has this statute been amended to place the "registered domestic partner" in line to make health care decisions? Does it have to be changed or can "registered domestic partner" be substituted in (2) above for "spouse?" (*See* West's California Family Code Ann. § 297.5 (West 2004 & Supp. 2007) which reads in part: "Registered domestic partners shall have the same rights, protections, and beneficiaries as are granted to.....spouses."

Reportedly, some companions even when in possession of notarized, witnessed, written statements have met with resistance from the authorities and funeral homes, who insist that a "family member" provide them with instructions. Giving authority in the will over the funeral does not work well as often the will is not read until after the funeral and almost never probated until after the funeral. So, urge the client to make and notarize (witness if required) that funeral directive.

XII. MARRIAGE, CIVIL UNIONS, PALIMONY.

Lee Marvin added the word "palimony" to our vocabulary. He never married his companion and when they split, she claimed that they had an agreement to split assets that came into the palimony during their time together: "In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements." (*Marvin v. Marvin*, 18 Cal.3d 660, 674, 134 Cal. Rptr. 815,___, 557 P.2d 106, 122 (1976). In later proceedings, the California Supreme Court affirmed the holding that there had, in fact, been no such agreement and refused to allow Ms. Marvin sums to rehabilitate or retrain her. *Marvin v. Marvin* 122 Cal. App. 3d 871,176 Cal. Rptr. 555 (1981).)

For propertied clients, consider having a palimony agreement, similar to a pre- or post-marital agreement. Be aware that while many state statutes provide that no consideration is needed to support a pre-marital agreement, the same may not be true of a palimony agreement. Also, certain aspects of the relationship that might be considered to be consideration by the couple could, in fact, be held to be outside the ambit of legal consideration.

XIII. CHILD CUSTODY ISSUES UPON THE "DIVORCE" OF SAME-SEX COUPLES.

If it happens that one member of a now-divorcing or divorced couple is heterosexual and the other gay, there have been courts which awarded custody of children to the hetereosexual parent; those courts tend to be overturned on appeal. In *Jacoby v. Jacoby*, 763 So.2d 410, 413, 415 (Fla. Dist. Ct. App.([2d Dist] 2000), *reh. dism'd),* a 2000 Florida District Court of Appeals case, the court noted: "If the court's 'obvious' preference was based on the father's heterosexual relationship, it was akin to the custody award to the father in *Packard v. Packard*, 697 So. 2d 1292, 1293 (Fla. 1st DCA 1997), based solely on the fact that he lived in a 'more traditional family environment.' As did the First District in *Packard*, we reject such a determination when no evidence showed harm to the children resulting from the 'nontraditional' environment. *See also Maradie*, 680 So. 2d at 542-543 (rejecting as improper the taking of judicial notice that 'a homosexual environment is not a traditional home environment, and can adversely affect a child')."

The *Jacoby* court also quoted*: "Maradie v. Maradie*, 680 So. 2d 538 (Fla. 1st DCA 1996). '[T]he mere possibility of negative impact on the child is not enough.' *Id.* at 543. The connection between the conduct and the harm to the children must have an evidentiary basis; it cannot be assumed."

If there is life insurance (perhaps changed on the "divorce" so it is payable to children in trust), consider contacting the insurance company to make sure that the "insurable interest" rule is not violated.

XIV. "ADOPTION" OF CHILDREN.

Alabama, Alaska, California, Connecticut, Delaware, George, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas (though the author has heard only anecdotally that some courts are allowing unmarried couples of the same sex to adopt children), Vermont, Washington, and the District of Columbia reportedly grant to same-sex couples the ability to both adopt a child, by statute or by case law (perhaps just at the trial court and may not be reported or published if not appealed). (There is a 1939 Texas Attorney General Opinion, No. 0-532, which opined that joint adoption of a minor by two unmarried females was illegal, that joint adoptions could be done only by married people, and therefore even though the court had entered an order effecting the adoption, the birth certificate could not be changed to reflect both "parents" and directed that the adoption proceedings should be returned to the district court "for correction." You can see this opinion on the WEB at http://www.oag.state.tx.us/opinions/O/O0532.pdf ; *see also* Horwood. Wolven & Zaluda, 813 T.M.-2nd, *Estate Planning for the Unmarried Adult*, A-14 and footnote 143. In checking these state's statutes randomly (not all were checked), the statutes tended to say if you are married, both must adopt, and to allow states to

consider sexual orientation of the proposed parent. Oklahoma made the headlines when it was seen as trying to set aside adoptions done by another state's courts where the adopting parents were same-sex partners, leading to fears that families moving to Oklahoma or even just passing through were at risk. *See* http://www.lambdalegal.org/news/in-the-news/court-restores-adopted-rights.html, issued on August 20, 2007; Oklahoma Statute Ann. § 7502-1.4 (West 2007), providing that the state shall not recognize a foreign adoption by more than one individual of the same sex.)

However, not all states will amend the birth certificate to allow both parents' names to be reflected there or will recognize an adoption by two people who are of the same sex. (*See the Texas Attorney General's Opinion cited above; In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001) (permitting second-parent, same-sex, adoption); *In re Luke*, 640 N.W.2d 374 (Neb. 2002) (disallowing second-parent adoption).) Some states specifically ban same-sex adoptions. (*See* Fla. Stat. Ann § 63.042(3) (2003, Supp. 2007), Miss. Stat. § 93-17-3 (2003, Supp. 2007), and Utah Code Ann. § 78-30-1 (2003, Supp. 2007). *Check* Lambda Legal does a lot of research in this area and you may want to check its WEB site for up to date information. One bibliography done by Lamda Legal as of June 2006 reporting on cases both favorable and unfavorable can be found at http://www.glad.org/rights/AdoptionCaseBibliography.pdf.)

If there is a separation/divorce of the couple, sans adoption of the children by both parents, support obligations re the child must be established at common law, or by contract, unless there is a statute. (*In the Matter of Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (Fam. Ct. 1985).) The couple can enter into a child-amony contract, but the courts may not be able to enforce it. (*Sporleder v. Hermes*, 471 N.W.2d 202 (Wis. 1991) (contract that custody would be determined through a mediation process and, in any event, the partner who did not receive custody would have visitation, held unenforceable)). Being the legally adoptive parent of a child is more likely to result in legal rights with regard to that child than being an unmarried, surrogate parent who has not legally adopted the child. (*See Nancy S. v. Michele G.,* 279 Cal. Rptr. 212 (Ct. App. [1st Dist., Div. 1] 1991) ("co-parent" who was not related biologically or by adoption was denied visitation rights when couple split); *In the Matter of Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (similar facts and denial of visitation as well).

Under the Uniform Parentage Act, as adopted in California, a child may have two same-sex parents; in this case both parents were women. (*Elisa B. v. Superior Court of El Dorado County*, 33 Cal. Rptr. 3d.46, 37 Cal. 4th 108, 117 P.3d 660 (2005), a child support case brought by the district attorney's office; West's Cal. Family Code Ann. § 7600 *et seq*. (West 2004 & Supp. 2007).

Perhaps of equal or even greater concern, however, is the fact that if the non-biological or non-adopting parent (and this may include someone who has adopted a child in a district court but who is not recognized at the highest court level as having a valid adoption) dies without a will and without having made provisions for that child, then under the state's intestacy laws, the child, because not validly adopted, cannot inherit. And if both members of a same-sex couple are not allowed to adopt the same child through the court system, then one must infer that adoption by estoppel will not work either. (*See* Note, Trast, Carissa, "You

Can't Choose Your Parents: Why Children Raised by Same-Sex Couples are Entitled to Inheritance Rights from Both Their Parents," 35 Hofstra L. Rev. 857 (No. 2 Winter 2006). Building upon the U.S. Supreme Court case of *Trimble v. Gordan*, 430 U.S. 762, 776 (1977), and its holding that to deny children of non-marital parents the right to recover intestate from both parents violates their equal protection, the note writer makes a compelling argument that the child of a same-sex relationship should be able to inherit by intestacy from both "parents," regardless of whether or not state law allows adoption, legally or equitably, of the child by two persons who are of the same sex (called "second parent adoptions"). According to the note writer, the Human Rights Watch Foundation Campaign reports that only 26 states offer second parent adoptions and 18 of those are determined county by county, which makes a judge's decision to allow the adoption one that could be overturned. Twenty-four states provide no second parent adoption possibility, with one of those, Florida specifically prohibiting a homosexual from adopting a child. (West's Florida Statutes Ann. § 63.04(3) (2005).) For materials published by the Foundation, see http://www.hrc.org.)

If a state will not allow an adoption, will it recognize that adoption when the family with an adoption valid in another state moves into the prohibiting state? Consider issues of custody, the child welfare arm of the state, ability to enroll the child in school and to give directions for medical care, intestacy, and when the child is an adult, does that child have rights under a prohibiting state's statutes; for example, to be in the line of folks authorized to make health care decisions for the parent and to get information and to direct the funeral?

Regarding the life insurance for the children as beneficiaries or perhaps bought by a crummy demand trust, again make sure the insurance company will honor the contract designation.

XV. GIFT AND ESTATE TAXES: CAN PERSONS OF THE SAME SEX BE MARRIED?

The Federal unlimited marital deduction applies only to married people. The Bipartisan Defense of Marriage Act of 1996 defines marriage as being between people of the opposite sex. Federal law preempts state law as far as federal statutes are concerned. Public Law 104-199, 110 Stat. 2419 (1996), codified in part at 28 U.S.C. § 1738C. The current IRS view appears to be that if there were not a Federal law defining marriage as being only between members of the opposite sex, the IRS might be likely to recognize a marriage which is recognized as such by any of the states. (Rev. Rul. 56-66, 1958-1 C.B. 60 -- IRS will recognize a marriage valid in another state even if the couple moves to a state where the marriage would not be recognizable; Priv. Ltr. Rul. 9431017 -- IRS will not exclude from an employee's income educational benefits provided to the domestic partner unless the state recognizes the "marriage.")

There is, however, a Federal law, so there is no "marriage" for Federal purposes. Thus, unless overturned by Congress or Federal courts, same-sex couples, even if "legally married" in another country or in Massachusetts, will not be eligible for the unlimited marital deduction. Even if you plan to overturn this through the courts, remember that our clients may

not be able to sustain the costs of such a legal battle and often prefer to be more cautious in their own personal planning. Thus, counting on a marital deduction should be avoided in the planning process.

There are numerous materials in law review articles and on the WEB about the constitutionality of the Defense of Marriage Act. In summary, an argument can and will be made that the Full Faith and Credit Clause of the U.S. Constitution requires each state to recognize as valid marriages that are valid in other states. (*See Loving v. Virginia,* 288 U.S. 1, 87 S. Ct. 1817, 18 L. Ed.2d 1010 (1967) - cannot prevent marriages based solely on racial classifications; 52 Am Jur. 2d, *Marriage* §§ 10 & 12 (2000); *Etienne v. DKM Enterprises, Inc.*, 186 Cal. Rptr. 321, 136 Cal. App. 3d 487 (1982) - the court found that the couple was not common law married in Texas prior to coming to California; *Boykin v. State Indus. Accident Comm'n*, 224 Or. 76 (1960), to the effect that a state where you cannot *ab initio* be married under common law must still recognize as married couples who moved from another state where they were married under common law; Miller, Annot., "Marriage Between Persons of the Same Sex," 81 A.L.R. 5th 1 (2000 & Supp. 2007).

Since the unified credit is increasing, the inability to use the marital deduction may not affect many couples. Also, if Congress makes permanent the repeal of the estate tax, no marital deduction will be needed at death to minimize estate taxes.

XVI. COMMUNITY PROPERTY.

There are 8 community property states and some others that allow you to adopt a community property system, at least in part. The 8 traditional community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Wisconsin and Alaska allow residents to elect community property-like treatment in some cases.

Each of the states treats community property slightly differently than the others, but the principles are the same in each state; they are just applied differently. In Texas, all property on hand during the marriage is presumed to be community property. That presumption can be overcome by clear and convincing evidence. Separate property is that property owned before and brought into the marriage, capital gain increases (not ordinary income) from separate property, property acquired during the marriage by gift, devise, or bequest, and personal injury awards. (Texas Family Code §§ 3.001, 3.002 & 3.003 (West 2006). Each spouse owns community property 50/50. Upon death, the spouse is entitled to give away his (or her) 50%. If there is a divorce, community property can be divided unequally, but separate property goes to the owner of it, subject to child support and claims for economic contribution and reimbursement. (Texas Family Code §§ 7.001 & (West 2006); McKnight, "Family law: husband and wife," 54 S. M.U.L. Rev 1383 (2001); *Wilson v. Wilson*, 44 S.W. 3d 597 (Tex. App. – Fort Worth 2001, *no writ*). Creditors must navigate the twists and turns resulting from whether property is separate, joint management, or sole management community. (Texas Property Code §§ 3.201-3.203 (West 2006).) Both halves of community property receive a

new basis (hopefully, a step-up in basis) upon the death of one of the spouses. (Internal Revenue Code § 1014.)

Suffice it to say, if a state recognizes as a marriage a union between people of the same sex and federal law does not recognize that union and other states do not recognize that union, a plethora of problems will ensue when dealing with community property issues. California has enacted community property for registered domestic partners, at least in the earned income situation and directed that for income earned after January 1, 2007, registered domestic partners may file a California state income tax as "married, filing jointly" if they wish. (See http://www.ftb.ca.gov/forms/RegDomPrtnr/RegisteredDomesticPartnerAGILimitationDiscussion.pdf issued in February 2007 and a summary of the changes effective January 1, 2007.

XVII. WRONGFUL DEATH

Generally, but not always, people must be married to be able to sue for wrongful death and loss of consortium. (*Medley v. Strong*, 200 Ill. App. 3d 488 (1st Dist. [4th Div.] 1990) (Illinois doesn't recognize common law marriage purportedly established in Illinois); *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988); *Garcia v. Douglas Aircraft Co.,* 133 Cal. App. 3d 890 (2d Dis. 1982); Annot., *Action for Loss of Consortium Based on Nonmarital Cohabitation*," 40 A.L.R.4th 553 (1985).) States that recognize a civil or marital relationship may, nevertheless, need to make changes to specific state statutes, like those allowing wrongful death claims.

XVIII. PILLOW TALK PRIVILEGE

Those of you who remember film noir criminals snarling, "she's my wife and she can't testify again me," will immediately understand the rule that bars a wife from testifying (criminally or civilly) as to communications from the husband (and vice versa) made during the marriage without the consent of the other. Why? To protect the confidential relationship of marriage. (*Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L.Ed. 2d 186 (1980).) There are, of course, nuances and exceptions that apply. However, unmarried people just are not entitled to the privilege. (*People v. Hamacher*, 438 N.W.2d 43 (1989).) Imagine the government's attorney examining the companion on the stand in a tax case about what the taxpayer has told him regarding various estate planning techniques used to minimize taxes. Clients may not always use language judiciously and there is probably no privilege between unmarried partners that can be raised in order to stop the government attorney's examination. (This may just be a privilege that can be asserted in criminal cases, but see Michigan's law at the time of the *Hamacher* case which barred one spouse from testifying for or against the other except in (1) divorce, (2) prosecutions for bigamy or crime against children, (3) tort done by one to the other or support obligations, (4) desertion and abandonment, and (5) certain cases relating to marriage and title to property. *Hamacher*, 438 N.W.2d at 44. Some of those clearly relate to civil matters, so the privilege must extend both to criminal and civil matters. Undoubtedly, a person who wants "private communication" privilege to apply will assert it and then we'll have even more interesting case law to discuss at these meetings.

SUMMARY

To be cautious and practical, always discuss with same-sex and unmarried couples the following:

(1) Wills (avoid testamentary libel);
(2) Financial powers of attorney;
(3) Health or medical powers of attorney;
(4) Advanced Directives (Living Wills);
(5) Revocable trusts and transfer of assets to such trusts (consider the mortgage company; insurance on assets; title insurance on home);
(6) Declaration or nomination of guardian or conservator and stating who can never be a guardian;
(7) Beneficiary designations (insurable interest) and non-probate property;
(8) Providing for children (adoption and other issues); and
(9) Funeral Directive.

In summation, please help your clients to plan within and sometimes around the laws as they exist today – patchwork though they may be – in order to achieve their wishes. That's one of our missions. Now, go out there, do good, and be careful.