

# ESTATE PLANNING IN A CRISIS ENVIRONMENT

## I. WHAT DO YOU NEED TO KNOW ABOUT GIFT AND DEATH TAX?

### A. First, You Don't Have to Worry About Gift/Inheritance Tax in Tennessee:

- (1) Tennessee's *gift tax* was repealed effective January 1, 2012, and our *inheritance tax* was repealed for all residents who died in 2016 or after.
- (2) Tennessee's *Hall Income Tax* is being phased out; this year, the rate of TN tax on passive income sources is 1%, and after 2020 we will be an income tax-free state.

### B. So, What About the Feds?

- (1) Here are the **federal estate tax-free amounts** in effect from and after **June 7th, 2001**:

<b>1977</b> - \$120,000	<b>1986</b> -	\$500,000
<b>1978</b> - 134,000	<b>1987 - 1997:</b>	600,000
<b>1979</b> - 147,000	<b>1998</b> -	625,000
<b>1980</b> - 161,000	<b>1999</b> -	650,000
<b>1981</b> - 175,000	<b>2000 - 2001:</b>	675,000
<b>1982</b> - 225,000	<b>2002 - 2003:</b>	1,000,000
<b>1983</b> - 275,000	<b>2004 - 2005:</b>	1,500,000
<b>1984</b> - 325,000	<b>2006 - 2008:</b>	2,000,000
<b>1985</b> - 400,000	<b>2009</b> -	3,500,000
<b>2010</b> - \$5 Million; unless an election is made for the tax-free amount to be <b>UNLIMITED</b> (but with carry-over basis)		
<b>2011</b> - \$5,000,000 with a 35% rate on the excess		
<b>2012</b> - \$5,120,000 with a 35% rate on the excess		
<b>2013</b> - \$5,250,000 with a 40% rate on the excess		
<b>2014</b> - \$5,340,000 with a 40% rate on the excess		
<b>2015</b> - \$5,430,000 with a 40% rate on the excess		
<b>2016</b> - \$5,450,000 with a 40% rate on the excess		
<b>2017</b> - \$5,490,000 with a 40% rate on the excess		
<b>2018</b> - \$11,180,000 with a 40% rate on the excess		
<b>2019</b> - \$11,400,000 with a 40% rate on the excess		
<b>2020</b> - <u>\$11,580,000 with a 40% rate on the excess</u>		

*Unless Congress takes action to the contrary, this high tax-free amount will “sunset” (expire) at the end of 2025, and the tax-free amount will automatically drop to approximately \$6 million per person in 2026 (indexed for inflation from 2011 onward). During the most recent presidential campaign, the **lowest** estate tax-free amount advocated by Hillary Clinton was \$3.5 million, with a maximum tax rate of 65% on the excess. Bernie Sanders’ position is a tax-free amount of \$3.5 million, then 45% on the excess up to \$10 million; from \$10 to \$50 million, he proposes 50%; from \$50 million to \$1 billion, 55%; and over \$1 billion, 77% tax rate.*

- (2) The **federal gift tax-free amount** for all **taxable gifts** is a **cumulative lifetime total of \$11,580,000 per donor**; each donor has a **\$15,000 per person annual gift tax exclusion** (indexed for inflation).
- (3) The **unlimited marital deduction** for certain types of gifts to a spouse during lifetime and at death and the **unlimited charitable deduction** for certain types of gifts to charitable organizations **are both still applicable for gift and death tax purposes**.
- (4) The **exemption from the generation-skipping transfer (GST) tax is \$11,580,000 as well**.
- (5) **The rate of federal estate, gift and GST tax is 40%**.

**C. Portability has now become a mandatory issue to consider if you are married. With portability, the tax-free amount doubles (if you both agree and if your surviving spouse does NOT remarry).**

- (1) The amount a married couple can pass on tax-free is, under Code Section 2010(c): (1) the “applicable exclusion amount” (\$11.58 million in 2020); plus (2) for a decedent who is a surviving spouse, the “Deceased Spousal Unused Exclusion Amount” or **DSUEA**.
- (2) **What is the DSUEA?** The amount of the deceased spousal unused exclusion is the lesser of the applicable exclusion amount (\$11.58 as indexed) or the last predeceased spouse’s unused exclusion amount.
- (3) **No statute of limitations:** Under **Code Section 2010(c)(5)(B)**, the IRS is entitled to examine the predeceased spouse’s estate tax return at any time for the purpose of determining the predeceased spouse’s unused exclusion amount that will be available for use by the surviving spouse.
- (4) **The first-death filing requirement:** In order to qualify for a DSUEA amount, the executor of the estate of the first spouse to die must timely file a federal estate tax return and make an election to use portability.
- (5) **Only the most recently-wed spouse’s DSUEA can be used:** This will be the case even if the last deceased spouse either had no unused exclusion, or did not make a timely election (in which case the DSUEA would be zero).
- (6) **The privity requirement:** A surviving spouse cannot use the DSUEA of his or her deceased spouse if the survivor remarries. For example, if Bernie dies leaving \$3 million to his children, and the rest was jointly owned with his surviving wife Mabel, who elects and claims Bernie’s unused \$8.58 million (\$11.58 million minus \$3 million) DSUEA, then Mabel

would herself have \$8.58 plus \$11.58 million that she could theoretically leave tax-free upon her death. But if Mabel later marries Frank, and Frank then dies, leaving his entire \$11.58+ million to his children, the maximum amount that Mabel can leave tax-free is back down to \$11.58 million, *not* the \$20.16 million she had going into her remarriage. [Remember that the overall tax-exempt amount could go down to \$3.5 million or even lower in the future, making the value of portability and the potential penalty of remarriage much greater.]

- (7) **Portability applies for gift tax purposes, too: Code Section 2505(a)(1)** provides that the applicable credit amount includes the DSUEA, so that amount will also be included in the calculation of the gift tax exemption amount. This means that if the widow decides to marry the millionaire next door, she should consider using her DSUEA with gifts to her kids *before* the wedding day, so that she does not lose it if her new husband predeceases her. (This is a good idea anyway in case the basic exclusion amount goes down.)
- (8) **Portability does not apply for GST tax purposes:** This (among other reasons) is why it's still a good idea to divide up a wealthy couple's assets in estate planning if they want to take advantage of a generation-skipping design.
- (9) **Portability has been made "permanent" and will not sunset on its own without Congressional action to remove it, and both political parties appear to support portability.**

**D. How do these changes affect your estate planning?**

- (1) If you are married, and if you have completed or updated your estate planning years ago, then you have probably included a so-called A/B plan (perhaps with "GAP" language in your documents to deal with the difference between the Tennessee tax-free amount and the federal tax-free amount). That GAP language is now unnecessary and can be omitted. The A/B plan could still be quite beneficial to protect assets if your surviving spouse should remarry, or to address potential future changes in the law, without relying on portability, but the details of the A/B plan may be unnecessary in many particular situations. In other words, you should consider simplifying your overall plan.
- (2) Under the law that is currently in effect, your income tax basis for an asset you receive through an inheritance (other than retirement funds) is equal to the fair market value of that asset at the date of the death of the person who left it to you. (This is called "stepped-up basis.") In other words, if someone receives stock worth \$110,000 through an inheritance from his or her parent (who originally bought the stock for \$10,000) the recipient's income tax basis in the stock will be equal to the fair market value of the stock at the time of the parent's death (regardless of how much the parent paid for the stock during his or her lifetime). **The estate tax value of the stock is also its fair market value at the date of the parent's death, so the Executor of the parent's estate will have to report an asset of \$110,000**

on the estate tax return. If the stock is sold on the day after the parent dies, there will be no capital gain (assuming the stock sells for its value on the day the parent died).

- (3) By contrast, all of the assets that are invested in IRAs, 401(k)s, many tax-deferred annuities, etc. (referred to herein as “retirement funds”) are typically **subject to ordinary income tax** (other than Roth IRAs), both during the lifetimes of the participant and spouse after they reach their 70s, and after death when these funds are passed on to children, grandchildren, nieces, nephews and/or beneficiaries other than tax-exempt charities.
- (4) Another point to remember is that the distribution of assets into trusts for beneficiaries will be complicated when a substantial portion of the estate is in retirement funds.

## II. **HEY, AM I IN THE WRONG SEMINAR?? I THOUGHT THIS WAS ABOUT ESTATE PLANNING IN A CRISIS ENVIRONMENT . . .**

**A. AND RIGHT YOU ARE:** This IS a seminar about estate planning in a crisis environment, and the reason for going into the A/B Plan and portability in such detail (especially with the current estate-tax-free amounts) is that there is no stepped-up basis for most retirement funds, and the federal gift and estate tax issues are now much less important to most folks than the income tax issues have become, especially in planning for people whose health is fragile.

**B. THE BIGGEST NEWS IN ESTATE PLANNING FOR EVERYONE IS THAT THE LAW GOVERNING THE TAXATION OF RETIREMENT FUNDS changed significantly on December 20, 2019, when President Trump signed the SECURE Act (aptly named: “Setting Every Community Up for Retirement Enhancement”). Folks, this Act really IS a “Set Up” for the American taxpayers, especially those with significant amounts in retirement funds.**

- (1) The Act passed the House 417-3 in **May of 2019.**
- (2) **But** it was so bogged down in the Senate that **no one thought it would pass last year.**
- (3) Then, at the **very end of 2019**, those rascals in Washington attached the Act to a comprehensive spending bill and passed it, AND
- (4) **President Trump signed it into law on December 20, 2019.**
- (5) Its provisions **took effect January 1, 2020.**
- (6) There’s a little **good news** in the Act, but
- (7) There’s a **whole lotta bad news** about it, too!
- (8) **Our website, [www.PassItOnWell.com](http://www.PassItOnWell.com), has a detailed separate seminar on the SECURE Act, along with a video of our free client seminar held in early February in Tellico Village. Look for that handout in the “Free Resources” section of the website.**

## III. **SO WHAT SHOULD YOU DO ABOUT YOUR RETIREMENT FUNDS, ESPECIALLY IN A CRISIS ENVIRONMENT?**

- A. Review all of your current primary and contingent beneficiary designations in writing in light of these new rules. Here are the specific recommendations:**
- (1) First, **contact each and every one of the plan administrators (IRAs, 401(k)s, 403(b)s, etc.)** and find out whether, after death, the spouse can elect to **roll over the benefits payable to him or her into the spouse's own separate retirement account.**
  - (2) Second, be sure to confirm that, **if the children are named as the direct or contingent beneficiaries, each one of them can elect, under the terms of the plan, to take his or her share out either right away or at any time(s) over a period of 10 years after your death.**
  - (3) Third, make sure that **if one of the children dies before you (and your spouse), the deceased child's share will pass to his or her descendants ("issue"), and NOT to the other surviving children (thus cutting out your grandchildren).** [But be careful if the grandchildren are young!]
  - (4) Fourth, consider the **age of each of the beneficiaries, their tax brackets and state of residency;** then consider **the number of beneficiaries and their individual circumstances.**
- B. Summarize the assets in your name alone (and in your spouse's name) OTHER THAN the retirement benefits, to enable you to compare the relative size of your after-tax estate versus the retirement funds.**
- C. Finally, after all of these steps, review your existing assets and current beneficiary designations, and then determine what's best at this time, based on the higher estate tax-free amounts and the current retirement benefit distribution and taxation rules.**

#### **IV. SO WHAT OTHER ADVICE DO WE HAVE TO ASSIST PEOPLE IN A CRISIS ENVIRONMENT?**

- A. Dust Off the Booklet, Review the Notebook & Get the Facts:**
- (1) Fill out "What My Family Should Know" (**downloadable and fill-outable from the "Free Resources" page at [www.PassItOnWell.com](http://www.PassItOnWell.com)**)
  - (2) Notebook Update: See **Exhibit A**
  - (3) Confirm ownership of all bank and brokerage accounts **in writing**
  - (4) Obtain Deeds to confirm ownership (**kgis.com**) **and basis**
  - (5) Confirm ownership **and basis** of all business entity interests, including Operating Agreements, Bylaws, Partnership Agreements, etc.
  - (6) Review copies of income tax returns (up to date?)
  - (7) Confirm the names and contact information for all your trusted counsellors: Financial advisor, CPA, attorney, doctors, etc.
  - (8) Review all documents: See **Exhibit B**
  - (9) Review your designated "strong soldiers" and go over the intimidating list of duties for each designee: See **Exhibit C**

**B. Address End-of-Life Issues:**

- (1) Tennessee's website on Advance Directives and Living Wills:  
<https://www.tn.gov/content/dam/tn/tenncare/documents/AdvanceDirectivesLivingWill.pdf>
- (1) Durable Power of Attorney for Health Care **and HIPAA**
- (2) Five Wishes
- (3) Specific medical concerns
- (4) Funeral and burial or cremation wishes
- (5) **Documentation of any and all prepayments**

**C. What to do if your estate is subject to federal estate tax (over \$11.58 Million):**

- (1) **Gifting?** You can definitely consider gifting the \$15,000 per person per year, thus saving 40% of the value of the gifted property from federal estate tax; however, the gifts **must be completed before death (checks must clear the bank; deeds must be delivered)**
- (2) Consider **basis** issues: **Gift cash or high-basis assets; retain low-basis assets.**
- (3) If you are married, if one of you is gravely ill, **and** if you own a highly appreciated asset, **putting that asset solely in the hands of the spouse who is quite ill, before his or her death, could provide a full step-up in income tax basis if it is still owned at death**; however, if the very same asset is then distributed outright within one year of death back to the person who transferred his or her interest in the asset, there is no full step-up in basis. The solution to this may be distributing the appreciated asset into a trust for your spouse, rather than leaving it to him or her outright.
- (4) For **married couples, don't forget the old A/B Plan**, using a so-called **Bypass or Family Trust coupled with a Marital Trust** to put off all death taxes until the second spouse's death, especially if portability might not work due to the likelihood of the surviving spouse's remarriage.
- (5) However, **if both of you are ill and/or elderly**, consider paying some federal estate tax at the first death, because if the surviving spouse dies within 10 years, there is a so-called **credit for tax on prior transfers** that might yield a better result.
- (6) Are we planning to **use portability or not?** [Remember that the Generation-Skipping Tax (GST) exemption is NOT portable.]
- (7) What about **charitable gifts?** If the estate is taxable, there would be a charitable deduction available; however, if the estate is NOT taxable, consider making the gift during lifetime if there is a current income tax benefit.
- (8) Consider the effect of **state inheritance tax on property held in a state with an inheritance or estate tax (not Tennessee, thankfully).**
- (9) Do we have **savings bonds with built-in income taxes?** Consult with your CPA to address how the taxation of the bonds should be handled,

- AND whether it would be possible to **use losses against income or gains from savings bonds, annuities, IRAs, etc.**
- (10) Consider the availability of a **fractional interest discount on real property interests!** The discount IRS has allowed / approved in the past has been as high as 40% off the fair market value of the realty.
  - (11) Consider **fractionalizing interests in business entities** as well.
  - (12) Be sure to **review copies of ALL prior gift tax returns filed by you (Forms 709), for both spouses if you are married.**
  - (13) Make sure the file for the **ILIT (Irrevocable Life Insurance Trust) is pristine** (all Crummey letters sent and copies preserved, etc.)
  - (14) If a **life insurance policy is owned by the ill person, do not gift it away; consider selling it...**
  - (15) For large estates, **consider a Charitable Lead Annuity Trust:** The charity receives a set annuity, with the remainder passing to your beneficiaries.
  - (16) Another suggestion has been to **gift significant assets using the very high, \$11.58 Million exemption right now, before they disappear;** IRS has stated it will NOT “claw-back” the tax differential.
  - (17) Finally, **please give us a call, because the tax-saving ideas in this section of the handout are understandably technical and complicated, and we would be pleased to help answer your questions.**

**D. Address Family AND End-of-Life Issues:**

- (1) Are you **of sound mind?** The tests are: Awareness of the nature and extent of the assets in your estate; coupled with awareness of the “natural objects of your bounty” (those no-good, do-nothing children!)...
- (2) Consider the **possibility of undue influence** by persons in or outside the family, working to improperly persuade you to take actions that are contrary to the lifelong plan, etc.
- (3) Review closely and carefully your “**chosen and trusted soldiers**” to be sure they will act in your best interests.
- (4) Check to see if there is a **forfeiture provision** or “**in terrorem clause**” in your documents to discourage a Will contest or Trust litigation in the future.
- (5) Consider the current **family dynamics**, and make sure to **confirm the identities and contact information** for the immediate (and extended?) **family members: Does everyone get along?**
- (6) Nowadays, we must **ask if any person who is named as executor, trustee, or agent under a power of attorney has ever been convicted of a misdemeanor or felony involving a sentence of imprisonment in a penitentiary** because such persons cannot hold these fiduciary positions in Tennessee.

- (7) If one particular family member is caring for a terminally ill parent or loved one, consider whether a **Personal Care Agreement** should be put into place to avoid issues in the future.
- (8) **Make sure any late-stage planning that you do matches the existing documents! (This is to avoid making the same gift twice...)**
- (9) Beware of actions taken under the **Power of Attorney** if there is a possibility of **self-dealing and/or undue influence.**



# **Fred & Wilma Flintstone**

## **IMPORTANT DOCUMENTS TABLE OF CONTENTS**

1. **Asset Letter – Dated \_\_\_\_\_**
2. **Living Wills – Dated \_\_\_\_\_**
3. **Powers of Attorney for Health Care – Dated \_\_\_\_\_**
4. **Powers of Attorney for Finances – Dated \_\_\_\_\_**
5. **The Fred Flintstone Revocable Living Trust – Dated \_\_\_\_\_**
6. **The Wilma Flintstone Revocable Living Trust – Dated \_\_\_\_\_**
7. **Wills – Dated \_\_\_\_\_**
8. **Declarations of Trust (Fred) – Dated \_\_\_\_\_**
9. **Declarations of Trust (Wilma ) – Dated \_\_\_\_\_**
10. **Transfers of Personal Property – Dated \_\_\_\_\_**
11. **Assignment of Beneficial Interest – Dated \_\_\_\_\_**
12. **Recorded Deed and Declaration of Trust (Bedrock)– Dated \_\_\_\_\_**
13. **Brokerage Accounts**
14. **Retirement Account Beneficiary Designations**
15. **Life Insurance Beneficiary Designations**

# Barney & Betty Rubble

## IMPORTANT DOCUMENTS TABLE OF CONTENTS

1. Asset Letter – Dated \_\_\_\_\_
2. Living Wills – Dated \_\_\_\_\_
3. Powers of Attorney for Health Care – Dated \_\_\_\_\_
4. Powers of Attorney for Finances – Dated \_\_\_\_\_
5. The Last Will and Testament of Barney Rubble – Dated \_\_\_\_\_
6. The Last Will and Testament of Betty Rubble – Dated \_\_\_\_\_
7. Assignment of Beneficial Interest – Dated \_\_\_\_\_
8. Recorded Deed and Declaration of Trust (Bedrock)– Dated \_\_\_\_\_
9. Brokerage Accounts
10. Retirement Account Beneficiary Designations
11. Life Insurance Beneficiary Designations

*Sample Notebook Table of Contents – Married Couple with Wills (no Trusts)*

# Pebbles Flintstone

## IMPORTANT DOCUMENTS TABLE OF CONTENTS

1. **Asset Letter – Dated \_\_\_\_\_**
2. **Living Will – Dated \_\_\_\_\_**
3. **Power of Attorney for Health Care – Dated \_\_\_\_\_**
4. **Power of Attorney for Finances – Dated \_\_\_\_\_**
5. **The Pebbles Flintstone Revocable Living Trust – Dated \_\_\_\_\_**
6. **Will – Dated \_\_\_\_\_**
7. **Declarations of Trust – Dated \_\_\_\_\_**
8. **Transfer of Personal Property – Dated \_\_\_\_\_**
9. **Assignment of Beneficial Interest – Dated \_\_\_\_\_**
10. **Recorded Deed and Declaration of Trust (Bedrock)– Dated \_\_\_\_\_**
11. **Brokerage Accounts**
12. **Retirement Account Beneficiary Designations**
13. **Life Insurance Beneficiary Designations**

# Bam-Bam Rubble

## IMPORTANT DOCUMENTS TABLE OF CONTENTS

1. **Asset Letter – Dated \_\_\_\_\_**
2. **Living Will – Dated \_\_\_\_\_**
3. **Power of Attorney for Health Care – Dated \_\_\_\_\_**
4. **Power of Attorney for Finances – Dated \_\_\_\_\_**
5. **The Last Will and Testament of Bam-Bam Rubble – Dated \_\_\_\_\_**
6. **Recorded Deed and Declaration of Trust (Bedrock)– Dated \_\_\_\_\_**
7. **Brokerage Accounts**
8. **Retirement Account Beneficiary Designations**
9. **Life Insurance Beneficiary Designations**

*Sample Notebook Table of Contents – Single Person with a Will (no Trust)*

## **ESTATE PLANNING DOCUMENT CHECKLIST**

**Living Will:**

- Copies should be as good as the originals
- Provide copy to your physician(s)
- Provide copy to your family
- Discuss with your family your wishes as expressed in the Living Will
- Store original in a safe and accessible location

**Power of Attorney for Health Care:**

- Copies should be as good as the originals
- Provide copy to your physician(s)
- Provide copy to your attorney(s)-in-fact
- Store original in a safe and accessible location

**Power of Attorney for Financial and Business Affairs:**

- Copies should be as good as the originals
- No need to record with the Register of Deeds
- Document should be recordable, if necessary
- Discuss the existence of the Power of Attorney and where the document is stored with family
- Be aware that the document is usually immediately effective

**Last Will and Testament:**

- Original should be kept in a fireproof safe or safe deposit box
- Best to probate the original Will, although a copy can be probated with much effort and expense
- Typically most current Wills replace previous Wills; therefore, destroy older versions to avoid confusion
- Codicils (or amendments) to Wills act to supplement Wills; therefore, they should be stored with the Will
- A copy of the Will (and any Codicils) may be given to the person(s) named to serve as Executor(s); however, this is not necessary
- Keep copies to a minimum
- Make sure that family and/or named Executor(s) are aware that a Will exists and where it is located

**Revocable Living Trust/Declaration of Trust:**

- Store original in a fireproof safe or safe deposit box
- Amendments to the Trust should be stored with the Trust Agreement
- Keep the original Trust Agreement, even after the Trust Agreement is amended and restated in its entirety; the Trust always relates back to the date of the original Trust Agreement
- A copy of the Trust Agreement may be given to the person(s) named to serve as Trustee(s); however, this is not necessary
- Use the Declaration of Trust to give to account holders who ask for proof of the Trust's existence
- Store Declaration of Trust in a safe and accessible location

**Transfer of Personal Property:**

- Transfers personal property to the Trust
- Should be stored with the original Trust Agreement

**Deeds:**

- Original should be recorded in the county where the property is located
- Store original with your other important papers
- Certified copy of the original is as good as the original

**Beneficiary Designation Forms:**

- Mail the originals and any supporting documents to the appropriate account managers or policy providers
- Store copies of Designation forms with your other important documents

**Irrevocable Life Insurance Trusts:**

- Trustee should store the original
- Store copy of the Trust Agreement with your other estate planning documents, with the Trust EIN and policy details!
- Copies may need to be provided to the policy provider and/or the bank where a Trust account is maintained

**Assignments of Beneficial Interest:**

- Used to transfer business interests to the Trust
- Management should be notified and a copy of the Assignment should be provided for the company's record books

## EXHIBIT C

### CHECKLIST FOR A NEW ATTORNEY-IN-FACT

- Do you really want to assume this responsibility? When you agree to serve under a power of attorney, you take on the duty to act in the highest good faith for the benefit of the “principal” (the word we use to refer to the person who gives you this power). Acting in the “highest good faith” means that you must act with care and diligence on behalf of the principal, and never take advantage of the principal or abuse the significant power you have been given.
- Read the power of attorney document thoroughly, and don’t hesitate to ask questions about it. You can only do those things that are authorized in the document.
- Confirm exactly when you are expected to assume your duties and responsibilities. Even if the power of attorney is immediately effective, the principal may not expect you to take any actions until he or she instructs you to, or until he or she is no longer able to function effectively.
- Remember that the principal does not suddenly give up the power to act on his or her own behalf, and he or she normally keeps the power to revoke the document at any time.
- Keep the original of the power of attorney document in a safe place and make several copies for you to use from day to day.
- Maintain careful records of all transactions you handle on behalf of the principal, because you have a duty to account to him or her for your actions at all times upon his or her request, and a court may require you to account for your actions at some point in the future. This means you must be able to document all of the principal’s income received, expenses incurred, assets sold or purchased, and how you have handled each item of income, expense and asset.
- Unless the power of attorney document forbids it, you are entitled to be compensated for the reasonable value of the services you performed as the attorney-in-fact for your principal. If the document sets your fee, you are bound to abide by the fee set out in the document. You are not required to charge a fee for your services; if you do charge a fee, the amount you charge must be included in your income tax return for the year in which you receive it. So long as the document permits it, you may receive reimbursement for the necessary out-of-pocket expenses you incur in carrying out your duties. If any dispute arises concerning your fees or expenses, a court has the power to decide what is fair compensation for the services you have rendered, and you could be forced to return funds the court decides to disallow.

**When you are called upon to manage all of the principal's assets when he or she becomes incapacitated:**

- Consider obtaining professional advice about your duties and responsibilities, because your level of responsibility is significant.
- You will need to prepare a listing of all of the principal's assets and take steps to protect those assets and manage the property for the principal's benefit.
- You will likely be paying bills on behalf of the principal, so you will need to notify any banks, brokerage firms, credit unions and other financial institutions holding assets of the principal that you have been appointed, and provide a copy of the power of attorney for their files.
- It is a good idea to review the principal's most recent personal income tax returns and consider meeting with the principal's accountant to be sure that all of the principal's tax obligations are being met appropriately.
- If the principal ran a business or an interest in any closely-held business entity, you may be required to take steps to maintain and protect that business and participate in the management of the closely-held entity.
- You may engage the services of an attorney, accountant or other professional advisor or assistant in carrying out your duties, and the fees for such consultations will in most instances be paid from the funds of the principal.
- If the principal had a safe deposit box, you should inventory the contents of the box, maintain an exact record of its contents, and continue to safeguard the items in the box as appropriate.
- You should make certain that the assets of the principal are insured and safeguarded, especially if he or she must leave home for a stay in the hospital or a nursing home; and you should explore whether the principal maintained liability insurance and if so, you should continue to do so.
- If the principal is the victim of an accident or some other incident which would normally require the filing of a lawsuit on his or her behalf, you should consult with an attorney to determine what obligation you may have to file on behalf of your principal. By the same token, if the principal is sued for any reason, you should consult an attorney concerning the manner in which to respond to the lawsuit.
- If the power of attorney authorizes gift-giving or charitable donations, you may make gifts strictly as specified in the document, and if you have any questions about



gift-giving under the power of attorney you should consult an attorney before making gift transfers in any amounts.

You should explore whether and to what extent the principal may qualify for any insurance or governmental benefits, and take steps to make all appropriate claims for such benefits on the principal's behalf. These benefits include, but are not limited to, Social Security, Medicare, Veterans' and Medicaid benefits.

**Things you should never do:**

Never put money or property belonging to the principal into your own bank account or any other investment or account that belongs to you; this is called "commingling" and is not permissible.

Never put your name onto an account or asset belonging to the principal "with right of survivorship" or as a co-owner, payee or beneficiary upon the death of the principal.

Never do anything that does not clearly benefit your principal.

**Your authority to act on behalf of your principal ends:**

When the principal revokes the power of attorney (assuming the principal is mentally competent to do so); or

When the document states that your authority is over; or

If the document is silent as to termination, then your authority ends upon the death of the principal.

Your authority will also end if a court terminates your power, or if a court appoints a conservator to act on behalf of the principal, and the conservator then revokes your authority.

You are free to resign at any time, but if you do resign you must notify the principal and, especially if the principal is disabled, you must notify the successor attorney-in-fact named in the document (if any). If the principal is disabled and there is no successor agent named in the document, you should continue to serve until appropriate arrangements are made to safeguard the interests of the principal.

## CHECKLIST FOR AN EXECUTOR OR ADMINISTRATOR

Checklist of duties for the person(s) named as executor or administrator of a decedent's estate (the generic name for an executor or administrator is a "personal representative" or PR):

- If necessary, notify Social Security and any applicable pension plan that the decedent has died. The funeral home may handle this as part of its services, or a family member may handle this task. Depending on the date of the death, Social Security may reclaim a pro rata portion of the month's benefit. If there is a surviving spouse, he or she may need to work with Social Security on adjusting benefits in light of the death.
- If the decedent's family has not already done so, secure the residence and tangible property. If the decedent lived alone, the PR may decide to change the locks to prevent heirs — or people who think they should be heirs — from helping themselves to items. Likewise, a family friend or neighbor should stay at the home during any funeral services to help discourage theft. Notify the homeowner's insurance carrier of the death and, if the home will be empty, let them know the specific steps taken to secure and monitor the residence.
- It is part of the PR's fiduciary responsibility to preserve and protect the assets of the estate. This includes continuing homeowner's insurance, utility payments and other essential, asset-protecting expenses; securing valuables such as jewelry and firearms from theft or damage; supervising and managing the operation of any rental properties or other business interests; and working with the decedent's financial advisor (if any) to make sure that investments don't lose value.
- Request 8-10 death certificates. These are essential for any legal business of the estate. The funeral home often will request these as part of its services; otherwise, they are available from the Health Department.
- Locate and read the will. This is the only way to know for sure who is appointed to be executor, whether the executor can serve without bond and other important details. The will may be stored in a safe deposit box, a fireproof safe at home or (though not recommended) in a filing cabinet. Some people even keep their wills in the freezer or other "hidey holes." Also check for and read any related estate planning documents, such as a revocable living trust or an irrevocable trust. Often, a revocable living trust can make probate unnecessary on its own; in addition, a trust may name successor trustees (after the deceased person) who will need to work closely with the PR.
- Consult the decedent's attorney, accountant and/or other professional advisors to solicit their input, and consider engaging a qualified professional to provide advice in fulfilling your duties.

Don't rush to probate. Even if the decedent left assets that do not automatically pass to another person, a full, formal probate may not be necessary. Depending on the assets and their value, it may be possible to administer the estate without a full probate. However, once you start a probate, you can't "un-start" one.

Determine what assets the decedent owned and how he or she owned them. Depending on the assets and their titling, a probate of the estate may not be necessary. Assets that were owned jointly with right of survivorship go to the co-owner (if he or she survives the decedent). Assets with a designated beneficiary — such as life insurance, retirement accounts or "Payable On Death" bank accounts or CDs — pass as directed in the beneficiary paperwork.

Finding all of the assets and how they are owned can take some detective work. Look through old tax returns, bank and brokerage statements, files, the safe deposit box and any other sources to make sure you have found all of the assets. Don't forget the decedent's computer and his or her email account; many of us handle our financial lives online, and these can be a treasure trove of information. After determining the decedent's passwords, make sure to check the browser bookmarks and history as well as any financial software.

If there are assets that will require a probate of the estate, file the appropriate paperwork with the probate court to be appointed the PR of the estate. If it will be a small-estate probate or muniment of title, a simple court order can appoint the PR; if a full probate is necessary, Letters Testamentary will be issued. These documents will authorize the PR to act on behalf of the estate to collect the assets; determine the proper debts, expenses and taxes; carry out the wishes of the person who has died and complete the estate settlement process.

Notify the heirs of the estate, either by sending them a copy of the will or (when there is no will) by sending them a copy of the Letters of Administration. This is an excellent time to let the heirs know about the probate process, particularly the facts that 1) they must usually survive the decedent for a certain period of time in order to inherit, and 2) the debts and taxes of the estate must usually be settled before any significant distributions are made.

Open a bank account for the estate and transfer funds from the decedent's account(s) into this account to cover expenses of the estate. You must have a death certificate and Letters Testamentary (or court order) in order to take care of this. Track any expenses you pay yourself for reimbursement by the estate; also track your mileage and time spent, in the event you apply for compensation as PR.

Notify the creditors of the estate that the probate process has begun. An official notice is published in the newspaper, but the PR must also send actual notice to any

known or reasonably known creditors, such as doctors, hospitals, credit card companies, etc. If a creditor files a claim which the PR believes is not correct or appropriate, it is the PR's responsibility to take exception to the claim within a short period of time to avoid having to pay for a "debt" of the deceased that may not be legitimately due.

Notify the three major credit bureaus that the decedent has died, and request that they place a "deceased, do not issue credit" notice on the decedent's credit file. Notification forms are available online. In addition, you may want to request that the credit bureaus send you a copy of the decedent's credit file as it stands at the date of his or her death.

Collect any money owed to the decedent, whether it is an income tax refund, a pro rata refund on health insurance or nursing home expense, a personal loan to a family member, etc. If the decedent made personal loans to heirs of the estate, such as children, it may be possible to have those assets (the loans) allocated to that heir's share of the estate.

Cancel any magazine subscriptions that the decedent may have been receiving. The estate may receive a pro rata refund of the unexpired subscription fee.

Determine that all of the assets of the estate have been located and that all of the estate's debts have been paid before making distributions to heirs. There have been cases in Tennessee in which a PR "over-distributed" before settling all of the debts and was held personally liable for part of the shortfall. When settling a legitimate claim against the estate, be sure to have the satisfied creditor sign a release that confirms payment.

Also make sure to pay all of the legitimate expenses of the estate, including accountants' fees, attorneys' fees, appraisers' fees, etc. The PR should also apply to the court for reimbursement of his or her expenses and, if the PR wishes to be paid, he or she should request compensation for serving as PR. Such compensation is based primarily on the time spent serving as PR, billed at a reasonable rate.

Once the PR knows that the debts are paid, the expenses are paid (including an estimate for the PR's time to finish settling the estate) and the assets are all found and taken care of, it is time to make distributions to the heirs. As with creditors of the estate, the PR must get a signed release from each heir receiving a distribution. If an heir wishes to disclaim his or her inheritance, such disclaimer also must be properly executed and filed with the probate court and with the PR within nine months after the date of death.

When testamentary trusts are created pursuant to the decedent's will, it is a good idea to meet with the attorney, accountant and financial advisor for the trust to

determine the tax effects of funding the trusts, the income tax basis and possible capital gains or losses on funding, the potential growth in the assets of the various trusts in the future, etc., before final funding decisions are made.

Finally, after all the debts, taxes, funeral bills, attorneys' fees, accounting fees, appraisal costs, court costs and PR's fees are paid, the balance of the assets in the estate must be distributed to the heirs as directed in the Will. If there is no Will, then this balance of property is paid to the heirs of the estate as determined by Tennessee law. The PR must file a receipt and release from each estate beneficiary with the probate court before the PR can be released from the duties of the estate administration.

## CHECKLIST FOR A TRUSTEE

Checklist of duties for the person(s) named as trustee of a decedent's trust:

Locate and read thoroughly the trust agreement to determine the grantor's expectations and purposes with regard to creating the trust. The named trustee should also review the decedent's Will to determine how it relates to the trust administration.

Consult the decedent's attorney, accountant and/or other professional advisors to solicit their input, and consider engaging a qualified professional to provide advice in fulfilling your duties.

You may need a "Declaration of Trust" or similar document to confirm your appointment as Trustee or successor Trustee and the facts giving rise to your appointment. This document is typically notarized and prepared in proper form for recordation.

Ascertain the assets that will fall under the trustee's control and management. This requires review of all known asset information, including, but not limited to, bank statements, brokerage statements, life insurance policies, stock certificates, bond certificates, and business documentation. The trustee should review the decedent's past Forms 1040, noting in particular assets that have generated income for the decedent in the past (i.e., rental income, royalties, interest, dividends, capital gains, and business related income reported on K-1s).

This step may require the trustee to send letters to various account holders to determine if the holder is still holding an account for the decedent, and if so, how many accounts, how was the account titled, what was the account worth on the decedent's date of death, and what steps need to be taken to claim the account. The trustee should also look for and inventory the decedent's safe deposit box(es), tangible personal property and real estate.

As assets are found and determined to be under the trustee's management, the trustee must secure the assets, preserving their value for the beneficiaries. This may include changing the locks on the decedent's home, contracting with insurance companies to make sure the real properties and vehicles are adequately covered, moving tangible personal property to more secure location(s), and working with account holders to decide if any of the decedent's investment funds should be liquidated to avoid a loss in the market.

If the decedent owned a business or farm, the trustee should take all necessary steps to insure that the grantor's wishes regarding the business or farm are carried out (i.e., is the business to be appraised and liquidated using a

particular broker, is the business or farm to be operated under the direction of the trustee or another named person, etc.), and that the value of the asset is maintained for the beneficiaries.

The trustee also needs to determine what liabilities of the decedent remain outstanding and whether or not such liabilities are valid. To this end, the trustee should cancel the decedent's credit cards, and stop cell phone and cable/satellite service. The trustee should make a list of the decedent's last medical providers and make sure that the decedent's health insurance fully satisfies outstanding balances as appropriate.

The trustee also needs to contact providers who may owe the decedent a refund (i.e., long-term care and/or health insurance companies for premiums paid in advance, magazine subscriptions, and other pre-paid service providers).

The trustee should complete claim forms to obtain payment of life insurance policies that name the trust as the beneficiary. The trustee may need to complete claim forms for retirement accounts and annuities that name the trust as beneficiary.

If there is no estate administration, the trustee is responsible for filing the decedent's final income tax return for the year in which he or she died.

The trustee normally obtains a tax identification number for the trust, and the trustee will be responsible for filing all fiduciary income tax returns to report the income of the trust.

Again, if there is no estate administration, the trustee will be responsible for filing the decedent's federal estate tax return. This return is due nine (9) months after the date of death.

The trustee may also be responsible for filing gift tax returns for the decedent, if the decedent made taxable gifts prior to his death. Such a return may be required for gifts made by the decedent in years past for which the decedent did not file a return. This is sometimes the case where the decedent transferred her real property to her children at the death of her spouse years prior to the decedent's death.

After ascertaining that all of the decedent's assets are under the trustee's control, the trustee must manage those assets in the name of the trust, using the trust's tax identification number. This means that bank accounts, brokerage accounts and other investments are managed by the trustee in the name of the trust.

- The trustee should keep meticulous records regarding the trust assets, noting receipt of income and other funds and payment of debts and expenses.
- Unless the trust agreement says otherwise, the trustee must provide each beneficiary of the trust with a copy of the trust agreement, and the trustee may also need to provide an accounting to the beneficiaries, as the same is provided for in the trust agreement, or if silent, in the Tennessee Uniform Trust Code.
- After all of the assets have been ascertained and brought under the trustee's control, after all of the decedent's debts have been satisfied, after all of the tax returns have been filed, and after all the administration expenses have been paid, the trustee can make distributions to the beneficiaries in accordance with the terms of the trust agreement. This may require the trustee to establish further trusts by obtaining tax identification numbers and opening accounts in the name of such further trusts or it may require the trustee to make distributions directly to the beneficiaries in kind or in cash, depending on the circumstances and the terms of the trust agreement.

When further trusts are created, it is a good idea to meet with the attorney, accountant and financial advisor for the trust to determine the tax effects of funding the trusts, the income tax basis and possible capital gains or losses on funding, the potential growth in the assets of the various trusts in the future, etc., before final funding decisions are made.

- It is a wise idea to obtain receipts and releases from the beneficiaries at the time that distributions are made.
- Unless the trustee handling the administration is also the trustee managing the testamentary trusts created under the trust agreement, the trustee's duties are complete once all of the trust assets have been distributed to the beneficiaries of the trust.