WILLS

A. Checklist for Gathering Client Information

The practice of law is an art, not a science. With this in mind, whatever solutions you offer a prospective client will depend, of course, on many factors, and the best advice will always be based on whatever information you glean from the client.

I usually spend an hour with each prospective client in the initial meeting, in an attempt to learn as much about them and their children as possible. If I learn that one of the children is disabled, then the question is raised as to whether the child will be receiving government benefits – depending on whether the child's benefits stem from social security or DHS, the client will need to consider whether a special needs trust should be created for the benefit of the child (so as not to disqualify the child from receiving benefits). If a child is to inherit a substantial IRA, but the child is having financial problems, extra planning might be required because of a recent ruling by the Supreme Court (*Clark vs. Rameker, 573 US* (2014); this topic is discussed in another portion of the outline, viz., Tax and Estate Planning for Pension and IRA Assets).

There is no magical checklist to be used, but it is important to know what the client owns. Here's what I am interested in:

1. Real estate holdings: not only legal descriptions, but how title is held, as well as real estate holdings in different forms: minerals, working interests, vacation time shares. If the client owns out of state real estate, tell the client his or her will has to be probated in Oklahoma and wherever the out of state real estate is located.

2. Vehicles: where licensed (including states other than Oklahoma), antique cars and collectables.

3. Stocks, bonds, mutual funds (Series EE, HH, I bonds; stock brokers, mutual funds, internet investment accounts and discount brokers).

4. Life insurance and annuities (companies, policy numbers, agent information, coverage).

5. Small corporation interest, LLC ownership, investment club membership.

6. Royalties, patents or copyrights owned by client.

7. Retirement information: pensions, IRAs, TSAs, 401(k)s, 403(b), 457 plans, Roth IRAs, etc.

8. Long term care information.

9. Loans made by the client to others (which will be repaid, or offset against inheritances) – and money owed to client when the client retires (renewal commissions, insurance agents, stock redemption and repurchase agreements, buy sell agreements, stock option plans).

10. Bank account and credit union information, and safe deposit boxes.

11. Holdings the client holds in trust for others (such as, real estate broker trust account).

12. Prenuptial agreements, divorce obligations, debts owed which might impact the estate (including reverse mortgages, regular mortgages, etc.).

If there are minor children, the clients must consider who is to serve as guardian of the person and estate. In addition, because of the pretermitted heir statute, and issues relating to deceased children and their progeny, as well as children born out of wedlock, ex-spouses, and other potential claimants, we are called upon to gather facts which may strike a sensitive cord with our clients. All of these topics have a bearing on the advice we give, and whether we anticipate a will contest will be initiated after the client dies (in which case, I recommend the signing of the documents be video recorded, to eliminate issues relating to competency).

I sometimes give a client a long list of information, which I ask them to complete in pencil (a copy of this document is part of the iPad app, WillCrafter). This document is not to be returned to me because of its content, but the form covers all of the issues listed above, and is, in essence, a locater list of where the client keeps important records (such as Armed service discharge papers, birth certificate, marriage license, divorce decree, location of abstracts to properties, etc.). The clients' children will appreciate it if the form is completed, because it will guide them to information they will need to know after their parents die.

If the client has no children, it is important to have a good genealogy chart in your notes, as well as dates of death of relatives, cities where nieces and nephews live, etc. – in this regard, it is helpful to list the following classes of persons in your notes: parents, brothers, sisters, nieces, nephews, grand nieces, grand nephews, etc. In the wills you prepare, no harm will come if you list as much of the genealogy information as is available, so that the personal representative (who may not even be related to the testator) will have an idea of who is to be notified before the will is admitted to probate.

Keep in mind that the statutory heirs of each decedent – spouses, children, adopted children, and sometimes brothers, sisters, nieces, nephews, and others – will have to be notified of the probate hearings to be held, when the will is being offered for probate. Statutory heirs are different, of course, from the legatees and devisees of the will; the statutory heirs are classes of persons included in the statute of descent and distribution, Title 84 O.S. Section 213.

B. Must-Have Provisions - Drafting Do's and Don'ts

The key to any will is getting it admitted to probate.

Here are the statutory references: 84 O.S. § 41, outlines who is permitted to make a valid will:

> A. Every person over the age of eighteen (18) years of sound mind may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in this title, being chargeable in both cases with the payment of all the decedent's debts, as provided in Title 12 of the Oklahoma Statutes.
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> B. The appointment of a guardian or a conservator does not prohibit a person from disposing of his estate, real and personal by will provided, that when any person subject to a guardianship or conservatorship shall dispose of such estate by will, such will must be subscribed and acknowledged in the presence of a judge of the district court. The judge before whom the will is subscribed and acknowledged shall attest to the execution of the will but shall have neither the duty nor the authority to approve or disapprove the contents of the will. Subscribing and acknowledging such will before a judge shall render such will valid if it would otherwise be invalid.

If the will is handwritten (holographic), it must be in the person's handwriting, dated, and signed by the testator. The statute is short and sweet as to what is required:

> 58 O.S. §54: A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this State, and need not be witnessed.

Whoever presents such a will for probate should be prepared to recognize the handwriting of the decedent, give the decedent's family tree, the capacity of the decedent when the will was made, and the decedent's state of mind when the will was signed (i.e., the will was not made under fraud, duress, menace, undue influence, or in the influence of drugs or medications). In Tulsa County, the person seeking to be appointed to be Personal Representative must state they are credit worthy (no bankruptcies), no criminal record, not under a guardianship, and no moral conduct which would impinge upon his or her character.

Although Oklahoma recognizes nuncupative wills, this topic is beyond the scope of this seminar, and to my knowledge, there is no Oklahoma reported case which directly deals with oral, deathbed "wills", witnessed by two persons. Here are the references:

> 84 O.S. §51, "A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities" and
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> 84 O.S. §46, "To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed: 1. The estate bequeathed must not exceed in value the sum of One Thousand Dollars ($1,000.00); 2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness that such was his will, or to that effect; 3. The decedent must at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death, or the decedent must have been at the time in expectation of immediate death from an injury received the same day".

<u>Self-Proving</u>. 84 O.S. §55 provides that every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will and a nuncupative will, must be executed and attested in conformity with the statute. The sample will (part of the materials in this outline) gives an example of what's required.

It goes without saying that when you prepare a will for a client, remember the cardinal rule of construction is to ascertain and give effect to the intent of the testator, unless such intent "attempts to effect that which the law forbids." *Matter of Estate of Bovaird,* 645 P2nd 500 (Okl. 1982); 84 O.S. 1981. The second rule of construction is that intent of the testator must be ascertained from the entire instrument, construed together with the surrounding facts and circumstances. *Cunningham v. Fidelity Nat'l Bank,* 186 Okl. 429, 98 P.2nd 57, 59 (1939). The third rule of construction is that where an uncertainty exists concerning the application of a particular provision, a testator's intent should be ascertained not only from the words used, but by taking into consideration the circumstances under which such provision was made.

C. Building Flexibility Into the Plan - Checklist of Special Provisions

Protective Clauses for Minors, Incapacitated Persons and Beneficiaries with Special Needs

The sample will contains provisions for minors, who inherit property. I typically use a testamentary trust for persons under age 25 (though some clients are satisfied that the age should be 18, and in that instance, the trust is modified accordingly). This same trust applies to persons who are “incapacitated”, but such persons may be receiving government benefits (e.g., SSI payments), which will be withdrawn by the government if the person receives an inheritance over $2,000.

Beneficiaries who receive government aid, and those with special needs, must be dealt with, and your clients want their children to have their cake and eat it, too: the kids should not lose government benefits when they receive an inheritance from you.

Let’s unpack this topic. If an heir receives government aid, will he or she lose government support when he or she inherits property? Maybe. The general rule of thumb is that persons receiving SSI disability payments can own no more than $2,000 in property, and can generally earn (W-2 earnings) no more than $773 a month, or $1100 a month for couples. In some instances, the child can own a car, a home, and other “exempt” assets. In other instances, the child cannot own anything. If the parents leave resources for the child, but leave the property in a “special needs” trust, the child may be disqualified from receiving benefits, if the trust provides for things other than food, clothing and shelter.

Suppose an inheritance is left to a disabled person who is receiving government assistance. To avoid becoming disqualified, the heir must comply with the safe harbor rules Congress created in 1993, as part of the Omnibus Budget Reconciliation Act: Congress permitted gifts made to be made to disabled persons, if the gifts are made through the conduit of a Special Needs Trust. The trusts must be carefully drafted to comply with the requirements of the Social Security Administration Program Operating Manuals (POMs), and the trust should be clear as to the types of distributions the trustee may make, so that the trustee does not unknowingly disqualify the beneficiary from public benefits.

Most of these trusts contain lots of “boiler-plate” language, which prohibits the trustee from making any distribution which would disqualify the beneficiary from receiving government benefits. The trusts generally permit distributions for things which are not covered by the government, such as, dental care, telephone services, and the like (there are probably close to 30 categories of distributions the Trustee can make, which don’t disqualify the beneficiary from receiving government payments). When the disabled child dies, the remaining balance of the funds in the trust must be paid to DHS. Federal law mandates that states attempt to be reimbursed for money spent through Medicaid programs, *after* the disabled child dies. If there is money left in the special needs trust, it must be returned to the state.

There are several web based resources that will shed more light on these topics: the National Special Needs Network (http://www.nsnn.com) is a non-profit group providing professional services to special needs families, and some states have their own networks. These resources may help in the following respects:

- Applying for estate and federal government programs on behalf of family members with disabilities.
- Making certain there are adequate funds to provide for other family members, and safeguarding assets so that government benefits will not be jeopardized or depleted.
- Selecting future living accommodations.
- Designating in writing an advocate/guardian.

The National Institutes of Health (NIH) also provides significant resources and informative links on their website, http://www.nih.gov, as well as the Social Security web-site, http://www.ssa.gov, which offers a comprehensive guide on available programs guidelines and eligibility, and how to apply for benefits.

Medicaid is designed for people who satisfy income eligibility requirements and, although the program is federally subsidized, it is administered by DHS. Medicare, on the other hand, is run by the Social Security Administration and may pay health costs of people older than 65, as well as those younger than 65 who have received Social Security benefits for at least two years. There will be instances where both programs are providing benefits to a person.

To develop a comprehensive plan for the care of disabled children, you will probably have to assemble a group of professionals, including lawyers, accountants, health professionals, and/or financial advisers. You might also further educate yourself by reading *Oklahoma Legal Guide to Long-Term Care*, by Catheryn Koss, 2013, available through Amazon.com.

D. Methods of Designating Fiduciaries

The will should designate who will serve as Personal Representative of the will, and the designation should also state that the person serve without bond. I suggest that an alternative PR be named, should the primary PR be unable or unwilling to serve. The major issue is, who should serve as Personal Representative? Should the Surviving Spouse serve alone as Personal Representative? Should only one child or all the children be named as Personal Representatives? Should a third party such as a bank or trust company be named as Personal Representative?

The Surviving Spouse is usually the best person to serve as Personal Representative. For example, suppose a client and spouse have been married for forty years. It is the client's only marriage. The clients have no step-children, but have their own, biological (and/or) and adopted children. The Surviving Spouse is healthy and very aware of the assets and wishes of the other spouse. Under these circumstances, the Surviving Spouse ought to serve as PR.

However, if this is a second marriage and there are children from prior marriages, the Surviving Spouse may not be the best person to serve as Personal Representative (much depends on the length of the marriage and other circumstances). If the Surviving Spouse is elderly and in poor health, it might be advisable to name the children as Personal Representatives.

Another issue is whether to name all of the children, or one of the children, to serve as Personal Representative. If all the children get along together and all of the children live in the same geographic area, naming all of the children as Co-Personal Representatives is appropriate. However, if the children do not get along, it may be advisable to name a trust company.

Not everyone may be appointed as PR. The events which disqualify a PR are found in 58 O.S. §102, which states:

No person is competent to serve as executor who at the time the will is admitted to probate is

1. Under the age of majority.

2. Convicted of an infamous crime.

3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding and integrity.

58 O.S. §138 grants a surviving spouse the right to serve as administrator of an estate, where there is no will. Presumably, this right might also apply with respect to a will which names someone other than a spouse as personal representative.

E. The No-Contest Clause and Educating Your Clients on the Harm of Writing Someone Out of the Will

Children and Grandchildren. The Oklahoma Statutes provide some protection for omitted children and children of a deceased child, who are not mentioned in the will. 84 O.S.§131 covers children who are born after the will has been created (who are – obviously – not mentioned in the will). Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

84 O.S. § 132 covers children unintentionally omitted from will. It provides that when any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.

84 O.S. §133 provides that when any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in a will as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees, or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator is relation to some specific devise or bequest or other provision in the will, would thereby be defeated; in such case

such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

84 O.S. § 134 provides that if such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of §§131, 132, and 133 sections. See *In the Matter of the Estate of Hoobler,* 925 P2nd 13, (Okl., 1996).

The intention to omit to provide for a child or grandchildren of a deceased child must appear in the will and extrinsic evidence is inadmissible. *Estate of Severns,* 650 P2nd 854 (Okl. 1982). *Crump's v. Freemen,* 614 P2nd 1096 (Okl.1980). The intention of a testator to disinherit children of his deceased children must affirmatively appear from the four corners of the will. *Monroe v. Lawrence,* 347 P2nd 1016 (Okl.1959*).*

The Personal Representative and the Court have the duty to protect the rights of pretermitted children when their existence is known or appears on the record. The pretermitted children do not have to assert their claim. The Personal Representative and the Court must provide in the Final Decree the pretermitted children's statutory interest. *Matter of Estate of Dorn,* 787 P2nd 1291 (Okl. App. 1989).

The pretermitted children statute applies to adopted children, *Brown v. Crawford,* 699 P2nd 162 (Okl.App. 1984); and to children adopted after the execution of a will, *Alexander v. Samuels,* 58 P2nd 878 (Okl., 1936). In *Roberson v. Hurst*, 190 P 402 (Okl.1920) the Court held that where a father made a will and a child was born thereafter, either in the lifetime or after the death of the father, leaving such child unprovided for by any settlement, nor mentioned in any way in the will, the child succeeds to the same portion of the Testator's estate that he would have succeeded to if the testator had died intestate.

Spouses. Pursuant to 84 O.S. §44, a decedent cannot disinherit his or her spouse, except in cases where the spouse signs a prenuptial agreement or waives his or her spousal right to elect against a will.

No Contest Clause: The Oklahoma Supreme Court and some other states have condoned the use of in terrorem or no contest clauses where they do not contravene public policy or a rule of law. *In the Matter of the Estate of Westfahl,* 674 P2nd 21 (Okl. 1983). *Whitmore v Smith,* 221 P. 775, 777 (1923). *In re*

Rettenmeyer's Estate, 345 P2nd 872 (Okl.1959); and *Grace v. Hildebrandt,* 237 P. 98, 100 (1925), where the Court has implicitly recognized the validity of no contest clauses:

> "A no contest clause should first be interpreted to reflect the testator's intent and to prevent forfeiture if possible. *Saier v. Saier,* 366, Mich. 515, 115 NW. 2d 279 (1962). In Westfahl, supra, we observed that public policy favors the use of no contest clauses because they protect estates from costly time consuming and vexatious litigation and serve to minimize family bickering concerning the competence and capacity of the testator, as well as the amounts bequeathed. As we noted, however, forfeiture provisions in a will are to be strictly construed against forfeiture, enforced as written and interpreted reasonably in favor of the beneficiary. Focus of the inquiry turns to whether the offending proceedings fall within the class of contests, challenges, or interference which the testator intended to prevent. In *Westfahl,* inquiry was focused on whether the "contest" which was submission of a subsequent will for probate constituted a contest of the prior will. The principles stated there are useful in resolving the case at bar.
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> "The word 'contest' as it pertains to a **no contest clause** is defined as any legal proceeding designed to result in the thwarting of the testator's wishes as expressed in the will . . . The intention of the testator is controlling; when the court construes a will, it must ascertain and give effect to the testator's intent, unless the intent attempts to effect what the law forbids. Each will must be construed by examining the peculiar surrounding circumstances, the language employed, and the intention of the testator gathered from the general situation. Attendant circumstances may be contemplated to perceive the testator's true intent and the testator's feelings toward the beneficiary named in the will.

E. Keeping the Clients Current on Their Wills

Unlike financial advisors, who meet with their clients on a yearly basis (so I am told), and dentists, who call their patients every six months for a checkup, lawyers are trained not to solicit business. Ethically, we are encouraged not to churn the clients for unneeded and perhaps unwanted legal services. So the question to be asked is, how do we keep clients current on their wills? If there were a good answer, I would gladly give it. So let me tell you what I do in my own practice, which is not necessarily what you should do in yours.

As the clients leave my office, they are encouraged to review their own estate plans on a yearly basis. I suggest they do this on their wedding anniversary, which should be an easy thing to remember. I do not send clients periodic mailings on new developments in estate planning, but encourage them to read newspapers and magazines for topics in estate planning, attend seminars on these topics, and view my website from time to time, for new articles I might have posted.

Clients will normally remember their estate plans when there is a death in the family, marriages (or divorces or remarriages), and birth or adoption of new children or grandchildren.

If you are inclined to see your clients periodically, no harm would come if you would ask them, as they are leaving your office, if you might contact them for a yearly review. Such a request would not be unlawful solicitation, in my opinion, but you will have to docket the dates on which you are to call them for an annual interview, if you decide to follow this practice.

F. Practical Pointers and Sample Will Review

In the *Hitchhiker's Guide to the Galaxy,* the ultimate question to life, the universe and everything was posed to the computer "Deep Thought". After many, many years of pondering this question, Deep Thought responded, "You won't like the answer. It is 42."

So what practical pointers might I give you, relating to will preparation and estate planning? You won't like the answer, but it is not "42". The answer is contained in a relatively short, inexpensive book, *Your Will's Companion*, available in e-book format (iBook and Kindle), and on Amazon.com. In this un-scholastic treatise you will discover an internet link to the will signing requirements for all 50 states, as well as lots of practical pointers (written mainly for those who are determined to complete a DIY will).

And now, here is a sample will for your consideration, which contains a testamentary trust. Note that the will is designed as a template for a word processor, so that you can do global search and replace for "Smith" (the testator) and "Smithe" (the personal representative).

Last Will and Testament of

Smith

In rendering final stewardship of the property entrusted to me by the will and grace of God, I, **SMITH**, residing in Tulsa, Oklahoma, being of sound mind and desiring to make proper provision for the distribution of my entire estate, do hereby declare and publish this to be my Last Will and Testament, hereby revoking any and all Wills by me at any time heretofore made.

ARTICLE I

1.1 ***Debts.*** My Personal Representative shall pay expenses of my last illness and funeral costs, claims, costs of administration and taxes assessed by reason of my death. Any other debts secured in any way, not yet due, or payable in installments, may be postponed, extended or paid according to the terms of such indebtedness, and my estate may be closed and property be distributed subject to unpaid indebtedness and encumbrances.

1.2 ***Taxes.*** All estate, inheritance, legacy, succession or transfer taxes (including any interest and penalties thereon) imposed with respect to all property taxable by reason of my death, shall be paid by my Personal Representative, but each beneficiary shall be chargeable (by my Personal Representative) with all inheritance, succession, transfer or estate taxes based upon the value such beneficiary's share bears to the value of the entire estate. My Personal Representative shall make such elections under the tax laws as she deems advisable, without regard to the relative interests of the beneficiaries. No election so made shall be subject to question by any beneficiary, and no adjustment shall be made between principal and income or in the relative interests of the beneficiaries to compensate for the effect of elections under the tax laws made by my Personal Representative.

ARTICLE II

2.1 ***Family Status.*** I declare that I am married, my wife being **SMITHE**, and that ___ children have been born of our marriage, who are now living, namely: _____________

2.2 ***Definitions.*** As used in this Will, the terms "child", "children", "issue", "lawful issue", "descendant", or "descendants", shall include persons legally adopted. Where applicable, references in this Will to the masculine shall include the feminine and to the singular shall include the plural.

2.3 In the event any beneficiary (or contingent beneficiary or claimant) contests the provisions of this Will as to its validity, my capacity to make this Will, or any other aspect which might affect the distribution to such person (other than matters dealing with the Personal Representative's administrative and statutory duties and responsibilities herein), I direct the Personal Representative to reduce the distribution to any such contesting person to $10.00, and to distribute the remaining balance of such person's original share (if any) to the other beneficiaries, on a prorated basis (calculated using the shares set forth herein).

ARTICLE III

Gift of Entire Estate to Surviving Spouse. I hereby give, devise, and bequeath all of my estate, whether real, personal, or mixed, and regardless of where the same may be situated, whether vested or contingent at the time of my death, to my wife, **SMITHE**, absolutely free and clear of any restrictions whatsoever, if she survives my death. In this event, I intentionally make no provision for present or future children.

ARTICLE IV

Gift of Estate if Spouse Does Not Survive. In the event that my wife shall not survive me, I make the following disposition of my entire estate, to-wit:

4.1 Subject to the provisions of Article V, I hereby give, devise and bequeath all of my estate, whether real, personal or mixed, and regardless of where the same may be situated, whether vested or contingent at the time of my death, to my children in equal shares, share and share alike.

ARTICLE V

TRUST FOR CERTAIN BENEFICIARIES

5.1 ***Trust for Persons Under Twenty-five Years of Age***. Notwithstanding any provision herein to the contrary, if any person who inherits any part of my estate hereunder is at the time of distribution under the age of twenty five years, I hereby create a testamentary trust, known as the Smith Family Trust. The beneficiary who is under age twenty-five is a vested beneficiary, but my personal representative shall distribute such share to ___, which is the Trustee of this trust. The Trustee is to serve without bond, and shall receive all property delivered to the Trustee by the Personal Representative of my estate. A trust account shall be established for each beneficiary under age 25, and the Trustee shall separately administer such share for the beneficiary until he or she becomes 25 years of age, whereupon that share, and any accumulated income, shall be distributed to him or to her. The Trustee may use and distribute so much of the income, in its sole discretion, as is reasonably necessary or desirable for the support, health, general welfare, and education of such beneficiary; in addition, the Trustee may, in the Trustee's sole and absolute discretion, use and distribute the principal for any emergency or extraordinary medical need of the beneficiary. In carrying out each such trust, the Trustee may, in its sole discretion, make payments or distribution of income and principal: (a) directly to the beneficiary; (b) to the legal guardian of the person or estate, Trustee, or near relative of the beneficiary; and (c) to third persons for the support, education, welfare, or benefit of the beneficiary.

5.2 ***Mandatory Termination of Trusts to Comply With Rule Against Perpetuities***. Any trust created under Section 5.1 shall finally terminate upon the distribution of all assets of such trust, and notwithstanding any other provision herein to the contrary, each such trust shall terminate so as not to violate the Rule Against Perpetuities. The Trustee shall take such actions as are required to terminate the trust, so that rule against perpetuities will not be violated.

5.3 ***Termination of Small Trusts****.* If any trust created by this Will should at any time become so small that in the opinion of the Trustee it cannot be efficiently and economically administered, the Trustee may, in the Trustee's sole discretion, terminate said trust and distribute any assets thereof to the beneficiaries entitled thereto, or as otherwise provided in Section 5.1.

5.4 ***Spendthrift Trusts****.* The interests of all individual beneficiaries in the corpus or income of any trust created herein are spendthrift trusts and shall not be subject to assignment, sale, mortgage, pledge, any voluntary or involuntary alienation, garnishment, attachments, execution, or process of court, nor be liable for the debts, contracts, torts or liabilities of any beneficiary.

5.5 ***Other Provisions***

5.5.1. In the event any provision of this trust conflicts with any applicable state law (in existence now, or which may be enacted hereinafter, including without limitation, the Uniform Trust Code), the provisions of this instrument shall prevail.

5.5.2. If this trust contains any spendthrift provisions, then I declare that such spendthrift provisions constitute a material purpose of this trust.

5.5.3. No bond shall be required of any trustee serving hereunder.

5.5.4. If the trustee is an individual who becomes incapacitated, as determined by the trustee's physician, or if there is no such physician, then by two independent physicians, the incapacitated trustee shall no longer be qualified to serve in the office of trustee; in such event, the trustee who is designated as a successor trustee, under the terms of this trust, shall become the trustee, and assume the office of trustee. There is no requirement that such incapacity be determined by a Court proceeding.

5.5.5. If any beneficiary's former spouse attempts by court proceeding or otherwise, to attach such distributions, for any purpose, including, without limitation, unpaid support alimony (or rehabilitative alimony), then, in such event, such distributions shall be regarded as being discretionary distributions, which shall not be subject to attachment.

5.5.6. For purposes of this trust, a "qualified beneficiary" is a vested (not contingent) beneficiary who is entitled to receive present (not future) income or principal distributions; the definition of a qualified beneficiary does not include (and specifically excludes) any contingent beneficiary or any vested remainder beneficiary.

5.5.7. If the Trustee is granted discretion in making distributions to any beneficiary, such as, distributions for the beneficiary's health, education, support, or general welfare, the standards (or factors) to be used in determining whether any distribution is to be made, or the amount of any distribution, include the beneficiary's income and other financial resources, the beneficiary's spending habits, the beneficiary's accustomed standard of living, the beneficiary's financial acumen, the beneficiary's credit worthiness and stature (and credit report), the beneficiary's immediate and long term needs (including any extraordinary health need, including the procuring of health insurance), the beneficiary's intended use for the cash or property distributed from the trust estate, the beneficiary's academic record, the beneficiary's susceptibility to substance abuse, and the beneficiary's employment history. The Trustee may deny distributions, based on one or a combination of these factors, or may make distributions, based on one or a combination of these factors. Once such a decision is made by the Trustee, such decision shall be regarded as being made in the sole and absolute discretion of the Trustee.

5.5.8. To the extent required, the Trustee may create a special needs trust for the benefit of any vested beneficiary hereunder, should the provisions made for such beneficiary hereunder make him or her ineligible for government benefits. The Trustee shall take all steps as are necessary or desirable in order to protect the rights of the beneficiary, but at the same time, not impair such beneficiary's receipt of government benefits, due to disability.

5.5.9. If ___ is unwilling or unable to serve as Trustee, then ___ shall serve as Trustee. If any person or institution named as Trustee is unable or unwilling to serve then the income beneficiary may select a trustee (or the guardian of an income beneficiary, if the income beneficiary is under age 18 or is under guardianship).

5.5.10 The trustee shall give each beneficiary a copy of this will, and shall provide annual accountings to each beneficiary. The trust shall terminate for each beneficiary when all trust assets have been distributed to the respective beneficiary, and a final accounting has been given to the respective beneficiary. The trustee may redact matters (including financial matters) inapplicable to a given beneficiary.

ARTICLE 6

ADMINISTRATIVE PROVISIONS FOR ALL TRUSTS

6.1 ***Immediate Appointment of Trustee****.* My personal representative shall immediately after the proving of my Will appoint as Trustee the person or corporation designated in this Will. The Trustee shall serve without bond. Immediately upon such appointment, the Trustee shall be deemed qualified without the need for court approval and shall immediately collect, and shall hold and administer under the applicable provisions hereof any insurance proceeds payable to the Trustee and any other funds or property when distributed to such Trustee.

6.2 ***Powers of Trustee****.* In the administration of the respective trusts, the Trustee shall exercise all powers conferred by all laws in effect at my death, and in addition to and not in modification or limitation of all powers conferred by law, the Trustee is hereby fully and completely empowered and authorized to sell, convey, and transfer all the trust assets, including real estate, to invest and reinvest the same with the broadest investment powers and discretion, and without being limited to trust investments as may be provided by law. My Trustee is hereby given full power and authority to operate and manage any business, property or investment, to vote stock, to retain unproductive or wasting assets, to compromise and settle claims, to purchase or sell trust assets from or to any other trust for a fair consideration, to lease for periods extending beyond the term of the trust, to commingle trust assets with assets of other trusts or in pooled investments or otherwise, to obtain advice and counsel for fees regarding investments, to delegate responsibility for investments to investment counselors for fees, and to do all things in connection with the respective trust estate, or any part thereof, which the said Trustee, in the exercise of its uncontrolled discretion, deems necessary and most beneficial in the best interests of the trust estates; and generally, to do any lawful act in relation to such trust property which the absolute owner thereof might do. The Trustee shall use good judgment in exercising the powers, discretion, and rights conferred by this trust and in performing duties as Trustee which are imposed by law, and, in order to feel free in doing so, the Trustee shall be exempt from liability for any action taken or omitted in good faith. However, the Trustee is not permitted to use any trust assets to pay for attorney's fees to any person or institution other than the trustee.

6.3 ***Reliance on Trustee's Authority****.* No person, firm, nor corporation dealing with the Trustee with reference to any of the trust property, if acting in good faith, shall be required to ascertain the authority of the Trustee nor to see to the performance of the trust, nor be responsible in any way for the proper application of funds or properties paid or delivered to the Trustee for the account of the trust but, if acting in good faith, may deal with the Trustee as though the Trustee were the unconditional owner.

6.4 ***Prudent Man Investment Rule****.* The Trustee may invest in any property in which an individual may make investments. In purchasing investments, the Trustee shall endeavor to exercise the judgment and care, in the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable safety of their capital. The trustee is not required to comply with the provisions of the Uniform Prudent Investors Act.

ARTICLE VII

7.I ***Appointment of Personal Representative and Successor.*** I nominate, constitute and appoint my wife, **SMITHE**, as Personal Representative of my estate under this, my Last Will and Testament, to serve without bond. In the event that she should predecease me or shall be unable to serve, I then designate ________________________ as substitute or successor Personal Representatives. I request that the Probate Court require no bond of my Substitute or Successor Personal Representatives.

7.2 ***Powers of Personal Representative****.* I hereby authorize and empower my Personal Representative, or any Successor Personal Representative, or Administrator with the Will annexed, to have and exercise all the power of my Trustee and in his discretion to continue to operate any business I may own or operate at my death, and give such person the power to sell, lease, mortgage, or encumber to such persons, at such times, at such prices, and upon such terms and conditions as in his absolute discretion is deemed proper, any apart or all of my property and estate, whether real, personal or mixed, at private or public sale, without notice and without authority of, or confirmation by, any court or person, and power to institute partition of any real estate in which I own an undivided interest, without authorization by any court or person. My Personal Representative, or any Successor Personal Representative, or Administrator with the Will annexed, in all cases, shall have full power to make, execute, and deliver or accept any deeds, assignments, leases, releases, mortgages, or other written instruments desirable or proper to carry out, consummate, and render effective any act or actions done or taken pursuant to the powers and authority granted herein.

ARTICLE VIII

8.1 ***Appointment of Guardian of Persons of Minor Children***. In the event that my wife, Smithe shall predecease me, or both of us die in a common disaster, I direct that the exclusive care, custody and education of my said named children, and any of my children born or adopted in the future, be entrusted during minority to ______________________________, of _________________, to serve without bond.

IN WITNESS WHEREOF, I Smith, have to this my Will and Testament subscribed my hand this ___ day of ______, 2015, A.D., Tulsa, Oklahoma.

____

Testator

ATTESTATION

THIS IS TO CERTIFY that the above and foregoing Last Will and Testament was subscribed by Smith in the presence of each of us, the undersigned, and at the same time declared by the said Smith to be his Last Will and Testament, and we, thereupon, at the request of Smith and in his presence and in the presence of each other, sign our names hereto as witnesses, at Tulsa, Oklahoma, this ___ day of ________, 2015, A.D.

WITNESSES:	RESIDENCE:
____	______________________________________
____	______________________________________

We the undersigned are the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and we do hereby declare that said Smith, testator, declared to said witnesses that said instrument is his last will and testament or a codicil to his last will and testament, and that he willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and said witnesses further declare that the said testator declared to them that said instrument is his last will and testament or codicil to his last will and testament, and that he executed same as such and wanted each of us to sign it as a witness; and that we did sign the same as witnesses in the presence of the said testator and at his request and that said testator was at that time eighteen (18) years of age or over and was of sound mind, all of which we declare and sign under penalty of perjury this ____ day of ___________, 2015.

____
Testator

____
Witness

____
Name and Residence (printed)

____
Witness

____
Name and Residence (printed)

ANNUAL EXCLUSION GIFTING, AND OVERVIEW OF ESTATE TAXES

1. Overview of Gift and Estate Taxes

Smart estate planning involves more than having a will, even a fairly complex one. We are faced with continuing uncertainty in dealing with federal estate taxes, restrictive privacy rules in health care matters, mandated rules on how IRA and retirement accounts must be paid to beneficiaries, concerns over nursing home costs, and other financial privacy issues. With all of these factors in play, estate planning is a bit more complex than in years past.

You must take into account a realistic assessment of your client's net worth, retirement plans, and consider the possible impact of future estate taxes (although with $5,430,000 exemptions from federal estate taxes, which apply for persons dying during 2015 and thereafter, and with no estate taxes in the majority of cases, estate taxes are not a factor for most people).

The Estate Tax Component. The starting point begins with an assessment of a client's actual net worth. This assessment will also give you a fair indication of how much the estate might have to pay in death (or estate) taxes (this will not be a problem for most of us; estate taxes may be a problem if an estate value exceeds $5,430,000). If you are married, through the use of the portability rules, both your client and your client's spouse can combine exemptions, so as to pass $10.86MM in assets to heirs, without any federal estate taxes. This amount is adjusted each year. Bottom line: using the "portability rules", a married couple can pass wealth totaling $10,860,000 without any federal estate taxes – and without using a credit sheltered trust.

The portability rules are explained in the section on Tax and Estate Planning for Pension and IRA Assets. Here's a brief summary: to benefit from the portability rules, the surviving spouse must file a Form 706 (Estate Tax Return) in a timely fashion. By doing this, the contingent beneficiaries of the estate (whether the estate consists of trust assets, IRAs, etc.) will not pay federal estate taxes, unless the combined estates of both husband and wife are in excess of $10,860,000.

Income Taxes. In addition, income taxes must be paid by your client's heirs, if they are the beneficiaries of your client's retirement plans (such as IRAs, 401k's, 403B's, etc.; but income taxes do not have to be paid if a beneficiary inherits sums from a Roth IRA). Your client will not (in most instances) control how retirement benefits are actually distributed to the designated beneficiaries, because the federal government has preempted your client's choices (there is one exception, which deals with naming a trust, or non-human being, as the beneficiary, and if that is the case, and in most cases, the trust will pay income taxes on benefits it receives at the 39.6% income tax bracket). Once your client names a human being as an IRA beneficiary, the beneficiary will receive an annual payment from the plan administrator, which is based on the life expectancy of the beneficiary (side note: if a beneficiary elects not to take a payout based on his or her life expectancy, they may do so, but will probably wind up paying more income taxes, based on a shorter withdrawal period, not to exceed 5 years).

So What Are We to Conclude on Estate Taxes? Estate tax problems generally will not arise until your client's spouse dies, at which time you need to advise the survivor whether or not to file a federal estate tax return (so as to take advantage of the portability rules). If one of your clients owns assets with a fair market value of over $5,430,000, the federal estate taxes are 40% (the tax on $5,430,000 is $2,172,000, which is the amount of the unified credit; if the client dies with an estate value of $6,430,000, the federal tax is $2,572,000, less the unified credit of $2,172,000, or a net tax of $400,000). If the client is married, and the surviving spouse inherits 100%, there is no estate tax on the first death, but a federal estate tax return should be filed – when the second spouse dies, with an remaining estate of $7,000,000, there is no estate tax to pay, because of the portability rules).

2. Determining Recipients of the Gifts; Maximizing Annual Exclusion and Lifetime Exemption Gifting

Although Oklahoma has no gift (or estate) taxes, the federal government has a gift tax, which has the same 40% rate used in the estate tax tables. There is a $14,000 per year exclusion per donee per year, for gifts of a present interest, and a lifetime exemption of $5,430,000. Your client may pay tuition directly to a college or university, and qualified medical care providers, and the amounts paid do not count towards the annual exclusion (but books, dorm fees, etc. do count towards the annual exclusion and lifetime exemption). And of course, gifts to spouses who are U.S. Citizens are exempt from both gift and estate taxes (these gifts qualify for the marital deduction).

Gift taxes are paid by the donors (though there are special rules applicable to the donees, whenever they pay the taxes).

Non-sentient entities (corporations, LLCs) can make gifts, but if the gift is in excess of $14,000 per year, the stockholders must pay the gift tax. Similarly, your client may make a gift to a corporation, but it is not regarded as a gift of a present interest. The IRS treats such a gift as being made to the shareholders, Regulations section 25.2511-1(h)(1), and the gift would "count" towards the lifetime exemption of $5,430,000.

Your client may enjoy using the annual $14,000 exclusion to pay for life insurance premiums, for a beneficiary of an irrevocable life insurance trust (ILIT), provided he or she follows these techniques: The premium is to be given to the trustee of the ILIT, which then notifies the beneficiary that he or she may withdraw the amount paid, within a reasonable period of time. If the premium is not withdrawn, the trustee pays the premium. This procedure was approved under IRC section 2503(b). Crummey v. Comm'r [397 F.2d 82 (9th Cir. 1968)], wherein the Court held that a power of withdrawal over contributions to a trust constituted a present interest transfer, for purposes of the annual gift tax exclusion. To obtain an annual gift tax exclusion for property subject to a withdrawal power, Revenue Ruling 81-7 (1981-1 CB 474) requires that the person who has the power to withdraw the amount given to the trustee, must be given notice of the power to withdraw, and a reasonable time within which to exercise the power before it lapses. The IRS has ruled in TAM 9532001 that a beneficiary who waives notice of future rights of withdrawal will not be considered as having received adequate notice in subsequent years, with the result that any future gifts in trust will not qualify under Crummey for the annual gift tax exclusion. It is therefore essential for taxpayers to have evidence to satisfy the IRS that the beneficiaries knew of their withdrawal rights. For more information on this topic, and on GST taxes, go to http://www.nysscpa.org/cpajournal/1999/0599/departments/e&t.html

3. Choosing the Most Highly Appreciated Assets for Annual Gifting

If your client has a sizable estate which will have an estate tax to pay, his or her CPA and financial advisor should be involved in techniques used in estate planning. That said, one such technique is to gift property while he or she is alive. First, the donor's cost basis becomes the donee's cost basis, when the gift is made. If the donor paid $1,000 for an original Rembrandt, and the painting is now worth $800,000, the donee's cost basis will be $1,000. If the painting is later sold, the capital gains cost basis for the donee is $1,000.

Second, if the asset is expected to grow rapidly, then the donor should give that asset away, rather than a slow growing asset. For example, if the donor owns 1,000 shares of Apple stock, which he or she bought for $200 a share, but it is now worth $500 a share, and will be expected to grow 15% a year, the stock will be worth much more when the donor dies, say 20 years from now, when it will be worth $2,000 a share (that is, it will be worth $2,000,000). Stated differently, the decedent's estate may be more heavily taxed because the Apple stock has grown so much in value.

Since the federal estate tax is based on the fair market value of the assets owned at the time of death, it's easy to understand that assets which grow in value may be the best ones to give away. Since there is no "step up in cost basis" for the donee, you also have to ask the donee what he or she plans on doing with the stock. If a sale of the asset is contemplated, then you have to consider the impact of the capital gains tax.

A third point deals with gifts of appreciated assets to charities: though it is illogical to conceive of this result, if a charity receives a gift of appreciated property, the donor is able to deduct the FMV of the asset, for income tax purposes (Schedule A deductions on the Form 1040), to the extent it does not exceed 30% of the donor's adjusted gross income. There are a variety of variations on an outright gift, such as, Charitable Remainder Trusts and Donor Advised Funds. In other words, the donor may gain income tax breaks by giving appreciated property to charities.

If you are going practice in estate tax planning, and you don't already own Leimberg's Number Cruncher, I suggest you subscribe to it, so you can compute the tax advantages of these types of gifts (you'll need this program if you enter the arena of GRITs, GRATS, GRUTs, QPRTs, private annuities and the like).

4. Minimizing Gift and GST Taxes

Generation Skipping Taxes are a surcharge on gifts made (during the donor's lifetime or at death) to "skipped" generations, such as grandchildren. As a general rule of thumb, these taxes are about 11-21% more than the maximum federal estate and gift taxes (but in some instances, the total estate taxes and GSTT will be 50%). The calculations produce such strange results I will not reproduce specimen computations made using Number Cruncher. In some instances, to make a net gift of $3,000,000 to a grandchild, the decedent needs $8.333MM in resources (using a testamentary taxable termination, which is one of four instances when a GSTT might be triggered).

So what should a rich donor do? First, make annual gifts to the grandchild (this can be done through a trust, if the trust is not subject to the grantor trust rules, IRC Section 677). Second, use as much of the lifetime gift exclusion as possible. Third, pray Congress will abolish the generation skipping transfer tax (and while your praying, pray that Congress would abolish the alternative minimum tax). Fourth, take advantage of tuition payments for a grandchild (which are not subject to the $14,000 exclusion; this same rule applies to payments for medical care).

To compute the GSTT, use Number Cruncher.

5. Reporting to the IRS

If gifts exceed the annual exclusion, you must report the gifts on an annual basis, using the Form 709. Since I don't enjoy completing tax forms, I defer these tasks to accountants and CPAs. This return is due on April 15th, after the year of the gift.

Estate tax returns are due 9 months after date of death, but an extension of 6 months is permitted. The estate tax must be paid, however, 9 months after date of death

7. Gifting Techniques Not Covered in Other Portions of the Seminar

Gifts can be made while you are alive, but can also be made at death, without involving the probate process. Let's first explore transfer on death options.

With Oklahoma's enactment of the "Non-Testamentary Transfer Property Act", a person can now effectively avoid the probate process, for real estate, including minerals. Whether use of these techniques is a good idea or not depends upon family circumstances. If the person to inherit the real estate is receiving government benefits, and the inheritance of the property will disqualify that person from receiving those benefits, then a transfer on deed procedure might not be the best idea. Additionally, if the beneficiary is a minor, a guardianship will have to be established in order for the minor effectively to inherit the real estate.

The Non-Testamentary Transfer Property Act is similar to statutes adopted in other states (the techniques used in other states are sometimes accomplished through "beneficiary deeds"). Use of the statutory language (found in title 58 sec. 1251,et al), in a recorded deed with a "TOD" designation, permits the grantor to avoid probate as to the real estate, upon the Grantor's death. After the death of the Grantor, certain forms will be filed with the county clerk within 9 months of date of death, and the real estate will then belong to whomever has been designated as the "TOD Beneficiary". The technique can be used for husbands and wives who want to leave their property to their children.

The TOD beneficiary may decline the gift within nine months of the date of the Grantor's death. The fact that somebody offers to give you something doesn't mean you have to accept the gift.

The pertinent statutes are contained in 58 OS §393-394.

In addition to real estate, bank accounts can be transferred on death by a "POD" technique, as set forth Title 6 O.S. Sec. 906(B); a similar technique can be used at credit unions (18 O.S.Sec. 381.48).

Avoiding probate for car titles, boats, etc., is accomplished by using a No Probate Affidavit (the form is provided by the Motor Vehicle Division of the Oklahoma Tax Commission, at any Tag Agency). Banks and credit unions also permit transfers of up to $20,000 in funds, to known heirs of an intestate decedent (someone dying without a will) – see 6 O.S. §906(B) or 18 O.S. §381.48 – through the use of an affidavit.

But what about stocks, bonds, personal property, annuities with no designated beneficiary? Other than probate, there is no known solution for annuities (where a beneficiary has not been named), but there are techniques for transferring other personal property, without resort to probate. The Oklahoma Legislature adopted portions of the Uniform Probate Code (Sections 3-1201 and 3-1202), which permit personal property valued less than $20,000 to be transferred to heirs, in lieu of probate.

There are restrictions on use of this technique; if probate proceedings have been initiated anywhere in the United States, transfer by affidavit is not available in Oklahoma.

Under the statutes, the heirs prepare the affidavit and present it to the custodian of the personal property, which would presumably include stock transfer agents, banks, and the like. Once the affidavit is presented to the “custodian”, the “custodian” delivers the personal property and is then discharged from further liability. Thus, the “custodian” is treated as if it is dealing with the personal representative of the estate.

Another gifting technique relates to IRAs. Congress approved direct gifts of IRAs to charities for the year 2014, but this is not a permanent addition to the Internal Revenue Code. In such instances, a donor does not have to “cash out” an IRA, pay the income tax due, and then make a gift: the donor simply gives his or her IRA to a charitable organization, and he or she may then deduct the current FMV of the IRA under Schedule A of the Form 1040. The donor realizes no income from the IRA, and deducts the value of whatever is given to the charity. The drawback to the technique is, Congress has to approve the technique, and so far, approval is only being given on a year to year basis. Approval has not been granted for the year 2015.

Gifts can be made at death (through inheritances, whether made through the probate process or the termination of a trust), and the donee will inherit at the FMV of property, at time of death. If a federal estate tax return is filed, the value of the gift can be determined as of the alternate valuation date, which is, 6 months after date of death.

Occasionally, delivery of the gift (after donor's death, but upon termination of a trust) can trigger a GST tax, if a grandchild (or other "skip" person) inherits several years after the death of the donor. The trustee must be aware of this possibility; I'm not certain the IRS is equipped to monitor this possibility.

Always keep in mind the elements of gift: the donor must intend to make a gift, then he or she completes the gift by delivery to or for the donee, and the donee accepts the gift. All three elements are required in order to effectuate a completed gift (incomplete gifts are not gifts). Once a gift has been completed, there may or may not be gift tax ramifications.

Federal gift taxes have been in effect since the Revenue Act of 1924. This tax applies to transfers made in trust or otherwise, and to transfers, direct or indirect, of property, be it real or personal, tangible or intangible (IRC § 2511). For gift tax purposes, only completed gifts are taxed, and control of the property is a key issue. If a "gift" is made to a revocable trust, the grantor still has control of the trust, so the gift is considered as being incomplete, and there are no gift tax ramifications.

One other gifting technique deserves mentioning: the Family Wealth Preservation Trust. This gifting device is a means of converting assets into homestead assets, meaning, the assets are protected from creditors' claims. 31 O. S. §10-18. Since Oklahoma doesn't permit a person to create a trust, so as to protect himself or herself from creditors (60 OS Section 175.25H), the legislature decided that a husband or wife could create a trust, and fund the trust with unlimited resources, so as to benefit the other spouse (or other qualified beneficiary, which means children). The trust can be revocable or irrevocable, but one of the trustees must be an Oklahoma trust company. Use of such a device presupposes a stable marriage, and that transfers into the trust will not make the transferor insolvent (which then involves the uniform fraudulent transfer act).

Time does not permit further explanation of this technique, but if a physician wants to shelter assets, and he or she has a stable marriage, then the FWPTA should be considered.

TAX AND ESTATE PLANNING FOR PENSION AND IRA ASSETS

1. Beneficiary Designations

Until the Supreme Court decision in *Clark vs. Rameker* 573 US (2014), IRA beneficiary designations were fairly easy to make: name the spouse as primary beneficiary, then the children as contingent beneficiaries. The reasoning: when the client dies, there are minimal forms for the beneficiaries to sign. The spouse can roll over the balance to his or her IRA (nothing taken out at this point), so no taxes are paid. Or the spouse can transfer the IRA into an inherited IRA, and begin taking distributions. If the kids inherit, they must take distributions immediately, under the inherited IRA rules (non-spousal beneficiaries cannot roll over inherited IRAs).

Or, if a trust is named as the beneficiary (which might mean, the trust pays 39.6% income taxes on distributions over $12,500), the trust can either (a) pay the income tax, or (b) submit a few forms to the IRA plan administrator (the forms require the trustee to state the trust is irrevocable, it is valid where it was made, and supply the administrator with the beneficiaries names and addresses), so the trust will become a conduit (benefits will then be paid directly to the named beneficiaries). In such circumstances, and under Reg. §1.401(a)(9)-4, issued pursuant to IRC Section 401(a)(9), each beneficiary will be taking required minimum distributions based on the life expectancy of the oldest beneficiary (which is the beneficiary with the shortest life expectancy). Reg. §1.401(a)(9)-(4) and –(5).

If the trust is a named beneficiary of the IRA, the Trustee may have the discretion to allocate IRA benefits to a charitable organization. The trust instrument should have a paragraph permitting the trustee to allocate selected trust assets (such as IRAs) to specific beneficiaries.

If no IRA beneficiary is named, then the plan administrator will pay the court appointed Executor or Administrator, and IRA withdrawals must be completed within 5 years.

2. Separate Shares for Beneficiaries

If there are multiple beneficiaries of an IRA, each beneficiary will have his or share, which is treated by the IRA plan administrator as a separate account. Originally, the RMD would be paid to a beneficiary, based on the age of the oldest beneficiary (2002 regulation; Regulation 1.401(a)(9)-8, Q&A-2). This procedure was changed in 2004, so that each beneficiary will be paid based on his or her life expectancy, so long as the division of the IRA is made by December 31st of the year following the IRA owner's death.

3. Trusts and Beneficiaries

The "separate share" rules do not apply if a trust is named as beneficiary of the IRA. As stated above, the trust can serve as a conduit (thereby avoiding paying income tax on IRA benefits paid to the trust) if: (1) the trust is valid under state law, (2) the trust is irrevocable as of the IRA owner's death, (3) the beneficiaries of the trust are identifiable, and (4) a copy of the trust agreement is provided to the IRA administrator by October 31 of the year following the year in which the IRA owner died. If there is more than one designated beneficiary of an IRA, generally the minimum required distributions are determined using the life expectancy of the oldest beneficiary. Regulation 1.401(a)(9)-5, Q&A-7(a)(1).

4. Roth Conversions

Though there are income limits that apply to making Roth IRA contributions, *there are no income limits regarding IRA conversions.* Mechanically, there are three ways to accomplish the conversion:

- *60-Day Rollover*. You can take direct delivery of the funds from your traditional IRA (check made payable to you personally), and then roll them over into a Roth IRA account, but you must do so within 60 days of the distribution. If you don't convert within this 60 day window, the amount of the distribution (less non-deductible contributions) will be taxable in the year received, the conversion will not take place, and the IRS will apply the 10% early distribution tax penalty.
- *Trustee-to-Trustee Transfer*. This is not only the easiest way to work the transfer, but it also virtually eliminates the possibility that the funds from your traditional IRA account will become

taxable. You simply tell your traditional IRA trustee to direct the money to the trustee of your Roth IRA account, and the whole transaction should proceed smoothly.

- *Same Trustee Transfer*. This is even easier than a trustee-to-trustee transfer, because the money stays within the same institution. You simply set up a Roth IRA account with the trustee who is holding your traditional IRA, and direct them to move the money from the traditional IRA into your Roth IRA account.

No matter how the transfer is accomplished, the funds coming out of a traditional IRA will be subject to regular income tax in the year that it occurs. However, any nondeductible contributions that you made to your traditional IRA will not be taxable, since they never had the benefit of tax deferral. If the conversion is done properly, you will not be subject to a 10% early withdrawal penalty.

If you have begun taking "substantially equal periodic payments" from your traditional IRA, you can convert those amounts to your Roth IRA as the payments arrive. The payments will be taxable, but the 10% early withdrawal penalty will not apply.

You will not be able to convert RMD distributions made from most other tax-sheltered retirement plans.

Some taxpayers mistakenly believe that they can get around the income tax liability created as a result of making a Roth IRA conversion, by rolling over only the portion of their IRA plans that were made with non-deductible contributions. For example, if a taxpayer has $200,000 in an IRA account, which includes $100,000 in investment earnings, $60,000 in tax deductible contributions, and $40,000 in non-deductible contributions, he may reason that he can avoid creating an income tax liability by rolling over the $40,000 in non-deductible contributions. It sounds right, doesn't it? The IRS won't agree. They have a Roth conversion pro-rata rule, which holds that the tax exempt portion of your rollover contribution must constitute only a pro-rata share of the total rollover.

Under this rule, since $40,000 of the taxpayer's total IRA balance is comprised of non-tax deducible contributions, then he will be eligible for tax relief on only 20% ($40,000 in non-deductible contributions, divided by the $200,000 total balance) of the amount of *any rollover* he converts to a Roth IRA.

Because of the pro-rata rule, if the taxpayer were to convert $40,000 to a Roth, only $8,000 of it would be exempt from income tax ($40,000 X 20%), not the full $40,000.

If non-deductible contributions have been made to an IRA, there is no income tax on withdrawals from these funds, whenever RMDs are being taken. In a sense, this is a "back door" ROTH IRA. The pro-rata rules still apply, however, if the IRA funds are mixed (both regular deductible contributions, and non-deductible contributions).

5. Bypass Trust Funding With IRAs

With the advent of the portability rules, funding a bypass trust with IRA benefits isn't as important as it used to be. Before 2010, it was difficult to equalize the value of estates if one of the spouses was top heavy in IRAs (or 401ks, etc.). If that spouse died, the IRA could be paid to a trust which contained a bypass funding provision, which loaded IRA assets into a bypass trust (which "equalized" the estate values), thereby protecting the unified credit for both husbands and wives.

The 2010 Tax Relief Act created the "deceased spousal unused exclusion amount" (DSUEA). For a surviving spouse, the DSUEA is the lesser of the basic exclusion amount or the basic exclusion amount of the last deceased spouse of the surviving spouse less the amount of the exclusion used by the last deceased spouse. Under Sec. 2010(c)(2), a surviving spouse's "applicable exclusion amount" is the surviving spouse's basic exclusion amount plus the DSUEA. As the Joint Committee on Taxation technical explanation (JCX-55-10) states, "[A]ny applicable exclusion amount that remains unused as of the death of a spouse who dies after December 31, 2010 . . . generally is available for use by the surviving spouse, as an addition to such surviving spouse's applicable exclusion amount." However, for the surviving spouse to get the benefit of the deceased spouse's unused exclusion amount, the executor of the deceased spouse's estate must make the appropriate election, as described below.

For example, in the case of the predeceased husband with only $1 million of assets, which he leaves outright to his surviving wife, his estate would have $5.43 million of unused exclusion, which, via the portability provision, could pass through to the surviving spouse and enable her to use the DSUEA in her estate, or during her lifetime to make lifetime gifts. Thus, the surviving spouse would have her own $5.43 million exclusion plus the $5.43 million DSUEA, which would shelter $10.86 million from estate tax in her estate or from gift tax. Significantly, this is accomplished without the need of a credit shelter trust under the husband's will and without having to retitle assets to assure each spouse owns at least $5.43 million.

To use the portability rules, the surviving spouse must file a Form 706 (Estate Tax Return) in a timely fashion. By doing this, the beneficiaries of the estate (whether held in trust, or by a will) will not pay federal estate taxes, unless the estates are in excess of $10,860,000.

6. Inherited IRAs

The money in an inherited IRA must be taken out eventually, unless the beneficiary is the spouse of the decedent.

Non-spouse beneficiaries have two options for liquidating the account. They can choose to take distributions over their life expectancy, known as the stretch option, which leaves the funds in the IRA for as long as possible. Or they must liquidate the account within five years of the original owner's death. Distributions from an inherited Roth IRA will be tax-free unless the account was established less than five years before -- in which case the earnings may be subject to tax.

7. Asset Protection

As you know, Oklahoma's homestead statute (Title 31) includes retirement plans. However, the United States Supreme Court decided that inherited IRAs are not entitled to creditor protection in a bankruptcy setting (*Clark vs. Rameker* 573 US (2014), so what should a client do, if he or she owns an inherited IRA?

One technique is to re-invest the inherited IRA into an IRA annuity, issued through an insurance company (or mutual benefit society). As you may or may not know, insurance products (including annuities) are homestead assets (see 36 OS Section 3631.1). If your client will amortize the IRA benefits, and convert the benefits into an immediate annuity, then the inherited IRA is protected as a homestead asset under Title 36.

A second technique is to have your client name his or her trust as the beneficiary of the IRA. If an IRA is left to a third-party trust and the subsequent beneficiary is simply the beneficiary of a trust to which they have limited access and control, all assets of the trust - including the inherited IRA that was left to it - can enjoy asset protection (assuming the trust grants spendthrift protection for the beneficiaries).

Of course, to avoid unfavorable income tax treatment, it will still be crucial that the trust-as-beneficiary is structured in a manner that complies with the requirements of Treasury Regulation 1.401(a)(9)-4, Q&A-5, so that the trust can stretch distributions from the inherited IRA over the life expectancy of the underlying individual beneficiaries. The plan administrator of the IRA will have some difficulty in understanding what is being done, and you may have to spend several hours arguing this point with the administrator.

Nonetheless, there is nothing directly conflicting between the requirements for a trust to be a beneficiary and still enjoy "see-through" treatment to stretch, and the use of a trust as IRA beneficiary for asset protection purposes. The approach simply means that the trust will be expected to accrue the required minimum distributions from the inherited IRA on behalf of the beneficiary, and not (necessarily) pass them through (where they would once again become subject to creditors of the beneficiary).

Accumulating inherited IRA distributions at the trust level and *not* passing them through to the beneficiaries will have less favorable income tax treatment; while inherited IRA distributions *can* be stretched over the life expectancy of the underlying trust beneficiaries (if the requirements are met), distributions that are not passed through and are held at the trust level will be reported on the trust's tax return and subject to compressed trust tax brackets. With a top tax bracket of 39.6% kicking in at $12,150 of taxable income (in 2014), pursuing such a trust-based asset protection strategy *will* represent an unfortunate trade-off of less favorable income tax consequences in exchange for more favorable asset protection treatment (remember: if the beneficiary of the IRA was named directly, he or she would be taxed at his/her more favorable rates, but after *Clark* such an approach no longer enjoys asset protection!).

8. Required Minimum Distributions

Use this worksheet to figure this year's RMD for your traditional IRA UNLESS your spouse is the sole beneficiary of your IRA and he or she is more than 10 years younger than you (there is an averaging life expectancy computation if a spouse is sole beneficiary of IRA and is 10 years younger).

Deadline for receiving the RMDs:

- Year you turn age 70 ½ - by April 1 of the following year
- All subsequent years – by December 31 of that year

1. IRA balance on December 31 of previous year ____________________

2. Distribution period from the table below for your age on your birthday this year ____________________

3. Line 1 divided by number entered on line 2 = your RMD for this year from this IRA ____________________

4. Repeat steps 1 through 3 for each of your IRAs

(Once you determine a separate RMD from each of your traditional IRAs, you can total these minimum amounts and take them from any one or more of your traditional IRAs)

Age	Distribution Period	Age	Distribution Period	Age	Distribution Period	Age	Distribution Period
70	27.4	82	17.1	94	9.1	106	4.2
71	26.5	83	16.3	95	8.6	107	3.9
72	25.6	84	15.5	96	8.1	108	3.7
73	24.7	85	14.8	97	7.6	109	3.4
74	23.8	86	14.1	98	7.1	110	3.1
75	22.9	87	13.4	99	6.7	111	2.9
76	22.0	88	12.7	100	6.3	112	2.6
77	21.2	89	12.0	101	5.9	113	2.4
78	20.3	90	11.4	102	5.5	114	2.1
79	19.5	91	10.8	103	5.2	115 and over	1.9
80	18.7	92	10.2	104	4.9		
81	17.9	93	9.6	105	4.5		

For additional information, please refer to Publication 590, Individual Retirement Arrangements (IRAs).

Inherited IRAs are dealt with in a similar fashion, but use a different table, which is found in Appendix C of IRS Pub 590. Rather than reproduce all of the rules, I suggest you refer directly to Pub 590, available on the internet, and you will be given a handful of scenarios, which are fairly easy to comprehend. In the meantime, here is Appendix C of Pub 590, used in computing RMDs for inherited IRAs.

Single Life Table (for use by beneficiaries)

Age	*Life Expectancy*	*Age*	*Life Expectancy*	*Age*	*Life Expectancy*	*Age*	*Life Expectancy*
0	82.4	27	56.2	55	29.6	83	8.6
1	81.6	28	55.3	56	28.7	84	8.1
2	80.6	29	54.3	57	27.9	85	7.6
3	79.7	30	53.3	58	27.0	86	7.1
4	78.7	31	52.4	59	26.1	87	6.7
5	77.7	32	51.4	60	25.2	88	6.3
6	76.7	33	50.4	61	24.4	89	5.9
7	75.8	34	49.4	62	23.5	90	5.5
8	74.8	35	48.5	63	22.7	91	5.2
9	73.8	36	47.5	64	21.8	92	4.9
10	72.8	37	46.5	65	21.0	93	4.6
11	71.8	38	45.6	66	20.2	94	4.3
12	70.8	39	44.6	67	19.4	95	4.1
13	69.9	40	43.6	68	18.6	96	3.8
14	68.9	41	42.7	69	17.8	97	3.6
15	67.9	42	41.7	70	17.0	98	3.4
16	66.9	43	40.7	71	16.3	99	3.1
17	66.0	44	39.8	72	15.5	100	2.9
18	65.0	45	38.8	73	14.8	101	2.7
19	64.0	46	37.9	74	14.1	102	2.5
20	63.0	47	37.0	75	13.4	103	2.3
21	62.1	48	36.0	76	12.7	104	2.1
22	61.1	49	35.1	77	12.1	105	1.9
23	60.1	50	34.2	78	11.4	106	1.7
24	59.1	51	33.3	79	10.8	107	1.5
25	58.2	52	32.3	80	10.2	108	1.4
26	57.2	53	31.4	81	9.7	109	1.2
		54	30.5	82	9.1	110	1.1
						111	1.0