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I. INTRODUCTION

A. [§1.1] Definition Of "Estate Planning"

A definition for "estate planning" cannot be found in the Florida Statutes or case law. Nevertheless, a large number of lawyers and non-lawyers in Florida devote all or a substantial percentage of their time to this field.

The term "estate" can be defined, with the specific meaning dependent on the modifying words used in connection with it. For example, "probate estate" means the property of a decedent that is subject to administration, *F.S.* 731.201(14), generally property owned solely by the decedent that has not been given away before death.

On the other hand, "gross estate" is defined under the Internal Revenue Code as all property in which the decedent had an interest at the time of the decedent's death. *IRC* §2033. The definition of "estate" contained in the Code is closer to the definition being sought but is still not inclusive.

The "estate" that is the subject of this manual includes not only the client's gross estate, but also the gross estates of the client's spouse, relatives, and other beneficiaries. Assets that might not be included in the client's gross estate for federal estate tax purposes, such as irrevocable trusts that the client created but in which the client retained no interest, or irrevocable trusts created by others in which the client has only an income interest, also are included.

In addition, the term "estate" is not limited to the property in which the client or the objects of the client's bounty had an interest at the time of the client's death. Not only does estate planning involve the transfer of assets at death, but also the accumulation and expenditure of assets during lifetime. The effect of inflation or deflation on these assets and the income from these assets must also be considered. Therefore, the "estate" consists of property in which the client and the client's beneficiaries have an interest at the time the plan is implemented, minus property expended, plus property accumulated before death, adjusted for the effect of inflation or deflation.

Planning estates, as defined above, involves ensuring the clients' financial well-being by making certain that their estates are preserved and managed and the clients and their beneficiaries are protected according to their intentions, both while they are living and after they die.

B. [§1.2] Scope Of Manual

This manual is a practical guide to estate planning. In addition to covering many of the laws relating to estate planning, this manual discusses solutions to problems that require knowledge from many disciplines.

Many chapters are organized in accordance with how a practitioner would approach an estate planning problem. The chapters deal with the substantive law in the context of the procedural steps a lawyer must take to solve a particular problem. In addition, principles, rules, or implications are explored that a practitioner discovers after considerable experience in the area.

The manual does not include detailed discussions of complicated issues of substantive law, although Chapter 2 highlights specific problem areas that may require further investigation by estate planners. In many instances, references to detailed discussions in other sources are cited in this text.

II. DEVELOPMENTS IN ESTATE PLANNING

A. [§1.3] American Assembly Recommendations

On December 24, 1976, the Real Property, Probate and Trust Law Section of the American Bar Association and the American Assembly of Columbia University sponsored a meeting at the Emory University law school on "Death, Taxes and Family Property." The meeting followed an ad hoc modification of Standard American Assembly Procedures. Participants considered a number of crucial questions in the estate planning and probate areas and issued findings and policy recommendations that were published and circulated by the American Bar Association. See *Death, Taxes and Family Property* in ESSAYS AND AMERICAN ASSEMBLY REPORT (West Pub. Co. 1977).

In its findings under the topic "Estate Services for the Public," the final report issued by the American Assembly stated at 188–189:

> The public should be offered greater variety and efficiency and more choices in estate planning services (including identification and coordination of probate and non-probate assets) and services connected with the administration of estates.

> In addition, there is a need for more public education about estate planning, and this should be provided by the Bar and others competent in the field. Better public understanding would also be promoted by uniformity of state laws of succession.
>
> ***Estate planning.*** In particular, it is desirable that readily available options in statutory or other form be developed to permit the simplified and inexpensive creation of both trust and non-trust dispositions by will in a manner analogous to but more diverse than present legislation concerning gifts to minors.
>
> The bar is urged to make estate planning services more widely available by providing them at reasonable cost through the use of group legal services, pre-paid legal insurance, increased technology and similar means.
>
> In addition, accepted definitions of "practice of law" should be re-examined carefully and seriously, looking to the possible performance by non-lawyers of some functions that have been classified traditionally as practice of law, with appropriate safeguards, particularly in connection with the drawing of wills.

Although not necessarily initiated by the members of the bar, many of the recommendations of the American Assembly have become reality over the last 30 years.

B. [§1.4] Probate Avoidance

The self-administered revocable living trust agreement ("living trust") initially became popular largely as a result of a book published in 1965 by Norman F. Dacey, HOW TO AVOID PROBATE. Mr. Dacey was a nonlawyer, a financial consultant, trustee, writer, and lecturer on various estate planning subjects. As of 1976 when the above Assembly Report was written, Mr. Dacey had sold approximately one million copies of his book. See *Dacey v. Connecticut Bar Ass'n*, 368 A.2d 125 (Conn. 1976).

Attorneys initially resisted the concept of living trusts, citing numerous problems such as a client's inability to properly fund the trust and keep adequate records. Instead, attorneys promoted wills or fully administered trust agreements with corporate fiduciaries.

Nevertheless, the popularity of living trusts continued to spread, fueled by seminars conducted primarily by nonlawyers. Estate planning was included in these seminars for two reasons. First, discussion of living trusts generated interest in other products. Second, many of the nonlawyers began to draft living trusts for compensation. See §1.5.

As a result, the living trust has become a major dispositive instrument used in estate planning. For a discussion of living trusts, see Chapters 8 and 9 of this manual.

Because of the increased use of living trusts in Florida, the 1993 Florida Legislature made changes to F.S. Chapter 737 that, in essence, attempted to make the postdeath administration of a living trust similar to the administration of a probate estate. In particular,

- *F.S.* 737.621 (now *F.S.* 736.1101) regarding rules of construction mirrors *F.S.* 732.6005 of the Probate Code;

- *F.S.* 737.622 (now *F.S.* 736.1107) regarding changes in securities, accessions, and nonademption mirrors *F.S.* 732.605 of the Probate Code;

- *F.S.* 737.623 (now *F.S.* 736.1102) regarding construction of generic terms duplicates *F.S.* 732.608 of the Probate Code;

- *F.S.* 737.624 (now *F.S.* 736.1103) regarding the "per stirpes" presumption mirrors *F.S.* 732.611 of the Probate Code;

- *F.S.* 737.625 (now *F.S.* 736.1104), the "killer statute," is derived from *F.S.* 732.802 of the Probate Code; and

- *F.S.* 737.627 (now *F.S.* 736.1004) regarding costs and attorneys' fees mirrors *F.S.* 733.106 of the Probate Code.

The 1993 Legislature also enacted a notice requirement for the postdeath administration of revocable trusts that were included in the gross estate of a grantor. In particular, *F.S.* 737.3057 provided that the trustee of such a trust was required to publish notice to creditors, giving creditors of a grantor the opportunity to file claims with the trustee of the living trust if no probate administration of the grantor's estate was required.

This publication of notice to creditors was viewed as an attempt by the legislature to require the "probate" of revocable living trusts. In addition, no statutory procedure was provided in the statute for objection to claims.

Therefore, the 1995 Legislature repealed this publication of notice to creditors requirement effective October 1, 1995. Thereafter, *F.S.* 737.308 (now *F.S.* 736.05055) requires trustees of revocable living trusts that are includable in the settlor's gross estate to file a "notice of trust" with the court of the county in which the settlor resided at the time of death and the court having jurisdiction of the settlor's estate.

In addition, legislative changes in 1993 and 1995 made it clear that a revocable living trust is required to pay administration expenses, debts, and taxes of the decedent if the probate estate is insufficient. *F.S.* 737.3054 (now *F.S.* 736.05053), which was enacted in 1995 in the wake of the repeal of *F.S.* 737.3056, provides that this insufficiency would be measured after specific bequests and statutory allowances.

The 1995 Legislature also enacted *F.S.* 737.2041 (now *F.S.* 736.1007), which prescribes a presumed reasonable attorneys' fee for services rendered to a revocable living trust included in a settlor's estate during the "initial" postdeath administration of the trust. This statute was retroactively modified by the 1997 Legislature. Unlike in the administration of a decedent's estate, there is no requirement that a trustee hire an attorney to assist in the initial postdeath administration of a living trust; if the trustee retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for the services. *F.S.* 736.1007(1). The trustee and the attorney may agree to the amount of compensation, but that agreement is not binding on the beneficiaries of the trust unless they consent to be bound. *Id.* In the absence of an agreement between the trustee and the attorney, "presumed reasonable" compensation for "ordinary" services is generally three quarters of the fee allowed the attorney for a personal representative (see §1.7). The fees for extraordinary services mirror the fees for the personal representative's attorney. *F.S.* 736.1007(5).Court proceedings to determine compensation, if required, are a part of the trust administration process, and the costs, including fees for the trustee's attorney, must be determined by the court and paid from the trust assets unless the fee request was unreasonable. *F.S.* 736.1007(6). The attorneys' fee provision for trusts applies to settlors dying on or after July 1, 1995.

F.S. 737.111(1) (now *F.S.* 736.0403) provides that the testamentary aspects of revocable living trusts executed in Florida are invalid unless the trusts are "executed . . . with the formalities required for the execution of a will in this state." *F.S.* 736.0403(2)(b). This provision applies to all trusts executed after September 30, 1995.

Therefore, even though the 1995 Florida Legislature eliminated the

publication of notice to creditors, which some argued required the "probate" of revocable living trusts, additional provisions were enacted that in many ways make the postdeath administration of a probate estate and a revocable living trust similar. In addition, the elimination of the "notice to creditor" provision will require prudent fiduciaries to open a probate to resolve creditors' claims. See Chapter 6 of ADMINISTRATION OF TRUSTS IN FLORIDA (Fla. Bar CLE 7th ed. 2012). See also §8.11 of this manual. On the other hand, a trustee is not required to hire an attorney to assist in the postdeath administration of a trust. If an attorney is hired, the trustee may negotiate the scope of services and the fee. In addition, there is a reduction in the presumed reasonable attorneys' fees for the initial postdeath trust administration from the probate fee described in §1.7. Consequently, it seems likely that revocable living trusts will continue to grow in popularity with clients and estate planners.

The 2006 Florida Legislature, in Chapter 2006-217, Laws of Florida, adopted substantial changes to the statutes governing Florida trusts by enacting the "Florida Trust Code," *F.S.* Chapter 736, which became effective July 1, 2007. For an extensive discussion of the Florida Trust Code, see Chapter 18 of ADMINISTRATION OF TRUSTS IN FLORIDA, *supra*.

C. [§1.5] Nonlawyer Competition

The Unlicensed Practice of Law Committee of The Florida Bar has attempted to restrict estate planning in Florida to attorneys licensed in Florida. On August 1, 1991, The Florida Bar Standing Committee on the Unlicensed Practice of Law issued a proposed advisory opinion on the following question submitted by American Family Living Trusts:

> Whether it constitutes the unlicensed practice of law for a corporation or other nonlawyer to draft living trusts and related documents for another where the information to be included in the living trust is gathered by nonlawyer agents of the corporation or by the nonlawyer and the completed documents are reviewed by a member of The Florida Bar prior to execution?

The Standing Committee gave examples of how nonlawyer companies solicited living trusts through licensed insurance agents, brokers, and securities dealers by conducting seminars, giving in-home presentations, and advertising. As a result of these seminars, nonlawyers sold other products such as deferred annuities, life insurance, long-term care policies, disability insurance, and investments. Examples of public abuse were also cited.

The Standing Committee concluded that all five steps involved in the creation of a living trust, including gathering necessary information, assembling the document, reviewing it with the client, executing it properly, and funding the trust agreement, constituted the practice of law under the authority of *In re The Florida Bar*, 215 So.2d 613 (Fla. 1968), 34 A.L.R.3d 1298 and *State ex rel. The Florida Bar v. Sperry*, 140 So.2d 587 (Fla. 1962), *vacated on other grounds* 373 U.S. 379.

The proposed advisory opinion was reviewed in *The Florida Bar re Advisory Opinion — Nonlawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992), in which the court ruled that the assembly, drafting, execution, and funding of a living trust, as well as the determination of the client's need for a living trust and the type of trust most appropriate for the client, constitute the practice of law. As a result of this opinion, the Unlicensed Practice of Law Committee has been successful in enjoining nonlawyers from creating living trusts and performing other estate planning functions. See *The Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So.2d 255 (Fla. 1997).

The American Assembly Report mentioned in §1.3 noted the "need for more public education about estate planning, and this should be provided by the bar and others competent in the field." Estate Services for the Public, at 188. The report also stated at 189 that "[a]ccepted definitions of 'practice of law' should be re-examined carefully and seriously, looking to the possible performance by non-lawyers of some functions that have been classified traditionally as practice of law, with appropriate safeguards, particularly in connection with the drafting of wills."

Therefore, members of the bar should educate the public about the advantages of using an attorney and the disadvantages of using a nonlawyer to perform estate planning functions.

D. [§1.6] Estate Planning Specialization

In 1986 estate planning and probate became an area of certification. The area was redesignated as wills, trusts, and estates in 1993. See Subchapter 6-7 of the Rules Regulating The Florida Bar.

To become a certified wills, trusts, and estates lawyer, an applicant must (1) have been engaged in the practice of law for at least five years; (2) demonstrate substantial involvement in the practice of estate planning, planning for incapacity, administration of estates and trusts, fiduciary and transfer taxation, probate and trust law, estates and trust litigation, and homestead law during the five years immediately preceding application,

including devoting at least 40% of practice to those matters during each of the two years immediately preceding application; (3) submit to peer review; (4) complete not less than 90 hours of continuing legal education in the three-year period immediately prior to application; and (5) pass an examination. Rule 6-7.3. Recertification is required every five years. Rule 6-7.4.

E. [§1.7] Attorney Compensation

The criteria for setting fees for estate planning services are outlined in Rule 4-1.5 of the Rules Regulating The Florida Bar.

The former practice of charging nominal fees for estate planning services and treating estate planning as a "loss leader" for future estate administration fees appeared to be passé in view of the Florida Supreme Court's decision in *In re Estate of Platt*, 586 So.2d 328 (Fla. 1991). *Platt* made it clear that, in the absence of an agreement with the beneficiaries regarding estate administration services, billing for these services on the basis of a percentage of the estate assets is not an acceptable practice. Therefore, it appeared that attorneys would begin charging a reasonable fee for the estate planning services provided and look to that fee as the sole basis for compensation, with no anticipation of an extraordinary probate fee at the client's death.

In the 1993 legislative session, *F.S.* 733.6171 was enacted to address the *Platt* decision. The statute provided that, absent agreement among the attorney, the personal representative, and the persons bearing the impact of the fee, "reasonable compensation" for normal services performed by the attorney for the personal representative was to consist of the sum of two parts. The first part compensated the attorney's responsibility and was an amount equal to 2% of the inventory value of the estate and the income earned thereon, plus 1% of the balance of the gross estate if the estate was required to file an estate tax return. The second part compensated the professional time expended and was an amount equal to the product of the number of hours reasonably expended times a reasonable hourly rate. *F.S.* 733.6171(3) (1993).

The 1993 legislative changes to the amount of attorneys' fees presumed reasonable in probate administration were criticized for being excessive. Therefore, the legislature again amended the statute regarding fees for the personal representative's attorney in 1995. The statute now provides for a sliding scale percentage fee, which is a "presumed reasonable fee" for ordinary services. *F.S.* 733.6171(3). The minimum fee is $1,500 for estates having a value of $40,000 or less, with a 3% fee for estates up to $1

million, which percentage reduces at various levels until it reaches 1% for all estates in excess of $10 million. *Id.* This percentage is applied to the inventory value of probate assets and income earned by the estate during the administration. *Id.* "Ordinary services" generally include those matters performed in an uncomplicated probate.

In addition, under the current version of the statute, the attorney is entitled to compensation for "extraordinary services," which is defined in *F.S.* 733.6171(4) under several broad categories, beginning with involvement in will contests through most tax work and tax planning, and concluding with ancillary administrations. The preparation of a federal estate tax return is defined as an extraordinary service and carries with it a presumptively reasonable fee of .5% up to a value of $10 million, and .25% of the value of the gross estate in excess of $10 million. *F.S.* 733.6171(4)(e).

If an objection to the attorney's fee is raised by an interested party, the burden remains on the attorney to establish that the fee is reasonable. *F.S.* 733.6175(3); *Fla.Prob.R.* 5.355. Upon petition of any interested party, the court may increase or decrease compensation and is required to consider the factors set forth in *F.S.* 733.6171(5) if a challenge is made. Attorneys' fees may be awarded by the court in compensation disputes unless the court finds the request for fees to be substantially unreasonable. *F.S.* 733.6175(2). *Rule* 5.400 requires that the final accounting disclose the amount and manner of determining compensation for attorneys, unless disclosure is waived.

Although the general effective date of the Act that created these changes to the attorneys' fee provisions (Ch. 95-401, Laws of Fla.) was July 1, 1995, the Florida Supreme Court in *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998), held that the law should not be applied retroactively because the right to recover attorneys' fees accrued at the moment representation commenced (which, in *Bitterman*, was before July 1, 1995). Therefore, even if services were rendered by an attorney after July 1, 1995, the prior statute applied if the representation commenced before July 1, 1995.

By enacting the fee statute for the trustee's attorney referred to in §1.4, the legislature has reduced the probate avoidance benefits of creating a revocable living trust. Under the 1993 version of the attorney's fee statute, the "2% of inventory value" portion of the "attorney's responsibility" fee could be eliminated by avoiding probate. Under the 1995 version of the attorneys' fee statute, the "presumed reasonable" attorneys' fee for services rendered to a trustee is 75% of the presumed reasonable fee for services rendered to a personal representative.

In addition, with the competition from other lawyers and nonlawyers performing estate planning services and drafting or providing estate planning documents, attorneys must make certain that their fees do not price them "out of the market." Several recent developments have assisted practitioners in providing competent estate planning services for a competitive fee.

First, the sophistication of computers and the development of drafting programs for the preparation of documents have substantially reduced the amount of time necessary to draft complicated documents, leaving lawyers with more time to spend on planning estates. Likewise, computer programs are available to assist estate planning attorneys in projecting estate taxes and liquidity needs, all adjusted for the effects of inflation or deflation. These programs reduce the time and drudgery previously associated with preparing projections. See Chapter 15 of this manual for a discussion of these programs.

One area of the estate planning process that continues to consume an inordinate amount of time is related to implementation of the estate plan. See §1.27. In particular, re-registering assets to fund living trusts or dividing joint assets to fund credit-shelter trusts is a very time-consuming service and, when handled completely by a lawyer, will cause fees to be unpredictable and noncompetitive. Although it is clear that supervising the implementation of an estate plan is an integral part of the estate planning process, it may be possible to delegate some of the responsibility for re-registering assets to the client and thereby reduce the attorneys' fees.

Those who argue against this delegation approach claim that the client is not qualified to assist in the funding of a living trust agreement. On the other hand, one could argue that if the client is not capable of assisting in funding the living trust agreement, the client will not be able to make certain that future assets are purchased in the name of the trust and that the trust records are properly maintained. If a client is unable to perform these duties with adequate instructions, should the client be acting as his or her own trustee?

An attorney should continue to be responsible for re-registration of some assets that clearly involve complicated legal issues, such as deeding real estate to the name of a trust or naming a trust as the beneficiary of a retirement plan. On the other hand, the client, with proper instructions from the attorney and the assistance of the client's broker or banker, should be capable of re-registering a brokerage account or a bank account in the name of the client's trust.

Attorneys will be required to charge extraordinary fees if they are responsible for every aspect of the estate planning process. If the fee quotation is too high or unpredictable, many clients will forgo estate planning altogether or resort to the services of nonlawyers to perform estate planning functions and draft or provide "self-help" estate planning documents. Therefore, it may be better to allow the client to perform the ministerial, nonlegal aspects of information gathering and asset re-registration so that the lawyer can handle, and charge for, the legal aspects of the estate planning process. Otherwise, the entire process might be handled by the client or nonlawyers because of the potential size of the attorneys' fee.

III. ESTATE PLANNING PROCESS

A. [§1.8] Systematic Approach

Estate planning for a particular client can be simple or complex, depending on the nature of the estate, the client's personal and family background, and the objectives. Nevertheless, experienced estate planners approach each client the same way and make independent determinations as to the relative complexity of each situation.

Estate planners should never trust clients to determine the complexity of the estate plan needed. Most estate planners have encountered clients who express the desire to have a simple will drafted (usually before the initial office conference and during the discussion of the estimated fees). After the estate planner has asked the proper questions, however, it often becomes clear that the situation is complex and a simple will would not meet the client's objectives.

On the other hand, many clients tend to overcomplicate their situation. For example, a client who has recently read an article about so-called Crummey trusts (see §2.11 of this manual) may ask to have one drawn. Upon further reflection, the estate planner might find that the client desires to have the insurance paid to an only child, and a transfer of the ownership of the policy to that child will meet the client's objectives without the complexity and cost of a trust.

Therefore, it is necessary and advisable to develop a procedure for interviewing clients and to follow this procedure in every case. Some find it helpful to use an estate planning checklist and client information list to make certain that each client is asked the proper questions. Such a checklist can be found in Chapter 15 of this manual.

B. [§1.9] Quantifying the "Estate"

The first step in developing the plan is to quantify the estate, as defined in §1.1.

It is often helpful to ask a client to compile financial and personal information before an initial meeting. This gives the client an opportunity to review records, gather documents, review life insurance and retirement plan designations, and do much of the groundwork in advance of the initial meeting. In this way, valuable professional time can be saved and more time can be expended on the other steps in the estate planning process.

Before planning begins, the estate planner must develop a complete understanding of the client's estate. First, a list and values of all of the assets in the estate must be obtained. This includes not only the assets of the client, but also the assets of the client's beneficiaries. In addition, assets that are not owned by the client but that are producing income for the client must be listed. See Chapter 15 of this manual, which covers the subject of estate planning checklists.

It is especially important to determine who owns the assets, because the form of ownership determines the disposition of those assets. The estate planner should not always rely on the client to determine the ownership of assets. Many times a client views assets as owned individually or half by the client and half by the client's spouse when, in fact, the assets are owned in a tenancy by the entireties. In addition, many clients assume that the beneficiary of their life insurance policies or retirement plans is their current spouse when, in fact, a spouse from a first marriage or their estate may be named.

It is important, therefore, for estate planners to review the documents of title and beneficiary designations to make certain that the ownership of the "estate" is known. When forced to rely on the representation of the client, a disclaimer such as "value and ownership of assets provided by client; estate planner did not independently verify" should be forwarded to the client to reduce the risk of liability if the goals of the estate plan are not achieved because of incorrect information.

After determining the size and nature of the estate, the lawyer must determine its liabilities. In addition to mortgages encumbering property and promissory notes, accrued income tax liability should be calculated. Especially important is the accrued income tax liability associated with retirement plan distributions.

After ascertaining the size of the estate and the liabilities, the lawyer must gather all relevant information on the client's beneficiaries. If the client is married, the planner should obtain all necessary information about the client's spouse. If the client is divorced, the lawyer must know the terms of the divorce or separation agreement. In addition, if generation-skipping is a possibility, lawyers must collect information regarding the client's children and grandchildren and the size of their respective estates.

Estate planners must also ascertain whether gifts have been made and whether gift tax returns have been filed. If so, planners must review these gift tax returns.

Because the size of a person's estate changes constantly due to the effect of living expenses, income, and changes in the value of assets, these various factors need to be projected. In addition, attorneys should factor into the estate the effect of inflation based on the life expectancies of the client and beneficiaries. Although many of these calculations can be done manually, computer programs are available to do much of this forecasting. See Chapter 15 of this manual.

C. [§1.10] Determining Objectives

Once the size of the potential estate is known, the attorney should determine the client's objectives. This determination should be made as objectively as possible, without imposing the estate planner's preferences on the client.

In particular, an estate planner should not assume that a client's primary objective is to reduce or eliminate estate taxes or to pass the maximum to the client's descendants. A client might have other legitimate objectives in mind. For example, a client with a young spouse and children from a prior marriage who are near the same age as the spouse may be willing to incur estate taxes so that these children will be able to enjoy their inheritance before the death of the spouse. Likewise, a couple may be more interested in enjoying their assets than placing a portion of them in trust with the associated restrictions to avoid taxation on the survivor's death. A related issue is the recent upsurge in asset protection planning, which is explored in Chapter 2 of this manual.

D. Explaining Restrictions and Alternatives

1. [§1.11] Restrictions

After ascertaining the client's goals and aspirations, the estate

planner has a duty to advise the client of any laws that can affect these objectives. For example, a client may want to pass his or her entire estate to the children with nothing to the surviving spouse. In this situation, the estate planner has a duty to advise the client of the homestead laws and the elective share, which may affect this objective. Alternatively, the client may want to give his or her entire estate to the spouse and, on the spouse's death, have the estate pass to the children. Not only must the loss of the unified credit equivalent be mentioned if the estate is taxable, but also the possibility of a subsequent marriage by the spouse should be discussed. In light of such legal restrictions, a client may change previously stated objectives.

Although transmission of wealth on death is usually on the client's mind when estate planning is contemplated, the lawyer also should remind clients to consider asset protection planning (see Chapter 2 of this manual) and planning for disability. Although most clients do not want to consider disability, the attorney should point out that a disability, either short-term or long-term, is a real possibility that must be considered when planning an estate. See Chapter 3 of this manual for a discussion of planning for disabilities. See also ASSET PROTECTION IN FLORIDA (Fla. Bar CLE 2d ed. 2011); FLORIDA GUARDIANSHIP PRACTICE (Fla. Bar CLE 7th ed. 2011, 2012 Supp.).

With the client's estate and objectives in mind, the planner should explain the various tools available to meet those goals. These are discussed briefly in §§1.12–1.20.

2. [§1.12] Gifts

At this point in the estate planning process, the planner should have a feel for the comfort level of the client and, therefore, will know whether a suggestion of gifts is appropriate. Lifetime gifts to loved ones and charities are appropriate only in situations in which the donor has enough assets to satisfy other estate planning goals for the remainder of his or her lifetime.

The advantages of lifetime gifts to loved ones and charities should be explained. The tax ramifications of gifts are discussed in Chapter 5 of this manual. In addition to the tax ramifications, the lawyer should cover the practical benefits of lifetime gifts.

For example, gifts to family members place property in the hands of beneficiaries at a time when they may need it most. In particular, lifetime gifts to young adults at the time that they are purchasing a home or paying for educational expenses of their children may be appreciated more than

bequests at death to older children who have already built estates of their own.

Likewise, lifetime gifts to charity, as opposed to bequests to charity at death, have practical benefits. If the gifts are made during the donor's lifetime, the donor will be alive to receive recognition and other attendant benefits by the charitable organization.

3. [§1.13] Living Trusts

As discussed in §1.4, many clients may be seeking the services of an estate planner specifically to create a living trust. On the other hand, many clients know little or nothing about living trusts or may have received inaccurate information. Therefore, planners must explain the advantages and the disadvantages of living trusts. The relative merits of living trusts are discussed in detail in Chapter 8 of this manual.

A discussion of living trusts as a probate avoidance device is necessary in most situations because of the enactment of *F.S.* 733.6171, discussed in §1.7. This discussion is especially appropriate when formulating plans for elderly widows and widowers, regardless of the size of their estates, and when planning for married couples whose combined estates exceed the unified credit equivalent. Of course, other situations may also warrant discussing this device. In these situations, however, both probate avoidance and disability planning should be covered.

In addition to revocable living trusts, the use of irrevocable living trusts may be appropriate. For a general discussion of irrevocable living trusts in estate planning, see Chapter 2 of this manual.

4. [§1.14] Wills

It goes without saying that the creation of a last will and testament should be part of the estate planning discussion. If the client uses a revocable living trust, a "pour-over" will is appropriate. If a client chooses to not select a living trust, the will becomes the sole dispository instrument on death. In connection with wills, attorneys should also discuss the following with clients:

- Intended burial arrangements. Burial instructions can be included in the will, although many attorneys counsel their clients to leave burial instructions with close family members in case the will is not available immediately after death. If the client desires to be cremated, cremation should be specifically

mentioned to protect the personal representative or other person relying on that direction. See *F.S.* 732.804.

- Intended disposition of tangible personal property. The client may prefer to make references to gifts of specific items to specific individuals, or a separate writing pursuant to *F.S.* 732.515 can be used so that items can be added or deleted at the client's convenience without redrafting the will. Clients may want their tangible personal property distributed equally among a class of people. It is important to discuss the selection process for this equal distribution along with a method for resolving conflicts among the class members.

- The exercise or nonexercise of powers of appointment. For a discussion of powers of appointment, see Chapter 11 of this manual.

- The disposition of the residuary of the estate, which the attorney should also determine. If a living trust has been created, the dispositive provisions normally are included in the trust agreement, and the residuary clause of the will provides that any assets in the "probate estate" (see §1.1 for definition) are to "pour over" into the living trust. On the other hand, if a living trust is not created, the will disposes of the residuary of the estate. The disposition of the residuary of the estate can be outright, or testamentary trusts can be created. For a discussion of estate tax consequences, see Chapter 5 of this manual. For treatment of the disposition of property to the surviving spouse, see Chapter 10. In discussing the disposition of the residuary of the estate, it may be appropriate to explore other specific areas. For a discussion of these various areas (such as generation-skipping, charitable planning, trusts for minors, and nonresident alien issues), see Chapter 2 of this manual.

- The source of payment of income, estate (both federal and state), and generation-skipping taxes. For a general overview of tax apportionment, see §2.53 of this manual.

- The selection of a fiduciary and the ultimate designation made in the will. Fiduciaries are discussed in Chapter 12 of this manual. The powers the fiduciary will have to administer the estate or any testamentary trusts should be explored.

- A preneed guardian, if the client has minor children. Although

the court is not obligated to follow this written declaration, it creates a rebuttable presumption of qualification. *F.S.* 744.3046(4). Attorneys should encourage clients to discuss this designation with the proposed guardians of the person and the property to determine if they are willing to accept the duties of guardian. See §3.21 of this manual for a discussion of additional approaches to the issue of the care of minor children.

5. [§1.15] Property Passing Outside Of Probate and Living Trust Agreement

The lawyer should discuss with the client the implications of holding jointly owned property. For a discussion of joint ownership, see Chapter 7 of this manual.

The lawyer should also review the disposition of contractual property, such as life insurance and pension and profit-sharing plans. For a discussion of retirement benefits, see Chapter 2 of this manual.

6. [§1.16] Homestead Property

Attorneys should review the treatment of homestead property under Florida law. This topic is covered in Chapter 6 of this manual. See also Chapter 21 of PRACTICE UNDER FLORIDA PROBATE CODE (Fla. Bar CLE 7th ed. 2012).

For a discussion of estate planning considerations concerning out-of-state property, see Lannon, *Estate Planning Considerations for Out-of-state Property*, 85 Fla. B. J. 49 (Nov. 2011).

7. [§1.17] Elective Share

Prior to October 1, 2001, the effective date of the new elective share statutes, *F.S.* 732.201–732.2155, it was relatively simple to avoid application of the elective share by placing the ownership of property outside of the probate estate. Under the revised elective share law, the surviving spouse has a right to share in the "elective estate," which consists of the decedent's probate estate, property passing by survivorship, fractional interests in property, revocable or discretionary trusts, cash surrender value of life insurance, retirement plans, and transfers within a year of death. For a discussion of the elective share, see Chapter 4 of this manual and Chapter 7 of PRACTICE UNDER FLORIDA PROBATE CODE (Fla. Bar CLE 7th ed. 2012). Therefore, discussion of premarital and postmarital agreements may be appropriate to avoid application of the elective share law.

8. [§1.18] Durable Power Of Attorney

Attorneys should explore with their clients the advantages of executing a durable power of attorney. It is important to determine not only who will hold this power of attorney, but also what powers the attorney-in-fact will have. It may also be appropriate to discuss who will have custody of the power of attorney to avoid a premature exercise. For treatment of durable powers of attorney, see Chapter 3 of this manual and Chapter 5 of FLORIDA GUARDIANSHIP PRACTICE (Fla. Bar CLE 7th ed. 2011, 2012 Supp.).

9. [§1.19] Living Will

Discontinuing life-prolonging procedures when an individual has no chance of recovering is an important aspect of preserving the estate. Therefore, planners should discuss living wills as part of the estate planning process. For a discussion of living wills, see Chapter 3 of this manual and Chapter 4 of FLORIDA GUARDIANSHIP PRACTICE (Fla. Bar CLE 7th ed. 2011, 2012 Supp.).

10. [§1.20] Health Care Surrogate

Although a durable power of attorney can contain a power to make health care decisions, it may be desirable to have someone other than the attorney-in-fact make these decisions. In addition, it may be desirable to list in detail those types of decisions that can be made. Therefore, attorneys should review the designation of a health care surrogate. For a discussion of health care surrogates, see Chapter 3 of this manual and Chapter 4 of FLORIDA GUARDIANSHIP PRACTICE (Fla. Bar CLE 7th ed. 2011, 2012 Supp.).

11. [§1.21] "HIPAA" Privacy Rule

When drafting a revocable living trust or designating a power of attorney or health care surrogate, planners should consider the Health Insurance Portability and Accounting Act of 1996 (HIPAA) Privacy Rule, Pub.L.No. 104-191, 45 C.F.R. Part 160, and 45 C.F.R. Part 164. The HIPAA Privacy Rule contains an exception that permits a covered entity to disclose protected health care information to an individual's "personal representative." 45 C.F.R. 164.502(8). Because disability planning can facilitate obtaining health care information without court action, consideration should be given to designating a trustee or successor trustee, a power of attorney, and/or a health care surrogate as the client's "personal representative" for HIPAA purposes. See Chapter 3 of this manual.

E. Consulting With Other Professionals

1. [§1.22] Lawyer as Team Leader

Estate planning involves the creation of legal documents and the interpretation of statutes and laws that affect the transfer of assets during life and at death. Therefore, the lawyer should coordinate the estate planning process.

On the other hand, estate planning is, in many cases, a team effort involving the client and other nonlegal professionals. The lawyer should be the captain of the estate planning team but should not hesitate to consult with other professionals.

2. [§1.23] Accountant

In many situations, a client's accountant may be the individual who initiates the estate planning process. By preparing annual income tax returns and financial statements, the accountant is in a unique position to estimate the size of the client's estate, the amount of the client's income, and the need for estate planning. Accountants are especially useful in valuing estate assets for gift and estate tax purposes.

3. [§1.24] Insurance Agent

It is difficult for a lawyer to be familiar with all of the insurance products available to satisfy a client's need for liquidity in the case of premature death. Therefore, the life insurance agent can be an invaluable member of the estate planning team. An insurance advisor can also be in a position to initiate estate planning discussions because clients may recognize the need to purchase insurance but often do not understand the ramifications of beneficiary designations.

4. [§1.25] Trust Officer

A corporate fiduciary has a unique opportunity to initiate estate planning discussions through contact with commercial bank customers, contact with a client's family developed through years of acting as a fiduciary, or other new business development activities. A corporate fiduciary can provide custody and investment advisory services during a client's life. In addition, a corporate fiduciary can provide estate settlement services. Finally, a corporate fiduciary can act as successor trustee to a self-administered living trust or as trustee of a testamentary trust on the client's death to provide custodial investment and discretionary invasion services on

a professional basis.

F. [§1.26] Setting Goals

Once the attorney determines a client's estate and objectives and alternatives have been explored, the estate planning professional must help the client establish reasonable goals that can be accomplished legally and practically through proper planning. For example:

- Establishing a qualified or nonqualified retirement plan may provide income for retirement.

- Life insurance may provide liquidity for payment of the living expenses and educational expenses of the next-of-kin of a client who dies prematurely.

- Creating shareholders' agreements, purchasing insurance, or drafting to take advantage of tax deferral provisions in the Internal Revenue Code can provide liquidity to meet financial obligations and taxes.

- The use of the marital deduction can achieve tax deferral.

- The use of the annual exclusion, the unified credit, and the generation-skipping exemption can minimize taxes.

- The use of trusts may meet the needs of minor beneficiaries. Likewise, the use of living trusts, living wills, and powers of attorney may achieve probate avoidance and be useful in disability planning.

G. [§1.27] Communicating Plan

Once the goals have been set, the lawyer should outline the proposed plan to the client. In a simple estate plan, the attorney may do this orally at the initial client interview, but in more complex situations, the plan should be communicated in writing. The details depend on the complexity of the situation and the fee arrangement made with the client.

It is best to first summarize the existing situation. If the client submitted a questionnaire, this questionnaire, as edited by the estate planner after a review of the applicable documents of title and beneficiary designations, can be used. This summary enables the client to have an accurate picture of his or her personal and financial situations at the time the

plan was prepared.

Next, the attorney should outline the recommended plan and explain any alternatives. Because many clients have problems understanding legalese, it is instructive to the client to have the plan explained in "plain English."

The attorney should prepare an analysis of the tax implications of the plan and liquidity needs of the estate. The attorney should calculate the taxes and liquidity requirements under the existing asset registration and dispositive provisions, the proposed asset registration and dispositive provisions, and any alternatives. Computer programs can provide such analyses and comparisons. See Chapter 15 of this manual.

Finally, include any caveats in the written communication of the plan. For example, if the client decides to forgo estate or generation-skipping tax savings to achieve other objectives, the attorney should document this decision to avoid problems with a forgetful client and the client's intended beneficiaries. In addition, if multiple clients are involved, any potential conflicts of interest should be disclosed and discussed. For a discussion of the malpractice and ethical issues involved in estate planning, see Chapter 13 of this manual.

H. [§1.28] Implementing Plan

Once the goals have been set and the estate plan has been detailed, it is the estate planner's obligation to make certain that the plan is implemented. Normally, legal documents need to be drafted. These documents can include a will, a revocable living trust, an irrevocable trust, a living will, a power of attorney, designation of a health care surrogate, and deeds. Other documents may be involved, such as beneficiary designations and asset transfer documents.

Whether the attorney becomes involved in the performance of nonlegal functions is certainly subject to debate. See §1.7. Some attorneys argue that every step in implementing an estate plan should be accomplished by the attorney, even if some of the tasks involve functions that are arguably nonlegal, such as re-registering assets or changing beneficiary designations.

Needless to say, the attorney is responsible for communicating with the client and advising what should be done and how to do it. The attorney should take responsibility for all legal functions in the implementation of the plan. If the attorney does not take responsibility for performing nonlegal functions, this should be clearly communicated to the client in writing.

If the client fails to follow the attorney's advice or decides not to implement the plan, this should also be discussed in writing with the client. For treatment of the malpractice considerations involved in the estate planning process and the implementation of the estate plan, see Chapter 13 of this manual.

I. [§1.29] Reviewing Plan

Each time the law affecting a client's estate plan changes materially, the attorney should advise the client of these changes. It is also advisable to suggest periodic reviews of the plan, even if the law has not changed, so that the client can take any financial or personal changes into account.

Attorneys may need to review simple plans once every five years or so, while more complex plans may warrant more frequent reviews. These follow-ups are a source of goodwill and a reminder to the client why he or she selected a conscientious attorney to plan the estate in the first place. Reviews may also serve as an excellent source of new business.