
SOUTHERN FEDERAL
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# FOUR WEEKS AND A FUNERAL: CONSIDERATIONS FOR THE TWO WEEKS BEFORE DEATH AND THE TWO WEEKS AFTER DEATH

By

Thomas D. Yates
Yates Campbell LLP
Fairfax, VA

Shane Kelley
Kelley & Kelley, P.L.
St. Augustine, FL

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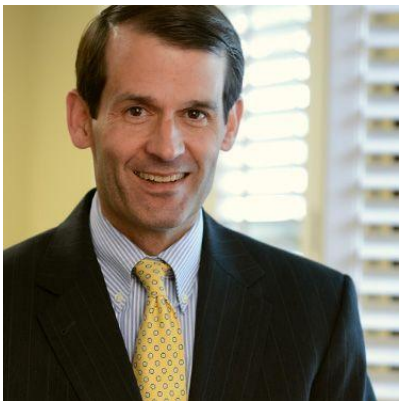
**SESSION V**



**Thomas D. Yates**
Yates Campbell LLP
4165 Chain Bridge Road
Fairfax, VA 22030
Direct dial: (703) 896-1160
tyates@yatescampbell.com

Tom is a partner at Yates Campbell LLP in Fairfax, Virginia. His practice concentrates on sophisticated estate planning and the administration of complex estates and trusts. Tom is a fellow of The American College of Trust and Estate Counsel where he currently serves as State Chair in Virginia and as a member of the Membership Committee in Virginia. He serves as Co-Chair of the Virginia Conner-Zaritsky Advanced Estate Planning and Administration annual seminar. He also serves as a member of the Legislative Committee of the Virginia Bar Association's Wills and Trusts and Estates Section where he formerly served as chair.

Tom has spoken at numerous continuing legal education seminars, including the University of Miami School of Law Heckerling Institute on Estate Planning, the American College of Trust and Estates Counsel National Meeting Professional Program and the Virginia Conner-Zaritsky Advanced Estate Planning and Administration seminars on various topics concerning estate planning and estate and trust administration.

**Shane Kelley**
Kelley & Kelley, P.L.
700 Plantation Island Drive South
Suite 206
St. Augustine, FL 32080
(904) 819-9706
shane@kelleyandkelley.com

Shane Kelley, a member of Kelley and Kelley, P.L., concentrates his practice in probate, trust and guardianship administration and litigation, and estate planning.

Mr. Kelley is Board Certified by The Florida Bar as a Wills, Trusts and Estates Lawyer. He is a member of the Real Property, Probate and Trust Law Section of The Florida Bar, served as the Chair of the Trust Law Committee and the Homestead Issues Study Committee and was also a past Chair of Probate Rules Committee of the Florida Bar. He is a Fellow of The American College of Trust and Estates Counsel, a prestigious national organization of recognized experts in the field of estate planning and probate law, and previously served as the State Chair for Florida. Mr. Kelley is also certified by the Florida Supreme Court as a Circuit Civil Mediator and mediates trust, estate and guardianship disputes.

Mr. Kelley graduated from the University of Colorado at Boulder in 1993. He earned his J.D. from Stetson University College of Law in 1995 and earned an LL.M. in taxation from the University of Florida, College of Law – Graduate Tax Program in 1999.

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Thomas D. Yates
Aejaz A. Dar
Yates Campbell LLP
Fairfax, Virginia

Ellis H. Pretlow
Bessemer Trust
Norfolk, Virginia

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## INTRODUCTION

This outline is concerned with the two weeks before and after a client's death. Despite those four weeks in total representing a short period of time, we have been in some sense overwhelmed by the number of issues, questions, and situations that can arise and that deserve consideration. In light of that, this outline could have easily turned into a voluminous estate planning and estate administration treatise even though the topic is just the four weeks surrounding a client's death; to prevent that, we have tried to strike the right balance by limiting the outline in a way so that it is practical, functional, and comprehensive.

The trusts and estates practice is a tax heavy practice, and tax-related planning is demonstrable and quantifiable value that practitioners can offer to their clients. We therefore cover issues and opportunities in the last two weeks of life with respect to the income, estate, gift, and GST tax. Despite our perspective as practitioners, though, tax planning may not always be the primary driver for clients, and so we cover issues in the last two weeks of life that touch on non-tax-related planning too.

Immediately after a client's death, the focus obviously pivots from planning to implementation. The outline accordingly pivots as well, and we discuss what can be done in the time prior to the qualification of a personal representative.

A connective thread that runs through the last two weeks of life and the first two after death is who has the authority to act and what authority do they have. Because the answers to those questions are of paramount importance, we analyze the ethics and legality of acting on behalf of another individual, the risks of doing so, and the scope of authority of those who can act.

Besides ethical or legal questions, practitioners may be confronted with atypical tricky or messy situations during this time. We also highlight those here.

All of that said, our goal with this outline is not just to identify the various issues, questions, and situations that can arise. We also want to offer suggestions that we believe will be helpful in serving your clients and achieving their objectives, whether tax-related or non-tax-related. We hope you find benefit in our work, now and in the future.

Please note that the authors are Virginia lawyers and our outline focuses upon Virginia law.

# I. ESTATE PLANNING TWO WEEKS BEFORE DEATH

## A. Introduction

In one sense it would be hard to imagine a more difficult estate planning situation than that posed by client's imminent death. From the point of view of client and client's family, the prospect of death is emotional and traumatic, full of sadness and, in many cases, uncertainties posed by pending changes. In these usually unsettled circumstances, the planner is challenged to take rapid but careful and decisive steps to design and implement client's final plan, obtaining in the process the best outcome.

Where client is dying, there is the burden of getting the plan right, for a mistake may have serious and sometimes immediate adverse consequences. In addition, much of the planning for the dying client is done in a limited time frame and thus requires instant action by the planner, including in many cases preparing legal documents at once. Finally, because diminished capacity may limit client's ability to participate in the process, the planner is often faced with difficulties in obtaining someone to provide accurate information, give authority to do the work, accept the risks and execute the documents.

From another perspective, in representing the dying client, the planner has the opportunity to fashion and fine-tune client's plan to fit client's final situation and objectives in light of the tax laws then in effect. The threat of death has a way of motivating people to get their affairs in order. In addition, in this scenario, the planner usually participates in carrying out the plan after client's death, which invites the planner to do pre-death planning with post-death administration in mind and positions the planner for the dying client in an advantageous position to make sure that all elements of the plan are successfully accomplished post-death.

It may be possible to fund revocable trusts right at the end of life whether by retitling or use of beneficiary designations. Of course, revocable trusts serve as the primary mechanism to avoid probate, which saves significant time and money for the family. The ability to implement such probate avoidance is dependent on the dying client's capacity, authority under powers of attorney and timing with third party financial institutions.

In this situation, the planner is in a position to serve as a key family advisor during a traumatic time of life while providing advice and counsel that can add significant value in terms of saving money and avoiding hassles. In the age of artificial intelligence and internet-based legal services such as Legal Zoom impacting the delivery and composition of trust and estate legal services, the lawyer's role as a trusted family advisor has never been more critical.

In the time period immediately before the death of a client, it may not be possible to accomplish any legal or tax planning due to lack of proper authorization and incomplete information as well as time constraints. Nevertheless, during this intense period of life for our clients and their families, we have the opportunity to serve and advise.

Given the breadth of this topic, this outline will cover a wide range of topics on a superficial level with the hope of identifying key issues for the lawyer/planner to focus on.

## B. Getting Access to Estate Planning Documents And Critical Information

As we analyze options for a dying client, we need to be sure that what we are doing is being authorized by the client, directly or indirectly, and that the client or someone on behalf of the client can sign whatever documents or changes to the documents that originate from the process. As part of this, the planning approaches, with attendant risks, must be explained and adopted. The client, or someone authorized to act for the client, must get on board.

Prior to undertaking end of life planning, we need to be familiar with the basic ethical rules relating to diminished capacity of clients and authorization to share information.

1. Clients with diminished capacity.

(a) Model Rules of Professional Conduct ("MRPC").

(i) MRPC Rule 1.14 Client With Impairment, states the following:

*(i) "when a client's capacity to make adequately considered decisions… is diminished…the lawyer shall, as far as reasonably possible, maintain a normal [] relationship with the client."*

*(ii) [where diminished client is at risk of financial or other harm] "the lawyer may take reasonably necessary protective action, including consulting with [others capable of taking action] to protect the client and [may even] seeking appointment of a guardian ad litem, conservator or guardian."*

*(iii) [when taking protective action pursuant to (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."*

(b) Lawyers appear to have implied authority to make limited disclosures, but only if they believe the client is at substantial risk of harm (financial or otherwise) and that doing so will protect the client.

(c) The comments to MRPC 1.14 state that "if the client has a legal representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client."

2. ACTEC Commentary

The American College of Trust and Estate Counsel commentaries to MRPC 1.14 expands upon these issues. (See discussion, infra, at II.B.2 and II.B.4 of estate administration outline).

(a) First, a lawyer should be authorized to discuss legal matters with third parties if possible.

(i) *"A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity."*

(ii) Pre-authorization is ideal whether in meeting notes, by letter or as specifically authorized in the general durable power of attorney.

(b) Second, if the client's capacity is under suspicion, the lawyer (of course) needs to act out of abundance of caution.

(i) *"A lawyer may properly assist a client whose capacity appears 'borderline.' In these 'borderline' circumstances, an attorney should preserve evidence of testamentary capacity."*

(ii) *"If there is a prior relationship, the lawyer should draw from the client's goals when he was lucid. If no notes/prior representation, by scrutinizing*

*existing documents and investigating the trajectory of the client's likely wishes (family planning) and best interests (tax planning)."*

(iii) Practitioners are advised to start at the lowest level (e.g., spouses, kids in close confidence) and take every measure to preserve the attorney-client privilege and confidential information at joint meetings.

(iv) The focus is on making inquiries. The lawyer should ask basic questions to determine whether client understands the instruments, asset values, and relationship to heirs and beneficiaries.

(c) Authorization to disclose information can come directly or indirectly. The legal representative, whether attorney-in-interest, guardian, trustee or conservator, for the dying client can provide such authorization.

(d) It is critical to determine who is the client – the dying individual or the legal representative? During the planning process, the prospects of actual and potential conflicts of interest have to be evaluated and monitored.

3. Critical Information

(a) The simple things matter, and accurate information is necessary to provide advice in order to accomplish the client's objectives and to provide value.

(b) The basic information needed to be reviewed by the lawyer includes existing Will, trusts, beneficiary designations, powers of attorney, powers of appointment, pre-marital agreements, marital agreements, divorce agreements, closely held business governing instruments (including buy-sell and transfer restrictions), health care documents, guardianship designations, funeral and burial declarations and HIPAA releases.

(c) As soon as feasible, the lawyer should obtain a family tree, a list of assets (including estimated values and basis of capital assets), list of liabilities (including whether the client is primary or secondary obligor or guarantor), title documents, recent entity tax returns and recent individual income tax returns. Often, complete information is not available in a timely manner.

(d) Further, it is critical to locate the original estate planning documents and obtain a list of contact information for the client's key advisors.

(e) An initial attempt should be made to gather passwords for digital assets, including bitcoin private key information, and to determine if a dying client has a safe deposit box, safe or storage unit. It is important to obtain an inventory of digital assets and to know who should be excluded from viewing such assets if so desired by the client.

(f) As part of the review of the above documents, the lawyer should master the testamentary dispositive plan, tax apportionment, abatement and fiduciary appointments.

(g) The planner should engage in a cash requirements planning in order to:

(i) quantify tax and non-tax cash needs both for pre-death time period and post-death time period;

(ii) identify sources of cash to meet needs;

(iii) insure that cash will be available in light of the particularity of the dispositive plan (beneficiary designations, form of ownership, testamentary documents);

(iv) develop strategies if estate/revocable trust is illiquid; and

(v) develop strategies if estate/revocable trust is insolvent.

(h) It is important to verify assets and liabilities along with ownership and beneficiary designations. Often clients and family members, particularly when ill or under pressure, are mistaken about how assets are titled and who is the named beneficiary.

(i) For liabilities, the planner should determine whether any loans come due at death. For instance, many commercial loans have due-on-death type clauses.

(j) For closely held business interests, the planner should ascertain whether a particular ownership interest may lose its right to vote (by disassociation) upon death and/or incapacitation of the member/partner.

## C. Access to Safe Deposit Boxes

1. Access During Life

(a) One Time Third-Party Access to Safe Deposit Box (if lessee not incapacitated or power of attorney in place—maybe?)

(i) Lessee of the Safe Deposit Box signs a One Time Access Authorization Form, which is a bank-specific form. A redacted version of one such form is attached hereto as **Exhibit A**.

(ii) The bank then supplies the authorized person with the box number and key, and the authorized person can schedule an appointment with the bank to access the safe deposit box

(iii) Bank manager verifies identity of the authorized person and then accompanies authorized person into the vault to access the safe deposit box. The authorized person is given time to privately look through the contents of the box and take whatever is desired (with no apparent restrictions on what can be taken out of the box unlike the statutory procedures provided for below).

(iv) Note: We have named a paralegal as the authorized person for an Estate with the out-of-state Executor authorizing the access as the safe deposit box lessee. Query whether this would work with agent under power of attorney authorizing another person to access the safe deposit box?

(b) Access upon incapacity of safe deposit box lessee:

(i) If power of attorney: Va. Code § 64.2-1629 explicitly allows an agent to, "enter a safe deposit box or vault and withdraw or add to the contents."

(ii) If no power of attorney, the person trying to gain access to the box needs a letter of incapacity of the lessee with specific knowledge or belief that person trying to gain access is named as agent under power of attorney or advance medical directive.

(c) Limited access to safe deposit box upon incapacity of lessee. Va. Code § 6.2-2303:

*A. Upon receiving a letter from a licensed physician that in his professional opinion an individual, who is the sole lessee of a box, is incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity:*

*1. To manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of another, the company may permit access to such box for the limited purpose of looking for a power of attorney executed by the lessee that relates to the management of his property or financial affairs; or*

*2. To meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of another, the company may permit access to the box for the limited purpose of looking for an advance medical directive executed by the lessee.*

*B. Such access shall only be granted to the lessee's guardian, conservator, spouse or next of kin or to a person asserting a knowledge or belief:*

*1. If the access is sought pursuant to subdivision A 1, that he is named as an agent in a power of attorney believed to be in the box; or*

*2. If the access is sought pursuant to subdivision A 2, that he is named as an agent in an advance medical directive believed to be in the box.*

*C. Access to a box shall be under the supervision of a designated officer or employee of the company, and nothing shall be removed from the box except (i) if the access is sought pursuant to subdivision A 1, the power of attorney for transmission to a person named as agent therein or (ii) if the access is sought pursuant to subdivision A 2, the advance medical directive for transmission to a person named as agent therein or in the absence of such a person, to the lessee's attending physician to be made a part of the lessee's medical records.*

*D. If the box is co-leased, the company may permit entry into the box by the same persons and under the same circumstances and terms as specified above, upon proof satisfactory to it that the then co-lessees are not reasonably available for access to the box.*

*E. The company shall (i) make a photocopy of any document removed from a box pursuant to this section, (ii) place the copy in the box prior to delivering the original to any person, and (iii) not be liable except for acting in bad faith or for permitting the removal of other items from the box.*

2. Following Death for Sole Purpose of Locating Will Prior to Qualification

(a) Limited access to safe deposit box upon death of lessee. Va. Code § 6.2-2302:

*A. Upon (i) the death of the sole lessee of a box or (ii) the death of a lessee of a box rented under the name of two or more persons upon proof satisfactory to the company that no then co-lessee is reasonably available for access to the box, the company may permit limited access to the box by*

*the spouse or next of kin of the deceased lessee, a court clerk, or other interested person for the limited purpose of looking for a will or other testamentary instruments.*

*B. The company may require proof of death as it deems necessary prior to permitting access to a box.*

*C. Access to a box shall be under the supervision of a designated officer or employee of the company, and nothing shall be removed from the box except the will or testamentary instrument for transmission to the appropriate clerk.*

*D. The company shall (i) make a photocopy of any document removed from a box pursuant to this section, (ii) place the copy in the box prior to delivering the original to any person, and (iii) not be liable except for acting in bad faith or for permitting the removal from the safe deposit box of items other than the will or other testamentary instrument of the deceased lessee.*

**D. Agent Acting Under Power of Attorney**

1. When a client is incapacitated and/or near death, using a power of attorney ("POA") can be the most efficient means of accomplishing tax and non-tax planning objectives and goals for the client. Although this outline is not intended to be a comprehensive discussion of POAs, there is a fair amount that is covered here nonetheless because of a POA's vast utility, the wide range of actions an agent can take pursuant to a POA, and the complexity and nuances of the statutory and caselaw (which can trip up not only agents but trusts and estates practitioners as well). To emphasize what we consider to be important points or salient features of the applicable law, we have bolded certain words.

2. Thirty-seven (37) states have enacted some form of the Uniform Power of Attorney Act (the "UPOAA"), and so the outline will make references to its sections.

3. The UPOAA does not apply however to the following:

   (a) "A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction." UPOAA § 103(1).

   (b) "A power to make a health-care decision." UPOAA § 103(2).

   (c) "A proxy or other delegation to exercise voting rights or management rights with respect to an entity." UPOAA § 103(3).

   (d) "A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose." UPOAA § 103(4).

4. Key definitions.

   (a) "Agent means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated." UPOAA § 102.

   (b) "Durable, with respect to a power of attorney, means not terminated by the principal's incapacity." Id.

(c) "Incapacity means inability of an individual to manage property or business affairs because the individual: (1) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (2) is missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return." Id.

(d) "Power of Attorney means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used." Id.

(e) "Principal means an individual who grants authority to an agent in a power of attorney." Id.

5. Key statutory issues and questions.

(a) Has the POA been executed with the proper formalities, and is it valid? Review UPOAA §§ 105 and 106 to confirm.

(b) Has the POA been executed with the requisite formalities so that it can be recorded? Review UPOAA § 105 and requisite state law to confirm.

(c) Is the POA durable? Under the UPOAA, a POA is durable unless it expressly states otherwise. UPOAA § 104.

(d) When is the POA effective? Namely:

(i) Is the POA effective immediately? Under the UPOAA, a POA is effective at the time it is executed unless it states that it becomes effective on a future date or upon the occurrence of a future event or contingency. UPOAA § 109.

(ii) Is the POA effective on a future date?

(iii) Is the POA effective on a future event or contingency?

(a) What is the future event or contingency?

(b) Who determines whether the future event or contingency has occurred? Under the UPOAA, the principal may authorize one or more persons to determine whether the future event or contingency has occurred. UPOAA § 109.

(c) If, however, the future event or contingency is whether the principal is incapacitated, there is a sequential order of who makes that determination. First, the person who has been authorized to make the determination by the principal in the POA. UPOAA § 109(C). Second, if the principal has not authorized any person to make the determination or if such person is unable or unwilling to make the determination, then the determination is made by either:

- the principal's attending physician and a second physician or licensed clinical psychologist after personally examining the principal; or

- an attorney-at-law, a judge or an appropriate governmental official. Id.

(d) A determination of the principal's incapacity by either (1) the principal's attending physician and a second physician or licensed clinical psychologist or (2) an attorney-at-law, a judge, or an appropriate governmental official must meet the subdivision 1 definition of incapacity in UPOAA § 102(5)(B). Id.

(e) If the principal has authorized a person to determine whether the principal is incapacitated, such person is the principal's personal representative for purposes of HIPAA. UPOAA § 109(D).

(e) Is the POA being held in escrow?

(i) The principal might have instructed a third-party to hold onto the POA until either the principal directed the third-party to release the POA to the agent or the occurrence of a future event or contingency, at which time the third-party was to release the POA to the agent.

(f) What authorities have been granted by the principal to the agent under the POA, and what is the scope of those authorities?

(i) The following authorities are known as "hot powers" because they must be expressly granted by the principal in order for the agent to exercise them:

(a) "Create, amend, revoke, or terminate an inter vivos trust";

(b) "Make a gift";

(c) "Create or change rights of survivorship";

(d) "Create or change a beneficiary designation";

(e) "Delegate authority granted under the power of attorney";

(f) "Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan";

(g) "Exercise fiduciary powers that the principal has authority to delegate"; and

(h) "Exercise authority over the content of electronic communications, as defined in 18 U.S.C. Section 2510(12) [as amended,] sent or received by the principal;" and

(i) "Disclaim property, including a power of appointment." UPOAA § 201.

(ii) A "do all acts that the principal could do" grant of authority by the principal to the agent grants to the agent all of the authorities under UPOAA §§ 204 through 216. UPOAA § 201(c).

**Note:** Language saying that the agent can do all acts that the principal could do does also grant to the agent the authority to make gifts, but only gifts that conform with the requirements of UPOAA § 217.

(iii) Even if the agent has been granted hot powers under UPOAA § 201 or has the authority to make gifts under UPOAA § 217, the exercise of those hot powers or the exercise of that authority may be nonetheless circumscribed due to how the agent is related to the principal. "Notwithstanding a grant of authority to do an act described in subsection (a), unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise." UPOAA § 201(b).

(iv) The UPOAA groups authorities under rubrics, to wit: real property (§ 204); tangible personal property (§ 205); stocks and bonds (§ 206); commodities and options (§ 207); banks and other financial institutions (§ 208); operation of entity or business (§ 209); insurance and annuities (§ 210); estates, trusts, and other beneficial interests (§ 211); claims and litigation (§ 212); personal and family maintenance (§ 213); benefits from governmental programs or civil or military service (§ 214); retirement plans (§ 215); taxes (§ 216); and gifts (§ 217).

(v) A principal can incorporate authorities by reference. Namely, if the POA refers to the descriptive term identifying the particular rubric or cites to the applicable statute for the particular rubric, the entirety of the rubric and all of the authorities granted thereunder are incorporated into the POA. A principal may modify however any authorities incorporated by reference. UPOAA § 202(c).

(vi) The UPOAA has a layered approach when the authority to make gifts is granted. **Remember:** An agent has the authority to make gifts when the principal does one or more of the following: makes an express grant of the same, says that the agent can do all acts that the principal could do, refers to the rubric titled "gifts" under the UPOAA, and/or cites to UPOAA § 217 (which is the statute for the "gifts" rubric).

(a) The principal can customize the gifting authority.

(b) Any grant of authority to make gifts is subject to UPOAA § 217 unless the POA states otherwise. UPOAA § 201(d).

(c) Because UPOAA § 217 can have a critical bearing on the scope of the agent's gifting authority, it is fully reproduced here:

*"A. In this section, a gift 'for the benefit of' a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act (1983/1986), and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code Section 529, 26 U.S.C. Section 529 [, as amended].*

*B. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:*

*1. Make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under I.R.C. § 2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to I.R.C. § 2513, as amended, in an amount per donee not to exceed twice the annual gift tax exclusion limit; and*

*2. Consent, pursuant to I.R.C. § 2513, as amended, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusion for both spouses.*

*C. An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:*

*1. The value and nature of the principal's property;*

*2. The principal's foreseeable obligations and need for maintenance;*

*3. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;*

*4. Eligibility for a benefit, a program, or assistance under a statute or regulation; and*

*5. The principal's personal history of making or giving in making gifts."*

**Note**: Virginia's modifications to the UPOAA have slightly different consequences than the UPOAA when it comes to gifting because the authority to make gifts pursuant to the "do all acts that the principal could do" language is not subject to Va. Code § 64.2-1638 (UPOAA § 217) unless the POA states that it is. Va. Code § 64.2-1622(C) & (H).

(vii) The rubric titled "estates, trusts, and beneficial interests", which appears at UPOAA § 211, enables and authorizes the agent, in relevant part, to "exercise for the benefit of the principal a presently exercisable general power of appointment" and to "transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor". UPOAA § 211(b).

(viii) The rubric titled "personal and family maintenance", which appears at UPOAA § 213, allows and authorizes the agent, in relevant part, to:

i. *"perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born: (a) the principal's children; (b) the individuals legally entitled to be supported by the principal; and (c) the individuals whom the principal has customarily supported or indicated the intent to support;"* UPOAA § 213(a)(1).

ii. *"provide living quarters for the individuals described in [UPOAA § 213(a)(1)] by: (a) purchase, lease, or other contract; or (b) paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;"* UPOAA § 213(a)(3).

iii. *"provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in [UPOAA § 213(a)(1)];"* UPOAA § 213(a)(4).

iv. *"pay expenses for necessary health care and custodial care on behalf of the individuals described in [UPOAA § 213(a)(1)];"* UPOAA § 213(a)(5).

v. *"act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, §§ 1171 through 1179 of the Social Security Act, 42 U.S.C. § 1320d, as amended, and applicable regulations, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;"* UPOAA § 213(a)(6).

vi. *"continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in [UPOAA § 213(a)(1)];"* UPOAA § 213(a)(7).

vii. *"maintain credit and debit accounts for the convenience of the individuals described in [UPOAA § 213(a)(1)] and open new accounts;" UPOAA § 213(a)(8); and*

viii. *"continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations."* UPOAA § 213(a)(9).

**Note:** The authorities the agent has under this rubric are not affected by whether the principal has granted to the agent the authority to make gifts. UPOAA § 213(b). **In other words, the agent can make the payments authorized under the "personal and family maintenance" rubric even though the agent has not been otherwise authorized by the principal to make gifts, and such payments are not subject to, and therefore not**

**constrained by, the limitations or conditions contained in UPOAA § 217.**

(ix) The rubric titled "benefits from governmental programs or civil or military service", which appears at UPOAA § 214, enables and authorizes the agent, in relevant part, to "prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation", and "receive the financial proceeds of [such a] claim and conserve, invest, disburse, or use for a lawful purpose anything so received." UPOAA § 214.

(x) The rubric titled "retirement plans", which appears at UPOAA § 215, enables and authorizes the agent, in relevant part, to "select the form and timing of payments under a retirement plan and withdraw benefits from a plan." UPOAA § 215.

**Note**: The rubric does not expressly authorize the agent to make a Roth conversion.

(xi) The rubric titled "taxes", which appears at UPOAA § 216, enables and authorizes the agent to:

*i.* *"prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under I.R.C. § 2032A, as amended, closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following 25 tax years;"*

*ii.* *"pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;"*

*iii.* *"exercise any election available to the principal under federal, state, local, or foreign tax law;" and*

*iv.* *"act for the principal in all tax matters for all periods before the Internal Revenue Service or other taxing authority."* UPOAA § 216.

**Note:**

- This rubric arguably allows the agent to make a Roth conversion.
- Review Treas. Reg. § 601.503, paragraphs (a), (b), and (c) in particular, to understand the interaction between a POA and Form 2848 and the IRS's procedural requirements when an agent is attempting to handle tax matters on behalf of a principal.
- For example, the IRS will accept a POA if (1) the principal has granted the authority under the "taxes" rubric to the agent and/or authorized the agent to do all acts that the principal could do, (2)

a completed Form 2848 with the principal's information as the taxpayer is attached to the POA, and (3) a statement executed by the agent under penalty of perjury is attached to the Form 2848 confirming the POA is valid under Virginia law.

(xii) A POA that says that the agent can do all acts that the principal could do and/or incorporates authorities by reference also grants to the agent the incidental authorities under UPOAA § 203. These incidental authorities are presumably necessary for the agent to exercise effectively the authorities granted to the agent.

(xiii) In the event any authorities granted to the agent are similar to or overlap with one another, the authority that is the broadest controls. UPOAA § 201(E).

(g) What duties does the agent owe to the principal?

(i) The following are non-waivable under the UPOAA:

(a) To "act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;"

(b) To "act in good faith;" and

(c) To "act only within the scope of authority granted in the power of attorney." UPOAA § 114(a).

(ii) The following are waivable under the UPOAA:

(a) To "act loyally for the principal's benefit;"

(b) To "act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;"

(c) To "act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;"

(d) To "keep a record of all receipts, disbursements, and transactions made on behalf of the principal;"

(e) To "cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and otherwise act in the principal's best interest;" and

(f) To "attempt to preserve the principal's estate plan, to the extent **actually** known by the agent, **if preserving the plan is consistent with the principal's best interest based on all the relevant factors**, including: (a) the value and nature of the principal's property; (b) the principal's foreseeable obligations and need for maintenance; (c) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (d)

eligibility for a benefit, a program, or assistance under a statute or regulation." UPOAA § 114(b).

(iii) Review the POA to confirm which of the agent's duties the principal has waived.

(iv) **Note:** "An agent that acts with care, competence, and diligence for the best interest of the principal is **not** liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal." UPOAA § 114(d).

(h) What is the relationship between the agent and a court-appointed fiduciary for the principal? "If, after a principal executes a power of attorney, a court appoints a conservator or guardian of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is **not** terminated and the agent's authority continues unless limited, suspended, or terminated by the court." UPOAA § 108.

(i) What if the POA is not accepted by an institution? Review and consider the remedies available under the various alternatives of UPOAA § 120.

6. Caselaw: Federal and Virginia.

(a) Although a POA is primarily a statutory creature, the common law continues to have relevance to the extent the UPOAA does not speak to or address a particular issue or matter. UPOAA § 121. The following cases are some of the more significant ones that have dealt with the authorities granted to an agent under a POA.

(b) Estate of Casey v. Comm'r, T.C. Memo. 1989-511, rev'd, 948 F.2d 895 (4th Cir. 1991).

(i) **Note:** Casey was decided before the enactment of the UPOAA and is a federal judicial decision.

(ii) The power of attorney did not expressly grant to the agent the authority to make gifts or to convey or transfer property without consideration or value in return.

(iii) The power of attorney did authorize, though, the agent "to transact all of my business and to do and perform all things and acts relating to my property, real, personal or mixed, which I might do," and "to do, execute and perform all and every other act or acts, thing or things as fully and to all intents and purposes as I myself might or could do if acting personally, it being my intention by this instrument to give my attorney hereby appointed, full and complete power to handle any of my business or to deal with any and all of my property of every kind and description, real, personal, or mixed, wheresoever located and howsoever held, in his full and absolute discretion."

(iv) The agent made gifts of the principal's property to various individuals and entities, including the agent, and released the principal's dower interest when joining in gifts made by the principal's husband.

(v) After the principal's death, a federal estate tax return was filed, and the gifts were not included in the gross estate.

(vi) The Tax Court held that transfers made by the agent were completed gifts "based on the broad grant of authority in the power of attorney itself and on the particular circumstances under which it was granted, as well as [the principal's] established pattern of giving . . . ."

(vii) The Fourth Circuit reversed on appeal, refusing to infer that the principal had granted to the agent an implied power to make gifts. Because the agent accordingly did not have the authority to make gifts of the principal's property under Virginia law, the transfers were void and therefore includible in the principal's gross estate pursuant to I.R.C. § 2038.

(c) Estate of Ridenour v. Comm'r, T.C. Memo. 1993-41, aff'd, 36 F.3d 332 (4th Cir. 1994).

(i) **Note:** Ridenour was likewise decided before the enactment of the UPOAA and is a federal judicial decision.

(ii) Under the power of the attorney, the principal granted to the agent the authority "to do, execute and perform all and every act, matter and thing, in law or in the judgment of [the agent] needful or desirable to be done in relation to all or any part of [the principal's] property, estate, affairs, and business of any kind or description, as fully and amply, and with the same effect, as [the principal] might or could do if acting personally."

(iii) The principal also granted certain specific authorities to the agent, but this grant was not intended to limit in any way the authority quoted above.

(iv) The principal had a history of making gifts for tax-related reasons.

(v) The agent made gifts totaling $85,000 to various individuals related to the principal, including the agent. The purpose of the gifts was, in part, to reduce the value of the gross estate and therefore, in turn, reduce the amount of estate tax due.

(vi) After the principal's death, a federal estate tax return was filed, and the $85,000 in gifts were not included in the gross estate.

(vii) The Tax Court held that the gifts were not includible in the gross estate because they were not revocable under Virginia law.

(viii) The Fourth Circuit upheld the Tax Court's decision and, in so doing, harmonized its decision here with its decision in Casey.

(a) "Casey . . . stands for the proposition that to infer an implied gift power, the court must look to the intent of the person granting the power of attorney.

(b) While we found that the instrument and circumstances involved in Casey did not indicate the principal's intent to confer a gift power on the attorney-in-fact, the evidence does support such an intent in the present case." 36 F.3d at 334.

(c) "Furthermore, we found in Casey that the principal's pattern of making gifts did not support an intent to confer a gift power on the attorney-in-fact. . . . These circumstances are clearly distinguishable from Ridenour's case." Id. at 334, 335.

(d) "Looking at the complete text of the instrument and circumstances surrounding its execution, we can infer that [the principal] intended to permit [the agent] to make gifts as [the principal] would do personally." Id. at 335.

(d) Jones v. Brandt, 274 Va. 131 (2007).

(i) **Note:** Jones was decided before the enactment of the UPOAA.

(ii) At the oral direction of the principal, the agent changed the payable on death designation for a certificate of deposit so that the executrix appointed under the principal's last will and testament was named as the beneficiary.

(iii) The Virginia Supreme Court upheld the agent's action even though the power of attorney did not expressly grant to the agent the authority to change a payable on death designation for a certificate of deposit and despite the principle of construction that powers of attorney are to be strictly construed.

(a) The Virginia Supreme Court viewed the agent's action as not the exercise of the authority to make a gift but rather the exercise of the authority to contract on behalf of the principal.

(b) "We are of opinion that . . . the principal, sufficiently expressed the intent to authorize . . . the attorney-in-fact, to make a change in the beneficiary designation under the provisions . . . of the power of attorney when those provisions are considered in concert." Id. at 138.

(iv) The Virginia Supreme Court distinguished Casey by saying that the change in the payable on death designation transferred only an expectancy and not an actual interest.

(e) Reineck v. Lemen, 292 Va. 710 (2016).

(i) Under the power of attorney, the principal granted to the agent:

(a) general authority that was broadly applicable (read: do all acts that the principal could do);

(b) general authority that was tied to the principal's IRA (read: do all acts that the principal could do with respect to the IRA);

(c) specific authority to perform certain actions with respect to any revocable trust created by the principal; and

(d) specific authority to create inter vivos trusts for the principal's benefit and the benefit of the principal's descendants.

(ii) The principal did **not** expressly grant to the agent specific authority to change the beneficiary designation for the IRA.

(iii) Pursuant to the power of attorney, the agent altered the principal's estate plan by creating new trusts for the benefit of the agent and the agent's sibling, transferring approximately $1,240,000 of the principal's assets to the new trusts, and changing the beneficiary designation of the principal's IRA to name the agent and the agent's sibling as the beneficiaries.

(iv) The Virginia Supreme Court held that all of the agent's actions were within the scope of the various authorities granted by the principal – including the change to the beneficiary designation for the IRA – and thus not ultra vires. It appears that this holding is inconsistent with the language of Va. Code § 64.2-1622, which says that hot powers, such as the authority to change a beneficiary designation, must be expressly granted. Under this holding, a grant of authority whereby the agent is authorized to do all acts that the principal could do may be sufficient to grant the agent one or more hot powers.

(v) **Caveat:** It is our opinion that trusts and estates practitioners should not rely on this holding alone as a sufficient reed for the argument or position that the principal has granted hot powers to the agent.

(f) Davis v. Davis, 298 Va. 157 (2019).

(i) Under a power of attorney executed in September 1993, the principal (who was the agent's son) granted to the agent (who was the principal's mother) the power to "transact for [the principal], in [the principal's name], place and stead, all business for [the principal] that [the principal] could do if acting personally; to endorse checks, write checks, make deposits in banks or other financial institutions . . . to receive any monies due [to the principal] and receipt for the same, to renew any savings account, certificate of deposit or other time deposit; **to sell and convey any and all personal property and all real property** [the principal] may own and execute and deliver an instrument for the same; . . . and **to execute and perform all and every act or acts**, thing or things in law needful and necessary to be done in about [the principal's] affairs, as fully, largely and amply, and **to all intents and purposes whatsoever as [the principal] might or could do if acting personally** . . . ". Id. at 163.

(ii) The principal executed a last will and testament in April 2005. At the time of its execution, the agent was unaware of both its existence and its contents.

(iii) In 2008, the agent became aware of the existence of the principal's last will and testament but did not know its contents.

(iv) The principal married in October 2013. The agent learned of the marriage soon thereafter.

(v) In October 2013, after both the principal's marriage and the agent's knowledge of the same, the agent transferred most of the principal's personal property to herself and transferred all of the principal's real

property to the principal's two siblings (who were also the agent's children). The agent did not inform the principal of these transfers.

(vi) The principal died in November 2013.

(vii) For the following reasons, the Wythe County Circuit Court held that agent had the authority to make the transfers and hence they were all valid:

(a) First, the "sell and convey" language in the power of attorney was sufficient to authorize the agent to make gifts of the principal's property.

(b) Second, the grant of general authority in the power of attorney, coupled with Va. Code § 64.2-1622(H), authorized the agent to make gifts in accordance with the principal's history of making gifts, and the transfers were in accordance with such history.

(viii) The Wythe County Circuit Court held as well that the limitation in Va. Code § 64.2-1638(B)(1) did not apply to the agent's authority to make gifts in accordance with the principal's history of making gifts.

(ix) The Virginia Supreme Court reversed the Wythe County Circuit Court on appeal.

(a) First, because the authority to make gifts is a hot power, and a hot power must be expressly granted according to § 64.2-1622(A), the "sell and convey" language was to have been strictly construed, and such language "d[id] not include the authority to make gifts or transfers for inadequate consideration." Id. at 169. (**Note:** The Virginia Supreme Court did not reconcile the foregoing with its decision in Reineck).

(b) Second, the transfers were not in accordance with the principal's history of making gifts.

- "When making a Code § 64.2-1622(H) determination concerning whether gifts given by an attorney-in-fact pursuant to a power of attorney are in accordance with the principal's personal history of making or joining in the making of lifetime gifts, a circuit court must compare the factual similarities between the principal's prior lifetime gifts and the gifts made by the attorney-in-fact. **The factors the court should consider to determine if the attorney-in-fact's gifts are in accord with the principal's prior lifetime gifts may include, but are not limited to, the purpose, nature, frequency, amount, and recipients of the principal's prior lifetime gifts compared to the gifts made by the attorney-in-fact.**" Id. at 173.

- "The nature, amount, purpose, and timing of the gifts made by [the agent] makes her transfers akin to testamentary gifts, rather than 'lifetime gifts' as contemplated by Code § 64.2-1622(H)." Id. at 175.

7. Key federal tax law issues and questions.

(a) Plainly, a POA can facilitate and effectuate a number of planning opportunities for the client. The following is a discussion of some of those opportunities when transfer taxes are a primary consideration (and the concomitant hazards trusts and estates practitioners should be aware of).

(b) If the requisite authority has been granted:

(i) Consider making gifts that qualify for the annual exclusion under I.R.C. § 2503(b). (See discussion, infra, at I.H.2)

(a) For 2025, the annual exclusion amount, as adjusted for inflation, is $19,000 per donee in each calendar year.

(b) The number of donees to whom an annual exclusion gift can be made is unlimited.

(c) In order for a gift to qualify for the annual exclusion, it must be a gift of a present interest. I.R.C. § 2503(b)(1); Treas. Reg. § 25.2503-3(a). A present interest is "an unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain)." Treas. Reg. § 25.2503-3(b). A gift of a future interest is therefore not eligible for annual exclusion treatment. A future interest "includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time." Treas. Reg. § 25.2503-3(a).

(d) Intermediaries cannot be used to increase the number of annual exclusion gifts to a donee. Heyen v. U.S., 945 F.2d 359 (10th Cir. 1991).

(e) A gift that qualifies for the annual exclusion:

- Should also be exempt from the GST tax, provided it was a direct skip, but if it was not a direct skip, will need to satisfy additional requirements in order to be exempt from the GST tax; I.R.C. § 2642(c); and

- should not be includible in the principal's gross estate, even if it was made from the principal's revocable trust, provided the principal was treated as the owner of the revocable trust under I.R.C. § 676 at the time the gift was made; See I.R.C. § 2035(c)(3) & (e).

(ii) Prior to the enactment of I.R.C. § 2035(e), there were a number of IRS rulings and court decisions that addressed whether annual exclusion gifts made from a donor's revocable trust within three years of the donor's date of death were includible in the donor's gross estate under I.R.C. §§ 2035 and 2038. The question at the heart of those rules and cases was whether the annual exclusion gifts represented relinquishments of the power to

revoke. With the enactment of I.R.C. § 2035(e), the application of those rulings and decisions has been largely precluded because annual exclusion gifts from a revocable trust are treated as having been made directly by the donor. **Remember:** The availability of § 2035(e) treatment is dependent on the donor being considered the owner of the revocable trust for income tax purposes under I.R.C. § 676. **Caveat:** If the trustee of a revocable trust does not have the power to make gifts or payments to third-parties, the grantor is deemed to have exercised the power to withdraw assets from the revocable trust and to have made the gifts or payments directly. Estate of Jalkut v. Comm'r, 96 T.C. 675 (1991). If the grantor of a revocable trust is incapable of exercising the power to withdraw assets though, gifts or payments made by the trustee of the revocable trust to third-parties are characterized as relinquishments under I.R.C. § 2038 and therefore includible in the grantor's gross estate. Id.

(iii) Consider making payments that qualify for treatment under I.R.C. § 2503(e). (See discussion, infra, at I.H.3) Namely:

(a) "Any amount paid on behalf of an individual as tuition to an educational organization described in section 170(b)(1)(A)(ii) for the education or training of such individual" does not constitute a gift for gift tax purposes. I.R.C. § 2503(e)(2)(A).

(b) "Any amount paid on behalf of an individual to any person who provides medical care (as defined in section 213(d)) with respect to such individual as payment for such medical care" does not constitute a gift for gift tax purposes. I.R.C. § 2503(e)(2)(B).

(c) Payments made pursuant to I.R.C. § 2503(e), whether for tuition or medical care, can be unlimited in amount, do not count against the annual exclusion but rather are additional, Treas. Reg. § 25.2503-6(a), may be made from a revocable trust, See I.R.C. § 2035(e), are "excluded in determining the total amount of gifts in a calendar year", Treas. Reg. § 25.2503-6(a), and are exempt from the GST tax, I.R.C. § 2642(c).

(d) The relationship between the principal and the donee is immaterial. Treas. Reg. § 25.2503-6(a).

(iv) Consider making a gift to a 529 Qualified Tuition Program account. A gift to a 529 Qualified Tuition Program account qualifies for the annual exclusion. See I.R.C. § 529(c)(2)(A)(i). (See discussion, infra, at I.H.2(d))

(v) Consider making a gift to a 529A Qualified ABLE Program account. A gift to a 529A Qualified ABLE Program account qualifies for the annual exclusion. See I.R.C. § 529A(c)(2)(A)(i). (See discussion, infra, at I.H.2(e))

(vi) **Note:** If the principal's spouse is not a U.S. citizen, any gift to the spouse will not qualify for the unlimited gift tax marital deduction. (See discussion, infra, at I.H.2(c))

(vii) Does the authority to make gifts constitute a general power of appointment? Although the law is unclear, it is nonetheless prudent for trusts and practitioners to give due consideration to this question.

(a) Review the POA to confirm whether it contains any applicable carve back or savings provision, such as an ascertainable standard or the ability to appoint a special or independent agent. **Note:** The UPOAA does not have any carve backs or savings provisions that would apply by default or as gap fillers. Furthermore, if the POA was deemed to constitute a power of appointment, the POA would presumptively be a general power of appointment.

(b) Analyze the authority to make gifts under federal transfer tax law.

- "The term 'general power of appointment' means a power which is exercisable in favor of the individual possessing the power . . . , his estate, his creditors, or the creditors of his estate." I.R.C. § 2514(c).

- The substance – and not the form – of the power matters. Treas. Reg. § 25.2514-1(b)(1) ("The term 'power of appointment' includes all powers which are in substance and effect powers of appointment received by the donee of the power from another person, regardless of the nomenclature used in creating the power and regardless of local property law connotations.").

- A power **limited by an ascertainable standard** is not a general power of appointment. I.R.C. § 2514(c)(1).

- A power created after October 21, 1942 that is exercisable **only in conjunction with the person who created the power** is not a general power of appointment. I.R.C. § 2514(c)(3)(A).

- A power created after October 21, 1942 that is exercisable **only in conjunction with a person who has a substantial interest in the property which is subject to such power and whose interest is adverse to the exercise of the power in favor of the powerholder** is not a general power of appointment. I.R.C. § 2514(c)(3)(B).

- **Note:** A POA that is revocable by the principal may not necessarily mean that the agent's authority to make gifts is exercisable in conjunction with the principal. See GCM 37428 (1978).

(c) Does the agent possess any incidents of ownership over any life insurance policies where the agent is the insured? If the principal owns a policy insuring the agent and the agent can exercise authorities granted under the POA with respect to such policy for the agent's personal benefit, it is arguable that the agent possesses incidents of ownership over such policy. See Rev. Rul. 84-179, 1984-2 C.B. 195.

**E. Access to Digital Assets**

1. Forty-Seven (47) states have enacted some form of the Revised Fiduciary Access to Digital Assets Act (the "RUFADAA"), and so the outline will make references to its sections. For a through discussion of an Agent's powers over digital assets and communication under a power of attorney, see Hook, 859-3rd T.M.P., Durable Powers of Attorney, Detailed Analysis, B. Revised Uniform Fiduciary Access to Digital Assets Act.

2. There is a difference in the UPOAA and RUFADAA sections relating to disclosure of electronic communications of the principal versus disclosure of other digital assets of the principal. Disclosure of electronic communications requires an express grant of authority in a power of attorney (UPOAA §201 and RUFADAA § 9), while disclosure of digital assets only requires a general grant of authority to the agent to be able to act for the principal.

3. Disclosure of electronic communications of principal. RUFADAA § 9:

*To the extent that a power of attorney **expressly grants** an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:*

*1. A written request for disclosure in physical or electronic form;*

*2. An original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;*

*3. A certification by the agent that the power of attorney is in effect; and*

*4. If requested by the custodian:*

*a. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or*

*b. Evidence linking the account to the principal.*

4. Disclosure of other digital assets of principal. RUFADAA § 10:

*Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalog of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:*

*1. A written request for disclosure in physical or electronic form;*

*2. An original or copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;*

*3. A certification by the agent that the power of attorney is in effect; and*

*4. If requested by the custodian:*

*a. A number, username, address, or other unique subscriber or account identifier*

*assigned by the custodian to identify the principal's account; or*

*b. Evidence linking the account to the principal.*

5. Interestingly, RUFADAA specifically imposes fiduciary duties on the fiduciary accessing and managing digital and electronic property in the same way that a fiduciary is bound by fiduciary duties in managing tangible property. RUFADAA § 15.

6. Suggested language for "Specific Grant" in power of attorney:

*In addition to the foregoing powers, I grant to my Agent the specific powers set forth below:*

*To have authority over the content of my electronic communication as provided by Sections 64.2-123 and 64.2-124 of the Virginia Code, which authority shall include, but shall not be limited to the power to access, use, and control my digital devices, including, without limitation, desktops, laptops, tablets, peripherals, storage devices, smartphones, cell phones, and any similar digital device or comparable items that currently exist or may exist as technology develops, for the purpose of accessing, modifying, deleting, controlling, or transferring my digital devices, and to access, modify, delete, control, and transfer my digital assets, catalog of electronic communications, and content of electronic communications, including, without limitation, my emails, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, online store accounts, online service providers, online service provider accounts, affiliate programs, other online accounts, and similar digital or comparable items that currently exist or may exist as technology develops; and the power to access the content of all electronic communications as defined in the Virginia Code.*

Modified from Gerry W. Beyer & Kerri G. Nipp, Practical Planning for Digital Assets and Administration of Digital Assets by Fiduciaries, Tax Mgmt. Est., Gifts & Trusts J. (Jan. 11, 2018).

OR

*By this document, I hereby authorize and consent for any person or entity that has possession, custody or control over any electronically stored information or digital assets wherein I have a property right or interest, or that provides an electronic communication service, a remote communication service, a storage service, whether public or private, to release and disclose to my personal representatives (a) any electronically stored information, (b) the contents of any communication that is in electronic storage by that service or that is carried or maintained on that service, (c) any record or other information pertaining to me with respect to that service. It is my intention that this authorization and consent is to be construed as broadly as possible to allow my personal representative under this document to have the access and use of information described above. I intend for my personal representative to include a trustee of my revocable trust, a trustee of a trust appointed under my will, an attorney in fact (agent) acting under a power of attorney document, a guardian or conservator appointed for me, the personal representative or executor of my estate or other representative created by operation of law. This authorization and consent is to be construed to be my lawful consent under the Electronic Communications Privacy Act of 1986, as Amended; the Computer Fraud and Abuse Act of 1986 as amended; and any other applicable federal or state data privacy or criminal law. This authorization is effective immediately. Unless I revoke this authorization in writing while I am competent, this authorization continues to be effective during any period that I am incapacitated and continues to be effective after my death. Unless a person or entity has received actual notice that this authorization has been validly revoked by me, that person or entity receiving this authorization may act in reliance on the presumption that it is valid and unrevoked and that person or entity is released and held harmless by me, my heirs, legal representatives, successors, assigns from any loss suffered or liability incurred for*

*acting according to this authorization. A person or entity may accept a copy or facsimile of this original authorization as though it were an original document.*

Hook, 859-3rd T.M.P, *Durable Powers of Attorney,* Detailed Analysis, B. Revised Uniform Fiduciary Access to Digital Assets Act; fn 142.11.

7. Innumerable issues exist for a fiduciary navigating the digital world, especially as it relates to conflict between the access allowed a fiduciary under RUFADAA and the restrictions of user agreements that a principal may have entered into and the intersection of issues of federal and state law in this area. See e.g., Gerry W. Beyer, Cyber Estate Planning and Administration, The Conner-Zaritsky 41st Annual Advanced Estate Planning and Administration Seminar (2020).

8. A note on cryptocurrency

   (a) In the world of cryptocurrency, an individual's "private key" allows access to an individual's cryptocurrency and without it, can mean loss of the asset entirely. See story of CEO who passed away without leaving the private key to cryptocurrency resulting in the company losing $137 Million in cryptocurrency. https://www.wired.com/story/crypto-exchange-ceo-dies-holding-only-key/.

   (b) For Bitcoin (currently the most commonly used form of cryptocurrency), a private key is a 256-bit number that can be represented several ways, but is oftentimes expressed in 64 A-F and 0-9 characters. Private keys are usually not handled by the Bitcoin owner or user—instead, the user typically is given a seed phrase that encodes the same information as a private key. The seed phrase is a list of words that stores all of the information needed to recover the Bitcoin chain, and is usually generated by Bitcoin wallet software and given to the user as a backup recovery for the bitcoin wallet. For more information, see https://bitcoinbriefly.com/ultimate-guide-to-bitcoin-wallets-seeds-private-keys-public-keys-and-addresses/#:~:text=Your%20seed%20phrase%20is%20a,generate%20a%20corresponding%20public%20key.

   (c) Recommendation to specifically include a provision in power of attorney if your client has cryptocurrency:

*In addition to the foregoing powers, I grant to my Agent the specific powers set forth below:*

*To specifically handle on my behalf any of my "cryptocurrency," defined for purposes of this instrument as digital assets that are exchanged electronically and based on a decentralized network or exchange, with such exchanges not requiring a reliable intermediary and managed using distributed ledger technology. In broad terms I give my agent under this instrument the power to accept or pay on my behalf any cryptocurrency, digital asset currency, funds, or other value that substitutes for currency from one person to another person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means. The above term "other value that substitutes for currency" encompasses situations in which the transmission does not involve the payment or receipt of cryptocurrency, but does include, but is not limited to, my private and public keys, blockchain and ledger information, bitcoins, bitcoin addresses, and any other cryptocurrency user or account data or information related to such transactions or to any convertible currency related thereto on my behalf. My intent also is that my reference to "cryptocurrency" under this paragraph be read together as broadly as possible in the context of my reference to electronic communications content and the definition of "digital assets" under section 64.2-116 of the Virginia Code.*

Modified suggested language taken from James M. Kane Legal Blog:
https://jameskanelegalblog.wordpress.com/2019/08/06/cryptocurrency-and-digital-assets/.

**F. Funded Revocable Trusts**

Oftentimes, a client has funded his or her revocable trust with some or all of his or her assets during his or her lifetime and is the sole trustee of the revocable trust. In that instance, the client's agent acting under a POA may have no control or authority over the client's assets that are titled in the name of the revocable trust and thus relatively little control over the principal's assets as a whole. This section of the outline addresses a successor trustee's power and authority acting as trustee of a revocable trust while the grantor is still alive but is incapacitated and the intersection of a successor trustee's powers with an agent acting under a POA. In addition, this section considers steps that can be taken to prevent issues that may arise in the face of a client's incapacity and obstacles to the successor trustee stepping into that role.

1. Authority of Successor Trustee

Uniform Trust Code ("UTC") § 1012. Protection of person dealing with trustee (Excerpts).

*A. A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.*

*B. A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.*

*C. A person who in good faith delivers assets to a trustee need not ensure their proper application.*

2. Certification of Trust prepared by Trustee under (UTC") § 1012:

*E. A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.*

*F. A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.*

*G. A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.*

(a) Although the UTC protects third parties who rely upon a certification of trust provided by a Trustee, it has been the authors' experience that if during a grantor's lifetime a successor trustee tries to take control of the trust assets, the successor trustee must somehow prove resignation or removal of the grantor as trustee. We often draft revocable trust agreements to name the grantor and some other person as co-trustee to avoid these kinds of issues when the grantor is unable to act for himself or herself. In the absence of a co-trustee, it often falls upon the successor trustee to prove the grantor's removal or resignation.

3. The best way to prepare and plan for this challenge is to include specific provisions in the Trust Agreement relating to deeming the grantor incapacitated for purposes of acting as trustee. Some examples of such language:

*During the lifetime of the Grantor and while the Grantor is serving as Trustee, the Grantor shall be considered "incapacitated" upon a good faith determination made by the successor trustee that the Grantor lacks the physical or mental capacity needed to effectively manage his or her personal or financial affairs (whether by reason of a medical condition or any other reason). The successor trustee shall make such determination in a written record signed by him or her and delivered to the qualified beneficiaries of the trust. Any third party conclusively may rely upon this determination.*

OR

*During the lifetime of the Grantor and while the Grantor is serving as Trustee, the Grantor shall be considered "incapacitated" upon a good faith determination made by the Grantor's spouse, if living, and if not, by the Grantor's then living children [or any applicable group of people], that the Grantor lacks the physical or mental capacity needed to effectively manage his or her personal or financial affairs (whether by reason of a medical condition or any other reason). The relevant parties shall make such determination in a written record and delivered to the successor trustee and qualified beneficiaries of the trust. Any third party conclusively may rely upon this determination.*

OR

*During the lifetime of the Grantor and while the Grantor is serving as Trustee, the Grantor shall be considered "incapacitated" if the successor trustee obtains the written opinion of [one or two] licensed physician(s) who are not related by blood or marriage to the Grantor, successor trustee, or any beneficiary of this trust that the Grantor lacks the physical or mental capacity needed to effectively manage his or her personal or financial affairs (whether by reason of a medical condition or any other reason). The successor trustee shall deliver the written opinion of incapacity to the qualified beneficiaries of the trust. Any third party conclusively may rely upon such a written opinion of incapacity.*

(a) In the absence of such language, it may require a letter of incapacity by the grantor's attending physician or resignation of the grantor (either by the grantor or agent acting under power of attorney).

4. In general, the law is that you cannot delegate fiduciary power—how do we get around this so that an agent can act on behalf of a trustee?

**Note**: The authors have experienced both cases in which a financial institution **has allowed** a resignation by an agent and situations in which it **would not allow** it.

(a) There is no specific power in the UPOAA allowing an agent to resign on behalf of the grantor acting as trustee of an inter vivos trust. There is the specific grant of power for an agent to, "create, amend, revoke, or terminate an inter vivos trust;" in UPOAA § 201; however, this power is very broad and most principals would be unlikely to want to include it in a general power of attorney. In addition, "Courts have found that a general grant of authority under a broadly worded [durable power of attorney] authorizes an agent to amend the principal's [revocable trust]." Hook, 859-3rd T.M.P., *Durable Powers of Attorney,* Detailed Analysis, D. An RLT Does Not Eliminate the Need for a DPA (citing Galante v. Galante, 3 Mass. L. Rep. 324 (Mass. Sup. Ct. 1995). See also First Union Nat'l Bank v. Grubbs, 37 Va. Cir. 35, 41 (1995) (stating that a principal may delegate to agent under a power of attorney

the authority to revoke revocable trust, but decided prior to the passage of the Virginia Uniform Power of Attorney Act).

(b) One option: Specifically grant agent under power of attorney the ability to "delegate fiduciary powers" under the UPOAA, but query whether, absent any specific language in the Trust Agreement, this delegation is truly valid?

(i) Suggested language for Trust Agreement: *"The Trustee may appoint any individual or entity to serve as the Trustee's agent under a power of attorney to transact any business on behalf of the trust or any other trust created under this instrument. Such agent's power expressly shall include the power to resign on behalf of the Trustee and/or appoint a successor trustee on behalf of any then serving Trustee."*

(ii) Suggested language for power of attorney: "*My Agent has the express power to exercise fiduciary powers that I have the authority to delegate, including but not limited to resigning on my behalf as trustee of any trust of which I serve as trustee*."

(c) It is very important to have consistent language in the power of attorney and revocable trust agreement relating to the grantor's agent's ability to act with regard to the trust agreement and the trust assets, especially in the case of the agent's resignation on behalf of the trustee but also as it relates to revocation, amendment, and creation of a revocable trust. For a thorough discussion of the issues relating to the interaction of the two documents, see Hook, 859-3rd T.M.P., *Durable Powers of Attorney*, Detailed Analysis, E. Practice Notes.

5. **Planning note**: One way to avoid issues related to grantor incapacity is to have a co-trustee appointed to serve with the grantor prior to the grantor's incapacity and give either co-trustee the ability to take administrative action alone. This provides the co-trustee with some flexibility and authority to be able to take necessary action if the grantor is unable to do so without a formal determination of the grantor's incapacity.

6. **Practical note**: When the grantor of a revocable trust is not also a trustee of the trust during the grantor's lifetime, it is proper for the trust to obtain a new EIN (not the grantor's SSN) and shift to grantor trust reporting on a separate grantor trust return for income tax purposes, especially if the duration of the trust during the grantor's lifetime is expected to be of significant length.

## G. Planning to Avoid Probate

1. Many clients view probate as a problematic process, even when a pour over last will and testament is involved, and thus probate avoidance is oftentimes a priority. This fear on the part of clients is not unfounded. The administration of a probate estate can be more costly and expensive than the post-mortem administration of a revocable trust, there can be a delay in the administration of the probate estate unlike the continuity in administration a revocable trust offers, the administration of a probate estate is public information while the post-mortem administration of a revocable trust is not, and the administration of a probate estate is supervised by the local court and Commissioner of Accounts office, while the post-mortem administration of a revocable trust is not. Accordingly, for those clients who have expressed a concern about probate and to otherwise streamline the administration of a client's estate, trusts and practitioners should consider doing the following:

(a) Confirm and verify ownership and titling of the client's assets.

(b) Review beneficiary designations, transfer on death designations, and payable on death designations.

(c) Fund the client's revocable trust if that is the primary dispositive vehicle by using the client's POA and the authority granted under UPOAA § 211 titled "estates, trusts, and beneficial interests".

(d) If the client owns property located outside of the client's domicile, consider mechanisms to avoid ancillary administration, such as transferring the property to the client's revocable trust or an entity.

2. For additional color, see discussion, supra, at I.B.3.

## H. Minimization of Estate, Gift, & GST Tax

1. For the last several years, it was only a microscopic percentage of the population that had to be concerned about transfer taxes, whether estate, gift, or GST. In response, trusts and estates practitioners pivoted to income tax planning as that had more relevancy to most clients. With proposals floated by the Democratic Party and drastic increases in the value of the stock market, a partial pivot back to transfer tax planning by trusts and estates practitioners may be appropriate and ultimately necessary. This back to the future moment we find ourselves in is the impetus for the discussion that follows, and this discussion is intended to function as a preliminary refresher of techniques that we might not have taken off the shelf in a while and the adjacent issues to consider. As before, to emphasize what we consider to be important points or salient features of the applicable law, we have bolded certain words.

2. Annual exclusion gifts.

(a) See discussion, supra, at I.D.7(b)(i).

(b) Remember:

(i) In order for the gift to qualify for the annual exclusion, it must be a gift of a present interest;

(ii) Annual exclusion gifts are tabulated on a per donee per calendar year basis;

(iii) The annual exclusion amount in 2025 is $19,000 per donee;

(iv) Annual exclusion gifts can be made to an unlimited number of donees;

(v) The use of intermediaries to increase the number of annual exclusion gifts to a donee is verboten; and

(vi) Annual exclusion gifts are not brought back into the donor's gross estate (unless they are deemed void or the donor has retained impermissible strings under either I.R.C. § 2036 or § 2038).

(c) **Note and Remember:** Although a gift to a spouse who is not a U.S. citizen does not qualify for the gift tax marital deduction, it may nonetheless qualify under the exclusion set forth in I.R.C. § 2523(i)(2) (which is $190,000 in 2025).

(d) **Caveat:** Although five years of annual exclusion gifts can be frontloaded to a 529 Qualified Tuition Program account, do not frontload them when the client is near death because part – if not all – of those gifts will be brought back into the donor's gross estate due to the donor not having survived the five-year period.

(e) **Caveat:** Annual exclusion gifts cannot be frontloaded to a 529A ABLE Program account.

(f) **Caveat:** Annual exclusion gifts may create problems around equality or fairness if members of one specific family line receive, in the aggregate, more annual exclusion gifts than the members of another specific family line. These problems can be addressed by gifting the same aggregate amount to each specific family line or through an equalization provision in the client's estate plan.

3. Direct payments of educational and medical expenses.

(a) See discussion, supra, at I.D.7(b)(iii).

(b) **Note and Remember:**

(i) "Section 2503(e) provides that any qualified transfer after December 31, 1981 shall not be treated as a transfer of property by gift . . . . Thus, a qualified transfer on behalf of any individual is excluded in determining the total amount of gifts in calendar year 1982 and subsequent years. This exclusion is available in addition to the . . . annual gift tax exclusion. Furthermore, an exclusion for a qualified transfer is permitted without regard to the relationship between the donor and the donee." Treas. Reg. § 25.2503-6(a).

(ii) "The term 'qualified transfer' means any amount paid on behalf of an individual as **tuition** to a **qualifying educational organization** for the **education or training** of that individual or to any person who provides **medical care** with respect to that individual as payment for the **qualifying medical expenses** arising from such **medical care**." Treas. Reg. § 25.2503-6(b)(1).

(iii) "A qualifying educational organization is one which **normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on**. **See Section 170(b)(1)(A)(ii) and the regulations thereunder.** The unlimited exclusion is permitted for **tuition expenses of full-time or part-time students paid directly to the qualifying educational organization providing the education. No unlimited exclusion is permitted for amounts paid for books, supplies, dormitory fees, board, or other similar expenses which do not constitute direct tuition costs.**" Treas. Reg. § 25.2503-6(b)(2).

(iv) **Note:** "According to Rev. Rul. 78-446, [1978-2 C.B. 257], a nursery or pre-school administering a group day care program may satisfy § 2503(e) if (1) it has a regular enrollment of children aged three to six years who attend all day, five days a week, up to 52 weeks a year, (2) it is operated in an open classroom setting with various groups having different instruction, (3) it has planned educational activities including exercises in

listening skills, exposure to numbers, letters, concepts, mathematics, science, arts and crafts, and problem solving, and (4) the instruction is provided by a head teacher and at least two assistants for each classroom. Conversely, a family day care program providing child care in the homes of a staff of child-care trained personnel and including story reading, projects involving science or art, letters, and numbers may not satisfy the requirements of § 2503(e) because the primary purpose of the program is custodial, not the presentation of formal instruction, even though the program has some educational activities." Lischer, 845-3rd T.M.P., *Gifts*, Educational Expense, Detailed Analysis, IX.B.1.

(v) "Qualifying medical expenses are limited to those expenses defined in Section 213(d) (Section 213(e) prior to January 1, 1984) **and include expenses incurred for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body or for transportation primarily for and essential to medical care**. **In addition, the unlimited exclusion from the gift tax includes amounts paid for medical insurance on behalf of any individual. The unlimited exclusion from the gift tax does not apply to amounts paid for medical care that are reimbursed by the donee's insurance.** Thus, if payment for a medical expense is reimbursed by the donee's insurance company, the donor's payment for that expense, to the extent of the reimbursed amount, is not eligible for the unlimited exclusion from the gift tax and the gift is treated as having been made on the date the reimbursement is received by the donee." Treas. Reg. § 25.2503-6(b)(3).

(vi) **Note:** "The term 'medical care' does **not** include cosmetic surgery or other similar procedures, **unless** the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease. For purposes of this paragraph, the term 'cosmetic surgery' means any procedure which is directed at improving the patient's appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease." I.R.C. § 213(d)(9).

(vii) In order to qualify for exclusion treatment under I.R.C. § 2503(e), payments, whether for tuition or medical care, must be made directly to the service provider.

(viii) Advance, non-refundable payments of tuition for future years qualify for exclusion treatment under I.R.C. § 2503(e). TAM 199941013.

(ix) **Caveat:** Like with annual exclusion gifts, tuition and/or medical care payments may create problems around equality or fairness if more of such payments are made for the benefit of the members of one specific family line than the members of another specific family line. These problems can also be addressed by making payments in the same aggregate amount for the benefit of each specific family line or through an equalization provision in the client's estate plan.

4. If any are in existence, consider making gifts to a trust that has Crummey withdrawal rights.

5. Ensure that any gift made is complete under state law and for federal gift tax purposes.

(a) State law requirements (Virginia).

(i) There must have been donative intent at the time the gift was made. Knop v. Knop, 297 Va. 553 (2019).

(ii) There must have been actual or constructive delivery of the property that is the subject matter of the gift. **Note:** In Knop, shares of stock were the subject matter of the gift, and the Virginia Supreme Court held that, even though the purported donees had been treated as the owners of such shares of stock on the company's books and records and in its tax filings, the delivery requirement had nonetheless not been met because the certificates for the shares of stock had not been delivered to the purported donees.

(iii) The donor must have been divested of all dominion and control over the property that is the subject matter of the gift.

(iv) The donee must have been vested with all dominion and control over the property that is the subject matter of the gift.

(b) Federal gift tax requirements.

(i) Donative intent is immaterial.

(ii) Has the donor relinquished all dominion and control over the transferred property?

(iii) Has the donor retained any legal right or beneficial interest to or in the transferred property?

(iv) The answer to each of the preceding questions is dependent upon whether the state law requirements have been satisfied or not. In other words, whether the donor has any dominion, control, and/or legal right or beneficial interest to or in the property is determined under state law.

(v) **Note:** A gift may be complete for federal gift tax purposes but incomplete for federal estate tax purposes, e.g., property over which the donor has retained the power to affect the time or manner of enjoyment and thus is includible in the donor's gross estate pursuant to I.R.C. § 2038.

(vi) **Note:** Under Revenue Ruling 96-56, 1996-2 C.B. 161, "delivery of a check to a **noncharitable** donee will be deemed to be a completed gift for federal gift and estate tax purposes on the **earlier** of (i) the date on which the donor has so parted with dominion and control under local law as to leave in the donor no power to change its disposition, or (ii) the date on which the donee deposits the check (or cashes the check against available funds of the donee) or presents the check for payment, if it is established that: (1) the check was paid by the drawee bank when first presented to the drawee bank for payment; (2) the donor was alive when the check was paid by the drawee bank; (3) the donor intended to make a gift; (4) delivery of the check by the donor was unconditional; and (5) the check was deposited, cashed, or presented in the calendar year for which completed gift treatment is sought and within a reasonable time of issuance." In light of the foregoing, if the client wants to write a check to a non-charitable

donee as a gift at the end of his or her life, consider using and delivering a cashier's or certified check.

(vii) In Estate of Demuth v. Commissioner (T.C. Memo. 2022-72), the Tax Court clarified the rules surrounding gifts made by checks written but not deposited prior to death. In *Demuth*, the taxpayer's son wrote and delivered eleven checks totaling $465,000 that all represented annual exclusion gifts to various individuals. The taxpayer died five days following the writing of the checks. At the time of his death, the checks were at various stages in being cashed or deposited:

(a) 1 check had been paid by the "drawee bank"—the bank from which the checks were written;

(b) 3 checks had been deposited into the donees' banks and credited by those banks, but the drawee bank had not paid the depositors' banks; and

(c) 7 checks had not been deposited by the donees.

(d) The seven checks that had not been deposited clearly were not completed gifts and were included in the taxpayer's estate.

(e) The question was which of the four checks that had been deposited by the donees was to be included in the taxpayer's estate. This case is further complicated because the IRS unintentionally conceded that the three checks that had been deposited but not yet paid were not to be included in the gross estate because of a confusion of terms. The Tax Court stated that only the one check that had actually been paid by the drawee bank was a complete gift for gift tax purposes but ruled that the three checks that had been deposited pre-death were not included in the taxpayer's estate because of the IRS' unintentional concession.

(f) **Note**: Demuth was decided under Pennsylvania state law, so a different state law could yield a different result. The Tax Court based its ruling on Pennsylvania law that stated a check is irrevocable when a stop order payment can no longer go through—once the drawee bank has paid out the funds.

6. If the client's estate plan includes pecuniary bequests, consider funding those bequests in advance if they can be covered by the annual exclusion and then amend or modify the client's estate plan accordingly, whether by amendment or by treating the transfers as advancements.

7. If the client is philanthropically inclined, consider making charitable contributions to an eligible organization under I.R.C. § 2522 possibly in lieu of existing charitable bequests. **Note:** The relation-back doctrine applies to charitable contributions made by check. Accordingly, a check issued to a charity is deemed to have been delivered even though it is not deposited or cashed until after the donor's death. Estate of Belcher v. Comm'r, 83 T.C. 227 (1984); AOD 1989-014.

8. If the client is married and a bypass trust is established under the client's estate plan, consider having the client's spouse transfer assets to the client so that the bypass trust can

be fully funded. **Note:** Under portability, the DSUE refers to the unused exclusion amount of the last deceased spouse. Accordingly, if the surviving spouse remarries, and the new spouse predeceases the surviving spouse, the surviving spouse can only port over the DSUE of the new spouse, and the DSUE of the previous spouse is lost. In other words, the surviving spouse cannot aggregate the DSUEs but is limited to only the DSUE of the last spouse who predeceased.

9. If the client is married and the client's estate plan establishes continuing trusts for the benefit of the client's spouse, consider having the client's spouse transfer assets to the client so that a valuation discount can eventually be obtained through the principle of non-aggregation of interests. Estate of Mellinger v. Comm'r, 112 T.C. 26 (1999); AOD 1999-006. **Note:** The principle of non-aggregation of interests is not available when an outright disposition is made to the surviving spouse, nor is it available when portability is used in lieu of continuing trusts for the benefit of the surviving spouse.

10. If the client is a beneficiary of a QTIP trust, consider having distributions made from the QTIP trust to the client in order to obtain valuation discounts based on the principle of non-aggregation of interests.

11. Consider gifting fractional interests in real property to obtain valuation discounts. See generally, Farhad Aghdami, Estate Planning for Real Estate Investors, 47 William & Mary Annual Tax Conference (2008). Gifts of fractional interests in real property will qualify for the annual exclusion. Rev. Rul. 83-180, 1983-2 C.B. 169.

12. If the client is married, consider splitting gifts with the client's spouse. But see, Diana S.C. Zeydel, Gift-Splitting? A Boondoggle or a Bad Idea? A Comprehensive Look at the Rules, Journal of Taxation (June 2007) (discussing problems that occur when gifts that have been gift-split are brought back into the donor-spouse's estate).

13. If it is known that a beneficiary plans on buying a depreciating asset, such as a car or a boat, consider having the client purchase the depreciating asset and then bequeathing the same to the beneficiary under the client's estate plan in order to lower the value of the client's gross estate.

14. If the client owns any interests in closely-held entities:

    (a) Consider gifting such interests as they may qualify for the annual exclusion and to generate valuation discounts for what is gifted and what is retained. TAM 9131006. **Caveat:** If the sole purpose of such gifts is to obtain a minority interest valuation discount, that stratagem may fail. Estate of Murphy v. Comm'r, T.C. Memo. 1990-472. That does not mean, however, that minority interest valuation discounts are completely off the table. Deathbed gifts have still been held to result in minority interest valuation discounts. E.g., Estate of Frank v. Comm'r, T.C. Memo. 1995-132.

    (b) Consider altering or modifying the governing documents with respect to such entities or, if such interests represent controlling interests, consider gifting them in order to obtain valuation discounts.

    (c) In light of the decision in Estate of Powell v. Commissioner, consider altering or modifying the governing documents with respect to such entities or selling such interests for adequate and full consideration in order to avoid estate inclusion. In Powell, the Tax Court held that assets contributed to a family limited partnership were includible in the decedent's gross estate under I.R.C. § 2035(a) even though

the decedent owned only a limited partnership interest because I.R.C. § 2036(a)(2) applied. Namely, by being able to dissolve the family limited partnership in conjunction with the other partners, the decedent had the right "to designate the persons who [could] possess or enjoy the [contributed assets] or the income therefrom." 148 T.C. 392 (2017). See also Estate of Moore v. Comm'r, T.C. Memo. 2020-40 (holding that assets transferred to a family limited partnership were includible in the decedent's gross estate under I.R.C. § 2036(a)(1) and then applying I.R.C. § 2043 to determine the value to be included which can lead to unexpected results).

15. If eligibility for treatment under either I.R.C. § 303 or § 6166 is a relevant consideration, consider what measures can be taken to qualify for such treatment.

    (a) Under I.R.C. § 303, the redemption of a decedent's shares of stock are treated as a capital transaction and not a dividend payment up to an amount equal to the sum of all estate taxes and all allowable funeral and administration expenses. In order to be eligible and thus qualify for treatment under I.R.C. § 303, the value of the decedent's shares of stock must exceed 35% of the value of the adjusted gross estate. Appropriate pre-death planning measures could involve increasing the value of such shares of stock vis-à-vis the value of the adjusted gross estate by transferring assets into the company.

    (b) Under I.R.C. § 6166, the payment of estate tax attributable to a closely-held business interest may be deferred for up to fourteen years. As with I.R.C. § 303, the value of the closely-held business interest must exceed 35% of the value of the adjusted gross estate. Because the closely-held business must be engaged in an active trade or business, appropriate pre-death planning measures taken may include enhancing that particular feature of the closely-held business by disposing or reducing assets from the closely-held business or adding assets to the closely-held business.

16. If a *Graegin* loan is a relevant consideration, consider what steps can be taken to render the client's estate even more illiquid. In Estate of Graegin v. Commissioner, the estate borrowed money from a family-owned company to pay the estate tax due, and the interest on the promissory note, which had yet to be paid and which was to take the form of a balloon payment at the end of a fifteen-year term, was allowed to be deducted as a reasonable and necessary administration expense under I.R.C. § 2053(a)(2). T.C. Memo. 1988-477. **Note:** Regulations proposed by the Service on June 28, 2022 under I.R.C. § 2053 may limit the use of *Graegin* loans in the future. The proposed regulations provide that interest on an obligation of an estate used to pay estate tax liability can only be deducted if the loan's terms are actually and necessarily incurred in the administration of the decedent's estate and are essential to the proper settlement of the decedent's estate. The proposed regulations specifically target loans by related parties and loans structured to create or increase the amount of interest that is deductible. See Guidance Under Section 2053 Regarding Deduction for Interest Expense and Amounts Paid Under a Personal Guarantee, Certain Substantiation Requirements, and Applicability of Present Value Concepts, 87 Fed. Reg. 38331 (proposed June 28, 2022) (to be codified at 26 CFR 20).

17. If the client is married, consider having the client's spouse transfer assets to the client so that the client's exemption from the GST tax can be fully used. **Note:** A portability election cannot be made for unused GST exemption. Because unused GST exemption is not portable, consider other ways as well that the client's unused GST exemption can be preserved, such as through the use of inter vivos QTIP trusts.

18. Consider mechanisms to cause estate inclusion at the next generation's level to reduce exposure to the GST tax, such as the granting of a general power of appointment to a non-skip person who has an interest in a non-GST-exempt trust.

19. Consider making transfers to a health and education exclusion trust (a "HEET"), such as through the exercise of a power of appointment, to avoid the GST tax.

20. If (1) the client is subject to state estate tax, (2) there is no state gift tax, (3) the state does not have a clawback for deathbed gifts, and (4) the estate tax base for state estate tax purposes does not include adjusted taxable gifts, consider making gifts to reduce the client's exposure to the state estate tax by capitalizing on the non-congruence between the estate tax base for state estate tax purposes and the estate tax base for federal estate tax purposes (which includes adjusted taxable gifts).

21. If (1) the client is subject to state estate tax and (2) the state estate tax liability arises because of tangible personal property located in the state, consider moving the tangible personal property to a different state that does not have an estate tax.

22. If (1) the client is subject to state estate tax and (2) the state estate tax liability arises because of real property located in the state, consider transferring the real property to an entity. **Caveat:** The state may look through the entity and impose estate tax nonetheless.

23. If the client has assets constituting income in respect of decedent ("IRD"), consider accelerating the IRD so that the income tax paid can be claimed as a deduction for federal and state estate tax purposes.

24. For gift giving purposes, gift the client's assets that have a high basis.

## I. Income Tax Planning at the End of Life

1. Core Final Individual Income Tax Return Concepts.

   (a) We have to know the income tax basics prior to engaging in planning.

   (b) The income, deduction and credit activity of a decedent received or paid prior to death are reportable on the final individual income tax return ("Final Return") for the time period of January 1 through the date of death.

   (c) The method of accounting (either cash method or accrual method) regularly utilized by the decedent before death also determines the income includible on the Final Return. Under the cash method, only those terms actually or constructively received before death are included in the Final Return. https://www.irs.gov/taxtopics/tc356; IRS Publication 559 (2023), Survivors, Executors, and, p. 5. Generally, under an accrual method of accounting, income is reported when it is earned. If the decedent used an accrual method, only the income items normally accrued before death are included in the Final Return. Id.

   (d) Decedent's medical expenses may be deducted on either the decedent's income tax return for the year in which they were incurred provided they are paid by the estate (or trust) within one year after the decedent's death, or on the estate tax return. I.R.C. § 213(c); Rev. Rul. 77-357, 1977-2 C. B. 328.

(e) The personal representative (or trustee) may elect to report all previously unreported E or EE bond interest accrued to the date of death, even if a cash basis taxpayer. I.R.C. § 454(a); Rev. Rul. 79-409, 1979-2 C. B. 206; PLR 9232006.

2. Special Rules For Income on the Final Return.

(a) Trusts

(i) In general, only distributable net income represented by actual distributions from an estate or trust to a decedent prior to his or her death is included on the Final Return.

(ii) If the decedent was the beneficiary of a simple trust, the Final Return will also include all distributable net income of the trust for a trust taxable year ending on or before the date of decedent's death. Treas. Reg. §§ 1.652(a)–2 and 1.662(c)-2.

(b) Partnerships

(i) The death of a partner closes the partnership's tax year for that partner. Generally, the death of a partner does not close the partnership's tax year for the remaining partners. The decedent's distributive share of partnership items must be figured as if the partnership's tax year ended on the date the partner died. I.R.C. § 706(c). More specifically, the allocation for the short year is made by an interim closing of the partnership's books or, if all of the partners agree, on a pro rata basis based on the number of days in each period. See Treas. Reg. § 1.706-1(c)(2)(ii). In general, it is preferable to elect out of the 'exact method' in order to avoid the expensive accounting costs of preparing a mid-year closing.

(ii) As a result, in the year of death, a deceased partner's share of the partnership should generate two Forms K-1 in the year of death – one to partner for his or her Final Return and one to his or her estate or trust.

(c) S Corporations

The deceased shareholder of an S Corporation must include on his or her Final Return the decedent's pro rata share of the S corporation's income for the period from the beginning of the year to the date of death, on a number of days allocation basis. I.R.C. § 1377(a)(1). If all the shareholders agree, the allocation for the short year is made by an interim closing of the books. I.R.C. § 1377(a)(2).

3. Carry-Overs and Carry-Forwards

(a) General

Net operating loss carry-overs, charitable deduction carry-forwards and capital loss carry-forwards from a prior year are deductible only on the Final Return and any unused losses or deductions are lost upon death as only the taxpayer who sustains the loss is entitled to take a deduction. Rev. Rul. 74-175, 1974-C.B. 52; Treas. Reg. § 1.170A-10(d)4; See ILM 201047021 (estate's beneficiaries could not use estate's unused capital loss carryover).

(b) Joint Return Exception

If a decedent was married and the surviving spouse files a joint return, then the surviving spouse may utilize losses generated by his or her deceased spouse to offset tax attributes generated in the same tax year as the tax year of the deceased spouse is deemed to have ended with the end of the relevant tax year for the surviving spouse. I.R.C. § 1.2-1(b).

4. Passive Losses.

(a) Passive activity losses and passive activity carry-overs relate to activities that are passive in nature in which a taxpayer does not materially participate. These types of losses cannot offset non passive income but are suspended until the taxpayer has passive income or fully disposes of the investment from which such losses were generated. I.R.C. § 469(g)(1). Upon disposition, the suspended passive activity losses can be utilized against other income. If passive activity loss property is sold to a related party, then loss is disallowed under related party rules. I.R.C. § 267 (a). The disallowed loss is added to the basis of the related person and the related person recognizes gain to the extent such gain exceeds the disallowed loss upon the later sale of that property. I.R.C. § 267(d)(1).

(b) If an interest in a passive activity is transferred by reason of the owner's death, the unused suspended losses are allowed as a deduction against non-passive income in decedent's Final Return but only to the extent that such losses exceed the amount by which the transferee's basis in the passive activity has been "stepped up" under I.R.C. § 1014. I.R.C. § 469(g)(2). Any losses not in excess of the basis step-up are lost.

(c) There is some uncertainty as to the applicability of the I.R.C. § 469(g)(2) treatment of assets owned by a grantor trust for income tax purposes at the death of the grantor. It has been suggested that if the assets of a grantor trust are not to be included in the gross estate of the taxpayer, then the suspended losses attributable to those assets should be triggered and allowed on the Final Return. See FSA 200106018; Cal Fiore, You Can't Take It With You (But Don't Have To Lose It): Pre and Post Mortem Planning For Income Tax Attributes, Estate Planning (Feb. 2021), p. 19.

5. Basis Adjustments at Death.

(a) In general, property acquired from a decedent has an income tax basis equal to its fair market value as of the decedent's date of death or at the alternate valuation date, if applicable. I.R.C. § 1014(a)(1). The fair market value is deemed to be the value as finally determined for federal estate tax purposes or "if no estate tax return is required to be filed," then as determined for state death taxes. Treas. Reg. § 1.1014-3(a). If no federal or state estate tax return is required to be filed, fair market value would, of course, not be reported initially but still be ascertained using federal estate tax valuation principles.

(b) For estate tax purposes, the fair market value of an asset is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Treas. Reg. § 20.2031-1(b). This is the "willing buyer/willing seller" test which is the cornerstone of the valuation process. The treasury regulations provide some fairly specific guidance as to some particular

types of assets, including promissory notes and closely held business interests. The valuation of real estate is not addressed in depth in the relevant regulations.

(c) The fair market value of an interest in a business is the "net amount which a willing purchaser whether an individual or a corporation, would pay for the interest to a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Treas. Reg. § 20.2031-3. This is just a slight variation on the test. Relevant facts may include an appraisal of the business's assets, the business's earning capacity, and the factors set forth in paragraphs (f) and (h) of Treas. Regs. § 20.2031-2. Id. The instructions to form 706 require that "complete financial and other data used to determine value, including balance sheets (particularly the one nearest to the valuation date) and statements of the net earnings or operating results and dividends paid for each of the 5 years immediately before the valuation date" be included with the return. See instructions to Form 706. Generally, business valuations may be based on asset value or earnings or a combination of both.

(d) The fair market value of real estate is determined under the general willing buyer/willing seller test. Treas. Reg. § 20.2031-9. Appraisals typically reflect closed sales of comparables and may be inaccurate in an improving market. By way of circular reasoning, the regulations assert that "[p]roperty shall not be returned at the value at which it is assessed for local tax purposes unless that value represents the fair market value as of the applicable valuation date." Caselaw provides additional guidance, including "highest and best use" where the real estate is reasonably subject to development. The appropriate method for valuing real estate depends on the type of real estate (undeveloped land, commercial, residential, etc.). E.g. Estate of Pattison v. Comm'r., T.C. Memo. 1990-428; Estate of Necastro v. Comm'r, T.C. Memo. 1994-352; Rev. Proc. 79-24.

(e) There are two significant exceptions to the general rule relating to basis adjustments at death.

(i) First, property constituting income in respect of decedent ("IRD") does not receive a basis adjustment at death. I.R.C. § 1014(c); Treas. Reg. § 1.1014-1(b). See Estate of Cartwright v. Comm'r, T.C. Memo. 1996–286, aff'd in part and remanded in part 183 F.3rd 1034 (9th Cir. 1999). Generally, IRD is income earned before the decedent's death but is received after death and is taxed upon receipt by the estate or other beneficiary. I.R.C. § 691(a)(1). Some examples of IRD include salary or wages, post-death bonuses, stock options, installment obligations, retirement plans and tax deferred annuities. The recipient of an IRD amount is entitled to an income tax deduction for estate tax attributable to IRD, if any. I.R.C. § 691(c); FSA 20011023.

(ii) Second, appreciated property acquired by a decedent does not receive a basis adjustment when such property:

(a) passes to an individual from whom or from whose spouse the decedent acquired property by gift within one year before the decedent's death; and

(b) the fair market value of the property exceeds its adjusted basis. I.R.C. § 1014(e).

In such cases, the basis of the property is the basis in the hands of the decedent at the time of his or her death.

(f) There are further exceptions to the basis adjustment rule including but not limited to (a) the use of the special use valuation (I.R.C. § 2032A); (b) basis in stock of a domestic international sales corporation (I.R.C. § 1014(d)); and (c) the estate's executor election carry-over basis for property passing through a decedent dying in 2010 known as a modified carry-over basis regime. I.R.C. § 1022.

(g) In general, the basis of property acquired by gift equals the donor's basis in the property, or the basis of the last preceding owner who did not acquire the property by gift. I.R.C. § 1015(a); Treas. Reg. § 1.1015-1(a)(1). If the donor's basis is greater than fair market value at the time of the gift, the taxpayer's basis for purposes of determining loss is fair market value of the gifted property. Id. Gifts to spouses are not subject to the rules under I.R.C. § 1015 which can otherwise eliminate the ability to take the loss. See I.R.C. § 1015(e); I.R.C. § 1014(c) and I.R.C. § 1041(b)(2).

(h) Importantly, the gift basis rules under I.R.C. § 1015 do not apply if the value of the property is includible in the donor's gross estate for estate tax purposes. Treas. Reg. § 1.1014-1(d); Rev. Rul. 55-531, 1955-2 C.B. 520. Classically, gifted property may be included in the donor's estate if the donor retains certain types of powers and benefit. See I.R.C. §§ 2035, 2036 and 2038.

(i) The Internal Revenue Service has denied a basis adjustment under I.R.C. § 1014(a) for assets gifted to an irrevocable grantor trust by completed gift that are not includable in the gross estate of the grantor. Rev. Proc. 2023-2.

(j) There is a basis adjustment for assets owned by non-exempt generation skipping transfer tax trusts if generation skipping transfer tax is imposed on such assets. I.R.C. § 2654(a)(2).

6. Important Tax Rates for 2025

(a) The United States income tax brackets have become progressively more graduated since the 1986 Tax Act.

(b) The key 2025 income tax rate schedules can be found in Rev. Proc. 2024-40 which is attached as **Exhibit B**. The top thresholds for core taxes are as follows:

| Type of Tax | Highest Tax Rate | Joint Filers | Individuals | Trusts & Estates |
|---|---|---|---|---|
| Ordinary Income (based on Taxable Income) | 37% | >751,600 | >626,350 | >15,650 |
| Qualified Dividends and Long-Term Capital Gains (based on Taxable Income) | 20% | >600,050 | >533,400 | >15,900 |
| Surtax on Net Investment Income ("NII") (based on Modified Adjusted Gross Income), not indexed for inflation | 3.8% | >250,000 | >200,000 | >15,200 |

(c) An example of graduated income tax rate structure is that the 24% tax rate bracket for joint filers covers the spectrum of taxable income of $206,700 to $394,600.

(d) As a further example, for capital gains tax rates, the maximum zero rate amount is $96,700 in the case of a joint return or surviving spouse, $48,350 in the case of a married individual filing a separate return, $64,750 in the case of an individual who is a head of household (I.R.C. § 2(b)), $48,350 in the case of any other individual (other than an estate or trust), and $3,250 in the case of an estate or trust.

(e) As a final example of the rate structure, for taxable years beginning in 2025, the threshold amount under I.R.C. § 199A is $394,600 for married filing joint returns and $197,300 for all other returns (other than for an estate or trust).

## J. Minimization of Income Tax

A major goal of end of life estate planning is to attempt to minimize overall income tax and avoid creating inadvertent negative income tax consequences through actions taken. More specifically, as planners, our goal is to create value by minimization of income tax and maximizing basis.

Any analysis of income tax options requires the availability of accurate information including but not limited to (1) current asset and liability information; (2) basis information; (3) charitable carry forwards; (4) suspended losses; (5) capital loss carry forwards; (6) net operating loss carry forwards; and (7) current year income, deduction and credit activity. It will be critical to review prior year tax returns. Further, any proper planning will want to include the dying client's accountant and investment advisor. Given the short timeframe and potential capacity issues at the end of life, many of these techniques will not be feasible.

1. Acceleration of Income onto Final Return

An evaluation will need to be made to determine the existing income tax attributes to determine whether there is a tax advantage to accelerating income prior to death onto the decedent's final individual income tax return ("Final Return"). The "bunching" of income onto the Final Return can lower overall income tax by utilizing decedent's charitable deduction carry forwards, capital loss carry forwards, net operating loss carry-overs, large medical deductions (which are common in the final year of life) and current year charitable contributions which cannot otherwise be claimed. Further, as the Final Return constitutes a partial tax year, a decedent may not have significant income in the year of death.

In terms of estate tax planning, the planner should consider any tax liability on the Final Return is a debt deduction for estate tax purposes, including for state estate tax.

Often given the graduated income tax rates structure and the high income thresholds for certain taxes (such as the net investment income tax), it could be advisable to recognize income on the Final Return rather than on an estate income tax return, trust income tax return, or a beneficiary's individual income tax return after the death of a decedent. The planner should evaluate whether the dying client would be in a lower tax bracket from the beneficiaries and the pre-death income realization could "soak-up" the lower rate structures.

A careful review of the tax rate schedule in Rev. Proc. 2024-40 shows that taxpayers can pay drastically different tax rates on the same income. In fact, ability to pick a taxpayer could easily save a 20% tax.

Any pre-death tax planning must carefully consider the impact of the proposed transactions upon the dispositive plan of the dying client.

If advisable, there are a variety of mechanisms to accelerate income onto the Final Return:

(a) Withdraw funds from qualified plans such as traditional individual retirement accounts and 401(k)s or tax deferred annuities to generate income.

(b) Converting all or a portion of a traditional IRA into a Roth IRA. A Roth conversion may be particularly beneficial due to the limitation imposed on post death minimum required distributions on account of the SECURE ACT. Post-death distribution from Roth accounts are not subject to income tax if distributed more than five years from the initial contribution to the Roth. Please note that Roth conversions are no longer "reversible."

(c) Sell assets to generate capital gains (a) if have available losses, (b) the zero capital gains bracket is applicable or (c) offsetting deductions exist. The sales could be beneficial in anticipation of estate/trust liquidity and cash needs. The benefit of the triggering capital gains immediately prior to death is limited due to the basis adjustment at death rules.

(d) Evaluate if certain partnership or S corporation elections would be beneficial, to the extent the client (or his or her family) has some element of control of the closely held business. Often, partnership or S corporations may earn proportionately more income in a given tax year after the date of death than before the date of death. In that case, if the income is allocated on a pro rata per day basis (rather than using an interim closing of the books), more income will be allocated to the deceased partner's or shareholder's Final Return. For a general discussion of planning strategies for partnership interests following death, See S. M. Jones & D. M. Maloney, Transfer of a Partnership Interest at Death Creates Tough Issues for the Successor, 94 J. of Taxation (Jan 2001).

(e) Consider accelerating gain on installment obligations. The executor could choose to elect out of the installment method for an installment sale made in the year of death. This would result in the gain being taxed on the decedent's Final Return. In addition, no IRD income recognition would occur after death. Further, if there is an existing installment obligation, the obligation could be transferred in a way which would transfer the gain, i.e., by transferring it to the obligor.

2. Accelerate Deductions

In certain circumstances, it may be advisable to accelerate deductions or generate losses on the Final Return in order to lower overall income tax. Mechanisms to accelerate deductions include the following:

(a) Make contributions to charities pre-death in order to obtain income tax charitable deduction on the Final Return. This type of transfer would generate a current income tax deduction and the donated sums would be excluded from the dying client's estate for estate tax purposes. One iteration of this approach is to transfer a portion of an individual retirement account owned by a dying client prior to death directly to a public charity (excluding donor advised funds), if the client has reached the age for required minimum distributions. Such transfer counts towards the client's required minimum distribution while avoiding the income tax on the withdrawal. There are a variety of issues with these approaches including whether

someone has authority to make the transfer and the lack of time to implement prior to the impending death of the client. Further, a planner should consider the impact such a transfer would have on the estate plan and the avoidance of "doubling up" a charitable bequest. One idea is for the transfer to constitute an advancement in lieu of an otherwise existing testamentary disposition.

(b) Dispose of the taxpayer's entire interest in a passive activity in order to utilize suspended losses. There are issues with this approach, including the availability of a reasonable buyer and existence of transfer restrictions in the governing instruments as the passive activity.

(c) "Harvest" capital losses before death to generate a loss deduction and avoid step down in basis upon death. The deduction can be utilized in the year of sale, including by the surviving spouse on a jointly filed Final Return. The planner should remember that such losses can offset up to $3,000 of other income (or $1,500 for single taxpayers).

3. Income Tax Basis Planning

(a) In recent years, the tax picture associated with estate planning has changed. In most cases, the focus now is away from minimizing estate taxes and towards obtaining the highest defensible step-up in the tax bases of capital assets owned by the decedent at death.

Because of the increased federal estate tax exemption ($13,990,000 for 2025 and $15,000,000 for 2026), which is indexed for inflation, and the portability rules (which, if elected, permits aggregation of the decedent's exemption with that of his or her predeceased spouse), most estates now escape the imposition of estate tax altogether. Of course, there are proposals to make significant changes to the tax system.

(b) In this current environment, increases in estate asset values or the transfer of additional assets into an estate may have little or no estate tax cost. Since the tax basis of a decedent's capital asset is equivalent to its estate tax value, and any valuation is not exact but generally accurate within a range of numbers, there is a premium on obtaining a higher-side value which is defensible from an audit point-of-view and protectable from penalties. This premium is enhanced by the current income tax climate where capital gains bear higher income taxes.

(c) As described above, death triggers an adjustment of basis for capital assets. In a world where planners have control, we would want to have as high a basis possible. In general, any planning to maximize basis must compare the estate tax cost of inclusion of an asset with the benefit of basis step-up.

(d) Basis planning at the end of life benefits from availability of concrete information in terms of knowledge of estate size, the available amount of estate tax exclusion, generation skipping transfer tax exemption and current income tax rates and brackets. In light of the above, the planner should consider whether the following transactions would mitigate overall tax:

(i) Evaluate whether low basis (or appreciated) assets owned by irrevocable trusts which are not includible in the dying client's estate should be includible in the dying client's estate for estate tax and basis adjustment

purposes. There are a variety of circumstances where this could be applicable:

(a) Irrevocable trusts which benefit the dying client (such as classic bypass trusts) often have existing distribution standards which would permit a trustee to distribute property to the dying client. The potential trust standards of distribution range from health, education, maintenance and support (possibly considering the impact of other resources prior to making such a distribution) or to an independent trustee, trust director or trust protector having the discretion to make distributions for the dying client's best interests or any other broad-based purpose. Any distributions to the dying client must weigh the impact of the distribution on the ultimate dispositive plan. A basic question to be asked prior to such a distribution is who will be negatively impacted by such a distribution and obtain necessary consents if possible.

(b) An independent trustee, trust protector or trust director may have the power and authority to grant a general power of appointment to the dying client over all or part of the irrevocable trust and, if so, such a grant may be advisable. The grant of a general power would generate a basis adjustment of the assets subject to the general power. I.R.C. § 2041. Again, the interests of anyone could be negatively impacted by an exercise of such power should be considered.

(c) An independent trustee, trust protector or trust director may have the authority to amend the irrevocable trust under certain conditions. In such circumstances, an amendment should be considered to enable low basis assets to be included in the dying client's estate for estate tax purposes and could include an expansion of the distribution standards.

(d) The irrevocable trust may be terminated (in whole or in part) and distributed to the dying client utilizing a nonjudicial settlement under the Uniform Trust Code. See UTC § 111. This approach would require consent of all the beneficiaries, which is problematic given short timeframes at the end of a client's life. Further, a termination and distribution could generate unanticipated estate, gift and income tax consequences.

(e) Enter into transactions where low basis assets owned by the irrevocable trust (over which the dying client is the grantor for income tax purposes) are exchanged for high basis assets owned by dying client. These transactions should be disregarded for income tax purposes. Rev. Rul. 85-13, 1985-1 C.B. 1984. One type of transaction could be implemented where the dying client has the power to substitute assets of equivalent value with assets owned by the trust. This power is often called a swap power. If a swap power does not exist, then the dying client could purchase assets from the irrevocable trust. Issues with these types of transactions include (a) whether the dying client has sufficient high basis assets to implement such a transaction and (b) whether the transfer is of equivalent value and fair market value. Where

there is little liquidity or a lack of high basis assets, the dying client could attempt to borrow the funds to make the swap/purchase by pledging assets as collateral for a short term loan. Hard to value assets create issues regarding what constitutes equivalent value and fair market value. Failure to utilize correct value creates fiduciary risk and potential negative transfer tax consequences. The fiduciary risk could be mitigated by consent of all the parties in interest and the transfer tax consequences could be reduced through the use of a Wandry style valuation formula clause. See Wandry v. Comm'r, T.C. Memo. 2012-88; AOD 2012-004.

(f) Consider the exercise of a limited power of appointment held by the dying client in order to trigger the Delaware Tax Trap and have such property includible in the dying client's estate for estate tax purposes.

(ii) Family members could consider transferring low basis assets to the dying client in order to achieve a step-up in basis at the time of death. The dying client would have to leave the transferred property to someone other than the initial donor or that donor's spouse in order to avoid the application of I.R.C. § 1014(e) carry-over basis rules. Some planners have suggested utilizing cross-gifts to a terminally ill client so that a donor does not receive property gifted upon the death of the dying client. Of course, the step transaction analysis by the Internal Revenue Service could be an issue with these types of transactions. Another idea to avoid I.R.C. § 1014(e) treatment is for the donor to disclaim the transfer of the gifted asset back to him or her from the dying client. Any pre-death tax planning must carefully consider the impact of the proposed transactions upon the dispositive plan of the dying client. For more information on I.R.C. § 1014(e) issues, we suggest the following: An Oxymoron? The Deathbed Lifetime QTIP for Basis Adjustment and Asset Protection, Richard S. Franklin and George D. Karibjanian, Estates, Gifts & Trusts Journal, Bloomberg, November 10, 2016, page 7; Mark R. Sigel, I.R.C. Section 1014(e) and Gifted Property Reconveyed in Trust, 27 Akron Tax J. 33 (2011-2012).

(iii) Consider changing bank/brokerage accounts from joint ownership between spouses into the dying spouse's name, if the dying spouse contributed all the funds for those assets and, in those circumstances, the basis step up is available.

(iv) Consider amending existing executory sales contracts in order to avoid income in respect of decedent treatment for the sales proceeds and the resulting loss of step-up in basis for the sale completed after death. For instance, a contract of sale will not generate a step-up basis if all major contingencies have been fulfilled at the time of death. If a contingency could be amplified or clarified (possibly with the consent of the buyer), then there is a possibility the asset could receive a step-up in basis. This technique is limited in utility and would require significant confidence in the buyer of such property if the contract is to be amended.

(v) Consider alteration of existing business governing instruments in order to reduce the application and scope of valuation discounts on those business

interests at the time of death. Potential alterations could include providing the interest owned by the dying client with enhanced management rights, right to have his or her interest purchased and broader rights on transferability. Any changes would need to be evaluated outside of the narrow confines of tax savings.

(vi) In terms of discounted assets, it may make sense for the dying client to acquire fractional interests in land (in order to own 100% interests in the property) or receive an interest in an entity to obtain control of the entire entity. These types of transfers can be made between spouses without transfer tax and the increase in the value of the asset may outweigh the potential loss in step up under I.R.C. § 1014(e) if applicable. The income tax planning goal would be for the dying client's interests to not be discountable or to minimize the discount on such property. The planner would need to run tax calculations to determine utility.

(vii) With regard to outstanding installment sales to intentionally defective grantor trusts, the planner should consider having the irrevocable trust repaying the outstanding note before death to remove the argument of whether there would be gain recognition with respect to post-death payments on that obligation. If needed, the irrevocable trust could borrow money from a third party to pay off the note.

(viii) If an intentionally defective grantor trust will be selling assets in the near future, the planner should consider the sale of the assets in the trust prior to the grantor's death, so that the income taxes will be payable by the grantor's estate rather than being a liability of the irrevocable trust following the grantor's death.

(ix) Consider amplifying and clarifying the existence of prior transfers where a retained interest is present triggering the estate tax inclusion of such assets and resulting basis adjustment for previously gifted property into the taxable estate of the dying client under I.R.C. §§ 2036 and 2038. See discussion of *Powell* case, infra at I.H.14(c).

(x) As previously discussed, if a dying client owns depreciated assets, the unrealized loss is lost at death because of the step-down in basis rules. In order to avoid the step-down, the planner could consider having the dying client:

(a) Harvest losses by selling the asset prior to death if the loss is usable on the Final Return;

(b) Gift assets to the dying client's spouse as the transfer carries over basis for all purposes under I.R.C. § 1015(e) and I.R.C. § 1041(b)(2);

(c) A dying client could sell the depreciated asset to an intentionally defective grantor trust or a non-grantor trust and not lose the unrealized loss as I.R.C. § 1015 applies only to gifts not to sales. A sale to a grantor trust is a disregarded transaction and that trust would acquire the seller's basis, thereby preserving the loss. A sale to a non-grantor trust would generate a disallowance under

the related party rules of I.R.C. § 267 but such loss is preserved for the future by being added to the basis of the asset purchased.

**K. Avoid Income Tax Pitfalls**

A mantra for any planner who is trying to assist a dying client and his or her family should be to do no harm. Harm can be generated by unnecessary income tax. Pre-death transfers of property can create negative income tax consequences under a variety of circumstances.

1. The transfer of low basis (appreciated) assets prior to death can create a major negative income tax result. As discussed above, the lifetime transfer generates carryover basis into the gifted property under I.R.C. § 1015 and a resulting loss in step-up in basis at death. The loss in step-up increases future capital gains tax while reducing ongoing depreciation deductions for that property.

2. A transfer of an asset in which liability exceeds basis can generate a taxable transaction. The classic example is the transfer of a negative capital account partnership or limited liability company interest will trigger gain to the donor.

3. Certain transfer of installment obligations could transfer acceleration of gain imbedded and deferred by such obligation. I.R.C. § 453. Acceleration can occur when obligations are transferred to the obligor.

4. Any transfer of S corporation stock to an ineligible S corporation will result in loss of S corporation status.

**L. Income Tax Resources**

1. For more information relating to immediate pre-death planning, we suggest a review of the following:

   (a) Edwin P. Morrow III, L. Paul Hood, Jr., JD, LL.M., CFRE, FCEP, For Whom the Bell Tolls: Pre-Mortem Planning Options and a Look Forward at Post-Mortem Estate Planning, Leimberg Information Services Webinar Feb 25, 2021;

   (b) David A. Handler and Kristen Curatolo, Planning at the Eleventh Hour, A Practitioner's Checklist for Clients Near Death, Trusts & Estates, June 2016 and April 2019 (Part II); and

   (c) L. Paul Hood, SNAP, Crackle, SWAP: The Substitution Power in Grantor Trusts, 2019.

2. For more information on basis planning issues, we suggest the following authorities:

   (a) Paul S. Lee, Run the Basis and Catch Maximum Tax Savings – Part 1, 42 Est. Plan J. (January 2015);

   (b) Paul S. Lee, Run the Basis and Catch Maximum Tax Savings – Part 2, 42 Est. Plan. J. (February 2015); and

   (c) Michael A. Yuhas and Carl C. Radom, New Estate Planning Frontier: Increasing Basis, 42 Est. Plan. J. (January 2015).

3. For more information relating to valuation and basis, we suggest the following authorities:

(a) John A. Bogdanski, Federal Tax Valuation (Thomson Reuters/Tax & Accounting, 2020); and

(b) Howard M. Zaritsky and Lester B. Law, Fundamentals Program: Basis – Banal? Basic? Benign? Bewildering? (Focus Series), 49 U. Miami Heckerling Inst. on Est. Plan. ch. 1 (2015).

4. IRS Valuation Guide For Income, Estate and Gift Taxes (CCH) (1994).

**M. End-of-Life Medical Considerations**

1. Authority of individual to act on behalf of incapacitated

(a) Virginia Health Care Decisions Act, Va. Code § 54.1-2983, *et seq.*.

(b) In the absence of an advance medical directive, there is a statutory ordering of individuals whom shall act as the principal's agent if the principal is deemed incapable of making an informed decision. Va. Code § 54.1-2986. If there are two or more individuals in a given class, then a physician may rely on a decision made by a majority of the "reasonably available members of that class." Id.

(c) If a patient has an advance medical directive, the agent(s) named under the advance medical directive acts on behalf of the individual and supersedes a person authorized to act for the individual under Va. Code § 54.1-2986.

(d) Regardless of whether the individual has an advance medical directive, an agent or statutorily defined person who may authorize health care only has authority once a physician has made a determination that the principal is "incapable of making an informed decision," which means the patient's attending physician's medical opinion that, "the inability of an adult patient, because of mental illness, intellectual disability, or any other mental or physical disorder that precludes communication or impairs judgment, to make an informed decision about providing, continuing, withholding or withdrawing a specific health care treatment or course of treatment because he is unable to understand the nature, extent or probable consequences of the proposed health care decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision. For purposes of this article, persons who are deaf, dysphasic or have other communication disorders, who are otherwise mentally competent and able to communicate by means other than speech, shall not be considered incapable of making an informed decision." Va. Code § 54.1-2983.2.

(e) The Agent's scope of authority under an advance medical directive is defined in the advance medical directive; provided, however, that an agent may not authorize nontherapeutic sterilization, abortion, or psychosurgery on behalf of the principal. Va. Code § 54.1-2983.3.

(f) Agent can restrict visitation if specifically allowed under the advance medical directive, but no next-of-kin acting as agent in the absence of an advance medical directive can restrict visitation. Va. Code § 54.1-2986.1.

(g) Advance Medical Directive can be revoked by written cancellation; physical cancellation; or orally if a principal is capable of making an informed decision. Va. Code § 54.1-2985.

(h) What happens if the principal is incapacitated and an agent's decision and the instructions given by principal about a particular health care decision are not in agreement?

(i) No real hard and fast rule: "Any agent or person authorized to make health care decisions pursuant to this article shall (i) undertake a good faith effort to ascertain the risks and benefits of, and alternatives to any proposed health care, (ii) make a good faith effort to ascertain the religious values, basic values, and previously expressed preferences of the patient, and (iii) to the extent possible, base his decisions on the beliefs, values, and preferences of the patient, or if they are unknown, on the patient's best interests." Va. Code § 54.1-2986.1.

(i) **Exhibit C** contains forms for expanded end-of-life provisions beyond Virginia's statutory advance medical directive form.

*** Note** about The Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. § 1320d *et seq*.): an agent only has authority under an advance medical directive once the patient has been deemed incapable of making an informed decision, so prior to that determination an agent has no authority under HIPAA to request medical information or speak to a doctor about the principal's protected health information. For this reason, it is wise to include a separate HIPAA release for the principal's agents to allow the principal's named agents (in addition to other individuals if desired) the ability to speak to doctors and obtain health information about the principal prior to the determination of incapacity by a physician.

2. Durable Do Not Resuscitate Orders ("DNR")

(a) DNR is a medical order signed by a physician instructing health care providers not to do CPR or to resuscitate a patient if a patient stops breathing or if the patient's heart stops beating.

(b) Agent under advance medical directive may execute a DNR on behalf of the patient once the patient has been deemed incapable of making an informed decision. Va. Code § 54.1-2987.1.

(c) Sample DNR is in the Virginia Administrative Code at FORMS (12 Va. Admin. Code 5-66, Forms) and at https://ris.dls.virginia.gov/uploads/12VAC5/forms/22f9c002902~1.pdf.

3. Physician Orders for Scope of Treatment (POSTs)

a. A POST is a physician-signed order (unlike an advance medical directive) that "communicates and puts into action treatment preferences when a patient is near the end of their life." For more on POSTs and a sample POST, please visit https://www.virginiapost.org.

b. Seen as a more nuanced and medically-specific enactment of a patient's wishes that may more generically be spelled out on his or her advance medical directive.

c. Virginia's DNR form actually contains a physician order for scope of treatment.

4. For Virginia lawyers, you should consider Understanding and Planning with Advanced Directives: Where the Legal Rubber Meets the Medical Road, Carter Brothers and Nathan

Kottkamp, Virginia Conner-Zaritsky 44th Annual Advanced Estate Planning and Administration Seminar (2023).

## II. ESTATE ADMINISTRATION TWO WEEKS AFTER DEATH

### A. Introduction

Attorneys often get a phone call immediately after a client's death from a family member or personal representative asking, "What should I do?" The first question an attorney must ask him or herself is if he or she can speak to the person calling, and we will address the ethical obligations to a client following death at the outset of this outline.

The two weeks immediately following the death of a client are simultaneously emotionally fraught, busy with planning for the client's funeral or other celebration of life, and somewhat at a standstill from an estate administration perspective.

This second portion of the outline deals entirely with issues that arise prior to qualification of a personal representative. The outline is focused on issues that need to be dealt with immediately following death, issues that may arise surrounding the burial or cremation of an individual and the corresponding services, and miscellaneous issues for an attorney to consider when responding to the, "What should I do?" phone call from a client's family member or personal representative.

While most attorneys hopefully will not need to serve as arbiter for disputes among family members related to burial, cremation, and funeral services or a failure of next of kin to make such arrangements, it is important to outline the statutes and case law surrounding these issues in the rare case in which they do arise. When these issues need to be addressed, they can be difficult to handle, and many planners are unfamiliar with the law surrounding those issues.

Finally, we will raise some practical issues that often need to be handled or raised after death to bring value to clients and their families at the outset of an estate and/or trust administration. It is not our goal to be exhaustive but rather to bring attention to issues that may need additional consideration based on a client's individual situation.

### B. Ethical Issues

1. Reminder: Agent's authority under power of attorney ceases upon death. UPOAA § 110(a)(1). However, a personal representative of a decedent's estate has the right to request an accounting of all action taken by agent acting under a power of attorney following the principal's death. UPOAA § 114(h). This right to information by a personal representative can be limited, restricted, or entirely waived in a power of attorney. Id.

2. Model Rules of Professional Conduct Rule 1.6: Confidentiality of Information

   *Confidentiality of Information*

   *(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).*

   *(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:*

   *(1) to prevent reasonably certain death or substantial bodily harm;*

*(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;*

*(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;*

*(4) to secure legal advice about the lawyer's compliance with these Rules;*

*(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;*

*(6) to comply with other law or a court order; or*

*(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.*

*(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.*

3. Generally, an attorney's duty of confidentiality continues after the death of a client.

4. The ACTEC commentaries to the MRPC state, "A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness." The ACTEC Commentaries on the Model Rules of Professional Conduct, 5th Ed. (2016).

5. Hypothetical: An heir-at-law who is not named as executor in the will in the attorney's possession calls and asks the attorney for the original will.

   (a) Can the attorney tell the individual that he or she has a will for the client and/or a file that does not contain the original will but does have a copy of a will if the family member is not the named personal representative?

   (b) Can the attorney tell the individual that he or she is in possession of a will, or can the attorney tell the individual who is named as executor in the will?

   (c) Is there any affirmative obligation of notification following a client's death if an attorney is holding an original will?

   (d) Suggestion that the attorney submit the will to the court of relevant jurisdiction to hold for probate.

6. Note on interaction with estate and trust beneficiaries prior to qualification: An executor has no duty to notify or keep beneficiaries of the estate informed until after qualification. However, (assuming the duty to inform and report is not waived in the trust agreement), a trustee does have a duty to notify the qualified beneficiaries of the acceptance of the trustee's role and certain details related to the trust itself within a reasonable time of accepting the trusteeship. Additionally, the trustee must respond to requests for information from the qualified beneficiaries and keep them informed on the trust administration after he or she accepts appointment as trustee. Uniform Trust Code § 813.

## C. Burial, Cremation, and Funeral Issues

**Note**: The following Section 3 of this outline focuses on Virginia law, but **Exhibit D** to this outline contains references to New York, Texas, California, and Florida law on this topic.

1. Death Certificates

   (a) Who is entitled to request a copy of a death certificate?

   (b) From the Virginia Department of Vital Statistics website: "Vital Records are available to immediate family members only-mother, father, husband, wife, child, brother, sister and grandparents with valid ID. . . Aunts, uncles, cousins, in-laws, etc. cannot obtain a Vital Record." (https://www.vdh.virginia.gov/vital-records/#:~:text=Vital%20Records%20are%20available%20to,cannot%20obtain%20a%20Vital%20Record).

   (c) Va. Code § 3.21-271.F: "The State Registrar or the city or county registrar shall issue a certified copy of a death certificate to the grandchild or great-grandchild of a decedent in accordance with procedures prescribed by the Board in regulation."

   (d) 25 years after death, death certificates become public information and can be requested by anyone. Va. Code § 32.1-271.

   (e) 12 Va. Admin. Code 5-550-470: Individual Requests for copies of Death Certificates

   *A. Upon request, the State Registrar or the city or county registrar shall disclose data or issue certified copies of birth or death records or information* ***when satisfied that the applicant therefor has a direct and tangible interest in the content of the record and that the information contained therein is necessary for the determination or protection of personal or property rights.***

   *B. A direct and tangible interest may be evidenced by requests from the registrant, members of his immediate family, his guardian, or their respective legal representatives in the case of birth records.* ***Such direct and tangible interest may be evidenced by requests from surviving relatives or their legal representatives in the case of death records.***

   *C. For the purposes of securing information or obtaining certified copies of birth records, the term "legal representative" shall include a registrant's attorney; a person with power of attorney for affairs of registrant; an attending physician; or a federal, state or local governmental agency acting in behalf of the registrant or his family.*

*D. For the purposes of obtaining information of certified copies of death certificates,* ***the term "legal representative" shall include the registrant's*** *funeral service licensee;* ***attorney; person with power of attorney for the affairs of the registrant;*** *insurance company insuring the registrant; a federal, state or local governmental agency acting in behalf of the registrant or his family; a court appointed guardian;* ***or a court appointed administrator.***

*E. A direct and tangible interest shall not be evidenced by the biological parents of an adopted child; nor by commercial firms, agencies, nonprofit or religious organizations requesting listings of names or addresses.*

(f) Amending death certificates: Va. Code § 32.1-269.1.

2. Defining Next of Kin: Va. Code § 54.1-2800.

(a) Defining who are a decedent's next of kin can become important for purposes of cremation, burial, and funeral decisions. Especially in the absence of a burial directive, next of kin are the responsible parties for these decisions immediately following the death of an individual and are given the authority to act for these specific decisions regardless of the appointment of a personal representative for the decedent's estate.

(b) "Next of kin" means **any** of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to Va. Code § 54.1-2825, the legal spouse, child aged 18 years or older, parent of a decedent aged 18 years or older, custodial parent or noncustodial parent of a decedent younger than 18 years of age, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship.

* **Note**: Chapter 28 of Title 54.1 does not differentiate between adopted and biological children, but the assumption would be that the rule of Va. Code § 64.2-102 applies so that "An adopted person is the child of an adopting parent and not of the biological parents, except that adoption of a child by the spouse of a biological parent has no effect on the relationship between the child and either biological parent."

(c) There is no hierarchy for who is defined as "next of kin" for purposes of body identification, funeral, burial, cremation, etc. like there is for heirs at law in Title 64.2. Presumably this is to allow for flexibility and expeditiousness in arranging for the disposition of a body but could create conflict.

(d) In 2010, the Virginia General Assembly enacted Va. Code § 54.1-2807.01 to address a disagreement among next of kin, but this does not solve all of the possible issues that could arise relating to disposition of remains and burial/cremation/funeral arrangements:

*§ 54.1-2807.01. When next of kin disagree.*

*A. In the absence of a designation under § 54.1-2825, when there is a disagreement among a decedent's next of kin concerning the arrangements for his funeral or the disposition of his remains, any of the next of kin may petition the circuit court*

*where the decedent resided at the time of his death to determine which of the next of kin shall have the authority to make arrangements for the decedent's funeral or the disposition of his remains. The court may require notice to and the convening of such of the next of kin as it deems proper.*

*B. In determining the matter before it, the court shall consider the expressed wishes, if any, of the decedent, the legal and factual relationship between or among the disputing next of kin and between each of the disputing next of kin and the decedent, and any other factor the court considers relevant to determine who should be authorized to make the arrangements for the decedent's funeral or the disposition of his remains.*

(e) How does a funeral director know if there is disagreement or does the funeral director have an affirmative duty to seek out approval form the entire class?

(f) How quickly does an action have to be instituted? Presumably could cause negligent handling of a body at some point?

(g) Comment from Protestor Rodney Johnson on § 54.1-2807.01: "Although the foregoing legislation will be of some help in resolving cases arising due to the absence of a priority rule, it is respectfully submitted that it is patently defective because it fails to take into account those cases where the evidence before the court is insufficient or hopelessly conflicting. What is the court to do in such a case? Is Virginia back to the days (and to the corresponding problems) when a case's outcome was measured by "the length of the chancellor's foot"? It is submitted that the only answer for such cases is a back-up priority provision. Although the legislation that was introduced did contain such a back-up priority provision, it was stricken because of opposition from lobbyists for the funeral/burial industry. It is respectfully submitted that this problem needs to be corrected in the 2011 Session. The better solution would be the adoption of a burial priority statute similar to that introduced in the 2009 Session, which would eliminate the need for the statute in question dealing with disputes among the next of kin. In the absence thereof, the only solution is a back-up priority provision for those cases where the court determines that the evidence of decedent's intent is insufficient or hopelessly conflicting." J. Rodney Johnson, Article: Wills, Trusts, and Estates, 45 U. Rich. L. Rev. 403, 415-17 (2010).

(h) There have been numerous attempts since 2010 to amend this statute to provide for a hierarchy for next of kin. See, e.g., proposed House Bill No. 2005 offered on January 13, 2021 and Senate Bill No. 1268 offered on January 13, 2021, both of which never made it out of Committee; attached as **Exhibit E**.

(i) In re: Estate of John S. Autry, Case No. CL16000850-00: Circuit Court for Arlington County: Autry involved a dispute between a decedent's partner and his brothers, and an attorney was appointed as administrator c.t.a of the estate. The brothers refused to consent to burial at Arlington, notwithstanding the express written wishes of the decedent. The brothers wanted him to be buried next to his first wife at another location. The administrator c.t.a. served the brothers with a petition, and ultimately the brothers were found in default for failing to answer; the judge ordered that the administrator c.t.a. be the person authorized to dispose of the decedent's remains in accordance with his wishes at Arlington National Cemetery. See petition and order attached as **Exhibit F**. See also Moon v. Jeoung, CL-2014-7208, Circuit Court for Fairfax County; pleadings attached as **Exhibit G.** The authors would like to sincerely thank Kimberley A. Murphy, Esq. and Lisa

M. Campo, Esq. of Hale Ball in Fairfax, Virginia, for sharing these materials with us for our use.

3. Goldman v. Mollen, 168 Va. 345 (1937).

   (a) Mr. Goldman died in 1922 and was buried in an orthodox Jewish cemetery associated with the synagogue that he had attended for many years. Mrs. Goldman then died in 1934 and in accordance with her wishes was buried in a cemetery associated with a reformed Jewish congregation and synagogue. The Goldmans' children then sought to have Mr. Goldman's body moved from the orthodox Jewish cemetery to the reformed Jewish cemetery to a burial plot adjacent to Mrs. Goldman.

   (b) The Goldmans' daughter testified that when her father died, plans for his burial were made prior to her being able to travel home to do so and appear to have been made by the synagogue of which he had been a former member and had been dissatisfied for some time. Mrs. Goldman was in failing health at the time of her husband's death and burial and expressed a desire to her daughter that she be buried in the reformed cemetery and that her husband's body be placed next to her after her death. The court also took testimony from an orthodox Jewish rabbi about Jewish law and how it relates to disinterment of a body.

   (c) The Court acknowledged in its analysis that "Primarily decedent's place of burial rests with his personal representatives, his widow or his next of kin. . . . As between them, the wishes of the widow should prevail." Id. at 354.

   (d) Ultimately, however, the Court ruled that Mr. Goldman's body should not be removed as there was no compelling reason to do so, citing "'Only some rare emergency could move a court of equity to take a body from its grave in consecrated ground and put it in ground unhallowed if there was good reason to suppose that the conscience of the deceased, were he alive, would be outraged by the change. Subordinate in importance, and yet at times not wholly to be disregarded, are the sentiments and usages of the religious body which confers the right of burial'. . . The faith of those surviving might change but the wishes of the dead are irrevocable." Id. at 358-59 (citing Yome v. Gorman 242 N.Y. 395, 403 (1926)).

4. Grisso v. Nolen: 262 Va. 688 (2001).

   (a) Mr. and Mrs. Nolen were married in 1955 and had one child. The Nolens then divorced in 1993, but following their divorce, the Nolens continued to live together intermittently for the next six years until Mrs. Nolen died.

   (b) Mrs. Nolen died intestate and left no written instructions concerning the disposition of her body or burial. Mrs. Nolen's daughter instructed that her mother's body be interned at Sandy Ridge Baptist Church in Franklin County.

   (c) Mr. Nolen filed a petition seeking to have Mrs. Nolen's body disinterred and reburied in an adjoining burial plot at a different cemetery alleging that his former wife had "at all times indicated her desire to be buried" there. Id. at 691. In addition, he testified that Mr. and Mrs. Nolen had purchased the burial plot during their marriage and had the headstones engraved as well as pre-paid the funeral service contract for both of them prior to their divorce. Mr. Nolen also argued that both he and Mrs. Nolen had been estranged from their daughter for some time.

(d) The chancellor in the lower court ruled that Mrs. Nolen's remains should be disinterred and moved to the joint burial plot per her former husband's wishes.

(e) The sole issue before the Court was whether Mr. Nolen had standing to bring the petition for disinterment and reburial.

The court ruled that Mr. Nolen had no standing to bring the petition for disinterment and reburial stating, "the circumstances of the couple's thirty-eight year marriage and continued periods of cohabitation following their divorce are insufficient to confer upon Dillard Nolen any cognizable interest or legal standing with respect to matters concerning his former wife." Id. at 695.

5. Mazur v. Woodson, 191 F. Supp. 2d 676 (E.D. Va. 2002).

(a) In a more recent case, the Eastern District of Virginia, ruling on a question of Virginia law, stated that the *dicta* in Goldman giving preference to a widow in questions of burial did not support a finding of damages to the plaintiffs in that case.

(b) In that case, Mrs. Mazur was suffering from dementia, and so her husband and children moved her to Virginia to live with her aunt. While in Virginia, Mrs. Mazur was moved to her brother's house without the knowledge of her husband or children. While Mrs. Mazur was living at her brother's house, her brother filed a petition to have her declared incompetent and to have himself appointed as her guardian and conservator. The circuit court ruled in favor of the brother's petition, and he was appointed guardian and conservator. Not long after that ruling, Mr. Mazur filed suit in federal court in New Jersey seeking to have the Virginia circuit court order appointing the guardian and conservator vacated. The federal court dismissed all claims. Then, 5 years later, Mr. Mazur and his children filed a § 1983 claim in federal court in Virginia claiming that the Virginia circuit court judge who appointed Mrs. Mazur's guardian and conservator violated their constitutional rights. Those claims were dismissed, and the dismissal was affirmed by the Fourth circuit.

(c) While the § 1983 suit was pending in federal court in Virginia, Mrs. Mazur passed away. Her brother, who was her guardian and conservator at that time, contracted with a funeral home to perform the burial of Mrs. Mazur in Virginia. Mrs. Mazur was buried on July 5, 2001. On July 15, 2001, Mr. Mazur and his children filed a petition in Virginia circuit court to have Mrs. Mazur's body disinterred so that they could bury her remains in New Jersey. The court approved the order to disinter Mrs. Mazur and re-bury her in New Jersey based on Mrs. Mazur's guardian and conservator agreeing to the order.

(d) Later in 2001, Mr. Mazur and his children instituted an action against Mrs. Mazur's guardian and conservator and the funeral home who performed the burial at his direction alleging "intentional and negligent mishandling of a corpse under Virginia law." Id. at 678. They claimed damages for intentional infliction of emotional distress in excess of $75,000.

(e) The court clarified that the funeral home had no affirmative duty to determine the wishes of all of Mrs. Mazur's next of kin. Their reliance on Mrs. Mazur's brother's (and Mrs. Mazur's conservator and guardian's) directions as to her burial was proper under Va. Code § 54.1-2807 because the "'definition of "next of kin" opened the class concurrently to any individual listed regardless of degree of

relationship to the decedent so that there may be an orderly and expeditious internment by the funeral director.'" Id. at 680 (citing Siver v. Rockingham Mem'l Hosp., 48 F. Supp. 2d 608 (W.D. Va. 1999)). "Because each member of the deceased's 'next of kin' as defined by the Virginia Code, has equal rights to 'possess, preserve, and bury' a decedent's body, there can be no cause of action among members of that class for withholding a corpse from other members of the class." Id. at 682.

(f) The court did recognize a widow's preferential treatment under common law to dictate how a decedent's body is interned, but the court refused to apply these preferences in a case for damages. Mrs. Mazur's body had already been moved in accordance with her widower's wishes, and so the court was unwilling to extend that preferential treatment to widowers to support a claim of damages. Id. at 682-83.

6. Absence of next of kin: Va. Code § 54.1-2807.2.

(a) In the absence of a next of kin and written burial directive, directions relating to disposal of a body can be taken by **any** of the following:

(i) Agent under advance medical directive

(ii) Legal guardian

(iii) "Any other person 18 years of age or older who is able to provide positive identification of the deceased and is willing to pay for the costs associated with the disposition of the decedent's remains."

(b) Interesting that executor or administrator of the decedent's estate is not included in this list. Should attorneys consider including burial and funeral instructions in advance medical directives if an agent could potentially take on this role at some point in the future?

7. A way to solve all the fighting: Burial Directives: Va. Code § 54.1-2825.

(a) *"Any person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements and be otherwise responsible for his funeral and the disposition of his remains, including cremation, interment, entombment, or memorialization, or some combination thereof, upon his death. Such designee shall have priority over all persons otherwise entitled to make such arrangements, provided that a copy of the signed and notarized writing is provided to the funeral service establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received the remains. Nothing in this section shall preclude any next of kin from paying any costs associated with any funeral or disposition of any remains, provided that such payment is made with the concurrence of any person designated to make arrangements."*

(b) If burial directive has not been accepted by the named agent during the decedent's lifetime, is it invalid? Can the named agent accept the designation in writing following the death of the decedent?

(c) Query whether a burial directive can be embedded within a will if the will is notarized and the designation is accepted in writing by the agent? Or, can and

should the burial directive be embedded in an advance medical directive (see II.C.6(b) supra).

(d) Especially relevant in cases of a decedent with a combined family, no close family members or a close relationship that may not be defined by statute (second marriage, friend, significant other, estrangement from particular family members, long-time healthcare worker, etc.)

(e) **Note**: If the decedent left separate instructions related to how his or her body should be disposed of and instructions about funeral services, there is no statute binding the agent named under the burial directive to those instructions.

(f) Several forms attached as **Exhibit H**.

8. Funeral Expenses

(a) Va. Code § 64.2-512. Funeral expenses: *"Subject to the provisions of § 64.2-528, reasonable funeral and burial expenses of a decedent shall be considered an obligation of the decedent's estate, which shall be liable for such expenses to (i) the funeral establishment, (ii) the cemetery, (iii) any third-party creditor who finances the payment of such expenses, or (iv) any person authorized to make arrangements for the funeral of the decedent who has paid such expenses. A person who is authorized to make arrangements for the funeral of the decedent shall have the authority to bind the decedent's estate for such expenses and may execute, on behalf of the estate, any necessary instruments."*

(i) Assuming "person authorized to make arrangements for the funeral of the decedent" ties back to next of kin, agent under advance medical directive, guardian, etc.?

(ii) Prior to qualification, an executor under Va. Code § 64.2-511 has the power to provide for the burial of the testator.

(b) Va. Code § 64.2-528 allows for payment of up to $4,000 in category 3 for funeral expenses in an insolvent estate (the only higher priorities are costs of administration and exempt property, homestead, and family allowances).

(i) If the funeral expenses exceed $4,000 or are otherwise not paid for in an insolvent estate, presumably the funeral home or individual who paid for the expenses and seeks reimbursement falls into category 10 of Va. Code § 64.2-528 for "all other claims."

(ii) The personal representative has the ability to seek recovery for unpaid claims and charges (including funeral expenses) against the beneficiary of a multi-party account owned by the decedent under Va. Code § 6.2-611.

(iii) Va. Code § 54.1-2808.1 states that if cremains are unclaimed after a period of 120 days, then the funeral home may dispose of the cremains and "the costs and all reasonable expenses incurred in disposing of the cremains shall be borne by the contracting agent, [which shall mean] any person, organization, association, institution, or group of persons who contracts with a funeral director or funeral establishment for funeral services."

(iv) Practically, in a solvent estate, the authors have not seen a beneficiary question the reasonableness of the cost of burial and a funeral or seen a Commissioner of Accounts question an amount spent on funeral expenses in an accounting, including a funeral expense of $85,000.

(c) Note on Ownership of Burial Plots: In *Terry v. Rickett,* the Supreme Court of Virginia clarified that an owner of burial plots is contractually limited by provisions in a cemetery's bylaws or rules and regulations about the disposition of the burial plots upon death. Because the cemetery's rules and regulations stated that if a cemetery plot owner dies without specifically devising the unused internment rights in a will or by written direction to the cemetery, then the burial plots passed to the owner's heirs at law pursuant to the cemetery's rules and regulations and not in accordance with the residuary clause in the decedent's will. Terry v. Rickett, No. 171410, 2018 Va. Unpub. LEXIS 27, 2018 WL 6695892 (Va. Dec. 20, 2018).

**D. Executor's Powers Prior to Qualification**

1. Va. Code § 64.2-511. Powers of executor before qualification.

*A person named in a will as executor shall not exercise the powers of executor until he qualifies as such by taking an oath and giving bond in the court or before the clerk where the will or an authenticated copy thereof is admitted to record, except that he may provide for the burial of the testator, pay reasonable funeral expenses, and preserve the estate from waste.*

(a) What does "preserve the estate from waste" mean?

(b) A change of beneficiary of a life insurance policy that was payable to the decedent's estate by a personal representative prior to qualification does not fall into the category of permitted acts of a personal representative prior to qualification. Prudential Ins. Co. v. Stephens, 498 F. Supp. 155 (E. D. Va. 1980).

(c) Relation back for purposes of bringing suit as the person representative of a decedent's estate: "[It] seems to be well settled, that if pending the action ancillary letters of administration are taken out, they relate back to the institution of the action for the purpose of preserving the plaintiff's right of action, and that the pleadings may be so amended as to show the facts, as well at law as in equity.

Among other authorities cited is the case of Doolittle v. Lewis, 7 Johns. Ch. 49, 11 Am. Dec. 389 (Johns Ch. N. Y. 1823), in which Chancellor Kent says: 'If the party sues as executor or administrator, without probate or taking out letters of administration, the taking them out at any time before the hearing will cure the defect and relate back so as to make the bill good from the beginning. In a light so merely formal is that omission viewed.'" Clinchfield Coal Corp. v. Osborne's Admr., 114 Va. 13, 18 (1912).

2. Uniform Probate Code § 3-701

*The duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named executor in a will may carry out written instructions of the decedent relating to the decedent's body, funeral, and burial*

*arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.*

3. Douglas v. Chesterfield Cnty. Police Dep't, 251 Va. 363 (1996).

   (a) A decedent's surviving spouse filed an action against the Chesterfield County Police Department for violation of the Decedent's constitutional rights after he died in police custody.

   (b) Decedent died on October 9, 1991. His surviving spouse file her initial complaint in Circuit Court for the City of Richmond on October 8, 1993, but this case was dismissed by voluntary nonsuit on September 29, 1994. The surviving spouse re-filed the action on March 16, 1995. She did not qualify as Executor of the Decedent's estate until April 26, 1995. The defendants moved to dismiss the action based on an expiration of the statute of limitations.

   (c) The court ruled that the filing of the action was not timely because the personal representative failed to qualify until after the action was filed; all statutes of limitation had expired between the filing of the federal action and the personal representative's qualification; and that "she was not a proper party to file the action, and her qualification did not relate back and validate the filing of the federal action." Id. at 368.

4. Va. Code § 64.2-451. Appointment of curator; when made; his duties.

   *The court or the clerk of such court, or his duly qualified deputy, may appoint a curator of the estate of a decedent during a contest about the decedent's will, during the infancy or in the absence of an executor, or until administration of the estate be granted and may require the curator to give a bond in a reasonable penalty. The curator shall ensure that the estate is not wasted before the qualification of an executor or administrator, or before such estate lawfully comes into possession of such executor or administrator. The curator may demand, sue for, recover, and receive the decedent's personal estate and all debts due to the testator. The curator may lease or receive the rents and profits of any real estate that the decedent possessed when he died. The curator shall pay debts, to the extent that there are sufficient assets to do so in the order of payment prescribed by law, and may be sued in the same manner as an executor or administrator. Upon the qualification of an executor or administrator, the curator shall account for and pay and deliver to him such estate as he controls or may be liable for.*

5. Jurisdiction of Probate of Wills: Va. Code § 64.2-443.

   *A. The circuit courts shall have jurisdiction of the probate of wills. A will shall be offered for probate in* ***the circuit court in the county or city wherein the decedent has a known place of residence****; if he has no such known place of residence, then in a county or city wherein* ***any real estate lies that is devised or owned by the decedent;*** *and if there is no such real estate,* ***then in the county or city wherein he dies or a county or city wherein he has estate****.*

   *B. Where any person has become, either voluntarily or involuntarily, a patient in a nursing home, convalescent home, or similar institution due to advanced age or impaired health,* ***the place of legal residence of the person shall be rebuttably presumed to be the same as it was before he became a patient.***

(a) A deposit to the credit of decedent in a bank, United States Savings Bonds and Treasury Bonds found in the lockbox in that bank, and the location in the same city of a partnership business in which decedent was interested, constituted "estate" within the meaning of the predecessor statute of Va. Code § 64.2-443 to give lower court jurisdiction to admit decedent's will to probate.

(b) Uniform Probate Code §§ 3-201 through 3-204:

> *(a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is: (1) in the [county] where the decedent was domiciled at the time of death; or (2) if the decedent was not domiciled in this state, in any [county] where property of the decedent was located at the time of death.*

(c) **Note**: The UPC does not contain a definition for "domicile." Domicile is "rarely defined by statute, but courts and state regulations generally assign the term its common law meaning: 'the place which an individual intends to be his permanent home – the place to which he intends to return whenever he may be absent.'" Portfolio 366-2nd: State Taxation of Compensation and Benefits, Detailed Analysis, B. State Definitions of "Resident."

(d) The situs of a debt due the decedent is the residence or location of the debtor. Dominion Nat'l Bank v. Jones, 202 Va. 502 (1961).

(e) Differentiating between residence and domicile

(i) "A Virginia circuit court can properly proceed to probate a will without any inquiry or adjudication as to a decedent's domicile." 20 M.J. WILLS § 54 (2020).

(ii) In describing an earlier version of the probate venue statute, "[T]he statute upon which the decision depends contemplates four distinct conditions, each of which would confer jurisdiction, and neither of which depends upon legal domicile as distinguished from residence:

(a) The decedent may have a mansion house, which implies residence, and if he has a mansion house which is his residence, the court of the county in which that mansion house is located has jurisdiction.

(b) The decedent may have no mansion house, and yet he may live with a friend or relative, or in a boarding house, and so have a known place of residence, and the establishment of this fact gives jurisdiction to the court of that locality.

(c) The statute contemplates that the decedent may have neither such a mansion nor such a place of residence, and then the court of the county or corporation wherein any of his real estate lies has jurisdiction to appoint his administrator.

(d) If neither of these conditions appear, then the court of the county or corporation in which he dies, or has estate, may appoint his administrator.

It is obvious that this statute cannot be so construed as to limit the appointment of a decedent's administrator to the court having jurisdiction over his legal domicile, and that this is not the test of such jurisdiction." Wilkinson v. Spiller, 143 Va. 267, 276 (1926).

(f) Conflict of Laws issues: French v. Short, 207 Va. 548 (1966).

(i) Upon a petition of the Decedent's son, a Florida court refused to probate the holographic will of Mr. French because it was not witnessed as required by Florida law, but did appoint the Decedent's son as curator and administrator of his father's estate.

(ii) The Decedent's son subsequently offered the will for probate in Dickenson County, Virginia, where the decedent had owned real and personal property.

(iii) The trial court took evidence on the question of decedent's domicile. The Decedent's son argued that his father's domicile was Florida, and one of the beneficiaries under the will argued that his domicile was Virginia. The trial court found that the decedent was Decedent's domicile was Florida but still admitted the will to probate in Dickenson County, Virginia.

(iv) The decision was appealed on the grounds that the probate of the holographic will should have been limited to real estate located in Virginia only. The court agreed, stating that, "a decedent's personal property passes according to the law of the state where he was domiciled at his death, but his real estate passes according to the law of the state where it lies." Id. at 551. Thus, the Court ruled that, "the Virginia court should not have admitted French's will to probate as a will of his personal property, but should have admitted it only as a will of his Virginia real estate." Id. at 554.

(v) UPC § 3-202: *If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state.*

## E. Authority and Control of Assets Following Death

1. Authority to File and Pay Income Taxes

(a) I.R.C. § 6012(b)(1): "If an individual is deceased, the return of such individual . . . shall be made by his executor, administrator, or other person charged with the property of such decedent." See https://www.irs.gov/taxtopics/tc356; IRS Publication 559 (2023), Survivors, Executors, and Administrators.

(b) If a surviving spouse is filing a joint return and there's no appointed personal representative, the surviving spouse should sign the return and write in the signature area "Filing as surviving spouse." A surviving spouse can file joint

returns for the taxable year in which the death occurred and, if the death occurred before filing the return, for the taxable year immediately before the year of death.

(c) If there's no appointed personal representative and there's no surviving spouse, the person in charge of the decedent's property must file and sign the return as "personal representative." Although, there is no income tax regulation defining who the person in charge of the decedent's property is, it would be analogous to look to the estate tax regulations to determine how they define executor for purposes of filing an estate tax return.

(d) In the estate tax realm, Treas. Reg. § 20.2203-1 defines executor: "The term 'executor' means the executor or administrator of the decedent's estate. However, if there is no executor or administrator appointed, qualified and acting within the United States, the term means any person in actual or constructive possession of any property of the decedent. The term 'person in actual or constructive possession of any property of the decedent' includes, among others, the decedent's agents and representatives; safe-deposit companies, warehouse companies, and other custodians of property in this country; brokers holding, as collateral, securities belonging to the decedent; and debtors of the decedent in this country."

(e) If claiming a refund, the proper party may need to also file IRS Form 1310—Statement of Person Claiming Refund Due a Deceased taxpayer.

2. Authority of Successor Trustee

(a) In the case of revocable trusts in which the decedent was the sole trustee during his or her lifetime, then presumably with a copy of the decedent's death certificate, the successor trustee should take authority and possession of the trust assets immediately upon death.

(b) In the case of a delay in a death certificate, the authors have seen brokerage houses and other financial institutions accept a copy of a published obituary to prove death and thus pass authority to a successor trustee.

(c) Presumably, a successor trustee could prepare a certification of trust immediately upon death of the trustee/grantor and a third-party should rely on the certification of trust for authority (see 6.2 of estate planning outline supra).

(d) Note the necessity of the trustee's duty to inform and report under UTC § 813 and provide notification to beneficiaries (if not waived under trust agreement).

(e) Note: Before a successor trustee accepts an appointment as trustee of a trust, it may want to consider if it will subject the trust to state income taxation in the state of the trustee's residence and the implications/costs of serving in such a role.

3. Taking Control of Business Interests

(a) Oftentimes, if the decedent owned an operating business at the time of his death, there may be no person authorized to handle the day-to-day business of the organization in the decedent's stead. The best way to plan for this scenario is to make sure that there are multiple individuals listed on the signature card for all of the company's bank accounts to make sure that salaries can continue to be paid, the lights stay on, and business can continue as normal. An issue could also arise if there is no responsible party to sign corporate tax returns and make tax payments

that may be due prior to the executor's qualification. Presumably, if a new manager, officer, or directors needed to be appointed prior to qualification of a personal representative for tax and business management purposes, then the executor could do so under its pre-qualification authority "to preserve the estate from waste." Va. Code § 64.2-511.

(b) In a similar vein, if the decedent was employing household staff or personal staff, it may be important to continue the staff's employment post-death to assist in administering the estate. As of death, a staff person is no longer a household employee of the decedent but instead an independent contractor performing services for the estate or trust. The estate or trust can issue a Form 1099 to the individual performing services (and deduct the cost as an expense of administration) or can rely on the individual to self-report the income on his or her individual 1040. Staff people can be instrumental in preserving and protecting the decedent's property as discussed in the next section below.

4. Property Issues

(a) Ensuring that the decedent's real and personal property is secured and continues to be insured following death is an important point that oftentimes requires action prior to an executor's qualification.

(b) The authors have found that oftentimes homeowner's or property insurance is prohibitively expensive (or unavailable) for unoccupied properties, and so confirming the existence of the insurance policy and its effectiveness may be advisable rather than informing the insurance company of the death, which could trigger policy changes that would not be advantageous to the estate or its beneficiaries. The authors have also had issues insuring tangible personal property that is not associated with a homeowner's policy.

(c) Practical points:

(i) The time immediately following death is the time to begin compiling an asset and liability list with titling to determine if probate is necessary or if the estate can be administered under the Virginia Small Estate Act. Va. Code § 64.2-600, *et seq*; UPC § 13-1201, *et seq.*

(ii) Gathering keys to properties, cars, boats, etc. may be important in a very quick timeframe after death if there are concerns that individuals with access to property may be a risk to the security of the property (*i.e.* a child walks away with his or her favorite piece of jewelry never to be seen again by the other siblings). It would also be prudent to change locks or install a security system if there are concerns about the security of the property or any tangible property located in a residence.

(iii) Also think about the security of property in the case of a natural disaster and any preventative steps that can be taken to preserve the assets (reasonable person standard). In this situation, confirming insurance coverage would be hugely important and a step that would need to be taken as soon as possible and prior to qualification.

(iv) Pets often need to be dealt with immediately, so making sure that pets are in a safe environment until it can be determined who will take ownership of them.

(v) The decedent's mail can be forwarded to his or her personal representative immediately following death online at usps.com, and often it makes sense to do this as soon as possible to start collecting information about assets and liabilities and prevents mail tampering or missing mail in certain family and beneficiary situations.

5. Disclaimers

(a) Although it may be tempting to start transferring accounts and assets right away following the death of the decedent, it is important to consider whether any beneficiaries will consider (or should consider) disclaiming any of the inherited assets. For the disclaimer to be considered a qualified and valid disclaimer for federal tax purposes and state law purposes, it, "cannot be made with respect to any interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer." Treas. Reg. § 25.2518-2(d)(1).

(b) Especially in the case of joint accounts with rights of survivorship or accounts with listed beneficiaries, it is important to not have the potential disclaimant accept any interest or benefit in any part of the account prior to the decision is made about disclaimer.

6. Miscellaneous

(a) Credit Card Rewards Points, Airline, and Hotel Rewards: It has been the authors' experience that in order to take advantage of credit card rewards points that a decedent accrued during his or her lifetime, the points and rewards need to be addressed prior to closing out the accounts, otherwise they may be lost. Companies will often allow the transfer of points to a beneficiary (sometimes only to a single beneficiary, which can also cause issues) or use the cash value to offset an existing balance. It is important to ask about any point balances prior to paying off and closing credit cards.

(b) Preparing for Potential Insolvency: Oftentimes, immediately after a decedent's death, it is difficult to determine if an estate will be insolvent. Executors should proceed with caution in making disbursements to the decedent's creditors before all assets and liabilities are known to the Executor and can be made in accordance with the order of priority in Va. Code § 64.2-528. Any payment in an insolvent estate made outside the statutory order of priority can lead to personal liability of the Executor. Family members should keep in mind that if the estate does end up being insolvent, they may not be reimbursed for any expenses paid on behalf of the estate prior to that determination.

**Note:** The UPC does not contain any provisions relating to insolvency or the payment to creditors and order of priority of such payments, so individual state laws are especially relevant when considering potential insolvency.

## III. PREMORTEM ESTATE PLANNING CHECKLIST FOR THE DYING CLIENT[1]

### A. Ongoing Issues

1. Someone to authorize legal services.

2. Someone to sign documents.

3. Time available.

4. Obtaining critical information.

5. Determining what should and can be done.

6. Prioritizing the planning.

7. Quick (but careful) implementation.

### B. Execution of Documents and Plan

1. Client execution – consider issues in light of short timeframe, potential lack of capacity and potential assertions of undue influence.

2. Attorney-in-fact/agent execution where incapacity – is there authority for a proposed transaction? Is the exercise of that authority prudent?

### C. Other Client Actions and Authorizations Needed

1. Engagement (scope/fees).

2. Client impairment.

3. Dealings with/through children.

4. Discussions with non-clients.

5. Approval of plan.

6. Acceptance of risks.

### D. Sources of Authorizations

1. Client directly or indirectly - consider personal contacts, ratification or continuation of prior planning.

**2.** Authorized agent – can be informal, attorney-in-fact, guardian/conservator, trustee or professional advisor.

### E. Ethical Considerations

1. Who is the client? Is the client impaired?

[1] As used herein, a "dying" client is one whose death is likely in the immediate near term and for whom the plan is the "final" one.

2. Communication of alternatives and risks.

3. Confidential communications.

4. Conflicts of interest.

**F. Basic Client Information**

1. Learn about client's health situation.

   (a) Availability.

   (b) Life expectancy.

   (c) Capacity.

   (d) Ability to sign documents.

2. Learn about client's family situation.

   (a) Marital history (including citizenship of spouse).

   (b) Children.

   (c) Grandchildren.

   (d) Parents.

   (e) Degree of interfamily cooperation and similarity of interests.

   (f) Financial transactions within the family (with a focus upon intrafamily loans and disproportionate gifts).

3. Evaluate client's business situation.

   (a) Employed.

      (i) Retirement/disability options.

      (ii) Fulfilling ongoing responsibilities.

   (b) Retired.

   (c) Business continuation issues.

   (d) Executor or trustee of estate or trust.

4. Identify client's professional advisors/providers.

5. Determine client's domicile and prior domiciles.

## G. Review of Client's Existing Documents

1. Availability and location of originals.

2. Analyze existing documents.

   (a) Will and codicils.

   (b) Revocable living trusts and amendments.

   (c) Powers of attorney.

   (d) Advance medical directives including HIPAA waiver.

   (e) Buy-sell agreements.

   (f) Executory contracts.

   (g) Employment agreements.

   (h) Premarital agreements, marital agreements and divorce agreements (from present and previous spouses).

   (i) Divorce decrees/court orders.

   (j) Retirement plan documentation including beneficiary designations, spousal waivers and distribution elections.

   (k) Life insurance policies and beneficiary designations.

   (l) Annuities and beneficiary designations.

   (m) Deeds.

   (n) Leases.

   (o) Joint brokerage and bank account contracts.

   (p) Income tax returns.

   (q) Gift tax returns (consider existence of adequate disclosure for prior transfers).

   (r) Business interest documentation (corporation, partnership, etc.), including governing documents and all agreements affecting owners' interests.

   (s) Debt instruments.

   (t) Documentation of split dollar arrangements.

   (u) Uniform donor card.

   (v) Burial and funeral contracts and instructions.

   (w) Hazard and liability insurance.

(x) UTMA accounts of which client is donor or custodian.

(y) 529 plans of which client is donor or owner.

(z) Safe deposit box contracts.

(aa) Trusts for client established by others.

3. Power of attorney issues.

(a) Is the power of attorney effective immediately, or is it a springing power of attorney?

(b) Is the power of attorney durable?

(c) Has the agent been granted general authority?

(d) What specific authorities, if any, has the agent been granted?

(e) Have any duties been waived?

(f) Does the power of attorney include any carve backs or savings provisions?

**H. Family Issues**

1. Evaluate potential spousal concerns.

2. Evaluate children/grandchildren concerns.

**I. Client's Financial Situation**

1. Solvent or insolvent? Illiquid?

2. Assets - title, current fair market value, tax basis, date acquired, location, percentage interest, beneficiary information.

(a) Real estate.

(b) Marketable securities.

(c) Bank accounts and cash.

(d) Mortgages and notes.

(e) Accounts receivable.

(f) Life insurance.

(g) Business interests - sole proprietorships, partnerships, limited liability company interests, corporations, "S" corporation stock.

(h) Tangible personal property.

(i) Annuities.

(j) IRA's, 401K plan benefits, 403(B), thrift savings, profit-sharing, pension and other qualified retirement plans.

(k) Stock options and other stock based employment benefits.

(l) Other employee benefits.

(m) Interests in trusts and estates.

(n) Powers of appointment.

(o) Contract rights.

(p) Leasehold interests.

(q) U.S. bonds.

(r) Copyrights, patents and trademarks and other intangible rights.

(s) Digital assets.

(t) Unusual assets.

3. Liabilities.

(a) Mortgages.

(b) Consumer debts.

(c) Litigation.

(d) Guarantees and indemnities.

(e) Professional or tort liability exposure.

(f) Spousal obligations.

(g) Obligations to children.

(h) Leases.

(i) Other contingent/potential liabilities.

(j) Joint obligations.

(k) Analyze potential acceleration of debt on account of death of client.

4. Miscellaneous.

(a) Box numbers and locations of bank safe deposit boxes and keys.

(b) Any assets received by gifts or inheritances.

(c) Assets accumulated while married in community property state.

(d) Passwords for all digital assets.

(e) Location of safes and keys to safes.

**J. Clarify Non-Tax Objectives and Choices**

1. Interests to be protected.

   (a) Spouse.

   (b) Children/grandchildren.

   (c) Charitable.

   (d) Others.

2. Probate avoidance.

   (a) Revocable living trust funding - put all assets (other than tax- deferred into revocable living trust to avoid court supervision ("probate"), considering:

      (i) Deed real property to trustees with deed to include trustee powers and power to appoint successor trustees.

      (ii) Retitle securities, brokerage, closely-held business interests and bank accounts into the name of the trust utilizing client's social security number; and

      (iii) Assign tangible personal property into the revocable trust.

   (b) Form of ownership (survivorship).

   (c) Beneficiary designations (consider making below asset types payable to revocable living trust).

      (i) Life insurance.

      (ii) Retirement accounts (often should be payable to individuals).

      (iii) Bank accounts ("POD").

      (iv) Securities accounts ("TOD").

      (v) U.S. bonds ("POD").

      (vi) Closely-held business interests – potential use of TOD and possible need for retitled stock certificate under recent Knop (Virginia Supreme Court) case.

   (d) Can the agent under the POA implement probate avoidance?

3. Anatomical gift.

4. Funeral and burial issues.

5. Fiduciary appointments – consider whether existing appointments should be changed, particularly if client can. make written designations of successors if desired.

6. Powers of appointment – consider exercise to adjust trust terms.

**K. Determine Client's Income Tax Situation**

1. Current and past taxes due or potentially due.

2. Status of tax filings.

3. Status of estimated tax installments.

4. Prior installment sales.

5. Capital loss carryovers and unrealized capital losses.

6. Charitable contribution carryovers.

7. Rental properties.

   (a) Accelerated depreciation.

   (b) Suspended losses.

   (c) Liabilities exceed basis?

8. Status of "minimum required distributions".

9. Executory contracts.

10. Identify other "income in respect of decedent" (IRD) items.

11. Determine income tax bases of client's capital assets and those assets held in irrevocable trusts of which the client is a beneficiary.

12. Potential income tax situations of estate/trust and beneficiaries of estate/trust.

**L. Analyze Client's Transfer Tax Situation**

1. Quantify potential estate taxes due under existing plan and asset structure.

2. Prior use of current annual exclusions, "applicable exclusion amount", qualified educational or medical transfers.

3. Quantify available deceased spousal unused exclusion per prior portability election.

4. "Adjusted taxable gifts" related to prior transfers, review gift tax returns. Transfers of life insurance policies within three years.

5. Tax bases of potential gift property.

6. Tax bases of assets previously transferred to irrevocable trust.

7. Opportunity to split gifts with spouse.

8. Opportunity to disclaim assets passing from others.

9. "QTIP" interests includible in client's estate.

10. Powers of appointment includible in client's estate.

**M. Clarify Tax Objectives and Choices, Planning to Mitigate Taxes**

1. Threshold concerns.

   (a) Prior to engaging in any tax planning, the planner should consider the transfer tax costs and benefits and the income tax costs and benefits.

   (b) Any tax planning should consider the impact of proposed transactions on the dispositive plan of the client.

   (c) Is there someone with authority to implement the planning?

   (d) If a fiduciary is involved in the proposed transaction, is the transaction a proper exercise of authority? What is the breach of fiduciary risk in this transaction?

   (e) There is no substitution for running tax projections for potential transactions prior to implementation.

2. Considerations to minimize income taxes.

   (a) If advantageous, accelerate income into decedent's Final Return.

      (i) To utilize individual rates or lower overall tax rates given the current steep graduated income tax brackets, the threshold for I.R.C. § 199A deduction and the threshold for the net investment income tax.

      (ii) To use charitable deductions and net operating losses including carryovers.

      (iii) Where offsetting medical deductions are available as dying client often has significant medical bills at the end of his or her life.

      (iv) Final Return often has less income as it is a partial tax year.

   (b) Mechanisms to accelerate income onto Final Return.

      (i) Withdraw funds from qualified plans such as traditional individual retirement accounts, 401(k)s or other retirement accounts to generate income.

      (ii) Convert IRA to Roth IRA.

      (iii) Sell assets to generate capital gains (a) if have available losses, (b) the zero capital gains bracket is applicable or (c) offsetting deductions exist. The sales could be beneficial in anticipation of estate/trust liquidity and cash needs, but planner must consider loss of basis adjustment at death.

      (iv) Make certain S Corp and Partnership tax elections to push income onto Final Return.

(v) Accelerate gain on installment obligations.

(c) If advantageous pre-death, accelerate deductions into decedent's final return.

(i) Make contributions to charities pre-death in order to obtain income tax charitable deduction on the Final Return. This type of transfer would generate a current income tax deduction and the donated sums would be excluded from the dying client's estate for estate tax purposes.

(ii) Dispose of dying client's entire interest in passive activity in order to utilize unused suspended losses.

(d) Income Tax Basis Planning.

(i) Hold low basis assets until death in order to get step-up.

(ii) "Harvest" capital losses before death to generate a loss deduction and avoid step down in basis upon death.

(iii) Third parties could transfer low basis assets to dying client who leaves those assets to someone or something other than transferor ("ricochet" gifts).

(iv) Evaluate whether low basis (or appreciated) assets owned by irrevocable trusts which are not includible in the dying client's estate could be includible in the dying client's estate for estate tax and basis adjustment purposes. Mechanisms to transfer assets into dying client's estate from an irrevocable trust include:

(a) Distribution of trust property to dying client using an existing distribution standard in the trust;

(b) If appropriate authority is in the trust document, an independent trustee, trust director or trust protector can amend trust to either grant a general power of appointment, expand distribution standard or distribute for broad purposes; or

(c) Irrevocable trust can be terminated by agreement. A termination of an irrevocable trust has timing issues at the end of client's life, problem of proper consents and potential negative tax consequences.

(v) Consider transactions where the dying client substitutes low basis assets of equivalent value (if such swap power exists) from an intentionally defective grantor trust for high basis assets (ideally cash). If a swap power does not exist, then consider recommending that the dying client purchase low basis assets from the trust in exchange for high basis assets in order to obtain basis adjustment at death for those low basis assets. One key impediment is whether there are high basis assets available for such an exchange. If high basis assets are not available, planner should consider borrowing from third parties.

(vi) Consider the exercise of a limited power of appointment held by the dying client in order to trigger the Delaware Tax Trap and have such property includible in the dying client's estate for estate tax purposes.

(vii) Consider changing bank/brokerage accounts from joint ownership between spouses into the dying spouse's name, if the dying spouse contributed all the funds for those assets.

(viii) Consider amending existing executory sales contracts in order to avoid income in respect of decedent treatment for the sales proceeds and the resulting loss of step-up in basis for the sale completed after death.

(ix) Consider alteration of existing business governing instruments in order to reduce the application and scope of valuation discounts on those business interests at the time of death. Potential alterations could include providing the interest owned by the dying client with enhanced management rights, right to have his or her interest purchased and broader rights on transferability.

(x) In terms of assets which would otherwise be discounted for basis adjustment purposes, it may make sense for the dying client to acquire fractional interests in land (in order to own 100% interests in the property) or receive interests in an entity to obtain control of that entity. These types of transfers can be made between spouses without transfer tax and the increase in the value of the asset may outweigh the potential loss in step up under I.R.C. § 1014(e) if applicable. The goal would be for dying client's interests to not be discountable or to minimize the discount on such property.

(xi) Consider amplifying and clarifying the existence of prior transfers where a potential retained interest is present to trigger the estate tax inclusion of such assets and resulting basis adjustment for previously gifted property into the taxable estate of the dying client under I.R.C. §§ 2036 and 2038.

(xii) With capital assets consisting of unrealized losses, consider gifting those assets to the dying client's spouse as a gift to a spouse is a carryover of basis for all purposes under I.R.C. § 1015(e) and I.R.C. § 1041(b)2. In the alternative, a dying client could sell the asset with an unrealized loss to an intentionally defective grantor trust or a non-grantor trust and not lose that unrealized loss as I.R.C. § 1015 carryover rules apply only to gifts not sales.

(e) With regard to outstanding installment sales to intentionally defective grantor trusts, the planner should consider having the irrevocable trust repay the outstanding note before death to remove the argument of whether there would be gain recognition with respect to post-death payments on that obligation. If needed, the irrevocable trust could borrow money from a third party to pay off the note.

(f) If an intentionally defective grantor trust will be selling assets in the near future, the planner should consider the sale of the assets in that trust prior to the "grantor's" death, so that the income taxes will be payable by the grantor's estate rather than being a liability of the irrevocable trust following the grantor's death.

(g) Avoid negative income tax results.

(i) The transfer of low basis (appreciated) assets prior to death can create a major negative income tax result on account of loss in step-up in basis at death.

(ii) A transfer of an asset in which liability exceeds basis can generate a taxable transaction.

(iii) Certain transfer of installment obligations could transfer acceleration of gain imbedded and deferred by such obligation.

(iv) Any transfer of S corporation stock to an ineligible S corporation could result in loss of S corporation status.

3. Address liquidity issues.

(a) Pre-death or post-death sales.

(b) Availability of IRC § 303 tax favorable redemption.

(c) Availability of IRC § 6166 tax payment deferral.

(d) Availability of IRC § 6161 tax payment deferral.

(e) Availability of borrowed funds.

(f) Use of Graegin-type loans. Note: Regulations proposed by the Service on June 28, 2022 under I.R.C. § 2053 may limit the use of Graegin loans in the future. The proposed regulations provide that interest on an obligation of an estate used to pay estate tax liability can only be deducted if the loan's terms are actually and necessarily incurred in the administration of the decedent's estate and are essential to the proper settlement of the decedent's estate. The proposed regulations specifically target loans by related parties and loans structured to create or increase the amount of interest that is deductible. See Guidance Under Section 2053 Regarding Deduction for Interest Expense and Amounts Paid Under a Personal Guarantee, Certain Substantiation Requirements, and Applicability of Present Value Concepts, 87 Fed. Reg. 38331 (proposed June 28, 2022) (to be codified at 26 CFR 20).

(g) Consider planning and transfers to improve qualification under I.R.C. § 303, I.R.C. § 6166 or Graegin loan.

4. Considerations to minimize estate, gift and generation skipping taxes.

(a) Make annual exclusion gifts to the maximum number of donees. Core concerns: checks must be cashed/clear bank prior to death and analyze impact of any gift's on dying client's dispositive plan.

(b) Maximize use of direct tuition transfers, dying client can pre-pay tuitions under certain circumstances.

(c) Make direct medical transfers.

(d) Fractionalize interests in real property to generate valuation discounts.

(e) Gift high basis assets, cash is king.

(f) Amend existing family limited partnerships/limited liability company (FLP/LLC) governing instruments to maximize valuation discounts.

(g) Transfer control interests in business entities out of dying client's estate to maximize valuation discounts of business interests.

(h) Consider pre-funding pecuniary bequests in order to shelter all or a portion of the transfers from transfer tax with the use of annual exclusion, need to ensure that such transfers would be in lieu of existing bequests.

(i) Transfer assets from well spouse to dying spouse in order to ensure dying spouse has sufficient assets to fully fund a bypass trust (although less important with portability) and to fully fund use of generation skipping transfer tax exemption (as generation skipping transfer tax exemption is not portable). Any transfer must consider impact of I.R.C. § 1014(e).

(j) Ensure that surviving spouse will have property for later annual exclusion gifts.

(k) Remember portability election can be lost if surviving spouse remarries and survives that new spouse.

(l) Outright dispositions to spouse do not provide non-aggregation valuation benefits which can be available when discounted assets are owned by a bypass trust or a QTIP type trust. Consider transfers of business interests and fractional interests between spouses and use of spousal trusts (bypass or QTIP) to maximize valuation discounts with non-aggregation planning.

(m) Accelerate IRD items pre-death in order to receive full estate reduction for income tax paid for USA and state estate tax purposes.

(n) Disclaim assets passing from others (in a qualified manner).

(o) Implement discount valuation planning with respect to dying client's QTIP trust interest, including implementing distributions of realty and business interests to dying client, (if distribution standards permit such transfers), in order to split ownership of business interests and real property between the QTIP trust and the dying client and receive non-aggregation valuation benefit.

(p) Avoid transfer of a portion of client's QTIP interest itself under I.R.C. § 2519.

(q) Purchase of property which loses value rapidly but is desired by beneficiaries (i.e. automobile, furniture, etc.).

(r) Consider terminating certain kinds of trusts which contain red- flags for estate tax audits. For instance, the United States estate tax return asks a number of questions about valuation discounts and the existence of irrevocable trusts which may be audit triggers.

(s) Mitigate I.R.C. § 2036 and § 2043 risks under Powell case by selling problematic assets (such as partnership interests) and obtaining the full and adequate consideration exception under I.R.C. § 2036.

(t) Consider transfers to enhance illiquidity to assist in qualification for Graegin loan treatment which provides an estate tax deduction for post-death interest payments even if such interest is paid over a long period of time. See note above on the proposed regulations addressing Graegin loans.

(u) If I.R.C. § 303 or I.R.C. § 6166 may be applicable, consider taking steps to enhance the ability to qualify for such benefits by contributing non-business assets to the business or by disposing of non-business assets.

(v) If (1) the client is subject to state estate tax, (2) there is no state gift tax, (3) the state does not have a clawback for deathbed gifts, and (4) the estate tax base for state estate tax gifts purposes does not include adjusted taxable gifts, consider making gifts to reduce the client's exposure to the estate tax by capitalizing on the non- congruence between the estate tax base for state estate tax purposes and the estate tax base for federal estate tax purposes (which includes adjusted taxable gifts).

(w) If (1) the client is subject to state estate tax and (2) the state estate tax liability arises because of tangible personal property located in the state, consider moving the tangible personal property to a different state that does not have an estate tax.

(x) If (1) the client is subject to state estate tax and (2) the state estate tax liability arises because of real property located in the state, consider transferring that real property to an entity. Caveat: The state may look through the entity and impose estate tax nonetheless.

(y) Back to the 1990s planning, part 1: "Equalization" planning may be advisable if transfer tax rates become more graduated.

(z) Back to the 1990s planning, part 2: consider triggering estate tax at death of first spouse to engage in "previously taxes property" ("PTP") planning.

(aa) Consider mechanisms to cause estate inclusion at the next generation's level to reduce exposure to the GST tax, such as the granting of a general power of appointment to a non-skip person who has an interest in a non-GST-exempt trust.

(bb) Consider making transfers to a health and education exclusion trust, such as through the exercise of a power of appointment, to avoid the GST tax.

## N. Cash Requirements Planning

1. Quantify Tax and Non-tax Cash Needs Pre-death and Post-death.

2. Identify Sources of Cash to Meet Needs.

3. Insure that cash will be available through the documents (beneficiary designations, form of ownership, testamentary documents).

4. Develop Strategies If Estate Is Illiquid.

5. Develop Strategies If Estate Is Insolvent.

## IV. Exhibits Attached

A. Wells Fargo: Safe Deposit Box Access Authorization Form
B. Rev. Proc 2024-40
C. Health Care and End-of-Life Preferences and Goals form
D. Multi-State Appendix for Post-Death Issues
I. 2021 House Special Session I – HB No. 2005
J. In Re: Estate of John S. Autry - Petition
K. Moon v. Jeoung, et al. - Complaint
L. Designation of Agent for Disposition of Remains form

**EXHIBIT A**

WELLS FARGO

# Safe Deposit Box Access Authorization

## One Time Only

To: WELLS FARGO BANK, N.A.

| Complete Box Number (Complete Alphanumeric) | Original Rental Date | COID |
|---|---|---|
| | | |

| Primary Customer Name | Primary Customer ECN |
|---|---|
| | |

**To Be Completed by the Customer**

By signing below I authorize you, Wells Fargo, to allow _____ to enter my Safe Deposit Box No. _____ one time only on or before _____ (month, day, year). This person, whose signature appears below, has my authority and permission to remove any or all of the box's contents, ~~as well as to close the box and terminate my rental agreement on my behalf.~~

I assume all risks of loss or damages, both direct and indirect, which may arise in connection with this authorization, and I hold harmless and release Wells Fargo Bank N.A. of any and all liability which may arise for accepting or acting upon this authorization.

| Signature of person who may enter my safe deposit box | Print Name |
|---|---|
| X | |

My signature below verifies that this is the signature of the person authorized to enter my safe deposit box. Each of us who signs this authorization is bound by all of its terms and the Safe Deposit Box Lease Terms.

| Customer | Date | Customer | Date |
|---|---|---|---|
| X | | X | |

FO01-00000SDP9400-01

The contents of a safe deposit box are not insured by the FDIC or by Wells Fargo Bank, N.A.

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*Exhibit A - Wells Fargo Safe Deposit Box Access Authorization form*

# EXHIBIT A

**Safe Deposit Box Lessee Must Be Notarized**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of _____ County of _____

On _____ (Date) before me, _____ (Name, Title of Officer - E.G. "Jane Doe, Notary Public").

personally appeared _____ (Name(s) of Signer(s))

☐ personally known to me - OR - ☐ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____

**For Bank Use Only Agent Authentication**

| | ID Type | ID Number | ID State/Province/Country | ID Expiration Date |
|---|---|---|---|---|
| Primary ID | | | | |
| Secondary ID | | | | |

_____ X _____

Banker Name Signature

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FO01-00000SDP9400-02

The contents of a safe deposit box are not insured by the FDIC or by Wells Fargo Bank, N.A.

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# EXHIBIT B

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.602: Tax forms and instructions.
(Also Part I, §§ 1, 23, 24, 32, 36B, 42, 45R, 55, 59, 62, 63, 125, 132(f), 135, 137, 146, 147, 148, 152, 179, 179D, 199A, 213, 220, 221, 448, 461, 512, 513, 642, 831, 877, 877A, 911, 1274A, 2010, 2032A, 2503, 2523, 4161, 4261, 4611, 6033, 6039F, 6323, 6334, 6601, 6651, 6652, 6695, 6698, 6699, 6721, 6722, 7345, 7430, 7702B, 9831; 1.148-5.)

Rev. Proc. 2024-40

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[1] Unless otherwise specified, all references to "section" or "§" are to provisions of the Internal Revenue Code (Code).

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SECTION 3. EFFECTIVE DATE

SECTION 4. DRAFTING INFORMATION

SECTION 1. PURPOSE

This revenue procedure sets forth inflation-adjusted items for 2025 for various Code provisions as in effect on October 22, 2024. The inflation adjusted items for the Code sections set forth in section 2 of this revenue procedure are generally determined by reference to § 1(f). If amendments to the Code are enacted for 2025 after October 22, 2024, taxpayers should consult additional guidance to determine whether these adjustments remain applicable for 2025.

SECTION 2. 2025 ADJUSTED ITEMS

.01 Tax Rate Tables. For taxable years beginning in 2025, the tax rate tables under § 1 are as follows:

TABLE 1 - Section 1(j)(2)(A) –Married Individuals Filing Joint Returns and Surviving Spouses

| **If Taxable Income Is:** | **The Tax Is:** |
|---|---|
| Not over $23,850 | 10% of the taxable income |
| Over $23,850 but not over $96,950 | $2,385 plus 12% of the excess over $23,850 |
| Over $96,950 but not over $206,700 | $11,157 plus 22% of the excess over $96,950 |
| Over $206,700 but not over $394,600 | $35,302 plus 24% of the excess over $206,700 |
| Over $394,600 but not over $501,050 | $80,398 plus 32% of the excess over $394,600 |
| Over $501,050 but not over $751,600 | $114,462 plus 35% of the excess over $501,050 |
| Over $751,600 | $202,154.50 plus 37% of the excess over $751,600 |

TABLE 2 - Section 1(j)(2)(B) – Heads of Households

| **If Taxable Income Is:** | **The Tax Is:** |
|---|---|
| Not over $17,000 | 10% of the taxable income |
| Over $17,000 but not over $64,850 | $1,700 plus 12% of the excess over $17,000 |
| Over $64,850 but not over $103,350 | $7,442 plus 22% of the excess over $64,850 |
| Over $103,350 but not over $197,300 | $15,912 plus 24% of the excess over $103,350 |
| Over $197,300 but not over $250,500 | $38,460 plus 32% of the excess over $197,300 |
| Over $250,500 but not over $626,350 | $55,484 plus 35% of the excess over $250,500 |
| Over $626,350 | $187,031.50 plus 37% of the excess over $626,350 |

# EXHIBIT B

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TABLE 3 - Section 1(j)(2)(C) – Unmarried Individuals (other than Surviving Spouses and Heads of Households)

| If Taxable Income Is: | The Tax Is: |
|---|---|
| Not over $11,925 | 10% of the taxable income |
| Over $11,925 but not over $48,475 | $1,192.50 plus 12% of the excess over $11,925 |
| Over $48,475 but not over $103,350 | $5,578.50 plus 22% of the excess over $48,475 |
| Over $103,350 but not over $197,300 | $17,651 plus 24% of the excess over $103,350 |
| Over $197,300 but not over $250,525 | $40,199 plus 32% of the excess over $197,300 |
| Over $250,525 but not over $626,350 | $57,231 plus 35% of the excess over $250,525 |
| Over $626,350 | $188,769.75 plus 37% of the excess over $626,350 |

TABLE 4 - Section 1(j)(2)(D) – Married Individuals Filing Separate Returns

| If Taxable Income Is: | The Tax Is: |
|---|---|
| Not over $11,925 | 10% of the taxable income |
| Over $11,925 but not over $48,475 | $1,192.50 plus 12% of the excess over $11,925 |
| Over $48,475 but not over $103,350 | $ 5,578.50 plus 22% of the excess over $48,475 |
| Over $103,350 but not over $197,300 | $17,651 plus 24% of the excess over $103,350 |
| Over $197,300 but not over $250,525 | $40,199 plus 32% of the excess over $197,300 |
| Over $250,525 but not over $375,800 | $57,231 plus 35% of the excess over $250,525 |
| Over $375,800 | $101,077.25 plus 37% of the excess over $375,800 |

TABLE 5 - Section 1(j)(2)(E) – Estates and Trusts

| **If Taxable Income Is:** | **The Tax Is:** |
|---|---|
| Not over $3,150 | 10% of the taxable income |
| Over $3,150 but not over $11,450 | $315 plus 24% of the excess over $3,150 |
| Over $11,450 but not over $15,650 | $2,307 plus 35% of the excess over $11,450 |
| Over $15,650 | $3,777 plus 37% of the excess over $15,650 |

.02 Unearned Income of Minor Children Subject to the "Kiddie Tax". For taxable years beginning in 2025, the amount in § 1(g)(4)(A)(ii)(I), which is used to reduce the net unearned income reported on the child's return that is subject to the "kiddie tax," is $1,350. This $1,350 amount is the same as the amount provided in § 63(c)(5)(A), as adjusted for inflation. The same $1,350 amount is used for purposes of § 1(g)(7) to determine whether a parent may elect to include a child's gross income in the parent's gross income and to calculate the "kiddie tax." For example, one of the requirements for the parental election is that a child's gross income is more than the amount referenced in § 1(g)(4)(A)(ii)(I) but less than 10 times that amount; thus, a child's gross income for 2025 must be more than $1,350 but less than $13,500.

.03 Maximum Capital Gains Rate (§ 1(h), § 1(j)(5)). For taxable years beginning in 2025, the maximum zero rate amounts and maximum 15 percent rate amounts under § 1(j)(5)(B), as adjusted for inflation, are as follows:

| Filing Status | Maximum Zero Rate Amount | Maximum15% Rate Amount |
|---|---|---|
| Married Individuals Filing Joint Returns and Surviving Spouse | $96,700 | $600,050 |
| Married Individuals Filing Separate Returns | $48,350 | $300,000 |
| Heads of Household | $64,750 | $566,700 |
| All Other Individuals | $48,350 | $533,400 |

| | | |
|---|---|---|
| Estates and Trusts | $3,250 | $15,900 |

.04 Adoption Credit. For taxable years beginning in 2025, under § 23(a)(3) the credit allowed for an adoption of a child with special needs is $17,280. For taxable years beginning in 2025, under § 23(b)(1) the maximum credit allowed for other adoptions is the amount of qualified adoption expenses up to $17,280. The available adoption credit begins to phase out under § 23(b)(2)(A) for taxpayers with modified adjusted gross income in excess of $259,190 and is completely phased out for taxpayers with modified adjusted gross income of $299,190 or more. See section 2.19 of this revenue procedure for the adjusted items relating to adoption assistance programs.

.05 Child Tax Credit. For taxable years beginning in 2025, the amount used in § 24(d)(1)(A) to determine the amount of credit under § 24 that may be refundable is $1,700.

.06 Earned Income Credit.

(1) In general. For taxable years beginning in 2025, the following amounts are used to determine the earned income credit under § 32(b). The "earned income amount" is the amount of earned income at or above which the maximum amount of the earned income credit is allowed. The "threshold phaseout amount" is the amount of adjusted gross income (or, if greater, earned income) above which the maximum amount of the credit begins to phase out. The "completed phaseout amount" is the amount of adjusted gross income (or, if greater, earned income) at or above which no credit is allowed. The threshold phaseout amounts and the completed phaseout amounts shown in the table below for married taxpayers filing a joint return include the increase provided in § 32(b)(2)(B), as adjusted for inflation for taxable years beginning in 2025. The threshold phaseout amounts and the

completed phaseout amounts shown in the table below for taxpayers with all other filing statuses also apply to married taxpayers who are not filing a joint return and satisfy the special rules for separated spouses in § 32(d).

| | Number of Qualifying Children | | | |
|---|---|---|---|---|
| Item | One | Two | Three or More | None |
| Earned Income Amount | $12,730 | $17,880 | $17,880 | $8,490 |
| Maximum Amount of Credit | $4,328 | $7,152 | $8,046 | $649 |
| Threshold Phaseout Amount (Married Filing Jointly) | $30,470 | $30,470 | $30,470 | $17,730 |
| Completed Phaseout Amount (Married Filing Jointly) | $57,554 | $64,430 | $68,675 | $26,214 |
| Threshold Phaseout Amount (All other filing statuses) | $23,350 | $23,350 | $23,350 | $10,620 |
| Completed Phaseout Amount (All other filing statuses) | $50,434 | $57,310 | $61,555 | $19,104 |

The instructions for the Form 1040 series provide tables showing the amount of the earned income credit for each type of taxpayer.

(2) Excessive Investment Income. For taxable years beginning in 2025, the earned income tax credit is not allowed under § 32(i) if the aggregate amount of certain investment income exceeds $11,950.

.07 Refundable Credit for Coverage Under a Qualified Health Plan. For taxable years beginning in 2025, the limitation on tax imposed under § 36B(f)(2)(B) for excess advance credit payments is determined using the following table:

| If the household income (expressed as a percent of poverty line) is: | The limitation amount for unmarried individuals (other than surviving spouses and heads of household) | The limitation amount for all other taxpayers is: |
|---|---|---|
| Less than 200% | $375 | $750 |

| | | |
|---|---|---|
| At least 200% but less than 300% | $975 | $1,950 |
| At least 300% but less than 400% | $1,625 | $3,250 |

.08 Rehabilitation Expenditures Treated as Separate New Building. For calendar year 2025, the per low-income unit qualified basis amount under § 42(e)(3)(A)(ii)(II) is $8,500.

.09 Low-Income Housing Credit. For calendar year 2025, the amount used under § 42(h)(3)(C)(ii) to calculate the State housing credit ceiling for the low-income housing credit is the greater of (1) $3.00 multiplied by the State population, or (2) $3,455,000.

.10 Employee Health Insurance Expense of Small Employers. For taxable years beginning in 2025, the dollar amount in effect under § 45R(d)(3)(B) is $33,300. This amount is used under § 45R(c) for limiting the small employer health insurance credit and under § 45R(d)(1)(B) for determining who is an eligible small employer for purposes of the credit.

.11 Exemption Amounts for Alternative Minimum Tax. For taxable years beginning in 2025, the exemption amounts under § 55(d)(1) are:

| | |
|---|---|
| Joint Returns or Surviving Spouses | $137,000 |
| Unmarried Individuals (other than Surviving Spouses) | $88,100 |
| Married Individuals Filing Separate Returns | $68,500 |
| Estates and Trusts | $30,700 |

For taxable years beginning in 2025, under § 55(b)(1), the excess taxable income above which the 28 percent tax rate applies is:

| | |
|---|---|
| Married Individuals Filing Separate Returns | $119,550 |
| All Other Taxpayers | $239,100 |

For taxable years beginning in 2025, the amounts used under § 55(d)(2) to determine the phaseout of the exemption amounts are:

| | Threshold Phaseout Amount | Complete Phaseout Amount |
|---|---|---|
| Joint Returns or Surviving Spouses | $1,252,700 | $1,800,700 |
| Unmarried Individuals (other than Surviving Spouses) | $626,350 | $978,750 |
| Married Individuals Filing Separate Returns | $626,350 | $900,350 |
| Estates and Trusts | $102,500 | $225,300 |

.12 Alternative Minimum Tax Exemption for a Child Subject to the "Kiddie Tax." For taxable years beginning in 2025, for a child to whom the § 1(g) "kiddie tax" applies, the exemption amount under §§ 55(d) and 59(j) for purposes of the alternative minimum tax under § 55 may not exceed the sum of (1) the child's earned income for the taxable year, plus (2) $9,550.

.13 Certain Expenses of Elementary and Secondary School Teachers. For taxable years beginning in 2025, under § 62(a)(2)(D) the amount of the deduction allowed under § 162 that consists of expenses paid or incurred by an eligible educator in connection with books, supplies (other than nonathletic supplies for courses of instruction in health or physical education), computer equipment (including related software and services) and other equipment, and supplementary materials used by the eligible educator in the classroom is $300.

.14 Transportation Mainline Pipeline Construction Industry Optional Expense Substantiation Rules for Payments to Employees Under Accountable Plans. For calendar year 2025, an eligible employer may pay certain welders and heavy equipment mechanics an amount up to $22 per hour for rig-related expenses that are deemed substantiated under an accountable plan if paid in accordance with Rev. Proc. 2002-41, 2002-1 C.B. 1098. If

the employer provides fuel or otherwise reimburses fuel expenses, an amount up to $14 per hour is deemed substantiated if paid under Rev. Proc. 2002-41.

.15 Standard Deduction.

(1) In general. For taxable years beginning in 2025, the standard deduction amounts under § 63(c)(2) are as follows:

| Filing Status | Standard Deduction |
|---|---|
| Married Individuals Filing Joint Returns and Surviving Spouses (§ 1(j)(2)(A)) | $30,000 |
| Heads of Households (§ 1(j)(2)(B)) | $22,500 |
| Unmarried Individuals (other than Surviving Spouses and Heads of Households) (§ 1(j)(2)(C)) | $15,000 |
| Married Individuals Filing Separate Returns (§ 1(j)(2)(D)) | $15,000 |

(2) Dependent. For taxable years beginning in 2025, the standard deduction amount under § 63(c)(5) for an individual who may be claimed as a dependent by another taxpayer cannot exceed the greater of (1) $1,350, or (2) the sum of $450 and the individual's earned income.

(3) Aged or blind. For taxable years beginning in 2025, the additional standard deduction amount under § 63(f) for the aged or the blind is $1,600. The additional standard deduction amount is increased to $2,000 if the individual is also unmarried and not a surviving spouse.

.16 Cafeteria Plans. For taxable years beginning in 2025, the dollar limitation under § 125(i) on voluntary employee salary reductions for contributions to health flexible spending arrangements is $3,300. If the cafeteria plan permits the carryover of unused amounts, the maximum carryover amount is $660.

.17 Qualified Transportation Fringe Benefit. For taxable years beginning in 2025, the monthly limitation under § 132(f)(2)(A) regarding the aggregate fringe benefit exclusion

amount for transportation in a commuter highway vehicle and any transit pass is $325. The monthly limitation under § 132(f)(2)(B) regarding the fringe benefit exclusion amount for qualified parking is $325.

.18 Income from United States Savings Bonds for Taxpayers Who Pay Qualified Higher Education Expenses. For taxable years beginning in 2025, the exclusion under § 135, regarding income from United States savings bonds for taxpayers who pay qualified higher education expenses, begins to phase out for modified adjusted gross income above $149,250 for joint returns and $99,500 for all other returns. The exclusion is completely phased out for modified adjusted gross income of $179,250 or more for joint returns and $114,500 or more for all other returns.

.19 Adoption Assistance Programs. For taxable years beginning in 2025, under § 137(a)(2), the amount that can be excluded from an employee's gross income for the adoption of a child with special needs is $17,280. For taxable years beginning in 2025, under § 137(b)(1) the maximum amount that can be excluded from an employee's gross income for the amounts paid or expenses incurred by an employer for qualified adoption expenses furnished pursuant to an adoption assistance program for adoptions by the employee is $17,280. The amount excludable from an employee's gross income begins to phase out under § 137(b)(2)(A) for taxpayers with modified adjusted gross income in excess of $259,190 and is completely phased out for taxpayers with modified adjusted gross income of $299,190 or more. (See section 2.04 of this revenue procedure for the adjusted items relating to the adoption credit.)

.20 Private Activity Bonds Volume Cap. For calendar year 2025, the amounts used under § 146(d) to calculate the State ceiling for the volume cap for private activity bonds is

the greater of (1) $130 multiplied by the State population, or (2) $388,780,000.

.21 Loan Limits on Agricultural Bonds. For calendar year 2025, the loan limit amount on agricultural bonds under § 147(c)(2)(A) for first-time farmers is $667,500.

.22 General Arbitrage Rebate Rules. For bond years ending in 2025, the amount of the computation credit determined under § 1.148-3(d)(4) of the Income Tax Regulations is $2,120.

.23 Safe Harbor Rules for Broker Commissions on Guaranteed Investment Contracts or Investments Purchased for a Yield Restricted Defeasance Escrow. For calendar year 2025, under § 1.148-5(e)(2)(iii)(B)(1) of the Income Tax Regulations, a broker's commission or similar fee for the acquisition of a guaranteed investment contract or investments purchased for a yield restricted defeasance escrow is reasonable if (1) the amount of the fee that the issuer treats as a qualified administrative cost does not exceed the lesser of (A) $50,000, and (B) 0.2 percent of the computational base (as defined in § 1.148-5(e)(2)(iii)(B)(2)) or, if more, $5,000; and (2) for any issue, the issuer does not treat more than $141,000 in brokers' commissions or similar fees as qualified administrative costs for all guaranteed investment contracts and investments for yield restricted defeasance escrows purchased with gross proceeds of the issue.

.24 Gross Income Limitation for a Qualifying Relative. For taxable years beginning in 2025, the exemption amount referenced in § 152(d)(1)(B) is $5,200.

.25 Election to Expense Certain Depreciable Assets. For taxable years beginning in 2025, under § 179(b)(1), the aggregate cost of any § 179 property that a taxpayer elects to treat as an expense cannot exceed $1,250,000 and under § 179(b)(5)(A), the cost of any sport utility vehicle that may be taken into account under § 179 cannot exceed $31,300.

Under § 179(b)(2), the $1,250,000 limitation under § 179(b)(1) is reduced (but not below zero) by the amount by which the cost of § 179 property placed in service during the 2025 taxable year exceeds $3,130,000.

.26 Energy Efficient Commercial Buildings Deduction. For taxable years beginning in 2025, the applicable dollar value used to determine the maximum allowance of the deduction under § 179D(b)(2) is $0.58 increased (but not above $1.16) by $0.02 for each percentage point by which the total annual energy and power costs for the buildings are certified to be reduced by a percentage greater than 25 percent. For taxable years beginning in 2025, the applicable dollar value used to determine the increased deduction amount for certain property under § 179D(b)(3) is $2.90 increased (but not above $5.81) by $0.12 for each percentage point by which the total annual energy and power costs for the building are certified to be reduced by a percentage greater than 25 percent.

.27 Qualified Business Income. For taxable years beginning in 2025, the threshold amounts under § 199A(e)(2) and phase-in range amounts under § 199A(b)(3)(B) and § 199A(d)(3)(A) are:

| Filing Status | Threshold amount | Phase-in range amount |
|---|---|---|
| Married Individuals Filing Joint Returns | $394,600 | $494,600 |
| Married Individuals Filing Separate Returns | $197,300 | $247,300 |
| All Other Returns | $197,300 | $247,300 |

.28 Eligible Long-Term Care Premiums. For taxable years beginning in 2025, the limitations under § 213(d)(10), regarding eligible long-term care premiums includible in the term “medical care”, as adjusted for inflation, are as follows:

| Attained Age Before the Close of the Taxable Year | Limitation on Premiums |
|---|---|
| 40 or less | $480 |
| More than 40 but not more than 50 | $900 |
| More than 50 but not more than 60 | $1,800 |

| | |
|---|---|
| More than 60 but not more than 70 | $4,810 |
| More than 70 | $6,020 |

.29 Medical Savings Accounts.

(1) Self-only coverage. For taxable years beginning in 2025, the term "high deductible health plan" as defined in § 220(c)(2)(A) means, for self-only coverage, a health plan that has an annual deductible that is not less than $2,850 and not more than $4,300, and under which the annual out-of-pocket expenses required to be paid (other than for premiums) for covered benefits do not exceed $5,700.

(2) Family coverage. For taxable years beginning in 2025, the term "high deductible health plan" means, for family coverage, a health plan that has an annual deductible that is not less than $5,700 and not more than $8,550, and under which the annual out-of-pocket expenses required to be paid (other than for premiums) for covered benefits do not exceed $10,500.

.30 Interest on Education Loans. For taxable years beginning in 2025, the $2,500 maximum deduction for interest paid on qualified education loans under § 221 begins to phase out under § 221(b)(2)(B), as adjusted for inflation, for taxpayers with modified adjusted gross income in excess of $85,000 ($170,000 for joint returns), and is completely phased out for taxpayers with modified adjusted gross income of $100,000 or more ($200,000 or more for joint returns).

.31 Limitation on Use of Cash Method of Accounting. For taxable years beginning in 2025, a corporation or partnership meets the gross receipts test of § 448(c) for any taxable year if the average annual gross receipts of such entity for the 3-taxable-year period ending with the taxable year which precedes such taxable year does not exceed $31,000,000.

.32 Threshold for Excess Business Loss. For taxable years beginning in 2025, in determining a taxpayer's excess business loss, the amount under § 461(l)(3)(A)(ii)(II) is $313,000 ($626,000 for joint returns).

.33 Treatment of Dues Paid to Agricultural or Horticultural Organizations. For taxable years beginning in 2025, the limitation under § 512(d)(1), regarding the exemption of annual dues required to be paid by a member to an agricultural or horticultural organization, is $207.

.34 Insubstantial Benefit Limitations for Contributions Associated with Charitable Fund-Raising Campaigns.

(1) Low cost article. For taxable years beginning in 2025, for purposes of defining the term "unrelated trade or business" for certain exempt organizations under § 513(h)(2), "low cost articles" are articles costing $13.60 or less.

(2) Other insubstantial benefits. For taxable years beginning in 2025, under § 170, the $5, $25, and $50 guidelines in section 3 of Rev. Proc. 90-12, 1990-1 C.B. 471 (as amplified by Rev. Proc. 92-49, 1992-1 C.B. 987, and modified by Rev. Proc. 92-102, 1992-2 C.B. 579), for the value of insubstantial benefits that may be received by a donor in return for a contribution, without causing the contribution to fail to be fully deductible, are $13.60, $68.00 and $136.00, respectively.

.35 Special Rules for Credits and Deductions. For taxable years beginning in 2025, the amount of the deduction under § 642(b)(2)(C)(i) is $5,100.

.36 Tax on Insurance Companies Other than Life Insurance Companies. For taxable years beginning in 2025, under § 831(b)(2)(A)(i) the amount of the limit on net written premiums or direct written premiums (whichever is greater) is $2,850,000 to elect the

alternative tax for certain small companies under § 831(b)(1) to be taxed only on taxable investment income.

.37 Expatriation to Avoid Tax. For calendar year 2025, under § 877A(g)(1)(A), unless an exception under § 877A(g)(1)(B) applies, an individual is a covered expatriate if the individual's "average annual net income tax" under § 877(a)(2)(A) for the five taxable years ending before the expatriation date is more than $206,000.

.38 Tax Responsibilities of Expatriation. For taxable years beginning in 2025, the amount that would be includible in the gross income of a covered expatriate by reason of § 877A(a)(1) is reduced (but not below zero) by $890,000 pursuant to § 877A(a)(3).

.39 Foreign Earned Income Exclusion. For taxable years beginning in 2025, the foreign earned income exclusion amount under § 911(b)(2)(D)(i) is $130,000.

.40 Debt Instruments Arising Out of Sales or Exchanges. For calendar year 2025, a qualified debt instrument under § 1274A(b) has stated principal that does not exceed $7,296,700, and a cash method debt instrument under § 1274A(c)(2) has stated principal that does not exceed $5,211,900.

.41 Unified Credit Against Estate Tax. For an estate of any decedent dying in calendar year 2025, the basic exclusion amount is $13,990,000 for determining the amount of the unified credit against estate tax under § 2010.

.42 Valuation of Qualified Real Property in Decedent's Gross Estate. For an estate of a decedent dying in calendar year 2025, if the executor elects to use the special use valuation method under § 2032A for qualified real property, the aggregate decrease in the value of qualified real property resulting from electing to use § 2032A for purposes of the estate tax cannot exceed $1,420,000.

.43 Annual Exclusion for Gifts.

(1) For calendar year 2025, the first $19,000 of gifts to any person (other than gifts of future interests in property) are not included in the total amount of taxable gifts under § 2503 made during that year.

(2) For calendar year 2025, the first $190,000 of gifts to a spouse who is not a citizen of the United States (other than gifts of future interests in property) are not included in the total amount of taxable gifts under §§ 2503 and 2523(i)(2) made during that year.

.44 Tax on Arrow Shafts. For calendar year 2025, the tax imposed under § 4161(b)(2)(A) on the first sale by the manufacturer, producer, or importer of any shaft of a type used in the manufacture of certain arrows is $0.63 per shaft.

.45 Passenger Air Transportation Excise Tax. For calendar year 2025, the tax under § 4261(b)(1) on the amount paid for each domestic segment of taxable air transportation is $5.20. For calendar year 2025, the tax under § 4261(c)(1) on any amount paid (whether within or without the United States) for any international air transportation, if the transportation begins or ends in the United States, generally is $22.90. Under § 4261(c)(3), however, a lower rate of tax applies under § 4261(c)(1) to a domestic segment beginning or ending in Alaska or Hawaii, and the tax applies only to departures. For calendar year 2025, the rate of tax is $11.40.

.46 Tax on Certain Uses of Crude Oil and Petroleum Products. For calendar year 2025, the tax imposed under § 4611(a) on crude oil received at a United States refinery and petroleum products entered into the United States for consumption, use, or warehousing is $0.26 cents per barrel.

.47 Reporting Exception for Certain Exempt Organizations with Nondeductible Lobbying Expenditures. For taxable years beginning in 2025, the annual per person, family, or entity dues limitation to qualify for the reporting exception under § 6033(e)(3) (and section 5.05 of Rev. Proc. 98-19, 1998-1 C.B. 547), regarding certain exempt organizations with nondeductible lobbying expenditures, is $143.00 or less.

.48 Notice of Large Gifts Received from Foreign Persons. For taxable years beginning in 2025, § 6039F authorizes the Secretary of the Treasury or her delegate to require recipients of gifts from certain foreign persons to report these gifts if the aggregate value of gifts received in the taxable year exceeds $20,116.

.49 Persons Against Whom a Federal Tax Lien Is Not Valid. For calendar year 2025, a federal tax lien is not valid against (1) certain purchasers under § 6323(b)(4) who purchased personal property in a casual sale for less than $1,960, or (2) a mechanic's lienor under § 6323(b)(7) who repaired or improved certain residential property if the contract price with the owner is not more than $9,790.

.50 Property Exempt from Levy. For calendar year 2025, the value of property exempt from levy under § 6334(a)(2) (fuel, provisions, furniture, and other household personal effects, as well as arms for personal use, livestock, and poultry) cannot exceed $11,710. The value of property exempt from levy under § 6334(a)(3) (books and tools necessary for the trade, business, or profession of the taxpayer) cannot exceed $5,860.

.51 Exempt Amount of Wages, Salary, or Other Income. For taxable years beginning in 2025, the dollar amount used to calculate the amount determined under § 6334(d)(4)(B) is $5,100.

.52 Interest on a Certain Portion of the Estate Tax Payable in Installments. For an estate of a decedent dying in calendar year 2025, the dollar amount used to determine the "2-percent portion" (for purposes of calculating interest under § 6601(j)) of the estate tax extended as provided in § 6166 is $1,900,000.

.53 Failure to File Tax Return. In the case of any return required to be filed in 2026, the amount of the addition to tax under § 6651(a) for failure to file an income tax return within 60 days of the due date of such return (determined with regard to any extensions of time for filing) will not be less than the lesser of $525 or 100 percent of the amount required to be shown as tax on such return.

.54 Failure to File Certain Information Returns, Registration Statements, etc. For returns required to be filed in 2026, the penalty amounts under § 6652(c) are:

(1) for failure to file a return required under § 6033(a)(1) (relating to returns by exempt organization) or § 6012(a)(6) (relating to returns by political organizations):

| Scenario | Daily Penalty | Maximum Penalty |
|---|---|---|
| Organization (§ 6652(c)(1)(A)) | $25 | Lesser of $13,000 or 5% of gross receipts of the organization for the year. |
| Organization with gross receipts exceeding $1,309,500 (§ 6652(c)(1)(A)) | $130 | $65,000 |
| Managers (§ 6652(c)(1)(B)) | $10 | $6,500 |
| Public inspection of annual returns and reports (§ 6652(c)(1)(C)) | $25 | $13,000 |
| Public inspection of applications for exemption and notice of status (§ 6652(c)(1)(D)) | $25 | No Limit |

(2) for failure to file a return required under § 6034 (relating to returns by certain trust) or § 6043(b) (relating to terminations, etc., of exempt organizations):

| Scenario | Daily Penalty | Maximum Penalty |
|---|---|---|
| Organization or trust (§ 6652(c)(2)(A)) | $10 | $6,500 |
| Managers (§ 6652(c)(2)(B)) | $10 | $6,500 |
| Split-Interest Trust (§ 6652(c)(2)(C)(ii)) | $25 | $13,000 |
| Any trust with gross income exceeding $327,000 (§ 6652(c)(2)(C)(ii)) | $130 | $65,000 |

(3) for failure to file a disclosure required under § 6033(a)(2):

| Scenario | Daily Penalty | Maximum Penalty |
|---|---|---|
| Tax–exempt entity (§ 6652(c)(3)(A)) | $130 | $65,000 |
| Failure to comply with written demand (§ 6652(c)(3)(B)(ii)) | $130 | $13,000 |

.55 Other Assessable Penalties With Respect to the Preparation of Tax Returns for Other Persons. In the case of any failure relating to a return or claim for refund filed in 2026, the penalty amounts under § 6695 are:

| Scenario | Per Return or Claim for Refund | Maximum Penalty |
|---|---|---|
| Failure to furnish copy to taxpayer (§ 6695(a)) | $65 | $32,500 |
| Failure to sign return (§ 6695(b)) | $65 | $32,500 |
| Failure to furnish identifying number (§ 6695(c)) | $65 | $32,500 |
| Failure to retain copy or list (§ 6695(d)) | $65 | $32,500 |
| Failure to file correct information returns (§ 6695(e)) | $65 per return and item in return | $32,500 |
| Negotiation of check (§ 6695(f)) | $650 per check | No limit |
| Failure to be diligent in determining eligibility for head of household filing status, child tax credit, American Opportunity tax credit, and earned income credit (§ 6695(g)) | $650 per failure | No limit |

.56 Failure to File Partnership Return. In the case of any return required to be filed in 2026, the dollar amount used to determine the amount of the penalty under § 6698(b)(1) is $255.

.57 Failure to File S Corporation Return. In the case of any return required to be filed in 2026, the dollar amount used to determine the amount of the penalty under § 6699(b)(1) is $255.

.58 Failure to File Correct Information Returns. In the case of any failure relating to a return required to be filed in 2026, the penalty amounts under § 6721 are:

(1) for persons with average annual gross receipts for the most recent three taxable years of more than $5,000,000, for failure to file correct information returns:

| Scenario | Penalty Per Return | Calendar Year Maximum |
|---|---|---|
| General Rule (§ 6721(a)(1)) | $340 | $4,098,500 |
| Corrected on or before 30 days after required filing date (§ 6721(b)(1)) | $60 | $683,000 |
| Corrected after 30th day but on or before August 1, 2026 (§ 6721(b)(2)) | $130 | $2,049,000 |

(2) for persons with average annual gross receipts for the most recent three taxable years of $5,000,000 or less, for failure to file correct information returns:

| Scenario | Penalty Per Return | Calendar Year Maximum |
|---|---|---|
| General Rule (§ 6721(d)(1)(A)) | $340 | $1,366,000 |
| Corrected on or before 30 days after required filing date (§ 6721(d)(1)(B)) | $60 | $239,000 |
| Corrected after 30th day but on or before August 1, 2026 (§ 6721(d)(1)(C)) | $130 | $683,000 |

(3) for failure to file correct information returns due to intentional disregard of the filing requirement (or the correct information reporting requirement):

| Scenario | Penalty Per Return | Calendar Year Maximum |
|---|---|---|
| Return other than a return required to be filed under § 6045(a), 6041A(b), 6050H, 6050I, 6050J, 6050K, or 6050L (§ 6721(e)(2)(A)) | Greater of (i) $680, or (ii) 10% of aggregate amount of items required to be reported correctly | No limit |
| Return required to be filed under § 6045(a), 6050K, or 6050L (§ 6721(e)(2)(B)) | Greater of (i) $680, or (ii) 5% of aggregate amount of items required to be reported correctly | No limit |
| Return required to be filed under § 6050I(a) (§ 6721(e)(2)(C)) | Greater of (i) $34,150, or (ii) amount of cash received up to $136,500 | No limit |
| Return required to be filed under § 6050V (§ 6721(e)(2)(D)) | Greater of (i) $680, or (ii) 10% of the value of the benefit of any contract with respect to which information is required to be included on the return | No limit |

.59 Failure to Furnish Correct Payee Statements. In the case of any failure relating to a statement required to be furnished in 2026, the penalty amounts under § 6722 are:

(1) for persons with average annual gross receipts for the most recent three taxable years of more than $5,000,000, for failure to furnish correct payee statements:

| Scenario | Penalty Per Statement | Calendar Year Maximum |
|---|---|---|
| General Rule (§ 6722(a)(1)) | $340 | $4,098,500 |
| Corrected on or before 30 days after required furnishing date (§ 6722(b)(1)) | $60 | $683,000 |
| Corrected after 30th day but on or before August 1, 2026 (§ 6722(b)(2)) | $130 | $2,049,000 |

(2) for persons with average annual gross receipts for the most recent 3 taxable years of $5,000,000 or less, for failure to furnish correct payee statements:

| Scenario | Penalty Per Statement | Calendar Year Maximum |
|---|---|---|
| General Rule (§ 6722(d)(1)(A)) | $340 | $1,366,000 |
| Corrected on or before 30 days after required furnishing date (§ 6722(d)(1)(B)) | $60 | $239,000 |
| Corrected after 30th day but on or before August 1, 2026 (§ 6722(d)(1)(C)) | $130 | $683,000 |

(3) for failure to furnish correct payee statements due to intentional disregard of the requirement to furnish a payee statement (or the correct information reporting requirement):

| Scenario | Penalty Per Statement | Calendar Year Maximum |
|---|---|---|
| Payee statement other than a statement required under § 6045(b), 6041A(e) (in respect of a return required under § 6041A(b)), 6050H(d), 6050J(e), 6050K(b), or 6050L(c) (§ 6722(e)(2)(A)) | Greater of (i) $680, or (ii) 10% of aggregate amount of items required to be reported correctly | No limit |
| Payee statement required under § 6045(b), 6050K(b), or 6050L(c) (§ 6722(e)(2)(B)) | Greater of (i) $680, or (ii) 5% of aggregate amount of items required to be reported correctly | No limit |

.60 Revocation or Denial of Passport in Case of Certain Tax Delinquencies. For calendar year 2025, the amount of a serious delinquent tax debt under § 7345 is $64,000.

.61 Attorney Fee Awards. For fees incurred in calendar year 2025, the attorney fee award limitation under § 7430(c)(1)(B)(iii) is $250 per hour.

.62 Periodic Payments Received Under Qualified Long-Term Care Insurance Contracts or Under Certain Life Insurance Contracts. For calendar year 2025, the stated dollar amount of the per diem limitation under § 7702B(d)(4), regarding periodic payments

received under a qualified long-term care insurance contract or periodic payments received under a life insurance contract that are treated as paid by reason of the death of a chronically ill individual, is $420.

.63 Qualified Small Employer Health Reimbursement Arrangement. For taxable years beginning in 2025, to qualify as a qualified small employer health reimbursement arrangement under § 9831(d), the arrangement must provide that the total amount of payments and reimbursements for any year cannot exceed $6,350 ($12,800 for family coverage).

SECTION 3. EFFECTIVE DATE

.01 General Rule. Except as provided in section 3.02 of this revenue procedure, this revenue procedure applies to taxable years beginning in 2025.

.02 Calendar Year Rule. This revenue procedure applies to transactions or events occurring in calendar year 2025 for purposes of sections 2.08 (rehabilitation expenditures treated as separate new building), 2.09 (low-income housing credit), 2.14 (transportation mainline pipeline construction industry optional expense substantiation rules for payments to employees under accountable plans), 2.20 (private activity bonds volume cap), 2.21 (loan limits on agricultural bonds), 2.22 (general arbitrage rebate rules), 2.23 (safe harbor rules for broker commissions on guaranteed investment contracts or investments purchased for a yield restricted defeasance escrow), 2.37 (expatriation to avoid taxes), 2.40 (debt instruments arising out of sales or exchanges), 2.41 (unified credit against estate tax), 2.42 (valuation of qualified real property in decedent's gross estate), 2.43 (annual exclusion for gifts), 2.44 (tax on arrow shafts), 2.45 (passenger air transportation excise tax), 2.46 (tax on certain uses of crude oil and petroleum products), 2.49 (persons against whom a federal tax

lien is not valid), 2.50 (property exempt from levy), 2.52 (interest on a certain portion of the estate tax payable in installments), 2.60 (revocation or denial of passport in case of certain tax delinquencies), 2.61 (attorney fee awards), and 2.62 (periodic payments received under qualified long-term care insurance contracts or under certain life insurance contracts) of this revenue procedure.

SECTION 4. DRAFTING INFORMATION

The principal author of this revenue procedure is Kyle Walker of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Mr. Walker at (202) 317-4718 (not a toll-free call).

# EXHIBIT C

## SECTION III: MY HEALTH CARE AND END-OF-LIFE PREFERENCES AND GOALS

Specific medical treatments and procedures should only be performed if they are medically appropriate, as determined by my health care team, and if they will help me get to my goal, as outlined below.

A. My main long-term goal for medical treatments is to:

☐ Live the best I can in a natural state, without artificial methods,* no matter how long that may be with a focus on my desired quality of life (as defined below) and not on prolonging my life

☐ Live as long as possible using artificial methods,* no matter what condition I am in (but see below for my desires if there is a medical situation in which I will most likely not return to an acceptable quality of life despite medical treatments)

*Artificial methods may include, but are not limited to: cardiopulmonary resuscitation (CPR), advanced cardiac life support (ACLS), feeding tubes/artificial nutrition and hydration, dialysis, breathing machines/respirators, mechanical circulatory support, certain blood products and certain intravenous medications).

B. My definition of a good quality of life:

_____

_____

*Some examples: Describe an ideal day, people you'd like to spend time with, your favorite food/drink or activities; your favorite music and shows. This statement helps us understand what makes life worth living for you.*

C. My biggest fear for the end of my life: As you age or your disease progresses, what are you most afraid of?

_____

_____

D. I feel the following would be worse than death (and not an acceptable quality of life), and I would no longer want artificial methods to keep me alive:

_____

_____

*Some examples: Not being able to interact with family or friends, financial burdens on others, uncontrollable pain or other symptoms. This statement helps us understand the types of burdens with which you are not willing to live.*

E. If I am in a medical situation in which I will most likely not return to an acceptable quality of life (as defined above) despite medical treatments, I ask my Agent to re-evaluate my situation (at a minimum) daily. I do not want this to occur for longer than _____.
*(time period: days, weeks, months)*

F. Comfort Measures

If my Agent thinks it appropriate, my Agent may choose to focus treatments on my comfort until my death, such "comfort measures" may include any treatments used to contribute to my comfort. Some examples include keeping me warm and dry; using medication by any route; positioning, wound care and other measures to relieve pain and suffering; and treating me with dignity and respect.



*Exhibit C – Health Care and End-of-Life Preferences and Goals form*

# EXHIBIT C

G. End-of-life Preferences

1. If and/or when I am unable to care for myself, my preference would be to:

☐ Be at home with in-home care OR ☐ Be in assisted living or other facility

Other thoughts:

_____

_____

2. If and/or when I qualify for hospice or palliative care (or my life expectancy is less than 6 months), my preference would be to:

☐ Be in a hospital OR

☐ Be at home with in-home care OR

☐ Be in assisted living or hospice facility

Other thoughts:

_____

_____

3. If and/or when my doctor reasonably anticipates that I have less than 1 week to live, my preference would be to:

☐ Be in a hospital OR

☐ Be at home with in-home care OR

☐ Be in assisted living or hospice facility

Other thoughts:

_____

_____

# EXHIBIT D

**MULTI-STATE APPENDIX FOR POST-DEATH ISSUES**

1. NEW YORK STATE: BURIAL, CREMATION, AND FUNERAL ISSUES

1.1. Death Certificates

1.1.1. Who is entitled to request a copy of a death certificate?

A. The deceased person's spouse, sibling, or parent; or those who have (1) a documented lawful right or claim, (2) a documented medical need, or (3) a New York court order. See https://www.health.ny.gov/vital_records/death.htm.

B. N.Y. Codes, Rules and Regulations §35.4: death records; disclosure.

1.1.2. Amending death certificates

A. Who can apply to correct or amend a death certificate?

i. The decedent's spouse on record; parent, child or legal guardian of the person; sibling of the decedent; the informant if within six months of death; the Funeral Firm that handled the disposition if within six months of death; Medical Certifier who handled the case; anyone with a court order.

B. How to make amendment/correction: See https://www.health.ny.gov/vital_records/docs/public_instructions_for_death_corrections.pdf for specific instructions.

1.2. Defining Next of Kin: N.Y. Estates, Powers, and Trusts Law §§2-1.1, 1-2.5.

1.2.1. New York defines next of kin as "a distributee," which is defined as "a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution."

1.2.2. Hierarchy of next of kin: N.Y. Pub. Health L. §4201.

A. Allows individuals to include in their estate planning an assignment of agent in the disposition of their remains. Person means a natural person eighteen years of age or older. §4201(1)(d).

B. §4201(2): In descending priority, the following persons have the right to control the disposition of the remains of such decedent:

i. The person designated within a written instrument executed pursuant to this section

ii. The decedent's surviving spouse or the decedent's surviving domestic partner

iii. Any of decedent's surviving children eighteen years of age or older

iv. Either of the decedent's surviving parents

v. Any of decedent's surviving siblings eighteen years of age or older

*** Note**: No legal difference between adopted and biological children, N.Y. Estates, Powers, and Trusts Law §2-1.3.

1.2.3. N.Y. Pub. Health L. §4201: Disagreement relating to disposition of remains:

(8) Every dispute relating to the disposition of the remains of a decedent shall be resolved by a court of competent jurisdiction pursuant to a special proceeding under article four of the civil practice law and rules. No person providing services relating to the disposition of the remains of a decedent shall be held liable for refusal to provide such services, when control of the disposition of such remains is contested, until such person receives a court order or other form of notification signed by all parties or their legal representatives to the dispute establishing such control.

1.3. Absence of next of kin: N.Y. Pub. Health L. §4201: If there are no next of kin nor a written burial directive, directions relating to disposition of remains can be taken by any of the following (in this order of priority):

A. Statutorily appointed guardian

B. Any person who would be entitled to share in the estate of the decedent as distributee, with the person closest in relationship having highest priority (see Estates, Powers, and Trusts Law § 4-1.1)

C. Duly appointed fiduciary

D. Close friend

E. Chief fiscal officer of county or public administrator.

1.4. In absence of written instrument made pursuant to §4201(3), the designation of a person for the disposition of one's remains in a will executed prior to the effective date of this bill (August 2, 2006) will be considered reflective of intent but will be superseded by any written instrument subsequently executed pursuant to subdivision three.3

1.5. Funeral Expenses

1.5.1. N.Y. Surr. Ct. Proc. Act Law §1811(1): Payment of debts and funeral expenses. "The reasonable funeral expenses of the decedent subject to the payment of expenses of administration shall be preferred to all debts and claims against his estate and shall be paid out of the first moneys received by his fiduciary."

A. "Reasonable" funeral expenses are not defined in the statute. In Re Billman's Will (267 N.Y.S. 491 (1932)), the court decided reasonable funeral costs were to be based on two factors: (1) the status in life of the decedent, and (2) the amount of the estate.

B. Held to include customary ceremonies accompanying the burial including reimbursement for expenditures for food. Estate of Kircher, 473 N.Y.S. 2d 679 (1984).

C. N.Y. Surr. Ct. Proc. Act Law §1811(2) does not state a maximum threshold for funeral expenses.

1.5.2. Insolvent estates:

N.Y. Surr. Ct. Proc. Act Law §1811(4): Dividends payable to secured creditors in insolvent estates shall be computed only upon the difference between the face amount of the claim without security and the value of the security itself as of a date to be determined by the court for the fixation of the rights of creditors, unless the creditor shall surrender his security to the fiduciary, in which event the dividend upon such claim when established as valid shall be computed on the full face amount thereof.

* **Note**: Disputed or unsettled debt or claim may be compromised, compounded or sold (SPCA § 1813).

2. TEXAS: BURIAL, CREMATION, AND FUNERAL ISSUES

2.1. Death Certificates

2.1.1. Vital Statistics maintains death records for the state of Texas. A qualified applicant can order one online, by mail, or in person. See https://www.dshs.texas.gov/vital-statistics/death-records. They remain confidential for 25 years after initial filing; only registered applicants can request copies. 25 years after death, death certificates become public information and can be requested by anyone. Tex. Gov't Code §522.115(a).

2.1.2. Individual Requests for copies of Death Certificates: Only qualified applicants can request confidential records. Tex. Admin. Code §181.1(2):

"The registrant, or immediate family member either by blood, marriage or adoption, his or her guardian, or his or her legal agent or representative. Local, state and federal law enforcement or governmental agencies and

other persons may be designated as properly qualified applicants by demonstrating a direct and tangible interest in the record when the information in the record is necessary to implement a statutory provision or to protect a personal legal property right. A properly qualified applicant may also be a person who has submitted an application for a request to release personal information and has been approved as outlined in §181.11 of this title (relating to Requests for Personal Data)."

2.2. Texas does not require a licensed funeral director in making or carrying out final arrangements. Texas Regulations require anyone who assumes custody of a body to file a "Report of Death" form with the local registrar of vital statistics within 24 hours of taking custody of the body. 25 Tex. Admin. Code (TAC) §181.2.

2.3. Defining Next of Kin:

2.3.1. Tex. HSC §711.002(a) determines legal next-of-kin for purposes disposition after death.

"Except as provided by Subsection (l), unless a decedent has left directions in writing for the disposition of the decedent's remains as provided in Subsection (g), the following persons, in the priority listed, have the right to control the disposition, including cremation, of the decedent's remains, shall inter the remains, and in accordance with Subsection (a-1) are liable for the reasonable cost of interment:

(1) the person designated in a written instrument signed by the decedent

(2) the decedent's surviving spouse

(3) any one of the decedent's surviving adult children

(4) either one of the decedent's surviving parents

(5) any one of the decedent's surviving adult siblings;

2.3.2. Disagreement among next of kin

Tex. HSC §711.002(k): "Any dispute among any of the persons listed in Subsection (a) concerning their right to control the disposition, including cremation, of a decedent's remains shall be resolved by a court with jurisdiction over probate proceedings for the decedent, regardless of whether a probate proceeding has been initiated. A cemetery organization or funeral establishment shall not be liable for refusing to accept the decedent's remains, or to inter or otherwise dispose of the decedent's remains, until it receives a court order or other suitable confirmation that the dispute has been resolved or settled."

2.4. Absence of next of kin: Tex. HSC §711.002(a), (d).

2.4.1. In the absence of next of kin and written burial directive, directions relating to the disposition of a body can be taken by any of the following (in this order of priority):

A. Duly qualified executors or administrators of the decedent's estate

B. Adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent.

2.4.2. Confirmed by §711.002(d): "A person listed in Subsection (a) has the right, duty, and liability provided by that subsection only if there is no person in a priority listed before the person."

Tex. HSC §711.002(e) "If there is no person with the duty to inter under Subsection (a) and (1) an inquest is held, the person conducting the inquest shall inter the remains; and an inquest is not held, the county in which the death occurred shall inter the remains."

2.5. Funeral Expenses

2.5.1. Tex. Estates Code §355.110. Allocation of Funeral Expenses: "A personal representative paying a claim for funeral expenses and for items incident to the funeral, such as a tombstone, grave marker, crypt or burial plot: (1) shall charge all of the claim to the decedent's estate; and (2) may not charge any part of the claim to the community share of a surviving spouse."

2.5.2. Funeral expenses in an amount not to exceed $15,000 have first priority out of estate fund.

A. Tex. Estates Code §355.110. Claims classification; priority of payment: "(a) Claims against an estate shall be classified and have priority of payment as provided by this section; (b) Class 1 claims are composed of funeral expenses and expenses of the decedent's last illness, including claims for reimbursement of those expenses, for a reasonable amount approved by the court, not to exceed $15,000 for funeral expenses and $15,000 for expenses of the decedent's last illness. Any excess shall be classified and paid as other unsecured claims."

2.5.3. Insolvent estates

A. Tex. Estates Code §355.108. Payment when assets insufficient to pay claims of same class: "(a) If there are insufficient assets to pay all claims of the same class, other than secured claims for money, the claims in that class shall be paid pro rata, as directed by the court, and in the order directed.(b) A personal representative may not be

allowed to pay a claim under Subsection (a) other than with the pro rata amount of the estate funds that have come into the representative's possession, regardless of whether the estate is solvent or insolvent."

2.5.4. Ownership of burial plots: Tex. Health & Safety Code §711.039.

(a) A plot in which the exclusive right of sepulture is conveyed is presumed to be the separate property of the person named as grantee in the certificate of ownership or other instrument of conveyance.

(b) The spouse of a person to whom the exclusive right of sepulture in a plot is conveyed has a vested right of interment of the spouse's remains in the plot while the spouse is married to the plot owner or if the spouse is married to the plot owner at the time of the owner's death.

(c) An attempted conveyance or other action without the joinder or written, attached consent of the spouse of the plot owner does not divest the spouse of the vested right of interment.

(d) The vested right of interment is terminated:

(1) on the final decree of divorce between the plot owner and the owner's former spouse unless the decree provides otherwise; or

(2) when the remains of the person having the vested right are interred elsewhere.

(e) Unless a plot owner who has the exclusive right of sepulture in a plot and who is interred in that plot has made a specific disposition of the plot by express reference to the plot in the owner's will or by written declaration filed and recorded in the office of the cemetery organization:

(1) a grave, niche, or crypt in the plot shall be reserved for the surviving spouse of the plot owner; and

(2) the owner's children, in order of need, may be interred in any remaining graves, niches, or crypts of the plot without the consent of a person claiming an interest in the plot.

(f) The surviving spouse or a child of an interred plot owner may each waive his right of interment in the plot in favor of a relative of the owner or relative of the owner's spouse. The person in whose favor the waiver is made may be interred in the plot.

(g) The exclusive right of sepulture in an unused grave, niche, or crypt of a plot in which the plot owner has been interred may be conveyed only by:

(1) specific disposition of the unused grave, niche, or crypt by express reference to it in a will or by written declaration of the plot owner filed and recorded in the office of the cemetery organization; or

(2) the surviving spouse, if any, and the heirs-at-law of the owner.

(h) Unless a deceased plot owner who has the exclusive right of sepulture in a plot and who is not interred in the plot has otherwise made specific disposition of the plot, the exclusive right of sepulture in the plot, except the one grave, niche, or crypt reserved for the surviving spouse, if any, vests on the death of the owner in the owner's heirs-at-law and may be conveyed by them.

3. CALIFORNIA: BURIAL, CREMATION, AND FUNERAL

3.1. ISSUES Death Certificates

3.1.1. Who is entitled to request a copy of a death certificate?

3.1.2. California Department of Public Health – Vital Records (CDPH-VR) maintains a permanent, public record of every death. Requests for certificates through electronic submission, mail-in request, and in-person with county clerk or recorder. See https://www.cdph.ca.gov/Programs/CHSI/Pages/Vital-Records-Obtaining- Certified-Copies-of-Death-Records.aspx.

A. Only specific individuals may receive an authorized certified copy of a death record. Cal. HSC §103526(B)(c)(2)–(3): parent or legal guardian of the registrant; party entitled to receive the record as result of a court order; member of law enforcement agency or representative of another governmental agency conducting official business; child, grandparent, grandchild, sibling, spouse, or domestic partner of the registrant; an attorney representing the registrant or registrant's estate, or any person or agency empowered by statute or appointed by court to act on behalf of registrant or registrant's estate. Authorized person can also be an agent or employee of a funeral establishment and who certifies copies of a death certificate.

i. Inclusive of Cal. Health & Saf. Code §7100(a): an agent under a power of attorney for health care; the competent surviving spouse; the sole surviving competent adult child of the decedent (if there is more than one, the majority of the surviving competent adult children); surviving competent parent(s); sole surviving competent adult sibling, or if more than one the majority of competent adult siblings; next surviving competent adult person(s) in the next degree of kinship; conservator under Calif. Probate Code Division 4, Part 3; the public administrator.

B. Those who are not authorized to submit the notarized Certificate of Identity may receive an Informational Certified Copy. These copies have the words "INFORMATIONAL, NOT A VALID DOCUMENT TO ESTABLISH IDENTITY," imprinted on copy.

3.2. Defining Next of Kin:

3.2.1. Next of kin means the closest living family members to survive the decedent's estate and include the following, in order: surviving spouse or registered domestic partner, children, grandchildren, parents, siblings, nieces and nephews, grandparents, aunts or uncles, cousins, and issue of predeceased spouse (Cal. Prob. Code § 6402).

A. California also recognizes half-relatives (Cal. Prob. Code §6406), posthumous relatives (Cal. Prob. Code §6407), and immigrant relatives (Cal. Prob. Code §6411).

3.2.2. Cal. Health & Safety Code §7100(a) Custody and Duty of Interment: "The right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services to be provided, unless other directions have been given by the decedent pursuant to Section 7100.1, vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon, the following in the order named:"

(1)–(7): an agent under a power of attorney for health care; the competent surviving spouse; the sole surviving competent adult child of the decedent (if there is more than one, the majority of the surviving competent adult children); surviving competent parent(s); sole surviving competent adult sibling, or if more than one the majority of competent adult siblings; next surviving competent adult person(s) in the next degree of kinship; conservator under Calif. Probate Code Division 4, Part 3; the public administrator. Person to make arrangements

3.2.3. If there is a disagreement among next of kin, §7100(a) governs.

3.2.4. If no next of kin can be found: Cal. Health & Safety Code §7104 provides that where the estate is insufficient to provide for interment and the duty of interment does not delve upon any other person residing in the state or if such person cannot after reasonable diligence be found within the state the person who has custody of the remains may require the County Coroner to take possession of the remains and inter the remains in the manner provided for the interment of indigent dead.

3.2.5. Burial directives: Cal. Health & Safety Code § 7100.1

# EXHIBIT D

3.3. Funeral Expenses

3.3.1. Cal. Health & Safety Code §7100(d): "The liability for the reasonable cost of final disposition devolves jointly and severally upon all kin of the decedent in the same degree of kinship and upon the estate of the decedent. However, if a person accepts the gift of an entire body under subdivision (a) of Section 7155.5, that person, subject to the terms of the gift, shall be liable for the reasonable cost of final disposition of the decedent."

3.3.2. There is no monetary threshold for funeral costs, instead California allows for the "reasonable" cost of final disposition.

A. Burial expenses chargeable to the estate are those 'reasonable' in view of the manner in which the decedent lived, his station in society and the condition of his estate. In re Estate of Adams, 138 Cal. App. 2d 319 (1957).

i. In re Estate of Kemmerrer, 114 Cal. App. 2d 810 (1952).

ii. In re Estate of Dennis, 110 Cal. App. 2d 667 (1952).

B. Calif. Probate Code §11420–21: Personal representative of estate must pay expense of administration, and if there are sufficient funds left, the personal representative will then pay funeral expenses.

Calif. Probate Code § 11422: If the property of the estate is insufficient to pay all debts, the order shall specify the amount to be paid to each creditor.

3.3.3. Ownership of burial plots: Calif. Health & Safety Code § 8650–8653

(a) Whenever an interment of the remains of a member or of a relative of a member of the family of the record owner or of the remains of the record owner is made in a plot transferred by deed or certificate of ownership to an individual owner, the plot shall become the family plot of the owner.

(b) If the owner dies without making disposition of the plot either in his or her will by a specific devise, or by a written declaration filed and recorded in the office of the cemetery authority, any unoccupied portions of the plot shall pass according to the laws of intestate succession as set forth in Sections 6400 to 6413, inclusive, of the Probate Code.

(c) As of January 1, 2002, any unoccupied portions of a family plot that became inalienable pursuant to this section as it read on December 31, 2001, shall no longer be inalienable and shall pass according to the laws of intestate succession as set forth in Sections 6400 to 6413, inclusive, of the Probate Code. No sale, transfer, or donation of any unused portion of a family plot made alienable under this subdivision shall be made

unless all persons entitled to interment in the family plot under Sections 8651 and 8652 are deceased or have expressly waived in writing the right to be interred in the family plot.

(d) The seller of a cemetery plot shall notify the buyer that unused portions of a family plot may pass through intestate succession unless written disposition is made by the buyer and may be sold, transferred, or donated by the buyer's heirs. The seller shall notify the buyer of the effect of a future transfer, sale, or donation of the unused portion of a family plot on any endowment for care or maintenance of the plot that the buyer may purchase in conjunction with the purchase of the cemetery plot.

4. FLORIDA: BURIAL, CREMATION, AND FUNERAL ISSUES

4.1. Death Certificates

4.1.1. Any person of legal age may apply for a certified copy of a death record without the cause of death. The first five digits of the decedent's social security will be redacted. Death records less than 50 years old with cause of death and full social security are confidential and can only be issued to decedent's spouse or parent; decedent's child, grandchild, or sibling; any person providing a will, insurance policy, document demonstrating interest in estate; any person who provides documentation they are acting on behalf of a previously listed person; by court order. https://www.floridahealth.gov/certificates/certificates/death/index.html.

4.1.2. Fla. Statutes §382.025(2). Certified copies of vital records; confidentiality; research; Other Records: "The department shall authorize the issuance of a certified copy of all or part of any marriage, dissolution of marriage, or death or fetal death certificate, excluding that portion which is confidential and exempt from the provisions of s. 119.07(1) as provided under s. 382.008, to any person requesting it upon receipt of a request and payment of the fee prescribed by this section. A certification of the death or fetal death certificate which includes the confidential portions shall be issued only:

1. To the registrant's spouse or parent, or to the registrant's child, grandchild, or sibling, if of legal age, or to any person who provides a will that has been executed pursuant to s. 732.502, insurance policy, or other document that demonstrates his or her interest in the estate of the registrant, or to any person who provides documentation that he or she is acting on behalf of any of them;

2. To any agency of the state or local government or the United States for official purposes upon approval of the department; or

3. Upon order of any court of competent jurisdiction."

# EXHIBIT D

Confidentiality expires 50 years after date of death, and records become public information. Fla. Statutes §382.025(2)(b)

4.2 Florida does not have a specific statute relating to burial directives but does contain several references to written directives:

4.2.1 In the order of priority for defining who is the "legally authorized person" able to make burial decisions that the first in the order of priority is "the decedent, when written inter vivos authorizations and directions are provided by the decedent." Fla. Stat. §497.005(43). Presumably this could take any form, as no formalities are specifically required by the statute.

4.2.2 Also see Fla. Stat. §732.804 which provides that even before issuance of Letters of Administration in a probate estate, "any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements." Additionally, the statute provides that if a cremation occurs pursuant to a written direction of the decedent, such written direction by the decedent is "a complete defense to a cause of action against any person acting or relying on that direction."

4.3. Defining Next of Kin:

4.3.1. In the absence of directions from the decedent, the decision-maker for burial decisions is tied to definition of "legally authorized person" in Fla. Stat. §497.005(43), which states the hierarchy of next of kin in Florida. In descending priority, next of kin includes:

A. The surviving spouse (unless the spouse has been arrested for committing against the deceased an act of violence that resulted or contributed to the death of the deceased),

B. An adult child;

C. A parent;

D. Am adult sibling;

E. An adult grandchild;

F. A grandparent;

G. Any person in any degree of kinship.

H. If no other family member is available, then the guardian of the dead person, the personal representative, the attorney in fact, or the surrogate is given burial rights.

I. If none of the above can serve, then a public health officer, medical examiner, county commission or another public administrator is given rights.

4.3.2. When there is disagreement among next of kin and/or an absence of next of kin: Fla. Stat. §497.005(43)(b):

"Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of the person making the representation or of any person in a higher priority class."

*But Matsumoto v. American Burial and Cremation Services*, 32 Fla. L. Weekly D36 (Fla. 2d DCA Dec. 20, 2006), in which the court held that F.S. § 497.005 does not impose a duty on the funeral homes to investigate whether they are releasing the body to the person with the highest priority under the statute, "The statute does not impose a due diligence requirement on funeral homes. Nor does it require funeral homes to provide others with higher priority notice of a family member's death. We decline to impose such obligations on the funeral home."

The major deficiency in the Florida statutory framework is that there is no clear authority on who has the right to control the burial of a decedent's remains when there is a dispute as to what the burial wishes of the decedent were at the time of his or her passing. All of the courts in Florida agree that the intent of the decedent regarding his or her burial controls, but there is inconsistency among the courts as to what type of evidence is allowed and uncertainty whether oral statements of the Decedent can be controlling,

> We find that neither section 497.005(37), nor section 406.50, control the outcome of this case, which in essence involves private parties engaged in a pre-burial dispute as to the decedent's remains. Otherwise stated, the trial court was not being asked to consider whether a funeral home or medical examiner was liable for its decision with respect to the disposition of a decedent's remains . . . In this case, common law is dispositive.

*Arthur v. Milstein, et al*, 949 So.2d 1163 (Fla. 4th DCA February 28, 2007).

4.4. Funeral Expenses

4.4.1. Fla. Stat. §733.707 states the order of payment of funeral expenses and obligations. Funeral expenses (Class 2) are second in priority to be paid from the decedent's estate. Fla. Stat. §733.707(b):

"Reasonable funeral, interment, and grave marker expenses, whether paid by a guardian, the personal representative, or any other person, not to exceed the aggregate of $6,000."

4.4.2. Fla. Stat. §406.50: Disposition of unclaimed remains. Before final disposition of unclaimed remains, the person in control shall make a reasonable effort to determine the identity of the deceased and any relatives, and if deceased is eligible for burial in a national cemetery. If no family exists or is available, a funeral director may assume responsibility to deliver unclaimed remains to the anatomical board after 24 hours have elapsed since time of death. If the anatomical board rejects the unclaimed remains, the board of country commissioners or designated department may authorize and arrange for the burial or cremation.

4.4.3. Ownership of Burial Plots: no specific statute, so presumably follow bylaws of cemetery corporation or pass like any other estate asset.

5. VENUE FOR PROBATE STATUTES

5.1. NEW YORK

N.Y. Surr. Ct. Proc. Act § 205: Domiciliaries; jurisdiction and venue

1. The surrogate's court of any county has jurisdiction over the estate of a decedent who was a domiciliary of the state at the time of his death, disappearance or internment. The proper venue for proceedings relating to such estates is the county of the decedent's domicile at the time of his death, disappearance or internment.

2. A surrogate shall transfer any proceeding to the surrogate's court of the proper county either on his own motion or on the motion of any party.

3. Notwithstanding the foregoing provisions of this section, the surrogate's court of any county has jurisdiction over, and is a proper venue for, the proceedings of any decedent who was a domiciliary of the state at the time of his or her death and who died as a result of wounds or injury incurred as a result of the terrorist attacks on September eleventh, two thousand one.

N.Y. Surr. Ct. Proc. Act § 206: Non-domiciliaries; jurisdiction and venue

1. The surrogate's court of any county has jurisdiction over the estate of any non- domiciliary decedent who leaves property in the state, or a cause of action for wrongful death against a domiciliary of the state. The proper venue for proceedings relating to such estates is the county (a) where the non-domiciliary decedent left property, or (b) where personal property belonging to the non- domiciliary decedent has since his death, disappearance or internment come into and remains unadministered, or (c) of the domicile of the person against whom a non-domiciliary left a cause of action for wrongful death.

2. Where venue may lie in more than one county under the provisions of subdivision one, the court where a proceeding is first commenced with proper venue shall retain jurisdiction, and matters relating to the estate of the non-

domiciliary decedent pending in the surrogate's courts of other counties shall be transferred to it.

3. A surrogate shall transfer any proceeding to the surrogate's court of the proper county either on his own motion or on the motion of any party.

5.2. TEXAS

Texas Est. Code Sec. 33.001. PROBATE OF WILLS AND GRANTING OF LETTERS TESTAMENTARY AND OF ADMINISTRATION.

(a) Venue for a probate proceeding to admit a will to probate or for the granting of letters testamentary or of administration is:

(1) in the county in which the decedent resided, if the decedent had a domicile or fixed place of residence in this state; or

(2) with respect to a decedent who did not have a domicile or fixed place of residence in this state:

(A) if the decedent died in this state, in the county in which:

(i) the decedent's principal estate was located at the time of the decedent's death; or

(ii) the decedent died; or

(B) if the decedent died outside of this state:

(i) in any county in this state in which the decedent's nearest of kin reside; or

(ii) if there is no next of kin of the decedent in this state, in the county in which the decedent's principal estate was located at the time of the decedent's death.

(b) For purposes of this section:

(1) the decedent's next of kin:

(A) is the decedent's surviving spouse, or if there is no surviving spouse, other relatives of the decedent within the third degree by consanguinity; and

(B) includes a person who legally adopted the decedent or has been legally adopted by the decedent and that person's descendants; and

(2) the decedent's nearest of kin is determined in accordance with order of descent, with the decedent's next of kin who is nearest in order of descent first, and so on.

# EXHIBIT D

5.3. CALIFORNIA

California Probate Code §7051: If the decedent was domiciled in this state at the time of death, the proper county for proceedings concerning administration of the decedent's estate is the county in which the decedent was domiciled, regardless of where the decedent died.

California Probate Code §7052: If the decedent was not domiciled in this state at the time of death, the proper county for proceedings under this code concerning the administration of the decedent's estate is one of the following:

(a) If property of the nondomiciliary decedent is located in the county in which the nondomiciliary decedent died, the county in which the nondomiciliary decedent died.

(b) If no property of the nondomiciliary decedent is located in the county in which the nondomiciliary decedent died or if the nondomiciliary decedent did not die in this state, any county in which property of the nondomiciliary decedent is located, regardless of where the nondomiciliary decedent died. If property of the nondomiciliary decedent is located in more than one county, the proper county is the county in which a petition for ancillary administration is first filed, and the court in that county has jurisdiction of the administration of the estate.

5.4. FLORIDA

Florida Statutes §733.101 Venue of probate proceedings.—

(1) The venue for probate of wills and granting letters shall be:

(a) In the county in this state where the decedent was domiciled.

(b) If the decedent had no domicile in this state, then in any county where the decedent's property is located.

(c) If the decedent had no domicile in this state and possessed no property in this state, then in the county where any debtor of the decedent resides.

(2) For the purpose of this section, a married woman whose husband is an alien or a nonresident of Florida may establish or designate a separate domicile in this state.

(3) Whenever a proceeding is filed laying venue in an improper county, the court may transfer the action in the same manner as provided in the Florida Rules of Civil Procedure. Any action taken by the court or the parties before the transfer is not affected by the improper venue.

# EXHIBIT D

6. PRE-QUALIFICATION POWERS OF PERSONAL

6.1. REPRESENTATIVE NEW YORK
New York Consolidated Laws, Estates, Powers and Trusts Law - EPT §11-1.3 Power and duty of executor before probate

An executor named in a will has no power to dispose of any part of the estate of the testator before letters testamentary or preliminary letters testamentary are granted, except to pay reasonable funeral expenses, nor to interfere with such estate in any manner other than to take such action as is necessary to preserve it.

6.2. Texas
Texas law does not allow for a personal representative to have any powers prior to qualification.

6.3. California
California Probate Code §8400.

(a) A person has no power to administer the estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters.

(b) Subdivision (a) applies whether or not the person is named executor in the decedent's will, except that a person named executor in the decedent's will may, before the appointment is made or becomes effective, pay funeral expenses and take necessary measures for the maintenance and preservation of the estate.

(c) The order appointing a personal representative shall state in capital letters on the first page of the order, in at least 12-point type, the following: "WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL LETTERS HAVE ISSUED."

6.4. Florida
Florida Statutes §733.601 Time of accrual of duties and powers.— The duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment. A personal representative may ratify and accept acts on behalf of the estate done by others when the acts would have been proper for a personal representative.

Note: This is a slightly revised version of UPC §3-701 in that it does not allow a personal representative to "carry out written instructions of the decedent relating to the decedent's body, funeral, and burial arrangements" prior to appointment.

# EXHIBIT E

## 2021 SPECIAL SESSION I

**HOUSE SUBSTITUTE**

21103975D

**HOUSE BILL NO. 2005**

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Health, Welfare and Institutions on January 28, 2021)

(Patron Prior to Substitute—Delegate Sickles

*A BILL to amend and reenact §§ 32.1-309.1, 54.1-2800, 54.1-2807, 54.1-2825, and 57-27.3 of the Code of Virginia; to amend the Code of Virginia by adding in Article 1 of Chapter 3 of Title 57 sections numbered 57-27.4, 57-27.5, and 57-27.6; and to repeal §§ 54.1-2807.01 and 54.1-2807.02 of the Code of Virginia, relating to disposition of the remains of a decedent; persons to make arrangements for funeral and disposition of remains.*

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 32.1-309.1, 54.1-2800, 54.1-2807, 54.1-2825, and 57-27.3 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 3 of Title 57 sections numbered 57-27.4, 57-27.5, and 57.27-6 as follows:**

**§ 32.1-309.1. Identification of decedent, next of kin; disposition of claimed dead body.**

A. As used in this chapter, unless the context requires a different meaning:

"Disposition" means the burial, interment, entombment, cremation, or other authorized disposition of a dead body permitted by law.

"Next of kin" has the same meaning assigned to it in § 54.1-2800.

B. ~~In the absence of a next of kin, a person designated to make arrangements for disposition of the decedent's remains pursuant to § 54.1-2825, an agent named in an advance directive pursuant to § 54.1-2984, or any guardian appointed pursuant to Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2 who may exercise the powers conferred in the order of appointment or by § 64.2-2019, or upon the failure or refusal of such next of kin, designated person, agent, or guardian to accept responsibility for the disposition of the decedent, then any other person 18 years of age or older who is able to provide positive identification of the deceased and is willing to pay for the costs associated with the disposition of the decedent's remains shall be authorized to make arrangements for such disposition of the decedent's remains. If a funeral service establishment or funeral service licensee makes arrangements with a person other than a next of kin, designated person, agent, or guardian in accordance with this section, then the funeral service licensee or funeral service establishment shall be immune from civil liability unless such act, decision, or omission resulted from bad faith or malicious intent~~ *Except as otherwise provided in this chapter, the right of a person to make arrangements and otherwise be responsible for a decedent's funeral and arrangements for the disposition of a decedent's remains shall be governed by § 54.1-2825.*

C. Upon the death of any person, irrespective of the cause and manner of death, and irrespective of whether a medical examiner's investigation is required pursuant to § 32.1-283 or 32.1-285.1, the person or institution having initial custody of the dead body shall make good faith efforts to determine the identity of the decedent, if unknown, and to identify and notify the next of kin of the decedent regarding the decedent's death. If, upon notification of the death of the decedent, the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains is willing and able to claim the body, the body may be claimed by the next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains for disposition, and the claimant shall bear the expenses of such disposition. If the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains fails or refuses to claim the body within 10 days of receiving notice of the death of the decedent, the body shall be disposed of in accordance with § 32.1-309.2.

D. If the person or institution having initial custody of the dead body is unable to determine the identity of the decedent or to identify and notify the next of kin of the decedent regarding the decedent's death, the person or institution shall contact the primary law-enforcement agency for the locality in which the person or institution is located, which shall make good faith efforts to determine the identity of the decedent and to identify and notify the next of kin of the decedent. However, in cases in which the identity of the decedent and the county or city in which the decedent resided at the time of death are known, the person or institution having initial custody of the dead body shall notify the primary law-enforcement agency for the county or city in which the decedent resided regarding the decedent's death, and the law-enforcement agency for the county or city in which the decedent resided shall make good faith efforts to identify and notify the next of kin of the decedent.

If the identity of the decedent is known to the primary law-enforcement agency or the primary law-enforcement agency is able to identify the decedent, the primary law-enforcement agency is able to identify and notify the next of kin of the decedent or other person authorized by law to make

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arrangements for disposition of the decedent's remains, and the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains is willing and able to claim the body, the body may be claimed by the next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains for disposition, and the claimant shall bear the expenses of such disposition.

If the identity of the decedent is known or the primary law-enforcement agency is able to determine the identity of the decedent but the primary law-enforcement agency is unable, despite good faith efforts, to identify and notify the decedent's next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains within 10 days of the date of contact by the person or institution having initial custody of the dead body, or the primary law-enforcement agency is able to identify and notify the decedent's next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains but the next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains fails or refuses to claim the body within 10 days, the primary law-enforcement agency shall notify the person or institution having initial custody of the dead body, and the body shall be disposed of in accordance with § 32.1-309.2.

E. In cases in which a dead body is claimed by the decedent's next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains but the next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains is unable to pay the reasonable costs of disposition of the body and the costs are paid by the county or city in which the decedent resided or in which the death occurred in accordance with this section, and the decedent has an estate out of which disposition expenses may be paid, in whole or in part, such assets shall be seized for such purpose.

F. No dead body that is the subject of an investigation pursuant to § 32.1-283 or autopsy pursuant to § 32.1-285 shall be transferred for purposes of disposition until such investigation or autopsy has been completed.

G. Any sheriff or primary law-enforcement officer, county, city, health care provider, funeral service establishment, funeral service licensee, or other person or institution that acts in accordance with the requirements of this chapter shall be immune from civil liability for any act, decision, or omission resulting from acceptance and disposition of the dead body in accordance with this section, unless such act, decision, or omission resulted from bad faith or malicious intent.

H. Nothing in this section shall prevent a law-enforcement agency other than the primary law-enforcement agency from performing the duties established by this section if so requested by the primary law-enforcement agency and agreed to by the other law-enforcement agency.

**§ 54.1-2800. Definitions.**

As used in this chapter, unless the context requires a different meaning:

"Advertisement" means any information disseminated or placed before the public.

*"Arrangements for disposition" means arrangements for the burial, interment, entombment, cremation, or other authorized disposition of a dead body or the remains thereof permitted by law.*

"At-need" means at the time of death or while death is imminent.

"Board" means the Board of Funeral Directors and Embalmers.

"Cremate" means to reduce a dead human body to ashes and bone fragments by the action of fire.

"Cremator" means a person or establishment that owns or operates a crematory or crematorium or cremates dead human bodies.

"Crematory" or "crematorium" means a facility containing a furnace for cremation of dead human bodies.

"Embalmer" means any person engaged in the practice of embalming.

"Embalming" means the process of chemically treating the dead human body by arterial injection and cavity treatment or, when necessary, hypodermic tissue injection to reduce the presence and growth of microorganisms to temporarily retard organic decomposition.

"Funeral directing" means the for-profit profession of directing or supervising funerals, preparing human dead for burial by means other than embalming, or making arrangements for funeral services or the financing of funeral services.

"Funeral director" means any person engaged in the practice of funeral directing.

"Funeral service establishment" means any main establishment, branch, or chapel that is permanently affixed to the real estate and for which a certificate of occupancy has been issued by the local building official where any part of the profession of funeral directing, the practice of funeral services, or the act of embalming is performed.

"Funeral service intern" means a person who is preparing to be licensed for the practice of funeral services under the direct supervision of a practitioner licensed by the Board.

"Funeral service licensee" means a person who is licensed in the practice of funeral services.

"In-person communication" means face-to-face communication and telephonic communication.

"Next of kin" means ~~any of the following persons, regardless of the relationship to the decedent: any~~

~~person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825, the legal spouse, child aged 18 years or older, parent of a decedent aged 18 years or older, custodial parent or noncustodial parent of a decedent younger than 18 years of age, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship~~ *the person or persons identified in § 54.1-2825 as having the right to make arrangements and otherwise be responsible for a decedent's funeral and the disposition of a decedent's remains.*

"Practice of funeral services" means engaging in the care and disposition of the human dead, the preparation of the human dead for the funeral service, burial, or cremation, the making of arrangements for the funeral service or for the financing of the funeral service, and the selling or making of financial arrangements for the sale of funeral supplies to the public.

"Preneed" means at any time other than at-need.

"Preneed funeral contract" means any agreement where payment is made by the consumer prior to the receipt of services or supplies contracted for, which evidences arrangements prior to death for (i) the providing of funeral services or (ii) the sale of funeral supplies.

"Preneed funeral planning" means the making of arrangements prior to death for (i) the providing of funeral services or (ii) the sale of funeral supplies.

"Solicitation" means initiating contact with consumers with the intent of influencing their selection of a funeral plan or funeral service provider.

**§ 54.1-2807. Other prohibited activities.**

A. A person licensed for the practice of funeral service shall not (i) remove or embalm a body when he has information indicating the death was such that an investigation by the Office of the Chief Medical Examiner is required pursuant to § 32.1-283 or 32.1-285.1 or (ii) cremate or bury at sea a body until he has obtained permission of the Office of the Chief Medical Examiner as required by § 32.1-309.3.

B. Except as provided in § 32.1-301 and Chapter 8.1 (§ 32.1-309.1 et seq.) of Title 32.1, funeral service establishments shall not accept a dead human body from any public officer, except the Chief Medical Examiner, an Assistant Chief Medical Examiner, or a medical examiner appointed pursuant to § 32.1-282, or from any public or private facility or person having a professional relationship with the decedent without having first inquired about the desires of the next of kin and the persons liable for the funeral expenses of the decedent. The authority and directions of any next of kin shall govern the disposal of the body, subject to the provisions of § ~~54.1-2807.01 or~~ 54.1-2825.

Any funeral service establishment violating this subsection shall not charge for any service delivered without the directions of the next of kin. However, in cases of accidental or violent death, the funeral service establishment may charge and be reimbursed for the removal of bodies and rendering necessary professional services until the next of kin or the persons liable for the funeral expenses have been notified.

C. No company, corporation, or association engaged in the business of paying or providing for the payment of the expenses for the care of the remains of deceased certificate holders or members or engaged in providing life insurance when the contract might or could give rise to an obligation to care for the remains of the insured shall contract to pay or pay any benefits to any licensee of the Board or other individual in a manner which could restrict the freedom of choice of the representative or next of kin of a decedent in procuring necessary and proper services and supplies for the care of the remains of the decedent.

D. No person licensed for the practice of funeral service or preneed funeral planning or any of his agents shall interfere with the freedom of choice of the general public in the choice of persons or establishments for the care of human remains or of preneed funeral planning or preneed funeral contracts.

E. This section shall not be construed to apply to the authority of any administrator, executor, trustee, or other person having a fiduciary relationship with the decedent.

**§ 54.1-2825. Person to make arrangements for funeral and disposition of remains.**

A. Any person may designate in a signed and notarized writing, which has been accepted in writing by the ~~person~~ *individual* so designated, ~~an individual~~ *one or more individuals* who shall *have the right to* make arrangements and be otherwise responsible for his funeral and the disposition of his remains~~, including cremation, interment, entombment, or memorialization, or some combination thereof,~~ upon his death. Such designee *or designees* shall have priority over all persons otherwise entitled to make such arrangements, provided that a copy of the signed and notarized writing is provided to the funeral service establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received the remains. ~~Nothing in this section shall preclude any next of kin from paying any costs associated with any funeral or disposition of any remains, provided that such payment is made with the~~

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~~concurrence of any person designated to make arrangements.~~

*B. A person who has previously designated one or more individuals who shall have the right to make arrangements and be otherwise responsible for his funeral and the disposition of his remains may make a subsequent designation in a signed and notarized writing. Upon acceptance in writing of the subsequent designation by the persons so designated, all previous designations shall be invalid.*

~~B.~~ *C.* In cases in which a person has designated in a U.S. Department of Defense Record of Emergency Data (DD Form 93) or any successor form an individual to make arrangements for his funeral and disposition of his remains, and such person dies while serving in any branch of the United States Armed Forces as defined in 10 U.S.C. § 1481, such designee shall be responsible for making such arrangements.

*D. In cases in which a person is the subject of a guardianship pursuant to Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2, provided the court order appointing the guardian specifically grants to the guardian the right to make arrangements for the disposition of remains of the person who is the subject of the order of appointment, and the order of appointment has not been revoked, terminated, or modified to remove such grant at the time the person dies, such guardian shall be responsible for making arrangements for the decedent's funeral and disposition of the person's body and shall have priority over all persons otherwise entitled to make such arrangements, provided that the guardian provides a copy of the court order appointing him as the guardian to the funeral services establishment and the cemetery, if any, no later than 48 hours after the funeral service establishment has received the remains.*

*E. Except as provided in subsection F and subject to subsection G, the right to make arrangements and otherwise be responsible for a person's funeral and the disposition of his remains shall be exercisable by the following persons, provided that any such person is 18 years of age or older and of sound mind, in the following order of priority:*

*1. A guardian appointed by a court of competent jurisdiction pursuant to Chapter 20 (§ 64.2-2000) of Title 64.2, provided the court order appointing the guardian specifically grants to the guardian the right to make arrangements for the disposition of remains of the person who is the subject of the order of appointment, and the order of appointment has not been revoked, terminated, or modified to remove such grant at the time the person dies.*

*2. A person designated in a preneed funeral contract or otherwise designated by the decedent in a writing pursuant to subsection A or B or, if applicable, subsection C.*

*3. The surviving spouse of the decedent, except where a divorce action has been filed and the divorce is not final or there has been a judicial separation.*

*4. The surviving child of the decedent or, if there is more than one surviving child of the decedent, the majority of the surviving children.*

*5. The surviving parent of the decedent or, if there is more than one surviving parent of the decedent, the surviving parents.*

*6. The surviving siblings of the decedent or, if there is more than one surviving sibling of the decedent, the majority of the surviving siblings.*

*7. Any other person who is willing to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains, including the funeral service establishment with custody of the remains, provided that such other person, including a funeral service establishment, attests in writing that he has made a good faith effort to locate and contact the individuals in subdivisions 1 through 6 and either no such persons could be located or contacted or no such persons are willing to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains. A funeral service establishment that is willing to make arrangements and otherwise be responsible for the decedent's funeral shall comply with the provisions of §§ 32.1-309.1 and 32.1-309.2.*

*F. A person entitled under this section to make arrangements and otherwise be responsible for a decedent's funeral and the disposition of his remains, including a person designated in a preneed funeral contract, a person designated by the decedent in a writing pursuant to subsection A or B or, if applicable, subsection C, or a guardian described in subsection D shall forfeit that right, and the right shall be exercisable by the next qualifying person in the order of priority in subsection E, under the following circumstances:*

*1. Such person does not notify the funeral service establishment having custody of the decedent's remains of his intention to exercise such right within 48 hours of notification of the decedent's death, provided that the funeral service establishment receives a response indicating that such person received such notification of death.*

*2. Such person is not willing to assume liability for the costs of the decedent's funeral or the disposition of his remains if sufficient resources are not available in the decedent's estate to pay such costs.*

*G. A person who seeks to exercise the right to make arrangements and otherwise be responsible for*

*a decedent's funeral and the disposition of his remains shall attest to his right to make such arrangements and be so responsible for such funeral and disposition in a signed writing and shall deliver such signed writing to the funeral service establishment. Any funeral service establishment, funeral service establishment manager of record, funeral service licensee, funeral director, embalmer, registered crematory, registered crematory owner, registered crematory manager of record, or certified crematory operator that relies upon such signed writing shall be immune from civil or criminal liability for any act, decision, or omission in connection with following such person's direction related to the decedent's funeral and the disposition of his remains, unless such act, decision, or omission resulted from willful neglect or bad faith. Such attestation shall include the following information:*

*1. Such person has a right pursuant to this section or other applicable law to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains.*

*2. Such person will take into account the decedent's religious beliefs and any preferences previously expressed by the decedent whether orally or in writing and made known to him prior to such arrangements being made.*

*3. All other persons with the same or higher priority to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains consent to such person making such arrangements, or after reasonable inquiry, (i) there are no persons who have the same or higher priority or (ii) no persons who have the same or higher priority could be located or contacted. Such reasonable inquiry shall be made in good faith. An attempt to contact such person at his last known address, telephone number, email address, or any known social media accounts shall be considered a reasonable inquiry made in good faith.*

*H. A person who has the right to make arrangements and otherwise be responsible for the decedent's funeral and disposition of the decedent's remains who is unwilling or unable to make such arrangements or to otherwise be responsible for the decedent's funeral and disposition of the decedent's remains may relinquish such rights in a signed written statement. A person who relinquishes his rights pursuant to this subsection may designate another person who shall be responsible for the decedent's funeral and disposition of the decedent's remains. Such designation shall be made in writing and signed by the person so designating. If a person who relinquishes his rights pursuant to this subsection does not designate another person who shall be responsible for the decedent's funeral and disposition of the decedent's remains, the right of a person to make arrangements and otherwise be responsible for a decedent's funeral and the disposition of the decedent's remains shall be determined in accordance with subsection E.*

*I. If there is more than one person in the same class in subsection E willing to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains and such persons do not agree on such arrangements, any such person or a funeral service establishment with custody of the remains may petition the circuit court in the county or city wherein the decedent has a known place of residence, or if he has no such known place of residence, then in the county or city wherein the decedent died, to determine who has the right to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains. If a funeral service establishment petitions the court pursuant to this subsection, the court shall award costs and expenses, including reasonable attorney fees, to the funeral service establishment payable by the other parties to the petition as the court deems necessary and appropriate. This subsection shall not be construed to require a funeral service establishment to file a petition with the court and a funeral service establishment shall not be liable for failing to do so.*

*J. If there is a dispute regarding the identity of any persons who have the right to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains, a funeral service establishment shall not be liable for refusing to dispose of the remains of the decedent or complete the arrangements for the final disposition of the remains until the funeral service establishment receives a court order or written agreement signed by the parties to the dispute that establishes the final disposition of the remains. If the funeral service establishment retains the remains for final disposition while any such dispute remains pending, it may refrigerate and shelter the dead body in order to preserve the dead body until resolution of the dispute in the aforesaid manner. Any costs incurred by the funeral service establishment pursuant to this subsection shall be paid by the person or persons who are adjudged or agreed to have the right to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains.*

*K. Nothing in this section shall preclude any person from paying any costs associated with any funeral or disposition of any remains, provided that such payment is made with the concurrence of any person designated to make arrangements.*

**§ 57-27.3. Authorization for interment.**

A cemetery may accept the notarized signature of one next of kin of a decedent for the purpose of authorizing the interment or entombment, and for erecting a memorial on the grave, crypt or niche,

# EXHIBIT E



unless the cemetery is on written notice that there exists a dispute between next of kin over such interment, entombment or memorialization. In the case of such a dispute, the cemetery shall have no obligation to perform the interment, entombment or memorialization until there is agreement of all next of kin, or a court order adjudicating the issue among all necessary parties.

For purposes of this section, "next of kin" means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § ~~54.1-2825~~ *57-27.4*, the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship.

***§ 57-27.4. Person to make arrangements for disposition of remains.***

*A. Any person may designate in a signed and notarized writing, which has been accepted in writing by the individual so designated, an individual who shall have the right to make arrangements and be otherwise responsible for the disposition of his remains, including cremation, interment, entombment, or memorialization, or some combination thereof, upon his death. Such designee shall have priority over all persons otherwise entitled to make such arrangements, provided that a copy of the signed and notarized writing is provided to the cemetery, if any, no later than 48 hours after cemetery has received the remains. Nothing in this section shall preclude any next of kin from paying any costs associated with the disposition of a decedent's remains, provided that such payment is made with the concurrence of any person designated to make arrangements.*

*B. A person who has previously designated one or more individuals who shall have the right to make arrangements and be otherwise responsible for the disposition of his remains may make a subsequent designation in a signed and notarized writing. Upon acceptance in writing of the subsequent designation by the person so designated, all previous designations shall be invalid.*

*C. In cases in which a person has designated in a U.S. Department of Defense Record of Emergency Data (DD Form 93) or any successor form an individual to make arrangements for the disposition of his remains, and such person dies while serving in any branch of the United States Armed Forces as defined in 10 U.S.C. § 1481, such designee shall be responsible for making such arrangements.*

***§ 57-27.5. When next of kin disagree.***

*A. In the absence of a designation under § 57-27.4, when there is a disagreement among a decedent's next of kin concerning the arrangements for the disposition of his remains, any of the next of kin may petition the circuit court where the decedent resided at the time of his death to determine which of the next of kin shall have the authority to make arrangements for the disposition of his remains. The court may require notice to and the convening of such of the next of kin as it deems proper.*

*B. In determining the matter before it, the court shall consider the expressed wishes, if any, of the decedent, the legal and factual relationship between or among the disputing next of kin and between each of the disputing next of kin and the decedent, and any other factor the court considers relevant to determine who should be authorized to make the arrangements for the disposition of the decedent's remains.*

***§ 57-27.6. Absence of next of kin.***

*In the absence of a next of kin, a person designated to make arrangements for the disposition of a decedent's remains pursuant to § 57-27.4, an agent named in an advance directive pursuant to § 54.1-2984, or any guardian appointed pursuant to Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2 who may exercise the powers conferred in the order of appointment or by § 64.2-2019, or upon the failure or refusal of such next of kin, designated person, agent, or guardian to accept responsibility for the disposition of the decedent, then any other person 18 years of age or older who is able to provide positive identification of the deceased and is willing to pay for the costs associated with the disposition of the decedent's remains shall be authorized to make arrangements for such disposition of the decedent's remains. If a cemetery makes arrangements with a person other than a next of kin, designated person, agent, or guardian in accordance with this section, then the cemetery shall be immune from civil liability unless such act, decision, or omission resulted from bad faith or malicious intent.*

**2. That §§ 54.1-2807.01 and 54.1-2807.02 of the Code of Virginia are repealed.**

# EXHIBIT E

## 2021 SESSION

**INTRODUCED**

21101273D

**SENATE BILL NO. 1268**

Offered January 13, 2021

Prefiled January 11, 2021

*A BILL to amend and reenact §§ 32.1-309.1, 54.1-2800, 54.1-2807, and 54.1-2825 of the Code of Virginia; to amend the Code of Virginia by adding in Article 5 of Chapter 28 of Title 54.1 a section numbered 54.1-2825.1; and to repeal §§ 54.1-2807.01 and 54.1-2807.02 of the Code of Virginia, relating to disposition of the remains of a decedent; persons to make arrangements for funeral and disposition of remains.*

Patron—Deeds

Referred to Committee on General Laws and Technology

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 32.1-309.1, 54.1-2800, 54.1-2807, and 54.1-2825 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 5 of Chapter 28 of Title 54.1 a section numbered 54.1-2825.1 as follows:**

**§ 32.1-309.1. Identification of decedent, next of kin; disposition of claimed dead body.**

A. As used in this chapter, unless the context requires a different meaning:

"Disposition" means the burial, interment, entombment, cremation, or other authorized disposition of a dead body permitted by law.

"Next of kin" has the same meaning assigned to it in § 54.1-2800.

B. ~~In the absence of a next of kin, a person designated to make arrangements for disposition of the decedent's remains pursuant to § 54.1-2825, an agent named in an advance directive pursuant to § 54.1-2984, or any guardian appointed pursuant to Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2 who may exercise the powers conferred in the order of appointment or by § 64.2-2019, or upon the failure or refusal of such next of kin, designated person, agent, or guardian to accept responsibility for the disposition of the decedent, then any other person 18 years of age or older who is able to provide positive identification of the deceased and is willing to pay for the costs associated with the disposition of the decedent's remains shall be authorized to make arrangements for such disposition of the decedent's remains. If a funeral service establishment or funeral service licensee makes arrangements with a person other than a next of kin, designated person, agent, or guardian in accordance with this section, then the funeral service licensee or funeral service establishment shall be immune from civil liability unless such act, decision, or omission resulted from bad faith or malicious intent~~ *Except as provided otherwise in this chapter, the right of a person to make arrangements and otherwise be responsible for a decedent's funeral and the disposition of human decedent's remains shall be governed by § 54.1-2825.*

C. Upon the death of any person, irrespective of the cause and manner of death, and irrespective of whether a medical examiner's investigation is required pursuant to § 32.1-283 or 32.1-285.1, the person or institution having initial custody of the dead body shall make good faith efforts to determine the identity of the decedent, if unknown, and to identify and notify the next of kin of the decedent regarding the decedent's death. If, upon notification of the death of the decedent, the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains is willing and able to claim the body, the body may be claimed by the next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains for disposition, and the claimant shall bear the expenses of such disposition. If the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains fails or refuses to claim the body within 10 days of receiving notice of the death of the decedent, the body shall be disposed of in accordance with § 32.1-309.2.

D. If the person or institution having initial custody of the dead body is unable to determine the identity of the decedent or to identify and notify the next of kin of the decedent regarding the decedent's death, the person or institution shall contact the primary law-enforcement agency for the locality in which the person or institution is located, which shall make good faith efforts to determine the identity of the decedent and to identify and notify the next of kin of the decedent. However, in cases in which the identity of the decedent and the county or city in which the decedent resided at the time of death are known, the person or institution having initial custody of the dead body shall notify the primary law-enforcement agency for the county or city in which the decedent resided regarding the decedent's death, and the law-enforcement agency for the county or city in which the decedent resided shall make good faith efforts to identify and notify the next of kin of the decedent.

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# EXHIBIT E



If the identity of the decedent is known to the primary law-enforcement agency or the primary law-enforcement agency is able to identify the decedent, the primary law-enforcement agency is able to identify and notify the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains, and the next of kin of the decedent or other person authorized by law to make arrangements for disposition of the decedent's remains is willing and able to claim the body, the body may be claimed by the next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains for disposition, and the claimant shall bear the expenses of such disposition.

If the identity of the decedent is known or the primary law-enforcement agency is able to determine the identity of the decedent but the primary law-enforcement agency is unable, despite good faith efforts, to identify and notify the decedent's next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains within 10 days of the date of contact by the person or institution having initial custody of the dead body, or the primary law-enforcement agency is able to identify and notify the decedent's next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains but the next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains fails or refuses to claim the body within 10 days, the primary law-enforcement agency shall notify the person or institution having initial custody of the dead body, and the body shall be disposed of in accordance with § 32.1-309.2.

E. In cases in which a dead body is claimed by the decedent's next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains but the next of kin or other person authorized by law to make arrangements for disposition of the decedent's remains is unable to pay the reasonable costs of disposition of the body and the costs are paid by the county or city in which the decedent resided or in which the death occurred in accordance with this section, and the decedent has an estate out of which disposition expenses may be paid, in whole or in part, such assets shall be seized for such purpose.

F. No dead body that is the subject of an investigation pursuant to § 32.1-283 or autopsy pursuant to § 32.1-285 shall be transferred for purposes of disposition until such investigation or autopsy has been completed.

G. Any sheriff or primary law-enforcement officer, county, city, health care provider, funeral service establishment, funeral service licensee, or other person or institution that acts in accordance with the requirements of this chapter shall be immune from civil liability for any act, decision, or omission resulting from acceptance and disposition of the dead body in accordance with this section, unless such act, decision, or omission resulted from bad faith or malicious intent.

H. Nothing in this section shall prevent a law-enforcement agency other than the primary law-enforcement agency from performing the duties established by this section if so requested by the primary law-enforcement agency and agreed to by the other law-enforcement agency.

**§ 54.1-2800. Definitions.**

As used in this chapter, unless the context requires a different meaning:

"Advertisement" means any information disseminated or placed before the public.

"At-need" means at the time of death or while death is imminent.

"Board" means the Board of Funeral Directors and Embalmers.

"Cremate" means to reduce a dead human body to ashes and bone fragments by the action of fire.

"Cremator" means a person or establishment that owns or operates a crematory or crematorium or cremates dead human bodies.

"Crematory" or "crematorium" means a facility containing a furnace for cremation of dead human bodies.

*"Disposition" means the burial, interment, entombment, cremation, or other authorized disposition of a dead body or the remains thereof permitted by law.*

"Embalmer" means any person engaged in the practice of embalming.

"Embalming" means the process of chemically treating the dead human body by arterial injection and cavity treatment or, when necessary, hypodermic tissue injection to reduce the presence and growth of microorganisms to temporarily retard organic decomposition.

"Funeral directing" means the for-profit profession of directing or supervising funerals, preparing human dead for burial by means other than embalming, or making arrangements for funeral services or the financing of funeral services.

"Funeral director" means any person engaged in the practice of funeral directing.

"Funeral service establishment" means any main establishment, branch, or chapel that is permanently affixed to the real estate and for which a certificate of occupancy has been issued by the local building official where any part of the profession of funeral directing, the practice of funeral services, or the act of embalming is performed.

"Funeral service intern" means a person who is preparing to be licensed for the practice of funeral services under the direct supervision of a practitioner licensed by the Board.

"Funeral service licensee" means a person who is licensed in the practice of funeral services.

"In-person communication" means face-to-face communication and telephonic communication.

"Next of kin" means ~~any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825, the legal spouse, child aged 18 years or older, parent of a decedent aged 18 years or older, custodial parent or noncustodial parent of a decedent younger than 18 years of age, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship~~ *the person or persons identified in § 54.1-2825 as having the right to make arrangements and otherwise be responsible for a decedent's funeral and the disposition of his remains*.

"Practice of funeral services" means engaging in the care and disposition of the human dead, the preparation of the human dead for the funeral service, burial, or cremation, the making of arrangements for the funeral service or for the financing of the funeral service, and the selling or making of financial arrangements for the sale of funeral supplies to the public.

"Preneed" means at any time other than at-need.

"Preneed funeral contract" means any agreement where payment is made by the consumer prior to the receipt of services or supplies contracted for, which evidences arrangements prior to death for (i) the providing of funeral services or (ii) the sale of funeral supplies.

"Preneed funeral planning" means the making of arrangements prior to death for (i) the providing of funeral services or (ii) the sale of funeral supplies.

"Solicitation" means initiating contact with consumers with the intent of influencing their selection of a funeral plan or funeral service provider.

**§ 54.1-2807. Other prohibited activities.**

A. A person licensed for the practice of funeral service shall not (i) remove or embalm a body when he has information indicating the death was such that an investigation by the Office of the Chief Medical Examiner is required pursuant to § 32.1-283 or 32.1-285.1 or (ii) cremate or bury at sea a body until he has obtained permission of the Office of the Chief Medical Examiner as required by § 32.1-309.3.

B. Except as provided in § 32.1-301 and Chapter 8.1 (§ 32.1-309.1 et seq.) of Title 32.1, funeral service establishments shall not accept a dead human body from any public officer, except the Chief Medical Examiner, an Assistant Chief Medical Examiner, or a medical examiner appointed pursuant to § 32.1-282, or from any public or private facility or person having a professional relationship with the decedent without having first inquired about the desires of the next of kin and the persons liable for the funeral expenses of the decedent. The authority and directions of any next of kin shall govern the disposal of the body, subject to the provisions of § ~~54.1-2807.01 or~~ 54.1-2825.

Any funeral service establishment violating this subsection shall not charge for any service delivered without the directions of the next of kin. However, in cases of accidental or violent death, the funeral service establishment may charge and be reimbursed for the removal of bodies and rendering necessary professional services until the next of kin or the persons liable for the funeral expenses have been notified.

C. No company, corporation, or association engaged in the business of paying or providing for the payment of the expenses for the care of the remains of deceased certificate holders or members or engaged in providing life insurance when the contract might or could give rise to an obligation to care for the remains of the insured shall contract to pay or pay any benefits to any licensee of the Board or other individual in a manner which could restrict the freedom of choice of the representative or next of kin of a decedent in procuring necessary and proper services and supplies for the care of the remains of the decedent.

D. No person licensed for the practice of funeral service or preneed funeral planning or any of his agents shall interfere with the freedom of choice of the general public in the choice of persons or establishments for the care of human remains or of preneed funeral planning or preneed funeral contracts.

E. This section shall not be construed to apply to the authority of any administrator, executor, trustee, or other person having a fiduciary relationship with the decedent.

**§ 54.1-2825. Person to make arrangements for funeral and disposition of remains.**

A. Any person may designate in a signed and notarized writing, which has been accepted in writing by the ~~person~~ *persons* so designated, ~~an individual~~ *one or more individuals* who shall *have the right to* make arrangements and be otherwise responsible for his funeral and the disposition of his remains~~, including cremation, interment, entombment, or memorialization, or some combination thereof,~~ upon his death. Such designee *or designees* shall have priority over all persons otherwise entitled to make such arrangements, provided that a copy of the signed and notarized writing is provided to the funeral service

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establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received the remains. ~~Nothing in this section shall preclude any next of kin from paying any costs associated with any funeral or disposition of any remains, provided that such payment is made with the concurrence of any person designated to make arrangements.~~

*B. A person who has previously designated one or more individuals who shall have the right to make arrangements and be otherwise responsible for his funeral and the disposition of his remains may make a subsequent designation in a signed and notarized writing. Upon acceptance in writing of the subsequent designation by the persons so designated, all previous designations shall be invalid.*

~~B.~~ *C.* In cases in which a person has designated in a U.S. Department of Defense Record of Emergency Data (DD Form 93) or any successor form an individual to make arrangements for his funeral and disposition of his remains, and such person dies while serving in any branch of the United States Armed Forces as defined in 10 U.S.C. § 1481, such designee shall be responsible for making such arrangements.

*D. Except as provided in subsection E and subject to subsection F, the right to make arrangements and otherwise be responsible for a person's funeral and the disposition of his remains shall be exercisable by the following persons, provided that any such person is 18 years of age or older and of sound mind, in the following order of priority:*

*1. A person designated in a preneed funeral contract or otherwise designated by the decedent in a writing pursuant to subsection A or B or, if applicable, subsection C.*

*2. The surviving spouse of the decedent, except where a divorce action has been filed and the divorce is not final or there has been a judicial separation.*

*3. The surviving child of the decedent or, if there is more than one surviving child of the decedent, the majority of the surviving children.*

*4. The surviving parent of the decedent or, if there is more than one surviving parent of the decedent, the surviving parents.*

*5. The surviving siblings of the decedent, or if there is more than one surviving sibling of the decedent, the majority of the surviving siblings.*

*6. Any other person who is willing to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains, including the funeral service establishment with custody of the remains, provided that such other person, including a funeral service establishment, attests in writing that he has made a good faith effort to locate and contact the individuals in subdivisions 1 through 5 and either no such persons could be located or contacted or no such persons are willing to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains.*

*E. A person entitled under this section to make arrangements and otherwise be responsible for a decedent's funeral and the disposition of his remains, including a person designated in a preneed funeral contract or otherwise designated by the decedent in a writing pursuant to subsection A or B or, if applicable, subsection C, shall forfeit that right, and the right shall be exercisable by the next qualifying person in the order of priority in subsection D, under the following circumstances:*

*1. Such person does not notify the funeral service establishment having custody of the decedent's remains of his intention to exercise such right within 48 hours of notification of the decedent's death or within 72 hours of the decedent's death, whichever is earlier.*

*2. Such person is not willing to assume liability for the costs of the decedent's funeral or the disposition of his remains if sufficient resources are not available in the decedent's estate to pay such costs.*

*F. A person who seeks to exercise the right to make arrangements and otherwise be responsible for a decedent's funeral and the disposition of his remains shall attest to his right to make such arrangements and be so responsible for such funeral and disposition in a signed writing and shall deliver such signed writing to the funeral service establishment. Any funeral service establishment, funeral service establishment manager of record, funeral service licensee, funeral director, embalmer, registered crematory, registered crematory owner, registered crematory manager of record, or certified crematory operator that relies upon such signed writing shall be immune from civil or criminal liability for any act, decision, or omission in connection with following such person's direction related to the decedent's funeral and the disposition of his remains, unless such act, decision, or omission resulted from willful neglect or bad faith. Such attestation shall include the following information:*

*1. Such person has a right pursuant to this section or other applicable law to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains.*

*2. Such person will take into account the decedent's religious beliefs and any preferences previously expressed by the decedent whether orally or in writing and was made known to him prior to such arrangements being made.*

*3. All other persons with the same or higher priority to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains consent to such person making*

*such arrangements, or after reasonable inquiry, (i) there are no persons who have the same or higher priority, or (ii) no persons who have the same or higher priority could be located or contacted. Such reasonable inquiry shall be made in good faith. An attempt to contact such person at his last known address, telephone number, email address, or any known social media accounts shall be considered a reasonable inquiry made in good faith.*

*G. A person who has the right to make arrangements and otherwise be responsible for the decedent's funeral and disposition of the decedent's remains who is unwilling or unable to make such arrangements or to otherwise be responsible for the decedent's funeral and disposition of the decedent's remains may relinquish such rights in a signed written statement. A person who relinquishes his rights pursuant to this subsection may designate another person who shall be responsible for the decedent's funeral and disposition of the decedent's remains. Such designation shall be made in writing and signed by the person so designating. If a person who relinquishes his rights pursuant to this subsection does not designate another person who shall be responsible for the decedent's funeral and disposition of the decedent's remains, the right of a person to make arrangements and otherwise be responsible for a decedent's funeral and the disposition of the decedents remains shall be determined in accordance with subsection D.*

*H. If there is more than one person in the same class in subsection D willing to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains and such persons do not agree on such arrangements, any such person or a funeral service establishment with custody of the remains may petition the circuit court in the county or city wherein the decedent has a known place of residence, or if he has no such known place of residence, then in the county or city wherein the decedent died, to determine who has the right to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains. If a funeral service establishment petitions the court pursuant to this subsection, the court shall award costs and expenses, including reasonable attorney fees, to the funeral service establishment payable by the other parties to the petition as the court deems necessary and appropriate. This subsection shall not be construed to require a funeral service establishment to file a petition with the court and a funeral service establishment shall not be liable for failing to do so.*

*I. If there is a dispute regarding the identity of any persons who have the right to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains, a funeral service establishment shall not be liable for refusing to dispose of the remains of the decedent or complete the arrangements for the final disposition of the remains until the funeral service establishment receives a court order or written agreement signed by the parties to the dispute that establishes the final disposition of the remains. If the funeral service establishment retains the remains for final disposition while any such dispute remains pending, it may embalm or refrigerate and shelter the dead body, or both, in order to preserve the dead body until resolution of the dispute in the aforesaid manner. Any costs incurred by the funeral service establishment pursuant to this subsection shall be paid by the person or persons who are adjudged or agreed to have the right to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of his remains.*

*J. Nothing in this section shall preclude any person from paying any costs associated with any funeral or disposition of any remains, provided that such payment is made with the concurrence of any person designated to make arrangements.*

***§ 54.1-2825.1. Exemption of cemeteries or cemetery companies.***

*This article shall not apply to cemeteries or cemetery companies as defined in § 54.1-2310.*

**2. That §§ 54.1-2807.01 and 54.1-2807.02 of the Code of Virginia are repealed.**

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# EXHIBIT F

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

IN RE: ESTATE OF JOHN S. AUTRY, Deceased

Case No. 16-850
File No. W35696

**PETITION FOR RELIEF PURSUANT TO VA. CODE ANN. § 54.1-2807.02 AND TO INTER CREMAINS**

**COMES NOW** LISA M. CAMPO, in her capacity as Administrator, *c.t.a.* of the Estate of John S. Autry, deceased, by counsel, and prays this Court enter an Order giving her authority to dispose of the remains of Decedent John S. Autry pursuant to Va. Code § 54.1-2807.02 in accordance with his known desires, stating in support thereof as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Lisa M. Campo is the Administrator *c.t.a.* of the Estate of John S. Autry (hereinafter "Petitioner") having qualified before this Court on March 1, 2016. A copy of Petitioner's Certificate of Qualification is attached hereto and incorporated herein as **Exhibit 1**.

2. Jurisdiction in this Court is proper pursuant to Va. Code § 54.1-2807.02.

3. Venue lies in Arlington County because the Estate of John S. Autry is located in Arlington County, Virginia and John S. Autry was a resident of Arlington County, Virginia at the time of his death.

**FACTS REGARDING JOHN S. AUTRY'S NEXT-OF-KIN**

4. John S. Autry (hereinafter "Mr. Autry") died testate on October 3, 2015, resident of Arlington County, Virginia.

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*Exhibit F – In Re: Estate of John S. Autry Petition*

5. Mr. Autry was survived by and his legal next of kin under Va. Code § 64.2-200 are Eugene C. Autry and James C. Autry (hereinafter collectively referred to as the "Autry Brothers").

6. Eugene C. Autry is Mr. Autry's adult brother, a resident of Chesterfield County, Virginia and is being served with notice of this Petition as an interested party.

7. James C. Autry is also Mr. Autry's adult brother, a resident of the City of Newport News, Virginia and is being served with notice of this Petition as an interested party.

8. While the Autry Brothers are Mr. Autry's legal next-of-kin under Va. Code § 64.2-200, Mr. Autry was estranged from his brothers and did not make any provisions for them in his estate planning documents.

9. In fact, Mr. Autry's Last Will and Testament executed on April 21, 2011 (hereinafter the "Will") omitted any relatives not provided for and specifically made no provisions for his brother, Eugene C. Autry and/or Eugene C. Autry's descendents. *See* Will at Art. IV. A copy of the Will is attached hereto and incorporated herein as **Exhibit 2**.

10. The Will also directed that Mr. Autry's brother, Eugene C. Autry and his descendants, not be involved in any manner in the administration of his estate. *See* Will at Art. IV.

11. Since his death on October 3, 2015, the Autry Brothers, as Mr. Autry's next-of-kin, have taken no steps to facilitate or arrange for the cremation or burial of Mr. Autry's remains.

12. As a result, Mr. Autry's remains have been held by Murphy Funeral Home located in Arlington, Virginia since his death without any final arrangements having been made.

13. Before permitting Mr. Autry's remains to be cremated, Murphy Funeral Home requires a Court Order granting the personal representative of the estate authority to direct the cremation of Mr. Autry's remains.

**FACTS REGARDING MR. AUTRY'S DESIRE FOR BURIAL AT ARLINGTON NATIONAL CEMETERY**

14. Prior to his death, Mr. Autry was an active duty service member in the United States Army, Infantry from 1951 to 1955, was in the U.S. Army Reserves from 1955 to 1959 and was a combat veteran of the Korean War.

15. It was the desire of Mr. Autry to be buried at Arlington National Cemetery, a desire he clearly made known prior to his death.

16. On or around April 26, 2011, Mr. Autry submitted inquiry by letter as to his eligibility for burial at Arlington National Cemetery. A copy of Mr. Autry's letter of inquiry is attached hereto and incorporated herein as **Exhibit 3**.

17. By facsimile transmission on or around June 6, 2011, Mr. Autry again communicated to a representative at Arlington National Cemetery his desire to be interred there. A copy of the facsimile transmission is attached hereto and incorporated herein as **Exhibit 4**.

18. On or around July 27, 2011, Mr. Autry was informed by letter from the Department of the Army that he was eligible for inurnment in the Columbarium or Niche Wall at Arlington National Cemetery. A copy of the Department of Army's letter is attached hereto and incorporated herein as **Exhibit 5**.

19. On January 30, 2012, Mr. Autry executed a Medical Power of Attorney and Advance Medical Directive (hereinafter the "MPOA") which again evidenced his desire to be buried at Arlington National Cemetery. *See* MPOA at ¶ 3(K). A copy of the MPOA is attached hereto and incorporated herein as **Exhibit 6**.

20. Mr. Autry also informed his estate planning and life care attorney, Jean Galloway Ball, Esquire, of his desire to be buried at Arlington National Cemetery.

21. Based on Mr. Autry's military service, the only way to accomplish his desire to be buried in Arlington National Cemetery is to have his remains cremated.

22. Prior to Petitioner's qualification as Administrator, *c.t.a.*, attempts were made by Mr. Autry's fiancée, Priscilla Roberts (hereinafter "Ms. Roberts") to obtain the cooperation and consent of the Autry Brothers to the cremation of Mr. Autry's remains so that he could be interred at Arlington National Cemetery as he desired.

23. The Autry Brothers contrary to the stated intentions of Mr. Autry believe that Mr. Autry should be buried next to his wife, who predeceased him and is buried in a cemetery in Newport News, Virginia.

24. Despite Mr. Autry's known wishes, the Autry Brothers as legal next-of-kin have refused to consent to cremation so that Mr. Autry can be interred at Arlington National Cemetery as he desired. A copy of the November 30, 2015 letter from the Autry Brothers, by counsel, communicating their refusal to cooperate is attached hereto and incorporated herein as **Exhibit 7**.

25. Unable to obtain the consent of the Autry Brothers to cremation of Mr. Autry's remains, Ms. Roberts requested an exception to the burial eligibility policy to allow Mr. Autry to be buried in ground in a single grave.

26. By letter dated January 19, 2016, Ms. Roberts' request for an exception was disapproved but it was communicated that Mr. Autry continues to be eligible for inurnment of his cremated remains in the Arlington National Cemetery Columbarium or Niche Wall. A copy of the disapproval letter is attached hereto and incorporated herein as **Exhibit 8**.

27. Since Mr. Autry is only eligible for inurnment in the Arlington National Cemetery Columbarium or Niche Wall the only way of honoring his wishes is for his remains to be cremated.

28. Unfortunately, due to the fact that the Autry Brothers will not consent to cremation, Murphy Funeral Home will not take any further steps and therefore, Mr. Autry's remains have been in limbo since his death on October 3, 2015 with no final arrangements having been made since that time.

29. As of the filing of this Petition, 173 days have passed since Mr. Autry's death on October 3, 2015.

**COUNT I – AUTHORITY TO DIRECT CREMATION PURSUANT TO VA. CODE ANN. § 54.1-2807.02**

30. Paragraphs 1-29 are incorporated herein as if fully restated.

31. Under Va. Code § 54.1-2807 the authority and directions of any "next of kin" are to govern and control the disposition of a decedent's body.

32. Va. Code § 54.1-2800 defines the term "next of kin" as

> any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825, the legal spouse, child aged 18 years or older, parent of a decedent aged 18 years or older, custodial parent or noncustodial parent of a decedent younger than 18 years of age, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship.

33. While the Autry Brothers technically satisfy the statutory definition of "next of kin," their November 30, 2015 letter makes it clear that they have refused to authorize or direct anything related to the burial or disposition of Mr. Autry's remains.

34. In addition to next of kin, arrangements for the burial or disposition of a decedent's remains may also be made by a person designated to make arrangements for the decedent's burial or the disposition of his remains under Va. Code § 54.1-2825, an agent named in an advance directive under Va. Code § 54.1-2984, or an appointed guardian who may exercise the powers conferred in the order of appointment or under Va. Code § 64.2-2019.

35. Prior to his death on October 2, 2015, Mr. Autry signed a Designation pursuant to Va. Code § 54.1-2825 designating Ms. Roberts as the person authorized to make arrangements for his burial or cremation (the "Designation"). Unfortunately, a notary public was not available when Mr. Autry signed the Designation and he passed away during the night of October 3, 2015 before the document could be executed in compliance with the statute. A copy of the Designation is attached hereto and incorporated herein as **Exhibit 9**.

36. As the Designation is not notarized as required by Va. Code § 54.1-2825 it is unfortunately, of no legal effect and fails to satisfy the statutory requirements that would have allowed Ms. Roberts to make arrangements for the burial or disposition of Mr. Autry's remains.

37. Mr. Autry's MPOA does name Ms. Roberts as his agent and grants her the authority to execute any documents and perform any acts necessary related to his funeral and burial at Arlington National Cemetery pursuant to Va. Code § 54.1-2984. *See* MPOA at ¶ 3(K).

38. Unfortunately, in light of the difficulty that Ms. Roberts has had with the Autry Brothers she is hesitant to exercise the authority granted to her under the MPOA.

39. Furthermore, Murphy Funeral Home is requiring a court order granting the personal representative the authority to direct the cremation of Mr. Autry's remains.

40. During Mr. Autry's lifetime a Guardian was never appointed pursuant to Va. Code § 64.2-2000, *et seq*.

41. Unfortunately, in the absence of a person designated in compliance with Va. Code § 54.1-2825; the refusal by the Autry Brothers to take any steps to authorize or direct the burial or disposition of Mr. Autry's remains; Ms. Roberts hesitation at acting under the MPOA; the absence of an appointed Guardian; and the requirements of a court order from Murphy Funeral Home, Petitioner, as Administrator, *c.t.a.* of the Estate has no choice but to petition this Court for the authority to authorize and direct the cremation and interment of Mr. Autry's remains at Arlington National Cemetery pursuant to his clearly stated desires.

42. Va. Code § 54.1-2807.02 provides in pertinent part that

> [i]n the absence of a next of kin, a person designated to make arrangements for the decedent's burial or the disposition of his remains pursuant to § 54.1-2825, an agent named in an advance directive pursuant to § 54.1-2984, or any guardian appointed pursuant to Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2 who may exercise the powers conferred in the order of appointment or by § 64.2-2019, or upon the failure or refusal of such next of kin, designated person, agent, or guardian to accept responsibility for the disposition of the decedent, then any other person 18 years of age or older who is able to provide positive identification of the deceased and is willing to pay for the costs associated with the disposition of the decedent's remains shall be authorized to make arrangements for such disposition of the decedent's remains.

43. Unfortunately, prior to his death, Mr. Autry did not designate a person to make arrangements for burial or disposition of his remains pursuant to Va. Code § 54.1-2825; the agent named in an advance medical directive pursuant to Va. Code § 54.1-2984

does not wish to exercise her authority; and he did not have a guardian appointed pursuant to Chapter 20 of Title 64.2.

44. Furthermore, Mr. Autry's next of kin have failed and refused to accept responsibility for the disposition of Mr. Autry's remains.

45. Under Va. Code § 54.1-2807.02, in the absence of a designated person pursuant to § 54.1-2825 and an appointed guardian under Va. Code § 64.2-2000, *et seq.* and upon the failure and refusal to act or accept responsibility for the disposition of Mr. Autry's remains by the Autry Brothers, as next of kin of Mr. Autry and the hesitation of Ms. Roberts as an agent pursuant to Va. Code § 54.1-2984, it is appropriate for another individual to be given authority from this Court to direct the disposition of Mr. Autry's remains.

46. Petitioner is over the age of 18 years of age, able to provide positive identification of Mr. Autry and is willing to pay for the costs associated with the disposition of Mr. Autry's remains.

47. Therefore, under Va. Code § 54.1-2807.02, it is appropriate for the Court to authorize Petitioner to make arrangements for the disposition of Mr. Autry's remains.

48. Va. Code § 64.2-512 provides that "[a] person who is authorized to make arrangements for the funeral of the decedent shall have the authority to bind the decedent's estate for such expenses and may execute, on behalf of the estate, any necessary instruments."

49. Therefore, as an appropriate person to be authorized to make arrangements for Mr. Autry's funeral, it is also appropriate that Petitioner be given authority under Va. Code § 64.2-512 to bind the Estate of John S. Autry for such expenses.

**COUNT II - AUTHORITY TO DIRECT INTERNMENT AT ARLINGTON NATIONAL CEMETERY**

50. Paragraphs 1-49 are incorporated herein as if fully restated.

51. It is clear that Mr. Autry's stated desire was to be buried at Arlington National Cemetery.

52. Mr. Autry's own actions and his communications with others evidence and establish the intent that his final resting place be Arlington National Cemetery.

53. Mr. Autry, prior to his death and on his own accord, sought eligibility for burial at Arlington National Cemetery.

54. Based on his active duty military service, Mr. Autry was found eligible for inurnment in the Arlington National Cemetery Columbarium or Niche Wall.

55. Mr. Autry on several occasions informed his life care and estate planning attorney and Ms. Roberts that it was his desire to be buried at Arlington National Cemetery.

56. Mr. Autry further made this desire known by the plain language of the MPOA.

57. The Supreme Court of Virginia has clearly articulated that it is permissible for decisions related to "decedent's place of burial [to] rest[] with his personal representative." *Goldman v. Mollen*, 168 Va. 345, 354 (1937).

58. Furthermore, it is "the duty of courts to see to it that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out." *Id.* at 355 (Quoting *Thompson v. Deeds*, 93 Iowa 228, 231 (1895)).

59. Mr. Autry's desire as to his final resting place is well-established and it is entirely possible for his wish to be carried out.

60. Therefore, it is appropriate for this Court to give Petitioner authority to direct the interment of Mr. Autry's cremains at Arlington National Cemetery.

**WHEREFORE**, Petitioner, Lisa M. Campo, Administrator, *c.t.a.* of the Estate of John S. Autry, prays that this Court enter an order authorizing her to make arrangements for the cremation of Decedent John S. Autry's remains pursuant to Va. Code § 54.1-2807.02; as a person authorized to make arrangements for the funeral of John S. Autry, to bind the Estate of John S. Autry for such expenses and to execute any necessary instruments pursuant to Va. Code § 64.2-512; to inter Mr. Autry's cremains at Arlington National Cemetery pursuant to his stated desires; and for such other relief as this Court deems necessary and proper.

**Respectfully submitted,**

**LISA M. CAMPO**
**Administrator, C.T.A. of the**
**Estate of John S. Autry**
By Counsel

**HALE BALL**
**Carlson Baumgartner Murphy, PLC**

**KIMBERLEY ANN MURPHY, ESQ. (VSB #45691)**
kmurphy@haleball.com
**JEAN GALLOWAY BALL, ESQ. (VSB #19280)**
jgball@haleball.com
**LISA M. CAMPO, ESQ. (VSB # 85898)**
lcampo@haleball.com
10511 Judicial Drive
Fairfax, Virginia 22030
Telephone: (703) 591-4900
Facsimile: (703) 591-5082
*Counsel for Administrator c.t.a. of the*
*Estate of John S. Autry, deceased*

# EXHIBIT F

FILED by Arlington County Circuit Court
06/17/2016

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

| | | |
|---|---|---|
| IN RE: ESTATE OF JOHN S. AUTRY, Deceased | ) | Case No. CL16000850-00 |
| | ) | File No. W35696 |

**FINAL ORDER**

**THIS MATTER** came before the court on June 17, 2016 upon Petitioner's Petition for Relief Pursuant to Va. Code § 54.1-2807.02 and to Inter Cremains; and it

**APPEARING TO THE COURT** that Lisa M. Campo qualified as the Administrator *c.t.a.* of the Estate of John S. Autry before this Court on March 1, 2016; and it further

**APPEARING TO THE COURT** that John S. Autry (hereinafter "Mr. Autry") died testate on October 3, 2015, a resident of Arlington County, Virginia; and it further

**APPEARING TO THE COURT** that Mr. Autry was survived by and his legal next of kin under Va. Code § 64.2-200 are his brothers, Eugene C. Autry and James C. Autry who have been provided with notice of these proceedings; and it further

**APPEARING TO THE COURT** that Eugene C. Autry and James C. Autry were both served with a copy of the Petition on April 27, 2016; and it further

**APPEARING TO THE COURT** that the twenty-one (21) day period within which Eugene C. Autry and James C. Autry were to file their responsive pleading expired on May 18, 2016 and no Answer has been filed; and it further

**APPEARING TO THE COURT** that Priscilla Roberts, Trustee of the John S. Autry Trust accepted service of the Petition on April 21, 2016; and it further

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Pretlow, Yates 2-75

**APPEARING TO THE COURT** that the twenty-one (21) day period within which Priscilla Roberts, Trustee of the John S. Autry Trust was to file her responsive pleading expired on May 12, 2016 and no Answer has been filed; and it further

**APPEARING TO THE COURT** that since his death on October 3, 2015, neither Eugene C. Autry nor James C. Autry, as Mr. Autry's next-of-kin, have taken any steps to facilitate or arrange for the cremation or burial of Mr. Autry's remains; and it further

**APPEARING TO THE COURT** that since his death on October 3, 2015, Mr. Autry's remains have been held at Murphy Funeral Home located in Arlington, Virginia; and it further

**APPEARING TO THE COURT** that as a combat veteran of the Korean War, it was Mr. Autry's desire to be buried at Arlington National Cemetery, a desire he made known prior to his death on multiple occasions; and it further

**APPEARING TO THE COURT** that on or around July 27, 2011, Mr. Autry was found eligible for inurnment in the Columbarium or Niche Wall at Arlington National Cemetery; and it further

**APPEARING TO THE COURT** that notwithstanding Mr. Autry's known wishes, his brothers as legal next-of-kin have refused to consent to cremation and have refused to authorize or direct anything related to the burial or disposal of Mr. Autry's remains; and it further

**APPEARING TO THE COURT** that prior to his death, Mr. Autry did not designate a person to make arrangements for burial or disposition of his remains pursuant to Va. Code § 54.1-2825; the agent named in Mr. Autry's advance medical directive pursuant to Va. Code

§ 54.1-2984 does not wish to exercise her authority; and Mr. Autry did not have a guardian appointed pursuant to Chapter 20 of Title 64.2; and it further

**APPEARING TO THE COURT** that Mr. Autry's next of kin have failed and refused to accept responsibility for the disposition of Mr. Autry's remains; and it further

**APPEARING TO THE COURT** that under Va. Code § 54.1-2807.02, in the absence of a designated person pursuant to § 54.1-2825 and an appointed guardian under Va. Code § 64.2-2000, *et seq*. and upon the failure and refusal to act or accept responsibility for the disposition of Mr. Autry's remains by the Mr. Autry's brothers, as next of kin and the hesitation of Mr. Autry's agent pursuant to Va. Code § 54.1-2984 to act, it is appropriate for another individual to be given authority from this Court to direct the disposition of Mr. Autry's remains; and it further

**APPEARING TO THE COURT** that Petitioner, as Administrator, *c.t.a.* of the Estate of John S. Autry, is an appropriate individual to be granted authority under Va. Code § 54.1-2807.02 to direct the cremation of Mr. Autry's remains; and it further

**APPEARING TO THE COURT** that Petitioner is over the age of 18 years of age, able to provide positive identification of Mr. Autry and is willing to pay for the costs associated with the disposition of Mr. Autry's remains as a cost of administration of his Estate; wherefore it is

**ADJUDGED, ORDERED and DECREED** that under Va. Code § 54.1-2807.02, Petitioner, Lisa M. Campo, Administrator, *c.t.a.* of the Estate of John S. Autry is hereby authorized to make arrangements for and to direct the cremation of Mr. Autry's remains; and it is further

**EXHIBIT F**

**ADJUDGED, ORDERED and DECREED** that Petitioner, Lisa M. Campo, Administrator, *c.t.a.* of the Estate of John S. Autry is also authorized pursuant to Va. Code § 64.2-512 to bind the decedent's estate for such funeral expenses and may execute, on behalf of the estate, any necessary instruments for the cremation, burial and interment of Mr. Autry's remains; and it is further

**ADJUDGED, ORDERED and DECREED** that Mr. Autry's desire that his final resting place be Arlington National Cemetery is well-established and it is entirely possible for his wish to be carried out; and it is further

**ADJUDGED, ORDERED and DECREED** that Petitioner, Lisa M. Campo as Administrator, *c.t.a.* of the Estate of John S. Autry is hereby given authorization to direct the interment and to sign any and all documents necessary to effectuate the interment of Mr. Autry's cremains at Arlington National Cemetery.

**ENTERED this** 17th **day of** June, **2016.**

JUDGE

**SEEN AND AGREED:**

**HALE BALL**
**Carlson Baumgartner Murphy, PLC**

**LISA M. CAMPO, ESQ. (VSB No. 85898)**
lcampo@haleball.com
10511 Judicial Drive
Fairfax, Virginia 22030
Telephone: (703) 591-4900
Facsimile: (703) 591-5082
*Administrator c.t.a. of the Estate of John S. Autry, deceased*

**EXHIBIT F**

FILED
CIVIL DIVISION

VIRGINIA:

2014 MAY 27 PM 2: 11

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

| | |
|---|---|
| **GI SUNG MOON,** | |
| **Plaintiff** | **2014 07208** |
| **v.** | **CL No. _____** |
| **HAE IN JEOUNG,**<br>**SERVE AT:**<br>**64 Aranna Way Road**<br>**Wardensville, WV 26851** | |
| **SOO YUNG KIM** | |
| **AND** | |
| **UNIVERSITY OF VIRGINIA MEDICAL CENTER**<br>**SERVE AT:**<br>**The University of Virginia Health Foundation**<br>**J. Brian Jackson, Registered Agent**<br>**McGuire Woods, LLP**<br>**Court Square Building, Suite 300**<br>**P.O. Box 1288**<br>**Charlottesville, VA 22902** | |
| **Defendants.** | |

**PRAECIPE**

**THE CLERK IS KINDLY REQUESTED** to prepare the enclosed Complaint for Relief Pursuant to Va. Code Ann. § 54.1-2807.01, Declaratory Judgment and Injunctive Relief for service of process upon the following individuals, to be served via private process/hand-delivery:

**HAE IN JEOUNG,**
**SERVE AT:**
**64 Aranna Way Road**



Pretlow, Yates 2-79

**EXHIBIT F**

**Wardensville, WV 26851**

**UNIVERSITY OF VIRGINIA**
**MEDICAL CENTER**
**SERVE AT:**
**The University of Virginia Health Foundation**
**J. Brian Jackson, Registered Agent**
**McGuire Woods, LLP**
**Court Square Building, Suite 300**
**P.O. Box 1288**
**Charlottesville, VA 22902**

Additional copies of the Complaint are included with this request. Please contact the undersigned at 703-591-4900 when the Summons and Complaint are ready to be picked up for service by private process. Your assistance and cooperation in this matter are greatly appreciated.

**Respectfully submitted,**

**GI SUN MOON,**
By Counsel,

**HALE BALL**
**Carlson Baumgartner Murphy, PLC**

**KIMBERLEY ANN MURPHY (VSB # 45691)**
kmurphy@haleball.com
**LISA M. CAMPO (VSB # 85898)**
lcampo@haleball.com
10511 Judicial Drive
Fairfax, Virginia 22030
(703) 591-4900 TEL.
(703) 591-5082 FAX.
Counsel for Plaintiff Gi Sung Moon

**EXHIBIT G**

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

2014 MAY 27 PM 3:15

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

GI SUNG MOON,

Plaintiff

v.

CL No. 2014 07208

HAE IN JEOUNG,
SERVE AT:
64 Aranna Way Road
Wardensville, WV 26851

SOO YUNG KIM

AND

UNIVERSITY OF VIRGINIA
MEDICAL CENTER
SERVE AT:
The University of Virginia Health Foundation
J. Brian Jackson, Registered Agent
McGuire Woods, LLP
Court Square Building, Suite 300
P.O. Box 1288
Charlottesville, VA 22902

Defendants.

**COMPLAINT FOR RELIEF PURSUANT TO VA. CODE ANN. § 54.1-2807.01, DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

COMES NOW GI SUNG MOON, by counsel, and prays this Court enter an Order giving custody of the remains of Decedent Kim Tae Hui, as well as the right to dispose of the remains of Decedent Kim Tae Hui in accordance with his faith, and for a temporary



*Exhibit G – Moon v. Jeoung, et al. - Complaint*

injunction to prevent the Defendant from obtaining and disposing of the Decedent's remains, stating in support thereof as follows:

PARTIES

1. Plaintiff Gi Sung Moon is Decedent Kim Tae Hui's nephew, and only living next-of-kin located in the United States of America. Kim Tae Hui was a Buddhist Monk and has never been married. He has a sister, Soo Yung Kim, who is 88 years old, located in the Republic of Korea. She has dementia.

2. Defendant Hae In Jeoung is a former monk associated with the Bo Rim Sa Buddhist Temple located at 5300 Ox Road, Fairfax, Virginia. He is a resident of Hardy County, West Virginia.

3. Defendant University of Virginia Medical Center is holding the decedent's remains at its facility located in Charlottesville, Virginia.

JURISDICTION AND VENUE

4. Jurisdiction and venue lie in Fairfax County because the decedent is a resident of Fairfax County, Virginia pursuant to Va. Code Ann. § 54.1-2807.01.

STATEMENT OF FACTS

5. Decedent Kim Tae Hui died on May 10, 2014 at the University of Virginia Medical Center. He is survived by his sister, Soo Yung Kim, and his nephew, Gi Sung Moon.

6. Decedent Kim Tae Hui was a resident of Fairfax County, Virginia.

7. Gi Sung Moon worked for his uncle, Kim Tae Hui, in many capacities over the years, from assisting him with running advertising in Korean Buddhist newspapers and

broadcasts, maintenance and repair work to the grounds of the Bo Rim Sa Buddhist Temple, to assistance with him due to his age and health.

8. Gi Sung Moon had a close relationship with his uncle, and his uncle never mentioned signing or having a Will.

9. A few years ago, Hae In Jeoung was a junior monk at the Bo Rim Sa Buddhist Temple. However, approximately five years ago, Hae In Jeoung parted ways with Kim Tae Hui, who stated that they were no longer "teacher and first student (religious father and son)". Basically, Kim Tae Hui continued working with the Bo Rim Sa Buddhist Temple, and Mr. Hae In Jeoung went to other temples, believed to be located in West Virginia (Aranna Temple) and Maryland (Muryang Temple).

10. Defendant Hae In Jeoung claims there is a valid Will appointing him as Executor, but according to Plaintiff, no such Will was ever executed.

11. Defendant Hae In Jeoung is publishing statements in local Korean Buddhist newspapers online purporting to be in charge of Kim Tae Hui's estate.

12. Mr. Kim Tae Hui did not designate an agent to dispose of his remains as permitted by Section 54.1-2825 of the Code.

13. The term "next of kin" is defined by Va. Code Ann. § 54.1-2800 as "any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to *§ 54.1-2825*, the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal

siblings over 18 years of age, or any other relative in the descending order of blood relationship."

14. Defendant Hae In Jeoung is not, by definition, next of kin for purposes of statutes governing who is entitled to make decisions as to funeral and burial of a decedent's remains.

15. In addition, Va. Code Ann. § 54.1-2807 (B) states: "Except as provided in §§ 32.1-288 and 32.1-301, funeral service establishments shall not accept a dead human body from any public officer except a medical examiner, or from any public or private facility or person having a professional relationship with the decedent without having first inquired about the desires of the next of kin and the persons liable for the funeral expenses of the decedent. The authority and directions of any next of kin shall govern the disposal of the body, subject to the provisions of § 54.1-2807.01 or 54.1-2825." (emphasis added)

16. In addition, subsection E of the statute specifically states that it shall not be construed to apply to the authority of an executor, administrator or other fiduciary acting on behalf of a decedent.

17. Virginia Code section 54.1-2825 speaks to persons authorized to make burial arrangements, and specifically requires a writing signed by both the decedent and the person to be charged with making arrangements. No such document exists.

18. Virginia Code section 54.1-2807.01 speaks to situations in which the next of kin disagree. One of the next of kin is not located within the United States of America, and the party is an individual who is unrelated to the deceased and has no preferential authority to take control of the remains of the deceased. Given that one of the next of kin is not present

to make a decision, and there is a claim by an unrelated third party, there is a dispute for purposes of the statute.

19. University of Virginia Medical Center, through its counsel, has advised that no action will be taken vis a vis disposition of Mr. Kim Tae Hui's remains absent agreement between the parties or entry of an order of the Court.

**COUNT I – FUNERAL ARRANGEMENTS AND CREMATION AND/OR BURIAL PURSUANT TO VA. CODE ANN. § 54.1-2807.01**

20. Paragraphs 1-19 are incorporated herein as if fully restated.

21. Virginia law broadly defines "next of kin" for purposes of making a determination about disposition of a decedent's body. The statute does not assert priority among the classes of relatives who are considered "next of kin". See *Mazur v. Woodson*, 191 F. Supp. 2d, 676, 680 (2002). Plaintiff and decedent's living sister, Soo Yung Kim, are the only persons meeting the statutory definition of next of kin.

22. The controlling statutes clearly do not contemplate that such authority or power vesting with a personal representative.

23. Virginia Code section 54.1-2807.01 permits this Court to enter an order permitting Plaintiff, as next of kin, to take control of Mr. Kim Tae Hui's body and make arrangements for the funeral and cremation and/or burial of the deceased's remains.

WHEREFORE, Plaintiff prays that this Court take jurisdiction of this proceeding, determine that Plaintiff is entitled to make the funeral and cremation and/or burial arrangements for the remains of Decedent Kim Tae Hui, and provide such other relief as this Court deems necessary and proper.

**COUNT II – DECLARATORY JUDGMENT (ALTERNATIVE)**

24. Paragraphs 1-23 are incorporated herein as if fully restated.

25. In the alternative, if this Court finds that Virginia Code section 54.1-2807.01 does not apply to the case at bar, then Plaintiff seeks adjudication pursuant to Va. Code Ann. § 8.01-184, et seq.

26. There is an actual and justiciable controversy that exists in that Defendant Hae In Jeoung claims that he is entitled to the remains of Kim Tae Hui, even though he is not next of kin.

27. Plaintiff is next of kin, and by statute, is entitled to decide as to the funeral and burial of the Decedent, Kim Tae Hui.

WHEREFORE, Plaintiff prays that this Court take jurisdiction of this proceeding, determine that Plaintiff is entitled to make the funeral and cremation and/or burial arrangements for the remains of Decedent Kim Tae Hui, and provide such other relief as this Court deems necessary and proper, including any and all order necessary to effect any decision rendered pursuant to Va. Code Ann. § 8.01-186.

**COUNT III - TEMPORARY INJUNCTION**

28. Paragraphs 1-27 are incorporated herein as if fully restated.

29. Defendant University of Virginia Medical Center currently has possession of the Decedent's body.

30. There is a likelihood of irreparable harm if the Decedent's remains are released to anyone other than next of kin.

31. There is no harm to any defendant unless and until a decision by this Court is made as to which party is entitled to make funeral and cremation and/or burial arrangements for the remains of Decedent Kim Tae Hui.

32. There is a substantial likelihood that Plaintiff will succeed on the merits, in that he is a next of kin and Defendant Hae In Jeoung is not.

33. Public interest demands that the quasi-property interest that next of kin have in the deceased bodies of loved ones be protected.

34. Defendant University of Virginia Medical Center should be enjoined from releasing the remains of Decedent Kim Tae Hui, pending further order of this Court.

WHEREFORE, Plaintiff prays for a temporary injunction to prevent Defendant University of Virginia Medical Center from releasing the body of the Decedent to any party to this lawsuit, or any agent or hired funeral home of any party, to dispose of the Decedent's remains other than as directed by this Court, for an award of attorney's fees to Plaintiffs, and for such other relief as this Court deems necessary and proper.

Respectfully submitted,

GI SUN MOON,

By Counsel

**HALE BALL**
**Carlson Baumgartner Murphy, PLC**

**KIMBERLEY ANN MURPHY (VSB # 45691)**
kmurphy@haleball.com
**LISA M. CAMPO (VSB # 85898)**
lcampo@haleball.com
10511 Judicial Drive
Fairfax, Virginia 22030
(703) 591-4900 TEL.
(703) 591-5082 FAX.
Counsel for Plaintiff Gi Sung Moon

# EXHIBIT H

## DESIGNATION OF AGENT FOR DISPOSITION OF REMAINS

Section 54.1-2825 of the Code of Virginia, as in force on the date this document is executed, provides that:

> "Any person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements and be otherwise responsible for his funeral and the disposition of his remains, including cremation, interment, entombment, or memorialization, or some combination thereof, upon his death."

By this document, I, _____, a resident of _____, _____, hereby designate and appoint _____, currently residing in _____, _____, as my agent for purposes of making any and all arrangements for my burial or the disposition of my remains, including cremation, upon my death.

In the event the agent named above is unable, unwilling or unavailable to act as my agent for purposes of this document, I designate and appoint _____, currently residing in _____, _____, to act as my successor agent.

My successor agent may establish that my prior agent is no longer able to act by an affidavit executed by my successor stating that my prior agent is not capable, willing or available to act. The affidavit may, but need not, be supported by a death certificate of my prior agent, a certificate showing that a guardian or conservator has been appointed for my prior agent, a letter from a physician stating that my prior agent is not capable of managing his or her own affairs, or a letter from my prior agent indicating an unwillingness or refusal to act.

This designation shall be effective immediately, and shall not terminate upon my disability or death. I hereby expressly intend for this designation to continue in effect after my death, as well as during any period of disability or incapacity. I have discussed with my agent my wishes and



Pretlow, Yates 2-90

*Exhibit H – Designation of Agent for Disposition of Remains form*

desires and have given my agent notes of some of the things I would like for my funeral and the disposition of my remains.

All expenses incurred by my agent or successor agent in connection with the exercise of the powers and authority conferred by this designation shall be a charge against my estate and paid by my personal representative as a cost of the administration of my estate.

Witness the following signature and seal this _____ day of _____, 2021.

Signature: _____

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK, to-wit:

The foregoing instrument was acknowledged before me this _____ day of _____, 2021, ☐ who is personally known to me or ☐ who has produced satisfactory evidence of identity.

_____
Notary Public

Commission expiration date: _____
Registration number: _____

Prepared by:
Ellis H. Pretlow, VSB # 84327
Kaufman & Canoles, P.C.
150 W. Main Street, Suite 2100
Norfolk, Virginia 23510
(757) 624-3249

# EXHIBIT H

**ACCEPTANCE OF DESIGNATION**

The undersigned agent hereby accepts this designation and appointment by _____ pursuant to Code of Virginia Section 54.1-2825.

Agent: _____

STATE OF VIRGINIA
CITY/COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this _____ day of _____, 2021, by _____, ☐ who is personally known to me or ☐ who has produced satisfactory evidence of identity.

_____
Notary Public

My commission expires: _____
Registration number: _____

**ACCEPTANCE OF DESIGNATION**

The undersigned successor agent hereby accepts this designation and appointment by _____ pursuant to Code of Virginia Section 54.1-2825.

Successor Agent: _____

STATE OF VIRGINIA
CITY/COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this _____ day of _____, 2021, by Myron Glassman, ☐ who is personally known to me or ☐ who has produced satisfactory evidence of identity.

_____
Notary Public

My commission expires: _____
Registration number: _____

# EXHIBIT H

**Designation**

I hereby appoint **«SPOUSE»/«TRUSTEE»**, of «ADDRESS1»/«ADDRESS2» (703) _____, as my agent to make decisions regarding and to make arrangements for my burial or the disposition of my remains upon my death as authorized in this document. If «SPOUSE»/«EXECUTOR» is not reasonably available or is unable or unwilling to act as my agent, then I appoint «ALTEXECUTOR», of «ADDRESS2»/«ADDRESS3» (703) _____, to serve as my agent hereunder. It is my intention that this document shall be honored by my family and that all actions by my agent shall be conclusive and binding on all individuals including my next of kin and my named executors in my will.

**Enforcement.** I hereby authorize my Agent to seek on my behalf and at my estate's expense (whether or not a personal representative has then been qualified or if qualified, regardless of whether such personal representative has consented):

a. A declaratory judgment from any court of competent jurisdiction interpreting the validity of this instrument or any of the acts authorized by this instrument, but such declaratory judgment shall not be necessary in order for my Agent to perform any act authorized by this instrument; or

b. A mandatory injunction requiring compliance with my Agent's instructions by any person obligated to comply with instructions given by my Agent.

**Counterparts/Certification.** This instrument may be executed in more than one counterpart, any one of which, for all purposes, shall be deemed an original. Revocation or modification of a counterpart as permitted or authorized by law shall be deemed a revocation or modification of all counterpart originals. Any action by my Agent under this instrument shall be deemed a certification of nonrevocation by my Agent and shall be conclusive unless it can be shown that the party relying upon this instrument had received actual prior notice of revocation. All actions of my Agent shall be binding on my estate, my heirs, and my personal representative.

**Miscellaneous.** My Agent shall receive no compensation for services, but shall be entitled to reimbursement of expenses. A copy of this instrument which is certified by a notary to be a true copy shall be treated for all purposes as an original of this instrument.

**Indemnification/Durable Power/No Lapse due to Disability or Time.** My Agent, while acting in good faith, is released from any civil liability and claims by me or my estate arising out of acts or omissions of my Agent, except willful misconduct or gross negligence. I agree, on behalf of my estate, to indemnify and hold my Agent and any funeral service establishment (as defined in Va. Code Section 54.1-2800), or its licensees, employees or agents, relying upon my Agent's instruction, harmless against any liability or expense, including attorney's fees, that any of the foregoing may incur as the result of serving as my Agent, or acting pursuant to my Agent's instructions, under this instrument, except for liability or expense resulting from willful misconduct or gross negligence. This power shall not terminate upon my death and shall not be affected by the lapse of time.[1]

[SIGNATURES AND NOTARIZATION ON NEXT PAGE]

[1] Highlighted language is optional for consideration.

# EXHIBIT H

_____ _____
DATE «MAKER», Maker

COMMONWEALTH OF VIRGINIA
AT LARGE, to-wit:

On the _____ day of _____, 2008, before me, the undersigned Notary Public, personally appeared «MAKER», known to me (or satisfactorily proven) to be the person described in and who executed the same as the Maker's free and voluntary act and deed and for the purposes therein contained.

My commission expires _____. _____
Control Number: _____ Notary Public

THE FOREGOING DESIGNATION IS SEEN AND AGREED TO:

_____ _____
DATE **«SPOUSE»/«EXECUTOR»**, Agent

COMMONWEALTH OF VIRGINIA
AT LARGE, to-wit:

On the _____ day of _____, 2008, before me, the undersigned Notary Public, personally appeared **«SPOUSE»/«EXECUTOR»**, known to me (or satisfactorily proven) to be the person described in and who executed the same as the Agent's free and voluntary act and deed and for the purposes therein contained.

My commission expires _____. _____
Control Number: _____ Notary Public

# EXHIBIT H

_____ _____
DATE «ALTEXECUTOR», Agent

COMMONWEALTH OF VIRGINIA
AT LARGE, to-wit:

On the _____ day of _____, 2008, before me, the undersigned Notary Public, personally appeared «ALTEXECUTOR», known to me (or satisfactorily proven) to be the person described in and who executed the same as the Agent's free and voluntary act and deed and for the purposes therein contained.

My commission expires _____. _____
Control Number: _____ Notary Public

(Add additional agent's name and notary if needed.)

Pretlow, Yates 2-95

# EXHIBIT H

**STATEMENT OF FUNERAL AND BURIAL PREFERENCES**
**AND DESIGNATION OF PERSON TO MAKE ARRANGEMENTS**
**FOR THE DISPOSITION OF MY REMAINS**

I, «MAKER», Social Security Number «SSN», of «COUNTY», Virginia (the "Maker"), make the following declaration regarding my preferences for the disposition of my remains in the event of my death. I understand and intend that this declaration is revocable by subsequently signing and dating a notarized writing revoking the document, physical cancellation or destruction (including cutting, tearing and burning) of the document by myself or by another in my presence and at my direction. My statement of preferences below are intended to be legally binding and I request and direct that my Agent follow my wishes. I confirm, moreover, that my designation of my Agent is intended and shall be construed as a legally binding designation of the person who shall make arrangements for my burial or the disposition of my remains upon my death pursuant to Virginia Code Section 54.1-2825, as amended.

**Statement of Preferences**

1. I prefer that my body be:
   ( ) cremated without embalming;
   ( ) embalmed, placed in a simple casket, and cremated;
   ( ) embalmed, placed in a simple casket, and buried;
   ( ) disposed of as specified under "Special Instructions" below.

2. I prefer that my ashes or remains be disposed of as follows:

   _____

   _____

3. I prefer that the above services be performed by the following funeral establishment:

   Name:_____

   Address:_____

   Telephone:_____

Pretlow, Yates 2-96

# EXHIBIT H

4. I prefer:
   ( ) a funeral service
   ( ) a memorial service
   ( ) no service
   ( ) other, as specified under "Special Instructions" below

5. I prefer that the funeral/memorial service be held at (location):

   _____ and conducted by

   _____.

6. I prefer the music, readings, attendance, pall bearers and other features described under "Special Instructions" below.

7. After the service, I prefer that the flowers be given to the following institution:

   _____

8. I prefer that memorial gifts be sent in lieu of flowers to the following:

   _____

9. Additional desires or instructions are indicated under "Special Instructions".

SPECIAL INSTRUCTIONS:

Pretlow, Yates 2-97