



**LARSON**  
**LATHAM**  
**HUETTL**  
ATTORNEYS

*Attorneys*  
Gregory C. Larson  
Steven L. Latham  
Damian J. Huettl  
James W. Martens  
Christopher G. Lindblad  
Emily L. Baer

*Certified Paralegal*  
Char Jacober

*Law Clerk*  
Samuel G. Larson

## **ESTATE PLANNING**

**GREGORY C. LARSON, JD, LLM (TAXATION)**

**LARSON LATHAM HUETTL LAW FIRM**

**521 EAST MAIN AVENUE, SUITE 450**

**P.O. BOX 2056**

**BISMARCK ND 58502-2056**

**PHONE: (701) 223-5300 FAX: (701) 223-5366**

**ESTATE/NURSING HOME PLANNING SEMINAR**

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**ESTATE PLANNING**  
**Gregory C. Larson, JD, LLM (Taxation)**  
**521 East Main Avenue, Suite 450**  
**P.O. Box 2056**  
**Bismarck, ND 58502-2056**  
**701-223-5300**

**I. THE WILL**

- A. Guardians
- B. Specific Bequests
- C. Certainty
- D. Personal Representative
- E. Decreased Time and Expense of Probate
- F. Update
- G. Execution

**II. PLANNING**

- A. Preservation of Property
  - 1. Liquidity
  - 2. Keeping Death Expenses at a Minimum
- B. Devices
  - 1. Marital Deduction Trust
    - a. QTIP
  - 2. Life Insurance Trust
  - 3. Minor's Trust
  - 4. Kiddie Tax
  - 5. Power of Attorney
  - 6. Living Wills
  - 7. Medical Assistance for Nursing Home
- C. Gift Planning

**III. PROBATE**

- A. Joint Tenancy
- B. Life Insurance
- C. Irrevocable Trusts
- D. Revocable Trusts
- E. Affidavit Procedure

**IV. TAXES**

- A. Federal Estate Taxes
- B. Deductions
- C. State Taxes
- D. Costs

**V. SUMMARY**

**ADDENDUMS**

- A** Disposition of Tangible Personal Property
- B** Life Insurance Trusts
- C** Durable General Power of Attorney
- D** Living Wills
- E** North Dakota's Medical Assistance Program
- F** Comparison of Traditional Will vs. Revocable Living Trust
- G** Designation of Retirement Plan Beneficiary
- H** Durable Power of Attorney for Health Care

## **ESTATE PLANNING OUTLINE**

Estate planning is deciding during your life what will happen to your property when you die. Everybody plans their estate one way or another. The use of a will is estate planning, but also deciding not to have a will is estate planning. So everybody, as they go through life, is planning their estate, whether they know it or not; whether they do it consciously or unconsciously. But proper estate planning can minimize current and future estate taxes and preserve estates while satisfying ones personal needs and desires.

Because everybody's estate is different, different decisions must be made. To know what decisions to make, one must have knowledge of the different alternatives available in estate planning. Estate planning can be divided into four main areas.

- I. THE WILL**
- II. PLANNING**
- III. PROBATE**
- IV. TAXES**

### **I. THE WILL**

There are three major reasons for having a will. First, and most importantly, is to assure that your property passes to the people that you want. The second reason is to save taxes, and the third reason is to provide stability and certainty.

Though everybody knows about wills, a significant number of people die without one. If you die without a will, then your estate passes to your heirs according to the statute of *Intestate Succession*. Intestate means dying without a will. In North Dakota, when a person dies (referred to as a "decedent"), the entire estate passes to the surviving spouse if there are no surviving children and no surviving parents or if all of decedent's surviving descendants are also descendants of the surviving spouse. If the decedent had children from a previous marriage, the surviving spouse gets the first \$100,000 and the remainder of the estate is divided 50-50 with the children of the decedent. If there are no children, the surviving spouse gets the first \$200,000 and three-fourths of the remainder. The other 25% passes to the parents of the decedent. If there are neither parents nor children, then it would go to brothers and sisters, or nieces and nephews, or to aunts and uncles, in that order. If there are no persons to take under the statute, then all of the property goes to the state.

This type of distribution may be just what the average person might want. Therefore, he may say that he doesn't need a will. But there are other aspects of a will that are important, and should be considered before determining whether or not to have a will.

## **A. GUARDIANS**

One major non-tax reason for a will concerns minor children. If a couple has young children, they should be concerned that the children are looked after in the event of premature death of the parents. Through the will, the parents can specify who is to be the guardian of the children in such a case. This use of the will can prevent a lot of problems of determining guardians, and can usually ensure that the guardians that the parents want will be appointed.

## **B. SPECIFIC BEQUESTS**

Another non-tax reason for a will concerns specific bequests. If a person wants to leave something to a non-relative at death, a will is essential. Also, if you want someone to have a specific item at your death, the only way to assure this is through a will. North Dakota has a statute which allows a person to prepare a *list* in conjunction with his will, designating where items of personal property are to go upon death. **(SEE ADDENDUM A)**

## **C. CERTAINTY**

Another important aspect of a will is the certainty that it provides. A person may be happy with the way his property would be distributed under state laws now, but those laws can be changed, and a change may cause the estate to be distributed in a manner different than what the decedent would have wanted. The use of a will can provide certainty that a person's estate will be distributed according to his wishes.

## **D. PERSONAL REPRESENTATIVE**

Another non-tax reason for having a will is the opportunity to appoint a personal representative. Since the personal representative will be in charge of seeing that the bills are paid, the estate is distributed, and tax returns filed, he is a very important person. Through the will, a person can ensure that a personal representative of his choice will be appointed.

## **E. DECREASED TIME AND EXPENSES OF PROBATE**

The will can decrease time and expenses of probate by providing that no bond be required by the personal representative, by empowering the personal representative to act without court approval, and by keeping fiduciary fees in the family.

## F. UPDATE

The final important non-tax aspect of having a will is that it will start a process of monitoring your estate by your estate planner, so that if changes occur in your circumstances or in tax laws, the proper adjustment can be made. Everyone's will and estate plan should be looked at least *annually* to see if it needs to be updated.

## G. EXECUTION

The proper execution of a will requires the person making the will to sign in the presence of two witnesses, who must also sign the will. The signatures can then be notarized so that the will is self-proved and the witnesses don't have to testify in court. There is an exception to this. North Dakota allows a person to make what is called a "*holographic*" will. This is a will that is all in the handwriting of the person making it.

Generally, all property of a decedent would pass according to his will, but there is an exception to this. The exception allows the surviving spouse to *claim a one-half share* (subject to certain limitations and conditions) of the estate instead of taking under the will. (Prior law allowed a one-third share.) So if a surviving spouse feels that he or she is getting less than one-half, this election can be made. Also, if a spouse is unintentionally *omitted*, that spouse would receive his or her intestate share.

## II. PLANNING

A major function of the will is to aid in the *tax planning* of an estate. Any family with an estate under *\$3,500,000* (2009) does not have to worry about estate taxes. But as soon as you get over these amounts you have tax consequences and the will is an essential part of lessening the taxes. A properly drawn will can significantly reduce the estate taxes.

The question in the planning area is whether a person's estate needs to be planned. As mentioned above, if the assets held by your family are worth \$3,500,000 or less, there are no tax consequences at death, and usually no estate tax return is required. In considering the size of your estate, one should consider the effects of inflation, future increases in income, and also any possible inheritances. The effects of inflation alone have caused more and more people's estates to be subject to estate taxes. So planning is much more important today than it was in the past.

The *ultimate goal* of any estate plan is to permit the client to use and enjoy his property during life, and to pass the property to his chosen beneficiaries with the least possible shrinkage in value. All estate planning should be done with this goal in mind.

## **A. PRESERVATION OF PROPERTY**

The goal of preserving one's property is accomplished in two general ways: (1) by providing liquidity at death, and (2) by keeping death expenses at a minimum.

### **1. LIQUIDITY**

Liquidity means to have assets which can easily be turned into cash. The principal means of providing liquidity is through *life insurance*. This automatically provides cash at death. It is very important to have insurance held in the right way so that it can be available to pay expenses, but doesn't increase the size of the estate. This can be accomplished by having policies on the life of the decedent owned by someone else, and by having the beneficiary of the policy keep the proceeds available to the estate to pay estate taxes or by using a life insurance trust.

### **2. KEEPING DEATH EXPENSES AT A MINIMUM**

The second method of preserving one's property is keeping death expenses at a minimum. This can be accomplished through the use of different devices, such as the will and trust, and by taking advantage of the existing tax laws.

## **B. DEVICES**

One of the most important devices used in estate planning is the *trust*. The trust has been defined as: "A loyal relationship with respect to property, subjecting one person, the Trustee, to a good faith duty to deal with property for the benefit of another person, the beneficiary."

The trust consists of three parties: the Trustor, the Trustee and the Beneficiary. The Trustor establishes the trust, and the Trustee manages the trust for the benefit of the Beneficiary. Trusts are very flexible, and almost anybody can set up a trust, anybody can manage a trust, and anybody can benefit from the trust. They can be set up so they are permanent or so they can be revoked.

Typically a family member or bank will act as *Trustee* of a trust. Banks are especially equipped to handle many trusts very economically and should be considered with larger trusts. Trusts, being individually designed, can specifically accomplish many objectives not otherwise attainable by a will. The primary function

of a trust is to provide an orderly, uninterrupted flow of property from the Trustor to the Beneficiary.

## ***1. MARITAL DEDUCTION TRUST***

One important use of the trust in estate planning is the Marital Deduction Trust. The Marital Deduction is as an unlimited deduction that is allowed for property passing at death from one spouse to the other spouse.

### ***a. QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP)***

In the past, property in which the surviving spouse only had a life interest did not qualify for the marital deduction. Now if certain conditions are met, a life interest granted to a surviving spouse will qualify for the marital deduction. This will allow the decedent's spouse to pass property to the surviving spouse for his or her life with the remainder, upon the death of the surviving spouse, going to children. In this manner, the decedent's spouse controls the final disposition of the property rather than the surviving spouse and the property still qualifies for the marital deduction.

## ***2. LIFE INSURANCE TRUST***

Another important use of the trust is the Life Insurance Trust. This trust is set up to hold life insurance policies. The terms of the trust allow the proceeds to be used to pay estate taxes, but the proceeds don't have to be included in the estate. Thus, you have liquidity without increasing the estate taxes. **(SEE ADDENDUM B)**

## ***3. FAMILY'S TRUST FOR MINOR CHILDREN***

Another important function of trusts in a will is to set up a trust for minor children if both parents should pass away. This trust would provide for the children and would designate an age (i.e. 21, 23, 25) when the property can be distributed outright to the children.

#### **4. *KIDDIE TAX***

The Tax Reform Act of 1986 has essentially eliminated the benefit of certain trusts for minor children. In the case of a child under age 14, the so-called "kiddie tax" applies and all unearned income in excess of \$1,200 is taxed at the parent's top rate. The first \$600 is non-taxable and the second \$600 is taxed at the child's rate.

#### **5. *POWER OF ATTORNEY***

The power of attorney allows one person to give another person legal authority to conduct the former's affairs in the event he becomes incapacitated without having to go to court to have a guardian or conservator appointed. (SEE ADDENDUM C)

#### **6. *LIVING WILLS* - (SEE ADDENDUM D)**

#### **7. *MEDICAL ASSISTANCE FOR NURSING HOME* - (SEE ADDENDUM E)**

### **C. GIFT PLANNING**

A husband and wife can each give \$13,000 to whomever they want each year without any gift tax consequences. This is called the *annual gift tax exclusion*. These gifts could go to the people directly, or in the case of minor children, this could go into trust until the children got older. Since the children would probably get the money anyway at death, this is one way of passing property to one's heirs without incurring an estate tax. Gifts larger than \$13,000 require a gift tax return. It is also possible for a spouse to join in on a gift by the other spouse to increase the non-taxable amount up to \$26,000 by one person.

### **III. PROBATE**

Probate can be defined as: "A court-supervised distribution of a decedent's property according to his will."

North Dakota has adopted the Uniform Probate Code for probate proceedings and this statute allows much flexibility in administering estates and has decreased probate costs. Though the probate of a will can be informal, it is still time-consuming and there are

expenses which people would like to avoid. This has led people to attempt to avoid probate when they can.

The three most common ways to avoid probate and its attendant expenses are: joint tenancy, life insurance and trusts.

#### **A. JOINT TENANCY**

Where property is held in joint tenancy, the surviving joint tenant has a right of survivorship and thus takes the entire property at the death of the co-owner. This avoids probate, executor's fees and other administrative expenses. But creating a joint tenancy may trigger a gift tax or create a higher estate tax and an attorney should be consulted before deciding on this method of avoiding probate.

#### **B. LIFE INSURANCE**

Life insurance, by law, is not subject to probate and administration expenses, and thus is one of the best means of keeping probate expenses down.

#### **C. IRREVOCABLE TRUSTS**

Transferring property to an irrevocable trust during one's life can avoid probate at death since this property does not pass under the will. A gift to an irrevocable trust does not qualify for the annual exclusion because it is not considered a present interest gift, which is a requirement for the annual exclusion to apply. However, if the trust has a "crummey" power, the gift to the trust will be considered a present interest.

Transfers to an irrevocable trust are removed from a person's estate.

#### **D. REVOCABLE TRUSTS (LIVING TRUSTS)**

It is possible to transfer property during your life to a revocable trust that will allow your property to be passed to your heirs without having to go through probate. Essentially, the revocable trust acts as a will and provides where the property will pass upon your death. In order to use this type of trust you have to actually transfer title to property to the trust during your lifetime. Since the additional cost of submitting your will to probate is not that great, the use of a revocable trust may be an added expense.

Another benefit of the revocable trust is that information of the transfer of the property does not become available to the public in general as would the probate file. Also, if property is owned in different states, the use of a revocable trust will allow the property in other states to be transferred without having to go through a probate in each of the states. If you do own property in a number of different states, the use of the revocable trust can result in a savings of time and expense. **(SEE ADDENDUM F)**

Since the trust is revocable, any property that is transferred into the trust is still part of your taxable estate unlike the irrevocable trust mentioned above.

#### **E. AFFIDAVIT PROCEDURE**

If the probate estate contains no real property and the value of the personal property, less encumbrances, does not exceed \$50,000, this property may be distributed by using an affidavit. The affidavit is prepared stating that the estate contains only personal property valued at less than \$50,000. The affidavit further names the person who is to receive the personal property. When this affidavit is presented to a person holding the property (i.e. bank or stock broker), that person or entity must turn the property over to the person presenting the affidavit.

### **IV. TAXES**

The last area to be covered is federal and state estate taxes.

#### **A. FEDERAL ESTATE TAX**

Federal estate tax is computed by taking the gross estate of the decedent and subtracting certain deductions, thus arriving at a tentative taxable estate. The tax is figured on this amount, ranging from 18% to 45%, and then a tax credit is allowed. This credit amounts to \$1,455,800 for 2009. The \$1,455,800 would eliminate tax on an estate of \$3,500,000.

#### **B. DEDUCTIONS**

Some of the deductions allowed are for funeral expenses, administration costs, debts of the decedent and marital deduction (as explained earlier).

### **C. STATE TAXES**

State taxes consist of the maximum amount allowed against the federal tax as a credit for state death taxes. This tax ranges from .8% to 16% on amounts over \$10,000,000.

The personal representative is responsible for filing returns and the federal tax is due within 9 months after death, unless a reasonable cause can be shown for an extension of time to pay. (State tax is due in 15 months.)

In the case of certain qualifying estates consisting mainly of a small business or farm, Internal Revenue Code Section 6166 and 6166A allows the option to pay the estate tax in installments over 10 or 15 years' time. These installment methods of payment can ease the liquidity problem discussed earlier.

### **D. COSTS**

A discussion of estate planning would not be complete without some explanation of its costs. Generally, a simple will costs between \$100 and \$150. Simple wills for both husband and wife cost around \$150 total, while complex wills with trusts range from \$200 to \$750. The more documents involved, the higher the cost. Usually there is little or no cost for the annual monitoring of a person's estate plan.

This cost of an estate plan is relatively small when compared to the thousands of dollars that can be saved in estate tax, and the peace of mind that comes with knowing that all of your affairs will be taken care of when you are gone.

Powers of Attorney and Living Wills each cost \$75 for one and \$100 for two.

### **V. SUMMARY**

In conclusion, it is very important to have a will and an estate plan. If you do not set out what you want to have happen to your property when you die, the state will do it for you. This state-made will may not be in accord with your own wishes and will probably be more expensive and disruptive to your family than if you had planned it yourself.

Also, there are both tax and non-tax reasons for making a will and estate plan, but until you get over \$3,500,000, the tax consequences are unimportant.

And remember that trusts can be very important in the right situation and they don't have to be complicated or expensive to operate.

Another thing to remember is that although avoiding probate may seem like a way to save time and money, it can also backfire and an attorney should be consulted to check the ramifications.

Finally, in most cases, the costs of wills and estate plans are insignificant in light of the security, efficiency and probably tax savings that it brings.

**ADDENDUM A.**

**DISPOSITION OF TANGIBLE PERSONAL PROPERTY**

If my spouse does not survive me, I, \_\_\_\_\_,  
hereby direct that the tangible personal property owned by me at my death shall be disposed  
of as follows:

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_\_ day of  
\_\_\_\_\_, 2009.

\_\_\_\_\_

\_\_\_\_\_

NOTE: Tangible personal property may be disposed of pursuant to this writing. It may not be used to dispose of land, money, evidences of indebtedness, documents of title, securities or property used in trade or business. It must describe the items to be disposed of and the person to whom they shall be given with reasonable certainty. It must be signed. If you wish to change this disposition, you may do so by destroying this writing and executing a new writing.

## **ADDENDUM B.**

### **LIFE INSURANCE TRUSTS**

#### **1. TAXATION OF LIFE INSURANCE**

- a. Part of gross estate if:
  - (1) Payable to estate; or
  - (2) Decedent possessed one or more incidents of ownership at death; or
  - (3) Transferred such incident of ownership within three years of death.

**"Incident of ownership"** is the right of the insured or his estate to the economic benefits of the policy

#### **2. BEST APPROACH**

- a. Set up life insurance trust with crummey provision
- b. Make contribution to trust in excess of premium
- c. Allow crummey time period to pass
- d. Trustee make application for insurance
- e. Provision in trust should give trustee discretion of what to do with contribution. Estate of Kurihara - trustee considered agent.
- f. Estate of Clay - funds from joint account of husband and wife on check from wife treated as coming from her.

#### **3. WHEN TO RECOMMEND LIFE INSURANCE TRUST**

- a. OBVIOUS - When estate without insurance is greater than \$600,000
- b. LESS OBVIOUS - When estate plus insurance is greater than \$600,000

## ADDENDUM C.

### DURABLE GENERAL POWER OF ATTORNEY

1. **Definition:** §30.1-30-01, N.D.C.C. A durable general power of attorney is a power of attorney which contains one of the two phrases or similar words showing the intent of the principal to continue the power of attorney notwithstanding the principal's subsequent disability of capacity:
  - a. "This power of attorney is not affected by subsequent disability or incapacity of the principal;"
  - b. "This power of attorney becomes effective upon the disability or incapacity of the principal."
2. **Durable Power of Attorney Not Affected By Disability:** The acts done by an attorney-in-fact under a durable general power of attorney during a period of disability or incapacity of the principal will inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had acted himself when competent. The purpose of the two different phrases enables a power of attorney to be put into effect and continue through a disability period. The second purpose of the language is to allow a principal to execute a power of attorney which does not become effective until he is disabled or incapacitated, and only so long as he is incapacitated.
3. **Relationship of Attorney-in-Fact to a Conservator, Guardian or Other Fiduciary Appointed by the Court.** The attorney-in-fact appointed under a durable general power of attorney provision is accountable to the court-appointed fiduciary as well as to the principal. The court-appointed fiduciary has the power to revoke and amend the power of attorney the same as the principal would have had if not incapacitated.

A durable general power of attorney may serve to nominate the principal's choice to act as his guardian or conservator if such proceedings are commenced thereafter, and the court is directed to make its appointment in accordance with the principal's nomination in a durable general power of attorney wherever possible.

4. **Continuation of Durable General Power of Attorney:** A durable general power of attorney is not revoked if the attorney-in-fact and the parties relying upon the acts of the attorney-in-fact were not aware of the death or disability of the principal at the time documents were executed. Acts undertaken in good faith and reliance upon an affidavit executed by the attorney-in-fact, durable or otherwise, confirming that the attorney-in-fact was not aware of the termination of the power by revocation by the principal's death, disability or incapacity, is conclusive of the non-revocation or non-termination of the power at the time the attorney-in-fact under the power.
  
5. **Activation of Power of Attorney Upon Disability.** As previously stated, a durable general power of attorney may be executed by the principal to become effective only upon occurrence conditions of incompetence or disability of the principal. Those conditions are determined by the principal, and generally include a combination of conditions and acts and people to activate the power of attorney. The principal's attending physician is usually included as one person, along with the possibly a second physician or other named persons, who must certify to the disability or incompetence of the principal in order to activate the durable general power of attorney. The same persons can similarly deactivate the power of attorney by certifying to the competency of the principal and file the notices of discontinuance of the power with the parties affected by the actions of the principal under the power of attorney. A power of attorney may also be activated by order of the court or by the principal certifying its activation.

## **ADDENDUM D.**

### **LIVING WILLS**

The 1989 Legislature passed the Living Wills bill to define the rights and responsibilities of the terminally ill to control decisions regarding the administration or withholding of life-prolonging treatment. An individual of sound mind and eighteen years of age or more may execute a declaration setting forth the use of life-prolonging treatment.

The following rules will generally apply:

1. **Execution of Declaration:** A declaration governing the use of life-prolonging treatment, including the withholding or withdrawal, can be executed by any individual of sound mind and eighteen years of age or more, and witnessed by two individuals, provided:
  - a. The witnesses are not related to the person by blood or marriage; and
  - b. The witnesses are not entitled to any portion of the estate of the individual signing the declaration under any existing will or operation of law; and
  - c. The witnesses cannot be claimants against any estate of the individual making the declaration; and
  - d. The witnesses cannot be responsible for the individual's medical care; and
  - e. The witnesses cannot be the attending physician of the individual making the declaration; and
  - f. If the individual making the declaration is confined to a nursing home, one of the two witnesses must be an ombudsman as provided in §50-10.1-02, N.D.C.C.
2. **Specific Language:** A declaration to withhold or withdraw life-prolonging treatment must include specific language directing that the declarant's life would not be artificially prolonged by acknowledging the following conditions:

- a. That two physicians must certify a terminal condition arising from incurable injury, disease or illness, and that death is eminent, whether or not the life-prolonging treatment is utilized and allow the declarant to die naturally.
  - b. A request that the declaration be honored by the family and physicians as a final expression of the declarant's legal right to refuse medical or surgical treatment;
  - c. That the declarant has not been diagnosed as being pregnant;
  - d. The declarant must pronounce emotional and mental competency to make the declaration; and
  - e. The declaration may be revoked at any time (while the declarant is competent).
3. **When Operative:** The declaration becomes operative as presumptive evidence of the declarant's desires concerning the use, withholding or withdrawal of life-prolonging treatment. Such declaration does not obligate the physician to use, withhold or withdraw life-prolonging treatment.
  4. **Revocation of Declaration:** A declaration as described herein may be revoked at any time by a competent declarant by a written declaration of revocation, an oral expression of intent to revoke, physical cancellation or destruction of the declaration by the declarant or at the declarant's direction, communication to the attending physician incorporated into the declaration is in a terminal condition.
  5. **Management of Patients Under Living Wills Statutes and Declarations:**
    - a. Nutrition and hydration may be withheld from a patient with a terminal condition and declaration only if nutrition and hydration could not be physically assimilated by the patient or would be physically harmful or unreasonably painful to the patient.
    - b. The health care provider must provide treatment for the patient's comfort, care and alleviation of pain under a declaration.
    - c. The patient may make decisions regarding life-prolonging treatment as long as the patient is competent.

- d. Medical treatment must be provided to a pregnant patient with a terminal condition unless the attending physician certifies that the medical treatment will not maintain the patient to permit the full development and life birth of the unborn child.

6. **General Provisions:**

- a. An attending physician or health care provider who cannot comply with the provisions of the declarant shall transfer such patient to another physician or health care provider. The law does not require any physician or health care provider to take any actions contrary to reasonable medical standards.
- b. Persons who willfully conceal, falsify, coerce or otherwise interfere with a declaration or revocation can be prosecuted for criminal violations.
- c. Death resulting from withholding of treatment pursuant to a declaration is not suicide or homicide.
- d. The making of a declaration does not affect life insurance coverage.

## **ADDENDUM E.**

### **NORTH DAKOTA'S MEDICAL ASSISTANCE PROGRAM**

#### **1. Eligibility Requirements**

- a. **Resource Limits** - one person - \$3,000; two persons - \$6,000
- b. **Exempt Property Items** - home, clothing, furniture, household goods, one vehicle and a pre-need burial contract up to \$5,000
- c. **Additional Property Provisions** (Spousal impoverishment rule) - The non-institutionalized spouse may separately own resources up to \$109,560 in 2009. This figure is adjusted annually.

#### **2. Omnibus Budget Reconciliation Act Of 1993 (OBRA).**

- a. Made major changes regarding Medical Assistance.
- b. Transfer of assets (effective 10-1-93 for transfer on or after 8-10-93).
  - (1) Nursing home 36-month look-back period (non-trust)
  - (2) 60-month look-back for transfers in trust
  - (3) Average cost of nursing home care for 2008 is \$5,247 per month (APPR)
  - (4) Minimum monthly maintenance needs allowance (MMMNA) for 2007 is \$2,267.
  - (5) The maximum Community Spouse Asset Allowance (CSAA) for 2007 is \$109,560 while the minimum is \$21,912.

#### **3. North Dakota's 2003 Annuity Bill (amended 2005 and 2007).**

This bill provides great benefits for couples where one is in the nursing home.

#### **4. Deficit Reduction Act Of 2005**

This act passed February 8, 2006. It increases the look back period from three to five years and creates a delayed penalty period for gifts of cash or property. It also allows states to provide very beneficial programs for nursing home insurance.

## **ADDENDUM F.**

### **COMPARISON OF TRADITIONAL WILL VS. REVOCABLE LIVING TRUST**

#### **1. AREAS OF IDENTICAL TREATMENT**

- a. No gift tax
- b. Step up in tax basis
- c. Identical treatment regarding federal and state estate tax
- d. Both subject to generation-skipping tax
- e. Income tax consequences identical
- f. Tax preparation expenses identical
- g. Usually same time required to pass property to beneficiaries

#### **2. TRUST SUPERIOR**

- a. Avoid out-of-state probate
- b. Decreases possibility of contest
- c. Avoids some of the delay and expense of probate procedure
- d. Avoids need for conservatorship
- e. Privacy retained
- f. Avoids court involvement with any continuing trust
- g. Less back-end costs

#### **3. WILLS SUPERIOR**

- a. Fiscal year available
- b. Statutory elimination of claims
- c. Divorced spouse automatically excluded
- d. No requirement to re-title assets
- e. Less up-front costs
- f. Need will to name guardian for minor children
- g. \$600 income tax exemption instead of \$100

## **ADDENDUM G.**

### **DESIGNATION OF RETIREMENT PLAN BENEFICIARY**

The proper beneficiary designation of retirement plans is a very important aspect of estate planning.

In cases where retirement plan benefits represent a large portion of the overall estate, the best primary beneficiary designation would normally be the surviving spouse. The best contingent beneficiary designation would be the credit shelter trust under your last will and testament.

This primary and contingent beneficiary designation would allow for optimum deferral opportunities for your surviving spouse and the credit shelter trust would be classified as a "designated beneficiary" and qualify for continued deferral of income taxes on the retirement funds.

The retirement trust's primary beneficiary is the surviving spouse. The surviving spouse receives income from the trust in such a manner that the trust value will not be taxable in the surviving spouse's estate. The method of getting the retirement funds into a credit shelter trust would be a disclaimer by the surviving spouse. The surviving spouse may disclaim (or renunciate) any portion or all of the retirement funds.

## ADDENDUM H.

### DURABLE POWER OF ATTORNEY FOR HEALTH CARE

1. **Definition.** §23-06.5-02 provides that a "Durable Power of Attorney for Health care" means a document delegating to an agent the authority to make health care decisions executed in accordance with provisions of this chapter. A "health care decision" means consent to, refusal to consent to, withdrawal of consent to, or request for any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition.
  
2. **Restrictions on who can act as agent.** A person may not exercise the authority of agent while serving in one of the following capacities:
  - a. The principals' health care provider;
  - b. A non-relative of the principal who is an employee of the principal's health care provider;
  - c. The principal's long-term care services provider; or
  - d. A non-relative of the principal who is an employee of the principal's long-term care services provider.
  
3. **Execution and witnesses.** The Durable Power of Attorney for Health Care must be signed by the principal in the presence of at least two or more subscribing witnesses, neither of whom may, at the time of execution, be the agent, the principal's health or long-term care services provider or the provider's employee, principal's spouse or heir, a person related to the principal by blood or adoption, a person entitled to any part of the estate of the principal upon the death of the principal under a will or deed in existence or by operation of law, or any other person who has, at the time of execution, any claims against the estate of the principal.

If the principal is physically unable to sign, the Durable Power of Attorney for Health Care may be signed by the principal's name being written by some other person in the principal's presence and at the principal's express direction.

4. **Acceptance of appointment.** To be effective, the agent must accept the appointment in writing. Subject to the right of the agent to withdraw, the acceptance

creates a duty for the agent to make health care decisions on behalf of the principal at such time as the principal becomes incapable.

5. **Revocation.** A Durable Power of Attorney for Health Care is revoked:
  - a. By notification by the principal to the agent or health care or long-term care services provider orally, or in writing, or by any other act evidencing a specific intent to revoke the power; or
  - b. By execution of the principal of a subsequent Durable Power of Attorney for Health Care.

If the spouse is the principal's agent, the divorce of the principal and spouse revokes the appointment of the divorced spouse as the principal's agent.

6. **Use of statutory form.** A statutory form of Durable Power of Attorney for Health Care is provided at N.D.C.C. §23-06.5-17.
7. **Common law power of attorney for health care.** It is also possible to create a power of attorney for health care by including a paragraph regarding health care in the principal's Durable General Power of Attorney. Use of the common law form dispenses with the requirement of witnesses and acceptance by the agent.
8. **New in 2005: Health Care Directive.** Combines living will and health care power of attorney.