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## Maximizing Flexibility in Your Estate Plan

Our clients are increasingly focusing on non-tax estate planning issues due to the social and economic changes we are all experiencing as well as the dramatic changes in the Federal and Maine estate and gift tax laws over the past ten years, the result of which is that very few estates will be subject to tax absent future legislative changes. Some of the key planning issues of this decade include: planning for one's own incapacity and the resulting long-term care costs; providing for disabled adult children, such as those with autism, mental illness and addiction; and addressing creditor and college debt issues of younger generations. Because of the ever-changing nature of these concerns, our emphasis in recent years has turned to drafting flexible estate plans that adapt and adjust in the face of uncertainty.

Historically, we have advised clients to leave assets in trust for a surviving spouse in order to maximize estate tax savings and/or provide for blended families. In the absence of the estate tax motivator, many clients in first marriages prefer to leave all assets outright to the surviving spouse. While this approach is often appropriate at the time the plan is signed, it fails to provide flexibility in the event the laws, the couple's assets, and/or the health of one or both spouses change significantly in the future. Accordingly, we often include optional trust planning in the documents of clients with significant (over \$500,000) but nontaxable estates.

For example, a continuing trust for the surviving spouse can be beneficial if the surviving spouse becomes unable to manage assets and/or requires long-term care. By providing that assets will be held in an appropriately-drafted trust for the surviving spouse, assets can be protected from creditors and long-term care costs after the death of the first spouse.

If, however, the surviving spouse remains in good health, an appropriately-drafted trust will include provisions allowing the trust to be terminated if the costs of administration outweigh the potential benefits. The surviving spouse may also be given a "power of appointment," which allows him/her to alter how remaining trust assets are distributed upon the surviving spouse's death. Use of a power of appointment can be beneficial in the event one or more remainder beneficiaries of the spouse's trust (such as children) develop creditor, addiction, or health issues that make outright distribution of assets undesirable.

The foregoing trust planning only works if the couple's assets are owned separately. Because most married clients prefer to own all or a majority of their assets jointly, we include provisions in the plan that will allow clients to take a wait-and-see approach to dividing assets. To accomplish this flexibility, clients should execute a durable power of attorney that gives a trusted agent the authority to make gifts of assets between spouses and change beneficiary designations. Such authority allows the agent of a disabled client to divide jointly-owned assets

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and transfer assets from one spouse to the other for trust planning and to qualify for certain long-term care benefits. Without a well-drafted durable power of attorney, expensive court proceedings may be required to accomplish such planning.

Use of a revocable “living” trust can also provide incapacitated clients with greater financial protection from untoward family members than does a durable power of attorney. The trust should provide that all trust assets should be used for the benefit of the client-creator of the trust during his or her life, as well as for the benefit of his or her spouse. Funding of the revocable trust may be delayed until necessary so long as the agent under the durable power of attorney has the authority to transfer assets to the revocable trust in the future.

Flexible planning for children and other non-spouse beneficiaries is also prudent. Most clients understand the benefits of leaving assets to minors in trust rather than outright; most, however, are uncomfortable with the trust continuing beyond a certain age, usually between 25 and 35. However, keeping assets in trust for the beneficiary beyond adulthood can provide benefits even for the most responsible beneficiary, such as protection of the trust assets from the claims of creditors (including divorcing spouses). Even if the trust does provide for outright distribution of assets at a certain age, the client should consider including provisions allowing for future modification of this withdrawal right by the trustee or another trusted party, as well as authority for the trustee to otherwise alter the distributive terms of the trust. The ability to alter the beneficiary’s withdrawal and distribution rights can be invaluable in the event the beneficiary is suffering from an illness, disability or addiction, is going through a divorce, or is otherwise unable to manage assets at the time the trust would otherwise be distributed to the beneficiary.

This alert is only a brief summary of some of the many ways we add flexibility to an estate plan, with the overall goal of providing clients with a plan that provides peace of mind in the face of changing needs and circumstances in uncertain times. As always, we welcome your questions, feedback, and comments.

Please feel free to forward to friends and family.