ESTATE PLANNING:
The Importance of Wills, Powers of Attorney, and Medical Directives

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Caty is president of the Eufaula Primary School PTO, a member of the Christ Child Circle service organization, and a member of First United Methodist Church of Eufaula. Caty is currently serving her church as the chairperson of the Board of Trustees and as a member of children's ministries, and with her husband Ed she co-led First United Methodist's Building Tomorrow Together Campaign, the recent capital campaign to raise funds for building renovations. Through the Christ Child Circle, Caty volunteers her time to assist women and children of Barbour County, Alabama. She has also worked with the Alabama State Bar Volunteer Lawyers Program. Before her move to Eufaula, Caty served on the Compass Bank Young Executive Board, the Montgomery Estate Planning Council Board, and as a member of the Junior League of Montgomery and Birmingham. Caty is married to Dr. Ed Richardson, a dentist practicing in Eufaula, and they have three children, Marianna (10), Maddox (6), and Mac (2).

FIRM PROFILE

Capell & Howard, P.C., founded in 1947, is based in Montgomery, Alabama, with an east Alabama office in the Auburn-Opelika area. Capell & Howard began as a two-member partnership of Jack Capell and Fontaine Howard in 1947, expanded to four members in 1953 and became a 14 member professional association in 1971. Initially, the firm's practice centered around real estate development so the first natural expansion was into the areas of construction law and construction litigation. With the development of a tax and bond section and a general litigation department in the early 1960's, the firm evolved into a full service law firm.

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ESTATE PLANNING

I. Benefits of a Will

A. Avoids Distribution under Laws of Intestacy

1. Selection of Recipients. You may, subject only to your spouse's "elective share", give your "probate property" to anyone pursuant to your will. Without a will, your oral or written instructions are not binding and may be ignored.

   If a person dies without a will (intestate), Alabama law will determine to which of his/her relatives his/her property will pass. The intestacy laws have been drafted to be "fair" in the average situation, but most people would like to choose who will receive their property when they die.

   See Exhibit "A" for the scheme of distribution under Alabama's Statute of Descent and Distribution.

2. Form and Timing of Distribution. Not only does a will allow you to designate who will receive your assets at your death, it also permits you to determine in what form and the time and manner of distribution to beneficiaries (i.e., in trust to be distributed at specified ages). For example, if you die without a will and have minor children, the minor children will be entitled to a portion of your assets, and:

   (a) a guardian ad litem will be appointed during administration of the estate;

   (b) a conservator may be appointed to manage the property the minor receives; and

   (c) the property passes to that person when he/she reaches age of majority which is age 19 under Alabama law.

3. Spouse's Elective Share. Unless a spouse has signed a waiver of his/her spousal rights (in what is commonly known as a pre-nuptial agreement), the spouse may take what is known as an "elective share" of the decedent's probate estate. The surviving spouse's elective share is the lesser of:

   (a) all of the estate of the deceased reduced by the value of the surviving spouse's separate estate; or

   (b) one-third of the estate of the deceased.

   Therefore, you cannot disinherit your spouse. However, children have no such statutory elective share and can be disinherited.

4. What Assets are Part of the Probate Property? All assets owned by the decedent except:

   (a) Property owned in Joint Tenancy with Rights of Survivorship. This form of title arrangement is usually found in property owned jointly between spouses. Title passes automatically to the surviving joint tenant at the death of the other spouse and does not pass under the will. The joint tenancy is dissolved after one tenant dies. If you name a child as a joint tenant on an asset, that asset becomes subject to such child's creditors and such child has authority to withdraw funds from such asset or force a sell of such asset.

   (b) Insurance which is not made payable to the decedent's estate. It is payable to whomever the owner named as the beneficiary of the life insurance policy. Therefore, life insurance is not subject to probate unless the estate of the decedent is the beneficiary.

   (c) Retirement Plan Benefits. Most retirement plan benefits, by Federal pension law, are automatically payable to the surviving spouse unless the spouse has consented in writing that they be paid to someone else. This is true even if the surviving spouse has signed a valid pre-nuptial agreement.

   (d) Revocable Trusts (also known as "living trusts"). Property transferred to a revocable trust prior to the decedent's death is not subject to probate unless by the terms of the trust it is payable back to the decedent's estate. All assets in a revocable trust at the death of the grantor are included in the grantor's gross estate for estate tax purposes. The advantages of using a revocable trust include that they (i) provide for management of assets by trustee; (ii) assets in revocable trust avoid probate because they are not owned by the decedent; (iii) they afford the grantor privacy in disposition of his/her assets at death since revocable trusts are normally not filed with the local probate court whereas wills are; and (iv) assets in a revocable trust generally are not subject to the surviving spouse's elective share claim. However, costs of creating a revocable trust can be high with legal fees and transaction costs of transferring assets to the trust. See Common Misconceptions of Revocable Trusts in Section VI below for further information.

   (e) Lifetime Gifts. Even gifts made shortly prior to death will avoid probate. Note, however, that gifts carry the donor's basis to the donee, whereas appreciated assets transferred at the time of death will get a new or "stepped up" income tax basis.

B. Permits the Nomination of a Guardian for Minor or Incapacitated Children.

Without a nomination in a will and if the child does not have a surviving parent, the probate court will appoint a guardian for minor children. Relatives are not always the best choice for a guardian and consideration must be given to the financial situation of the potential guardian, as well as his/her health, age and ability to care for children and whether the parents feel that person would provide a desirable environment for their minor child to live.

C. Allows a Choice of Personal Representative.

1. The duties of an administrator/executor of an estate can be very time-consuming. If you make a will, you can name an executor in that will. In the event an executor is not named in the will or if a person does not have a will, the Probate Court will appoint a personal representative. The order of preference for the appointment of the personal representative of an intestate estate is as follows:

   (a) the surviving spouse,

   (b) the next-of-kin (heir nearest in degree) entitled to share in distribution,

   (c) the largest creditor residing in Alabama, and

   (d) such other person as the Probate Court may appoint.

D. Allows the Waiver of Probate Bond and Filing an Inventory. In the absence of a will waiving the posting of a bond, the Probate Court will require a fiduciary bond to be posted by the personal representative, referred to as the administrator, of the estate in order to guarantee the replacement of any funds which might be embezzled or diverted by the personal representative. Since this additional cost must be borne by the estate, the bond requirement is almost always waived in the will. If the posting of a bond is not waived by the will of the decedent or if the decedent dies intestate, the personal representative of the estate must post a bond. In addition, unless the Will waives an inventory of the probate estate, the personal representative will be required to file an inventory with the court within 60 days of the appointment of a personal representative.

E. Allows Personal Representative to Act Without Court Approval. If a person dies without a will granting the executor certain powers, such as selling property, the personal representative will be required to obtain court approval before performing certain acts during the estate administration.

F. Allows Planning for Non-traditional Family Situations. A will allows an individual to make provisions for non-traditional family situations such as second marriages, blended families, or same-sex couples. For example, if an individual remarries but has children from his/her first marriage, he/she can structure his/her will to make provisions for both his/her spouse and his/her children by providing for outright gifts directly to children or a trust for the surviving spouse during life with the principal ultimately passing to the children. A trust created by a will can also protect the ultimate distribution to an individual's children in the event of the remarriage of a surviving spouse. In addition, same-sex couples are not addressed by Alabama's intestate laws, and therefore, in order to provide for this situation, an individual will need to make provisions in his/her Will.

G. Allows Planning to Avoid Estate Taxes. Under current federal estate tax law, a person's estate will not owe estate taxes if his/her taxable estate does not exceed his/her $5,490,000 "Basic Exclusion Amount" and, with properly structured wills, a married couple with assets

not in excess of $10,980,000 can generally avoid estate taxes. See Exhibits "B", "C", "D," and "E" for examples of tax planning for 2017.

1. Estate and Gift Tax "Basic Exclusion Amount". The gift and estate tax credits have been "unified" and now shelter $5,490,000 of transfers (the "Basic Exclusion Amount") per taxpayer. A taxpayer can use his/her Basic Exclusion Amount partially or totally during his/her lifetime and then his/her estate can use the balance at that person's death. In addition, the current estate and gift tax laws introduced a "portability" concept which allows a surviving spouse, subject to certain conditions, to use any part of the deceased spouse's Basic Exclusion Amount which the deceased spouse failed to use (i.e., if the deceased spouse's taxable estate was less than $5,490,000).

2. Taxable Estate. A person's "taxable estate" is his/her "gross estate" less certain permitted deductions. A person's "gross estate" is the fair market value of all the assets which the decedent owned or which he/she is deemed to have owned for estate tax purposes. It can include assets which are not in the probate estate. For example, the gross estate includes:

   (a) insurance proceeds if the decedent had "incidents of ownership" in the policy. The proceeds are included whether they are payable to the decedent's estate or to a beneficiary other than the decedent's estate;

   (b) all or part of property owned in joint tenancy with rights of survivorship;

   (c) assets in retirement plans;

   (d) assets which the decedent has given away if he/she retained the right to the income or enjoyment of the property or the right to determine who receives the income or enjoyment of the property. For example, it is not uncommon for parents to deed their home to their children in an attempt to avoid estate taxes and/or allow them to qualify for Medicaid benefits but to continue to live there until their death. (Please note there is a risk of being disqualified from receiving Medicaid for a certain time period if an individual transfers assets for Medicaid purposes within 5 years of applying for Medicaid benefits.) If you give property to your children retaining a life estate, the fair market value of that property is included in your gross estate; and

   (e) assets transferred to revocable trusts.

3. Marital Deduction. For purposes of the estate tax, the value of the gross estate is reduced by the value of most property passing to the surviving spouse. This results in the estate tax on those assets being deferred, not necessarily avoided, depending on the value of the surviving spouse's separate property.

II. Durable General Powers of Attorney

A. Generally. A power of attorney is a written instrument by which a person, as "principal", appoints another person, referred to as the attorney-in-fact, as agent of the principal. A special or limited power of attorney confers upon the agent the authority to perform certain specified acts on behalf of the principal. A durable general power of attorney confers upon the attorney-in-fact the authority to perform a broad array of acts on behalf of the principal. The term "durable" means that the power-of-attorney remains in effect after the principal's disability, incompetency, or incapacity.

B. Durable Power of Attorney versus Common Law Power of Attorney. At one time under Alabama law, a power of attorney was enforceable only during the period of time that the principal was legally competent. Thus, when a principal became legally incompetent, the time at which the power of attorney is most helpful, the power of attorney was automatically revoked.

Code of Alabama 1975 ("Code"), section 26-1-2 authorizes so-called "durable" powers of attorney and governs their effect and applies to all powers of attorney executed prior to January 1, 2012. Alabama adopted the Alabama Uniform Power of Attorney Act, Code, section 26-1A-101 through 26-1A-404, which became effective January 1, 2012.

The term "durable" means that the power of attorney is not affected by, and thus is enforceable after, a principal's disability, incompetency, or incapacity, which occurs after the principal has signed the power of attorney.

C. Purpose. The purpose of a durable general power of attorney in the estate planning context is to provide the principal's attorney-in-fact with the legal powers required to manage the principal's business affairs when the principal would otherwise be unable to do so personally (for example, in the event of incapacity). The existence of a durable power of attorney may preclude the necessity of the appointment of a conservator or other fiduciary for the principal. A durable power of attorney will facilitate the management of the principal's affairs in case of illness or emergency. For example, if you were to become incapacitated and you did not have a general durable power of attorney, your spouse or child would have to go to court, have you declared incompetent, and have someone appointed as your conservator in order to conduct any necessary business such as borrowing money, selling or mortgaging real estate, signing contracts in your name, selling securities, or cashing checks. A conservator is also required to post a bond with the probate court and file periodic accountings with that court.

D. Springing Powers. You may be reluctant to grant a durable power of attorney that is effective immediately. In that case, you can use a power that "springs" into effect upon your disability. For a durable power of attorney to be effective immediately upon signing which most of them are, the following or similar language is included in the instrument: "This power of attorney shall not be affected by disability, incompetency, or incapacity of the principal." For a durable power of attorney that will become effective in the future at the time of the disability, the following or similar language should be included in the instrument: "This power of attorney shall become effective upon the disability, incompetency, or incapacity of the principal."

However, a doctor's letter declaring the disability or incapacity is often required for the power of attorney to become effective in this case. Furthermore, if the principal is reluctant to trust one person's judgment, the principal may also name co-attorney's-in-fact and give them the power to act on your behalf only if both of them agree.

E. Choice of Attorney-in-Fact. While a power of attorney is revocable, it should be signed only if the principal is fully confident in permitting the attorney(s)-in-fact to manage the principal's property and business affairs. A power of attorney can be revoked, but the damage may have already been done before the power can be revoked. Therefore, the choice of the attorney(s)-in-fact requires careful consideration. The principal should consider naming one or more successor attorneys-in-fact in the event the first choice becomes unable to act in that capacity. The principal may also wish to name co-attorneys-in-fact, giving the co-attorneys the power, in the alternative, (i) to act jointly or (ii) to act jointly and severally.

III. Living Wills

A. Generally. In 1997 and again in 1981, the Alabama Legislature amended the "Natural Death Act" (the "Act"), codified as Code sections 22-8A-1 through 14. The Act (i) allows competent adults to give written directions concerning the providing, withholding or withdrawing of life-sustaining treatment and artificially provided nutrition and hydration in instances of terminal illness or permanent unconsciousness; (ii) permits the designation of proxy health care decision-makers; and (iii) provides for the appointment of surrogate decision-makers in instances where the adult has not made such a designation.

A life-sustaining treatment is defined as any medical treatment, procedure, or intervention that in the judgment of the attending physician when applied to the patient, would serve only to prolong the dying process where the patient has a terminal illness or injury, or would serve only to maintain the patient in a condition of permanent unconsciousness.

Life-sustaining treatment does not include the administration of medication or the performance of any medical treatment deemed necessary to provide comfort or to alleviate pain.

A terminally ill patient is a patient whose death is imminent or whose condition, to a reasonable degree of medical certainty, is hopeless unless he or she is artificially supported through the use of life-sustaining procedures and which condition is confirmed by a physician who is qualified and experienced in making such a diagnosis.

The Act provides a mechanism whereby an adult may affect medical care decisions even after he/she is no longer able to participate actively in such decisions.

B. Execution of the Directive. The directive must be:

(a) in writing;

(b) signed by the person making the directive, or by another person in the declarant's presence and by the declarant's expressed direction;

(c) dated; and

(d) signed in the presence of two or more witnesses at least 19 years of age neither of whom shall be (i) the person who signed the directive on behalf of and at the direction of the person making the directive, appointed as health care proxy therein, (ii) related to the declarant by blood, adoption, or marriage, (iii) entitled to any portion of the estate of the declarant according to the laws of intestate succession or under any will of the declarant, or (iv) directly financially responsible for the declarant's medical care. Code section 22-8A-4.

C. Revocation of the Directive. If the declarant is incompetent at the time of the decision to withhold or withdraw life-sustaining procedures, a directive executed in accordance with the Act is presumed to be valid. Code section 22-8A-7. A directive may be revoked at any time by the declarant, without regard to his mental state or competency. Code section 22-8A-5. The revocation may be accomplished by any of the following methods:

(a) by being obliterated, burnt, torn, or otherwise destroyed or defaced in a manner indicating intention to cancel;

(b) by a written revocation of the directive signed and dated by the declarant or person acting at the direction of the declarant; or

(c) by a verbal expression of his/her intent to revoke the directive in the presence of a witness 19 years of age or older who signs and dates a writing confirming that such expression of intent was made. Any verbal revocation becomes effective upon receipt by the attending physician of the writing.

The Act provides an exemption from criminal or civil liability when a person fails to act on a revocation of which he had no knowledge.

D. Protection from liability. The physician, licensed health care professional, medical care facility, or employee thereof who, in good faith and pursuant to reasonable medical standards, causes or participates in the withholding or withdrawal of life-sustaining procedures from a patient pursuant to a directive made in accordance with the Act is granted a broad exemption from civil liability, criminal liability, and professional sanction. Code section 22-8A-7.

A health care provider who refuses to comply with the directive shall not be liable for his refusal, but shall permit the qualified patient to be transferred to another health care provider. Code section 22-8A-8.

IV. Reducing the Estate during Life & Gifting Techniques

A. Gifting Generally. With certain exceptions, (i) a person must pay gift tax on the value of gifts made by that person during his life and (ii) a person's estate must pay estate tax on the value of the assets a person owns (or is deemed to own) at his death. Therefore, to avoid or reduce estate and gift taxes, one may give away his assets during his life maximizing the use of the exceptions.

1. $14,000 Annual Gift Tax Exclusion.

(a) A gift tax annual exclusion is available in the amount of $14,000 per donee per year. Thus, a taxpayer can give away $14,000 per year per recipient without triggering a gift tax payment or using any of his/her Basic Exclusion Amount. Annual exclusion gifts are in addition to the taxpayer's $5,490,000 Basic Exclusion Amount.

(b) When gift splitting (one spouse owns the property being given and the other spouse consents to the gift), spouses may transfer a total of $28,000 per donee each year without using any Basic Exclusion Amount or triggering any gift-tax liability.

(c) The annual exclusion is available only when the gift or transfer consists of a present interest (an interest commencing in possession or enjoyment immediately). Thus, a gift in trust is generally not a present interest gift. To convert a gift to a trust into a present interest gift that is eligible for the annual exclusion, the trust instrument must grant each beneficiary the right to withdraw any contribution to that trust for a period of thirty days. This withdrawal right is called a "Crummey Power."

2. Estate and Gift Tax "Basic Exclusion Amount". Discussed in Section I.

3. Income Tax Basis of Property Upon Transfer by Gift.

(a) A gift of property during lifetime results in a "carry-over" basis to the donee. In other words, the donee's basis in the gifted property is what the donor's basis in the property was.

(b) Most property includable in a decedent's estate for estate tax purposes (whether or not there is an estate tax liability) receives a "step-up" in basis.

B. Outright Gifts v. Gifts in Trust. Gifts may be outright but consider these disadvantages: Donee may dissipate property rather than save it; with a minor donee, it may be necessary to appoint a guardian to sell, exchange, lease, or otherwise deal with the property; if the donee dies before reaching the age of majority, the property may return to donor under intestate succession.

C. Gifting Techniques. The following techniques are frequently used because they (i) allow the donor to leverage the use of his/her Estate and Gift Tax Basic Exclusion Amount and annual exclusion and (ii) in some cases, allow the donor to retain some degree of control over the gifted asset.

1. Irrevocable Life Insurance Trust. Currently owned insurance is transferred to the trustee of an irrevocable life insurance trust, or, alternatively, a new policy is purchased by the trustee.

(a) Advantages. Proceeds of insurance policy are not subject to estate taxation (subject to three year rule for preexisting policies); provides liquidity for the estate; trustee provides management for proceeds if beneficiaries not capable; trust can provide lifetime benefits for surviving spouse yet escape estate taxation at her death; a client may provide for the client's children by a prior marriage using life insurance and provide for the client's spouse with his or her remaining estate.

(b) Disadvantages. Trust is irrevocable and may not be amended; insured loses ability to access cash surrender value.

Note that if estate liquidity is the reason for the life insurance, as opposed to providing for surviving spouse, second to die policies may be purchased.

2. Qualified Personal Residence Trust. This arrangement allows a donor to give his primary residence or vacation home (or both) to his children at a significantly lower transfer tax cost than he would incur if he left the residence to them in his will or gave them the residence outright. A parent does this by transferring the residence to a trust and retaining the right to use the residence without the payment of rent for a specified period of time. At the end of that specified period, the residence either passes outright to the children or continues in trust for their benefit. The donor may continue to occupy the residence after his retained interest terminates, but if he does so he must pay market value rent. If the donor dies before the specified period of time expires, the residence is included in the grantor's estate as if the gift had not been made.

3. Family Limited Partnership or Limited Liability Company. These entities are often used to implement a management system and provide liability protection especially if numerous family members will be inheriting and owning the property together. In addition, they may also provide advantages in gifting interests if a minority discount or lack of marketability discount can be applied.

4. Disclaimer. Consider disclaiming assets which are inherited. If disclaimed, assets will pass as though disclaimant predeceased the inheritance (generally, to the disclaimant's children) and thus will not be subject to estate and gift tax in the disclaimant's estate.

5. Generation-skipping Transfers. Consider gifting assets to trusts for the benefit of children and grandchildren. If properly structured, such assets will not be subject to estate taxes in the children's estates although available for their use during their lives. Alternatively, gift assets to grandchildren and great-grandchildren (outright or in trust) instead of to children. Note, however, that all such gifts, whether in trust or otherwise, must be carefully structured as there is, in addition to the gift and estate tax, a generation-skipping transfer tax.

6. Charitable Giving.

   (a) Charitable Remainder Trust.
   (b) Charitable Lead Trust.
   (c) Charitable Gift Annuity.
   (d) Outright Gift to Charity.

V. **Business Assets**

A. Business Succession Planning

1. Solid business succession planning that may include buy-sell arrangements, restricted stock agreements, options to purchase and lifetime gifts of controlling interests should be considered. Transfer of controlling interest in a business to a trust that directs distribution of these interests at death (thereby avoiding the probate process) may ensure that there is no interruption in the management of the business.

2. Children may be working in a family business and a business owner may want to ensure that ownership of the business passes to these children rather than to the spouse. Life insurance offers an opportunity to give the spouse the cash equivalent of stock or other "family" assets.

3. The use of family limited partnerships and manager managed limited liability companies should also be considered by the practitioner as a means to protect the assets of a business and insulate children of prior marriages while still permitting the business owner client to control the income from and management of the entity.

VI. **Common Misconceptions About Revocable Trusts**

A. Revocable Trusts Provide Creditor Protection: A revocable trust does not provide creditor protection for the settlor. A spendthrift provision is ineffective against any beneficial interest retained by the settlor. Code, section 19-3B-502 cmt. During the settlor's lifetime, the assets of a revocable trust are subject to the claims of the settlor's creditors. Code section 19-3B-505(a)(1).

B. Revocable Trusts Are Money Savers: The use of a revocable trust generally will not eliminate post-death costs. The only potential post-death cost savings resulting from the use of a revocable trust are probate costs. Often a revocable trust will not avoid probate costs, as the settlor commonly fails to transfer all of his assets to the trust. If a settlor leaves even one bank account or parcel of real estate in his individual name, a probate proceeding will be necessary. As with probate proceedings, transfer costs are incurred in transferring the trust assets to the beneficiaries. Other post-death expenses, such as the filing of a federal estate tax return and state inheritance tax returns, when applicable, are

incurred whether the decedent uses a will, a revocable trust, or both. The costs associated with preparing and filing these returns often represent the greatest expense in the administration of an estate. Therefore, avoiding probate in a taxable estate will only marginally reduce post-death expenses. Furthermore, a revocable trust is generally not cheaper to administer than an estate. The majority of the work involved in administering an estate includes the collection and transfer of the decedent's assets, the payment of debts and taxes, and the distribution of the remaining assets. An executor of an estate incurs time and expense in searching for and transferring assets to the estate and ultimately distributing them to the beneficiaries. Likewise, a settlor incurs time and expense in transferring assets to a revocable trust and upon the trust's termination, the trustee of the trust incurs time and expense in distributing the assets from the trust to the ultimate beneficiaries. Whether assets are held in a trust or pass through a probate estate, the executor or trustee, as the case may be, is responsible for paying the decedent's debts and taxes. Additionally, once a trust is established the trustee is required to keep adequate records of the trust administration. Code section 19-3B-810(a).

C. Revocable Trusts Save Taxes: Revocable trusts do not provide any income tax savings to the settlor. The trust assets are considered as if owned by the settlor individually during his lifetime. The settlor must pay taxes on all of the income earned by the assets transferred to a revocable trust. Accordingly, all items of income, loss, and deductions are reported on the settlor's personal income tax return. In addition, assets held in a revocable trust are subject to both state inheritance tax and the federal estate tax, just like assets that pass through a probate estate.

D. Revocable Trusts Make Wills Unnecessary: A revocable trust is not a replacement for a will. A revocable trust is ineffective as to any asset not transferred to the trust. It is inevitable that some assets will not be transferred into the trust, either by oversight or because they were acquired after the initial funding of the trust. Additionally, assets are sometimes acquired after death such as medical insurance reimbursements, tax refunds, etc. A will with a "pour-over" provision is necessary to make sure that these assets are transferred into the trust and distributed according to the terms of the revocable trust. Without a will, any property not transferred to the trust will be subject to probate and distributed according to the laws of intestacy.

E. Probate is Complicated, Expensive and Time Consuming and Must Be Avoided: Generally, the probate process in Alabama is not overly prohibitive and if a will is drafted properly, probate in Alabama can be a relatively simple process. If the will is self-proved according to the law, waives the requirement that the executor provide a bond, waives the requirement that an inventory and accounting be filed, and gives the personal representative certain powers, the probate process can be completed without much court involvement. Probate fees in Alabama consist of a small filing fee, which varies by county, but normally does not exceed $100. The probate process rarely ties up a decedent's assets for years.

VII. **Special Needs Beneficiaries**

A. Disabilities and Special Needs Trusts

1. Clients who have children with disabilities or other special needs may have particular estate planning needs. The goal is often to leave enough assets to ensure a comfortable life, while preserving the child's eligibility for government benefits such as Medicaid and Supplemental Security Income ("SSI").

2. Special needs trusts, also known as supplemental needs trusts, permit a disabled beneficiary to receive income from trust assets without jeopardizing eligibility for public benefits.

3. The Omnibus Budget Reconciliation Act of 1993 authorizes the use of trusts created with the funds of a disabled beneficiary, such as those received from settlements, judgments and inheritances, if certain conditions are met, including:

   (a) the beneficiary must be under 65 at the time the trust is established;

   (b) the trust must be irrevocable;

   (c) the trust must be established by a parent, grandparent, guardian of the beneficiary, or by a court, or if the trust is a pooled special needs trust, the trust may also be established by the beneficiary;

   (d) the trustee must have sole discretion over distributions; and

   (e) any funds remaining in the trust at the death of the beneficiary be used to reimburse the State for its Medicaid costs on behalf of the beneficiary.

4. However, if the trust is not funded with funds of the beneficiary, but with funds directly from someone else, such as a parent or grandparent, then the age limitation, irrevocability requirement, and Medicaid reimbursement requirement do not apply.

   (a) It is often advisable to create a single irrevocable trust that various members of the family can contribute to or incorporate by reference in their estate plans. This avoids having separate trusts with inconsistent provisions.

5. The Alabama Family Trust ("AFT"), authorized by the Code of Alabama, is a pooled trust which manages accounts for multiple individuals that can be used for all beneficiaries including those over age 65. These provisions authorize a non-

profit agency to administer a pooled trust that may be created as either a third party special needs trust, funded by a parent, grandparent, guardian, or court, or a Self-Settled special needs trust, funded directly by the beneficiary. This is the only trust alternative in which resources of a person age 65 or older may be transferred without Medicaid transfer penalty.

(a) An AFT account can be opened for as little as $500.00.

(b) This type of trust is best suited where the amount of non-exempt assets owned by the special needs child is not large enough to justify the cost of establishing and administering a Medicaid Payback Trust

(c) See www.alabamafamilytrust.com for more information.

B. ABLE Act Accounts (ABLE Act – Achieving A Better Life Experience Act)

1. On June 30, 2015, Governor Robert Bentley signed legislation implementing the ABLE Act in Alabama. In December 2016, the Alabama State Treasurer announced Alabama has partnered with Nebraska making the Enable Savings Plan, sponsored by the State of Nebraska, available to Alabama residents for individuals with disabilities. The savings plan will be known as Enable Savings Plan Alabama. For more information please visit EnableAL.com.

2. The idea behind the ABLE Act is to provide disabled individuals with the ability to save through accounts modeled after current 529 plans (college savings plans) without losing their needs-based government benefits. The key to qualification for an ABLE account is written documentation of a diagnosis before age 26 or qualification for SSI or SSDI before age 26, and ABLE Accounts are subject to Medicaid Payback Liens.

3. Advantages of ABLE accounts include: (1) allows for savings and earnings from employment by disabled individuals (annual contribution limit of $14,000 in 2017) and maximum accumulation of $350,000 (in Alabama); (2) less complex than first-party settled trusts; (3) substitute for small pooled-trusts; (4) allows for lifetime gifts to disabled individuals; and (5) tax free earnings.

4. Disadvantages of ABLE accounts include: (1) not designed to be a key testamentary estate planning tool; (2) monetary limitations prevent from serving as a key beneficiary of assets; (3) asset limitations (limited to cash only) prevent ABLE Accounts from serving as a key beneficiary of non-cash assets (i.e. real estate, stock, tangible personal property, etc.); (4) Medicaid Payback Lien – naming a third party special needs trust as a beneficiary avoids medical payback requirements unlike the ABLE Account; and (5) limited investment options and directives.

EXHIBIT "A"

WHAT HAPPENS TO YOUR PROBATE ESTATE IF YOU DIE WITHOUT A WILL?

It will pass under the Alabama statute of descent and distribution.

Persons left surviving	The decedent's property
Spouse (no parents or issue of decedent surviving)	All to surviving spouse
Spouse and parent(s) of decedent (no issue of decedent surviving)	First $100,000 to surviving spouse, plus 1/2 of remaining balance. Parents of decedent receive balance remaining after surviving spouse's share. Example: if $200,000 estate, the spouse receives $150,000 and the parent(s) receives $50,000
Spouse and issue of surviving spouse and decedent (without regard to surviving parents, if any)	First $50,000 to surviving spouse, plus 1/2 of remaining balance. Issue of decedent receive balance after surviving spouse's share. Example: if $200,000 estate the spouse receives $125,000 and the children receive $75,000
Spouse and issue of decedent not issue of surviving spouse (without regard to surviving parents, if any)	1/2 to surviving spouse. 1/2 to issue of decedent
Issue of decedent (no surviving spouse and without regard to surviving parents, if any)	All to issue of decedent
Parents of decedent (no issue of decedent and no surviving spouse)	All to decedent's parents
No spouse, issue, or parents	All to brothers and sisters of decedent, by representation

EXHIBIT "B"

CALCULATION OF ESTATE TAX

Fair Market Value of Gross Estate
- Deductions
Taxable Estate
x Tax Rate (up to 40% in 2017)
Tentative Tax
- Credits
Estate tax

Note that the gross estate includes assets not included in the probate estate. Generally, assets are valued at their fair market value on the date of death.

Deductions include administrative expenses (such as executor's and attorney's fees), funeral expenses, debts of the decedent, charitable contributions and the marital deduction.

The maximum estate tax rate for 2017 is 40%.

The most important credit is the credit on the applicable exclusion amount which is as follows:

2006, 2007 and 2008	$2,000,000
2009	$3,500,000
2010	No Estate Tax
2011 and 2012	$5,000,000
2013	$5,250,000
2014	$5,340,000
2015	$5,430,000
2016	$5,450,000
2017	$5,490,000

Therefore, in general, for decedents dying during 2017, only estates exceeding $5,490,000 must pay estate tax.

EXHIBIT "C"

CALCULATION OF ESTATE TAXES IF HUSBAND GIVES ALL PROPERTY TO WIFE OUTRIGHT

	At Death of Husband	At Death of Wife
GROSS ESTATE	$10,980,000	$10,855,000
DEDUCTIONS		
Less: Debts	$100,000	$100,000
	$10,880,000	$10,755,000
Less: Administrative and Funeral expenses	$25,000	$25,000
Less: Marital deduction	$10,855,000	$ -0-
TAXABLE ESTATE	$ -0-	$10,730,000
TENTATIVE TAX	$ -0-	$ 4,237,800
Less: Applicable Credit Amount	$ 2,141,800	$ 2,141,800
ESTATE TAXES PAYABLE	$ -0-	$ 2,096,000

** The availability of the new portability feature under the current tax law may shield the outright transfer to a surviving spouse from estate tax at the surviving spouse's death. The continuing availability of this feature, however, is uncertain and planning should not center around its availability.

EXHIBIT "D"

CALCULATION OF ESTATE TAXES IF HUSBAND'S WILL USES OPTIMUM MARITAL DEDUCTION AND CREDIT SHELTER TRUST

		At Death of Husband	At Death of Wife
GROSS ESTATE		$10,980,000	$5,365,000
DEDUCTIONS			
Less:	Debts	$100,000	$100,000
		$10,880,000	$5,265,000
Less:	Administrative and Funeral expenses	$25,000	$25,000
Less:	Marital deduction	$5,365,000	-0-
TAXABLE ESTATE		$ 5,490,000	$5,240,000
TENTATIVE TAX		$ 2,141,800	$2,041,800
Less:	Unified Credit	$ 2,141,800	$ 2,141,800
ESTATE TAXES PAYABLE		$ -0-	$ -0-

EXHIBIT "E"

HYPOTHETICAL DISTRIBUTION OF HUSBAND'S WILL
(USES MARITAL DEDUCTION AND APPLICABLE CREDIT AMOUNT)