

Elder Law



Chairperson's Message

by Jacob Menashe

Greetings and a Happy New Year to you and yours! I am happy to be writing as chair of the Elder Law Section of the Bar. As a Section, I think we are able to say that we are going from strength to strength. Fiscally our house is in good order and program-wise we offer our members a listserve; a forum where we can learn about and comment on rule, legislative, and policy matters; a newsletter; and CLEs that are open to our members and members of the wider Bar and community.

I think our CLE work has been particularly impressive. During 2004, our Section sponsored or co-sponsored four CLEs: "The New Essentials of Practicing Elder Law;" "Establishing, Managing and Terminating the Special Needs Trust;" "Vulnerable Adults;" and "The Annual Elder Law Section Meeting and Seminar," and this does not include our latest seminar held January 28th titled "Elder Law Issues and Estate Planning." All together, these seminars attracted over 563 registrants, and attendees gained a wealth of valuable information. Thank you to our seminar chairs and presenters for all they contributed to the success of these events.

Speaking of the WSBA, I do want to take a moment to thank them for their assistance with the CLEs and the support of our Section. Our Bar as a whole is lucky to have fine people working for them and us, such as Mark Sideman, the director of the CLE Department, and Toni Doane, our Section liaison.

Watch for additional news coming out of our Section. I am sure most of you are aware of GR31, the new court rule on access to court records. If you are not familiar with this rule, be sure to visit our listserve (see information on how to join in this newsletter) and you will find a discussion of this breaking and important matter that probably impacts all of our practices. Our executive committee has an ad hoc group looking at this rule and we hope in the near future to get analysis, and possibly action items that stem from that analysis, out to our members.

Our Section will only be as active and successful as our members make it. Would anyone out there like to assist with the GR31 matter? What about writing for or helping produce our next CLE? Have you considered speaking at or helping plan an upcoming CLE? Would you like to work on the legislative and policy matters committee? What about helping our Section create a usable and helpful website? There is a lot of great work we can do as a Section if more of us are involved.

To get involved, please feel free to contact me, Jacob Menashe, at jacob@hickmanmenashe.com or at 425-744-5658. The names, e-mails and phone numbers of our hardworking Executive Committee are listed on page 2. Please feel free to contact any of us if you would like to work on any particular matter or if you have any comment, question, or concern.

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ELDER LAW SECTION 2004-2005 OFFICERS & EXECUTIVE COMMITTEE

Chair

Jacob H. Menashe
Hickman Menashe, P.S.
4211 Alderwood Mall Blvd.,
Ste. 202
Lynnwood, WA 98036
(425) 744-5658
(425) 744-6078 Fax
jacob@hickmanmenashe.com

Chair-elect

Eileen S. Peterson
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6419
(253) 620-6565 Fax
epeterson@gth-law.com

Secretary

Peggi (Margaret) M. Moxley
P.O. Box 881
Wenatchee, WA 98807-0881
(509) 662-1211
(509) 662-3311 Fax
peggimoxley@aol.com

Treasurer

Evelyn M. Zeller
10900 NE 8th Street, Ste. 900
Bellevue, WA 98004-4448
(425) 861-1765
(425) 882-9404 Fax
evelyn@zellerlaw.com

Immediate Past Chair

William S. Hickman
Hickman Menashe, P.S.
4211 Alderwood Mall Blvd.,
Ste. 202
Lynnwood, WA 98036
(425) 744-5658
(425) 744-6078 Fax
bill@hickmanmenashe.com

Legislative Co-Chairs

Barbara J. Byram
219 E. Galer Street
Seattle, WA 98102-3730
(206) 324-4300
(206) 324-3106 Fax
barbarab@dussaultlaw.com

Amy L. Crewdson

711 Capitol Way S., Ste. 304
Olympia, WA 98501-1233
(360) 943-6260 ext. 214
(360) 754-4578 Fax
amy.crewdson@columbialegal.org

Grants Committee Chair

Frederick J. "Joe" Buck
P.O. Box 2551
Redmond, WA 98073-2551
(425) 883-6025
(425) 702-5710 Fax
fjb22@georgetown.edu

CLE Committee Co-Chairs

James Hamilton Bush
2645 N. Pearl Street
Tacoma, WA 98407-2601
(253) 756-0459
(253) 879-0150 Fax
jimbush@qwest.net

Karl L. Flaccus

7010 35th Avenue NE
Seattle, WA 98115-5917
(206) 523-0297
(206) 523-0166 Fax
kflaccus@yahoo.com

Trustees

Peter Greenfield
101 Yesler Way, Ste. 300
Seattle, WA 98104-2528
(206) 464-5933
(206) 382-3386 Fax
peter.greenfield@columbialegal.org

Michael J. Longyear

801 Second Avenue, Ste. 1415
Seattle, WA 98104-1517
(206) 624-6271
(206) 624-6672 Fax
mlongyear@rimalaw.com

Richard L. Sayre

201 W. North River Dr., Ste.
460
Spokane, WA 99201-2262
(509) 325-7330
(509) 325-7334 Fax
dick@sayrelaw.com

Newsletter Editor (ExOfficio)

Rajiv Nagaich
33838 Pacific Hwy S., Ste. B102
Federal Way, WA 98003-6887
253-838-3454
253-838-9268 Fax
rnagaich@eldercounselor.com

The *Stamm* Case and Guardians ad Litem

by Margaret K. Dore, Esq.¹ © 2004

On June 1, 2004, the Washington State Court of Appeals issued *In re Guardianship of Stamm v. Crowley*, 121 Wash. App. 830, 91 P.3d 126 (2004). *Stamm* is the first Washington State case to address the admissibility of guardian ad litem testimony in a guardianship case. It limits the admissibility of such testimony.

Stamm is part of a national trend by courts to define the proper role of guardians ad litem and also parenting evaluators who perform similar functions. This article discusses *Stamm* as well as this trend and the situation in other states. The article concludes with a discussion of implications for guardianship practice.

A. Stamm Limits Admissibility

With the issuance of *Stamm*, the Washington State Court of Appeals limits its prior guardian ad litem case, *Fernando v. Nieswandt*, 87 Wn. App. 103, 940 P.2d 1380 (1997). *Fernando*, a child custody case, seemed to state that a guardian ad litem's recommendations and testimony are always admissible. *Id.* at 107-08. *Stamm*, by contrast, limits admissibility to testimony which is helpful to the trier of fact under ER 702. A guardian ad litem is not to be a mere vehicle for hearsay. *Stamm* states:

We ... hold that the trial court has discretion under ER 702 to permit a [guardian ad litem] to testify to his or her opinions if the court is persuaded the testimony will be of assistance, and may ... state the basis for those opinions, including hearsay.

This is not to suggest, however, that all information relied upon by a [guardian ad litem] should automatically be recounted at trial. The [guardian ad litem's] testimony must not be used as a vehicle to present and reiterate otherwise inadmissible hearsay. ...

The testimony of a [guardian ad litem] must be carefully evaluated to ensure it is indeed helpful to the fact finder. An opinion formed on inadequate or unreliable grounds cannot be helpful. (Footnotes omitted).

Stamm, 121 Wn. App. at 837-8.

Stamm also limits admissibility by providing that a guardian ad litem is not to testify as to his or her assessments of credibility. *Stamm* states:

[A guardian ad litem's] subjective assessments of credibility are irrelevant. Questions of credibility and the weight to be given to evidence are matters solely within the province of the fact finder.

Stamm, 121 Wn. App. at 839.

B. Reversible Error

In *Stamm*, the guardian ad litem had testified that her recommendations "depended upon her assessment of credibility" and that her role was to act as the "eyes and ears" of the court. *Id.* at 840. The jury followed her recommendations "almost to the letter" so that a guardianship was imposed. *Id.* at 843. *Stamm* reversed due to the "substantial likelihood" that her testimony had encroached on the jury as fact finder. *Stamm* states:

[W]e must conclude the [guardian ad litem's] improper description of her role was prejudicial and there is a substantial likelihood that [her] improper testimony [on credibility] affected the jury's verdicts.

Id. at 844.

C. A National Trend

Stamm is part of a national effort to increase the reliability of outcomes in cases involving guardians ad litem and parenting evaluators. There is also a small, but growing, movement urging the elimination of such persons from court proceedings.² Even supporters concede there can be problems. For example, Meredith Lynn Hardy and Nancy Bradburn-Johnson, state:

[A]necdotes were given of [guardian ad litem] abuses ... which centered on the futility of challenging a [guardian ad litem] once appointed and of the difficulties in challenging [their] recommendations in court. ...

Many of the concerns voiced have a legitimate factual foundation. (footnotes omitted)³

Since publication of this commentary, the Washington State Supreme Court has adopted new court rules, the "GALRs."

In other states, it appears that Tennessee has imposed the most stringent restrictions on guardians ad litem. For child custody abuse and neglect cases, Tennessee no longer has guardian ad litem reports and recommendations. The reasoning for this change is described below:

Those who have supported the continuation of this practice ... have asserted that allowing the [guardian ad litem] to gather and synthesize evidence and make recommendations enables the judge to dispose of the case more efficiently because the judge can rely on the [guardian ad litem] as a kind of expert witness/special master.

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The New Will Repository

by Michael L. Olver

The ancient Greeks maintained Hellenistic archives including Will Repositories throughout the ancient world from Carthage in the west to Seleucia-on-the-Tigris in the east. In large administrative buildings that also housed local officials, they stored wills along with legal contracts such as marriage contracts, loans, and land sales agreements, not unlike modern country recording offices that record deeds, loans, records of births, deaths, marriages and courthouse records.

The ancient wills, written on papyrus, were tied with twine, and small pieces of clay were pressed into the twine and sealed with individual signets or stamps. These tiny ancient clay impressions, known as "bullae," are found in excavations throughout the Mediterranean bearing names and cultural symbols.

Now, you and your clients can reap the same benefits as the ancient Greeks from a Will Repository. A new statute, effective June 10, 2004, allows your clients, law firms, or anyone in control of an original will to file it under seal with the Clerk of any Superior Court that has jurisdiction.

The new legislation reads as follows:

"Any person who has custody or control of any original will and who has not received knowledge of the death of the testator may deliver the will for filing under seal to any court having jurisdiction. The testator may withdraw the original will so filed upon proper identification. Any other person, including an attorney in fact or guardian of the testator, may withdraw the original will so filed only upon court order after showing of good cause. Upon request and presentation of a certified copy of the testator's death certificate, the clerk shall unseal the file."

RCW 11.12.000.

The Will Repository is voluntary. In King County, a party wishing to deposit an original will of a living person must complete a Will Repository Cover Sheet (WRCS), which is available in the Clerk's Office or on the Clerk's Website at www.metrokc.gov/kcsccl/forms.htm. A filing fee of \$20 is required to deposit a will in the Clerk's Will Repository. An index will be maintained in the Superior Court Management Information System (SCOMIS) under the name and date of birth of the testator. Any other filing, such as a codicil, also requires payment of a \$20 filing fee. If a will is withdrawn from the Repository, it may be deposited again with payment of the \$20 filing fee.

The testator may withdraw the will upon verification of identity. Removal of the deposited will by someone other than the testator requires a court order. A sample

Motion and Order is available on the Clerk's Website. After the death of testator, and upon request and presentation of a certified copy of the death certificate, the will is unsealed. All pleadings filed relating to the repository must be captioned "IN RE THE DEPOSITED WILL OF (testator)" and should include the date of birth of the testator. The Clerk will retain deposited wills or the record of their withdrawal for 100 years.

The cover sheet contains various self-authenticating information such as the last four digits of the Social Security number and mother's maiden name, *inter alia*.

The Will Repository can be a helpful tool in several respects:

1. Retiring Attorneys

Many clients prefer to leave their original wills with their attorney. When attorneys die or retire, they or their widows try to persuade their estate planning clients to pick up their original wills and offer, as an alternative, to transfer the will to a new attorney designated by the client or, in the absence of a response, that the will will be transferred by default after X days to a certain law firm. The Will Repository offers a better default option.

2. Unaware of Wills

- a) **Family.** Family members may be unaware of the existence or the location of a decedent's last will. The SCOMIS index can be checked easily and quickly.
- b) **Heirs.** An heir, devisee, or legatee may not know that they have standing to inherit under a prior will and given the short four-month period to contest a will admitted to probate, an earlier will in the Repository can confirm or refute a party's standing to contest a probated will.

3. Testator's Intent

A series of sealed wills can help establish or refute a testator's testamentary intent, when a new best friend "helps" a testator write a new will.

4. Establishment

The costs and unpredictability of interweaving RCW 11.20.070 (Proof of Lost Wills and the concept of *Animo Revocandi*) with RCW 11.12.040 (Revocation of Wills and the concept of Dependent Relative Revocation) when the original cannot be found are daunting given the ancient case law that was perfected before today's photocopying machines.

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Practice Tips – Estate Planning and IRAs

by Doug Legg – Investment Representative – Edward Jones Trust Company

Part I - MAKING THE BENEFICIARY DESIGNATION

The Selection of a Traditional IRA Beneficiary

This outline is intended solely for use by attorneys and other estate planning professionals and is provided to facilitate discussion regarding certain estate planning and tax planning issues. It is not intended to be legal advice and should not be treated as such. Neither Edward Jones nor Edward Jones Trust Company assumes any responsibility for any person's reliance upon the information contained herein. Each person in receipt of this outline should independently confirm any information contained in the outline and should independently determine the applicability of any of the estate planning or tax planning concepts contained herein to any particular situation in which they may be involved.

Individual Retirement Accounts (IRAs) have become an increasingly popular retirement planning tool, and the value of assets held within such accounts continues to grow. Before clients pass away, it is important to plan for the ultimate distribution of the remaining balances of these accounts to the clients' intended beneficiaries. Consequently, it is critical to understand the implications of the different beneficiary designation options available to the client.

This topic will be explored in two parts: Part I covers the nuances of actually selecting a beneficiary, whether it be an individual, several individuals, a charity or a trust. Part II will cover Minimum Required Distribution rules for both the account holder and the beneficiaries upon the death of the account holder.

I. Making the Beneficiary Designation

A. Select the Recipient of Your Bounty. Many clients believe that the selection of an IRA beneficiary is a simple matter of deciding who should receive the benefits of the IRA. However, that is only the first step in the selection process.

B. Consider Estate Planning Factors. The second step is to determine if there are any special estate planning factors that should be taken into consideration. For example, a client may have decided that his child should receive the benefits of the IRA. However, the client may also have concerns regarding the child's ability to handle money. In such a case, the client may want to consider naming a trust as the IRA beneficiary as opposed to naming the child outright. This would enable the child to enjoy the benefits of the IRA, but also allow the client to put restrictions on the benefits to ensure that the child does not mismanage the funds. Other estate planning factors to consider include the following: Does the client have creditor protection concerns for any of the beneficiaries? Does the client have children from a prior marriage? Does the client

have any "special needs" children? Is the IRA necessary to fund a credit shelter trust at the client's death?

C. Consider Tax Planning Factors. The third step is to determine the consequences of the beneficiary designation upon the required minimum distribution rules. For example, a client may prefer to name a marital trust as the beneficiary to ensure that children from a prior marriage have the possibility of receiving unused benefits upon the spouse's death. However, by naming the marital trust as the beneficiary, the client's spouse will be denied the opportunity to benefit from the spousal rollover rules. Other tax planning factors to consider include the following: If the client desires a charity to benefit from the IRA, can it be done in a manner that allows for other beneficiaries to qualify as designated beneficiaries? If a trust is necessary for estate planning concerns, can the trust be drafted as a "qualifying trust?"

D. Consider Other Factors. The estate planning considerations and the tax planning considerations will also need to be evaluated in light of the size of the IRA relative to the other assets of the client. For example, if the client is charitably inclined, it may be beneficial to name a charity as the beneficiary of a small-sized IRA. This would allow the charity to receive the IRA with no income tax consequences and allow the client's other beneficiaries to receive after-tax dollars from other assets. Another example would be in a second marriage situation. If the IRA is smaller in size, it may be more beneficial to name the spouse outright if there are enough other assets to eventually benefit the children from a prior marriage through the credit shelter trust and marital trust. This would allow the spouse to benefit from the variety of spousal options. This has the additional advantage of simplicity, so the planner does not need to needlessly concern himself with some of the complex rules associated with

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In adopting the guidelines, the Supreme Court has embraced a contrary position: that judicial decision-making should be based on evidence presented in court, subject to cross examination and to the rules regarding admissibility that are designed to ensure a fair and accurate decision-making process.⁴

Tennessee also restricts the admissibility of guardian ad litem testimony generally. See e.g., *Toms v. Toms*, 98 S.W.3d 140, 144 (Tenn. 2003):

We conclude that the guardian ad litem's reports were hearsay and that the trial court erred in relying upon the reports as the basis for its custody determination.

Additional caselaw from other states is listed in the endnote below.⁵

D. Implications for Practice

Per *Stamm*, its limitations on admissibility are more significant when the guardian ad litem testifies before a jury. *Stamm* states:

[W]hat might be appropriate in a written report and testimony to the court is not necessarily appropriate in testimony before a jury ...

[T]he judge can cast a skeptical eye when called for. But a jury has no basis for such discernment. (Spacing changed).

Stamm, 121 Wn. App. at 838-9, and 841.

With this situation, counsel for a proposed ward who finds himself opposing a guardian ad litem recommendation for guardianship should ask for a jury. Through *voir dire* of the guardian ad litem, he may be able to exclude the guardian ad litem's testimony in its entirety. Specific issues would include:

- * Is the proffered testimony "helpful" under ER 702?
- * Is the recommendation based on the guardian ad litem's assessment of credibility?

Counsel for the proposed ward should also be certain to object. In *Stamm*, there was a standing objection to hearsay and also a request for a corrective instruction that the guardian ad litem was not the "eyes and ears" of the court.⁶ Without these objections, Mr. Stamm's appeal might not have been successful.

E. Other Potential Challenges

The imposition of a guardianship is a severe loss of liberty akin to involuntary commitment or incarceration. *Matter of Guardianship of Hedin*, 528 N.W.2d 567, 573-74

(Iowa 1995). Counsel for the proposed ward should therefore also consider the possibility of Constitutional arguments. For example, if Mr. Stamm had been a criminal defendant, admission of the guardian ad litem's opinion as to capacity, i.e., his "guilt," would have been inadmissible on Constitutional grounds.⁷ This argument did not prevail in *Stamm*, but could prevail with a different factual scenario or additional briefing.⁸

Counsel for a proposed ward should also consider a challenge to the idea that guardianship is a "benefit."⁹ For example, if stress from the guardianship proceeding is causing the proposed ward to have high blood pressure, the argument can be made that imposition of the guardianship will be harmful and should be denied.¹⁰ The fact finder should also be informed of the guardianship's cost, that the fees to pay for the guardianship may cause the proposed ward to be spent down. The fact finder could also be informed of the increasing reports of guardianship abuse, for example, per the recent hearings of U.S. Senator Craig.¹¹

F. Conclusion

Stamm is an important case for guardianship practitioners, especially for those who represent proposed wards. Future case law may provide yet additional changes.

1 Margaret Dore is a former law clerk to both the Washington State Supreme Court and the Washington State Court of Appeals. Her published decisions include *Stamm* and *Lawrence v. Lawrence*, 105 Wn. App. 683, 20 P.3d 972 (2001), which was nationally recognized. See: Wendy N. Davis, *Family Values in Flux*, 87 ABA Journal 26 (October 2001) (discussing *Lawrence*). Ms. Dore is a graduate of the University of Washington School of Law. She has an M.B.A. in Finance and a B.A. in Accounting. She passed the C.P.A. examination in 1982.

Loren Stamm, the appellant in *Stamm*, is retired from a successful career in the United States Navy. He is now free of guardianship and living in Kenmore, Washington, with his wife.

Further information about Ms. Dore and the *Stamm* case can be viewed at www.margaretdore.com and <http://www.margaretdore.com/briefs.htm>.

2 Cf. Raven Lidman and Betsy Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, *George Mason L. Rev.*, Vol. 6:2, (1998); Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, *Loyola Journal of Public Interest Law*, Vol. 3, Spring 2002, No. 2, p.106-151; and Dana Royce Baerger, et al, *A Methodology for Reviewing the Reliability, and Relevance of Child Custody Evaluations*, 18 *Journal of the American Academy of Matrimonial Lawyers*, 35, p. 36 ("Concern regarding the generally poor quality of [child custody evaluations] has prompted some commentators to suggest an end to the use of [evaluations] in divorce proceedings").

3 Meredith Lynn Hardy & Nancy Bradburn-Johnson, *Guardians ad Litem Face the 1996 Statute Changes*, *Washington State Bar News*, (December 1997) at <http://www.wsba.org/media/publications/barnews/archives/dec-97-adjusting1.htm>.

4 Andy Shookhoff and Susan L. Brooks, *Protecting our Most Vulnerable Citizens (New Guidelines Clarify, Strengthen Mission for Guardians ad Litem)*, 38-June Tenn. B.J. 13, 16-17, 2002.

5 Cf. *C.W. v. K.A.W.*, 774 A.2d 745, 749 (Pa. Super. 2001) (the trial court's reliance on the guardian ad litem constituted "egregious examples of the trial court delegating its judicial power to a nonjudicial officer"); *Patel v. Patel*, 347 S.C. 281, 555 S.E.2d (2001) (the guardian ad litem so tainted the family court decision, the wife was denied due process of law); *S v. S*, 571 N.W.2d 801, 809 (Neb. App. 1997), overruled on other grounds (no merit in giving credence to guardian ad litem opinion based on hearsay); *In Re B.S. and J.S.*, 829 P.2d 939, 940 (Mont. 1992) (hearsay elicited from the guardian ad litem should not have been considered); *Gilbert v. Gilbert*, 664 A.2d 239, 243 (Vt. 1995) (error to rely on

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Having the original will secured in the Repository avoids the pitfalls inherent in these old concepts.

5. Safe Deposit Box

The Repository also saves clients the ongoing expense of a safe deposit box and saves the family the expense and nuisance of drilling a box after death.

6. Practice Tip

Clients should fill out the Will Repository Clerk's form when they execute their wills and be offered the option to file their wills under seal following execution. This legislation was sponsored by the WSBA Real Property, Probate and Trust Section, ably lead by Barbara Sherland and by the Washington Chapter of the National Academy of Elder Law Attorneys.

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guardian ad litem report based on hearsay); *Pirayesh v. Pirayesh*, 359 S.C. 284, 596 S.E.2d 205 (2004) (reversing because the guardian ad litem's recommendation was not the product of an independent, balanced and impartial investigation); *Hastings v. Rigsbee*, 875 So.2d 772, 777 (Fla.2d DCA 2004) (reversing because the trial court delegated its authority to the "parenting coordinator" who improperly acted as finder of fact); and *In Re Schiavo*, 780 S.2d 176, 179 (Fl. App. 2001) (affirming decision to proceed without a guardian ad litem because "a guardian ad litem ... might cause the process to be influenced by hearsay").

6 *Stamm*, 121 Wn. App. at 835 and 840, footnote 21.

7 See: Mr. Stamm's Opening Brief, §D.5.a. at: http://www.margaretdore.com/images/Stamm_Opening_Brief.pdf.

8 See: *Id.*; *Stamm*, 121 Wn. App. 835, footnote 3 (rejecting Mr. Stamm's argument due to the status of guardianship as a "civil" proceeding); *Quesnell v. State*, 83 Wn. 2d 224, 228-30, 517 P.2d 568 (1974) (describing *Gault*'s rejection of the civil model of juvenile commitment in which the child was placed in a "school," but in substance incarcerated); and *State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996) (rejecting the State's description of "community placement" as a "reward" when it is in substance, punishment). See also: Mark Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 Elder L.J. 75 (Spring 1997).

9 Cf. *Matter of Guardianship of Atkins*, 57 Wn. App. 771, 777, 790 P.2d 210 (1990) (The purpose of the guardianship statute is to benefit the alleged incompetent).

10 *Id.*

11 See: www.aging.senate.gov. See also: Barry Yeoman, *Stolen Lives*, AARP Magazine, January-February 2004 (<http://www.aarpmagazine.org/people/Articles/a2003-11-19-stolenlives.html>); Diane G. Armstrong, Ph.D., *The Retirement Nightmare: How to Save Yourself from Your Heirs and Protectors*, Prometheus Books, (2000) (www.retirementnightmare.com); www.justiceforfloridaseniors.org; and www.victimsofguardians.net.

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qualifying a trust as a designated beneficiary. However, the beneficiary designations in both of these examples become less and less appropriate as the size of the IRA increases.

- E. **Strike a Proper Balance.** Combinations of the various estate planning and tax planning factors are far too numerous for discussion here. The facts and circumstances of the client, as well as the client's desires, make each situation unique. Sometimes it may be possible to balance the various estate planning and tax planning considerations. Unfortunately, there will be other times that it is necessary for the client to decide among competing considerations.

II. Naming an Individual as Beneficiary

Naming an individual as the beneficiary of the client's IRA is the simplest form of beneficiary designation. Absent any special estate planning considerations, many planners also consider it the preferred form of beneficiary designation. An individual qualifies as a designated beneficiary, so he/she has the opportunity to benefit from continued tax-deferred growth of the account by receiving distributions over his/her life expectancy. The reason it may be the preferred form of beneficiary designation is that there is probably less chance for the client or planner to inadvertently cost the beneficiary the tax deferral opportunity. While a trust may be drafted in a manner to qualify as a designated beneficiary, the likelihood of inadvertently losing the tax deferral opportunity increases due to the complex rules of trust qualification as a designated beneficiary. (Those rules are discussed later in the outline.)

III. Naming a Spouse as a Beneficiary

- A. **Selecting a Spouse.** For most married people, the spouse is usually the first choice as beneficiary. While this is often the result of factors not involving estate planning or tax planning, such a choice has certain tax planning advantages.
- B. **Required Minimum Distribution (RMD) Calculation.** If the client has selected his/her spouse as the designated beneficiary, the spouse may choose to begin distributions from the IRA by December 31 of the year following the year of the client's death, just like any other designated beneficiary. If the spouse is the sole beneficiary, the spouse may use the more advantageous

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recalculation/fixed-term combination method of calculating RMDs. Reg. § 1.401(a)(9)-5 Q&A-5(c)(2).

- C. **Spousal Rollover.** A spouse also has the ability to “roll over” the deceased client’s IRA to the spouse’s IRA with no immediate income tax consequences. Reg. § 1.402(c)-2, Q&A-12(a). There are several advantages to a spousal rollover. First, the spouse can defer distributions from the IRA until such time as he/she attains the age of 70, as opposed to beginning distributions by the end of the year following the year of the client’s death. Secondly, the surviving spouse’s RMDs will be calculated under the Uniform Lifetime Table, which provides for smaller distributions, as opposed to calculation under the surviving spouse’s single life expectancy if distributions were taken from the decedent’s IRA account. Finally, the spouse can name his/her own beneficiary, allowing additional opportunity for tax-deferred growth. Following the surviving spouse’s death, RMDs may be calculated based upon the life expectancy of the beneficiary as opposed to distributions based upon the remaining life expectancy of the surviving spouse.
- D. **Spousal Election to Treat as Own IRA.** If the spouse is the sole beneficiary, the spouse also has the opportunity to treat the IRA as his/her own. Reg. § 1.408-8, Q&A-5. The spouse may also delay distributions until such time as the deceased client would have attained the age of 70. Reg. § 1.401(a)(9)-3 Q&A-3(b). Delaying distributions until the client would have turned 70 may be a benefit when the client is younger than the beneficiary spouse.

Example: Client names wife as beneficiary before dying in 2004 at the age of 65. Wife, who is age 60, can begin taking RMDs by December 31, 2005, or wait until December 31, 2009 (the year client would have attained the age of 70). Since wife is the sole beneficiary, she can use the more advantageous recalculation/ fixed-term combination method. She can also roll over the IRA to her own IRA or treat the client’s IRA as her own.

Special considerations apply when a marital trust is named as a beneficiary of the IRA. Those issues are discussed below.

IV. Naming a Charity as a Beneficiary

- A. If a client is charitably inclined and has an IRA, the client may want to consider naming the charity as the

IRA beneficiary. If the charity is qualified as a tax-exempt entity under Section 501(c)(3) of the Internal Revenue Code, the special tax rule applicable to such entities would allow an immediate distribution of the entire IRA balance without having to pay any income tax. This may allow for a greater benefit to the client’s intended recipients.

Example: Client dies in 2004 with \$1,000,000 in a regular brokerage account and \$1,000,000 in an IRA. Client wanted one-half of her assets to go to charity and the other one-half to go to her son. If she named a charity as the sole beneficiary of her IRA and her son as the sole beneficiary of her brokerage account, each beneficiary would receive \$1,000,000 in after-tax dollars. If she named a charity and her son as equal beneficiaries of both accounts, the charity would receive \$1,000,000 and the son would receive \$800,000 in after-tax dollars (assuming a 40% total income tax liability applied to the son’s portion of the IRA).

- B. **Charity as One of Multiple Beneficiaries.** Unfortunately, the facts and circumstances usually are more complicated for such a simple solution. Often the charity is one of several beneficiaries because the client’s planning goals are more complex and/or the nature of the client’s assets requires it. Under the multiple beneficiary rule, all beneficiaries of an IRA must be designated beneficiaries to allow for the life expectancy payout option. To ensure that the individual beneficiaries can benefit from this option, the client can establish a separate IRA during his/her lifetime for the amount that he/she desires to be distributed to charity. However, this is often not practical because the client may want a fixed amount to be distributed to the charity or an amount calculated under a formula. Therefore, the client will probably need to rely on post-mortem planning to save the tax deferral for the other beneficiaries. The post-mortem planning may come in the form of distribution of the charity’s complete share by the designation date or through the use of the separate account rules.
- C. **Naming a Charitable Remainder Trust.** While the term “charity” may initially invoke thoughts of large public charitable organizations, one should also remember that a charitable remainder trust (“CRT”) is also a 501(c)(3) entity qualifying for special income tax treatment. Depending on the client’s goals, a CRT may be a useful estate planning technique. The trustee of the CRT could take a complete distribution from the

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IRA without any immediate income tax consequences and then reinvest the proceeds for the benefit of an individual during his/her lifetime with the remainder distributed to a charity. In addition to the IRA rules and regulations, the planner should be well acquainted with the rules and regulations governing CRTs, including the special “four-tier accounting rules,” before using this technique.

Complications can arise when a charity is a potential beneficiary of any trust named as the IRA beneficiary. Those issues are discussed below.

V. Naming a Trust as a Beneficiary

A. **Naming a Trust.** Many people have named their revocable trusts as the beneficiaries of their IRAs in order to allow for a comprehensive administration of all of their assets at their deaths. At first glance, this may seem like a good idea. However, a number of complications can arise by naming a trust as the beneficiary. Consequently, unless one has other estate planning reasons, it may be more appropriate to name individuals directly.

B. **Qualified Trust.** If there are other estate planning reasons (for example, a second marriage, a spendthrift child, a need to fund a credit-shelter trust, etc.) that warrant naming a trust as the beneficiary, care should be taken by the attorney drafting the trust. To ensure that the trust can take advantage of the benefits of continued income tax deferral inside the IRA, the trust must be a “qualified trust.” This allows one to look through the trust and treat the trust beneficiaries as if they were named directly as beneficiaries of the IRA. To take advantage of the opportunities of being a designated beneficiary, the trust must meet the following requirements:

1. The trust is a valid trust under state law or would be but for the fact that there is no corpus;
2. The trust must be irrevocable or will, by its terms, become irrevocable upon the death of the participant. Generally, most revocable living trusts become irrevocable at the client’s death, thereby satisfying this requirement. Also, a testamentary trust meets this requirement despite the fact that it is not yet in existence at the time of client’s death;
3. The trust beneficiaries must be identifiable from the trust document. A beneficiary does not need to

be specified by name. The members of a class of beneficiaries capable of expansion or contraction will be treated as being identifiable if it is possible to identify the class member with the shortest life expectancy; and

4. Certain trust documentation must be provided to the plan administrator. A copy of the trust or a summary of the trust listing all of the beneficiaries must be delivered to the IRA trustee or custodian by October 31 of the year following the year of the client’s death.

Reg. § 1.401(a)(9)-4, Q&A-5(b).

C. **Trust Beneficiaries Must Be Individuals.** There is one additional requirement for a trust to meet in order to qualify as a designated beneficiary. If the above-referenced four requirements are met, the individual trust beneficiaries are treated as if they were named directly as the IRA beneficiaries. Reg. § 1.401(a)(9)-4, Q&A-5(a). Therefore, each trust beneficiary must be an individual to qualify as a “designated beneficiary.” This requirement is often more complex than many clients or planners might imagine. The relevant question for the planner to consider is who may potentially receive IRA distributions. That inquiry should include identifying those who may receive distributions immediately upon receipt from the IRA, as well as those who may eventually receive distributions accumulated inside the trust or the earnings generated from those accumulations. Consequently, the planner should review the remainder beneficiaries as well as current beneficiaries.

The planner should carefully review each provision of the document to ensure that it does not inadvertently fail to meet this requirement. Two examples of common trust provisions that could cause problems are (1) a provision allowing for the payment of expenses or debts of the estate, and (2) a power of appointment provision that includes a charity in the class of potential appointees. These provisions may allow for IRA proceeds to be distributed to an estate or charity, thereby disqualifying the trust as a designated beneficiary. To avoid such a problem, the planner may want to consider adding a provision to the trust that prohibits the use of IRA proceeds for the payment of estate expenses or prohibits the payment of such expenses after the designation date, and a provision limiting the class of potential appointees under a power of appointment to individuals.

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The question of who are the trust beneficiaries is also relevant for determining the life expectancy factor to be used by the trust. As discussed earlier, the life expectancy of the oldest trust beneficiary will be used for the RMD rules applicable to the trust. Again, the planner should consider remainder beneficiaries, as well as current beneficiaries, when reviewing the document regarding this issue.

Currently, there is some uncertainty regarding the matter of who should be considered a “beneficiary” for the trust qualification rules. Should contingent remainder beneficiaries be considered? See Reg. § 1.401(a)(9)-5, Q&A-7(b). If so, is there a point where the contingency is too remote for consideration of the beneficiaries?

Example: Mother establishes a trust for her two minor children and names the trust as the beneficiary of her IRA. The trust provides for discretionary income and principal for the benefit of each child until he/she reaches the age of 30, at which time the trust will be distributed to the child. If the child dies before the age of 30, the child’s share passes to the child’s descendants or, if none, to the other child. If both children die before the age of 30 with no descendants, the shares pass to a 67-year-old great uncle. Whose life expectancy will be used to calculate the RMDs of the trust?

In recent Private Letter Ruling 200228025, the IRS held that the life expectancy of the 67-year-old great uncle should be used in a situation similar to the above example. Would the result have been the same if the great uncle was not specifically named? As questions such as these remain unanswered at this time, the planner should carefully consider the provisions that are included in a trust that is to be named as beneficiary of an IRA.

- D. **Trust Principal and Income Act.** If a trust is to be named as beneficiary of the IRA, the planner must also make sure that the principal and income provisions applicable to the trust are consistent with the client’s intentions regarding the IRA distributions. The planner should review the applicable principal and income rules to determine the manner in which RMD will be treated under the trust accounting rules. The principal and income rules may be expressly delineated in the trust agreement or may be referenced under applicable state statutes. It may be possible that under the principal and income rules applicable to the trust only a small

portion of the RMD will be considered trust income for distribution to the income beneficiary. This may not provide support that the grantor/client had intended.

Example: A client creates an income only trust for the benefit of a child because client has concerns regarding child’s management of money. The bulk of client’s assets are held in an IRA naming the trust as beneficiary. Under applicable law, only ten percent of distributions from an IRA would be considered income. After the client’s death, the trust qualified as a designated beneficiary and began taking RMDs based upon the child’s life expectancy. Unfortunately, only ten percent of each RMD would be considered income and distributed to the child, far below what the client had intended. While the trustee of the trust could take distributions larger than the RMD, only ten percent of such distributions would be distributable to the child. The remaining portion of the distribution would be considered trust principal and retained in the trust. This would also have the disadvantage of realizing income tax liability earlier than necessary and “trapping” that income tax liability inside the trust at potentially higher rates due to the compressed tax brackets.

Of course the planner can avoid the outcome of the above example by carefully reviewing the interaction of all of the trust provisions. The planner can modify the definition of trust accounting income in the trust agreement or provide for discretionary principal distributions to the child. Again, each situation is unique, so the provisions of each trust agreement must be reviewed in light of the client’s situation.

- E. **Funding the Credit Shelter Trust.** There are many instances where married clients have the bulk of their net worth held in IRA accounts, and it is necessary to use a portion of the IRA assets to fund a credit shelter trust for estate tax planning. While normally the use of IRA assets to fund a credit shelter trust should be avoided because they do not provide the most tax-efficient transfer of assets, the breakdown of the couple’s assets may simply make it necessary. If so, the planner should consider the use of a “fractional marital formula” to divide the account between the credit shelter trust and the marital trust (or outright distribution to spouse). Many commentators believe that the use of a pecuniary marital formula would trigger immediate realization of the income tax liability of the IRA. Since that question

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currently remains unsettled, planners may be wise to avoid the issue by using a fractional formula.

- F. **Credit Shelter Trust Funding with a Disclaimer.** The disclaimer can be an effective tool for post-mortem planning. One common technique is to name the spouse as the primary beneficiary of the IRA and the credit shelter trust as the contingent beneficiary. The spouse, with assistance from the planner, could then disclaim the least amount necessary to fund the credit shelter trust in the most tax efficient manner. This technique can be especially advantageous in this time of uncertainty over the future of the estate tax exemption amount. The disadvantage of this technique is the risk that the surviving spouse would not disclaim as was intended because she was unaware of the implications, unable due to illness, or unwilling for other reasons. Consequently, there will be many situations where this technique probably should not be relied upon, such as if the client has second marriage concerns or spendthrift spouse concerns.
- G. **Marital Trust.** If the client does not have any estate planning concerns such as a spendthrift spouse or children from a prior marriage, naming a spouse outright is probably preferable to naming a marital trust. Naming a spouse outright is a simpler approach that provides more options to the spouse and less chance to inadvertently lose qualification as a designated beneficiary. However, if estate planning factors exist that merit naming a marital trust, the planner must ensure that the marital trust also complies with the requirements necessary to qualify for the marital deduction. Two types of trusts typically meet the requirements to qualify for the marital deduction: (1) a general power of appointment marital trust and (2) a qualified terminal interest property ("QTIP") trust.

Due to its ability to allow the grantor to control the disposition of the assets of the trust following the death of the surviving spouse, the QTIP trust is often used in this context. Requirements for both types of marital trusts are found in Section 2056 of the Internal Revenue Code. One of those requirements is that the surviving spouse must be entitled to all of the trust income during his/her lifetime. IRC § 2056(b)(7). The planner should carefully consider the interaction of this requirement with those of the RMD rules and the principal and income rules.

- H. **Conduit Trust.** One type of trust that many commentators have suggested as a valuable estate planning tool is the "conduit trust." A conduit trust is a trust drafted specifically to receive the required minimum distributions and immediately make the distributions to the trust beneficiary. By its design, it avoids many of the potential obstacles inherent in other types of trusts. Careful review of the document is still required to ensure that it meets all of the necessary requirements.

VI. Conclusion

As you can see, there is no standard or "boilerplate" IRA beneficiary designation that can be advised for all clients. Rather, the IRA beneficiary designation should be part of a comprehensive estate plan unique to each individual that takes into consideration the client's estate planning goals and those goals' interaction with the rules and regulations governing IRAs. The planner should carefully consider the client's estate plan in light of these sometimes complex rules and strive to strike an appropriate balance, if necessary, between competing estate planning and tax planning interests.

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Washington State Bar Association
Elder Law Section
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