The Kids are Alright—Navigating between the Hard-knock Life and Easy Street when Passing Assets to Children

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I. INTRODUCTION

This paper addresses the intersection of children and money. We will discuss children's rights to receive assets, guardianship of minors, and methods for intentionally passing, or not passing, assets to children.

II. RIGHTS OF THE CHILD

A. Heirship

In the United States, when a decedent dies intestate and fails to leave a surviving spouse, his estate passes to his descendants. In addition, even if a decedent dies intestate survived by a spouse, at least a portion of his estate will pass to his descendants provided he is also survived by at least one child who is not a child of the surviving spouse.

1. Intestate Distribution Plans

Most, if not all, states in the United States follow one of three distribution plans when a person dies intestate and the surviving spouse fails to take the entire estate—*per capita* at each generation, *per capita* with representation, and *per stirpes*.

a. Uniform Probate Code Approach to Intestate Distributions to Descendants—Per Capita at Each Generation

According to the Uniform Probate Code, descendants claiming to be heirs of an intestate decedent take by representation. *See* Unif. Probate Code §2-103 (2010). When the estate of an intestate decedent passes to descendants by representation, the estate is divided into as many equal shares as there are surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and deceased descendants in the same generation who left surviving descendants if any. Then, each surviving descendant in the nearest generation to the decedent is allocated one share. The remaining shares are combined and then divided in equal shares among the surviving descendants of deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent. *See id.* at §2-106 (2006).

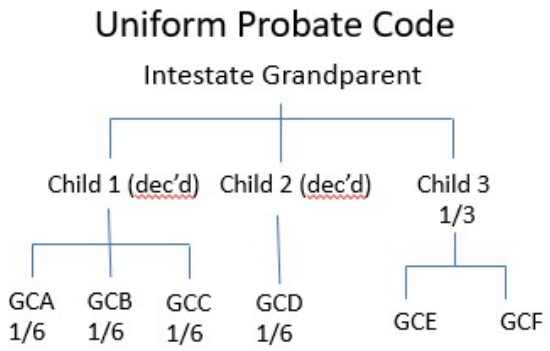

Figure 1: *Per Capita* at Each Generation (two of three childen predeceased decedent)

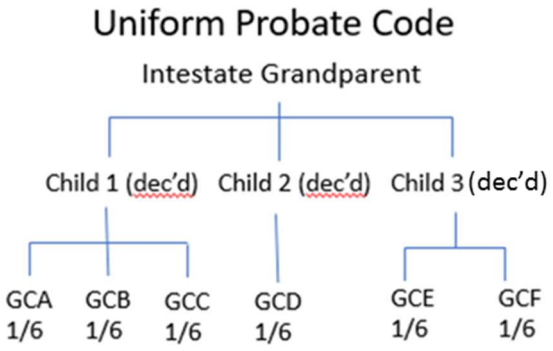

Figure 2: *Per Capita* at Each Generation (all children predeceased decedent)

The Uniform Probate Code adopts the *per capita* at each generation approach to intestate distribution among descendants, as the underlying premise behind such approach is that those equally related to the decedent receive an equal portion. *See id*. Further, a survey of client preferences conducted by Fellows of ACTEC concluded the intestate distribution plan most favored by clients enabled those of the same generation to inherit equal shares. *See id*. (*quoting* **Young**, "Meaning of 'Issue' and 'Descendants,'" 13 *ACTEC Probate Notes* 225 (1988)). "The survey results were striking: Of 761 responses, 541 (71.1%) chose the per-capita-at-each-generation system; 145 (19.1%) chose the per-stirpes system, and 70 (9.2%) chose the pre-1990 UPC system." *See id.* The following states have enacted the Uniform Probate Code: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah.

Importantly, a descendant may not disclaim his or her interest in the decedent's estate in order that such descendant's branch of the family tree receive an enhanced portion. The Uniform Probate Code makes it clear that "the *disclaimed interest* [emphasis added] passes as if the disclaimant had died immediately before the time of distribution [except that] if, . . . the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive at the time of distribution." *See id.* at 2-1106(b)(3)(a).

b. Texas Estates Code Approach to Intestate Distributions to Descendants—Per Capita with Representation

In Texas, if some of the children predecease and at least one child survives the intestate decedent, then each descendant of the child(ren) who predeceased the intestate decedent is entitled to a distribution of the intestate decedent's estate. Each such descendant inherits only that portion of the property to which the parent through whom the descendant inherits would be entitled if that parent were alive. *See* Tex. Est. Code §201.101. If all of an intestate decedent's children predecease him, then the grandchildren of such decedent take equal shares. *See id.* The distribution plan adopted in Texas is referred to as *per capita* with representation.

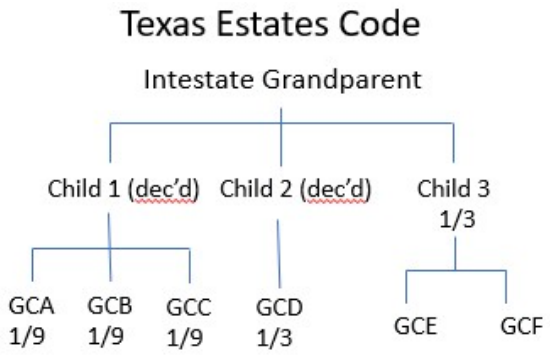

Figure 3: *Per Capita* with Representation (two of three childen predeceased decedent)

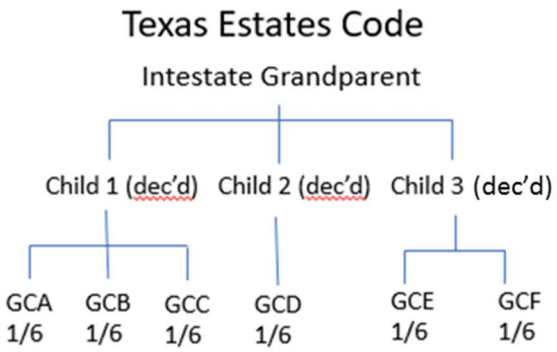

Figure 4: *Per Capita* with Representation (all children predeceased decedent)

The *per capita* with representation distribution plan divides the intestate estate into equal shares at the first generational level where there are living takers. The denominator for such fractional share is determined by adding the number of those living at such level to those on such level who predeceased the decedent but left descendants who survived the decedent. Those who are in such level take such fractional share. The fractional share that would have otherwise passed to a person on such level had such person survived the decedent passes to his or her descendants. *See id.*

About half of the states in the United States follow the intestate distribution scheme known as *per capita* with representation. Some such states include: California, Oregon, and Idaho. *See eg.* CA Prob. Code §240; Or. Rev. Stat. §112.065; ID Code §15-2-103.

c. Illinois and Florida Approach to Intestate Distributions to Descendants—Strict Per Stirpes

The States of Illinois, Florida, Delaware, Georgia, Iowa, Kentucky, and Tennessee follow the strict *per stirpes* approach to intestate distribution to descendants. *See* 755 ILCS 5/2-1; §§732.101-732.111 Fla. Stat.; 12 Del. C. §503; GA Code § 53-2-1; Iowa Code §633.219; KRS §391.040; T.C.A. §31-2-104. Under a *per stirpes* distribution plan, each branch of the family tree receives an equal portion. When a person from the first generation predeceases the intestate decedent, the portion such person would have received passes to his or her descendants. In contrast to the approach to intestate distribution followed in Texas, or *per capita* with representation, even if all of the members of the first generation predeceased the decedent, the members of the second generation share only the portion to which their parent would have been entitled had such parent survived the decedent.

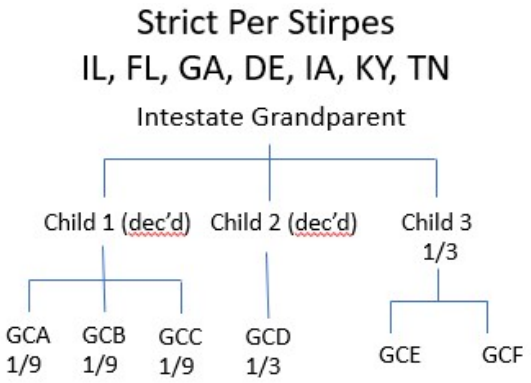

Figure 5: Strict *Per Stirpes*
(two of three childen predeceased decedent)

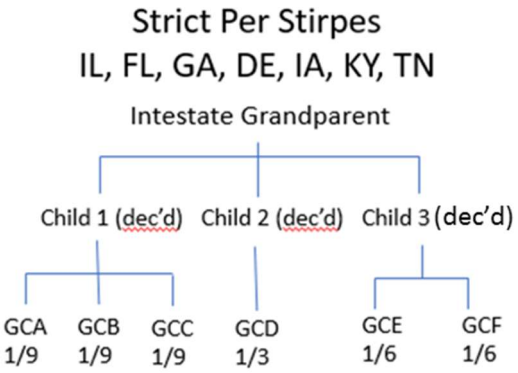

Figure 6: Strict *Per Stirpes*
(all children predeceased decedent)

2. Non-Marital Children

In the United States, almost 40% of the babies born are born to unwed mothers. *See* **Martin**, Joyce A., Brady E. **Hamilton**, Michelle J.K. **Osterman**, Anne K. **Driscoll**, Patrick **Drake**, "Births: Final Data for 2016," 67 *National Vital Statistics Report* 1 (2018). In the 1960s and 1970s, between 9% and 12% of births in the United States were to unwed mothers. *See* **Ventura**, S. J. & C. A. **Bachrach**, "Nonmarital Childbearing in the United States, 1940-1999," 48 *National Vital Statistics Reports*, 16 (2000).

Thankfully, almost all of the states have removed the offensive and pejorative terms "bastard" and "illegitimate" to refer to children born to unwed mothers and replaced such terms with a more descriptive and appropriate term, "non-marital children." A few states still refer to non-marital children as "illegitimate" in such state's laws on succession. *See* AR Code §28-9-209 (2017)(*stating*, "[a]n illegitimate child or his or her descendants may inherit real or personal property in the same manner as a legitimate child from the child's mother or her blood kindred.") Sadly, after a quick Westlaw search, this author found that courts in Texas, as recently as 1969, referred to non-marital children as "bastards." *See Garcia v Garcia*, 444 S.W.2d 207 (Tex. Civ. App.—Corpus Christi 1969).

In the distant past, at common law, non-marital children could not inherit by or through their mother or father and such child's mother and father could not inherit by or through such non-marital child. The non-marital child could inherit from such child's spouse and descendants; but, if such child died unmarried and without descendants, such child's estate escheated to the state. *See* **Beyer**, G., *Texas Probate Code with Commentary*, www.professorbeyer.com (2013). Though slow to keep up with the ever-changing conception of the family and the impact of science and technology associated with reproduction, modern law has evolved to alleviate the harsh treatment non-marital children suffered in the past with respect to inheritance and succession law.

In applying an equal protection analysis, the United States Supreme Court struck as unconstitutional a Louisiana statute that prohibited non-marital children from bringing wrongful death suits to recover from a defendant after the wrongful death of a parent. *See Levy v Louisiana*, 391 U.S. 68 (1969). Then, in a sweeping decision which borrowed the equal protection analysis in *Levy*, the United States Supreme Court held that marital and non-marital children must be treated the same under a state's intestacy statutes. *See Trimble v Gordon*, 430 U.S.762 (1977). *Trimble* involved an Illinois statute that prevented a non-marital child from taking as an intestate heir unless the child's mother and father later married. In *Trimble*, the Court balanced the state's interest in promoting two parent families and encouraging the orderly settlement of estates against the child's right to equal protection under the Fourteenth Amendment of the U.S. Constitution, ultimately finding after intermediate scrutiny that the Illinois statute had only an "attenuated relationship to the asserted goal." *See id*.

Shortly after the Supreme Court issued its decision in *Trimble*, the Court recognized as compelling a state's interest in the orderly settlement of estates and upheld a New York statute allowing a non-marital child to inherit if paternity was established by adjudication. *See Lalli v Lalli* 439 U.S. 259 (1978). The Court determined that a state may have legitimate motives to apply a more challenging standard for non-marital children to inherit from their fathers than from their mothers. "The Court cited several justifications for this unequal treatment including the more efficient and orderly administration of estates, the avoidance of spurious claims, the maintenance of the finality of judgments, and the inability of the purported father to contest the child's paternity allegations." *See* Beyer at 31.

The Uniform Probate Code provides that, for purposes of intestate succession, an individual is the child of his or her natural parents, regardless of their marital status. *See* Unif. Probate Code §2-114 (2010).

In Texas, for purposes of inheritance, a child is the child of a biological father if: 1) the child is born under circumstances which create a presumption of paternity; 2) the child is adjudicated to be the child of the father by court decree; 3) the child was adopted by the child's father; or 4) the father executed an acknowledgment of paternity. *See* Tex. Est. Code §201.052. Even if a child does not meet the criteria described above, he or she may petition the probate court for a determination of inheritance rights from a decedent, and if the court finds by clear and convincing evidence that the purported father was the biological father of the child, the child is treated as any other child of the decedent for purposes of inheritance. *See id*. A child described above may inherit from and through his or her paternal kindred and they may inherit from such child and the child's issue. *See id*.

In this author's research, it seemed as if the State of Arkansas places some of the most burdensome requirements necessary for a non-marital child to inherit from a deceased father. Arkansas Code Annotated 28-9-209(d) states that an illegitimate child may inherit real or personal property "provided that at least one of the following conditions is satisfied and an action is commenced or claim asserted against the estate of the father in a court of competent jurisdiction within 180 days of the death of the father." The conditions are: 1) a court has established paternity; 2) the man has made a written acknowledgement that he is the father of the child; 3) the man's name appears with his written consent on the child's birth certificate; 4) the mother and father married before the child's birth; 5) the mother and father attempted to marry before the child's birth, though the marriage may have been declared invalid; or 6) the man is obligated to support the child under a written voluntary promise or court order.

In a recent case, the Supreme Court of Arkansas rejected a woman's arguments that, as a non-marital child, she was not afforded equal protection under the law as compared to her marital child counterparts and that the 180 day window after a purported father's death to establish paternity was unreasonably short. The justices explained, "The Supreme Court has recognized that a statutory differentiation based solely on illegitimacy can be justified by a state's interests in preventing spurious claims against intestate estates, and in the maintenance of a prompt and accurate method of distributing an intestate's property." *See Bell v McDonald*, 2014 Ark. 83 (unpublished).

3. Equitable Adoption or Adoption by Estoppel Involving Stepparents and Foster Parents

The doctrine of equitable adoption is sometimes referred to as adoption by estoppel, putative adoption, and constructive adoption. Such theories of adoption sound in the law of contracts. The doctrine enables a child to inherit from a foster parent even without a formal adoption, so long as the foster parent made promises or acted in a way to cause the child to believe he or she either was adopted or would be adopted by the foster family. Unlike formal adoption and because equitable adoption is based upon principles of estoppel—the foster parent acted in a manner which caused the child to believe he or she was or would be adopted and the child relied on such behavior—the child may inherit only from the foster parent, but not through the foster parent.

In 2013, the Illinois Supreme Court formally recognized the concept of equitable adoption in supporting a child's right to inherit from his stepparent. The Court explained, "Although no Illinois court has expressly recognized the concept of equitable adoption as it is presented here, no

Illinois court has expressly rejected it either." *DeHart v. DeHart*, 2013 IL 114137. The facts analyzed in *DeHart* established a compelling reason to break new ground in the area of equitable adoption in Illinois. More than sixty years before his death, Donald DeHart married Virginia, the mother of a two year old son named James from a prior relationship. James grew up believing that Donald was his biological father and it was represented to him that Donald was named as his father on his birth certificate, and Donald went so far as to hire an attorney to gin up a birth certificate. It was not until James was 56, when he went to apply for a passport, that he discovered Donald was not his biological father. In the end, the Supreme Court was persuaded by the persuasive facts in *DeHart* and found that, "in Illinois an equitable adoption theory should be recognized under the right circumstances." *Id.*

Comparatively speaking, Texas has long recognized the doctrine of adoption by estoppel. In the past, Texas courts required proof of either a defective statutory adoption or a failed agreement to adopt. *See Cavanaugh v Davis*, 235 S.W.2d 972 (Tex. 1951). However, modern Texas courts have taken a more liberalized view and have held that a child's knowing reliance on an agreement to adopt is unnecessary as the child's belief in his or her status as a "child" is enough to support a claim of adoption by estoppel. *See Luna v Estate of Rodriguez*, 906 S.W.2d 576 (Tex. App.—Austin 1995, no writ).

In California, a stepchild or foster child of a decedent may take under the laws of intestacy as a child of a stepparent or foster parent provided that: 1) the relationship between them began when the child was under the age of 18 and continued throughout the lifetime of the stepparent or foster parent; and 2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier. *See* CA Prob. Code §6454. Such statute codifies the common law principles of equitable adoption. After this author's limited research of the issue, California's statutory provisions enabling stepchildren and foster children to take as a child of an intestate stepparent or foster parent appears unique to California.

Interestingly, for years, the courts of appeal in California disagreed whether an adult stepchild or foster child could meet the second requirement of Section 6454, as in California, most legal barriers to adoption are removed once the person attains the age of majority. The Supreme Court of California settled the debate and made it much more difficult for an adult stepchild or foster child to take as a child of a deceased stepparent or foster parent, as any legal barriers to adoption would have to persist into the adulthood of such stepchild or foster child, not just be present during the childhood of such stepchild or foster child. *See Estate of Joseph*, 17 Cal. 4th 203 (1998).

In certain cases where the estate of a decedent would otherwise escheat to the state, the State of Maryland includes stepchildren in its plan for intestate succession, but not as children of the decedent. In the event a person dies intestate and fails to leave a spouse, descendants, or descendants of his or her great grandparents, the decedent's estate is divided into as many equal shares as the number of decedent's stepchildren living and stepchildren who are deceased but leaving issue who survived the decedent. Each such share of the decedent's estate passes to each such stepchild and the issue of deceased stepchildren by representation. *See* Md. Code, Est. & Trusts §1-206. Similarly, in the State of Washington, when a spouse dies leaving behind both a surviving husband or wife and biological children from a former relationship, if the surviving

spouse later dies and fails to leave living heirs so that such surviving spouse's estate would otherwise escheat to the state, then the first spouse's children from a prior relationship, or the most recently deceased spouse's stepchildren, take as heirs. *See* Wash. Rev. Code § 11.04.095.

4. Posthumous Children

The Uniform Probate Code provides that, "an individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." Unif. Probate Code §2-108 (2010).

The Texas Estates Code provides that, to inherit as an intestate heir, a person must be born before, or be in gestation at the time of, the intestate decedent's death and survive for at least 120 hours. A person is presumed to be in gestation at the time of the intestate decedent's death if such person is born before the 301st day after the date of the intestate decedent's death. *See* Tex. Est. Code §201.056. Curiously, the Texas Family Code appears to conflict with the Texas Estates Code, as it provides that, "if a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child." *See* Tex. Fam. Code Ann. § 160.707.

In California, a posthumously conceived child will be recognized as an intestate heir provided: 1) the decedent left written consent to posthumous conception and designation of someone to control the genetic material; 2) written notice that genetic material is available for posthumous conception was provided within four months following the decedent's death to a person with the power to control the distribution of property; and 3) the child was in utero within two years of the decedent's death. *See* CAL. Prob. Code §249.5.

Under the laws of succession in Louisiana, a child who is born to the surviving spouse of a decedent within three years after such spouse's death is eligible for intestate succession rights if he or she was born to the decedent's surviving spouse and provided the deceased spouse specifically provided written authorization for his surviving spouse to use his genetic material. Any heir whose interest would be reduced by the child's inclusion has up to one year from the child's birth to challenge his or her paternity. *See* La. Rev. Stat. Ann. §391.1.

In Colorado, a posthumously conceived child is treated as if he or she was in gestation on his parent's date of death and entitled to be recognized as a child of the deceased parent if such child is: 1) in utero not later than thirty-six months after the deceased parent's death; or 2) born not later than 45 months after the individual's death. *See* Colo. Rev. Stat. §15-11-120(11).

5. Children Whose Parentage Established Post-Mortem

Sophocles warned, "Do nothing secretly; for Time sees and hears all things, and discloses all." The revelation of a previously unknown child of a decedent represents one of the most dramatic, disruptive, and emotionally charged events taking place within the context of an estate administration. Thousands of people who are getting DNA tests, like AncestryDNA and 23andMe, are uncovering unexpected family secrets. Paternity discrepancy, or when a person is identified as being biologically fathered by someone other than the person they believe is the father, occurs between 0.8% to 30% in the population. *See* **Farr,** Christina, "As At Home DNA Tests Become

More Common, People Must Grapple with Surprises about Their Parents," cnbc.com (December 10, 2017)(*citing* **Bellis,** Mark A., Karen **Hughes**, Sara **Hughes**, & John R. **Ashton**, 59 *J. of Epidemiology and Community Health* 9, (2005) "Rates vary between studies from 0.8% to 30% (median 3.7%, n=17)").

In 2010, the Texas Supreme Court resolved what Professor Stanley M. Johanson dubbed in his commentary in the Texas Estates Code Annotated, "The Kenedy Ranch Saga," and ruled that the four-year statute of limitations applies to heirship claims by a non-marital child. The Supreme Court declined to toll the statute of limitations and rejected the principles underlying the Discovery Rule, which allows the plaintiff to file the claim within a reasonable time once the injury is discovered, as inapplicable in probate. *See Frost National Bank v Fernandez*, 315 S.W.3d 494 (Tex. 2010).

In *Frost*, the decedent, John G. Kenedy, Jr., held vast land holdings in South Texas with his sister, Sarita Kenedy East. Neither John nor his sister were believed to have children. When John died in 1948, he left everything to his wife, Elena Suess Kenedy, via a holographic will. Elena died in 1984 at the age of 95, leaving the bulk of her estate to a charitable trust and her estate was closed in 1987.

Sarita died in 1961, but her estate was not closed until 1987 because a will contest and other complications arising out of questions related to a foundation she created shortly before her death delayed the settlement of her estate. Enter Ana Fernandez. Ana was born in 1925 to Maria Rowland, a then unmarried woman who worked for the Kenedy family. For years, Ana heard rumors that John was her father and shortly before her mother's death in 2001, Maria revealed to Ana that John was, in fact, her father. Ana petitioned the probate court attempting to assert her interest in the estates of John, Sarita, and Elena. Despite filing a flurry of pleadings including numerous bills of reviews, writs of mandamus, pleas to the jurisdiction, motions to abate, and transfer orders, Maria was unable to prove her standing as John's child.

The Texas Supreme Court cited the four-year statute of limitations set out in Section 16.051 of the Texas Civil Practice and Remedies Code and declined to toll the statute of limitations explaining, "if we were to apply the discovery rule in this context, we would subject estates to open-ended litigation, a result squarely at odds with the policy that has informed our jurisprudence for more than a century." *See Frost* at 510.

6. Forfeiture Due to Bad Acts

The Texas Estates Code poetically echoes the Texas Constitution when it provides, "No conviction shall work corruption of blood or forfeiture of estate . . ." Tex. Est. Code §201.058. However, in the event the beneficiary of a life insurance policy is convicted and sentenced as a principal or accomplice in willfully bringing about the death of an insured, the proceeds of such policy will be paid as provided by the Texas Insurance Code. *See id*. and Tex. Ins. Code §1103.151.

The only statutory remedy to avoid the unjust enrichment of an heir convicted of killing an intestate decedent involves life insurance. However, common law intervenes to support the equitable principle that a person should not be allowed to be unjustly enriched as a result of

wrongful conduct by allowing the imposition of a constructive trust on the share of an intestate decedent's estate which would otherwise pass to such person as a result of the wrongful conduct. *See Pritchett v Henry*, 287 S.W.2d 546 (Tex. Civ. App.—Beaumont 1955, *writ dism'd w.o.j.*).

Under the Uniform Probate Code, a parent is barred from inheriting from or through a child of the parent if the parent's parental rights were terminated or the child died before reaching 18 years of age and immediately before the child's death, clear and convincing evidence exists that the parental rights of the parent could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child. *See* Unif. Probate Code §2-114. If the parent is barred from inheriting from or through a child, the parent is treated as if he or she predeceased the deceased child. *See id*.

In Texas, a parent may be barred from inheriting by or through a child. Texas is more discriminating about the behaviors giving rise to forfeiture—only the most heinous acts call for forfeiture—simple abuse and neglect will not suffice. When a child who is under the age of 18 dies, a probate court may enter an order declaring that a parent of such child may not inherit from or through the child under the laws of descent and distribution if the court finds that the parent has voluntarily abandoned and failed to support the child or the child's mother during her pregnancy or the parent is criminally responsible for the death or serious injury of a child. *See* Tex. Est. Code §201.062.

Importantly, only the parent may be barred from inheriting by or through a child. So, if a grandparent or other collateral relative engaged in odious conduct toward the child, this statute could not be used to snap back such grandparent or collateral relative's right to inherit by or through the child. Presumably, common law principles of unjust enrichment would enable a constructive trust to be placed upon assets which would otherwise pass to such evil-doing relative provided the behavior brought about the death of the child.

7. Adopted Children

This section on adopted children is intentionally abbreviated, as this topic will be covered by another panel. It is worth noting, however, that an adopted person is the child of his or her adopting parent or parents and not of his or her natural parents unless such adopted person is adopted by the spouse of either of such person's natural parents (stepparent). In the event a person is adopted by the spouse of such person's natural parent, the adoption has no effect on the right of the adopted person to inherit from or through the other, non-custodial, natural parent. Intuitively, though the adopted individual may inherit from and through the non-custodial natural parent, neither the non-custodial parent nor his or her kindred may inherit from or through the adopted individual. *See* Unif. Probate Code §2-114 (2010).

B. Forced Heirship

Conspicuously, due to its history as a French and then Spanish colony, Louisiana represents one state where the French and Spanish civil law influence giving rise to the concept of forced heirship remains. Though each of the other forty-nine states have adopted inheritance laws generally respecting testamentary freedom, a few limits on such freedom exist. In many states, the limits of testamentary freedom are tested when a decedent's estate includes homestead and exempt property passing to someone other than the surviving spouse or minor children, a family

allowance, pretermitted children, or community property. Also, adhering to choice of law principles, courts in the United States may apply the laws of foreign jurisdictions which may limit testamentary freedoms to domestic or ancillary administrations. This portion of the outline will examine: 1) forced heirship in Louisiana; 2) the limits of testamentary freedom in other states; and 3) application of foreign laws limiting testamentary freedom.

1. Forced Heirship in Louisiana

a. A Brief History

The inheritance laws of Louisiana are rooted in the legal traditions of France and were also influenced by the Spanish. First colonized by French settlers in around 1700, Louisiana was governed by royal charters which extended the Laws and Custom of Paris to the new territory. From 1763, when France ceded the territory of Louisiana to Spain, to 1801, when Spain agreed to return such territory to France, the inhabitants of Louisiana resisted the Spanish effort to establish government and replace French legal traditions. Since both French and Spanish legal traditions emphasized the concept of forced heirship, it is unnecessary to debate the influence of Spanish law with respect to testamentary freedom in Louisiana.

Developed in 1801 to reform the legal system in France in accordance with the ideals which inspired the French Revolution including: liberty, equality, fraternity, popular sovereignty, and natural rights, the Napoleonic Code all but abolished testamentary freedom. In addition, since the Napoleonic Code was inspired by Justinian's sixth-century codification of Roman laws, as it relates to succession, such Code finds its origins in: a) the Roman legal tradition which limited testamentary freedom for the protection of the family organization and the custom of continuing the care and worship of household gods; and 2) the Germanic inheritance system respecting the family as a primitive social organization and recognizing the concept of private property ownership. *See* **Dainow**, Joseph, *"*The Early Sources of Forced Heirship; Its History in Texas and Louisiana,*"* 4 *La. L. Rev.* 42 (1941). Limiting testamentary freedom fit in well with two important social imperatives of the time: distribution of wealth to promote equality and preventing the accumulation of wealth among a few families by favoring certain heirs, such as primogeniture. *See* **Connell-Thouez**, Katherine, "The New Forced Heirship in Louisiana: Historical Perspectives, Comparative Law Analyses and Reflections upon the Integration of New Structures into a Classical Civil Law System*,*" 43, *Loy. L. Rev.* 1 (1997) (*referencing Succession of Lauga*, 624 So. 2d 1156, 1158 (La. 1993)).

In addition to supporting the social initiatives which led to the French Revolution, the legal tradition of forced heirship furthers the state's interest in promoting familial harmony and solidarity through deterring intra-family discord and litigation. *See id.* The citizens of Louisiana hold fast to their civil law rooted in French legal traditions and the Napoleonic Code. Lawmakers' continued embrace of the Louisiana tradition limiting testamentary freedom represents a well-known anomaly in United States jurisprudence. Maintaining the tradition of forced heirship is so important, the State of Louisiana enshrined the tradition within its Constitution in 1921. *See* Dainow at 42.

Prior to the reforms discussed below, Louisiana's model of forced heirship protected the extended family of the decedent. Forced heirs have an interest in the succession and such heirs

can only be divested of succession by either renouncing succession or pursuant to the rules of disinherison. *See* L. **Oppenheim**, 10 *Louisiana Civil Law Treatise: Successions and Donations* 6 (West 1973).

Modern expectations regarding individual liberty tested Louisiana's steadfast adherence to traditions limiting testamentary freedom, culminating in laws redefining forced heirship in 1989 and 1990. Ultimately determined unconstitutional, the Louisiana Supreme Court struck down such laws in *Succession of Lauga,* above. Revealing a sea change in popular attitudes toward the formerly venerated institution of forced heirship, an overwhelming majority of lawmakers voted to amend the Louisiana Constitution in 1995, all but eliminating forced heirship, as forced heirship would only be applied in certain cases to protect the young, disabled, and infirm. This constitutional change ushered in years of lawmaking designed to implement reforms expanding testamentary freedom in Louisiana.

b. Modern Reforms Expanding Testamentary Freedom in Louisiana

Though modern reforms substantially expanded testamentary freedom in Louisiana, the institution of forced heirship persists as a lesser, enervate incarnation of its ancestor. An heir's right to succession is no longer based simply on familial relationship, rather to qualify as a forced heir, such heir must meet certain conditions based upon need. More specifically, the following classes of heirs will be treated as forced heirs under Louisiana's modern forced heirship laws:

i) descendants of the first degree, who at the time of the death of the decedent, are 23 years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the decedent's death;

ii) if a descendant of the first degree predeceases the decedent, and a descendant of such deceased descendant of the first-degree left descendants who were 23 years of age or younger on the decedent's date of death, such descendants who were twenty-three years of age or younger become a forced heir by representation; and

iii) if a child of a descendant of the first degree, who at the time of the death of the decedent, because of a mental incapacity or physical infirmity, is permanently incapable of taking care of his or her person or administering his or her estate, such child becomes a forced heir by representation.

See La. Civ. Code art. 1493. In the article cited above, Katherine Connell-Thouez explains, "All vestiges of the fundamental principle of equality between heirs has been lost. Thus, the notion that descendants, including their families through representation, have a right in the succession unless it is refused has been substituted for the notion that if one leaves dependent or needy children or grandchildren, a fraction of the estate must be made available for those children upon a showing of need." Connell-Thouez at 5.

When an heir is twenty-three years of age or younger, rights to succession vests on the death of the decedent. However, when an heir who is older than 23 but is mentally incapacitated or physically infirm, proving the disability is necessary before succession vests in such older, disabled heir. *See* La. Civ. Code arts. 940-949.

c. Forced Share

Gifts and bequests may not exceed three-fourths of the property of the donor or testator if he leaves, at his death, one forced heir and if two or more forced heirs are left by the donor or testator, the portion reserved to the forced heirs, or the reserved portion, is increased to one-half. *See* La. Civ. Code art. 1495. The remainder of the donor or testator's estate is called the disposable portion. If the forced heir would take a larger portion of the donor or testator's estate as compared to the forced heir's intestate share, such forced heir takes only his or her intestate share. *See id.*

When calculating the share passing to a forced heir, gifts made by the decedent within three years of death, other than gifts made to a spouse, are taken into account. Importantly, proceeds from life insurance and contributions to certain qualified plans are not considered when calculating the forced share. However, life insurance proceeds or distributions from qualified plans may be used to satisfy the forced share. *See* **Galligan**, Michael W., "'Forced Heirship' in the United States of America, with Particular Reference to New York State," 22 *Trusts & Trustees* 103 (2016).

The share passing to a forced heir may be satisfied by an interest placed in trust, so long as the forced heir is both the income and principal beneficiary of such trust and so long as the trust conforms to the provisions of the Louisiana Trust Code governing such share. *See* La. Civ. Code art. 1502.

d. The Undeserving or Unworthy Heir

A forced heir may not be deprived of the share of the decedent's estate reserved to him or her by law unless the decedent has just cause to disinherit such forced heir. *See* La. Civ. Code art. 1494. Prior to the reforms which all but abolished forced heirship in Louisiana, the following persons were considered as unworthy: 1) those who have been convicted of killing or attempting to kill the decedent, even though later pardoned; 2) those who have brought some calumnious accusation against the decedent which tended to subject him to infamous punishment; and 3) those who upon being apprised of the murder of the decedent took no steps to bring the murderer to justice. *See* **Moses**, Leslie, "The Law of Descent and Distribution in Louisiana", 6 *Sw L. J.* 81 (1952). The unworthiness is never incurred by the act itself, but must be judicially declared in a suit. *See id*.

Under modern law in Louisiana, a person entitled to succession may also be divested of such succession if such person is determined to be unworthy. A successor shall be declared unworthy if he intentionally participates in killing or attempting to kill the decedent. *See* La. Civ. Code art. 941. An action to declare an heir unworthy may only be brought by a person who would take in the place of such purported unworthy successor; and if such purported unworthy successor is a minor child or incapacitated adult, then an attorney will be appointed to represent such heir in an action to declare him or her unworthy upon motion of the court or an any family member. *See* La. Civ. Code art. 942.

2. Limits of Testamentary Freedom in States Other than Louisiana

Most states limit absolute testamentary freedom in an effort to avoid or stave off the impoverishment of a decedent's dependent family members. Mandatory provisions which set aside a portion of the decedent's estate for the benefit of surviving, dependent family members are described as, *inter alia,* "an elective share," "a child's award," and "family allowance."

a. New York

Though not really considered forced heirship as it is known in civil law jurisdictions, most states in the United States offer some degree of protection to children and spouses with respect to inheritance rights. For example, in New York, if a person dies leaving children who are under the age of twenty-one, the following property vests either in the surviving spouse, or in the absence of a surviving spouse, the decedent's children who are under the age of twenty-one: i) certain personal effects not to exceed $2500 in value; ii) certain farm and ranch assets not to exceed $20,000 in value; iii) motor vehicle not to exceed $25,000 in value; and iv) cash up to $25,000. *See* NY EPTL §5-3.1. In addition, the surviving spouse may take an elective share equal to the greater of fifty thousand dollars or one-third of the net estate and reduced by the share of the deceased spouse's estate passing to such surviving spouse. *See id*.

Pretermitted children enjoy some protections in New York akin to forced heirship. Such protections depend upon whether the testator had children at the time his or her will was executed and whether the testator made provisions for any such children. If the testator had a child or children at the time he or she executed the will but failed to make provisions for such child or children, the only claim a pretermitted child has against the estate is, perhaps, a claim under the exempt property provisions discussed above. However, if the testator provided for at least one child in the will, the pretermitted child shares equally with the child or children for whom provisions are made in the share passing to such child or children, provided the testator did not indicate the provisions for such child or children excluded after-born children. In which case, the pretermitted child would take his or her intestate share of the decedent's estate. *See* NYEPTL §5-3.2 and Galligan, above.

b. Illinois

In Illinois, like New York, the surviving spouse and minor children of a decedent enjoy inheritance rights. In Illinois, such rights take the form of a "child's award." If a minor child of a decedent does not reside with the surviving spouse of the decedent at the time of the decedent's death, the child is awarded from the personal representative of the decedent's estate an amount which is exempt from the enforcement of a judgment, garnishment, or attachment, a sum of money that the court deems reasonable for the proper support of the child for the period of nine months after the death of the decedent, in a manner suited to the condition in life of the minor child and to the condition of the estate. The award shall be at least $10,000 and shall be paid for the benefit of the child to such person as the court directs. *See* 755 ILCS 5/15-2 (2018). In addition, if the decedent failed to leave a surviving spouse, minor children receive an additional sum of at least $20,000 that is divided equally among the decedent's minor children or apportioned as the court directs. Such sums shall be paid for the benefit of such children to any person that the court directs. *See id*.

Finally, effective June 1, 2018, if an adult child of the decedent who is not living with the surviving spouse of the decedent is likely to become a public charge and was financially dependent on the decedent at the time of the decedent's death, the child is entitled to an award from the personal representative of the decedent's estate which is exempt from the enforcement of a judgment, garnishment, or attachment. Such award is for the proper support of the adult child for

the period of nine months after the death of the decedent, in a manner suited to the condition of life of the adult child and to the condition of the estate. The award shall be at least $5,000 and shall otherwise be consistent with the financial support that the decedent was providing the adult child immediately prior to the decedent's death. Within 30 days after receiving written notice of this potential award from the personal representative of the decedent's estate, the adult child, or the adult child's agent or guardian, or other adult on behalf of the adult child, shall provide written notice to the representative asserting that the adult child was financially dependent on the decedent at the time of the decedent's death and that the adult child did not reside with the surviving spouse at the time of the decedent's death. Failure to provide such written notice to the representative or affiant within 30 days after receiving notice from the representative shall be a bar to the right to receive the award. *See id*.

c. Texas

In Texas, the court sets aside the decedent's homestead for the use and benefit of the decedent's surviving spouse and minor children. In addition, other exempt property having an aggregate value of not more than $100,000 is also set aside for the surviving spouse, minor children, incapacitated adult children, and adult children remaining with the decedent's family. *See* Tex. Est. Code §353.051 and Texas. Prop. Code §42.001(a). Such exempt property includes: home furnishings, including family heirlooms; food; farming or ranching vehicles and implements; tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession; wearing apparel; jewelry; two firearms; athletic and sporting equipment, including bicycles; a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the non-licensed person; and animals and forage on hand for their consumption. *See* Tex. Prop. Code §42.002(a).

d. Uniform Probate Code

The Uniform Probate Code contains protections for the family including a homestead allowance and provisions preserving exempt property. The decedent's surviving spouse, or in the absence of a spouse, the minor and dependent children of the decedent, are entitled to a homestead allowance of $22,500, adjusted for inflation. This allowance enjoys priority over all claims against the estate. What is more, this allowance is in addition to any share passing to the surviving spouses or dependent or minor children by intestacy or by will. *See* UPC §§2-402 and 1-109. In addition, to the homestead allowance, the surviving spouse, or minor and dependent children in the absence of a surviving spouse, are entitled to exempt property (furnishings, appliances, automobiles, personal effects) having a value up to $15,000. *See id.* at §2-403.

Further, like New York, Illinois, and Texas, under the Uniform Probate Code, the surviving spouse enjoys a right to take an elective share amount equal to fifty percent of the value of the augmented estate, and if such amount fails to reach $75,000 in value, then such share is augmented to reach up to such amount. *See* UPC §§2-202(a)-(b). The augmented estate includes: 1) the value of the net probate estate; 2) the value of decedent's non-probate transfers to others; 3) the decedent's non-probate transfers to the surviving spouse; and 4) the surviving spouse's property and non-probate transfers to others. *See id* at 2-203. The marital property portion of the augmented

estate equals the sum of the four components which is then adjusted by a multiplier equal to between 3 and 100 percent depending upon the length of the marriage. *See id*. and Galligan, above.

Under the Uniform Probate Code, pretermitted children are not entitled to a portion of a decedent's estate when it appears that the failure of the decedent to provide for such children was intentional or when the decedent provided for such children with non-probate assets. *See* UPC §2-302. However, if the testator provided for a child or children in his will, a pretermitted child will share equally in the portion of the testator's estate passing to such child or children. Further, a pretermitted child will take his or her intestate share of a testator's estate in the event the testator had no living children at the time of the will's execution, unless the testator's spouse is the parent of the pretermitted child, survives the testator, and receives the bulk of the testator's estate. *See id*.

3. Application of Foreign Laws Limiting Testamentary Freedom

What happens when a decedent dies domiciled in a jurisdiction which recognizes forced heirship claims but has real property located in a jurisdiction which does not recognize such claims? Or, what happens if the decedent dies in a jurisdiction which does not recognize claims for forced heirship yet has real property located in a jurisdiction which does recognize such claims? In the United States, the Restatement of Conflict of Laws explains how such choice of law questions are answered. In addition, principles of comity and the doctrine of *renvoi* impact how these questions are resolved.

a. Choice of Law

Once a court accepts jurisdiction over the estate of a decedent, it must determine what law applies to the issues arising with respect to such estate. Choice of applicable law depends upon the character of the property involved. Characterization of property as real or personal is determined by the local law accepting jurisdiction over the probate of the decedent's estate and can get muddy at times.

Section 236 of the Restatement provides that the disposition of an intestate decedent's interest in land is determined by the law that would be applied by the courts of the situs. *See* Restatement (Second) of Conflict of Laws. Similarly, whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. *See id.* at §239. In both situations, where a decedent dies testate or intestate, the courts will usually apply their own local law in determining questions related to the land situated within their jurisdiction. *See id.* at §§236, 239.

In contrast, Section 263 of the Restatement states that, "Whether a will transfers an interest in movables [personal property] and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death." *Id.* at §263. With respect to the validity of a will, most jurisdictions recognize a will as admissible to probate provided it was validly executed in: 1) such jurisdiction; 2) the jurisdiction in which the will was executed; or 3) the jurisdiction in which the testator was domiciled, either at the time of execution or of death. *See e.g.,* New York Estates, Powers & Trust Law §3-5.1(h)(2006), Tex. Est. Code Sec. §251.053 (2015).

b. International Approach

Interestingly, the Hague Conference on Private International Law offers a broader approach to determining the legitimacy of a testamentary disposition, as in addition to the three jurisdictions mentioned immediately above, a will may also be valid if it is valid in the: 4) nation where the testator was a citizen at the time of his or her death; or 5) the situs of real property purported to be governed by such will. See Hague Conference on Private International Law, Full Status Report Convention #11. *See also* **Lawrence**, III, Robert C., and Elisa Shevlin **Rizzo**, "Basic Conflict of Laws Principles" in *A Guide to International Estate Planning* (Jeffrey A. Schoenblum, ed. 2000).

Notably, the United States is not a contracting party to the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, a convention concluded on October 5, 1961. In fact, though the United States is a contracting party to the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, it is not a contracting member to conventions related to the administration of estates.

c. Principles of Comity

Though the United States declined to sign conventions developed by The Hague Conference on Private International Law related to the administration of estates, courts in the United States enforce foreign judgments based on principles of comity. Comity is the principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. *See Black's Law Dictionary*, 242 (5th ed. 1979).

For example, in 1995, the District Court of Appeals in Florida, operating pursuant to principles of comity, ordered the transfer of Florida bank accounts to Aruba to be disposed of pursuant to Dutch law. *See Nahar v Nahar*, 656 So.2d 255 (Fla. Dist. Ct. App. 1995). The *Nahar* case involved a decedent dying intestate who had six children with his first wife and three additional children with his second wife. At the time of his death, the decedent and his second wife were living in Florida but domiciled in Aruba. The six children from the decedent's first marriage obtained a ruling from The Hague that Dutch law, not Florida law, controlled the decedent's estate and that the money from the Florida accounts was presumptively an asset of the estate and subject to distribution in conformity with the forced heirship provisions of Dutch law.

In response to the second wife's argument that Florida law should control the distribution of the Florida bank accounts, the District Court of Appeals of Florida found that The Hague's decision amounted to *res judicata*, noting that the parties had been given notice and the opportunity to be heard, and entered final summary judgment in favor of the decedent's six children from a prior marriage. The District Court's opinion included an important quote from *Cardenas v Solis*, 570 So.2d 996 (Fla. 3d DCA 1990) setting out the general rule that foreign judgments are entitled to recognition and enforcement:

> [I]t is well settled that, as a general rule, only the final judgments of courts of a foreign country are subject to recognition and enforcement in this country, provided certain jurisdictional and due process standards are observed by the foreign court;

> non-final or interlocutory orders of foreign courts, however, are generally not entitled to such recognition or enforcement.

See Nahar at 228 (*noting* the Restatement (Second) Conflict of Laws §98 which states that, "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned.")

The court in *Cardenas* made it clear that only final judgments obtained when "certain jurisdictional and due process standards are observed by the foreign court" should be recognized and enforced. A judgment is valid if: 1) the state had jurisdiction to judicially act on a matter; 2) the persons affected received reasonable notice and had an opportunity to be heard; 3) the judgment is entered by a competent court; 4) the court acted in compliance with the requirements of the state necessary for a valid exercise of the court's power. *See* Restatement (Second) Conflict of Laws §92 (1971).

d. Doctrine of Renvoi

The doctrine of *renvoi* provides that a court apply both substantive law and conflict of law rules when determining a particular issue where multiple jurisdictions are concerned. The forum court invokes the use of *renvoi* when its own choice of law rules direct the court to apply the law of another state. *See* Restatement (Second) Conflict of Laws §8 (1971). When the doctrine of *renvoi* is at work, the forum court supplants its local law with the local substantive law *and* choice of law rules of the foreign jurisdiction, resulting in the forum being directed to apply its own law, the local law of the foreign jurisdiction, or even the law of a third jurisdiction. *See id*. The doctrine of *renvoi* is limited by practical and feasibility considerations. *See id*.

For example, when a domiciliary of New York left a will which disposed of real property in Switzerland and the validity of such disposition came into question, a New York court looked to Swiss choice of law rules and concluded that a Swiss court would apply the law of the testator's domicile to both the testator's real (immovable) and personal (movable) property. Consequently, the New York court upheld the testator's disposition of real property in Switzerland. *See In re Schneider's Estate*, 96 N.Y.S. 2d 652 (Sur. Ct. 1950).

e. Choice of Law Indicated in Testamentary Instrument

Generally, a will should be probated or established in the testator's domicile. However, because each jurisdiction has the power to administer property located in such jurisdiction, a will may frequently be probated in a jurisdiction where the testator left property. *See* Lawrence and Rizzo above. In addition, a testator may indicate jurisdiction of probate or choice of law within the will itself and such provisions will be honored provided the testator established a sufficient nexus with such jurisdiction by, for example, maintaining assets in such jurisdiction or naming beneficiaries or fiduciaries domiciled in such jurisdiction.

In 2001, Francine Meyer, a 77 year old citizen of France and domiciliary of New York, died with a will disinheriting her estranged son. The son sought to recover portions of gifts made during the lifetime of Ms. Meyer which totaled over $33 million pursuant to the forced heirship provisions of French law. The question presented to the court was whether New York would apply forced

heirship rights under French law to a decedent's *inter vivos* disposition of New York property. Her son's complaint alleged that at the time of her death, the decedent was a citizen and domiciliary of France. He went on to argue that applicable French forced heirship principles required the decedent to leave 75% of her augmented estate to him along with her other two children and she failed to do so. The complaint explained that French law permits disadvantaged heirs to bring an action to recover from those who received gifts to the extent that such gifts encroached upon the share to which the disadvantaged heirs were entitled. *See In re Will of Meyer*, 62 A.D.3d 133 (N.Y. App. Div. 2009).

In addressing the complaint, the court cited *Wyatt v Fulrath*, 16 N.Y.2d 169, (N.Y. 1965) and explained that civil law provisions of forced heirship are inapplicable to gifts made during a decedent's lifetime as such gifts relate to New York property, irrespective of the transferor's domicile, because the validity of these transfers, as well as the capacity to make them, are governed by the law of the state where the property was situated at the time of the transfer. The court went one step further and explained that when a testator of a will directs that probate be had in New York and that New York law apply to such probate, as was the case with Francine Meyer's will, then New York law governs the intrinsic validity of the disposition made in the will. Therefore, claims made pursuant to forced heirship under French civil law are inapplicable to property situated in New York. *See Meyer* at 137-138.

f. Summary—Choice of Law Principles and Principles of Comity at Work

Getting back to the hypothetical questions posed above regarding decedents who have a significant nexus with a jurisdiction which recognizes forced heirship, generally speaking, the disposition of a testator's real property will likely be governed by the law of the situs of such property and the disposition of a testator's personal property will likely be governed by the law of the testator's domicile. So, if a testator's estate contains real property located in a civil law jurisdiction recognizing forced heirship, the disposition of such real property may be subject to forced heirship claims, even if the testator is domiciled in a common law jurisdiction recognizing testamentary freedom. However, if the choice of law principles of such civil law jurisdiction apply the law of the testator's domicile to questions regarding the validity and effect of testamentary transfers of real property located within such civil law jurisdiction, then testamentary transfers of real property located within such civil law jurisdiction may not be subject to forced heirship claims, as was illustrated in *In re Schneider's Estate*, above.

In addition, when a foreign civil law jurisdiction recognizing forced heirship claims adjudicates the validity and effect of a disposition of moveable or personal property held within the United States and the foreign court observed certain jurisdictional and due process standards, the judgments of such foreign courts are entitled to comity and will likely be given effect by courts in the United States, as was illustrated in *Nahar*, above.

In sum, claims of forced heirship may limit testamentary freedom when the testator owns real property or is domiciled in a jurisdiction recognizing forced heirship. However, whether forced heirship claims can be judicially enforced depends upon choice of law principles and the willingness of a forum court to defer to the judgments of a foreign court under principles of comity.

C. Child Support Obligations

In some states, when a non-custodial parent dies, the ongoing obligation to pay support ceases unless otherwise provided in the divorce decree. *See Pittman v Pittman*, 419 So.2d 1376, 1380 (Ala.1982). In many other states, the obligation to pay child support lives on beyond the obligor's death. In Texas, for example, future support payments are discounted to present value and accelerated on the decedent's death. *See* Tex. Fam. Code §§54.015 and 154.016. Often, the court presiding over the divorce will require security for such payment in the form of life insurance.

However, in the absence of life insurance, accumulated arrearages and unpaid child support obligations must be paid as obligations of the decedent's estate. In most states, such obligations are classified as priority claims. For example, in Texas, the principle amount and accrued interest on delinquent child support and child support arrearages that have been confirmed as: 1) a judgment; 2) a determination of arrearages by a court; or 3) a determination by a child support enforcement agency are classified as class four claims. Class four claims in Texas are paid only after: 1) funeral expenses and expenses in last illness; 2) administration expenses; and 3) secured claims for money. Naturally, though not mentioned in the classification of estate liabilities in Section 355.102 of the Texas Estates Code, federal income taxes due take priority over claims for child support. However, federal income taxes likely do not tax priority over the family allowance. *See Schwartz v Commr*, 560 F.2d 311 (8th Cir. 1977).

Like Texas, the State of Illinois recognizes a parent's continued obligation of child support, even after the death of such parent. "An existing obligation to pay for support or educational expenses, or both, is not terminated by the death of a parent. When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced, modified, revoked or commuted to a lump sum payment, as equity may require, and that determination may be provided for at the time of the dissolution of the marriage or thereafter." 750 ILCS 5/510 (2017).

Since the child support obligation of a deceased parent may outlive such parent, the legislature in Illinois has codified at least one way such obligation of support may be secured outside the probate estate of the decedent. If necessary to protect and promote the best interests of the children, the court, at the time of divorce, may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties. *See* 750 ILCS 5/503 (2018). The court's intervention resulting in the creation and funding of a trust for children is unusual and often considered only when one parent has demonstrated a desire to avoid support obligations. *See In re: Marriage of Melamed*, 2016 IL App (1st) 141453.

In New York, the court may order a party to purchase, maintain, or assign a policy of accident insurance or insurance on the life of either party and designate in the case of life insurance, the person or persons on whose behalf the petition is brought as irrevocable beneficiaries during a period of time fixed by the court. The obligation to provide such insurance shall cease upon the termination of such party's duty to provide support. *See* §416 N.Y. Family Court Act.

Similarly, courts in the State of Florida have the authority to order the parent paying child support to maintain a life insurance policy protecting such obligation of support. Prior to making such an order, the court must consider the following: 1) how much the life insurance will cost the parent; 2) the extent of the need for the life insurance policy; 3) the availability of the life insurance; and 4) how much financial impact the order to provide life insurance will have on the parent. *See* Fla. Stat. §61.30(c).

D. Social Security Benefits

In 2017, approximately 4.2 million in the United States received more than $31 billion in social security benefits because one or both parents were disabled, retired, or deceased. *See* "Benefits for Children," published by the Social Security Administration at https://www.ssa.gov/pubs/EN-05-10085.pdf. Doing the math, the average amount each such child received annually comes out to approximately $7380. According to the Social Security Administration, "[t]hose dollars help to provide the necessities of life for family members and help make it possible for those children to complete high school. When a parent becomes disabled or dies, social security benefits help stabilize the family's financial future." *Id.* Below is a list of persons who qualify for such benefits:

- Unmarried and younger than age 18;
- Unmarried and 18-19 years old and a full-time student (no higher than grade 12); or
- Unmarried and 18 or older with a disability that began before age 22. *See id.*

In addition and under certain circumstances, adopted children, stepchildren, grandchildren, and step grandchildren may also qualify for social security benefits. To receive such benefits, such children must have:

- A parent whose disabled or retired and entitled to Social Security benefits; or
- A parent who died after having worked long enough in a job where they paid social security taxes. *See id*.

If a child receives survivor's benefits, they can receive up to 75 percent of the deceased parent's basic social security benefit. Benefits paid to a family may be capped at between 150 and 180 percent of the deceased parent's full benefit amount, and if the total amount being paid to the family members of a decedent exceeds such cap, each family member's benefit is reduced proportionately. *See id*.

III. GUARDIANSHIP OF MINORS AND INCAPACITATED ADULT CHILDREN

A. A "minor" is a person who has not attained the age of 18 years (incapacitated adult children are NOT minors).

1. Guardian of the Person: shall have the custody, nurture, and tuition and shall provide education of the Ward and of his children.
2. Guardian of the Estate: shall have the care, management and investment of the Estate… for the comfort and suitable support and education for Ward, his children, and persons related by blood or marriage who are dependent on the Ward or entitled to support from the Ward, or for any purpose as the Court determines for the Ward's best interests.
3. Temporary Guardianship of minors: Illinois does not recognize Temporary Guardianship of minors. If there is an emergency and the minor's parents are unresponsive, then DCFS has jurisdiction.
4. Standby Guardian: is someone who has been appointed by the Court as the person who will act as Guardian of the child when the child's parents or the guardian of the person of the child dies or are no longer willing or able to make and carry out day-to-day child care decision concerning the child. Requires court approval.
5. Short-Term Guardian: Non-Court action. Without Court approval, a parent, adoptive parent, or adjudicated parent whose parental rights have not been terminated, or the guardian of the person of a minor may appoint in writing, without court approval, a short-term guardian of an unmarried minor or a child likely to be born.

B. Rights of absent, uninvolved, estranged or abusive surviving parent as natural guardian:

1. Jurisdiction. In Illinois, the Court lacks jurisdiction to proceed on a petition for the appointment of a guardian of a minor if it finds that the minor has a living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor…unless (a) the parent or parents voluntarily relinquish physical custody of the minor; (b) after receiving Notice of Hearing, the parent or parents fail to object to the appointment at the hearing on the Petition; OR (c) the parent or parents' consent to the appointment as evidenced by a written document that has been notarized and dated.
2. Presumption. There is a rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence.

C. Nomination and Appointment of Guardians

1. How does a Parent Nominate a Guardian?
   a) upon the filing of a Petition with the Court;
   b) a written nomination in a Will; or
   c) a dated and signed written designation, witnessed by two (2) people (with same formalities as a Will).

2. How often is the named guardian appointed?

High likelihood of the appointment of a nominated guardian unless the proposed guardian is objected to by a parent, or proposed guardian has a felony conviction, or the Ward (over age 14) objects to the proposed guardian.

3. What do judges consider when making appointments (with or without declaration or nomination of guardian)?

a) age of a Ward;
b) school district of Ward;
c) whether the appointment would split up the residence of multiple children;
d) whether the child has special needs;
e) background of the proposed guardians; and
f) what necessitates the guardianship, such as, illness, armed services, parent unable to care for the child, etc.

4. Disqualification of Persons to be Guardian

The Court will or should conduct a criminal background check on the proposed guardian. The Court will examine any felony conviction issues such as date, nature of offense, probation status, etc. In Illinois, the Court can require a "Roy" hearing to examine the proposed guardian's felony and whether this would impact the best interests of the child. On occasion, the Court can be faced with a proposed guardian that may not be appropriate due to such factors as age, illness, disability, housing, employment, or other people that are living in the proposed guardian's household.

5. Co-Guardians

The Court has NO problem with Co-Guardians so long as the Co-Guardians live in the same household and work together for the best interests of the child. They could be Grandma and Grandpa, brother and sister, close friends, etc. The Co-Guardians need to have the same Care Plan for the minor.

6. Who May Serve as a Guardian?

In Illinois, a person is qualified to act as Guardian of the Person and as Guardian of the Estate if the Court finds that the proposed guardian is capable of providing an active and suitable program for the minor and that the proposed guardian:

a) has attained the age of 18 years;
b) is a resident of the United States;
c) is not of unsound mind;
d) is not an adjudged person with a disability;
e) has not been convicted of a felony (subject to a "Roy" hearing).

7. If the declaration names a married couple, what if they divorce?

Answer: I Don't Know! In Illinois, that would not stop Guardianship. Notice to all parties would be necessary. The Court would proceed in the best interests of the child.

8. What about naming a Guardian in another state?

This can be complicated but not impossible. First consider which state is the "home state" of the minor under the Uniform Child Custody Jurisdiction Enforcement Act. May need to start there

and if the Guardian is appointed, then seek removal of the child to the Guardian's state of residence. After 6 months, if the home state enters an order allowing the child to be removed to another state, you may use this order to circumvent that state's 6 month statute to open a Guardian Estate in THAT state and when a Guardian is appointed, you would need to terminate the Guardianship case in the home state.

9. What if you name a Guardian in another country?

This situation would be significantly different than #8 above because the proposed Guardian would not qualify as a Guardian here in Illinois. May need to open a Guardianship case here as in #8 above and then seek authority to have the child placed in the foreign county. Look out for immigration issues. It would most likely require a Guardian *ad Litem* to be appointed to investigate the "best interests" of the minor.

D. How do Courts handle different assets passing directly to a minor at death (such as cars, weapons, real estate, business interests, valuables, tangibles, personal property)?

The Guardian of the Estate is appointed to handle these issues. Normally, most assets are sold and the proceeds are invested for the benefit of the minor. The problem for the courts is that of storage of the items until the minor reaches 18. That is why liquidation is more attractive to the Guardian. If the cash is not needed by the Estate and the minor Estate is able to pay for storage, then it is possible to retain possession of the items until age 18.

E. Value and Enforceability of Parental Qualifications, Restrictions, or Instructions to Guardian

The powers of a Guardian are found in the Probate Act and there is no provision for parents to "rule from the grave". Any restrictions or instruction would have to come from some kind of Trust which would hold title to assets upon the death of the parent. The Trustee may have an obligation to the Trustor, but the Guardian would only be answering to Court. The Court considers only the "best interests" of the minor.

F. Visitation with Family Members

If the parents are both deceased, Illinois provides for Grandparent visitation with the minor. Visitation may also be granted to any other relative and also to "others" who have an interest in the child. It would be by Petition by the relative and must be in the child's best interests.

G. What Happens at Age 18

The Probate Court loses its jurisdiction over the minor by operation of law upon the minor reaching age 18. The Court has limited jurisdiction at age 18 only to hear the final account of the Guardian of the Estate and the petition for attorneys' fees associated with the presentment of the final account.

If, upon attainment of age 18, the minor is "Disabled" in that the minor fails to have adult capacity, it would be necessary to open a new estate file as an Adult Disabled Person. It may be necessary to keep in place any minor estate budget during the transition to the adult disabled court.

H. Using Probate/Guardianship Court to Repair Unintended or Botched Estate Plan Provisions:

1. Court-directed management Trust. Again, the Guardianship Court's jurisdiction terminates at age 18; if you seek to delay payments past age 18 you will run into an issue here. Perhaps the Decedent Court or Trust Court could make a "clarification" to an Estate Plan, but if that proposed change would delay payment past age 18, I would think the effected minor would need to be represented in that litigation.
2. Court-directed Transfer to UTMA Account. Trouble Here! UTMA accounts are in place to age 21, which is beyond the Guardianship jurisdiction to Order. Now, if a Will or Trust calls for a disbursement to an UTMA, that's different, and a Guardianship is not needed for the minor. UTMA assets are not assets of a minor Guardianship.

I. How Does the Uniform Child Custody Jurisdiction and Enforcement Act Control Which Court has Jurisdiction in Guardianship?

1. The UCCJEA sets forth a statutory scheme to be used in determining the venue of a Guardianship proceeding. At the root of the Statute is an initial determination of "HOME STATE":

a) ….This State is the home state of the child on the date of commencement of the proceeding… (or) was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in this State.

2. A court of another state does not have jurisdiction under Paragraph (1)… (or) a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is more appropriate…

3. All courts having jurisdiction under Paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court in this state is more appropriate…

4. No court of any other state would have jurisdiction under the criteria specified under Paragraphs (1), (2) or (3)

b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a Court in this state.

c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

IV. INTENTIONAL TRANSFERS TO CHILDREN[1]

A. Lifetime gifts and how to give

Estate planners often encourage clients with significant wealth to consider making lifetime gifts to the natural objects of their bounty, either to reduce taxes or because of financial need of the younger generations. There are a number of ways in which lifetime gifts can be more attractive than testamentary gifts in the right situation. Annual exclusion gifts fall outside the estate and gift tax rules as long as the donor is a U.S. taxpayer. Giving away appreciating assets earlier (e.g. during life instead of at death) can push the future income from and appreciation on those assets to the donee without incurring additional transfer tax. Donors can leverage their exemptions by making gifts of assets subject to valuation discounts. For those clients actually paying gift tax, keep in mind that gift tax is computed on a tax exclusive basis (the dollars paid to the IRS are not themselves subject to tax) while estate tax is computed on a tax inclusive basis. Beyond the tax benefits, lifetime donors can have the emotional and psychological benefit of seeing how their descendants benefit from the assets, and the donees have the opportunity to show their appreciation to the donor while the donor is still living.

A hurdle that many people face in parting with assets as lifetime gifts, however, is the fact that the natural objects of their bounty are minor children or grandchildren. Making gifts of cash or securities to take advantage of the gift tax annual exclusion is less attractive when the recipient is a toddler or even a teen unprepared for the responsibility of managing money. In fact, if the assets are given directly to the minor, those assets can become subject to a guardianship and require significant effort and expense to manage them. To avoid this, most donors choose other methods of making gifts to minor children.

1. Direct Payments for Education and Health Care

Under §2503(e) and §2611(b) of the Internal Revenue Code (IRC), certain payments made directly to the provider for health care and education costs do not count as gifts for purposes of the gift and generation skipping transfer taxes. A relatively straightforward way to provide for a minor is for the donor to make direct payments for tuition or health care. These transfers are simple to make, require no tax reporting and do not need a trustee or other manager for the funds. Reimbursement for these expenses is not treated in the same manner however – direct payment to the provider is a critical element. To take advantage of the §2503(e) rule, some grantors create trusts solely for the purpose of making this type of payment so that they can continue after the donor's disability or death. The advantages are the simplicity and favorable tax treatment (no gift, GST, estate or income tax consequences). The downside is the strict limitation on the purposes for which the funds can be used and the requirement that the funds be paid directly to the provider.

2. Uniform Transfers to Minors (UTMA) Accounts

a) All US jurisdictions except South Carolina and Puerto Rico have adopted the Uniform Transfers to Minors Act ("UTMA"), which provides a way to register assets in the name

[1] Jane Ditelberg would like to gratefully acknowledge the kind contributions to the materials for this presentation of ACTEC fellows Susan Bart and Svetlana Bekman, both of whom generously shared research and their own written work on the subject with the author. Any errors that remain are solely my own responsibility.

of an adult or other fiduciary on behalf of a minor. This is typically accomplished by the way the security or account is registered or titled.

b) A transfer to a UTMA may only benefit one minor, and the transfer is irrevocable. *See* UTMA §10. This type of gift is treated as a gift to minor directly for gift and GST tax purposes. Rev. Rul. 59-357, 1959-2 C.B. 212, Rev. Rul. 73-287, 1973-2 C.B. 321.

c) The custodian can only use the funds for the benefit of the beneficiary and cannot use it to relieve a parent of the parent's legal obligation to support the minor. UTMA §14(c). If this were not the case, the parent would be taxed on the income under Rev. Rul. 56-484, 1956-1 C.B. 131.

d) The appeal of using this method to hold assets for a minor is the ease of creating it, the fact that there is no fiduciary income tax return required (any income generated belongs directly to the minor and, subject to the kiddie tax rules under IRC §1(g) , is taxable directly to the minor).

e) The downside to using an UTMA account is that the assets automatically become distributable to the beneficiary at such time as the beneficiary reaches the age of majority. *See* UTMA §20. The uniform law provides for age 21 as the age of majority due to the fact that the IRS permits "minor's" trusts under § 2503(c) of the Code to last until the beneficiary reaches age 21, even though the actual age of majority is often lower for other state law purposes. *See* Comment to UTMA §1. Nevertheless, there may be limits on how long assets transferred to a UTMA account from a guardianship estate or other source that is not a direct gift to the UTMA can be subject to the custodianship. In those cases, the statute may provide that the assets may only stay subject to the custodianship until the minor reaches the age of majority under state law, which is likely age 18. *See, e.g*. 760 ILCS 20/21.

f) In some states, like South Dakota, termination is at the lower age of majority (18). *See, e.g*., S.D. Cod. Laws, §55-10A-22.

g) In sixteen states extending the UTMA account's termination from when the beneficiary attains age 18 or 21 until such time as the beneficiary reaches age 25 is permitted under certain circumstances. Sometimes, only an UTMA created by a donor who specifically allowed the extension of the custodianship beyond the age of majority can be extended. *See, e.g*. Cal. Prob. Code Div. 4, Part 9, §3920.5. In Florida, a beneficiary of a custodianship who reaches the age of majority has the absolute right to require that the custodianship be terminated, even if the donor specified that it could last until age 25. Fla. Stat. Title XL, §710.123.

h) In Illinois the custodian of a UTMA account is permitted to transfer the UTMA assets to a trust for the beneficiary that qualifies under § 2503(c) of the Code. 760 ILCS 20/15(a-5). This can make it possible to create a more robust trust with additional terms to manage the assets if a custodian finds that the authority granted under UTMA is inadequate, perhaps because the UTMA assets are invested in a closely-held business or if the assets have grown in value substantially and additional powers or fiduciaries would be helpful to manage the assets.

i) A direct gift is not the only use for UTMA custodianship accounts. A trust or will or beneficiary designation may provide that the share of a minor can be distributed to a UTMA

custodian for the beneficiary. Other persons holding assets that belong to or should be distributed to a minor are generally granted the power, subject in some cases to dollar amount limitations, to transfer such assets to a new or existing UTMA account for the minor. See UTMA §§4-7, 760 ILCS 5/4.20(c).

> *Example 1 UTMA beneficiary designation for a specific minor: To my daughter, Ava, if she is then living, provided that if Ava is living but under the age of 21, such assets shall be distributed to my brother, Brian, to hold as custodian under the Illinois UTMA for the benefit of Ava. Brian shall be authorized to act for Ava in all respects with respect to the benefits payable to Ava hereunder.*

> *Example 2 UTMA beneficiary designation generally: To my descendants in shares per stirpes, provided, however, that if any descendant is under the age of 18 or is otherwise disabled at the time of distribution, then such descendant's share shall be held by Carol, or if she is unwilling or unable to act, by such other person appointed by such descendant's living parent as custodian for such descendant under the Illinois Uniform Transfers to Minors Act. Such custodian shall be authorized to act for such descendant in all respects with regard to the benefits payable to such descendant hereunder.*

j) UTMAs are popular for their simplicity. No trust agreement is required, no separate tax returns are required, and there is no separate taxpayer identification number. Gifts to a UTMA clearly qualify for both the gift tax and the GST tax annual exclusion. However, they can only be used for gifts up until the donee reaches the age of majority and they cannot be extended longer than the permitted distribution time under applicable state law if the beneficiary is not in a position to manage the money at the time for termination. UTMA assets are also considered the child's assets for purposes such as divorce, financial aid and creditor's claims.

3. <u>529 College savings plans</u>

a) "Qualified Tuition Plans", also known as 529 plans after the Internal Revenue Code section authorizing them, while a creature of the Internal Revenue Code, are created by action of individual states, state agencies, or educational institutions. A comparison of the various plans is available at www.savingforcollege.com. These plans offer the opportunity to contribute funds to be saved and invested for the higher education expenses of a specific designated beneficiary. The owner of the account, whether that person is the donor or another adult, retains the power to change the beneficiary and also the power to withdraw the funds, although that will generate tax and penalties.

b) The funds accumulate income tax free, and in over 30 states, certain contributions of assets to such a plan are deductible for state income tax purposes. As long as assets are withdrawn for qualified education expenses, the assets will not be subject to income tax on withdrawal.
c) Beginning in 2018, up to $10,000 may be withdrawn income tax free from funds in 529 plans for certain primary and secondary school expenses. Note, however, that while this change was made at the federal level, the states have yet to make corrections in their individual state laws. *See* Mulhere, "The Tax Law's Biggest Education Change Is on Hold in Several States", *Money*, January 9, 2018. The consequence is that while the funds applied to those expenses may not draw a federal tax, there will be a claw-back of state income tax deduction benefits for 529 plan funds used for those purposes unless the state programs are changed.
d) Despite the fact that the account owner can change the beneficiary, contributions to a 529 plan are treated as completed present interest gifts for purposes of § 2503 of the Code and qualify for the gift tax annual exclusion as well as the GST tax annual exclusion. Furthermore, donors with significant assets are able to make a contribution of up to five times the annual exclusion rate at one time and effectively apply the annual exclusion for future years to the contribution to avoid payment of gift tax. *See* IRC §529(c) (2) (B). This allows the assets to compound more quickly to increase the funds available to the beneficiary when the time for tuition payments comes.
e) The account is not includible in the estate of the owner or the beneficiary, except to the extent of excess contributions (includible in the estate of the donor). There is no gift tax imposed when the beneficiary is changed.
f) The "owner" of the account, who might be the donor or might be another relative, is treated as the owner of the funds because they have the right to divert the funds to a different beneficiary who falls within a circle of permitted related party transferees. For this reason, 529 Plan accounts can be an advantage over other savings accounts in the name of the child when it comes to determining eligibility for financial aid.
g) The downsides of 529 plans are the investment limitations (investments are limited to what a specific plan offers, and cannot be changed more than twice a year), and the fact that if the funds are not needed for education expenses, they incur a penalty as well as tax on withdrawal unless they can be transferred to benefit another beneficiary with educational expense needs within the defined family group. There are exceptions when a beneficiary does not use college funds because he or she attends a US Military Academy, obtains certain kinds of scholarships, or dies/becomes disabled. Funds for a qualified disabled beneficiary can also be rolled over to an ABLE account for that beneficiary (see IRC §529A).
h) A 529 plan under certain circumstances may be created by a custodian, a guardian, or a trustee with money belonging to the minor or with funds held for the benefit of the minor, in order to obtain the tax-free investing opportunities.
i) One issue that arises is when the "owner" of the plan, such as a grandparent, dies before the plan is fully distributed without having named a successor. In that event, there can be an issue as to what happens to the account – while the funds are still held for the

beneficiary, what happens when ownership passes under grandparent's estate plan to a residuary trust, for example?

j) 529 Plans have very attractive income, gift, estate and GST tax treatment. They are simple to create and they require no annual income tax returns or other reporting. The owner of the account retains some ability to change the beneficiary, and can always take the money back if they are willing to pay the taxes and penalties. The assets are considered as belonging to the account owner and not the child for financial aid purposes. However, they have a limited purpose and there are limits on how much can be contributed to such an account (between $230,000 and $560,000 depending on the plan), which may be a limitation for wealthier donors. Another consideration is the fact that tuition is something that can be paid directly without constituting a gift, as provided in IRC §2503(e). If parents, grandparents, or other family members are able to pay the tuition expenses currently out of income or savings, they may want to use their gift tax annual exclusions for a particular beneficiary in a way that will further reduce their overall transfer tax burden, such as with leveraged gifts (discounted gifts, gifts to an insurance trust, etc.)

4. <u>2503(c) Trusts</u>

a) The annual exclusion from gift tax under § 2503 (b) and the GST tax annual exclusion of § 2642(a) of the Internal Revenue Code only apply to gifts of 'present interests'. Under Treas. Regs. §25.2503-3(b), a gift of a present interest requires that the donee has an unrestricted right to the immediate use, possession, or enjoyment of property or the income from it. This generally means that gifts to trusts that are designed to hold assets for a beneficiary's future benefit are not eligible for the annual exclusion. There is an exception in §2503(c) for gifts made while a beneficiary is under age 21 to certain types of minor's trusts generally referred to by the Code Section as "2503(c) Trusts".

b) These trusts need to be for a single beneficiary who is under age 21 at the time of the gift, allow distributions to the beneficiary during his minority without significant restrictions on the trustee's discretion, and call for distribution no later than age 21 or the beneficiary's earlier death. The trust must also be includible in the minor's estate (generally accomplished by giving the beneficiary some type of general power of appointment or by providing that on the beneficiary's death, the assets are payable to his or her estate). The fact that a beneficiary under local law is too young to execute a valid Will does not count as a restriction on this power.

c) Some donors comply with the age 21 distribution rule by granting the beneficiary the right to withdraw assets at that age for a limited period of time (30-60 day window beginning on the beneficiary's twenty-first birthday), with assets that are not withdrawn remaining in trust until the beneficiary is older. This approach was approved by the IRS in Rev. Rul. 74-43, 1974-1 Cum. Bul. 285.

d) 2503(c) trusts for a grandchild or more remote descendant can qualify as skip trusts to which the automatic allocation rules will allocate GST exemption to any transfer in excess of the GST annual exclusion.

e) 2503(c) trusts are taxed as complex trusts for income tax purposes, with the caveat that amounts distributed to or for the benefit of the beneficiary will nearly always be subject to the Kiddie Tax under IRC § 1(g). If there is a right of withdrawal at age 21, the trust

thereafter will be treated as a grantor trust to the beneficiary under § 678 of the Internal Revenue Code.

f) 2503(c) trusts are comparatively simple to create and administer, and clearly qualify for both the gift tax and GST tax annual exclusions. They are more complex than an UTMA account, because they have a separate TIN and require a separate tax return filing. The ability to hold the assets until 21, and then to continue after the beneficiary reaches age 21 if the assets are not withdrawn, is attractive, but it is important to note that while the trust can continue after age 21, gifts to the trust after the beneficiary is older than 21 will NOT qualify for the gift tax annual exclusion.

5. A Crummey Trust.

For clients wishing to make annual exclusion gifts to a trust for a beneficiary both before and after the beneficiary reaches the age of majority, a Crummey Trust may be preferable.

a) Under this type of trust, the contributions qualify as present interest gifts due to the right of the beneficiary to withdraw contributions during a limited period of time after their initial contribution. *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968).
b) These are popularly used to qualify gifts for the payment of insurance premiums in an Irrevocable Life Insurance Trust for the gift tax annual exclusion.
c) A caveat with Crummey Trusts is that if a GST annual exclusion is needed as well as a gift tax annual exclusion, the trust must have only one beneficiary and it must be includible in that beneficiary's estate, so the typical irrevocable insurance trust with multiple beneficiaries each holding a right of withdrawal will not work. *See* IRC §2642(c)(2)
d) The beneficiary's right of withdrawal must not be illusory, and the beneficiary must have knowledge of his or her right of withdrawal and a meaningful opportunity to exercise the power. Rev. Rul. 81-7, 1981-1 Cum. Bul. 487, Rev. Rul. 83-108, 1983-2 Cum. Bul. 167, *Turner v. Commissioner*, T.C. Memo. 2011-209, *Holland v. Commissioner,* T.C. Memo. 1997-302. However, the fact that a guardian might have to be appointed to exercise the power is not a limitation that disqualifies it. *See Crummey, supra*.
e) If the Crummey right of withdrawal is over all contributions to the trust (i.e. it is granted for gifts up to the annual exclusion limit and no additional gifts are made or it is granted over all contributions with no limit), the IRS takes the position that the lapse of the rights of withdrawal is equivalent of a release and causes the trust to be a grantor trust under § 678 of the Internal Revenue Code to the beneficiary. *See, e.g.*, PLR 9034004 (May 17, 1990). This can subject the income to the Kiddie Tax under § 1(g) of the Code. It can be a useful way to make sure the trust is eligible to hold S corporation stock. If the right of withdrawal only extends to some of the contributions, however, you will end up with a partial grantor trust with the fractions changing every year there are new rights of withdrawal granted. This can be complicated to administer and allocating the income between the grantor and non-grantor portions will make the income tax returns more challenging to prepare.
f) Crummey trusts for a single beneficiary allow the grantor the most flexibility in determining what happens to the assets and when the beneficiary can have access to them.

However, they are among the most complicated to administer. Not only does such a trust need its own TIN, it will also require its own tax return, which may be complicated if the trust is only partially a grantor trust. Furthermore, the trustee has record keeping obligations to track contributions and the beneficiary's rights of withdrawal, and typically is required to provide written notice to the beneficiary of each contribution. That being said, Crummey Trusts are one of the only vehicles that can continue receiving gifts on behalf of a child after the child reaches the age of majority (so a second vehicle is not required) and have those gifts qualify as annual exclusion gifts.

g) Multi-beneficiary Crummey trusts do not qualify for the GST annual exclusion under IRC §2642(c) (2) but they can qualify for the gift tax annual exclusion under IRC §2503. Where there are no skip person beneficiaries or the donor is willing to allocate GST Exemption to the trust, this can be attractive to donors who want to have a single fund for all their beneficiaries, either because of the potential needs of the beneficiaries or because of the type of investments. 529 plans, UTMAs, direct gifts and 2503(c) trusts are all ways to benefit a single beneficiary – if there is a desire to benefit a class of beneficiaries then the best option may be a Crummey trust.

B. Beneficiary Designations of Minors for IRAs, Life Insurance and other assets passing at death

There are many kinds of assets that do not pass via a decedent's Will or even her revocable trust. Given the shift in retirement funding (from pension plans, which leave nothing to pass at the employee's death, to defined contribution plans and self-funded IRAs, which because of the RMD calculation method will typically leave a surplus at the participant's death) a significant amount of wealth passes via beneficiary designations. According to the Investment Company Institute, as of December 31, 2017 35% of the financial assets of American households were in retirement plans, and they constituted in the aggregate $28.2 trillion. (April 19, 2018). Retirement Plan participants and IRA owners are permitted, and encouraged, to name beneficiaries to receive such assets at death. With tax deferred plans like 401(k) and IRA accounts, tax deferral can be prolonged or "stretched out" when beneficiaries younger than the plan participant are named. However, there are pitfalls too in naming a minor as a beneficiary.

1. First, there is the obvious issue of how the minor is going to deal with the funds. The beneficiary of a qualified plan (QP – for this purpose a plan meeting the requirements of IRC §§ 401(a), 403(a) or 403(b)) or Individual Retirement Account (IRA) can deal with the account as if it were his or her own, in terms of making investment decisions, directing roll overs or trustee-to-trustee transfers, and withdrawing assets from the account. However, when the beneficiary is a minor, the beneficiary cannot practically or legally do so as minors lack the capacity to contract. If a minor is named directly as the beneficiary of such an asset, his or her guardian will need to act on his or her behalf. This can add cost and complexity to the management of an otherwise simple asset. In some cases, where a UTMA account already exists for the beneficiary or a family member is willing to create one, the IRA custodian can accept direction from the custodian regarding the minor's

interest in the IRA, but in some states there are limitations on the dollar amount that can be handled that way.

2. An IRA (or QP) beneficiary will generally have to withdraw a minimum amount each year from the account (annual required minimum distribution or RMD). *See* IRC §401(a) (9) (B) (iii) and Treas. Reg. §1.401(a) (9)-5, Q&A-5. As long as the beneficiary is an individual, that person can use his or her own life expectancy in computing the RMD, which means that a young beneficiary has the option to withdraw the funds from the IRA over a much longer time period, and therefore defer the income tax longer, than an older beneficiary. If the funds in the account are being spent currently for the child's support, the payments made from the IRA for the child's benefit will count towards the RMD. However, if the RMD exceeds what is needed for the minor's support, that amount will need to come out of the retirement plan and be otherwise held and managed for the direct benefit of the minor, typically in a guardianship estate or on occasion with the court's permission, a UTMA account.
3. If the IRA is a "trusteed IRA", meaning that the IRA agreement gives the IRA provider fiduciary powers and duties over the funds beyond investment and custody, the trustee can be given the power to spend the funds on behalf of the account beneficiary rather than distribute them outright, although it cannot permit further accumulation of the RMD. This allows the account owner, by restrictions written into the beneficiary designation, to restrict the beneficiary's right to withdraw assets in excess of the RMD, either permanently or until the beneficiary reaches a certain age. It can alleviate the need for a guardian to manage the investments and make the expenditures for the minor. The IRS provides a model form 5305 for Trusteed IRAs, and many financial institutions that provide custodial IRAs also provide Trusteed IRAs. The beneficiary of a trusteed IRA is treated as the Designated Beneficiary and the RMD's are calculated using his or her life expectancy. To use this approach, the IRA owner has to establish a Trusteed IRA during his or her lifetime, and then use a restricted beneficiary designation to provide what limitations are on the beneficiary (e.g. cannot withdraw assets in excess of RMD until age 25). It could be more expensive than a custodial IRA, but it provides fiduciary distribution services as well as investment services and therefore may be less expensive than a guardianship would be.
4. As an alternative, the account owner can name a custodian under a UTMA for the child as the beneficiary of the IRA or QP, eliminating the need for a guardian's involvement. In that case, the RMD can be withdrawn from the plan by the custodian and then held in another account titled as UTMA for the same child.
5. Plan participants or IRA owners who contemplate leaving significant IRA or QP assets to a minor may want to consider naming a trust as a beneficiary of the assets. The caveat is that not all trusts are created equal for this purpose, and the terms of the trust can create very different RMD calculations and tax payments for the beneficiary.
6. For a Trust to constitute a "Designated Beneficiary" under the IRA and QP rules, the plan administrator or custodian must be able to "look-through" the trust to determine if there is a designated beneficiary, which is a necessary requirement for stretching out the IRA withdrawals. *See* Treas. Reg. §1.401(a) (9)-4, A-5. The requirements to "look through" a trust are:

- The trust is valid under state law.
- The trust is irrevocable or will, by its terms, become irrevocable upon the death of the retirement account owner.
- The trust has identifiable individual beneficiaries.
- A copy of the trust instrument (or a list of all trust beneficiaries, including contingent and remainder beneficiaries) is provided to the IRA custodian or plan trustee by October 31 of the year following the year of the account owner's death.

7. A trust that allows the RMD assets withdrawn from the plan account to be accumulated in the trust is an accumulation trust. To determine if an accumulation trust constitutes a Designated Beneficiary of an IRA or QP, requires looking at all of the trust's beneficiaries, including those who may benefit in the future from IRA/QP assets not distributed to the current beneficiary as well as the potential objects of any powers of appointment. *See* Treas. Reg. §§1.401(a) (9)-4, Q&A-5; 1.401(a) (9)-5, Q&A-7(c) (1). If all of those beneficiaries are individuals (not entities such as charities) and can be identified, then the RMD will be computed based upon the life expectancy of the oldest of those identifiable beneficiaries. Treas. Reg. §1.401(a) (9)-4, A-1. Te oldest identifiable beneficiary may be someone other than the minor who is the primary beneficiary, such as the person or persons, who will receive the remainder if the minor dies without receiving all the IRA or QP assets.
8. An exception to the foregoing rule is for "conduit" trusts, which require the trustee to withdraw the RMD from the IRA or Qualified Plan and immediately distribute it to a specific identified individual. In that case, there can be other current or future beneficiaries of the trust that are unknown or are not individuals, but the trust still qualifies as a Designated Beneficiary because only one specific identifiable individual will receive the assets of the IRA or QP. *See* Treas. Reg. §1.401(a) (9)-5, A-7(c) (3), Example 2. These are attractive for Marital Trusts and other trusts for adults, but can be problematic for minors, because of the immediate distribution requirement. It may be inconsistent with a client's goal of preventing the distribution of assets to a beneficiary unequipped to handle them. However, if the funds will be needed for the minor's support anyway, and there will be a guardian or custodian who can act to expend those funds in that manner, this may be something to consider even for a minor.
9. If the IRA passes to an estate or to a trust that does not meet the requirements above for a conduit trust or an accumulation trust, the account will be treated as not having a "Designated Beneficiary" at the account owners'death. This can accelerate the recognition of income by the beneficiary, reduce the opportunities for tax deferral, and thereby reduce the tax benefits of the IRA or QP. With no Designated Beneficiary, the account of an owner who dies before age 70 ½ must be withdrawn in full before the fifth anniversary of the account owners' death. *See* Treas. Reg. § 1.401(a) (9)-3, Q&A-1. If the deceased account owner of an IRA or QP without a Designated Beneficiary was beyond the required beginning date at the time of death, the applicable distribution period is over the remaining life expectancy of the deceased IRA owner. In each subsequent calendar year, the distribution period is reduced by one year. Treas. Reg. §1.401(a) (9)-5, Q&A-5(c) (3).

10. A trust that is a grantor trust to the beneficiary can enter into transactions with the beneficiary without income tax consequences. A 2008 Private Letter ruling (200826008) relied upon this theory to provide that a change of ownership of an inherited IRA from the minor to such a trust did not trigger any income taxes. In that case, the court appointed guardian of a minor's estate asked the court to authorize the creation of a trust that would be a grantor trust to the minor beneficiary of the IRA to which the minor's share of the IRA would be assigned. The minor was the sole beneficiary and the trustee had discretion to make discretionary distribution to the child. The child could withdraw all the assets at a stated age. It was determined that this did not recognize income. It should be noted, however, that (a) the minor was named directly as the beneficiary of the IRA. This is not a situation where the trust was named as the beneficiary. There was no question that there was a Designated Beneficiary or the RMD would be computed based upon the minor's life expectancy, and (b) there is no specific authorization for this approach in the Internal Revenue Code or the Treasury Regulations. Clients contemplating this type of post-mortem transfer should consider applying for their own private letter ruling from the IRS.
11. While life insurance, pay-on-death accounts, non-qualified retirement benefits, and stock options may not have the same income tax incentives to name a youthful beneficiary, nonetheless when the natural object of the decedent's bounty is a minor child, these other types of assets that typically pass by means of a beneficiary designation need to be reviewed carefully. To the extent ownership is not transferred to a trust prior to the death of the participant or owner (as with an irrevocable life insurance trust or other gift trust), provisions need to be made in the beneficiary designation if the client wishes to avoid a guardianship imposed over proceeds passing to a minor. Designating a trust or a UTMA account as the beneficiary can streamline the administration of the assets after death and provide for the retention of assets in trust beyond the age of majority.

C. Designing Trusts for Children (testamentary or inter vivos)

The grantor of a trust for the benefit of children has a lot of freedom, but also a lot of decisions to make, in determining the ways in which the trust will benefit the children. Does the grantor want the trust to last only during minority, or will it continue into adulthood or even for the beneficiary's lifetime? What kinds of distributions can be made from the trust and who makes those decisions? Will each child have his or her own trust, or will they share a single trust and perhaps benefit unequally from it?

1. Distribution Standards and types of trustee discretion

a) **Ascertainable Standard.** A familiar standard for distributions is health, education, support and maintenance – the standard determined by the Internal Revenue Code to be an "ascertainable" standard, or one that a beneficiary can enforce against the trustee. There are tax reasons one might use this standard if the beneficiary or a related party is acting as a trustee or otherwise has discretion over the distribution. *See, e.g.* IRC §2041(b), IRC §674(b) (5). However, even in the absence of such considerations, some grantors prefer this type of standard as one encouraging the trustee to be restrictive in making distributions. How it is interpreted can also be impacted by whether or not the trustee is directed to take

into account other assets that the beneficiary could use for those purposes or if there is a specific standard of living specified (e.g. maintenance in the standard enjoyed by such beneficiary prior to my death or maintenance in circumstances similar to those of my other children etc.).

b) **Non-Ascertainable Standard.** A second option is a broad discretionary standard (non-ascertainable standard) – which generally permits discretionary distributions for the beneficiary for things such as best interests, happiness, or well-being. *See* Treas. Reg. §20.2041-1(b) (2). These kinds of standards are generally interpreted to authorize (though not direct) loose purse strings by the trustee. Not only would this standard justify distributions for more extravagant lifestyles, it may also authorize distributions to a beneficiary to make gifts to his own children or to create and fund a charitable foundation.

c) **Sole discretion.** This is the result when the grantor puts no limits on the trustee's distribution discretion. It might be drafted as "distribute to the beneficiary so much of the net income and principal of the trust as the trustee in such trustee's sole discretion deems appropriate." This type of standard is sometimes considered justification for the trustee to limit distributions or for the trustee to be very generous. It is helpful for the grantor to provide precatory guidance, directly in the trust agreement or in other contemporaneous communications with the trustee on what the grantor intends in using such a standard. These might include authorizations regarding distributions for a beneficiary to buy a home or start a business, or provide for the beneficiary's own family.

2. Pot trust vs. single beneficiary trust for multiple child families

While the parents are living, many families do not consider whether they are spending equally on each child and view the available resources as a pot from which to satisfy everyone's needs. Johnny needs braces, Suzie wants a big wedding, Joe wants to go to Harvard, and Mary has a full-ride basketball scholarship. In that vein, many parents consider leaving their assets in a single pot trust to provide for the children as a group. However, grantors should take into account that:

a) Not all beneficiaries will agree that they should receive fewer trust distributions from the pot than a sibling because they have fewer needs or are better able to support themselves.
b) An assumption that the trustee will make all distributions equally is not realistic or practical, particularly with respect to principal invasions, where the needs of the beneficiaries differ and there is a standard that requires considering the needs or desires of the beneficiary.
c) Trust accountings for pot trusts go to all the beneficiaries, which mean that, once the beneficiaries are over 18, the other siblings will see evidence of what each beneficiary is receiving. This can lead to disputes and make challenging relationships more difficult.
d) Beneficiaries with different attitudes towards money and different economic situations often advocate for different investment policies for a trust – one beneficiary is a high earner and is currently in a high tax bracket, so she advocates holding non-dividend paying stocks while her brother who has current income needs advocates for a fixed income focused portfolio and their sister wants income that is tax exempt in California.

These competing interests can be very difficult to balance in a single trust. The issues are compounded when the pot trust covers children from different marriages and/or multi-generation

classes such as "descendants" or "issue". A wise family advisor has commented that "people who cannot harmoniously share a house together should not share a trust together".

Individual trusts for each beneficiary, or the ability to sever a pot trust on some basis to create individual trusts, can alleviate these issues. Clients sometimes fear that the expenses of separate tax returns and trustee fees will make separate trusts more costly, but these costs may pale in comparison with the costs of litigating disputes among the beneficiaries or the costs of reforming, decanting or otherwise taking action to sever the trusts later. For situations where it makes sense for the trusts to invest together even if distributions are separate, family investment entities may be a useful solution.

3. Distribution ages

When is a beneficiary old enough to have the assets distributed outright to him or her? At 18? 21? 25? I once had a client make the distribution age 90. This is a difficult question for many clients, in part because we do not have crystal balls to tell us what will happen when the happy toddler before us becomes an adult. Some thoughts to consider on this front:

a) Does the grantor know the child now and have any feelings about the child's personality and/or relationship to money? This is far more likely when you are dealing with the parent of young adult children than if the children are minors, or are unborn future descendants. Some young people demonstrate fiscal maturity at a young age and their parents know that if they come into a sum of money at an age like 21, the funds will not be squandered.
b) How much money is involved? The more money, the more likely the parents may wish to consider giving the child more than one chance to demonstrate maturity or to dribble the funds out more slowly. Some clients authorize the distribution of all the income first, and then grant the child rights of withdrawal of fractional portions of the trust over the child's lifetime. In that case, rights of withdrawal that the child can exercise if he wishes may be preferable to mandatory distributions at certain ages, given the possibility that capacity issues or the beneficiary's preference for the investment skills of the trustee may mean he or she prefers to leave the assets in trust for some period of time. One theory for this approach is that if the beneficiary makes an immature decision with respect to the funds received in the first distribution, all is not lost, and there is a chance to further educate the beneficiary before the time for the next withdrawal.
c) Is the child in a situation where creditors or spousal claims against assets in the child's own name are likely? Again this is more apt when dealing with young adults than minors. However, with a child in a profession with a high risk of liability claims (anesthesiologist or litigator) or other creditors (business owner who personally guarantees corporate debt) or a child in a rocky marriage without a prenuptial agreement, the parents may want to consider holding the assets in trust longer, or perhaps for the child's lifetime, to offer the protection from creditors of a spendthrift trust.
d) Is the child in a position to save for his or her own retirement? The parents may wish to consider leaving some or all of the assets in trust until the beneficiary reaches normal retirement age, so that there is a sum put away for retirement in case the child does not have his or her own savings or pension.

4. Special or Supplemental Needs Trusts

The advantages and requirements for Special Needs Trusts are beyond the scope of this presentation but it should be noted that:

a) Some clients prefer to make all trusts supplemental needs trusts, with the fear that any child could become dependent upon state aid at a later point in life. While this may be useful if in fact that situation arises, depending upon how the trust is drafted it can also preclude the trustee from making distribution for things like education or health care for a child who is not disabled or who is not receiving government benefits.
b) Others want to include "contingent" specials needs trust language, that springs into action if needed to protect the assets. This may work depending upon how the condition is triggered. If the trust has the ability to provide support to a beneficiary and the special needs restrictions come into play if the beneficiary RECEIVES state aid, the state may have a basis to deny benefits. The condition has to be tied to some other trigger (having a disability, being ELIGIBLE for aid, etc.)
c) Some state decanting statutes now expressly permit the use of decanting to protect assets otherwise passing to a disabled beneficiary by permitting the trustee to pour the assets into a newly created supplemental needs trust (*see, e.g.*, 760 ILCS §16.4(c)(4), Colo. Rev. Stat. § 15-16-913, § 13 of the Uniform Trust Decanting Act.) If the trustee has this power, under state law or by the terms of the trust agreement, it may be possible to forego the conditional language in the trust and take a wait and see approach.

5. Providing for guardian and/or guardian's family from child's trust

Something to consider when creating trusts which, if they come into being, will be held to benefit a minor child who will be living with a guardian other than the surviving parent, is whether the guardian may need financial assistance from the trust in order to serve in that role, despite receiving distributions from the trust for the child's own expenses.

a) For example, is it enough for the trust to permit distributions for the child's health care needs, tuition, clothes and food, or will the guardian struggle to provide a suitable home for a bigger family, or need a bigger or safer car? In these cases, the grantor may want to consider making provision in the trust for distributions to the guardian that may only tangentially be for the benefit of the child but which will facilitate the guardian taking on the responsibility for the child – for example funding the purchase of a larger home or a home in the community where the child was raised, or paying a stipend to the guardian to allow the guardian to reduce the hours worked for pay to have more time to raise the child.
b) A similar concern is that the opportunities that the grantor would wish to have provided for the child will not be possible because they are things the guardian cannot provide for himself or herself and his or her own family – for example camps, lessons, enrichment activities, vacations, or private school tuition. Under certain circumstances the grantor may wish to provide for distributions to the guardian for the well-being of the family of which the child is now a part (for example Disney World or European vacation) or to provide similar scholastic or enrichment opportunities for the other children in the household to avoid singling out the ward.

6. Trust provisions with behavior conditions

a. Restrictions

Grantors more and more often use the terms of the trusts they create to try to influence the activities or behaviors of the beneficiaries. This is typically done by directing the trustee to curtail or limit distributions from a trust in the event a beneficiary does not comply with standards set forth in the documents. Typical ones apply in the event a beneficiary has a substance abuse problem or does not achieve certain educational milestones such as receiving a degree from a four year college. Others provide funds to match a beneficiary's earned income, hoping to create an incentive for the beneficiary to earn more on his or her own. Other types of restrictions that come up are exclusion of beneficiaries who do not adhere to the grantor's religious beliefs, including beliefs on marriage, or beneficiaries who fail to enter into a premarital agreement whereby their spouse relinquishes rights to the beneficiary's inherited assets. I have reviewed a trust that precluded distributions to any beneficiary addicted to pornography. In some cases, these are based on actual concerns the grantor has about the specific beneficiary, while others reflect the grantor's fears about what might happen to beneficiaries who are young, or perhaps not even in being, when the trust agreement is drafted.

b. Compliance

Those of us representing trustees recognize that these types of provisions, while often very heartfelt on the part of the grantor, are things that a trustee realistically cannot monitor. While a trustee can require a beneficiary to present evidence of receiving a degree, how does a beneficiary present evidence of his adherence to a religious tradition? What about the impossibility of proving a negative, such as I am not addicted to pornography, or I have not cohabitated outside of marriage? A trustee who has been making distributions to a single beneficiary generally would not have any way except news from the beneficiary herself that she has married anyone at all, let alone someone of another faith.

A common problematic one precludes distributions to a beneficiary that does not enter into a premarital agreement or a postmarital agreement in which the spouse relinquishes rights to inherited assets. These present a significant problem to the trustee because they typically require that the agreement be "effective" or that it be "valid in all jurisdictions". These are legal conclusions a trustee is not in a position to make, and are in some cases conclusions that a trustee would be hard pressed to find a lawyer to give a legal opinion on.

Addiction to illegal drugs, prescription medication, or alcohol is something it may be possible to prove, but not without privacy invading testing. A corporate trustee may not be in a position to know whether or not to administer such a test because they see the beneficiary less frequently than family members. A family member trustee may have more observational data, but relationships may come under strain if the family member acts upon those observations to require drug or alcohol testing. The terms of the restrictions may inform what type of compliance is needed as well. For example, if a trust agreement states that "a trustee may make no distributions to Diane without evidence at the time of such distribution Diane is not addicted to illegal substances" will require frequent inquiry. Compare that to the following language that requires testing only if the trustee has reason to believe there is a problem.

> *If at any time the trustee believes that a beneficiary of any trust hereunder is unable to give reasoned attention to financial matters because of an addiction to illegal substances, alcohol or prescription medications, the trustee may request that such beneficiary submit to medical testing and may withhold any mandatory distributions other than payment for any treatment sought by the beneficiary, until such time as the beneficiary has been free from use of such substances for a period of 90 days.*

A drafting attorney also needs to consider the application of HIPPA and other privacy laws to medical information collected by a trustee, who pays the cost of obtaining the testing, and how a beneficiary is able to demonstrate rehabilitation.

Restrictions on distributions to a beneficiary on the grounds of religion or marriage choices may face public policy arguments against them. For analysis of the scope of those public policy arguments, *see In re Estate of Feinberg,* 235 Ill. 2d 256 (2009), which upheld the exclusion of a granddaughter who married outside the Jewish faith.

c. How and by whom can they be enforced?

In addition to the fact that these types of restrictions are not self-executing, they are also not self-enforcing. In the event a trustee does not comply with the provisions, what happens? For example, a trustee is directed to withhold distributions to a beneficiary who is a habitual user of marijuana. The trustee decides not to discontinue distribution to a beneficiary who uses medical marijuana to treat a seizure disorder, because it is under medical supervision, and because it is legal under state law where the beneficiary arises. A wise trustee might obtain court instructions or an agreement of all the parties that this is not inconsistent with the grantor's intent, as marijuana was completely illegal at the time the grantor drafted the trust. The beneficiary who did not receive a distribution can object, as the plaintiff in the Feinberg case did, but what happens when the trustee makes the distribution? Beneficiaries who would otherwise take the funds if they were not distributed to the marijuana user might complain, but they might also wish that the trustee exercise similar forbearance with them. If the trust is a single beneficiary trust and the beneficiary holds a testamentary power of appointment, there might not be anyone with standing to oppose. The grantor who wishes to include this type of language in a trust should consider how and by whom such a limitation will be enforced.

d. Alternatives

For grantors who wish to include such provisions, the drafting attorney should take the time to determine what the primary concerns are and what outcome the grantor wants under various scenarios. Perhaps the grantor is open to giving the trustee broad discretion to make or withhold distributions, along with a statement of the grantor's values intended to inform the trustee in exercising the discretion would be appropriate.

> *In exercising the discretion granted to the trustee under this Article, the trustee shall be guided by the following values of the grantor which the grantor expects each of her descendants to emulate:*

- *The pursuit of higher education culminating in a four-year degree from an accredited U.S. college or university or the foreign equivalent*
- *Gainful employment, including employment in the arts, academia, or the helping professions and military service*
- *Care for minor, disabled, and elderly family members*
- *Support of charitable organizations*
- *Healthy lifestyle choices, including avoiding abuse of or dependence on alcohol, legal or illegal drugs (other than as prescribed by the beneficiary's physician)*
- *Fiscal responsibility and the avoidance of excessive debt*

A grantor could also consider naming an individual who by virtue of their relationship with a particular beneficiary or beneficiaries to be a trustee or other fiduciary with responsibility for determining a beneficiary's eligibility to receive distributions, based upon that person's judgment, which the grantor trusts.

Grantors with concerns about a specific beneficiary can make sure that such beneficiary's share of assets remains in trust longer, perhaps for the beneficiary's entire lifetime and limit mandatory distributions.

Finally certain of these conditions can be built into an incapacity clause that will preclude the incapacitated individual from exercising powers over the trust (rights of withdrawal at ages, naming successor trustees, serving as a trustee, etc.).

D. Minor Children in Business Succession Planning

While many business owners dream of adding "And Sons" to the business's name, there is a very different reality when the sons or daughters are minor children. Passing interests in closely-held businesses to minors can have significant consequences for both the minor and the business. Whether the goal is to continue the business or sell either the business or its assets upon the founder's death, things become much more complicated when the successors are minors.

1. Management vs. beneficial interests

While a parent may want a minor child to receive the financial benefit of owning the business, it is not realistic to expect that the minor will take over the management and operation immediately, or even when the child reaches maturity. This means that to successfully transfer the economic benefits to the business to the minor, there needs to be a division between the ownership and the management of the business. There are a number of ways to approach this – one is to sign the outside managers to financially advantageous contracts that provide an incentive to stay on and manage the business for the minor beneficiaries who own the business, through a guardianship or a trust. Another option is to create voting and not voting shares or other business interests that can go to different people – so the minor gets non-voting shares that have no management rights or obligations, but accrues economic benefit from the business. If there is a concern that managers will accumulate too much liquidity inside the business and leave the child without means of support, the non-voting shares could be preferred stock.

2. Retention of Key Employees

The owner of the business needs to have confidence that the managers of the business will be able to continue the operations and also be willing to do so when the benefits are passing not to them but to the child. Will they be willing to stay on? Do they need economic incentives to continue managing the business? ESOPs, stock options, phantom stock and other incentive compensation programs can be implemented to benefit both parties.

3. Who can (or should) manage a business owned by or for a minor child?

a) The person who is chosen to have the care and custody of the minor, and even the person who has the responsibility for financially providing for the minor from his own or other sources, may not be the right people to make decisions about an operating business.
b) Business partners or non-owner managers may have conflicts of interests in acting on the minor's behalf, given their own personal interests in the business. However, they may also be the ones in the best position to understand and/or manage the operating business. If this is the grantor's plan, it is helpful for the trust agreement or Will to include provisions waiving the conflict of interest for at least some purposes, and for the grantor to be specific in the powers granted to the fiduciary.
c) Independent fiduciaries with business acumen or experience may be advantageous in these situations as they can bring an unbiased eye to questions such as whether the value for the minor is maximized by operating the business or selling it, what the proper compensation for the managers might be, and whether the managers are performing adequately.

4. Buy Sell Agreements

A stock restriction agreement with cross-purchase provisions, perhaps funded by key-man life insurance, can provide a mechanism for partners or other shareholders to buy the business interests passing to the minor on terms the grantor previously agreed were fair, allowing funds to go to the minor for his or her support, and allowing the other business owners to prevent the ownership interest in the business from being in the hands of outsiders managing it on behalf of the minor child.

5. Treating Beneficiaries equitably vs. equally

Business owners with minor and adult beneficiaries may wish to consider whether leaving the business to such beneficiaries "equally" is in fact the most advantageous plan. This comes up frequently when there are children from a first marriage who are adults, perhaps already involved in the business, and minor children from a subsequent marriage. Leaving the ownership of the business to all of the beneficiaries in equal shares may be "equal", is it equitable? And is it practical? Leaving other asserts, such as life insurance proceeds, real estate, and other assets in trust for the minors, while the business passes to the adult beneficiaries may be more satisfactory in some cases. This may depend on the relationship between the minor and adult beneficiaries, the role of the minor's other parent, and the comparative values of the business and non-business assets in the estate.

E. Excluding Child(ren) from an Estate Plan

In most US jurisdictions, the testator has complete freedom to exclude one or all of her children from receiving assets at the individual's death. In planning for individuals with children, it is an important first step to decide whether or not the children will be beneficiaries of the individual's estate. Here are some of the reasons a testator may want to exclude one or more of his children:

1. "I love you" Wills (passing everything to the surviving spouse)

a) Practical with non-taxable estates for couples in a first marriage with only mutual children.
b) Advantage is simplicity
c) Risk is that surviving spouse disposes of assets to someone else (perhaps a new spouse or subsequent children).

2. 100% Marital Trust plan

If the unified credit has been used up during the decedent's lifetime (a big estate) or where the income from all the assets is needed to support the surviving spouse (usually a relatively smaller estate), a 100% Marital Trust may be necessary or tax effective.

a) Whether or not a QTIP election is made for part or all of the trust under IRC §2056(b) (7), for this type of trust, the spouse is the sole beneficiary during his or her lifetime.
b) The advantage of the marital trust approach is addressing the needs of the spouse while curtailing the spouse's right to divert assets away from the children at the spouse's subsequent death.
c) In these cases, the decedent's children, perhaps including children from another marriage or relationship, end up waiting until the surviving spouse's death to receive assets from the decedent. This is typically more tolerable to the children when the surviving spouse is their other parent. It can create significant family issues when the surviving spouse is close in age to the children from a prior marriage, as they may not be alive to receive a benefit at the surviving spouse's death. If there is sufficient wealth in the family, using lifetime gifts that do not generate much if any gift tax, such as annual exclusion gifts, GRATs or payments of tuition and medical expenses, or funding a life insurance policy on the parent's, through a trust or otherwise, can make sure that the children from the first marriage do not have to wait until the surviving spouse's death for their entire inheritance.

3. Children otherwise provided for outside of estate plan (e.g. lifetime gifts, trusts from ancestors, tort settlements or non-probate assets)

a) In many wealthy families, the family legacy trusts benefit an individual's descendants at his death, such that it makes sense for the decedent's own assets outside of the legacy trusts to go the surviving spouse.
b) Sometimes, because of family wealth from ancestor trusts, the children will be better off than the surviving spouse, so it then becomes vital for the decedent to find ways through the estate plan to protect the spouse.
c) In these cases, equity and the needs of the spouse may require that the children be excluded from benefitting from the decedent's assets.

d) Other times, the decedent may leave his or her own assets to charity since the children and/or other family members are provided for outside of the basic estate plan.

4. Children from different marriages

a) When there are children from different marriages, sometimes it makes sense to treat children separately. For example, in some cases there has a been a divorce, and the children of the first marriage were provided for as part of the divorce settlement with that spouse, so that it makes sense for the children of the second marriage to be the beneficiaries of the estate that remains for the parent to give away at death, or for them to receive a larger share.
b) On the other hand, if the decedent is passing one portion of the estate to the surviving spouse who is the parent of some of the children, it may make sense to provide for the children of the first marriage up front, and let the surviving spouse provide for their mutual children at the surviving spouse's death.
c) Sometimes, the children from one marriage have expectancies in terms of inheritances from their other parent or from ancestors or collateral relatives, making it desirable to treat them differently under the testator's plan than the children who will not receive such other inheritances.

5. Estranged child

a) We have all encountered the family where one or more children are estranged from the parents, for a myriad of different reasons. Estranged children are sometimes excluded completely from an estate plan. Other times they are given a small bequest that is subject to forfeit under a "no-contest" provision if they challenge the Will or other aspects of an estate plan.
b) Sometimes the share of the estranged child will be directed to such child's descendants in lieu of the child, depending on the nature of the estrangement.

6. Disabled child

a) The extraordinary needs for lifetime support and treatment for a disabled child lead to various different estate planning approaches, depending upon the family's wealth, the child's needs, the roles the siblings are playing, and whether there are other sources of support, including public aid or a tort settlement, available to the disabled child.
b) In some families, the disabled child is allocated a greater share or all of the decedent's assets, on the grounds that it will take all or most of the family resources to support that child for life when such child, unlike his or her siblings, has little prospect of self-support.
c) Other times, the disabled child is excluded from being a beneficiary of the parent's estate. This may be done to preserve the child's eligibility for public aid or because the child's own assets in the form of a tort settlement exceed what the parents have. The parents' assets may also be given entirely to a sibling who is charged with caring for the disabled child with an understanding, implicit or explicit, that the sibling will use some or all of the funds to benefit the disabled child.

7. Non-marital child

a) After the Supreme Court opinion in *Trimble v. Gordon*, 430 U.S. 762 (1977) held that distinctions between legitimate children and illegitimate children in intestacy statutes were unconstitutional, state intestacy statutes have been changed to eliminate this distinction for purposes of inheritance. *See, e.g*. 755 ILCS 5/2-2, Cal. Prob. Code §6450, Fla. St. Title XLII, Ch. 732.108. In Illinois, this distinction was also dropped with respect to construing gifts under instruments (e.g. trusts or Wills) created after 1998. Nevertheless, we still see clients who view their obligations and their expectations for children differently based upon the circumstances of their birth and/or the nature of their relationship to the child during lifetime. The variety of statutory and case law interpretations of terms like "issue", "descendant", and "child" with respect to children born outside of wedlock means that a scrivener should be explicit in addressing these issues when drafting.

b) Some decedents intend to leave their assets only to the children of their marriage, to the exclusion of one or more known or unknown children born of other relationships. Other times these children are provided for separately, under an insurance policy or a separate child support trust. This may be done because the parent has had no ongoing role in the non-marital child's life, because there is a lack of family harmony between this child and his or her other parent and the decedents other children, or because the decedent has chosen not to disclose his relationship to the non-marital child to his other family members.

c) In these cases it is important to take particular care in drafting to ensure that other provisions in the document, such as failure of beneficiary clauses, are drafted to match the decedent's wishes with respect to such a child. For example, if the gift in the event of a failure of beneficiaries is drafted to provide for the decedent's heirs, the decedent might believe this will direct the assets to siblings, not realizing that the non-marital child is in fact an heir.