

Estate Planning
(LAWS 7217)
Spring Semester 2010
Professor Darla L. Daniel

REQUIRED COURSE MATERIALS:

1. Wayne M. Gazur & Robert M. Phillips, Estate Planning: Principles and Problems (2nd ed. Aspen Publishing 2008), ISBN 978-0-7355-6813-6;
2. Thomson-West, Selected Federal Taxation Statutes and Regulations, 2010 Edition, Daniel J. Lathrope, Editor, ISBN 978-0-314-90700-4. (This is the same volume used in the Fall 2009 Federal Estate & Gift Taxation class).
3. Supplementary materials placed on course reserve at the law library, posted on TWEN, or as provided by the instructor.

RECOMMENDED COURSE MATERIALS:

Natalie Choate, Life and Death Planning for Retirement Benefits, 6th Ed. 2006 (book and periodic updates available for purchase at www.ataxplan.com). This volume is on reserve. If you plan to practice in the Estate Planning field, you will find this book essential.

COURSE MATERIALS ON RESERVE:

Colorado Estate Planning Forms (“Orange Book”), Continuing Legal Education in Colorado (CBA-CLE 2004 and supp. 2006);

Kevin D. Millard, Drafting Wills, Trusts and Other Estate Planning Documents: A Style Manual, (Bradford Publishing 2006).

Other forms collections such as C. Jean Stewart and Krendl;

Volume 7 of Page on Wills, as revised by Jeffrey Schoenblum, which contains sample language;

Jeffrey N. Pennell, Wealth Transfer Planning and Drafting (Thomson-West 2005).

The West Education Network (“TWEN”):

I have created a course home page on TWEN at lawschool.westlaw.com. I have posted a copy of this syllabus on TWEN. I will post additional articles and will send messages to you from time to time during the semester, so please register your e-mail address on the course home page. The pertinent forms from the

Forms Supplement referred to in this syllabus and in the text are on a CD in the back of the text. If you do not have a Westlaw access number, please see me.

GRADING:

Class Attendance

Twenty (20) points of the final grade will be based upon regular class attendance, preparation, and active participation in discussions.

Required Projects

I will post a detailed memo on TWEN with instructions for each of these projects.

- A. (Due February 22, 2010) Drafting responses to Part C of Case Study 15-1 (pourover will and revocable trust project)—30 points.
- B. (Due March 15, 2010) Drafting responses to Part D of Case Study 7-1 (Will with contingent trust for minors project)—20 points.
- C. (Due April 12, 2010) Drafting responses to Part B of Case Study 11-1 (Complex Will with A/B testamentary trusts)—30 points.

Final Exam

There is no final examination.

FORMS AND PROJECTS PROTOCOL:

When submitting the required projects do not include your name or Social Security number. Instead, for each project choose a different random, alphanumeric identifier (e.g., AZM1402) and place that on the papers. When I return the graded papers I will ask you to identify yourselves.

The required forms are on a CD in the back cover of the book. Use them as a starting place, but you are free to improve/embellish them as you deem fit. You may find it helpful to consult the Colorado Estate Planning Forms (“Orange Book”) and the Notes on Use which accompany each form. Please produce a professional product, and remove the annotations, footnotes, etc. that are embedded in the forms.

OFFICE HOURS:

Please feel free to discuss questions by email at ddaniel@csbt.com. My telephone is (303) 864-7209. I will plan to be available at the law school most Monday evenings before class from 5:00 to 6:00 p.m. to answer questions. I am also available after class, or by appointment.

1. January 11, 2010 – Dealing with Clients

Read Chapter 1. **Print out the Estate Planning Questionnaire, Exhibit 1-3, and bring it to class.**

Prepare Exercises 1-4, 1-5, and 1-8 for discussion in class (note: when the syllabus calls for you to prepare the exercises, this is not a written submission unless otherwise expressly indicated).

Read Exercises 1-1 and 1-2; we will discuss the importance of interviewing and conduct some sample interviews in class.

Read Exercise 1-7 together with CRS §§ 15-11-502 through 506.

Note: There will be no class Monday January 18, 2010, due to the Martin Luther King holiday. We will have 2 sets of reading assignments for class on Jan. 25, 2010, as detailed below. Please plan your schedule accordingly.

2. January 25, 2010 – Fundamentals of Drafting Wills; Review of Federal Wealth Transfer Taxes

First half of class:

Read Chapter 2. Do Exercises 2-1 and 2-2 and skim CRS §§ 15-11-705, 15-11-103(8), and 15-11-115 through 122 (relating to the inheritance rights of children conceived by artificial means). These statutes were recently revised due to Colorado's adoption of the Uniform Parentage Act.

Read "The Larry Hillblom Inheritance" article posted on TWEN.

Do Exercise 2-8 (read CRS § 15-12-916) for discussion in class. **Read Ms. Smith's Will in Case Study 2-1 carefully, and bring a copy of Forms B (Simple Will) and C (personal property memorandum) to class.** We will go through the forms and compare them to Ms. Smith's Will in Case Study 2-1.

Second half of class (lecture):

Read Part A of Chapter 16, p. 377-392 (review of the federal wealth transfer taxes), and review the outline posted on TWEN, Masters, *An Introduction to Transfer Taxation*. I may also post additional required reading materials on TWEN, depending on Congressional action/ inaction on the estate tax. This will be an overview of the 2010 transfer tax rules you need to keep in mind when analyzing a client's estate planning goals, tax and otherwise. Mark Masters, Esq., a seasoned practitioner in Englewood, CO, will help with this lecture. Students who have not taken the Federal Estate and Gift Taxation course may wish to spend additional time reviewing reference materials in Part C of Chapter 16, including IRS Publication 950, Introduction to Estate and Gift Taxes, available at <http://www.irs.gov/publications/p950/index.html>.

3. February 1, 2010 – The Young Adult; Powers of Attorney and Advance Medical Directives

Read Chapter 3. Do Parts A, B, and C of Case Study 3-1 for discussion in class. Colorado now has a transfer-on-death deed provision referred to as a “beneficiary deed.” Please print a copy of the statute at CRS §§ 15-15-401 through 415. You might also wish to print the general nonprobate status of joint tenancies found at CRS § 15-15-102.

Review Forms D-1, D-2, E-1, E-2, and F found on the disk in your book. Please review Colorado’s recently adopted version of the Uniform Power of Attorney act, CRS § 15-14-702 et seq., which contains its own statutory form for a financial durable power of attorney at 15-14-741. You need to be able to concisely explain the difference between a financial power of attorney, a medical power of attorney, and a living will; clients get these confused all the time.

I will post additional reading materials regarding advance medical directives on TWEN.

Who has authority to make medical decisions for a hospitalized person with no medical power of attorney or advance medical directive? See CRS §§ 15-18.5-101 through 105 (proxy decision maker statute). The privacy provisions of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) have complicated the process of getting medical information about an individual to determine if he/she is incompetent. The incompetency “trigger” is not confined to medical powers of attorneys, but also to revocable trusts (if the settlor is removed as a trustee), stock redemption agreements, and so forth. Please read an article by Daniel B. Evans, *What Estate Lawyers Need to Know About HIPAA and “Protected Health Information”* in the July/August 2004 issue of PROBATE AND PROPERTY, as well as Jacqueline Myles Crain, *HIPAA—A Shield for Health Information and a Snag for Estate Planning and Corporate Documents*, 40 REAL PROP. PROB. & TR. J. 357-372 (2005).

4. February 8, 2010 – Planning for Incapacity; Deathbed Planning

First half of class:

Read Chapter 15. Discuss Parts A (joint tenancy planning) and C (evaluation of necessary documents) of Case Study 15-1. **Part C of Case Study 15-1 (pourover Will and revocable trust) are due in two weeks, so read this with some care.** If time permits, we will look at the pourover Will and revocable trust forms (Forms I & J) so please bring a hardcopy of each document. How does this work? For example, who are the initial trustees? How would the revocable trust for the client in Case Study 15-1 be structured in terms of trustees? Should we fund the trust during her lifetime? You would be considering a durable power of attorney for property transactions. Janice Green owns a home, so you need to be aware of CRS § 38-30-123 which requires that the power of attorney be recorded in the real property records when it is utilized in connection with a conveyance.

Following our class session, I will send you an electronic estate planning proposal describing the documents you will need to draft for the client, Janice Green.

Consider what you would do if a client told you that he or she had only two months to live. What measures would you consider? Read several of the articles below to assemble a plan. All of the articles are readily available on Westlaw. *See, e.g.,* Suzanne Tucker Plybon & James R. Robinson,

Estate Planning for Procrastinators: Those Who Wait Until the Last Minute, 28 EST. PLAN. 422 (2001); Marc A. Aaronson, *Planning for the Dying Client*, 69 N.Y. ST. B.J. 10 (Mar./Apr. 1997); Lynn Wintriss & Cristin P. Carnell, *A Checklist of Predeath Planning for the Dying Client*, 1 PROB. & PROP. 9 (Jul/Aug. 1987).

Second half of class: Tentative guest lecturer Judge Jean Stewart of the Denver Probate Court.

In connection with Judge Stewart's visit please skim two articles: Edie L. Greene, *Deciding to Let Others Decide: Judging the Need for Guardianship and Conservatorship*, 22 PROB. & PROP. 47 (Jan./Feb. 2008); and Paul Mitchell, *Crisis Intervention to Prevent Elder Abuse: Emergency Guardianships and Other Legal Procedures*, 33 COLO. LAW 91 (June 2004).

5. February 15, 2010 – Planning for Retirement Assets; The Wealthy Young Adult Contemplating Marriage

Read Part E of Chapter 12, p. 292-297 (tax planning for retirement plan assets). In Natalie Choate, *Life and Death Planning for Retirement Benefits*, 6th edition, on reserve, review Appendix A (distribution tables, p. 524-528) and read the first part of Appendix B (beneficiary designation checklist, p. 529-533).

Read Chapter 4. Read Case Study 4-1 for discussion of Parts A, C, and E in class. **Print out the Marital Agreement from the back of the book, Form K, and also print a copy of Form 41:57, Sample Prenuptial Agreement from the Colorado West Practice series, posted on TWEN. Bring a copy of both of these to class for discussion.** Also read the Colorado statutes dealing with marital agreements, principally CRS §§ 14-2-301—310 and 15-11-207; and CRS § 14-10-113 (which provides default rules for division of property on divorce in the absence of a prenuptial agreement). Pay particular attention to 14-10-113(7)(b).

For Part E of Case Study 4-1, you will do an in-class negotiation concerning the terms of the prenuptial agreement. Some of you will represent Ron and some of you will represent Janet. Make a list of what rights a spouse has in Colorado – both upon divorce, and upon the death of the other spouse. What rights can and cannot be waived in a prenuptial agreement? Think about the practicalities: What will each side want? What concessions will each side be willing to make? Pay attention to 14-2-307 regarding requirements for enforceability. You may find it helpful to skim two articles posted on TWEN, Smith, et al, *Marital Agreements in Colorado*, 36 Feb. COLO. LAW 53 (Feb. 2007) and Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 REAL PROP. PROB. & TR. J. 1-37 (2005).

We can discuss any issues that have arisen in the course of working with the drafting problem that is due next week.

6. February 22, 2010 – Married Couple Without Children; Introduction to Charitable Gift Planning

Part C of Case Study 15-1 is due at the beginning of the hour.

Read Chapter 5. Prepare Parts A, B, C and D of Case Study 5-1 for discussion in class. Assume Paul and Linda consider their dog Cookie as their “child” and wish to leave some funds for his continued care. What would you suggest? Read CRS § 15-11-901. Read the two TWEN posts “Leona Helmsley’s dog loses 10 million” and Katharine M. Davidson, *Trust Fund Puppies*, TRUSTS & ESTATES, Dec. 1, 2008.

Skim Chapter 6, pages 133-142, and read Colorado’s new Designated Beneficiary Agreement act, CRS §§ 15-22-101 through 112, effective July 1, 2009. The statutory form is at 15-22-106.

Skim Chapter 14, p. 335-348, to get an overview of charitable giving techniques. For the last 30 minutes of class, Leslie Karotkin of the Denver Foundation will guest lecture.

7. March 1, 2010 –Married Couple with Young Children

Read Chapter 7. Prepare Parts A (suggested revisions to estate plan) and B (beneficiary designations) of Case Study 7-1 for discussion in class. Also prepare Parts C & D of Case Study 7-1 for class discussion. In connection with Part B read CRS § 15-15-101. Also, please print hard copies of the Will with contingent trust for minors, Form G. Read CRS § 15-14-203 to see when a minor is given a say in choice of a guardian, and CRS § 15-12-203 regarding priority for appointment as Personal Representative. **The class discussion is important because the documents required by Part D are due in two weeks.**

A Will for a parent with young children is probably one of the better platforms for an “ethical Will.” In reading the Case Study in Chapter 7 (you might wish to read the Case Study in Chapter 8 to get a sense of the grandparents’ values as well), think of what someone like Paul Davis (independent, self-reliant, driven, frugal) might want to say to his children and loving wife. This would come from the client, of course, and it is difficult for us to create that without input, but this could be a Will demanding such drafting. There is a difference of opinion as to whether such language invites Will contests if fiery or inaccurate, and whether it should be in the Will itself or in a side document. Please read the following short articles: Steven Keeva, *A Legacy of Values*, 91 Oct A.B.A. J. 88 (Oct. 2005) & Constance D. Smith, *New and Improved Testaments for Estate Planning Documents*, 32 Dec. COLO. LAW. 73 (Dec. 2003).

Following our class session, I will send you an electronic estate planning proposal letter that I wrote to the client.

8. March 8, 2010 – Gifts from Grandparents

Read Chapter 8. Prepare Exercise 8-1 for discussion in class. Read Case Study 8-1 for a discussion in class of Parts A (IRC § 1014 question), B (evaluation of gift structure in light of IRC § 529 alternative) C (evaluation of gift structure for family compound) and D (drafting a single irrevocable trust for grandchildren's education).

In connection with Part B and 529 plans, check out "College Savings 101" at <http://www.savingforcollege.com/>.

I will post some additional reading materials on TWEN to expand on Chapter 8's discussion of distribution schemes, holdback and incentive provisions, and powers of appointment.

In connection with Part C, assume that Paul's father has expressed to you that although he wants to gift Tanglewood Farms to his descendants, he feels that it absolutely should be kept in the family, to the extent that if any descendant wants to sell his/her interest, the others should have the first right to purchase it. What are the options available, particularly while Paul's father and mother plan to continue to live there? How would you conduct a discussion of the pros/cons of each option with him? This is a very common situation; we will work through the options and review sample language.

In connection with Part D, please print a hard copy of the irrevocable trust instrument, Form L, and bring it to class. Review Chapter 16 to make sure you understand how to make the gifts free of gift tax (i.e., use of Crummey powers), and to be sure that the trust is not pulled back into the Settlor's taxable estate. We will look at Form L see how it operates in that respect. We also have the income tax issues of grantor trusts. A Crummey power raises section 678 issues and a hanging power exacerbates that. As far as other grantor trust issues, the use of an independent trustee tends to avoid them.

9. March 15, 2010 – Remarriage with Children

Drafting assignment from Part D of Case Study 7-1 is due at the beginning of the hour.

Read Chapter 9. Even in the best of second-marriage situations, it is important to consider, and where possible, to proactively minimize the opportunities for conflict between the surviving spouse and the children of the deceased spouse's first marriage. This is not always easy to accomplish. In Case Study 9-1 prepare parts A (evaluation of plan to gift house to children), B (tax implications of the gift), C (common law property state impacts), E (mortgage issue), and F (retirement accounts) for discussion in class. In connection with part F, skim the chapter on Marital Issues in Natalie Choate, Life and Death Planning for Retirement Benefits, on reserve.

Also, consider language for Exercise 9-1. We will discuss that in class.

SPRING BREAK

10. March 29, 2010 – The Married Small Business Owner or Investor

Read Chapter 11. Read Chapter 16, Part C, Section 2, pp. 419-426, “Planning after EGTRRA”, dealing with marital deduction planning under the uncertainty of EGTRRA. Prepare Exercises 11-1 through 11-13 (dealing with various aspects of the marital deduction) for discussion in class. We will discuss Part A of Case Study 11-1 in class. **Part B (complex Will) of Case Study 11-1 is due in two weeks.** Prepare Exercises 11-15 and 11-16 (dealing with ILITs) for discussion in class. We probably won’t complete all of the exercises this week. Consider whether a disclaimer Will is the best prescription for Part B of Case Study 11-1? Please print a hard copy of the complex Will, Form H.

Colorado no longer has a state estate tax, but many other states do; read Jennifer Spitz, *Planning for Other States’ Estate Taxes*, 37 COLO. LAW. 73 (Sept. 2008). Also, in looking at Form H consider whether the guardian clause should be eliminated if the client has adult, emancipated, yet unmarried children.

The client in the Chapter 11 Case Study is a shareholder in a corporate business. Assume the presence of a buy-sell agreement, such that the estate would be cashed out. However, what if that doesn’t happen? E.g., the corporation doesn’t have the funds or the beneficiaries of the estate and the continuing shareholders reach some other arrangement. Our Will should anticipate that the stock may not be redeemed immediately, that the C corporation might need to be converted to an S corporation. The Orange Book contains a special provisions tab concerning a possible S election; Volume 7 of Page on Wills does as well.

HIPAA is an issue again with the power of attorney that could be required for this client. For yet another article, with some suggested language, see Thomas J. Murphy, *Drafting Health Care Proxies to Comply with the New HIPAA Regs*, 20 EST. PLAN. 559 (2003) 2003 WL 22376020.

11. April 5, 2010

Chapter 11 is long and the material is complex, so we will continue the material from the prior week. **I will post additional reading material on TWEN for this class;** what we read will depend on Congressional activity/inactivity and other developments with the estate tax, availability of discounts, portability of exemptions, and other issues. Options may include (a) a disclaimer Will; (b) a revocable trust; (c) caps and collars tied to shifting amounts of the unified credit; (d) marital unitrust; or (e) use a standard formula clause as in Form H, with enhanced access by the survivor to the family trust.

12. April 12, 2010 – Dynasty Trust Planning and Trust Administration

Part B (complex Will) of Case Study 11-1 is due at the beginning of the hour.

First half of class: Read Chapter 13 as additional background on GST issues and holdback/protector/incentive language. Review Part B of Chapter 16 on wealth transfer planning strategies and techniques.

Reflect on how a perpetual or “dynasty” trust would be drafted to allow for some flexibility in the future, particularly in terms of:

- 1) Drafting for the trust’s eventual termination (for failure of issue, for insufficient assets, for adverse tax developments, etc.)
- 2) Drafting incentive or holdback provisions and powers of appointment
- 3) Providing for a trust protector or for “decanting”

Consider: How much flexibility is too much? I will post additional reading materials on TWEN regarding trust administration issues, special needs trusts, and Colorado’s proposed decanting statute (7 other states already have decanting statutes).

Second half of class: tentative guest lecture

Connie Smith, Esq., of Rothgerber, Johnson and Lyons LLP will guest lecture on her experiences with drafting dynasty trusts, using various estate planning “acronym” techniques (GRATs, IDGTs, ILITs that have “blown up”), and recent trends in the estate planning area.

13. April 19, 2010 – Introduction to Estate Administration; Avoiding Probate Litigation

First half of class: Read Part A of Chapter 17, p. 429-444 (introduction to probate); Chapter 10 (migratory married couples and ancillary probate), and Karen S. Gerstner, *A Message to Clients . . . Avoiding Probate Court Litigation*, from the March/April 2008 issue of PROBATE AND PROPERTY.

I will post additional reading materials on TWEN.

Second half of class: tentative guest lecture

Marco Chayet, Esq. of Chayet & Danzo LLC will guest lecture on the variety of issues he handles in his practice, including probate litigation, elder law, and Medicaid planning.

End of Course