

Estate Planning
(LAWS 7217)
Spring Semester 2009
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, 2009 Edition, Daniel J. Lathrope, Editor, ISBN 978-0-314-19073-4. (This is the same volume used in the Fall 2008 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 ON RESERVE:

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

Natalie Choate, Life and Death Planning for Retirement Benefits, 6th Ed. 2006 (available for purchase at www.ataxplan.com);

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

OTHER COURSE MATERIALS ON RESERVE:

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 may 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

- A. (Due February 23, 2009) Drafting responses to Part C of Case Study 15-1 (revocable trust project)—30 points.
- B. (Due March 16, 2009) Drafting responses to Part C of Case Study 7-1 (Will with contingent trust for minors project)—20 points.
- C. (Due April 13, 2009) Drafting responses to Part B of Case Study 11-1 (complex Will project 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 12, 2009 – 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 19, 2009, due to the Martin Luther King holiday. We will have 2 sets of reading assignments for class on Jan. 26, 2009, as detailed below. Please plan your schedule accordingly.

2. January 26, 2009 – Review of Federal Wealth Transfer Taxes; Introduction to Planning for Retirement Plan Assets; Fundamentals of Drafting Wills

First 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*. We will revisit these issues in greater detail throughout the semester; the objective here is to give you an overview of the tax rules and how they apply in practice, and a framework for 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>.

Second half of class:

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*, on reserve, review Appendix A (distribution tables, p. 524-528) and skim the first part of Appendix B (beneficiary designation checklist, p. 529-533).

Read Chapter 2. Do Exercises 2-1 (read CRS § 15-11-705(3)), 2-5, and 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 form and compare it to Ms. Smith's Will in Case Study 2-1. If we don't have time to finish this, we will do so in the next class.

3. February 2, 2009 – The Young Adult

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.

Read Forms D-1, D-2, E-1, E-2, and F dealing with incompetency. The CBA's Trust and Estate Section Orange Book subcommittee has recently considered a revised Advance Directive and Living Will form; I will post additional material on TWEN for review and discussion. The privacy provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") have significantly affected 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). Both of these articles are easily found on Westlaw.

4. February 9, 2009 – Planning for Incapacity; Deathbed Planning

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 letter that I wrote to the client, Janice Green. It will describe the documents that you will need to draft.

In connection with Chapter 15's discussion of long term care and planning for incapacity, check out: <http://www.marketwatch.com/news/story/MetLife-Mature-Market-InstituteR-Releases/story.aspx?guid=%7B0BE90570-40F9-4C0F-AE26-1580F1848E52%7D> (listing current nursing home and assisted living rates across the nation) and

Edie L. Greene, *Deciding to Let Others Decide: Judging the Need for Guardianship and Conservatorship*, PROB. & PROP. 47 (Jan./Feb. 2008), posted on TWEN.

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. They are repetitive, so you need to read only several of them, but I am providing you with the full list so you have a bibliography. All of the articles are readily available on Westlaw. See, e.g., Richard M. Horwood & Jeffrey A. Zaluda, *Planning Strategies When a Client's Death Is Imminent*, 20 EST. PLAN. 168 (1993); 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); Gerald L. Cowan, *Estate Planning for the Terminally Ill*, 32 RES GESTAE 86 (Aug. 1988); Lynn Wintriss & Cristin P. Carnell, *A Checklist of Predeath Planning for the Dying Client*, 1 PROB. & PROP. 9 (Jul/Aug. 1987).

5. February 16, 2009 – The Wealthy Young Adult Contemplating Marriage

Read Chapter 4. Read Case Study 4-1 for discussion of Parts A, C, and E in class. Look at the Marital Agreement form in the Forms Supplement and please bring a hard copy. Colorado is a particularly interesting jurisdiction in terms of marital agreements because of the Balanson decision, 25 P. 3d 28 (2001), dealing with irrevocable transfers for the benefit of a person as marital property. Another case, dealing with revocable transfers as marital property, Gorman, 36 P.3d 211 (Colo. App. 2001), prompted statutory amendment reflected in CRS § 14-10-113(7)(b). Read the Colorado statutes dealing with marital agreements, principally CRS §§15-11-207 & 14-2-301—310. Also, read an article written by a Colorado practitioner focusing on Colorado law, including Balanson, Marc A. 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 23, 2009 – Married Couple Without Children

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 Chapter 6 as background.

7. March 2, 2009 – 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 C are due in two weeks.**

A Will for a parent with young children is probably one of the better platforms for an “ethical Will” or at least some statements from the heart, as opposed to just grinding things out. 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 9, 2009 – 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/>.

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. Read Chapter 13 as additional background on GST issues and holdback/protector/incentive language. Reflect on how a perpetual trust would be drafted in terms of when it might terminate (for failure of issue, for insufficient assets, for adverse tax developments, etc.). I will post or bring sample clauses for review and discussion.

Professor Jeffrey N. Pennell's Wealth Transfer Planning and Drafting (West 2005) contains sample language reproduced with permission of The Northern Trust Company. He states that "Attorneys are specifically granted authority to reproduce these forms in their representation of clients." (p. 5-2).

Please review the following italicized excerpts for discussion in class:

On Adopted Descendants:

"excluding, however, any individual adopted as an adult unless that individual lived with the adopting parent when the individual was a minor" (p.5-3)

Note that this provides safeguards, yet is a bit more flexible than a "no adoption of someone under age 18" rule. The child could live for years with the adopting parents (e.g., a foster child), yet the adoption does not actually move forward until years later, after the child is older than 15, 18, 21 etc. Note that Colorado, by statute, addresses this issue if the instrument is not that of the adopting party. See CRS § 15-11-705(3), which is as inflexible as the no adoptee under age 18 rule.

On Advanced Fertility Procedures:

"children conceived after the death of their biological parent shall not be regarded as the child of that deceased parent." (p. 5-3)

This is currently a hot topic among estate planners; the above language is one way to resolve the issue, although not all clients would want this result. As of fall 2008, the Statutory Revisions committee of the Trust & Estate Section of the CBA was studying NCCUSL-sponsored legislation which addresses these issues. NCCUSL is the National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org>. If possible, I will obtain and post the NCCUSL materials on TWEN for review and discussion.

Holdback Events:

“trustee suspects that a beneficiary is a member of a “cult” (any organization involving extreme devotion or attachment to or extravagant admiration for a person, principal, or other object or fixation) or is addicted to any substance. . .” (p. 5-5).

Holdback Events but Mixed with Incentives:

“no beneficiary shall depend on this trust for support and maintenance to the extent the beneficiary is mentally, emotionally, and physically capable of earning a living, and it is my desire that trust distributions never impair a beneficiary’s motivation to be productive and self sustaining. (p. 5-5).

Corporate trustees often see language like this, sometimes with directives to make “matching” distributions according to the beneficiary’s own income. This language normally requires the trustee to delve into the beneficiary’s financial affairs and employment status before making a determination about distributions. Not surprisingly, beneficiaries are loathe to provide this information. The inclusion of language directing the beneficiary to comply with the trustee’s reasonable requests for information can avoid many problems in this area.

I intend that a beneficiary with financial difficulties, addictive behavior (such as substance abuse, gambling, or spendthrift habits), relationship disorders or dysfunctionality, and similar maladies should address those problems that can be resolved by the beneficiary’s personal industry and dedication or changes in life style and associations, and that the trustee shall be circumspect in making trust distributions in circumstances that contravene this intent.” (pp. 5-5 –5-6)

“Dysfunctionality”? What is that? Consider: If the trustee requests that the beneficiary undergo drug testing, or counseling, or vocational training to obtain better employment, but the beneficiary refuses, what happens? (Be aware that sometimes parents and grandparents have unrealistic assumptions as to what an estate plan can accomplish – i.e., expecting to correct years of poor parenting through a Will or Trust, or blindly assuming their Depression-era beliefs and values correspond with the consumption-based reality in which their children and grandchildren now live.) What if the trustee arbitrarily considers the beneficiary to have a “relationship disorder” and refuses to make distributions once the beneficiary is discovered to be involved in a same-sex relationship? What recourse does the beneficiary have in that event? What duty does the estate planner have in counseling the settlor who wants this kind of language in his/her estate planning documents?

The Case Against Incentive Trusts:

Some commentators argue that the rigidity of incentive trusts serve to “handcuff” a trustee. See the article posted on TWEN, David A. Handler and Alison E. Lothes, *The Case for Principle Trusts and Against Incentive Trusts* from the Oct. 2008 issue of TRUSTS & ESTATES.

In dealing with Chapter 8 we have a number of state law drafting issues in expressing the grandparents’ wishes. However, we also have the federal wealth transfer taxation aspects. We want to make the gifts free of gift tax. That raises Crummey issues, as well as avoiding a gift over on the lapse of the power. We also need to be sure that the trust is not pulled back into the settlor’s taxable estate. You should review Chapter 16 in that regard to have a clear view of how a trust can be pulled back. We will look at the 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 16, 2009 – Remarriage with Children

Drafting assignment from Part C 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, 6th Ed. 2007, on reserve.

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

SPRING BREAK

10. March 30, 2009 – 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 in light of the uncertainty that exists today about the path of the estate tax. Please print a hard copy of the complex Will, Form H.

Note that Form H does not reflect the elimination of the state death tax credit, supplanted by a deduction. 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 6, 2009

Chapter 11 is long and the material is complex, so we will continue the material from the prior week. You need to read three short articles: Paula M. Jones, *Planning for the 10-year Phase Out of Estate Tax*, 17 NO. 2 PRAC. TAX LAW. 57 (Winter 2003); Sebastian V. Grassi, Jr., *Drafting Flexibility into Estate Planning Documents After the 2001 Tax Act*, 17 NO. 2 PRAC. TAX LAW. 7 (Winter 2003); Conrad Teitell, *My Crystal Ball*, 147 TRUSTS & ESTATES 51 (May 2008). Our options include (a) a disclaimer Will; (b) a revocable trust; (c) caps and collars tied to shifting amounts of the unified credit; (d) one-lung QTIP; (e) Clayton QTIP; or (f) use a standard formula clause as in Form H, with enhanced access by the survivor to the family trust, coupled with a section 1022 clause. Following this class I will distribute a memorandum suggesting an approach to the problem.

12. April 13, 2009 – Introduction to Probate; Guest Lecturer

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

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 the brief article posted on TWEN, Karen S. Gerstner, *A Message to Clients . . . Avoiding Probate Court Litigation*, from the March/April 2008 issue of PROBATE AND PROPERTY. I may post additional articles of interest for the lecture on TWEN.

Dennis Whitmer, Esq., who has been a Trust Officer for 30+ years, will guest lecture on a variety of practical trust administration and implementation issues, including drafting to retain unique assets under the prudent investor act, and mediation and alternative dispute resolution in probate.

13. April 20, 2009 – last day of Class

Do FCQs.

Read Chapter 14 (background) and review Part B of Chapter 16 on planning strategies and techniques.

We will briefly discuss some charitable gift planning techniques, and then Connie Smith, Esq., of Rothgerber, Johnson and Lyons will guest lecture and share her experiences with a variety of estate planning “acronym” techniques (GRATs, IDGTs, ILITs that have “blown up”), and how to tell when these vehicles are, or are not, appropriate for a client.

End of Course