A NEW APPROACH TO BASIC ESTATE PLANNING IN MONTANA (FITTING THE PIECES OF THE PUZZLE TOGETHER)

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INTRODUCTION

Estate planning is like a jigsaw puzzle: it involves several different, interlocking pieces, and the picture is not complete unless they are all there. The centerpiece is the Will, but other pieces are taking on increased significance. The outline ends with some thoughts on a new approach I have developed in my practice that may simplify your client's estate planning.

LIFETIME PLANNING TECHNIQUES

GIFTS

Much of estate planning deals with what happens upon and after death. Lifetime gifts, however, are an important piece of the estate planning puzzle.

Annual Exclusion

Gifts up to $12,000 per year are not taxed.

A donor can make any number of gifts as long as each gift is less than $12,000.

A husband and wife each get a $12,000 exclusion, so together they can give up to $24,000 annually to each recipient.

This exclusion is annual, and so is available each year.

Lifetime Exclusion

Gifts above $12,000 per recipient per year are taxable.

A gift tax return is required to be filed (due at the same time as the donor's income tax return).

Each donor has a $1 Million lifetime exemption.

Gifts above $12,000 / year use up the $1 Million exemption. Taxable gifts above $1 Million in a lifetime will require the donor to pay tax.

To the extent lifetime gifts use up the $1 Million lifetime exemption, they also use up the $2 Million estate tax exemption.

Gifts to Minors

Gifts to minor involve special considerations, because they are not able to handle their own finances.

Gifts can be made under the Uniform Transfers to Minors Act, which allows an adult custodian to hold the funds and invest and use them for the benefit of the minor. The custodianship, if not previously terminated, will terminate when the child attains age 21.

Trusts can also be used for minors. If the trust is to extend beyond age 21, special provisions allowing the minor an opportunity to withdraw the funds will be required in order to qualify any gifts to the trust for the annual exclusion.

STEPPED-UP BASIS

For both lifetime gifts and at-death transfers, it is important to understand the impact of stepped-up basis.

Basis is what the seller gets to deduct in determining the profit (or loss) on a sale of property.

	Sales Price
-	Basis
=	Profit (Loss)

Usually, basis is what the seller paid for the property. If any improvements were made to the property, their cost is added to basis. If the property was depreciated for tax purposes, the depreciation reduces the basis.

If the property was inherited rather than purchased, its starting basis is the value of the property included in the estate of the person from whom it was inherited. So, at death, property gets a new basis, equal to its value at that time. This is referred to as "stepped-up basis." "Stepped-up" because the property usually is appreciated from what the owner paid for it.

The effect of stepping up the basis at death is to wipe out exposure to income tax on any appreciation that occurred during the owner's lifetime.

> **Example:** I buy a piece of land for $10,000. It appreciates to $100,000. If I sell the land, I have to pay income tax on the $90,000 of gain. If I give the land to my children, they take my basis of $10,000 in the land and if they sell it for $100,000, they have to pay income tax on the $90,000 of gain. If I die owning the land when it is worth $100,000 and it passes to my children, it gets a stepped-up basis of $100,000 and my children can sell it for that much without having any income tax on the sale. If they held on to it and eventually sold it for $150,000, they would have income tax on the $50,000 of appreciation that occurred subsequent to my death, but not on the $90,000 of appreciation that occurred while I was alive.

In the preceding example, if I retain the land, it is included in my estate for estate tax purposes at the time of my death, but my heirs will receive an income tax benefit in the form of the stepped-up basis. This interplay between the income tax and the estate tax is an example of how the pieces of the estate planning jigsaw puzzle interlock.

In making gifts, keep in mind the effect of stepped-up basis. There may be good reasons for making the gift, but do not make gifts without taking into account that you then are passing up the opportunity for stepped-up basis in the property.

PROBATE-BASED PLANNING TECHNIQUES

WILLS

The Will disposes of the decedent's testate property, but with all the other non-probate "tools" now available, that is an increasingly small percentage of the client's assets. Many clients seem to believe that the Will overrides everything else, when in fact just the opposite is true.

INTESTACY

Clients often begin an estate planning meeting by saying "I just want a simple will." That may mean they want to leave everything to the surviving spouse, or if the spouse dies first, to the children. It may turn out they need much more than that, but if that is all the client truly needs, I may very well tell the client not to bother with a Will. If the children are grown, the assets are not enough to trigger estate tax, and there is no concern about the ability of the surviving spouse to manage finances, a Will may not accomplish anything more than what is provided by law for persons who die without a Will.

Under Montana's laws of intestacy, when one dies without a Will (or with a Will that does not completely dispose of one's property), the manner in which the assets are distributed depends on whether there is a surviving spouse, and whether there are other heirs, principal among which are surviving descendants of either or both of the spouses. The surviving spouse is given highest priority, but the statute also recognizes that many times there has been a second (or third, or fourth, and so on) marriage and the descendants of the decedent spouse should not be excluded for the sole benefit of the surviving spouse. If this was a first marriage, the only children are of this marriage, and there is no need to make a distribution to the children, all the property should go to the surviving spouse. On the other hand, if this were, for example, a second marriage, and the decedent had children from the first marriage, the share of the surviving spouse would be reduced so that the children could receive a share. Without this protection, the surviving spouse may be tempted to leave all property to his side of the family, to the exclusion of the decedent's children.

The first step under Montana's intestacy law is to determine the share of the spouse. 72-2-112, M.C.A.

The next step is to determine the share of the other heirs. 72-2-113**, M.C.A.**

Here are some examples:

> **Example 1:** Husband and Wife have had three children during their marriage. Upon Husband's death, Wife and all (or any) of the children are still living. His entire estate will pass to Wife.
>
> **Example 2:** Same facts as **Example 1**, and now Wife dies. Her intestate estate passes in equal shares to the three children.
>
> **Example 3:** Husband and Wife have no children. Husband's mother is still alive when Husband dies. Wife takes the first $200,000 plus ¾ of the balance of Husband's intestate estate. Husband's mother takes ¼ of Husband's intestate estate in excess of $200,000. Notice that had any descendant of Husband survived him, Husband's mother would not have taken any share.
>
> **Example 4:** Wife had a child born of her first marriage. She married a second time, during which marriage she died, survived by her second husband and her child. The second husband takes the first $100,000 plus one-half of the balance of Wife's intestate estate. The child takes the other ½ of the intestate estate in excess of $100,000.
>
> **Example 5:** Wife had a child with Husband during their marriage and Husband has a child from a prior marriage. Wife is survived by Husband, her child and her step-child. Husband takes the first $150,000 plus ½ of the balance of Wife's intestate estate. Wife's child takes the other ½ of the intestate estate in excess of $150,000. The step-child takes nothing.

Escheat

If there are no heirs, the property goes to the State of Montana.

ELECTIVE SHARE

The surviving spouse of a decedent who dies domiciled in Montana has a right of election to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other. 72-2-221, M.C.A. The elective-share percentage is as follows:

If the decedent and the spouse were married to each other:	**The elective-share percentage is:**
Less than 1 year	supplemental amount only
1 year but less than 2 years	3% of the augmented estate
2 years but less than 3 years	6% of the augmented estate
3 years but less than 4 years	9% of the augmented estate
4 years but less than 5 years	12% of the augmented estate
5 years but less than 6 years	15% of the augmented estate
6 years but less than 7 years	18% of the augmented estate
7 years but less than 8 years	21% of the augmented estate
8 years but less than 9 years	24% of the augmented estate
9 years but less than 10 years	27% of the augmented estate
10 years but less than 11 years	30% of the augmented estate
11 years but less than 12 years	34% of the augmented estate
12 years but less than 13 years	38% of the augmented estate
13 years but less than 14 years	42% of the augmented estate
14 years but less than 15 years	46% of the augmented estate
15 years or more	50% of the augmented estate

The supplemental amount is $50,000, adjusted for certain amounts received outside the elective share.

A bare-bones definition of the augmented estate is the decedent’s probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims, plus the value of the decedent’s nonprobate transfers to others. The definitional statute defining “augmented estate,” however, is complex in its treatment of nonprobate transfers and must be carefully examined if a surviving spouse elects against the decedent’s Will. See 72-2-222(2), M.C.A.

Discuss this with married clients. Make sure they understand that any Will you draft for them may be subject to challenge by the other. You may want to get them sign a waiver of the elective share. This of course puts the attorney in a position of having a conflict of interest. Consequently, it is advisable to have the clients consider having separate counsel and if they choose to use the same attorney, sign a waiver of conflict of interest and perhaps a waiver of right to elect.

PROBATE

Probate Protections

Probate provides protections that should not be overlooked. Clients often want to avoid probate but they may not be aware of some of the advantages of probate.

Probate cuts off the claims of creditors after a statutory period.

Creditors are required to file claims within 4 months of notice or their claims will be forever barred. 72-3-801, M.C.A. Notice to creditors is published in the newspaper. For any known creditors, notice should be mailed or otherwise delivered to them.

This feature of probate is especially valuable if decedent was engaged in business or was a professional.

Homestead Allowance

The surviving spouse or the minor or dependent children of a decedent are entitled to a homestead allowance of $20,000. The homestead allowance is exempt from and has priority over all claims against the estate. 72-2-412, M.C.A.

Exempt Property

In addition to the homestead allowance, the surviving spouse or surviving children of the decedent are entitled to value not exceeding $10,000 in excess of any security interests in household furniture, automobiles, furnishings, appliances, and personal effects. 72-2-413, M.C.A.

Family Allowance

In addition to the homestead allowance and the exempt property allowance, the surviving spouse and children being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration. 72-2-414, M.C.A.

The family allowance may not continue for more than 1 year.

The family allowance is exempt from and has priority over all claims except the homestead allowance.

The family allowance does not, in general, reduce the share of the decedent's estate passing to the surviving spouse or children.

Court supervises proper disposition of property

In even an informal probate, an inventory of assets and accounting by the Personal Representative is required (unless the Personal Representative is the sole residual devisee of the estate). 72-3-1005(3), M.C.A. This helps to assure that the property of the decedent is properly administered and distributed.

NONPROBATE PLANNING TECHNIQUES

As well-drafted as it may be, a Will may have no effect on how one's property passes. Wills only control the passage of probate property; increasingly, individuals are using non-probate means of passing property. A first step in drafting a Will would be to know how a client's assets are titled. An understanding of some of the more common means of passing property is needed.

TRUSTS

Testamentary Trusts

Testamentary trusts are created under a decedent's Will.

Revocable (Living) Trust

These trusts are created during the Trustor's lifetime and are used for the Trustor's benefit.

Upon the Trustor's death, trust assets are distributed according to the Trust terms, so it can serve as Will substitute but a pour-over Will is still needed.

There are no tax benefits above and beyond what can be obtained through use of a Will:

- All income is included on the Trustor's income tax return;
- All assets are included in the Trustor's estate.

A trust avoids the necessity of ancillary probate. In other words, there will be no need to open a probate in each state in which the real property is located. Instead, the real property passes pursuant to the terms of the trust instrument. Consequently, a living trust may be indicated for a client who owns property in multiple states.

> **Planning Note**: Living trusts are a popular means of avoiding probate. Unfortunately, many clients never completely transfer all their Standard planning for living trusts

involves making certain that all the assets of the Trustor should be transferred into the trust prior to death in order to get the

The Irrevocable Inter Vivos Trust

As with Living Trusts, these are established during the Trustor's lifetime ("inter vivos"), but they can<u>not</u> be revoked ("irrevocable").

These are usually created for their tax advantages, namely:

- To get assets out of the Trustor's estate;
- To avoid tax to the Trustor on income from assets placed in the trust;
- To remove future appreciation from the Trustor's estate.

The price of the getting these tax advantages usually is loss of control over the assets.

An irrevocable inter vivos trust may be an appropriate vehicle to hold life insurance. Done properly, such a trust will keep the insurance out of the client's taxable estate. Clients often do not realize that life insurance on their lives although free of income tax is still subject to estate tax.

JOINT TENANCY

Co-Tenancies

Montana recognizes three forms of ownership by multiple persons:

> **70-1-306. Ownership by several persons -- types.** The ownership of property by several persons is either of: (1) joint interests; (2) partnership interests; (3) interests in common.

Tenancy in Common

Tenancy in common is a form of concurrent ownership in which two or more persons own an undivided fractional interest in the property. Each tenant has an equal right to occupy the whole of the property. The interest of each tenant is freely transferable, either during lifetime or upon death.

Joint Tenancy

Joint tenancy is a form of concurrent ownership very similar to tenancy in common, except that it includes the right of survivorship, even though that right is not stated in the statute. In

Hennigh v. Hennigh (1957), 131 Mont. 372, 309 P.2d 1022, the Montana Supreme Court stated that the Montana joint tenancy statute incorporated all the incidents of joint tenancy that existed under the common law, including the right of survivorship.

In Montana, joint tenancy must be expressly created.

> **70-1-307. Joint interest defined.** A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants.

For example, in *In re Estate of Shaw* (1993), 259 Mont. 117, 855 P.2d 105, 50 St. Rep. 709, the Montana Supreme Court held that absent an express declaration that the parties were creating a joint tenancy with right of survivorship in a brand certificate or that the brand and cattle were to be owned by partnership, the son, father and mother each owned an undivided one-third interest in the brand and in the cattle as tenants in common and use of word "or" in the brand certificate, without more, did not create a joint tenancy.

Shaw overruled *First Westside Nat'l Bank v. Llera* (1978), 176 Mont. 481, 482 P.2d 100, which had held that, as to personal property, not real estate, an ownership document showing title to two or more persons "and/or" had the effect of creating a joint tenancy estate with right of survivorship. *Shaw* also clarified that an earlier case, *Marshall v. Minlschmidt* (1966), 148 Mont. 263, 419 P.2d 486, which was quite similar to *Shaw* in that a brand was held in the names of three persons in the form of "A or B or C" was not applicable because it had been decided on other grounds and the discussion in *Marshall* pertaining to joint tenancy was merely dicta.

Automobiles

A specific statutory exception to this general rule applies to automobiles. Joint tenancy with right of survivorship is presumed if the owners listed on the title are members of the same family:

> **61-3-202. Certificate of ownership -- issuance -- contents -- joint ownership -- inspection -- fees.** ... (3) When the names and addresses of more than one owner who are members of the same immediate family are listed on the certificate of ownership, joint ownership with right of survivorship, and not as tenants in common, is presumed.

Safe Deposit Boxes

Montana has a specific statute applicable to safe deposit boxes which provides that when a safe deposit box agreement grants multiple persons the right to use or occupy the safe deposit box, it will be held in joint tenancy.

> **70-1-308. Safe deposit box -- joint tenancy.** When so specified in the agreement granting for a term of time the right in two or more persons to use or occupy any safe or box, commonly referred to as a safe deposit vault or box for the safekeeping of valuables, such interest and estate created in the grantees shall be a joint tenancy in such vault or box and pass to the survivors and survivor upon the death of one or more of the joint tenants with right in such survivors and survivor to have access to and possession of such vault or box and the contents thereof under the terms of the agreement.

In *Estate of Silver* (2000), 299 Mont. 506, 512, 1 P.3d 358, 362, the Montana Supreme Court held that this statute provides for joint access to and possession of the safe deposit box and its contents; it does not provide for joint ownership of the contents of the safe deposit box. Consequently, ownership of cash in the safe deposit box did not pass to the surviving joint owner of the safe deposit box.

Tax Impact of Joint Tenancy

Estate Tax: General Rule

The decedent's gross estate will include the entire value of any property held by the decedent and someone else as joint tenants, except for such part as can be shown to have originally belonged to such other person or for which the consideration was provided by such other person. Internal Revenue Code §2040.

If the decedent made a gift to the other person who was used to acquire that person's interest, that will not count as consideration provided by the other person.

Estate Tax: Husband and Wife

The decedent's gross estate will include one-half the value of any property held by the decedent and the decedent's spouse as joint tenants. Treas. Reg. §20.2040-1(c)(7).

> Strategies:
>
> If a married couple's combined estate is less than $2,000,000, and they would otherwise each leave all their property to the survivor, the use of joint tenancy is a simple way to pass the property to the surviving spouse. The joint tenancy avoids probate and operates automatically by operation of law to pass the interest to the survivor.

If a married couple's combined estate is above $2,000,000, probably only the home and some bank accounts should be held in joint tenancy. Any more than that could bloat the estate of the survivor beyond what would be best for tax purposes.

Example: John and Jane Joint have a combined estate of $3,000,000. All their assets are held in joint tenancy. Upon Jane's death, all property passed to John. Due to the marital deduction, there was no estate tax payable upon Jane's death, but upon John's death, the total estate tax was $450,000. Had the property been held differently, the entire estate tax could have been avoided.

This applies only if the husband and wife are the only joint tenants. If the decedent owned the property in joint tenancy with someone other than the decedent's spouse, the IRS will presume that the full value of the property will be included in the decedent's estate, not just the decedent's proportional interest. Treas. Reg. §20.2040-1(a)(2). This presumption may be rebutted by evidence establishing that consideration for the property came from someone other than the decedent.

Planning Note: Note that this presumption of 100% inclusion applies to property held by a parent in joint tenancy with children. Note also that this presumption does not apply to property held by tenancy in common. Treas. Reg. §20.2040-1(b). Consider the situation of a mother who had deeded her ranch to her children and herself in joint tenancy. If she dies with the property titled in that manner, the full value of the property will be included in her estate, because in fact none of the consideration for the property has come from the children. If instead the property is held by the mother and her children as tenants in common, upon her death only her fractional interest is included in her taxable estate.

Gift Tax Consequences

The creation of a joint tenancy may be a taxable gift. The regulations distinguish between financial accounts and other assets. Creation of a joint tenancy in a bank account will not be considered a gift until such time as the money is withdrawn by the donee. Treas. Reg. §25.2511-1(h)(4). Creation of joint tenancy in land, however, will be considered a gift as of the execution and delivery of the deed unless it is between a husband and wife. Treas. Reg. §25.2511-1(h)(5).

Planning Note: Creating joint tenancies in land other than between a husband and wife could result in double taxation. For example, if a parent adds a child as a joint tenant to land owned by the parent, there is a completed gift upon execution and delivery of the deed. Treas. Reg. §25.2511-1(h)(5). In addition, because the parent provided all the consideration for the land, upon the parent's death, 100% of the value of the land would be includible in the parent's taxable estate. Treas. Reg. §20.2040-1(a)(2).

Severance

In general

At common law, joint tenancy was unilaterally severable by either tenant. A joint tenancy in real property can be severed during lifetime by a conveyance on the part of a joint tenant. *In re Estate of Matye* (1982), 198 Mont. 317, 319, 645 P.2d 955, 957. Consequently, the creditor of any joint tenant can reach the undivided interest of such joint tenant. Upon the death of a co-tenant, the creditors of the estate will be able to reach the interest of the decedent in property held in tenancy in common; whether the creditors can reach the interest of the decedent in property held in joint tenancy (assuming the decedent is survived by at least one other co-tenant) is less clear. Usually they cannot, but that is not always the case. For these reasons, it is important to know whether the tenancy has been severed.

Divorce

There had been some uncertainty under Montana case law whether a divorce effected a severance of joint tenancy between the formerly-married couple. In 1993, the Legislature adopted 72-2-814, M.C.A. which provides in subsection (2)(b) that the divorce or annulment of a marriage "severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship and transforms the interests of the former spouses into tenancies in common."

Subsection (3), however, provides that "A severance under subsection (2)(b) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property, which records are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership." No cases have yet been decided to flesh out the meaning of this subsection, but this language appears to state that a post-transaction recording could detrimentally affect a creditor's position.

Homicide

Felonious and intentional killing of one co-tenant by another also severs joint tenancy. 72-2-813, M.C.A. In *Matye*, a case decided prior to the adoption of 72-2-813, M.C.A., the Montana Supreme Court held that where a wife murdered her husband, a severance took place at the moment of death, resulting in a one-half interest being retained by the wife and the remaining one-half interest passing as the property of the decedent husband. *In re Estate of Matye* (1982), 198 Mont. 317, 319, 645 P.2d 955, 957.

Without more, the severance of the joint tenancy would not necessarily preclude the property from passing to the killer. For example, where one spouse kills another, they might well have wills leaving everything to each other, so even though the joint tenancy was terminated and converted into a tenancy in common, the interest of the decedent would still, under the terms of the will, pass to the surviving spouse. That result is changed by statute, so that the killer does not succeed to the victim's interest; rather the killer forfeits all benefits under the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance, and if the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the killer's intestate share. 72-2-813(2), M.C.A.

In addition, the felonious and intentional killing of the decedent revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer; and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent. 72-2-813(3), M.C.A.

Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by 72-2-813, M.C.A., or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent. 72-2-813(5), M.C.A.

Shares of the Tenants

Just because a joint tenancy is severed does not mean that the tenants have equal shares of the property. Absent proof, there is a presumption that the co-tenants have equal interests, but that is subject to rebuttal. In *In re Estate of Garland* (1996), 279 Mont. 269, 928 P.2d 928, the Montana Supreme Court stated:

> Tenants in common presumptively own undivided equal interests in property; however, that presumption is subject to rebuttal. *See Sack v. Tomlin* (1994), 110 Nev. 204, 871 P.2d 298, 304; *Lawrence v. Harvey* (1980), 186 Mont. 314, 322-24, 607 P.2d 551, 557; *Ivins v. Hardy* (1947), 120 Mont. 35, 42, 179 P.2d 745, 748 (overruled on other grounds). Therefore, on the death of one co-tenant, the surviving co-tenant and the decedent's estate may be entitled to unequal shares in the property. The respective shares of the decedent's estate and the surviving co-tenant depend on the decedent's and the surviving tenant's individual contributions to the acquisition and maintenance of the property. *See*, e.g., *Tomlin*, 871 P.2d at 305. Absent proof of disparate contributions, however, the presumption that the co-tenants are entitled to undivided equal interests stands.

Distinguish this result under state law from what IRS regulations provide for estate tax purposes. See Tax Impact of Joint Tenancy beginning at page 10.

Distinguishing Tenancy in Common from Joint Tenancy

Determining when property is held joint tenancy and when it is held as tenancy in common should be simple, but as indicated by the cases above, it has not always been. Since *Shaw*, it is apparent that joint tenancy will not be presumed, the intent to create it has to be clear, and words such as "or" or "and/or" inserted between the names of the tenants will create a tenancy in common, not a joint tenancy. While the tenants are alive, there may be little difference. A creditor of one could reach the tenant's interest in either event. Upon death of a co-tenant, however, if the deceased co-tenant has creditors, they would be able to reach the decedent's interest if there is a tenancy in common but not, in general, if there is a joint tenancy.
In *Shaw*, the Montana Supreme Court admitted that the case law was confusing, but attempted to make it more certain with the following:

> "Without attempting to reconcile all of the various cases dealing with the creation of joint tenancies that have come before this Court, we hold as follows: The creation of a joint tenancy (same as joint interest) in property is by Montana statute. Sections 70-1-307 and 70-1-314, M.C.A., mandate that if parties want to create a joint tenancy (same as joint interest) in property, they must make an express declaration that they intend to create a joint tenancy or joint interest. Simply using words such as "or" or "and/or" without expressly using the words "joint tenancy", "joint tenancy with right of survivorship" or "joint interest" will not suffice to create a joint tenancy, absent a specific statute to the contrary. In the event the parties do not expressly declare that the ownership interest created in the instrument of title or transfer is a joint tenancy or joint interest or a partnership interest, then a tenancy in common or an interest in common will be created."

Shaw, 259 Mont. at 126, 855 P.2d at 111.

POD ACCOUNTS

Pay on Death ("POD") accounts may be created in Montana. A "POD designation" means the designation of: (a) a beneficiary in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries; or (b) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned. 72-6-201(8), M.C.A.

During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount. 72-6-211(2), M.C.A.

POD accounts can be established for any contract of deposit between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, and share account. 72-6-201(1), M.C.A. A "financial institution" is an organization authorized to do business under state or federal laws relating to financial institutions and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union. 72-6-201(4), M.C.A.

In contrast to property owned in joint tenancy, a beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party. 72-6-211(3), M.C.A. This feature provides asset protection for the owner of the account, since the creditors of the beneficiary cannot reach the account; the beneficiary has no interest in it. An account held in joint tenancy or tenancy in common, however, can be severed and the beneficiary's creditors can reach the beneficiary's interest. Note, however, that a co-tenant's interest in Montana is only presumed to be an equal share of the account, but that can be rebutted by proof.

At the death of the owner, the account passes to the beneficiary outside of probate, as it would if the property had been held in joint tenancy. But during the lifetime of the owner, the account has not been subjected to the possible claims of the beneficiary's creditors, the beneficiary has had no right to withdraw funds from the account and the owner has retained the ability to change the beneficiary designation on the account or otherwise exercise complete dominion and control over the account without requiring the consent of the beneficiary.

TOD ACCOUNTS

Transfer on Death ("TOD") accounts are created under the Uniform TOD Security Registration Act, Title 72, Ch. 6, Part 3, M.C.A. Though similar to POD accounts, they are created for "securities" and "security accounts" as defined in 72-6-301, M.C.A.

As with POD accounts, the designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death, and a registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then-surviving owners without the consent of the beneficiary. 72-6-306, M.C.A. Consequently, TOD accounts insulate the account owner from the claims of a beneficiary's creditors, at least as to the securities in the account.

At the death of the owner of the account, the securities pass to the beneficiary outside of probate, as they would if they had been owned in joint tenancy. If there are multiple beneficiaries, they hold their interests as tenants in common, until the securities are divided after the death of the owner. If no beneficiary survives the death of all owners, the security belongs to the estate of the owner. 72-6-307., M.C.A.

BENEFICIARY DEEDS

Montana has recently adopted the use of beneficiary deeds. 72-6-121, M.C.A. Effective October 1, 2007, these deeds can be used with real estate much the same as POD are used for bank accounts and TOD accounts are used for securities. They provide for the transfer of the owner's interest upon death, but provide no rights to the beneficiary during the owner's lifetime. There can be more than one beneficiary, and the deed may specify that multiple beneficiaries take their interests as joint tenants, as tenants in common, or in any form of valid tenancy.

If the property is owned in joint tenancy, then in general the deed will be given effect only on the death of the last surviving joint tenant, and then only if that joint tenant has joined in executing the beneficiary deed.

A beneficiary deed may be revoked at any time.

The statue provides a sample bare-bones beneficiary deed.

RETIREMENT ACCOUNTS

Retirement accounts, including IRA's, have to be owned by the plan participant, but beneficiaries can be designated.

LIFE INSURANCE

Life insurance is another form of non-probate asset. My clients are often confused to learn that life insurance may be taxable in their estate; they usually are thinking of the income tax treatment.

ADDITIONAL DOCUMENTS

DURABLE GENERAL POWER OF ATTORNEY

Benefits of a General Power of Attorney

With a thorough general power of attorney, a principal may give an agent broad powers to act on behalf of the principal. This would include buying and selling assets, conducting banking transactions, security transactions, signing income tax returns and representing the principal in front of the Social Security Administration. With such powers, if the principal eventually becomes incapacitated the agent can tend to the affairs of the principal.

A durable general power of attorney may be used by the agent to transfer assets into the pricipal's living trust, but the power should be specified in the power of attorney.

Limitations to a General Power of Attorney: Agent vs. Guardian

The desire is that the agent can tend to the affairs of the principal without the necessity of having a guardian or conservator appointed, the proceedings for which are costly and may cause hard feelings. The agent, however, does not supplant the principal; the principal is still entitled to override the agent and to act without the consent of the agent. In situations where the principal needs protection from himself, a guardian or conservator is required, and the power of attorney may designate that the principal nominates the agent to serve in that capacity.

ANATOMICAL GIFTS

The client may wish to donate organs to medical science. That may most simply be accomplished by signing an organ donor card and keeping it with the driver's license.

LIVING WILLS

A Living Will is a declaration that the signer does not wish to be kept alive by artificial means if in a terminal condition. They can also be used to request that all means be used to keep the signer alive, but these are less common.

HEALTH CARE POWER OF ATTORNEY

Montana does not yet have specific legislation recognizing health care powers of attorney, except in connection with Living Wills, but those come into effect only if you are in a terminal condition. Nonetheless, they seem to be accepted by hospitals and physicians.

A NEW APPROACH: COMBINING THE BEST OF BOTH PROBATE AND NON-PROBATE TECHNIQUES

In the past several years, the use of nonprobate transfers has gained popularity. Joint tenancy has been available for many years, as have beneficiary designations of retirement plans. Of more recent origin, POD and TOD accounts have been made available and most recently, beneficiary deeds.

The use of nonprobate transfers has created other problems, however: each nonprobate instrument has its own beneficiary designation and if the client desires to change the beneficiaries, it is necessary to change multiple instruments. A change to the Will does not alter the disposition of property passing under nonprobate instruments. It is necessary for the client to sign a new POD designation with the bank, a new TOD designation with the stock broker, a new beneficiary designation with the life insurance company, and record a new deed to property held in joint tenancy (if indeed the deed can even be changed). If all of a client's assets will pass through probate, any change to the Will controls disposition of the assets. With the use of non-probate instruments, the Will is no longer a simple, central point for making changes to a client's intended dispositions. This simplicity has been lost for the sake of avoiding probate.

In addition, it is necessary to determine that each nonprobate instrument carries out the client's intentions upon the occurrence of various contingencies. For example, if the client designates his children as beneficiaries of his stock account under a TOD arrangement, what happens if one of the children dies before the client? Under a Will, the deceased child's share usually passes to the child's descendants. Under TOD beneficiary designations, the deceased child's share often passes to the other surviving siblings, but this differs from institution to institution. To be thorough, the attorney should confirm with each institution what happens upon various contingencies. Some clients have accounts at multiple brokerages and POD accounts at multiple banks. What had been thought of as a means of simplifying transfers at death has created something more complicated.

My suggestion is to consider the use of an unfunded revocable living trust. Even if the trust is not funded during the client's lifetime, it can be used as the designated beneficiary of various nonprobate instruments. The retirement plan might have a primary beneficiary designated as the client's spouse, and a contingent beneficiary as the successor trustee of the client's living trust. The client's TOD securities accounts can designate the living trust's successor trustee as beneficiary, as can the client's POD bank accounts. Now, with the availability of beneficiary deeds, even real estate can have the living trust as beneficiary. Then if the client wishes to change beneficiaries, it takes one amendment to the trust agreement not multiple amendments to various beneficiary designations. If a child dies before the client, the trust instrument controls who receives the share that would have gone to the child; it is not necessary to review multiple forms to determine what they provide. The living trust is used as the central receptacle for all the other nonprobate assets. In this manner, it is possible to leave the living trust unfunded and still avoid probate on the client's entire estate.

By leaving the trust unfunded, the client retains ownership of assets in the client's own name, which in my experience is what most clients prefer. The client gets the best of the probate techniques—simplicity during lifetime—*and* the best of the non-probate techniques: simplicity upon death. Using an unfunded revocable trust in this manner combines the best of both probate- and nonprobate-based planning.