Estate Planning 101

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These materials are intended to provide you with a user-friendly reference that will explain what an estate plan is, what is involved in creating an estate plan, why everyone needs one, and what happens when one does not have one. Included are definitions of key estate planning terminology and the standard documents, along with considerations for the client, and a quick discussion of the federal and state transfer tax system.

I. What Is An Estate Plan?

An “estate plan” is a set of documents created by an individual or couple that lays out the client’s wishes so a loved one can speak and act on the individual’s behalf in the event of incapacity and to direct the handling of assets when the individual is unable to do so, either due to incapacity or death. Estate plans are important for people in all stages of their lives.

A. Key Terms

“Estate” refers to a person’s assets and possessions, both tangible and intangible.

“Probate Estate” are the assets that a person owns individually, with no named beneficiary. For example, Jane Smith’s probate estate would include bank accounts in the name of Jane Smith, a vacation home that she holds in her name alone, and her possessions, including her jewelry, art collection, and automobile.

“Gross Estate” are the assets in which the individual has an ownership interest or over which he or she maintains control during life. Jane’s gross estate would include the probate items listed above, along with her life insurance policy, her IRA and 401(k) plan, her revocable trust, and her jointly held home with her husband, Jim.

“Beneficiary” or “Deviser” or “Distributee” is the person chosen to receive another’s assets by will, trust, or beneficiary designation.

“Heir” is a person legally entitled to inherit from another due to relationship. Jane’s heirs would include her husband and her children. The heirs of Jane’s unmarried sister, Sue, include Sue’s parents, and then her sister, Jane, and then Jane’s children.

“Will” is the document created by a person over the age of 18 that is used to govern the disposition of probate property (more on wills to follow). A will is not binding until allowed by the probate court. Because it must be “probated” in the county probate court, a will becomes a public document once allowed by the court after the person’s death.

“Trust” is the document created by a person over the age of 18 that can be used to dispose of a person’s property (more on trusts to follow). Trusts go into effect once signed. They are not filed with the probate court and thus are private. Trusts have many purposes.
“Donor” or “Grantor” or “Settlor” is the person who creates the trust. The terms “donor” and “grantor” are also used to refer to the person who makes a gift to another. That recipient is the “donee” or “grantee.”

“Trustee” is the fiduciary in charge of carrying out the trust and administering the property for the benefit of the beneficiaries.

“Fiduciary” is a broader term that refers to the caretaker or custodian of property who is responsible for managing the property for the benefit of another. Fiduciaries include trustees and others in positions of authority like personal representatives of wills. The term is also used as an adjective to describe the responsibility and authoritative nature of such roles.

“Conservator” is a person appointed by the probate court to manage the property of a person who is incapacitated due to minority or physical or mental disability. A conservator acts in a fiduciary capacity.

“Guardian” is a fiduciary appointed by the probate court responsible for the care and custody of an incapacitated person.

B. Basic Estate Planning Documents

The following is a list of the documents that make up the typical estate plan.

Will

A will is the document created by an adult during life that provides for the disposition of the property held individually by him or her at death. Wills cover the disposition of tangible personal property, including antiques, artworks, and jewelry. Your will also governs individually held real estate and other all assets, including accounts in your individual name. Wills do not govern contractual assets like retirement plan assets, life insurance, and jointly held assets.

The will, which is subject to the jurisdiction of the probate court, is the document where you name the guardian(s) for children under the age of 18, the age of legal majority. Your will also nominates your “personal representative,” who is the fiduciary charged with settling your estate and carrying out the terms of your will. The personal representative can be a family member (ideally someone who is organized, responsible, and practical) or a professional individual or office who settles estates as part of her/his/its business.

Wills must be created and signed in accordance with state law requirements, which vary from state to state.

For example, under Massachusetts law, a person aged 18 and older can create a will by written instrument signed in the presence of two disinterested witnesses (i.e., not related to the “testator” or named in the will as a beneficiary or fiduciary). The will must be typewritten – a handwritten or “holographic” will does not pass muster. The witnesses will affirm by their signatures that the testator was of age, of sound mind, and under no constraint or undue influence, and that he understood that he was putting a will in place. Along with the two disinterested witnesses, a notary public should be present at the will signing. The notary’s signature on the attestation clause makes the will “self proving,” meaning that the witnesses will not be called to testify in court that the will was properly executed.
**Trust**

A trust is a free-standing legal entity created by a written instrument that sets forth in detail how it must be administered. Trusts have tremendous flexibility, which is why they are so widely used by estate planners. From a personal standpoint, trusts allow you to carry out your goals and expectations for the application of your assets for your loved ones and for you. From a financial perspective, trusts enable you to save taxes, fulfill your charitable ambitions and/or protect or preserve your assets. A trust for the benefit of a second spouse can ensure that he remains provided for during life in the manner to which he was accustomed when his wife was living, while ensuring that the assets will remain for the benefit of the children of his marriage to his late wife (and not diverted to a new wife and children).

Parents of young children can create a trust to ensure that wishes for the benefit of their children will be fulfilled in the event of their untimely deaths. With a trust that is either funded during life or at death via the terms of the will, surviving family members will not have to be involved with ongoing probate court oversight as to the assets in trust. Your trust can set forth who should be in charge of the property, how long it should be held in trust before passing outright to each child, and how trust income and principal should be managed and distributed during the continuing term of the trust. You can use a trust to protect the financial interests of your adult children who may not be financially savvy or who may be vulnerable to outside influences.

If you become incompetent, the named trustee of your own self-funded trust can pay bills and handle other financial matters for you without needing to go to court to be appointed conservator. Assets held in a funded trust for your benefit will be administered by a trustee chosen by you for your benefit without interruption according to the dictates you set forth in the instrument.

Trusts also offer more flexibility than other gifting alternatives for children, and trusts allow you to provide for multiple generations of beneficiaries. Young beneficiaries whose assets are held in a custodial account, like an UTMA, will inherit those assets automatically upon reaching age 21. Assets in a 529 education savings account can be applied only to certain expenses. Creating an **educational trust** for your grandchildren will allow you to help pay for their education in a tax-efficient fashion.

An educational trust does not have to be applied strictly for college or graduate school expenses. The trust might recognize that a family member’s talent lies in less conventional educational pursuits and permit trust distributions to encourage such ambitions. Trusts are more adaptable to changing circumstances; with a trust you can direct the trustees regarding what should happen with the trust property when there is no longer a need to meet educational expenses.

**Probate court avoidance** is an important benefit of trusts. Property transferred at death via a trust will not incur the costs and delays associated with the probate process. For example, appreciated stocks held in trust can be sold immediately upon your death to lock in the value, while stocks passing through probate usually cannot be sold for six to eight weeks. As the administration of the trust assets can continue without interruption, the trust property can be tapped to cover the expenses that arise in the wake of your death without the delays associated with probate. Because a trust is not filed with the probate court, the bequests and directives in a trust are private.
By law, trustees have a high duty of care toward the donor and the beneficiaries. The trustees may have discretion to determine how much income or principal each beneficiary receives from time to time. Trustees managing a single fund for the benefit of multiple persons with different needs must address those varying needs with fairness. Trustees are also required to invest trust assets prudently in a diversified portfolio.

**Trusts offer adaptability** and can be written to accommodate the estate tax laws in effect at the time of your death. (See Section III for a discussion of estate tax laws.) Formulas written into trusts provide guidance to the fiduciaries administering the trust and settling your estate to enable them to make the appropriate funding decisions and tax elections to minimize the estate tax due from your and your spouse’s combined estates, to the extent possible. Because estate tax laws have been so uncertain of late, a well-drafted trust can offer the assurance that decisions can be made at the time of your death when circumstances are known to receive the best possible estate tax result. Leaving assets outright to your spouse by will does not offer such flexibility.

**Charitable trusts**, which can continue in perpetuity, can create private foundations or more simply set up regular charitable gifts. Alternatively, they can be split between charities and non-charitable beneficiaries, enabling you to carry out a worthwhile charitable pursuit and perhaps provide an income stream/or generous payments for you or a family member.

Lastly and importantly, trusts can be used to supplement the quality of life of an elderly or disabled person while protecting that person’s eligibility for public assistance. As the beneficiary of a **“special needs trust,”** a person may remain eligible to receive publicly provided healthcare and housing that will accommodate his or her disability but still be able to tap trust assets to be able to go on a family vacation. For a person with limited assets who is in need of expensive long-term care, a trust can be used to protect those assets for the benefit of heirs while enabling the beneficiary to qualify for public assistance to meet those long-term care costs.

Other components of the estate plan are the client’s lifetime incapacity documents. The lawyer should recommend that the client create new durable powers of attorney and health care proxies. These documents are invaluable if a client becomes physically or mentally disabled. Both serve to avoid probate court proceedings during life.

**Health Care Proxy**

The health care proxy serves to name a health care agent to communicate the client’s wishes on his/her behalf if he/she is incapable of doing so. Having a health care proxy in place saves the client from being subject to burdensome probate court proceedings to appoint a guardian to handle health care matters.
In Massachusetts, Chapter 201D of the Massachusetts General Laws contains the Commonwealth’s applicable statute on health care proxies. The health care proxy document names the chosen health care agent and successor(s) and sets forth instructions to the agent so that the client’s wishes are clear. The directives in the health care proxy essentially serve as the client’s “living will” and the client can be specific regarding what level of care he or she wishes to receive, and whether only palliative measures are desired if he or she suffers from a terminal condition or is in a persistent vegetative state. Most law offices have template health care proxy documents that include physician-approved language. After reviewing the draft health care proxy, the client can direct any changes to this very personal document. The client should be advised to choose a close and trusted family member or friend to serve as health care agent.

**Durable Power of Attorney**

The durable power of attorney names a person or persons to handle the client’s financial matters should he/she be unable to do so. Through the use of a durable power of attorney, the client, if sick, injured or otherwise indisposed, should not have to endure a potentially inefficient and expensive court proceeding to name a conservator to handle financial matters.

II. **What Happens If You Do Not Have an Estate Plan?**

A person who dies without an estate plan has died “intestate.” This means the estate will be distributed according to state law in the state where the person was domiciled at the time of death.

Massachusetts recently (2011) implemented the Uniform Probate Code, in an attempt to unify the body of law governing estates throughout the Commonwealth and to become more in line with the bulk of the country. By law, if a person dies intestate, his or her property passes pursuant to the Section 2-101 of Chapter 190B of the Mass. General Laws, which states, in part:

(a) Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs as prescribed in this part…

If a married person dies without a will (or funded trust), his spouse will receive a share of his intestate estate, the size of such share to be dependent on what other heirs survive the decedent. Chapter 190B, Section 2-102 sets out a formula of what the surviving spouse gets. For example, if a person dies leaving his wife and a child from a prior marriage, by law the wife will receive the first $100,000 plus one-half of the balance of his intestate estate. Although the intestate laws are intended to achieve a fair result for beneficiaries that mimic a donor’s intent, the end result may not be what the decedent would have wanted.
**Degree of Relationships.** When a person dies without a spouse, child, grandchild or more remote descendant surviving, his estate will be distributed to his heirs at law. Heirs are determined by law according to their “degree of kindred” to the decedent. The legal closeness of kin is set out in the following “Table of Consanguinity.”

![Table of Consanguinity](image)

*From www.thisMatter.com*

It is crucial for married same-sex couples living in states that do not recognize their marriage and for people who are in committed, long-term relationships but not married, to have an estate plan benefiting each other and naming each other as health care agent and attorney-in-fact. If something happens to render a person physically or mentally unfit, his or her partner is not recognized as having any legal authority to speak or act for him or her. In a state that does not recognize same-sex marriage, a surviving spouse would not be considered an heir at law under that state’s intestacy statutes. For inheritance purposes, a partner is not considered an heir, despite the length of the relationship. Some states, such as Massachusetts, do not recognize common law marriages. This highlights the importance of setting out your wishes in an estate plan. Surely no one intends to have an unknown second cousin twice removed inherit everything in place of a spouse (!) or a beloved partner of many years.

Additionally, without an estate plan, you may be more vulnerable to the imposition of estate tax.

III. **Estate Taxes**

Historically, a major aspect of estate planning has been minimizing estate taxes. The estate tax originated as an excise tax on the transfer of wealth. The estate tax is imposed on a decedent’s estate and is based on the value of his/her “taxable estate,” which is the “gross estate” reduced by debts, expenses and deductions. The federal gift tax is also a transfer tax and is assessed on gifts (i.e., transfers for no consideration) made during life to others that exceed the then applicable exemption amount. The generation-skipping transfer tax (or “GST tax”) is a tax that is imposed on gift transfers to individuals more than one generation below you. A gift to a grandchild could be subject to GST tax along with gift or estate tax. The various transfer taxes are imposed on the giver of the gift (the donor) when his or her total transfers to non-spouses and/or charities exceed a certain amount. That threshold amount is referred to as the “exemption” from tax. An individual’s total exemption applies to all gifts he or she makes at life and at death.
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**Federal Estate Tax.** Recent federal estate tax legislation has reduced the anxiety associated with paying estate taxes (aka the dreaded “death tax”) for the bulk of the population. The 2012 Tax Act made permanent the legislation increasing the exemption from federal estate, gift and GST Tax to $5,000,000 per person as adjusted for inflation. The 2015 exemption is $5,430,000. That exemption applies to the estate tax, the lifetime gift tax and the generation-skipping transfer tax. A married couple can give away up to $10,860,000 during life and at death before paying any federal estate tax. No tax is imposed on transfers to spouses. Gifts to charities are not taxed and result in an estate tax charitable deduction.

Notably, the terms “married,” “marriage,” and “spouse” refer to marriages that are recognized under federal law, which currently includes same-sex marriages recognized under individual state laws. This makes estate tax planning for couples in a state that does not recognize same-sex marriage more complicated (and necessary) as gifts or bequests to the surviving spouse are not eligible for the unlimited marital deduction from estate and gift tax.

Each person also has the ability to make “annual exclusion” gifts currently at $14,000 per recipient and that annual exclusion gift does not count against the lifetime exemption. You can also make unlimited direct payments of tuition and medical expenses free of federal gift tax.

**State Estate Tax.** Several States have imposed their own estate and inheritance taxes. For example, the Massachusetts estate tax filing threshold (a more appropriate term than “exemption” at the state level) is $1,000,000, an amount expected to remain constant.

See Exhibit B for a map showing other states with estate or inheritance taxes.

Estate taxes and estate tax planning are complicated and this synopsis does not delve into sophisticated planning and estate tax minimization strategies. A more in-depth discussion of this can be provided to you by your own estate planner.

**IV. Getting Started**

The job of an estate planning attorney is to craft a set of documents for a client that accomplishes the client’s goals. Such goals and objectives will likely include providing for the client’s beneficiaries, disposing of his or her assets in an orderly fashion, and minimizing the estate tax consequences on his or her estate. A couple with young children might be seeking wills to name a guardian for their children who are both still under age 18, a trust to provide for the children if something happened to them in a common disaster, and health care proxies and durable powers of attorney.

So that the estate plan works for clients, the attorney will want to find out from them what they have for assets, how title is held, and most importantly, their priorities for the care of their children and for achieving other goals.
**The Estate Plan Questionnaire.** As a first step, the attorney will likely send the new client an estate planning questionnaire. I have included a copy of our office’s questionnaire, which we use to gauge the needs of new clients (see Exhibit A). It asks for a list of assets, the names of heirs and beneficiaries, as well as the names of other professionals with whom the client is working including the client’s financial advisor, accountant, and insurance broker, as applicable.

Before discussing the particulars of a proposed plan or the estimated cost, the attorney will need to discuss with clients their specific concerns and gain some idea of the full family picture, including family dynamics and issues.

Some couples are more trusting than others and are more nonchalant about the concept of remarriage. Others are somewhat more fearful and prefer having more control over their assets after death through the use of a trust to avoid the potential of any assets being diverted from their children. Parents may also differ about how able and deserving their children are to receive assets.

The estate planning attorney should try to anticipate problems that might arise in the aftermath of the client’s death. Second marriage situations, for example, frequently require balancing the interests of the spouse and the children by the former marriage – a key question to be discussed in advance. Certain clients may wish to treat their children differently, and it is important that they are aware of and consider the emotional burden that this may place on all of the children, even the favored ones. When children do not get along, clients should avoid placing them in fiduciary or co-ownership positions where they must cooperate. These family issues have particularly high stakes in the context of a successful family business.

**Disposing of Real Estate.** How best to dispose of real estate is a key question. If there are multiple children it almost always makes sense to direct a sale of the family home at death to avoid the conflicts inherent in co-ownership among siblings. Inevitably, there will be disagreement about who should live in the family home. Where a family has a vacation home and the plan is to keep it in the family after the death of the parents, a comprehensive plan – such as a trust or shared ownership agreement – should be put in place with details of ownership and management of the property to avoid the inevitable family squabbles.

**Estate and Charitable Gift Planning.**

Estate plans can also carry out a person’s charitable goals. Charities can be benefited during life or at death through outright gifts, bequests, or more technical vehicles like split-interest charitable trusts or private foundations. Institutions like Emerson College offer a number of different opportunities to incorporate charitable giving into an estate plan, which can provide a legacy and tax benefits to the donor, and lasting benefits and impact for the College.
Title to Assets. When embarking on the estate planning process, it is important to be aware of how title is held. Title is an issue for both tax and non-tax reasons. A widowed mother, for example, may hold an account jointly with one of her children. At the widow’s death, that account will go right to that child and will not pass by the terms of her will, which might provide for all three of her children. Beneficiary designations on insurance and retirement plans should be checked to ensure they are up to date and in accord with the new estate plan.

Revising and Re-Visiting Your Estate Plan. Wills, revocable trusts, durable powers of attorney, and health care proxies are all documents created by written instrument that become effective once properly executed. These instruments can be changed over time by replacement properly signed instruments. A client who signs up an estate plan and later changes his or her mind about the beneficiaries, fiduciaries, or plans for administering the assets can revise the documents at any time during life. We recommend that clients review their documents every few years to ensure that the documents still carry out their wishes, and to contact us promptly if changes are needed.

Of course, everyone is different, has different priorities and different definitions of family. Thankfully, estate plans can be written to cover virtually any situation.

With a good estate plan in place, you can do your best to ensure that your family will be happy and harmonious.

These materials are solely for educational purposes and are not intended to be legal or technical advice by Jennifer T. Fleming, Steffensen, Fleming & Associates, LLC, or Emerson College.
**ESTATE PLANNING QUESTIONNAIRE**  
(MARRIED)

In order to create an effective estate plan tailored to your personal circumstances, we need to assemble all of the relevant information concerning your biographical, family and financial situation. This form is intended to aid you in organizing that information in preparation for your first meeting with us.

**CONFIDENTIALITY NOTE:** As with all attorney-client communications, please note that any information you disclose to us orally or in writing will be held in the strictest confidence and released to no one without your consent.

I. **PERSONAL/FAMILY INFORMATION**

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<td>Other Names Used</td>
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<td>Date of Birth</td>
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Send mail to: Home? [ ] or Business? [ ]
At what time of day and at what phone number do you prefer to be contacted? ________________________

B. CHILDREN*

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<th>Full Name</th>
<th>Date of Birth</th>
<th>Social Security #</th>
<th>Address (if different from yours)</th>
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* Please note any stepchildren of either spouse.

C. OTHER BENEFICIARIES*

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<th>Full Name</th>
<th>Relationship</th>
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* E.g., parents, siblings, grandchildren, spouses/partners of children, relatives, friends or others whom you or your spouse might want to benefit.

D. CHARITABLE BENEFICIARIES

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<th>Organization Name</th>
<th>Charitable Mission/Purpose</th>
<th>Address</th>
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E. TRUST INCOME/EXPECTANCIES

1. Are you or your spouse current beneficiaries or trustees of any trust?*

* Please bring a copy of any such trust(s) with you to the first meeting, if possible.

2. Do you or your spouse anticipate receiving an inheritance anytime soon?
F. PERSONAL REPRESENTATIVES

Consider the person(s) in your life who would be appropriate to serve as your personal representative(s) in the following roles: 1) Executor; 2) Trustee; 3) Health Care Agent; 4) Attorney-in-Fact, i.e., Financial Guardian; and/or 5) Guardian of any minor or special needs child/ren you may have. We will explain and discuss in depth these fiduciary designations at our first meeting.

II. FINANCIAL INFORMATION

Please list your estimate of the current fair market value of your assets and liabilities in the applicable categories below. If you would prefer, you may submit a copy of a recent personal financial statement that includes the requested information instead of completing this section.

A. ASSETS

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<th>You</th>
<th>Spouse</th>
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<td>Other Real Property*</td>
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*Have you ever lived in or owned real estate in one or more of the following Community Property states: Arizona [ ], California [ ], Idaho [ ], Louisiana [ ], Nevada [ ], New Mexico [ ], Texas [ ], Wisconsin [ ] or Washington [ ]?

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<th>Bank Accts, CDs &amp; Money Market Funds</th>
<th>Brokerage Accts &amp; Individual Stocks, Bonds, Mutual Funds</th>
<th>Retirement Benefit Plans (e.g., Pension, 401ks, IRAs, SEP-IRAs, Keogh Plans)</th>
<th>Other Corporate Benefit Plans (e.g., Stock Options, Profit Sharing)</th>
<th>Closely Held Business Interests** (e.g., S.Corp, LLC, Partnership)</th>
<th>**Buy-Sell Agreement in place?</th>
<th>Annuities, Notes &amp; Other Receivables</th>
<th>Miscellaneous Assets</th>
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(a) Automobiles/Boats |
(b) Household/
    Personal Property

(c) Other (e.g., Antiques,
    Art, Jewelry, etc.)

Life Insurance
(Note: 1) Type of Insurance—e.g., Term,
    Whole, Individual, Group, etc.; 2) Ins. Co.;
    3) Policy Owner; & 4) Beneficiary(ies)

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<th>Total Assets</th>
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C. LIABILITIES

You
Spouse
Jointly Held Property
(Held w/Spouse? Other?)

Real Estate Mortgage #1

Real Estate Mortgage #2

Loans, Notes &
    Personal Guarantees

Other Debts & Liabilities

Divorce Payment/
    Transfer Obligations
    (Current or Post-Death)

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D. ESTIMATED
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E. OTHER FINANCIAL ADVISORS*

Name/Company
Telephone/Address

Accountant

Insurance Agent ____________________________________________________________

Broker/Trustee(s)/Investment Advisor(s) ______________________________________

*We will contact your other advisors only with your consent and only if needed to coordinate your estate planning with other aspects of your financial planning.

F. ESTATE & TAX PLANNING OBJECTIVES

Finally, please consider what estate planning objectives you want to achieve. Here are a few examples: 1) obtain basic or revised estate planning documents (will, trust, durable power of attorney and/or health care proxy); 2) strategize to minimize or fund the payment of estate taxes; 3) initiate personal or charitable gifting strategies; 4) plan education funding for children, grandchildren, et al.; 5) consider retirement plan distribution options; and/or 6) explore business succession strategies. We will discuss general estate planning concepts as well as your specific planning goals when we meet.

G. ADDITIONAL DOCUMENTS

Along with this questionnaire or other personal financial statement you may bring to our first meeting, it may be helpful for you to bring copies of certain additional legal or financial documents--if it is convenient for you to readily assemble them. Such documents would include any or all of the following documents, as applicable to your situation:

1) Existing Wills or Trusts;
   (including any trust created by another on which you are a beneficiary)

2) Real Estate Deeds;

3) Investment or Retirement Plan Statements;

4) Gift Tax Returns Previously Filed;

5) Most Recent Income Tax Return;

6) Any Current Prenuptial or Prior Divorce Agreements;

&/or 7) Any Relevant Closely Held Business Financial Statements or Agreements.

Thank you for your time and preparation. We look forward to meeting with you.

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EXHIBIT B

Inheritance and Estate Tax Rates and Exemptions in 2014

Notes: Exemption amounts are shown for state estate taxes only. Inheritance taxes are levied on the posthumous transfer of assets based on relationship to the decedent; different rates and exemptions apply depending on the relationship. For more details, see table 35 of Facts & Figures: 2014: How Does Your State Compare? Data as of Jan. 1, 2014. Published May 28, 2014

Sources: U.S. Census Bureau; State Statutes; Schoening Strategies
taxfoundation.org/maps