LINDA ROBERSON'S CAPITOL TIMES COLUMN
ARCHIVED COLUMNS – ESTATE PLANNING

July 15, 2004

Q: What is a "springing power" of attorney and should I have one?

A: Lawyers use the term "springing power" to refer to a power of attorney that does not give the agent the authority to act for the principal unless/until the principal becomes disabled. Usually the document will require that two physicians or a physician and a psychologist certify that the principal is unable to act on his/her own behalf before the agent can act.

I generally do not recommend the use of springing powers. I have found that many third parties are reluctant to accept the authority of an agent under a springing power. Additionally, there can be considerable delay between the time when the agent should begin to act and the time that the medical certifications are obtained, and much confusion and loss of funds can occur during this period. Finally, if you do not trust your agent enough to be comfortable that he or she will not misuse the power while you are competent and can check up on him or her, is this really the person you want to handle your affairs when you are unable to monitor his or her decisions?

If you do decide you want to include a springing power in your power of attorney, you should be very careful to provide clear language to triggering activation of your agent's authority to act. Your document should specify not only who makes the determination of incapacity, but also the basis upon which the determination should be made. The specific language should help overcome the scepticism of third parties who are reluctant to accept an agent's authority under a springing power.

April 22, 2004

Q: What is a health savings account and how can I start one?

A: The new medicare legislation enacted last December provides for a new tax-deductible account known as a Health Savings Account (HSA). If you are eligible to do so, you can start an account at any time, now that the commencement date of January 1, 2004, has passed.

To be eligible, you must be covered by a "high deductible" health insurance plan during each month in which contributions are made to an HSA – defined as a deductible of $1,000 for a single participant and $2,000 for a family. You must be under age 65 and not on Medicare.

The HSA is a tax-exempt trust or custodial account similar to an individual retirement account (IRA). Its sole purpose is paying qualified medical expenses for the account beneficiary. The account is set up with a qualified trustee or custodian, similar to an IRA.

Financial institutions and insurance companies are gearing up to handle these accounts. Contributions, up to the annual limit, may be made by an eligible individual, the individual's employer, or a family member who is an eligible individual. There are strict limits on the amount that you can contribute to an account, though "catch-up" provisions allow persons aged 55 to 65 to make additional contributions.

Contributions are tax exempt and the earnings on the contributions are also tax-exempt, so long as they are expended on qualified medical costs. Distributions may be made at any time. If you have high medical expenses and high-deductible insurance, an HSA may save you significant tax dollars.

January 29, 2004

Q: I decided to start the new year right by making a will but the lawyer I talked to says that my wife and I each need a will and in addition we need some kind of agreement, and the cost will be over $2000. I don't have thousands of dollars to spend on this now, so I would like to do my will myself. Can you point me in the right direction?

A: Affording quality legal services is a challenge for middle-income people. The fees quoted in both of these questions are within the range of expected charges for the services desired, and on the low side for an experienced attorney. The reality is that an estate plan can cost as much as a nice vacation, and a relatively straight-forward divorce can cost as much as a new car, if not more. There are really only three choices here.

First, you can decide that legal services are a necessary expense and do what you have to do to acquire the money to purchase the help you need. You can plan ahead and save for the expense; you can borrow from family or from your bank; you can increase your charge card balance; you can talk to your attorney about a payment plan (though a bank loan is usually cheaper). If you have a complex problem, or if there is a lot at stake, this is really the best choice.

Second, you can adopt a "bargain basement" approach to legal services. Perhaps you can consult occasionally with an attorney, depending on the other party to prepare documents and just asking your lawyer to read them and make sure you understand them. At least you'll know what you're agreeing to, though you won't have someone to advocate for you, get information for you, and help you to arrive at a reasonable settlement. If you are preparing your own documents, you will probably use commercially sold forms, which you should approach with caution: in general, they are generic in nature and geared to the country as a whole instead of to Wisconsin's somewhat unique laws, and the "fill-in-the-blank" approach doesn't help you to determine what your special issues are or what other problems you may have that you should address. The Dane County Clerk of Courts has a useful web site and information on where to get the best forms available. You can find it at http://www.co.dane.wi.us/clrkcort/clrkhome.htm. If you're writing your will, you should be aware that the way you go about signing the document may be as important as what is in it. Because Wisconsin is a community property state, married people usually

need a marital property agreement in addition to a will for each spouse.

For me, this seems a lot like trying to do my own car repairs. I could probably learn how to do simple mechanical adjustments, but instead I take my car to a reputable dealer for tune-ups and repairs. Of course it costs more to consult a professional than to do it myself. But I don't have to spend the time learning about auto mechanics, I don't have to deal with the frustrations of struggling to perform unfamiliar tasks, and I don't have to deal with big trouble if I find out down the road that I didn't do something right.

The third option is to do without legal services. Sometimes that's not an option; if you're the defendant in a lawsuit or the respondent in a divorce action, you can't avoid the legal system. And it's never a good option: if you don't plan your estate, issues like how your property will be distributed and who will care for your children may be resolved only after a bitter and expensive legal battle, and in a way you wouldn't have chosen. If you don't consult counsel when you buy a house, the offer to purchase may not say everything it should, or the deed may be incorrect. Paying a lawyer now may save you money, time and trouble in the long run.

December 12, 2003

Q: My parents saved some money for me for college but I didn't choose that, so the money is still in an account. The account is in my name, I think, but my dad is in charge of it. It's the kind of account that you can get when you turn 18. I'm 20 now, and I've been asking my dad about it for at least a couple of years, but I'm not getting very far with him. What do I need to do to get it from the bank and put it someplace else?

A: I think you are talking about an account held for you under the Uniform Transfers to Minors Act. Such an account permits minors to hold money in their own names. It designates an adult, often but not necessarily a parent, as "custodian" of the account, with the obligation to manage the account for the benefit of the minor owner until the minor reaches the age of 18 years, and the right to retain control of the funds until the minor is 21 years old. If this is the kind of account you have, when you are 21 you can take proof of age to the bank and have the money released to you, even if your Dad objects.

Alternatively, your parents might have saved money for you in a trust. In that case, your account would be held by Trust for You, Dad as Trustee. In this situation, Dad has the right to retain the funds in the account until the language of the trust that created the account requires him to release it. There is no specific age at which a trustee must release trust funds; the age stated in the trust document controls.

But let's think for a minute about whether it's wise for you to ignore your parents' wishes and take the money anyway, assuming that you can get it. At age 20, there are still a lot of years ahead of you in which you might change your mind and want to go back to school. It would be nice to have that money available for that purpose: easier on you

financially, and doing with the money what your parents intended. And if you make a financial decision now that your parents strongly disapprove of, they may be less inclined to help you financially in the future. Getting established in the adult world is difficult and sometimes expensive, and it sounds like a bad idea for you to alienate your parents and restrict your future access to resources that they might be able to share with you.

If you can be patient for a couple of years more and see how things develop, I'm betting that you and your parents can come to an agreement about how and when to distribute these funds to you. In the meantime, they're sitting there and earning you at least a little bit of money, and your parents can't use the funds for their own purposes. So the worst thing that happens is that the money sits there and grows, and when you're a bit older you will have it to use as you see fit.

The moral of this story: sometimes doing what is legally possible isn't the best response to a situation.

Q: I hold financial and health care powers of attorney for an elderly aunt, and have done so for about 10 years, though I haven't needed to use them until recently. She and I have always been close, and her children are on the west coast, so it makes sense for me to do this for her. I did the same for my dad, who passed away some years ago, and never had any problems. But I am finding that I am having difficulty in using the powers of attorney with third parties like her brokerage firm, her bank, and even her medical providers. They always ask a ton of questions and in some cases have called her to get her verbal OK. Is this because I'm not a close enough relative? Is there anything I can do to make the process work more smoothly?

A: I think the problem is probably that the powers of attorney you're trying to use are old ones, and you haven't used them before. In the trade, they're known as "stale" powers – anything more than five years old may fit this category – and you're right, third parties are reluctant to accept them. Why? The longer it has been since the principal executed a power of attorney, the more likely it is that he or she has changed his or her mind and executed a new document naming a different agent. Since old powers don't automatically self-destruct upon execution of replacements, third parties are cautious about accepting older documents. If you had been working with these third parties all along for the past ten years, there wouldn't be a problem. But you're a new player to them, and the documents are old, and they are trying to protect your aunt.

It sounds like your aunt is still competent, so it makes sense to have her sign new documents now. I'm willing to bet that you won't have trouble using the new documents. If she isn't competent to execute new documents now, I would ask her primary physician for a letter that explains that she doesn't have the capacity to do so and that when she was capable of making such decisions you are the person she chose. That should answer a lot of questions and make the situation easier for all concerned.

November 1, 2003

Q: I recently moved to Wisconsin from another state. I executed financial and health care powers of attorney just a couple of years ago. Do I need to have them redone, just because I changed my state of residence?

A: Your agent may be able to persuade appropriate authorities to accept your out-of-state powers – but why take the chance?

Wisconsin's health care power of attorney must be on the designated state form, and health care providers are often reluctant to accept any other document. It makes sense to execute a new document now for two reasons: first, to ensure that your agent will be able to act on your behalf, and second, to avoid giving someone who doesn't agree with your agent's decision an argument to invalidate your power of attorney.

With respect to your financial power of attorney, unfortunately there is not a lot of consistency among the states in the way they deal with several crucial areas. Significant divergence exists concerning fiduciary standards of care and remedies for abuse, authority of an alternate agent, activation of springing powers (i.e., what needs to happen for the power of attorney to go into effect), authority of multiple agents, and the impact of divorce on a spouse's authority as agent. In order to ensure that your document does what you need it to, it should be drafted with knowledge of current law in the state in which you reside.

Challenges to the validity or scope of powers of attorney typically arise either because a third party is reluctant to accept the agent's authority or because one or more family members believe that they, rather than the agent, should have authority to act for the incapacitated principal. Of course, such challenges arise only at a time when you, the principal, are incapacitated and unable to defend your choices or explain your wishes. Prudence dictates that you review your powers of attorney – and, incidentally, your will – with an estate planner in your new state of residence.

August 14, 2003

Q: My home was originally in my name, with a life estate to him – but when we went refinance the lender required that we retitle the house in both names. Will I lose half of my home to my husband's children from a prior marriage if he dies before I do?

A: I hate to hear about lenders requiring that a home be retitled in order to complete a refinancing of the mortgage. Most people, like you, bow to the pressure and unwittingly give up property rights. You needed a lawyer to work with your lender and come up with an agreement that protects your rights but also ensures that the lender's investment is protected. However, that's water over the dam at this point.

What your property rights are now depends on how the property is titled. In Wisconsin, if a husband and wife are named as owners on the deed to their home, the property is survivorship marital property, in which each spouse has an equal, undivided interest during their joint lifetimes and which automatically becomes the property of the survivor at the death of the first spouse to die. This means that you will become the sole owner of the property if he dies first – but, conversely, he will become the sole owner of the property if you die first. If this result isn't what you want, you need to talk to an estate planning lawyer.

Q: I have a signed power of attorney document for my mother but I am confused about how I should sign the document. Can I just sign her name?

You should sign in one of two ways: "John Doe as power of attorney for Jane Smith" or "Jane Smith, by John Doe, Power of Attorney."

May 22, 2003

Q: We recently moved to Wisconsin from another state. Do we need to re-do our wills?

Maybe. Wisconsin is a community property state, and your original state of residence may not be. So you now may be subject to different laws that govern entitlement to assets acquired during marriage, rights to property in the event of the death of a spouse, responsibility for debt incurred during marriage, and other important financial concerns. These issues may influence you to make some changes in your estate planning documents.

Moreover, both federal and state tax laws have changed (and continue to change) in ways that may require you to re-think your estate planning strategies. Thus, even without a recent move, there may be reasons to consult with an attorney about possible changes in your estate plan.

Finally, the move may have made it either easier or harder for your fiduciaries – personal representative, trustee, guardian – to do the jobs you have assigned to them in the event of your death. Choices for these designations often depend at least in part on availability and convenience. So there may be a reason to reconsider your personnel choices, because of the move and also because of the passage of time.

You didn't ask about this, but the move is also a good time to execute or update powers of attorney for health care and financial management. Wisconsin does not have a law of imputed agency, so your next-of-kin cannot automatically act for you in the event of your incapacity. This may not have been the case in the state from which you moved. In any event, re-executing such documents every few years is reasonable, to prevent them from becoming "stale": many third parties are reluctant to accept old powers of attorney.

The bottom line is that it would make sense for you to take your current documents to a

Wisconsin estate planner, who can help you decide whether and how you need to make changes in your current plan.

April 10, 2003

Q: **I am an older person living alone except for my dog and cat. I am doing some estate planning and as a part of this process I want to make some provisions for my animals, who may well outlive me. It seems wrong somehow to treat them as "property" and give them away to someone in the same manner as I distribute my jewelry or household goods. I don't want to leave this to chance since if they ended up in an animal shelter they would probably be unadoptable because of their ages and would end up being euthanized – something I want to prevent if possible. I also want to provide a small stipend for whoever ends up taking care of them, to pay for their expenses after my death. Is this the kind of thing I can take care of in a will or do I need a separate trust or other document for this purpose? Can a regular lawyer handle this or do I need a specialist?**

A: Estate planning for animals is becoming more and more common. I have drafted provisions to care for horses, dogs, cats, and birds. Not only is it possible to plan for the care of your pets after your death, but in fact such planning is an integral part of responsible pet ownership.

Under the law, your pets are treated as property and thus you may bequeathe them to any person or persons of your choice. Often, a pet owner will provide a lump sum of money to the beneficiary who receives a pet, with a stated expectation (though no legal obligation) that the funds will be used to provide for the pet's care. Depending on the age of the animal and how expensive it is to care for, some pet owners opt to create a trust, with trust income and principal used in the trustee's discretion to care for the pet during its lifetime, and the trust balance then distributed after the pet's death to ultimate beneficiaries. In a plan like this, the trustee has a clear legal obligation to expend funds for the pet's welfare.

There is no reason to create a special, separate document to provide for the care of your pets unless you want the trustee to have powers and responsibilities during your lifetime. If your only concern is for the care of your pets after your death, appropriate provisions in your will can amply meet this need. However, I would be sure to talk in advance to the person or persons to whom you intend to entrust your pets' care so that they are prepared to step in immediately after your death, rather than finding out about their responsibilities when the will is admitted to probate. The animals will need care from day one, and you want to do what you can to assure a swift and smooth transition.

Q: **About 15 years ago my elderly father added my name to his bank savings account. He wanted me to have access to the money in case he became incapacitated. Since then, I personally have not made any deposits or withdrawals to or from the account; it's still all his money, and he is still living. I've just read that there is a**

new law in Wisconsin that makes it illegal to hold bank accounts in joint tenancy with one's heirs. Is that true? What should we do now?

A: I am not aware of law in Wisconsin or elsewhere that prohibits joint tenancy accounts held by a person and his/her potential heir. However, the situation you describe may create potential tax consequences and potential difficulty with other heirs.
It is reasonable for you and your father to be concerned about the availability of his funds to pay his expenses if he becomes incapacitated. As I've said several times in this column, the best way for any of us – and that includes you as well as your father – to make sure that matters can be handled as we wish in the event of our incapacity is to execute powers of attorney for health care and financial management. Your father's bank account should be a "POA account" – one for which you, as his agent under his durable financial power of attorney, have signature powers. That way it's clear that the money belongs to him, clear that you are authorized to use it for his benefit, and clear that the money is in his estate in the event of his death, to be distributed according to the terms of his will.

February 27, 2003

Q: I went to a lawyer to get a simple will. The lawyer said that I needed not only a will, but also a power of attorney. And not just one power of attorney, but two. Am I being taken for a ride?

A. To the contrary, your lawyer is giving you very good advice. A good estate planner will help you not only to think about what happens to your assets after you die, but also to plan how to preserve your assets and use them for your benefit during your lifetime in the event that you become incapacitated and cannot make decisions for yourself. The document used to accomplish this result is a power of attorney for financial management. Your attorney should also help you to plan for your own health care in the event of your incapacity. The document used for this purpose is a power of attorney for health care.

Many people believe erroneously that their spouse or next of kin can act for them to make health care decisions or handle their finances if they are incapacitated. Some states have laws permitting such "implied agency" but Wisconsin is not one of those states. I have written about this issue many times in this column but the issue continues to arise and many people have a seriously mistaken view of the law. Only when fate has intervened and it is too late to execute these powers of attorney, requiring the expense and time involved to have a guardian of the incapacitated person appointed by a court, do people realize the significance of their error.

Bottom line: You need these powers of attorney, and they may well be more important to you than your will.

Q: My husband and I are re-doing our wills, and our lawyer has recommended that we sign a marital property agreement at the same time. I am somewhat uneasy about

this, since I have inherited property which I understand belongs to me alone. It's OK with me to treat this as joint property as long as we are married, but if our marriage should end for some reason I would not want him to have half of my inheritance. I think a marital property agreement is a good idea for him but not for me, and I don't know how to address this delicate subject with our lawyer. Can you help?

A. In most cases, good estate planning for a married couple will include preparation and signing of a marital property agreement classifying their assets as marital property or as the individual property of one spouse. Without such an agreement, at the death of the first spouse to die, the entire estate of both spouses must be classified so the composition of the deceased spouse's estate can be determined. This process can be frustrating and time-consuming (and thus expensive), and it may result in a disposition of assets that differs from the result the deceased person intended. As a consequence, most estate planners prefer to start the estate planning process with a marital property agreement, so that everyone will know what is in each spouse's estate, there will be no surprises when the estate is distributed, and the costs of administration can be kept low because there will be no need to analyze and classify each asset.

A marital property agreement executed by a couple in conjunction with their estate planning, where one lawyer represents both parties and the agreement is designed to facilitate the estate plan, cannot include divorce provisions. One lawyer cannot represent both husband and wife in drafting an agreement that will apply at divorce. An agreement that is effective during the ongoing marriage and at the death of a spouse, and that specifically states that it does not apply at divorce, would appear to be beneficial to you in your family estate planning and would not disadvantage you if your marriage were to end. You should discuss this issue specifically with your lawyer, and if you are uneasy with his or her answers, you should contact a separate lawyer whose function is to give you as an individual advice about how to proceed with your estate plan.

January 16, 2003

Q: My father has suffered from a chronic illness for years and everyone thought he would die before my mom. But life takes funny twist sometimes and Mom just died suddenly and unexpectedly. She hadn't redone her will in years and of course it names Dad as the beneficiary. Dad's doctor says he won't last another six months and it seems overwhelming to think about putting everything through probate twice. All of Dad's affairs are arranged to make the transfer of assets simple when he dies. Now this unexpected development is causing problems. Is there anything we can do about it?

A: You should speak with your estate planning attorney about the advisability of having your Dad disclaim all or part of his interest in your Mom's estate. The effect of a disclaimer is that the disclaimed property passes to the heirs next in line as set forth in the decedent's will or by the law of intestate succession, just as if the beneficiary had predeceased. A

disclaimer must be in writing and must describe the property disclaimed, declare the disclaimer the extent to which it operates, and be signed by the disclaimant. It must be executed not later than nine months after the death of the person whose property is at issue and the disclaimant cannot have accepted the property or received any benefit from it. Your attorney will be able to tell you whether this option is workable for you under your particular circumstances.

December 3, 2002

Q: My brother wants our mom to sign a power of attorney giving him the right to manage her affairs. Mom has slipped a lot and it makes sense for him to take over for her. My problem is that I don't think she really understands what she would be doing -- or if she understands it now, in fifteen minutes she will have forgotten. How do you tell if someone is able to sign a legal document?

A: You don't have to be able to understand a lot of legal jargon to considered competent to sign a legal document. If your mom has the capacity to understand the effect of the document and if she can articulate to you that she wants your brother to take over managing her affairs, in my opinion she is competent to sign the power of attorney. Many older people have short-term memory lapses; I do not think that a memory problem necessarily means she lacks capacity to sign a power of attorney, as long as she understands the effect of her signature at the time she signs it -- and would decide the same thing tomorrow, even if she can't remember having made the decision today.

Unfortunately, the alternative to a power of attorney is going to court and having your brother appointed her guardian. This is an expensive and often demeaning process, and if you can avoid it I am sure this transition will be easier on all members of your family.

Your best bet at present is to consult with your mom's primary physician. If he or she believes your mom has the capacity to sign the power of attorney, go ahead. If there is anyone who might challenge her choice of your brother as agent, ask the doctor to put his or her opinion in writing. And then take the next step -- execute *your own* powers of attorney for health care and financial management, before *you* get to the point where you are not capable of doing so.

October 24, 2002

Q: My sister-in-law suffers from a degenerative disease and recently was placed in a nursing home because my brother can no longer care for her himself. My elderly mother fears she may precede my sister-in-law in death and is afraid that his share of her estate would be lost to nursing home costs. Can she protect my brother's inheritance?

A: Your mother can protect her son's inheritance from being depleted to pay his wife's medical bills by putting his share of her estate in a properly drafted trust. The advantage

of such an arrangement is that the estate would be preserved for your brother's sole use. The disadvantages are that he would not have full access to or control of his inheritance, and that his wife might, if other funds were not available, be limited to treatment options covered by Medicaid, which may not provide her the full range of services that the family would desire for her. Your mother should consult with an attorney who specializes in estate planning and elder law to weigh the pro's and con's of creating such a trust.

September 12, 2002

Q: I'm 70 years old and I have an IRA that I haven't needed to dip into yet. My accountant tells me that I have to start taking distributions even though I'd prefer not to. Is this required by law?

A: Yes, it is. The law requires that you begin taking distributions by age 70 ½. The good news is that, as of April 16, 2002, the Internal Revenue Service issued final regulations for minimum distributions of retirement plans. The new regulations update the applicable life expectancy tables and thus allow taxpayers to leave their money in their retirement plans for a longer period of time. The result is that only in very rare cases will the participant outlive his or her plan, if he or she takes only the minimum distributions. Of course, the other side of the coin is that more people will inherit larger amounts of retirement savings.

Q: My wife and I spent a lot of money about ten years ago creating a complex and complete estate plan. Our lawyer says we should come in and re-do all that work. Is it really necessary?

A: Historically, the rule of thumb used by most estate planners has been that you should review and consider revising your documents every five years or so. Under this standard, you are overdue for an update. There are many reasons to justify such a periodic re-evaluation: the law changes; your family configuration and alliances may change; the size of your estate may change. Any or all of these changes may require a readjustment in your estate plan so that it continues to do what you want it to.

As a result of the recent passage by the Federal Congress of EGGTRA (the Economic Growth and Tax Relief and Reconciliation Act, signed into law on June 7, 2001), the tax laws that are central to much estate planning have changed dramatically. Moreover, the amounts excluded from federal estate tax change every couple of years between now and 2010, when for one year there will be no federal estate tax. As if the change in the federal law did not create enough complications, Wisconsin has initiated a new state estate tax that will apply to estates of decedents dying on or after October 1, 2002. Because of these extremely significant tax law changes, most estate plans should be reviewed for possible revision by a capable estate planning attorney, and many plans will need to be significantly rewritten.

Listen to your lawyer. He or she is not suggesting that you reinvent the wheel, only that

you review with him or her your objectives and determine whether your old plan, drafted under very different law and probably under at least somewhat different conditions than you currently face, needs to be changed to conform to your desires.

Readers who completed estate plans prior to June of 2001 should contact their attorneys to determine whether their plans should be revised. It's well worth the time, money, and effort to make sure that your plan still does what you want it to.

August 2, 2002

Q: Many years ago my ex-husband wrote a will making me his heir because he did not want to leave his estate directly to our young sons and he trusted me to deal with them fairly. Now our sons are mature adults and I would like to persuade him to change his will in their favor. I do not want to pay higher inheritance taxes than necessary, and I assume that our sons' tax rates would be lower than mine – and perhaps they would not have to pay tax at all. The inheritance is worth no more than $300,000.

A. The good news is that, on an estate of approximately $300,000, your family will owe neither federal estate tax nor Wisconsin inheritance tax. So taxes on your ex-husband's estate are not a reason for suggesting that he change his will.

However, if *your* estate is large, overloading your estate by adding your ex's $300,000 to it might increase the estate and inheritance tax burdens at the time of your death. So, depending on the size of your estate, you might or might not have a tax reason for asking your ex to make a change in his will. If your total estate exceeds $500,000, you should talk to your attorney and financial planner, and make sure your ex-husband's plan dovetails with yours to avoid taxes if possible, or at least to minimize the tax impact at the time of the second death.

If you can't talk your ex into changing his will, and there is a possibility of adverse tax consequences for your own estate, you can disclaim any interest in his estate at the time of his death. The effect of a disclaimer is that his assets are distributed as if you had predeceased him. His will probably says that if you die before he does, your children will share equally in his estate – so disclaimer would solve your problem, and get the money where you want it to go. Be sure to check to see where his assets go in the event of your prior death before exercising your disclaimer right, to make sure that your sons will inherit as planned. If you disclaim, you cannot direct the disposition of the assets; you have no control over their disposition, which will be controlled by his will.

Q: I thought you could give a $10,000 gift without a gift tax consequence, but my accountant says it's more. Did the rule change?

A: Internal Revenue Code Section 2503(b), governing the annual exclusion from gift tax, has been indexed to inflation. This year, the exclusion amount is $11,000.

May 9, 2002

Q: **My mom isn't exactly demented, but at age 82 she forgets a lot of things and she doesn't manage her money well. She signed a power of attorney giving me the authority to manage her accounts but she continues to do things on her own anyway. Last month she wrote a check to "cash" for $1,000 and didn't enter it in the checkbook, so the checks I wrote for her rent and utilities bounced. She doesn't remember what she did with the money. This is very frustrating. Should I be doing something different?**

A: You have a couple of good options. First, you can open an account under your own name as the agent designated on her power of attorney. You can maintain sole check writing power for this account. This option prevents your mother from sabotaging your attempts to keep her checkbook balance in the black. As long as her income (from Social Security or wherever) is deposited directly into this account, this option should work for you.

Another possibility is the creation of a trust, with the transfer of assets to the trust. You will need your mother's cooperation to establish such a trust. If you are trustee, you have sole authority to expend funds from the trust. Again, you will need to make sure that her income goes into the trust.

March 28, 2002

Q: **My mother's husband recently died. He did not have a will. The court decided that my mother was only entitled to half of the property and her husband's children from an earlier marriage got the other half. This means that she has to pay them for half of the house or move out. She is in her late 80's and the stress is terrible. How can we protect her interests? She doesn't have the money to buy off his kids, and it will break her heart to have to move. They were married for 20 years.**

A: This is a sad situation because it could have been prevented if your step-father had done some advance planning. It would have been easy for him to draft a will providing that your mother would have a life interest in her family home. After her death, his children could have received their share.

However, your step-father did not do this. Since he did not take the time to make his own will, Wisconsin law regarding the distribution of the estate applies. That law says that half of his estate goes to his surviving widow, and the other half is distributed to his children.

You might consult a lawyer to see if you could negotiate the purchase of a life estate now. This approach would allow your mother to stay in her home as long as she can, and it would be less expensive than buying out her step-children's one-half interest.

The moral of this story: make sure you have a will so your assets can be used and

distributed after your death as you wish – which may be different from what the law will do in the absence of the expression of your intentions.

Q: If a husband dies and his wife is sole beneficiary and all accounts are joint, do you have to go through probate court?

A: No. The probate process is required only to transfer assets owned by a decedent at the time of his or her death where some other form of asset transfer is not already in place. Assets held in joint tenancy or as survivorship marital property carry with them a right of survivorship in the surviving owner that operates as a matter of law to transfer the decedent's property interest to the survivor. Such assets are transferred outside of probate. Other assets transferred outside of probate include insurance contracts naming a specified beneficiary and accounts that are designated "payable on death" account.

January 1, 2002

Q: Does Wisconsin have an estate tax or not? I have always thought that we did not, but a couple of friends insist that there is a new state estate tax. Is this true? If so, why has it not been publicized?

A: Surprise: Wisconsin does have a new, independent estate tax system, as of August 30, 2001 - the date Governor McCallum signed the budget bill, 2001 Wis. Act 16. One of the travesties of lawmaking in Wisconsin is that important substantive legislation is often hidden within the biennial budget bill, a mammoth piece of legislation (literally hundreds of pages long) that is consistently enacted without discussion, scrutiny, or understanding of many of its provisions. A change in our estate tax system deserves stand-alone legislation and merits individual discussion and debate. This did not happen because of the routine and continuing misuse of the budget bill process.

The effective date of the new law is October 1, 2002 - but anyone planning his or her estate must take its provisions into account now.

In the past, Wisconsin has had a form of estate tax known as a "gap tax" or "pick-up" tax. If an estate was liable for federal estate taxes - which permit a dollar-for-dollar deduction for state inheritance or estate taxes paid - Wisconsin also imposed a tax. The estate's liability remained the same, but part of the tax money went to the state and then was a deduction on the federal return, whereas without our pick-up tax, the entire amount would have been paid to the federal government.

The new tax provisions suspend our former tax system for a period of roughly five years and create an independent estate tax system to be in force during this period. During this period, Wisconsin freezes the amount of the estate that can pass to heirs with no tax due at its current level, $675,000. In contrast, pursuant to legislation enacted last June, the federal exclusion amount is $1 million as of January 1, 2002, $1.5 million as of January 1, 2004, and $2 million as of January 1, 2006. Thus, a Wisconsin estate valued at $675,000

or more will owe state estate tax even though there is no federal tax liability.

By picking up the federal credit for state estate tax payments, Wisconsin was able to dismantle its estate tax bureaucracy and simply piggyback onto the federal system. Thirty-seven states and the District of Columbia use the pick-up system because of its simplicity, because of the savings involved in eliminating death tax administration and collection activities and because - since most states use this system - high-wealth residents have no incentive to establish residency elsewhere to obtain favorable tax treatment. Less then ten years ago, when this system was initiated, Governor Thompson considered it one of his administration's most significant accomplishments.

The new law makes estate administration more difficult and requires re-creation of an estate tax bureaucracy within the state Department of Revenue. It is bad news for Wisconsin taxpayers. And the way this ill-advised legislation was enacted is bad news for all Wisconsin citizens.

Q: What is the difference between a "529" plan and an education savings account? Which is preferable?

A. Both a "529" plan and an education savings account permit favorable income tax treatment for money designated to fund a child's education. Which plan is "better" in a given situation depends on the goals of the investor.

A "529" plan - or "qualified tuition program" - allows families to save for a child's higher education by making contributions to an account set up for the child. The account must be established within guidelines of a state plan, which is generally managed by a private investment firm. You do not get to choose your investments with a "529" plan. Contributions to the account are not subject to federal income tax, and withdrawal for education expenses are also completely tax-free on the federal level as of January 1, 2002.

If the designated beneficiary does not go on to school or does not exhaust the funds, they may be transferred to another family member, or may be reclaimed by the donor (who will have to pay taxes).

An education savings account (sometimes called, inaccurately, an "education IRA") permits after-tax contributions up to $2000 annually until the child reaches age 18. Tax-free withdrawals may be made for elementary and secondary educational expenses, not just for college expenses. High earners are subject to phase-out eligibility limits so these accounts are not available to wealthy families. Once you make a contribution, it belongs to the beneficiary; you cannot reclaim it, as you can with a 529 plan. But unlike a 529 plan, you have complete management control over your investment.

As you can see, both plans have pluses and minuses. What works best for one family may be the wrong choice for another. But both offer the opportunity for tax-advantaged savings for educational costs - a wonderful opportunity that should be used in one form or

the other.

August 30, 2001

Q: My dad ran up some credit card bills a couple of months before his death. Can I be held responsible for the debt?

A: You are not personally responsible for the debt. The creditors can file claims against your father's estate, and if they do so in a timely manner the estate must pay or contest the claims. As a result, you may inherit less than you would have if the debts had not been there. But you have no direct, personal responsibility to pay your deceased father's debts.

Q: My mother has given my husband and me some money over the years: $10,000 for a down payment on a house three years ago, and about $15,000 total at various other times. On each occasion, we have offered to sign a note and pay her back, but she has always made clear that it is a gift and that she is happy to make things a little less tight for our three kids and us. The problem is my brother. He saw her checkbook and is mad about the money she has given us. He sent me a promissory note for us to sign, stating that he is the executor of her will and he wants to deduct the money we've already received from any potential inheritance. I am not going to sign the note. I am very hurt that he would do this. Should I hire a lawyer to protect me?

A. Your mom has a right to make gifts when and to whom she chooses. And you have the right to be a recipient of these gifts. Your mom has the right to say, "I want you to have access to this money now but I expect that it will come out of your share of my estate after I die," and she can put this kind of provision in her will. It seems that she hasn't done that -- but it's her choice, if she wants to. Your brother doesn't have any rights at all. He may be the executor of her will, but he has no power as long as she is alive. Your mom has no obligation to treat you and your brother equally, and your brother does not have the right to force her to do so. It may be that your brother can exercise "undue influence" over your mother to get her to change her will. Stay in touch with your mom, her friends, and her doctor to try to prevent this from happening. It may be that your brother will try something underhanded after your mother dies, when her estate is being probated. You may need to get a lawyer at that point, but I don't think you need one now. Your mom may wish to consult with her estate planner to make sure that her wishes are well known and well expressed, and perhaps to execute a financial power of attorney designating someone of her choice (probably not your brother) to manage her affairs if she cannot.

Q. My father is rewriting his will. He recently heard someone say that if he leaves someone a token amount in his will, that person cannot contest the will. Is this true?

A. A bequest of a dollar, say, eliminates the argument that the testator (person making the will) has simply forgotten to include a beneficiary. However, if a spouse or child has

received considerably less that his or her expected share, the small bequest will not prevent that potential beneficiary from contending that the testator was unduly influenced by someone else, or was not capable of making distributional decisions at the time the will was made. If the will significantly changes the testator's prior distribution plan, and is written while the testator is very ill and vulnerable, the will contest may succeed.

June 6, 2001

Q: My ex-husband recently died. He did not have a will. He had remarried and had a child from the new marriage. What rights do my three children have to their father's estate?

A. Family rights to the estate of an intestate (without a will) decedent are governed by the law of the jurisdiction in which the decedent's probate estate is administered, usually the jurisdiction in which the decedent lived at the time of his/her death. In Wisconsin, since all of your ex-husband's children were not the children of his current marriage, his half of the marital property and half of his nonmarital property would be divided equally among his four children. Each of your children, therefore, would be entitled to a quarter of his interest in marital property and also to a quarter of his nonmarital (acquired before this marriage or received as a gift or inheritance) property. The rights in other jurisdictions will differ, but in any jurisdiction your children are entitled to some portion of their father's probate estate. (Note that property owned in joint tenancy and property designating a specific beneficiary are *not* part of the probate estate.) You need to contact an attorney in the jurisdiction in which your children's father resided at the time of his death.

February 1, 2001

Q: My husband recently passed away with a will leaving me 50% of the house and a life estate in it. The other 50% goes to his children. Are they obligated to pay for any taxes or major repairs? Can they charge me rent?

A: Without looking at the will, no one can definitively answer your questions. Generally, a life estate entitles the recipient to use the property during his or her lifetime, without any obligation to pay rent to the eventual recipients of the property. Generally, the person with the life estate is responsible for paying the expenses associated with living in the property and keeping it up. Your husband could have provided something different in the will, however. Your best bet is to ask the attorney who probated the estate. He or she will have reviewed the will and will have definite answers for you.

September 28, 2000

Q: My stepfather recently murdered my mother, and then killed himself. Since he survived her, does her property go to him and then get distributed as provided in his will? Or is it not possible for his family to benefit from his criminal actions?

A: Most states include in their probate codes what is commonly referred to as a "slayer statute" – a law that prevents a murderer from inheriting from the person s/he murders. Wisconsin has such a statute; readers in other states should consult with a local attorney to determine whether their state has a slayer statute.

If your mother left a will, it probably had a requirement that any beneficiaries survive her by 30 days or 60 days. The general purpose of such a provision is to avoid two probates in situations where the testator and a beneficiary die within a short period of time. An example would be a car accident that kills the testator outright, with the beneficiary dying a few days later. If your mother had a will and it had such a provision, that provision would control in this case even if there is no applicable slayer statute.

Q: If someone dies without a will, can his property be sold by his wife, without the permission of his children?

A. Maybe. If the deceased person's children are also the children of the surviving spouse, under Wisconsin's law of intestate succession the surviving spouse receives all of the decedent's probate property. If the deceased person's children are NOT the children of the surviving spouse, the surviving spouse receives half of the decedent's probate property and the children share equally in the other half. If the deceased person owned the property in a form that allowed him or her to name a beneficiary or a joint owner, at his or her death the property would pass by beneficiary designation or operation of law. Some specific examples: If your dad was married to your mom at the time of his death, all of his probate property goes to her and she can do with it as she chooses. If he was married to another woman, she (your stepmother) gets half of his probate property and you and his other children share equally in the other half. If he and she owned a house as marital property with a right of survivorship or in joint tenancy, she would automatically succeed to his ownership interest at his death. If he named his wife as the beneficiary of an insurance policy or retirement account, she would receive the benefit.

July 6, 2000

Q: My grandfather died leaving everything to his third wife. She has told my mother and me that we will get the property when she dies. (She and my mother are about the same age.) Her lawyer refuses to give us a copy of the will. The surrogate court says the will hasn't gone through probate. My mother is the only living child. Don't we have a right to her inheritance now, or at least to know what's going on?

A: An adult child has no automatic right to inherit from a deceased parent. Moreover, property may be passed to another owner at the death of the previous owner by mechanisms other than wills. From what you tell me, it seems likely that this is what happened in your situation. Your grandfather transferred assets to his new wife through non-probate means: joint tenancy accounts, for example, or by naming his wife as the beneficiary of his insurance policies or retirement accounts. Such methods are effective

to change ownership to his third wife without invoking the probate process. It seems likely that there may never be a will admitted to probate in your situation, because there is no need for one: your grandfather used other means to dispose of his estate at his death. It sounds as if with respect to some property – likely his home – he gave his widow the right to live in or use the property during her lifetime, and provided that upon her death your mother or her heirs would receive the property. This arrangement was likely accomplished through a deed or perhaps a trust document. A deed would be a matter of public record which you could check at your register of deeds' office. However, your grandfather had the right to dispose of his property in ways that protect his privacy – even from his own daughter.

January 20, 2000

Q: I made a will about ten years ago with an attorney who has relocated. I need to update my will and wonder if I can take it to another attorney to review or if I have to start all over. My will states that a bank is the trustee; should I just go to the bank to update my will? Will all of my assets go to the trust when I die, or will designated beneficiaries receive certain assets with the balance to the trust?

A: You're smart to update your will; generally, you should review and update it every five to seven years – and sooner if there is a major change in your situation. It's fine to take your existing will to a new attorney with your notations as to changes you wish to make. Your attorney can tell you whether it's simpler to draft a *codicil* (amendment) to your will or to start over with a new will. The bank that is serving as your trustee probably does not offer will-drafting or estate planning services. Generally, you need a private attorney for this work.

Your will apparently contains a trust (a "testamentary trust") to manage and distribute your probate assets. Assets held in a form of ownership that includes a survivorship component (such as joint tenancy), and assets for which you can designate a specific beneficiary (payable on death accounts, life insurance beneficiaries, retirement plan death benefit beneficiaries), are not included in your probate estate and thus will not be affected by the trust.

October 28, 1999

Q: My husband has recently asked for a divorce. I intend to write a will, when our divorce is final, leaving everything to my sister. However, because I face surgery for a serious condition in the near future, I am concerned that I may not survive to see my divorce finalized. Can I write a will now, even though I am not the sole owner of any assets?

A: You can write a will now. The extent to which it will transfer assets to your sister depends on the assets in your probate estate. Property held in joint tenancy, as survivorship marital property, or in tenancy by the entirety will transfer by operation of

law to the surviving owner at one owner's death. These forms of property co-ownership carry a "right of survivorship" giving the survivor the right to all of the property. However, a decedent may transfer his/her interest in property held by two or more owners as tenants in common by means of a will.

If you live in Wisconsin or another community property state, you may have an ownership interest in property titled solely to your spouse that you can transfer to others in the event of your death. Bottom line: a will makes good sense, and you would do well to discuss with your divorce attorney the specifics of your situation.

Q: My family has been waiting on our inheritance since our father's death over a year ago. Every week our mother, who is the executor of his estate, gives us a new excuse as to the delay. She has told us that she has made changes to his will. Can she do this? She refuses to do the proper thing and give the family their money. What can we do?

A: Give your poor mother a break. She was recently widowed and is having to cope alone with a whole host of problems, many of which she probably relied on your father to handle. Instead of counting on supportive children to lend a helping hand, she has to contend with greedy kids with their hands out. If your mother is truly being dilatory, the probate court will call her to account for her tardiness. A year or so is not inordinately long for a probate process, and she may well be waiting for tax clearances which are totally beyond her control. In answer to your specific question your mother could disclaim an interest to which she is entitled under her late husband's will, but neither she nor anyone else can change the will after his death. Your mother didn't ask for my advice, but if I were she I would ask the lawyer assisting with the probate to send "the family" a letter explaining the current status of the proceeding, and I would refuse to discuss the subject further with you because of your unhelpful attitude.

Q: I think I was included in my Grandmother's will along with my brother but for reasons unknown to us it seems that my father may have kept this fact hidden from us. I would like to know how to get a copy of my Grandmother's will.

A: If you are a designated heir of your Grandmother's will, by law you must be provided with a copy of the document. If you haven't received the document and the personal representative (called executor in some states) has been appointed, Grandma didn't name you in the will and you have no right to the document. You do not have a right to inherit from your Grandmother; if she did not name you as a beneficiary of the will, what she chose to do with her money is none of your business. Now, think about how *you* would feel if your mother died and your children accused you of misleading them. Your Dad has just gone through a significant life crisis and deserves support and understanding from his children – not accusations of dishonesty or demands for money.

Q: If a parent leaves money to a child in a will but the terms of the will conflict with the "in trust for" designations on accounts, who gets the money? The designated

beneficiary or the person whose name is on the accounts?

A: Accounts held in the name of a custodian or trustee that are designated to be "in trust for" someone else are not owned by the custodian or trustee and are not part of that person's probate estate. Thus, they are not governed by the custodian or trustee's will. In your case, it sounds like Parent left his estate to Child but had accounts titled "Parent, as trustee for X." Child would receive Parent's probate estate but X would remain the beneficiary of the trust, with (presumably) a successor trustee designated to manage the accounts.

Q: A father signed over an asset to his son two years before the father died. The daughter is executor of the estate. Does she have any legal rights to the asset if she needs to sell off part of it or borrow against it in order to settle the estate?

A: The estate consists of assets owned by the father at the time of his death. Since he had given away or sold the asset in question two years prior to his death, the asset is not part of his estate. It is not available to satisfy creditors' claims; the executor has no right and no authority to invade the asset.