Unedited transcript of

Initial Steps, Fundamentals, and Estate Planning Documents (continued)

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Speaker(s)

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>>: Lots of good stuff to cover in the next hour. We did have some more good questions come in over the break. So let me just run those now for you, Heidi. And then totally up to you, I know we have a lot to cover so if you want to, you know, take these at the end or we can take them at the end of the program, that's fine. So the first one was: What do you do when a client tells you I don't have anyone in my family that can serve as a trustee, because they wouldn't know what to do or I don't have any family, etc. who can serve as trustee, by understanding if the banks, other entities or attorneys offering their service can be quite expensive, any advice? That was the first one. Second question, can an unsigned will be used to assist in the determination of who would be a personal representative?

>>: Okay. I'm going to answer both of those questions. Actually, I'm going to answer the trustee question when I get to the trust because I'm going to talk a lot about who can serve as a trustee and why you would appoint some people versus other people. The unsigned will question is no. If you have an unsigned will, it can't be allowed to probate. So it won't govern the nomination of who the personal representative is. In that instance, you would look to the statute. I don't remember the statute off the top of my head, but there's a statute that actually provides for an order of operations of who would serve as personal representative. Basically, different family members and things from there. If all of those things fail, the state will appoint a personal representative in that instance. So I hope that answers that question. So I'm going to answer the fiduciary question, the trustee question when you get in there, but again, feel free to pop up questions as

we go. Like Katie said, this is kind of a bulky one so hold on to your hats and I'll try to get through this in the time that we have allocated. So before we left, I talked briefly about what the core estate planning documents are. Over the next hour, I'm going to really get into the nitty-gritty of those core estate planning documents. I think, obviously, this is a presentation for attorneys so I'm going to be a little bit more detailed than I would with clients. You can obviously kind of pare this back for when you're speaking with clients, but obviously, it's important for them to understand how each document works and what it actually does. And then once I get through all of that I'll kind of talk about wrapping up that initial meeting and kind of what the rest of the engagement looks like. So let's dive in with our will and trust. We already kind of talked about ' what a will does. It governs the disposition of individually owned assets, your probate estate. You know, this is kind of again more detailed than I would be for a client, but again, what are the statutory requirements for validity? Massachusetts law requires that in order to have a valid will, the person creating the will must be 18 years of age or older. The document must be signed and dated and it must be witnessed by two witnesses. Those witnesses must be 18 years of age or older and not interested parties to the will. So that means they are not benefited under the will itself. Bonus points, if you obviously have a professionally drafted will, that will is hopefully going to include a self-proving affidavit. This is a statutory basically notary block and language that you add to the will that proves it was signed properly. It was executed, attested and made self-approved by a specific acknowledgment and what that does is allows the court to allow the will without having to get into, you know, figuring out who the witnesses were and whatnot. So it just makes it easier to administer, if you have that self-proving affidavit in it. And like I said, that statutory language is literally just in the statute, in the code, you can just pull that language out of the Massachusetts statutes. The questions about kind of how do you revoke a will or prior wills? You know, there's always language in a will that says this, but the statute again provides that a subsequent will revokes a prior will, so by creating a new will you are revoking the old one. You can also physically destroy prior wills. Trashing them, burning them, shredding them. Oftentimes clients will have me to do that for them. For example, if I'm holding their prior documents, they ask me to do that. I don't like to do that as a matter of practice. I want them to be the ones that are actually physically doing that.

Oftentimes, I'll keep old wills in our files, if there was ever a question about what intent was, you can look back at old wills. They're not governing, obviously, because they've been revoked, but it's nice to keep them. So I'll give the clients the option of whether or not they want me to hold on to them or I will send them back to them so they can burn them or tear them up. Obviously, a will can also be revoked by a change in circumstances. If you have a will, and then you get married after the will, your new spouse will be entitled to a statutory interest in your probate estate, unless you draft a will that's made in contemplation of marriage. So like at the very beginning of the will, if you know you're getting married next week, you would say I, Heidi Seely, in contemplation of my marriage to Mark, hereby create this will, and that language saying you're doing it in contemplation of will mean that the spouse won't have that kind of statutory interest; they'll have the interest that's provided for them in this new will that you're drafting. Just from a practice perspective, I don't typically love doing those. I would rather wait until after they get married and we can have a fresh new will that's done as a married couple. But some people want to do it beforehand and that's how you do that. Other changes of circumstances, homicide. If you kill somebody that was -- if you get killed by somebody that's named in your will, that person loses their interest in the estate. I had that happen and it was a pretty crazy situation where we had to figure out how did that homicide affect the estate plan? Divorce is probably a little more common one. The divorce revokes the disposition under the prior will, and severs any joint tenancies with right of survivorship, except as provided under the terms of the divorce agreement. So you can always carve out, you know, retention of joint ownership interests, but if you don't carve those out in the divorce agreement, that divorce will automatically change the terms of the will. So again if a client of yours gets divorced, it's time for a new will is basically what that comes down to. What goes into a will? The key kind of provisions in a will that I like to kind of think of and this is kind of how I draft as well is that we're going to dispose of tangibles. You can technically have tangibles pass as part of the disposition of your residue, but I find that tangibles themselves not only are just kind of more difficult to deal with as part of the -- how do I say this? They're just a different type of asset and they have their own kind of peculiarities so I find it easier to deal with tangibles as their own thing and deal with the rest of the assets later. I was going to say that you can have tangibles pass as

part of the residue into your revocable trust, which we're going to talk about in a minute in a pourover part of your residue. I know that some practitioners do that. I prefer -- it just seems a little weird to have your tangibles have to pass from the will to the trust, and then most likely be disposed of outright. I just personally typically prefer to deal with tangibles in the will. The other reason that we deal with tangibles in the will is that Massachusetts probate laws allows for a written memo or letter. If you reference a letter or memo -- sorry. Massachusetts law allows for the disposition of individual pieces of tangibles. For example, your wedding ring or a car or vintage license plate or whatever, to go to specific team, and if you have a signed and dated memo or letter, and you reference that letter or memo in the will, that letter or memo becomes binding on your estate and what's nice about that is that letter or memo can be changed at any time, depending on who's being nice to you that day, you can change that letter or memo to decide who gets those specific things and it doesn't have to go through the attorney. As long as it's signed and dated, the most recent one will be effective. So that's another reason why I like to have tangibles disposed of under the will so that provision can be applicable. We dispose of tangibles. Then we do any outright bequests. If somebody wants to give $10,000 to their former piano teacher or whatever, you can do bequests in wills. You can do charitable bequests in wills. The only kind of down side doing bequests in the will is that a will becomes a public document. When you file a will in the probate court for allowance of the court, anybody can walk into the probate court and pull a copy of it. You can pull the file and look at the will itself. So depending on how much your privacy is important to you, you may want to have your bequest in your trust, which is not a public document. But sometimes people just deal with the bequest in the will. Once that has happened, we do our tangibles, we do our bequest, then we dispose of the residue, or the remaining property. So you can have what's called a simple will, or if you have a married couple, it could be called an "I love you" will where basically you just say after the disposition of my tangibles, my bequest, the payment of all my debts and expenses, the remaining assets in my estate go to whoever it is, my spouse, my child, that very simple, simple will. You can do that. I'm going to talk about why I don't typically do that when we start talking about revocable trusts, but that's what a simple will is, you're just disposing of everything under the terms of the will. A pourover will is what we typically

use when we have a revocable trust. Basically, the will will say, I gather up all of my assets and I pour them over or I distribute them to my revocable trust. And then the revocable trust then becomes the guts of the estate plan and that's where you will -- the terms of the trust will govern the disposition of the property. So that's what people mean when they say a pourover will. The last thing -- the second-to-last thing that the will does is nominate a personal representative. We talked about the fact that this used to be known as an executer. Now, it is known as a personal representative. The personal representative is the administrative of the estate. It is a very administrative, paperwork-heavy job. Their job is to gather assets and when I say gather assets, I mean figuring out what assets the decedent had, but also speaking with banks, speaking with brokerage accounts, dealing with real estate brokers, kind of any of that kind of detailed, paper-heavy work that has to be done with gathering the assets. They're also in charge of filing the probate paperwork which probate has to be done. I know it sounds a little bit weird that you're nominating someone to be the personal representative, but the will hasn't been allowed yet so when you file a petition for probate, oftentimes, it is filed by the petitioner. The petitioner is the person filing the petition -- by the nominated personal representative. And they have authority to file that paperwork. And then the final thing that that personal representative has to deal with is taxes. Not only the decedent's final individual income tax return for the year of their death, but also any estate tax returns that need to be filed, as well as any fiduciary income tax returns, so the estate itself becomes an income tax person of its own that then has to file tax returns on its own. So there's lots of tax work that has to be done. So when thinking about who to name as your personal representative, I oftentimes -- I run through all of those tasks that need to be done and just encourage them to pick somebody who they think will be good at those tasks. You know, as just kind of a personal practice tip, I often have to talk clients out of naming all of their children as personal representatives. If they have four kids that -- they don't want to hurt anybody's feelings by naming one over the other. I try to talk them out of that. Number one, not everybody is suited to the rule of personal representative. It's a lot of work. But number two, naming that many people adds a lot of confusion and too many cooks in the kitchen. So I try to encourage folks to name the one that they think is going to be best suited and I always suggest naming successors. You can

name one person and then name a successor and then another successor. But just put them in order. So it's just a general practice tip. Final thing is nominating the guardian and conservator for minor children. The guardian is the person who will be taking kind of legal control of a minor child. They will make decisions for the child, the child will live with them, they will care for them in every way. In every way, except for the financial way. You can also name a separate conservator for a child, which is -- means somebody that governs the finances of that minor, until they reach the age of majority. You'll see that when we talk about trusts that oftentimes, the trustee is the one that is going to be managing the finances for the child, but if you don't have a trust, you need to kind of have a guardian and conservator to handle both of those roles, and the will is where you nominate those people. One thing that I really point out to clients, with respect to guardians, is, for example, if somebody wants to name their brother and sister-in-law as guardian because they're married, they love both of them. I just caution people to say that's great that you want to name your sister-in-law, but let's think about what happens if your brother dies or is unable to serve. Are you comfortable with that quote /unquote non-blood person serving as guardian? It's 50/50. Some people say I like my sister-in-law better than my brother or they'll say oh, my god, I wouldn't want that to happen. So if that's the case, I very -- I kind of push people to say let's just name the blood relative, knowing that that spouse or the sister-in-law is going to be there and obviously, part of the child's life, but there's just one person that's named as the guardian. So obviously, the will, even though we're saying that, you know, in a pourover situation where the guts of the estate plan are in the trust, the will certainly does quite a lot and needs to be drafted carefully. So after all this buildup, let's talk about trusts. Like Katie said, almost every estate plan that I put together includes the use of a revocable trust. What is a trust? A trust is a legal relationship basically between a trustee and a beneficiary. So a settlor, or the person who creates the trust, creates the trust and decides what all the terms of the trust are. They name a trustee, whose job is to manage the assets of the trust, and follow the governing -- you know, the dispositive provisions of the trust in making distributions from the trust to the beneficiaries. The beneficiaries are the people who benefit from the assets that are held in the trust. So we kind of have those three layers, the settlor, the trustee and the beneficiary. Why do we use them every time?

Trusts provide kind of all kinds of legal benefits and practical benefits. The one that we already talked about is this avoidance of probate. If you fund your trust prior to your death, those assets at your death will seamlessly just pass pursuant to the terms of the trust and won't need to go through the probate process to kind of access them and use them. The other big benefit to using a trust is tax. I will show you in the next couple of slides how this works, but basically by utilizing trusts, we are able to fully use your estate tax exemptions in a way that will not only defer a state tax but will also reduce estate tax. That's a huge reason why we do it. And another huge one is control. Using revocable trusts allows you to control the management and disposition of property beyond death, and so that can mean making sure that your spouse is taken care of. It can mean making sure that assets are held for the benefit of your children beyond just the point of your death. They can be held for the children's lifetimes; they can be held for multiple generations and that trust will continue to govern the disposition of those assets. Again, that can be super important from a tax planning perspective, from just if you are a controlling person, that can be a good thing and also super important in blended family situations. Making sure that if you pass away, that your assets are going to benefit your children rather than potentially benefiting your spouse's children or, you know, a new spouse, if your spouse gets remarried. Revocable trusts by their terms are revocable. They can be changed at any time, and if you don't fund them during your lifetime, they're basically just an empty -- an empty shell that can then be filled, at best, by this pourover will into the trust. So you know, I would say 50/50 -- well, we don't have get into that. They can be funded during life or not, and then they'll be funded at death.

>>: Heidi, we have a couple of questions on that actual topic, so I just want to bring them up. So the first one, does funding your rev trust via pourover will mesh with funding -- lifetime and the second is, if one has a pourover will and a revocable trust, that pourover will has to go through probate, question mark. Can you explain that in detail.

>>: Yes. Absolutely. Great questions. So I'm going to answer the second question first. So yes if you have a pourover will, that will have to go through probate. So think of the pourover will, the pourover part is just the disposition of the property. So in order for that will to be able to validly

dispose of the assets that it's governing, it has to be allowed by the court and that's what that probate process is, having the court look at the will, say yes, it checks all the boxes I talked about, it's signed and dated and witnessed properly, and then the court will allow the will. And so once it's allowed, the personal representative's job is to read the will, and it will say, those are my tangibles, just make any bequests and then the remaining trust property after the payment of debts and expenses will be poured over, or distributed, to the revocable trust. And at that point, all of the assets in the estate are gone. We've used them all up. We've done what the will says and the will goes away. The trust then becomes the governing body of what happens to those assets. So yes, you have to probate the pourover will.

>>: And I would -- [Overlapping Speakers]

>>: Just so, but if you have a pourover will, right? Primarily the reason we're doing pourover wills is so we can utilize this wonderful revocable trust and try to avoid the probate process right, as best we can, if that's what the client wants. So if you have the pourover will, you hope that you fund the revocable trust during lifetime so that really that pourover will has nothing to do when that person passes away. So it's really whether you're funding now or later. So your pourover will still has to go through probate if you're not funding that trust during the lifetime. And then ultimately, everything pours over via the probate process once the person passes away. If you're funding that trust during lifetime, and there are no other various and sundry probate assets that crop up, then your pourover will doesn't have to go through probate.

>>: Perfect, perfect segue to answering the second question. How do you kind of mesh the funding of the trust with the pourover will? So I was trying to explain that a little bit by saying, you know, you can kind of partially fund a trust during your life. Say, for example, you have a big brokerage account and a lot of little other assets. You could fund the revocable trust with your big brokerage account so that you know that that brokerage account doesn't have to go through probate, the assets will be available immediately upon death to seamlessly transition into the next phase of the estate, but then maybe didn't want to go through the hassle of dealing with

all the other little assets. Those other assets then would have to go through probate and they would be poured over into the trust. I will say, no matter how careful we are about funding trusts, oftentimes, we miss something, or there's one little thing that comes in and you still have to probate the will, and that's just kind of how it works. And that's okay. At that point, you're really only probating the will to deal with that one little thing, and it's okay if it takes a long time. It's kind of a hassle, but you've gotten the bulk of everything into the trust and allowing the trust -- to do its job. You can have a partially funded will. That's how those two things work together. I want to take a minute to go over the tax benefits of revocable trusts and this is the situation where I always pause to kind of explain to clients why revocable trusts are so important. I'm going to kind of remind everybody here, the Massachusetts estate tax kicks in at $1 million. This is much lower than federal estate tax. So we need to plan for Massachusetts estate tax in almost every estate that we do. If you own a house and a -- and a retirement account in Massachusetts, you're probably over $1 million. It's just kind of how, you know, Massachusetts real estate prices are. So here's how this works and I'm going to use a married couple example. Husband and wife, each own $2 million in their own names. We're pretending that they don't have any joint properties, that they don't have any retirement assets. They just so happen to each have exactly $2 million in each of their own names. So on the left-hand side that we're talking about here, if we don't use trusts and we just have a simple will, an "I love you" will, husband dies, the will says I give everything that I own to my wife because I love her so much. Husband is gone. His $2 million passes over to wife and at wife's death, she has a $4 million taxable estate. Everything went outright to her. There was no tax at the husband's death because, as Katie is going to explain tomorrow, there's an unlimited marital deduction which allows a spouse to pass assets tax-free to their spouse, but the problem is when the wife dies, she now has a $4 million taxable estate which will result in a Massachusetts estate tax of $280,000. If on the other hand, we utilize a revocable trust and make various tax elections that Katie will probably talk a lot about tomorrow, let's use the same example. Husband has $2 million, wife has $2 million. Husband dies, but instead of passing everything outright to his wife, at his death, his $2 million gets held in trust. You can see that I kind of have these two blue squares. There's $1 million in each square. The reason for that is that we

are utilizing the husband's Massachusetts estate tax exemption, which is $1 million. By holding that property in a separate trust, which is typically called a family trust or a credit shelter trust, that $1 million does not get included in the wife's estate at her death. So upon the wife's subsequent death, she has her own $2 million. She has $1 million of the husband's which was put into a marital trust, which I'll talk about in a minute. She ends up with a $3 million taxable estate rather than a $4 million taxable estate and you can see that that ends up saving quite a bit of Massachusetts estate tax. So this is the key. This is the key to why we use revocable trusts in married couples and situations like that is that we are utilizing the Massachusetts estate tax exemption by holding it in trust and excluding it from the estate of the surviving spouse. The same thing actually works in children. Say, for example, you just have a person who passes away and gives everything to their children. If you give everything outright to the children, those assets will end up in the children's taxable estates. If you instead hold $1 million in trust for those children, they will not be included in the children's estate when they pass away. So the same thing works. It doesn't have to be a spouse. It's just utilizing that Massachusetts estate tax exemption. So that's a big reason why we are utilizing trusts. And I really do give this example to clients, and it's -- and I feel like it's easy for them to understand kind of okay I see from a tax perspective, this is why we do it. So what are we going to put into these trusts? As a reminder? The way that trusts work is that you put assets into them. The terms of the trust tell the trustees what to do with those assets, and then it's the trustees' job to invest those assets and do the things that you're telling them to do. So we are going to go through a lot here and forgive me, this is going to be a lot of information, but just bear with me here. So the first thing we have to think about is who are the beneficiaries of the trust going to be? If we're talking about a married couple with children, for example, the primary beneficiaries of the trust are going to be the surviving spouse and then the children. Or the surviving spouse and the children and then after the spouse passes away, then just the children. You can have trusts that provide for just outright distribution. So, for example, we have our pourover will, right? Everything got gathered up, it got poured over into the trust, and then we just make outright distributions under the terms of the trust. Some people would ask why would you bother even doing that? You're giving everything away, why even bother having

the trust? The answer is privacy in a situation like that. Like I said, the revocable trust itself is not a public document, whereas the will would be. And you can also have a situation, for example, if you had a married couple that wanted to do an I love you or simple will, give everything to their surviving spouse, you can have an outright distribution to the -- if your spouse survives you, you could just say under your trust to give everything outright to my spouse, but if my spouse doesn't survive me, here's what I want you to do. I want you to govern those assets in a different way. If people are feeling a little squishy about wanting to use trusts, but they do have young children, that's a reason why you would do it. If you do have young children or any children, you know, oftentimes, I will see that, you know, couples come in and their goals are to provide for their surviving spouse in the most tax-efficient way that we can and as you saw in that prior slide, the best way to do that is to have trusts for the benefit of the surviving spouse. But then the real key is kind of what happens on the death of the surviving spouse? If they have children, the question then becomes what are we going to do for the children? You can have trusts that distribute at certain ages. For example, when the child turns 25, they get everything outright. Or you can stagger distributions. For example, a third at 25, a third at 30, a third at 35 and everything goes out by 35 or you can have trusts that run for the lifetime of the beneficiaries and you can have multiple generations. Trusts can run for a lifetime or the lifetime of, you know, children, grandchildren and great-grandchildren. Obviously, you run into a little bit of a situation -- you run into the rule against perpetuities, which requires that a trust end 21 years from the death of a -- dean, but as long as you fall within that time frame, you could have a trust run for a long period of time. So that's kind of a philosophical question for a lot of clients and I kind of walk them through the pros and cons of distributing property outright versus holding it in trust for a longer period of time. Trusts can also include powers of appointment. And I think -- I'm kind of floating over the top of a lot of this because I think that some of this is going to be dealt with later on in the program. But it's basically allowing a trust beneficiary upon their death or even during their life to change the disposition of a trust. So, for example, if I have a trust for the benefit of my son, harry, upon harry's death I could grant him a power of appointment to appoint the remaining trust property to anyone he wanted. He could choose to distribute it to his spouse, to his favorite charity, whenever he wanted. If he doesn't exercise

that power, my trust will provide it will go to X, Y, Z. Powers of appointment are extremely powerful, as in the title, and extremely useful in estate planning. They allow a second look at the death of a beneficiary or during the beneficiary's life to say you know what? That ultimate disposition under the terms of the trust isn't exactly what makes sense anymore because the tax laws have changed or the circumstances of the beneficiaries have changed and we're going to redirect the property. I would say more often than not we use more limited powers of appointment. For example, in that trust for my son, Harry, that I was just talking about, I could limit his ability to appoint the trust property to just my descendants, for example. He can only appoint it to my daughter Ellie and her kids and that's it. And it would allow him a little bit of flexibility there, but not quite so broad that I've given up full control. We also talk about a disaster clause. This is kind of what happens if all of the beneficiaries under the trust have died? Or are not able to accept distributions? I have some clients that like to get very, very detailed here, but I would say most of clients simply say if everyone's gone, I give the property to my heirs at law, the people that would have received the property had I died without a will. You know, I'll also say some people don't want that to happen. For example, if they don't have a great relationship with some of their family members, they will want to direct the property to charity or other named individuals in that instance, but it's just something that's important to make sure you include in your dispositions. And it's important to think through what happens in a simultaneous death. For example, if you had a trust that provided for, you know, a disposition to your surviving spouse and if your spouse doesn't survive you, it passes to the children, well, what happens if the husband and wife pass away at a exact same time and you can't figure out where the property is supposed to go? That simultaneous death clause will basically say if this happens, then, you know, it goes in this direction. It's kind of a technical piece of writing. It's important to have in there. But I always like to highlight it to make sure it gets included from a drafting perspective. So those are kind of the dispositive provisions. There are 10,000 different ways to draft dispositive provisions that I don't have time to get into right now, but I just kind of wanted to highlight these are the main things you're going to end up thinking about. I do want to spend some time talking about choice of trustee and I know that we had a question about this earlier so I want to highlight this. Like I said, the trustee's job is to invest and manage the

trust's assets for the benefit of the beneficiary. You can have family members serve as trustees or you can have professionals serve as trustees. Or you can have something in between like friends or just people that you know. The role of the trustee is obviously very important and very -- it's a job. Serving as a trustee is a job. It takes a lot of effort. It takes a lot of energy, and can be a very long-term situation. Oftentimes, I will see spouses name each other as the first-level trustee, and then, you know, if we're talking about upon the death of the surviving spouse, then the question becomes who serves as trustee in that situation? And that can often be a time where you see friends or other family members or professionals come in. The key to naming a trustee or the -- one key thing to think about is that if you have an independent trustee or a beneficiary trustee, the terms of the trust themselves have to be changed. So what do I mean when I say that? If we have -- let's just say, for example, we have a client creating a trust for the benefit of his surviving spouse, and then upon his surviving spouse's death, share trusts for his children. So husband passes away, wife is the beneficiary of the marital trust for her benefit, but she is also the trustee of that trust. You probably are saying what are you talking about? You can't -- isn't that just the same thing? Aren't you just giving the property outright to her? And the answer is you have to draft very carefully to make sure that we don't have kind of a joinder of those two roles, that we separate the beneficiary spouse from the trustee spouse, and the way that you do that is including what's called an ascertainable standard. So that trustee spouse can only make distributions to herself for her health, education, maintenance, and support, and that ascertainable standard, the things I just said, health, education, maintenance and support, that is a tax standard that is kind of required under the tax code and under case law to make sure that that surviving spouse who is serving as both trustee and beneficiary, that those assets aren't included in her estate as a general power of appointment. That's a super high-level way of explaining that, but just know that you have an interested trustee, they have to be limited to an ascertainable standard. If on the other hand, you name an independent trustee and that means somebody who cannot benefit from the trust itself or who isn't related to somebody who could benefit from the trust itself, that independent trustee can be allowed to make distributions for any reason. They have a complete discretion to make distributions. That can be a very powerful thing not only

just from like allowing trustees to make distributions, bigger distributions, but it can be a very powerful thing from a creditor protections standpoint. When you have a trustee that has full discretion to make distributions, they also have the power to not make distributions. So let's say, for example, one of the beneficiaries of a trust is getting a divorce. If you have an independent trustee who has discretion to make distributions for any reason, that independent trustee can cut off distributions or just say I'm not going to make any distributions, and that divorcing spouse will be protected, those trust assets will be much more protected than they would be if the beneficiary just had them outright. In that instance where we have a divorce happening and the -- trust, the nonindependent trustee serving under an ascertainable standard, that requirement to make distributions for health, education, maintenance and support has been interpreted by the courts to mean that the divorcing spouse, those trust assets can be attacked, that distributions must be made for those reasons and therefore, those trust assets can be attacked during the divorce. So that's just one example of kind of why an independent trustee with fully discretionary distribution standards can be a good thing. So that's the difference -- that's the difference between a professional and a kind of -- I'm sorry. Let me take that back. That's the difference between an independent trustee who often is a professional and a nonindependent trustee who often is a family member. I'm going to real briefly touch on the question that was raised earlier, and then I'm going to kind of proceed. What you do when you don't have anybody to serve as a trustee, like the question asker said, there are lots of people in our industry that do serve as trustees. There are banks that serve as trustee, but we also have in Massachusetts and in Boston specifically kind of a quirky part of our culture here, which is that we have professional individual trustees. The Boston trustee, if you will. These are people that are individuals, not institutions, that serve in the role of a professional trustee. It's -- so those are the people that you would turn to, to serve as trustee if you don't have any family members. They can be expensive. Professional trustees typically charge a percentage of the assets under management, and so if you have a very large trust, obviously, that can be quite a large amount of money. But if you have a very small trust, it can be difficult to find a professional trustee who's willing to take that on. I certainly know from personal experience that, you know, individual professional trustees may be more willing to take on those

smaller trusts than the banks or the institutional trustees. However, because they can be a little bit more flexible, they can charge on an hourly basis rather than a percentage basis. And so you know, those individual professional trustees can be found -- there's kind of partnerships in Boston and in other areas of people that do that, and also a lot of state attorneys serve as professional trustees themselves. For example, I serve as professional trustee. It's not my firm that serves. It's me individually serving as the professional trustee. I'm going to move on now because I'm starting to run out of time. We can go back to questions on that a little bit more if I didn't fully answer that question. Other important things for the trustee provisions. It's super important to talk with your clients about whether or not they want beneficiaries to have the power to remove a trustee that is named in the document. For example, if I'm named in the trust as trustee, should the beneficiaries be able to remove me and replace me with somebody else? I often suggest that they do have the power to do that, because, you know, I don't -- you don't want beneficiaries to be completely cut off from any sort of authority over their trust. However, you can limit that ability to replace a trustee by saying, for example, the beneficiaries can remove a trustee, but only once every five years, for example. Or only once they turn 35 can they remove a trustee. And then you can also limit the ability to replace a trustee. You could say, for example, the beneficiary can remove any trustee. However, any successor trustee must be a professional. So that way, the beneficiary can't remove me, and then appoint their best friend as the trustee and be able to access all the trust assets. They would have to replace me with another professional who would probably be as conservative as I am. Final thing on trustees. This is a super important thing to do. I always, always, always suggest that you name successor trustees. If you're going to name your brother, what happens? Always have the ability to name another successor or allow the beneficiaries themselves to appoint successors. If you get into a situation where you don't have any more successor trustees named and, for example, the beneficiaries are all incompetent and they can't name a successor, you can petition the court for the appointment of a trustee, but it is a long, drawn-out process and during that time when you don't have a trustee, the trust assets are basically frozen so not what you want. You want to make sure that you have the trustee succession provision in there. I just really briefly glossed over trusts. I didn't get a chance to get into the

marital trust idea. Hopefully, Katie is going to get a little bit more into that with hers or there's more on that later. I know there's lots of resources for that. I hope I've impressed how important revocable trusts are and if we have time at the end I can certainly get into the details a little bit more. So we've talked about the will, we've talked about the trust. Now, we can talk about our incapacity documents. These documents are documents that are effective during the decedent's lifetime or the client's lifetime. They're not dead yet. So the first one is the power of attorney. The power of attorney allows you to name somebody to serve in your shoes, to make financial decisions for you. When you say financial decisions, I mean things like accessing your checking account to write a check or transferring assets from one account to another, or signing a deed or signing any sort of contract on your behalf. Powers of attorney can be springing or durable. Springing powers of attorney mean that they only become effective upon your incapacity. So you would have to be determined to be incapacitated either by a court or by a doctor. These are very rare, to be honest. Most powers of attorney are durable powers of attorney which means they're effective immediately upon signing. The benefit of doing that is that you don't have to be declared incompetent. So, for example, let's say I'm on safari in Africa and oh, my god, I forgot to send in my mortgage check. The agent that I've appointed as my power of attorney can sign that check on my behalf immediately and we can on our merry way. Obviously, that's a really frivolous example, but there can be instances where you need somebody to step into that role immediately without the hassle and emotional energy that has to go into being declare incompetent. You don't want that. What are the powers that are granted to an agent? Like I said, they're very broad. You can give the power of attorney the power to do a lot of different things. Some big ones that we put into our documents is giving that agent the ability to make gifts from my fund. You can have limitations on that, like you're limited only to the annual exclusion amount, or only limited to gifts to people other than the person that you name as your agent. Giving the ability to create and fund a trust, this is a tricky one. We do allow this in our documents, but one thing that I don't do very often, but I know that you can do is give the agent the ability to amend trusts that you create. Massachusetts law now allows for you to do this. It has to be in both the power of attorney and the trust that somebody could do that, but it could be a powerful estate planning tool if you feel like it's necessary. You

can give your agents the ability to manage retirement plans and a big one now with all our digital assets in the world is giving them the ability to access digital assets. So again when I'm talking to clients about what it means to serve in this power of attorney role, what it means to serve as an agent, this one as a very administrative-heavy, paperwork -- you have to be the kind of person that can deal with banks, deal with paperwork, deal with financial stuff, so thinking about who to name in that role, just kind of think about the tasks that would need to be done. I always suggest naming, you know, one person, and then a successor, and then we go from there. Powers of attorney are completely revocable. They can be changed at any time. Like I said, at the beginning, I often will just have new ones done every couple of years so that they don't become stale and a bank doesn't say oh, this was done ten years ago, it's not valid anymore, even though it is valid. It's not worth the fight so it's just easier to have a new one. Other incapacity documents. Healthcare proxy. This is a document that allows somebody to make medical decisions for you upon your inability to make or communicate decisions for yourself. So this one is not effective immediately. It is effective only when you can't make decisions. And this one is a very different role. It's obviously a very personal role, and very intimate. So I will often suggest that perhaps those will be different roles -- or different people named than in your power of attorney. HIPAA authorization is a separate statute. I know we've all heard about HIPAA in the news these days. HIPAA just makes it so that your personal healthcare information cannot be shared with somebody without your consent. So by including a HIPAA authorization in your healthcare proxy or doing it as a separate document, you are giving somebody the ability to access your medical information. You're not giving them the ability to act on that information, like make medical decisions; you're just giving them the opportunity to access it. What does that actually mean? It means that they can talk to your doctors. For example, come to a doctor's appointment with you and listen in, if you need a little help there, or do things like pick up prescriptions. Technically, nobody should be able to pick up your prescriptions without having a HIPAA authorization. So we include that authorization in our healthcare proxies. I know other firms have them as separate documents, but it's important to include. Final incapacity document, I'm going to speed up here. The living will. This is where you kind of give your direction to your healthcare agent. It allows you to say

things like I don't want to be kept alive if I'm never going to come back, if I'm in a vegetative state. It allows you to talk about burial instructions, cremation versus burial or where you would like to be buried. It's a guide for your healthcare agent. I always have people include these documents in them, but I also always tell my clients that a conversation with your healthcare agent is worth way more than a living will. These documents are not binding under Massachusetts law. It's just a guide. So it's easier to have that guidance given in a conversation, I think. So holy moly. We have gone through all of these estate planning documents. Your clients' eyes are glazed over as I'm sure yours are as well right now. But at the end of the estate planning meeting, it's super important about what to do next. You want to make sure that your clients understand timing. You know, what's going to happen next. You're going to -- so what is going to happen next? You're going to send them an engagement letter, because you now know what documents are going to be drafted, that they know what documents are going to be drafted. You're going to go over your billing with them. You're going to talk about when they will be expected to bill. And in your engagement letter, you are going to tell them what your hourly rate is. That's important under the rules of professional responsibility. You're going to send them your questionnaire, if you haven't already. And you're going to talk to them about potential fiduciaries. I'm going to flip to the next slide in a minute here to show you how I do that. And you're going to give them a request to provide you with any missing information. As you've heard me going through each of the documents, you heard me talk about the different fiduciaries in each of those so your personal representative under your will, you trustee under your trust, your healthcare agent, and your attorney in fact under your power of attorney. I have this little form that I send to people, you can see just a little paragraph blurb of what each role is and then give them a place to write names and addresses. I just find this easier to do rather than kind of reexplaining it in every e-mail that I send. That's something you can decide whether or not it makes sense in your practice. So we've gotten all of the information. We've drafted all of the documents. I like -- when I send the draft -- so I send the draft documents to the clients, allow them to review them and then we can go over them, any questions. I like to use this as a time to provide them with a really detailed summary of what the documents do because they've probably forgotten everything that you've said in that initial meeting. So take that

draft summary as a time to go over that. I know that we're totally running out of time, Katie. I don't know if I should keep going or just real quick? Or end? I'm going to keep going, real fast. We send the draft to the clients, the clients get them, they ask any questions, and then we have an interim meeting to go over anything. One important thing to do. Now, we've gotten all the documents finalize asked we're going to sign everything. Obviously, with COVID we weren't doing execution meetings in person just for a new estate planner, my suggestion is this, you will never remember every single estate plan that you execute. You will do too many over the course of your career so you need to do it the same way every single time. I have a process that I go through. I do it the same way every time so I can say if I was ever asked, I don't remember this specific one, but I do know that this is how I do it every time. So we execute everything, we now have a stack of original documents. My firm personally does hold original documents for our clients as part of just the services that we provide. I know that some firms don't so you'll have to make that decisions for yourself. And then we have to talk about getting paid. Like I said, we typically charge hourly. I send a bill when I send my draft, so it's basically the bulk of the work and then there will be a final bill at the end that will cover the execution meeting and any interim meetings that we had. And then ending the engagement. The final letter will include copies of the documents, if you are holding on to the originals. It will go over any asset allocations and beneficiary designations. I'm sorry we didn't have a chance to get into that, but listed that's a huge key to finalizing the estate plan. And then the last thing is just making sure that you close the engagement, that you appreciate being part of that, to formally conclude this engagement and if they want to ask any other questions, it will be a new engagement. So that was a long meeting. We went over a lot, but I hope that was helpful for people. If you guys have questions, I'm happy to answer them via e-mail or Katie and I will be on during the question-and-answer question at the end of this section.

>>: Awesome thank you so much. Once more have a couple of questions that I'm going to rapid fire through, if you have additional questions, Heidi will be on at the end so you can always ask them and then I will introduce our new speakers and we can head right into life insurance. So the first question was a rev trust, would this allow a step-up in basis for that asset? And yes, because a revocable trust is essentially the grand tour, just with a

fancy title. It's not a separate entity so everything held in a revocable trust is going to be fully includable in a taxable estate. In order for an attorney -- does the power of attorney need to include the personal Social Security number? No. You don't want to put people's Social Security numbers in any documents because god knows where they're going to end up. That information, the POA will be able to get and they'll be able to deal with the IRS having that document in hand. Can you explain the joinder issue with trusts? I'm not sure that Heidi touched on a joinder issue with trusts in relation to marital trusts. If the person, if you have more specificity, if you want to -- so a testamentary trust is within the will itself. There's no separate document. The provisions of a trust that are within the will are within the will. So, which is why it is called a testamentary trust. So that is it for those questions. Any other questions, on Heidi's section, please hold until we finish up at 12:30. Heidi thank you so much. That was fascinating.