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This newsletter is primarily about our kids and estate planning.

I believe one aspect contributing greatly to many of us not having sufficient interest or motivation to complete our estate planning is a widespread, and potentially mistaken, presumption.

A presumption that the estate planning documents will require stringent controls and restrictions for our family members and beneficiaries after our death, such as incentive trusts, burdensome prohibitions, lack of control, officious oversight, and so forth.

To the contrary, many of us, frankly, prefer less-controlling, autonomous estate planning for our family and children. Thus, when contemplating the notion that estate planning will force us into these controls, we react by doing nothing. We choose to deal with this situation later.

In many instances this estate planning presumption needs to be reversed by focusing on enabling rather than controlling. The question, therefore, becomes "What estate planning features will protect my family members, while also enabling them to have flexible options and autonomy?"

This means the documents will have all the bells and whistles for effective asset protection, tax features, and so forth; but there also will exist avenues to allow the beneficiary to choose among various flexible options. This newsletter centers on these options.

The decanting and limited powers of appointment I discuss below – and recommend in virtually all cases – are particularly very effective options that can be applied later, if necessary, in reacting to future problems, if they arise.

I simply do not believe estate planning documents need always to be prepared on a presumption that our children are in the midst of dire problems.

Of course, I am not blind to the need for more specific control (with fewer or no options) in situations where there are known issues, e.g., drug or alcohol problems, health and mental issues, or persistent mishandling of money. But, in my experience these circumstances are realistically in the minority.

### Our Children

The following commentaries about children have stuck with me for 25 years or so. They illustrate, as examples, the underpinning of a less-controlling view of children (including my view of my own kids) that fits well within the context of this newsletter:

The key is in your attitude. If you truly see your children as powerful, responsible entities and treat them as equal to you in spirit (while acknowledging that they are less experienced than you in form), they will mirror that attitude back to you.

Shakti Gawain, *Living in the Light* (1986).

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## Controlling vs. Enabling

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Your children are not your children.

They are the sons and daughters of  
Life's longing for itself.

They come through you but not from  
you,

And though they are with you, yet they  
belong not to you.

You may give them your love but not  
your thoughts.

For they have their own thoughts.

You may house their bodies but not  
their souls,

For their souls dwell in the house of  
tomorrow, which you cannot visit, not  
even in your dreams.

You may strive to be like them, but seek  
not to make them like you.

Kahlil Gibran, The Prophet (1923).

### Here are the Specifics for this Newsletter

The following features are options designed to enable the beneficiary, rather than restrict or control. These items also provide excellent asset protection, along with substantial flexibility and autonomy for the beneficiaries.

You can check the box next to each heading below as a reminder of the items you may wish to consider for your particular situation.

#### Asset Protection

Even in the spirit of enabling the beneficiaries, I consistently recommend the use of trusts rather than outright distributions. The reason is asset protection [and also in larger estates for the estate tax marital deduction and generation-skipping purposes (GST)].

Asset protection trust features provide a considerable amount of safekeeping and comfort for the beneficiaries. More freedom from worry about the safety and rainy-day availability of the assets.

Specifically, the asset protection provisions I recommend include fully-discretionary trustee provisions for an independent trustee. The trust also includes alternative health, education, maintenance, and support (HEMS) standards that allow a family member or beneficiary to serve as trustee (thus, a non-independent trustee), if he or she desires.

The family member can be the trustee and later choose, if desired, whether to step down and put into place an independent trustee with the fully discretionary powers. An independent trustee with full discretion is the gold standard for asset protection, when compared to lesser-protective HEMS provisions. But, key is the family member gets to decide about this trustee situation.

#### Decanting Trust Powers

This is a power included in the trust document that allows a trustee essentially to hatch another new trust from the existing trust, sometimes referred to as a distribution-in-further-trust. With this power the trustee can create a completely new subtrust as an offshoot of the initial trust and fund the subtrust by moving property down from the initial trust. This decanting power and the following limited power of appointment are two substantial provisions that add a great deal of flexibility in the trust document to address future unanticipated circumstances.

#### Limited Powers of Appointment

These are trust powers called powers of appointment.

Powers of appointment are hard to comprehend in theory. Thus, the following examples illustrate some real world instances of how the surviving spouse in this example, as well as the couple's children, might have occasion to trigger these powers. If not triggered, the powers will have no effect on the trust property.

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Example 1 -- Child A might end up facing a very costly divorce. The surviving spouse (the mother of Child A) may decide to exercise her (the surviving spouse) power of appointment so as to decant a subtrust with stricter trust provisions for Child A. The stricter provisions can help insulate the trust property from the divorce action. This is a use of the power of appointment to make a distribution-in-further-trust as to a portion or all of Child A's share of the trust property.

Example 2 -- A child (who, for example has no children) can exercise a power of appointment to direct a portion or all of the trust property (trust income or principal) to the child's spouse, if the child so chooses. Thus, these powers of appointment are very important in allowing the power holders – if they so choose – to include spouses of the descendants within the benefit of a trust.

The person who creates the trust document (you) specifies in the document both (i) who holds the power of appointment and (ii) for whose benefit the power can be triggered (exercised), for example, requiring the power to be exercised only as to your descendants.

### 90-Day Option

I covered this option in a previous newsletter, entitled Let the Kids Decide. This option is generally for smaller estates. It is a 90-day provision that allows each child (but only after both parents' deaths) to decide whether to take

any portion of the property outright rather than having it remain in trust. The trust is, therefore, the default mode.

### No Default to Descendants-Line Only

Many estate planning documents keep the property only within the descendants' line. Thus, parents' property for a married child with no children when that child dies will pass to the child's other siblings. This can leave the childless-married child's spouse with nothing. And, this surprisingly may not be desirable in some family situations.

A more flexible alternative is to incorporate the limited powers of appointment discussed above so that a child's spouse can be added later, if desired, as a beneficiary of part or all of a childless-married child's share of the property.

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