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**Special Estate Planning Issue****WOODS FULLER®**

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**Inside this Issue...****Estate Tax Portability....pg. 1****Wills Vs. Trusts.....pg. 2****Updating Estate Plans.pg...3****Welcome..****Woods Fuller Welcomes Two New Associates**

Chad J. Jungman

Woods Fuller is pleased to announce the addition of two new Associates. Mitchel Martin and Chad Jungman. Chad joined the firm in August 2011. He grew up in Pierre, SD. While attending law school at the University of South Dakota he served as a graduate assistant to Professor Thomas Geu. He also participated in the Alternative Dispute Resolution Board. Following graduation Chad served as Law Clerk for the Sixth Judicial Circuit of South Dakota.

Chad is a member of the American Bar Association. His practice area is Business Organizations and Transactions.



Mitchel L. Martin

Mitch joined the firm in the spring of 2011. He grew up in Evanston, WY. While attending law school at the University of Wyoming, he worked as a research assistant to Professor John Burman, the Carl M. Williams Professor of Law & Ethics. He participated in moot court competitions and his team was a finalist in the University of Wyoming's Pace Environmental Law Moot Court Competition.

His practice areas include Litigation, Insurance and Construction law.

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**WOODS FULLER®**  
**SHULTZ & SMITH P.C.**By Matt Bock • [matt.bock@woodsfuller.com](mailto:matt.bock@woodsfuller.com)**More On Estate Tax Portability...  
Should You Rely On It?**

Matt's areas of practice include Estate Planning and Probate, Taxation, Trusts, and Business Law

In our last newsletter, we discussed estate tax portability whereby a surviving spouse may use his or her estate tax exemption plus the unused portion of the first spouse's exemption to avoid estate tax without an estate plan.

Using a couple worth \$8 million as an example, under prior law, when the first spouse died, a trust was typically funded up to the exemption amount (currently \$5 million) and remaining assets passed to the surviving spouse. The trust was available to the surviving spouse until death and then would go to other beneficiaries. When the second spouse died, his or her exemption would be used to pass the \$3 million not in trust to the beneficiaries. Under this plan, the couple worth \$8 million paid no estate tax. If, however, the couple had no tax plan, the surviving spouse would inherit \$8 million and would be able to pass only \$5 million estate tax free, exposing \$3 million to estate tax. With portability, this planning still results in no estate tax. Failure to plan, however, also results in no estate tax due. After the first spouse dies, \$8 million passes to the survivor. When the second spouse dies, his or her exemption plus the first spouse's unused exemption amount is used to pass the entire \$8 million estate tax free.

As desirable as portability sounds, there are reasons not to rely on it:

1. Portability is available only until 2013 for those whose spouse dies after December 31, 2010. The personal representative must make an election and file an estate tax return, even if no estate tax is due, or the exemption is lost.
2. The exemption may be reduced, exposing more estates to tax, even with portability. Whereas plans with

flexibility, such as disclaimer plans, are effective even if the law changes.

3. Most couples trust that their surviving spouse will leave everything to their children. However, creditors and second marriages can complicate matters. Trusts can provide creditor protection for the spouse or child, who: (1) has business creditors, (2) is negligent, (3) is employed in a high-risk profession, or (4) who cannot manage money. In addition, if a surviving spouse remarries, a trust can insure that the children receive an inheritance.

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4. Most states assess estate or inheritance tax. A portability plan does not protect against these taxes as states are not likely to adopt portability, and state tax exemptions are typically much lower than \$5 million. Thus, while a couple with \$2 million and no plan would pay no federal estate tax, they may end up paying state estate tax.

5. The generation skipping transfer tax exemption is not portable. GST tax affects gifts from grandparents to grandchildren. If the first spouse does not use his or her GST exemption amount, it is lost.

6. When assets pass outright to a survivor, the appreciation is included in that spouse's estate. With a credit shelter or disclaimer plan, the assets can be placed in a trust that can appreciate estate-tax free.



By Lisa Maguire • lisa.maguire@woodsfuller.com

# Wills vs. Trusts...How Do You Know Which One You Need?

Lisa's areas of practice include Estate Planning and Probate, Taxation, and Trusts

Do you need a Will or a Trust? It depends on your circumstances. For some, a Living Trust can be a useful and practical tool. For others, it may be unnecessary.

### What is a Will?

A Will is a written document governing distribution of property at death. It is subject to amendment during your lifetime and allows appointment of a guardian for minor children.

### What is a Living Trust?

A Living Trust, sometimes called a Revocable Trust, provides for property management during lifetime and after death. It is also subject to amendment during your lifetime.

### A Living Trust can:

- Avoid probate after death
- Avoid costs and delays
- Plan for incapacity
- Control what happens to property after you are gone
- Prevent financial affairs from becoming public record
- Provide creditor protection for heirs

There are drawbacks. A Living Trust is more expensive to set up than a typical Will and is somewhat useless unless it is funded. A Living Trust only can control assets placed into it. If assets have not been transferred, or if you die without funding the Trust, the Trust will be of little benefit as your estate will still be subject to probate.

### Will vs. Trust Considerations

There are many reasons to establish a Trust, but it will involve more upfront effort and expense. To determine if you should make the extra effort and invest in the expense of a Trust, answer these questions:

### Is informal probate an available option?

In South Dakota, unlike many states, probate is not a complex or burdensome process, making a Will appropriate if you do not need a Trust for other reasons.

### Do you have real property in multiple states?

If you have real property in other states, each state requires its own probate for such real property, costing more in attorney's fees, time, and trouble.

### Do you have minor children?

A Trust allows you to establish provisions specifying when a child will be entitled to assets.

### Do you have children, grandchildren, or other dependents with special needs?

Access or control those heirs have over inherited property may need to be limited. With a standard Will, your property can be passed on to those heirs, but a Will alone does not allow you to exercise much control over their use of the property.

### Will your estate be subject to estate taxes?

If the value of your estate exceeds the federal estate tax threshold, you might consider a Trust with tax planning provisions.

### Will you actively manage your estate plan?

If not, a Living Trust may not be a suitable solution.

In many ways, a Living Trust and a Will accomplish similar objectives. A Trust, however, gives you options that a Will cannot. Those advantages don't come without a price. Whether a Living Trust is better than a Will depends on whether the additional advantages are worth the cost. One size does not fit all. Your estate plan should be prepared to address your own personal needs.



By Mary Akkerman • mary.akkerman@woodsfuller.com

# When Should You Create or Update Your Estate Plan?

Mary's areas of practice include Estate Planning and Probate, Taxation, and Trusts

Everyone should have an estate plan. However, the type of plan that works for your friend, relative or neighbor might not be right for you. In fact, the type of plan that worked for you at one point may no longer be appropriate. At certain times in your life, you may benefit by reviewing your current plan to ensure that it remains appropriate. Tax laws, business interests, and family dynamics change over time, and there are many estate planning techniques that can be optimized only if used at the proper time in your life.

To make sure that you have protected your family and any business you may own, you should have an estate plan drawn up, or you should review or revise your current plan if you experience any of the following:

1. A recent or upcoming marriage
2. The recent or upcoming birth of a child
3. Upcoming lengthy travel or overseas vacation
4. The purchase of real property in another state or country
5. Diagnosis of a serious medical condition
6. The illness or death of your spouse
7. Divorce or contemplation of divorce
8. Cohabitation with someone other than a spouse

9. Birth, death or illness of a parent, sibling, child or grandchild, or business partner
10. Marriage or divorce of a child or grandchild or business partner
11. Growth (or decline) in a business significantly in the last few years
12. Growth (or decline) in net worth significantly in last few years
13. Adding or losing business partners
14. If you are within five years of retirement
15. If you are within five years on contemplating sale of business
16. Job loss or business litigation
17. Disability of family member
18. A significant shift in federal or state inheritance or estate tax law

The estate planning lawyers at Woods Fuller have over 119 years of combined experience creating wills, trusts, and other estate planning documents. Every estate plan we create is customized to fit the unique needs of each client, and we can help you plan during every stage of life. Contact us today if we can assist you with your estate planning.

## 2012 Best Lawyers in America Includes 13 Woods Fuller Lawyers

Recently several Woods Fuller lawyers were recognized in their respective areas of practice by *Best Lawyers in America*. For 29 years, *Best Lawyers* has come to be regarded – by both the legal profession and the public – as the definitive guide to legal excellence in the U.S. The new *2012 Best Lawyers*, is based on a rigorous national survey involving more than 3.9 million detailed evaluations of lawyers by other lawyers. Those recognized include: Richard Gregerson, Merle Johnson, Bill Taylor, Gary Thimsen, Brad Grossenburg, James Wiederrich, Comet Haraldson, Jeff Shultz, Roger Damgaard, David Kroon, James Moore, Kristine O'Connell, Troy Leonard.