ANSWERS TO FREQUENTLY ASKED ESTATE PLANNING QUESTIONS

These are some of the most frequently asked estate planning questions to help you better understand the estate planning process. While some of the answers to the questions which follow may not apply in your situation, you may find the answers to be informative nonetheless.

Once Your Will and/or Trust is Signed:

Q. Where is the best place to keep my signed original estate planning documents?

A. The best place is probably in a safe deposit box because it will protect the documents from theft, fire, accidental loss, and most other types of damage or harm. A potential problem, though, is getting it opened after your death.

If you decide to keep your estate planning documents in a safe deposit box, consider naming a family member or your Personal Representative or trustee as a joint holder on the box. That should simplify matters following your death because someone will be able to get into the box without delay.

Another option is to keep your original estate planning documents at my office. I will hold your originals here at no charge. Of course, if you move, you will need to be sure to remember to provide me with your new address and phone number.

Many people keep their original estate planning documents at home in a secure place. If you have a safe at home, that can be a good place to keep them. Be aware though, when thieves enter your home and discover a locked safe, they often take the whole safe thinking they'll find cash and jewelry. The last thing they want is a file containing your estate planning documents, but that's one of the things they'll get if you keep them in your safe. Therefore, unless your safe is bolted to the foundation of your house, it may not be the best place to keep your originals.

More people than you would expect keep original Wills and other estate planning documents in an air-tight plastic bag at the bottom of their freezers. Freezers are well insulated and heavy, and have a way of withstanding fires, hurricanes, and tornadoes. Also, they don't die or move away, and they are stolen far less frequently than in-home safes.

Q. If someone's Will is in a safe deposit box at a bank when he or she dies, how do you get access to it?

A. There are several ways to get the Will out of the box.

The easiest way is if another person is named as a joint holder of the box. That person can retrieve the Will with no problems or delays.

Another option is to go to court to request that a judge order an examination of the box. If a Will is found, it will be sent to the court. This should be the option of last resort because it takes longer, requires the filing of papers with the court, and usually involves a lawyer and the associated legal fees.

Q. Should I give copies of my Will and other estate planning documents to my children and to the Personal Representatives of my estate?

A. For some people, their estate planning documents are as private as their income tax returns, and nobody is ever given copies. For other people, estate planning documents are no different than a spare key to the house, and every family member and Personal Representative and/or trustee named in the documents is given a copy.

If you are the type of person who values your privacy, who does not especially trust your children, Personal Representative, or trustee, or if you have written a Will or trust which does not treat all the children equally, then it may not be a good idea to hand out copies. Also, you may have more money than your children expect, and depending on how your Will or trust is written, giving them a copy may be letting them know too much about your personal business.

On the other hand, if you have a fairly open relationship with all your children, you regularly discuss finances with them, and you are leaving your estate to them in equal shares, then go ahead and give everyone a copy. Of course, if you decide to change your Will or revocable trust, you should be sure to give all the same people copies of the new documents. If you don't, then there may be some arguments following your death over which document controls the disposition of your estate.

Gifts:

Q. What gifts can I make without having to pay gift taxes?

A. Every year, you can give any person you want as much as $14,000 without any gift tax consequences. This dollar amount is known as the annual exclusion, and it is now indexed for inflation. It will be increasing from time to time in $1,000 increments.

If you are married, the amount you can give to each person doubles to $28,000 since the person receiving the gift can receive $14,000 from each spouse. Gifts can be in the form of cash, stocks, bonds, real estate, or anything else of value. Buying real estate or bonds in the names of one or more other persons is the same as making a gift of that property to them. The value of the gift would be the amount of money you spent to buy the property or the bond.

You can also make tuition payments for any person you choose, and these payments do not count toward the $14,000 annual limit. Payments you make for medical expenses don't count against the $14,000 limit either. However, if you make a tuition or medical payment, be sure to pay the school, hospital or doctor directly, as a check made payable to a person which is used for tuition or medical care counts towards the $14,000 annual limit.

If you want to give more than $14,000 to any one person, to the extent your gifts exceed $14,000, you will use up a portion of your $5,340,000 lifetime exemption. This is the amount each person can give away without having to pay gift or estate taxes. By way of example, if you give one of your children $45,000 this year, you can exclude the first $14,000 under the annual exclusion, and the other $31,000 will leave you with a remaining lifetime exemption of $5,308,000.

Keep in mind that if the gifts to any person exceed $14,000 during a single calendar year, you will be required to file a gift tax return by April 15th of the following year to report the gift. That is how the IRS keeps track of how much of your $5,340,000 lifetime exemption is still available. Once you have given away more than the $5,340,000 lifetime limit, you must start paying gift taxes. The estate and gift tax rate is presently 40%.

Before making large gifts, it is often a good idea to talk to an estate planning attorney.

Once gifts are made, you can't go back and do things a better way. For instance, if you are planning to make really large gifts, then it may be wise to create trusts for the benefit of your children. There are a number of important advantages to creating trusts, with few downsides.

Q. What are 529 accounts, and are they really as good as everyone seems to think?

A. Yes, 529 accounts may be that good. In fact, they may be one of the best ways--and many people think they are the best way--to save for a child's education.

You have a number of options when it comes to saving for college. There are Uniform Transfers to Minors Accounts, education IRAs, and prepaid tuition plans, to name a few. All the options have their advantages, yet 529 accounts seem to combine the best features of all of them to make a fairly good investment vehicle.

The main advantage is that the earnings and most withdrawals are income tax free. Even though you must use after-tax money to create the accounts, all capital gains, dividends, and interest are generally tax free. Withdrawals are subject to income taxes only when they are not used for tuition, room, board, and other authorized expenses.

Another advantage is that gifts to a 529 account not only qualify for the $14,000 annual gift tax exclusion, but you can even make five years worth of gifts today and elect to treat them as being made equally over a five year period. In other words, if a married couple with four grandchildren can give as much as $140,000 to each grandchild right now, for a total of $560,000 to the four grandchildren. Each grandchild will be treated as receiving $28,000 per year for five years.

As far as estate taxes are concerned, all amounts you contribute to the account will be excluded from your estate even though you are the person controlling the account. However, you should note that if you elect to spread your contributions over five years for gift tax purposes, and you die within that five year period, a portion of the gift will be included in your gross estate.

You can also designate a successor to yourself to control the account should you die before a grandchild goes to college.

There are a few downsides worth noting. Unlike some of the other alternatives available for saving for college, 529 accounts don't let you choose the investments yourself. All you can pick is the type of investment portfolio the account will maintain. Also, if you use funds in the account for non-qualified purposes, a 10% penalty will apply to the portion of the withdrawal which constitutes investment gains. Importantly, as well, some of the tax laws which make 529 accounts so great may expire in 2011 if Congress fails to extend the new tax laws, and other key benefits can always be changed during a future session of Congress.

Overall, 529 accounts present you with an unbeatable combination of features. The accounts offer income tax free growth and withdrawals with no gift taxes, no estate taxes, retained control of the funds, and flexibility in the future should circumstances change.

Call your broker or financial planner for details on how to set up the 529 accounts.

Revocable and Irrevocable Trust Questions:

Q. For whom are living trusts most appropriate? What are the pros and cons?

A. Living trusts are useful estate planning tools, and they have an important place in many

people's estate plans. If you find any one of the following benefits appealing, then a living trust may be appropriate for you.

Benefit #1: No Probate. When a person dies, most properties pass either under a person's Will or under a living trust. Some properties--such as life insurance, IRAs, and certain types of bank and brokerage accounts--pass directly to named beneficiaries. If property passes under a Will, then the Will must be probated at the courthouse. Probate entails hiring a lawyer, filing a number of papers with the court, attending one or more hearings, and providing a written inventory to the court valuing the properties which passed under the Will.

Some people don't want this type of involvement with the court, so they opt for a living trust. By transferring all properties which would otherwise pass under your Will to a living trust, you can avoid the probate proceeding. For estates which owe no estate taxes, there is usually less work for the lawyers, and that translates into reduced estate administration costs.

Court involvement is not eliminated entirely however. Florida now requires the trustee of a living trust to file a notice of the trust with the appropriate court containing information about the person who created the trust and the trustee. Also, in certain circumstances, the trustee may be required to pay expenses of administering the decedent's estate as well as the claims of creditors against the decedent's estate.

Benefit #2: More Privacy. As mentioned above, when a person dies with a Will, an inventory must be filed with the court. You may not want your friends, neighbors, or the media to be able to read a listing of what you own and what it is worth. After all, an inventory is a public record. With a living trust, your properties and their values remain private.

Benefit #3: Plan For Future Incapacity. You may be worried that one day you won't be able to manage your own finances, and you may want to name someone to handle these types of matters for you. You can address this potential problem with a power of attorney or with a living trust. A power of attorney will usually be accepted by banks, title companies and the like, but there is always the risk that an institution's legal department will reject it. The same person who may be denied the ability to use a power of attorney will likely be allowed to do anything he or she wants when acting as trustee of a living trust.

Benefit #4: Harder to Challenge. If you are planning to disinherit one of your children or grandchildren, you may be better off with a living trust because there is nothing filed at the courthouse. Also, it is a little harder to contest a living trust than a Will. Many people are interested in doing as much as possible to prevent a successful challenge to their estate plan.

Benefit #5: Avoid Out-of-state Probate. If you own property in another state, you can avoid a costly probate proceeding in that state by transferring the property to a living trust.

Before you establish a living trust you need to understand the downsides, which include the following:

Disadvantage #1: Time-consuming to Set Up. Depending on how many different types of properties and accounts you own, it can take quite some time to switch everything over to the name of your living trust.

Disadvantage #2: Complicated. Wills are usually shorter and simpler to understand than living trusts. Also, with a Will, you can sign it and forget about it. But with a living trust, you need to put your property into the trust and run your life out of it for as long as you live. For many people, this downside outweighs all the potential benefits.

Disadvantage #3: Time-consuming to Revoke. A year after you set up the living trust, you may decide you don't want it any more. At this point, you will need to return to every bank and brokerage house, and undo everything you had done to establish the trust. You can expect

more lawyers' fees too.

Disadvantage #4: Post-Death Costs Not Eliminated. If you have a taxable estate (which is generally an estate over $5,340,000), there will be a lot of work to be done after death regardless of whether probate is required. Typically, there are tax returns to file, trusts to establish, assets to value, and more. Avoiding probate will only marginally reduce the cost of administering a taxable estate.

Disadvantage #5: May Still Need to Probate Will. If you leave just one bank account or one piece of real estate out of the trust, probate will still be necessary. And probate takes about as long when there is one asset as when there are twenty.

Q. What is the difference between a Living Trust and a Bypass Trust?

A. A Living Trust is a revocable trust created while a person is alive, whereas a Bypass Trust is typically an irrevocable trust created at death. A Bypass Trust can be created by a Living Trust or by a Will. (Yes, a Living Trust can create a Bypass Trust, but a Bypass Trust would never create a Living Trust.)

A Living Trust is simply an ownership arrangement where property is held in the name of a "trustee" rather than in the name of the person who really owns the property. People almost always create Living Trusts for their own benefit, with the goals of avoiding probate, addressing the possibility of future incapacity, and keeping matters private.

Normally, the person who creates a Living Trust names himself or herself as trustee and as beneficiary. Upon that person's death, all or a portion of the property which remains in the Living Trust passes according to the terms specified in the trust agreement.

Bypass Trusts are most often created when a husband or wife dies in order to save taxes when the other spouse passes away. When a married person dies and leaves everything to his or her spouse, that surviving spouse may then be too wealthy to pass everything to their beneficiaries tax free. Being "too wealthy" typically means the married couple is worth over $5,340,000. The Bypass Trust is a way to shelter the first spouse's $5,340,000 exemption from taxation when the surviving spouse dies, thereby doubling the amount that can be left tax-free to $10,680,000.

Bypass Trusts do have non-tax benefits though, and for some people, saving taxes is not the motivating factor in creating one. For instance, Bypass Trusts protect the trust property from creditors' claims, and they allow the deceased spouse to direct where the trust property passes when the other spouse dies.

There are some exceptions to the statements contained in this answer. For instance, Bypass Trusts are not always created at death. Some wealthy people create them during life, and other people use their estate tax exemptions for different purposes rather than the creation of a Bypass Trust. Also, in answering your question, I have assumed that when you said "Living Trust," you meant the standard type of revocable trust people across the country regularly create and not another unusual type of trust which may be created while someone is living.

Q. What are the tax advantages to setting up an irrevocable trust to own an insurance policy?

A. Although life insurance is generally not subject to income taxation upon the death of the insured, it is subject to estate taxes if the insured owns the policy (or has other ownership rights).

Owning a life insurance policy results in all or a portion of the insurance proceeds being

included in the insured's estate and therefore taxed when death occurs, thereby substantially defeating the purpose of buying the life insurance.

While it is true that life insurance which is received by a spouse is not subject to estate or inheritance taxes because of the unlimited marital deduction (assuming the surviving spouse is a citizen of the United States), those same proceeds will be included in the spouse's estate later on when he or she dies. Therefore, life insurance trusts are often a good idea even when there is a surviving spouse to receive the proceeds.

Life insurance trusts offer a number of significant advantages over outright ownership. For starters, the trust will insulate the proceeds from the claims of creditors and from spouses in a divorce.

Also, life insurance trusts can be written to last for children's lifetimes and then pass without estate taxes to additional trusts for grandchildren. This is a feature commonly referred to by estate planning lawyers as "generation skipping planning." Your children shouldn't be alarmed by the words "generation skipping" because you are not skipping them. Your children can serve as trustees of their trusts, and they can be given the power to make distributions to themselves or their children according to fairly liberal standards. Normally, trusts like the ones being described would allow your children to make distributions for their health, education, maintenance and support. And your children would be the ones determining how much money it takes to maintain and support themselves. Even though the life insurance proceeds will be held in a trust, your children would not be prevented from using the trust funds.

Custodial Account Questions:

Q. I created a Uniform Transfers to Minors Account for my son a few years ago, and it is now worth about $80,000. My son has no idea about the account, but I know he is legally entitled to the funds when he turns 21 later this year. I realize it's not exactly legal to put the $80,000 back in my name, but I don't want him to get the funds because I have a suspicion it will be spent in a matter of weeks. Is there anything legal I can do to maintain control of the account and keep him from having full access at age 21?

A. There are two realistic options available to you.

For starters, you could invest the $80,000 in a limited partnership controlled by you. When your son reaches age 21, he will not receive the $80,000, but instead will become the owner of a limited partner interest. As a limited partner, his rights can be severely restricted, thereby allowing you to control the funds for as long as the limited partnership exists. The limited partnership agreement can be written so that your son has no right to demand a distribution or veto your investment decisions.

One of the downsides to creating a limited partnership is that you are introducing a bit of complexity into your life. Many people find this type of business arrangement too complicated for their tastes. Also, the fees to set up a limited partnership can be costly. And once the limited partnership exists, you will need to file annual income tax returns to report the partnership's income to the IRS.

Not only that, but many people create a corporation or limited liability company to serve as the limited partnership's general partner. If you choose to create this additional entity, the fees to form and maintain the limited partnership arrangement will be even higher.

A word of caution: Your son may be the type to hire a lawyer to represent his best

interests. If he does, it is possible--although highly unlikely--that your son might sue you to recover any funds you have placed in a limited partnership which limits his rights. In theory, your son would have a compelling argument. After all, most people would agree that receiving $80,000 in stocks and cash is better than receiving a limited partnership interest with all the associated restrictions.

Another option is to tell your son about the existence of the account, but make it clear that he would be making a huge mistake by not letting you continue to control the funds. If he puts up too big a fuss and demands the money, you can modify your estate plan and completely cut him out as a beneficiary of your estate. There is nothing illegal about you managing your son's investments for him, assuming he has the right to ask for the money at any time.

Q. I set up custodial funds in my children's names to pay their college expenses, with me as custodian. The mutual funds I invested in have done so well that the accounts far exceed what they'll need for college. Can I legally give money from these funds back to myself? If so, how?

A. No, even though there is nobody to stop you from giving the money back to yourself, doing so would be illegal. Gifts to custodial accounts are irrevocable.
If you were to return the funds to yourself, your children would have the right to sue you, and they would probably win. Of course, they would probably never know what you did, and most kids don't sue their parents (especially if they think there may be a lot more money to come one day).

Fortunately, you can start spending the money in the custodial account on things for your children which you may now be paying out of your own funds. For instance, if one of your children wants to spend the summer studying in France or if one of your children needs a new car, use the money in the custodial account to pay for these expenses, not your own money.

Tax Questions:

Q. Could you explain how stock values are "stepped up" as a result of death? My father has a lot of stocks that he bought decades ago, and I'll be inheriting them when he dies.

A. Getting a stepped-up cost basis on inherited stock allows you to save taxes when the stock is sold.

For instance, if your father bought a stock at $10 a share, and it is now worth $100 a share, when he sells the stock, he will owe a capital gains tax on the $90 the stock has appreciated. If your father gives you the stock before his death, the gift will be valued at $100 a share, but you will take his cost basis of $10 a share. That means you will owe a capital gains tax when you sell the stock.

If your father waits to give you the stock until after his death, the stock will be valued in his estate at $100 a share, and you will have a new cost basis of $100. Your father's $10 cost basis gets "stepped-up" to $100 as a result of his death. This is true even if your father's estate is not required to file a federal estate tax return. When you later sell the stock, you will only owe capital gains if the value of the stock is higher than $100.

There are two exceptions worth noting. First, after your father's death, if his estate owes estate taxes, it is possible to value the stock six months following his date of death. If the stock is worth less at that time, you can use this lower value as a way to pay less estate taxes. But if you

do, the basis in the stock is also the lower value--not the higher date of death value.

Second, if you own $20,000 worth of stock that you purchased for $1,000 years ago, you may be hesitant to sell the stock because you don't want to pay capital gains taxes (typically 15% of $19,000, or $2,850). Your idea may be to give the stock to your father, who is very ill and near death, and then have him leave it to you when he dies, thereby getting a stepped-up cost basis. As you might expect, the IRS doesn't like this, and there is a rule which says if your father dies within one year of being given your stock, then you receive the stock with your old cost basis. If your father makes it more than a year, then you do get the stepped up cost basis.

Q. A relative recently died and left me some stock. How is the tax handled on this transaction? Do I pay the tax when I sell it? Her basis in the stock was very low.

A. When you inherited the stock, you received what is commonly referred to as a stepped-up cost basis. That means your relative's low basis in the stock is forgotten, and instead, your new basis is the stock's value on the date of death.

Technically, your cost basis is the average of the stock's high and low trading prices on the date of death, not the stock's closing price. If your relative died on a weekend or holiday, then an average of the two nearest open market trading days is used to determine your cost basis.

As a general rule, no taxes are due until you sell the stock unless your relative had a taxable estate, which in 2014 is an estate over $5,340,000. And when you do sell the stock, you will have a short term capital gain or loss if you sell the stock within one year of your relative's death, or a long term capital gain or loss if you wait longer.

Note: there are several exceptions to the general rules in this answer.

Power of Attorney Questions:

Q. What is the difference between a Designation of Health Care Surrogate and a Living Will?

A. A Designation of Health Care Surrogate is a document that allows you to name an agent to make medical treatment decisions for you in accordance with your wishes if you are not able to do so yourself.

A Living Will is a document that allows you to address what kind of medical treatment you would like to receive if you ever face a terminal or irreversible medical condition. It is often referred to as the document where you tell the doctors to "pull the plug." Most people request that all treatments other than those needed to keep them comfortable be discontinued or withheld so they can be allowed to die as gently as possible.

The main difference between the two documents is that the Living Will is where you actually express your own specific preferences as to the use of life sustaining treatment, and the Designation of Health Care Surrogate is where you name one or more persons to make most medical decisions for you.

It is not uncommon to combine a Living Will and a Designation of Health Care Surrogate into a single form. Preparing the two documents as separate forms or as a single form are both valid ways to address the medical issues.

Q. If I name someone to make medical decisions for me in a Designation of Health Care

Surrogate, can that person later decide not to turn off the machines even though I have signed my Living Will?

A. If you have both a Living Will and a Designation of Health Care Surrogate, there certainly can be some overlap.

For instance, a decision made by your agent under a Designation of Health Care Surrogate may have the effect of ending your life within hours or days even though you may not yet have reached the point at which your Living Will would have applied to your medical condition.

Probate Questions:

Q. Which assets are handled outside of probate?

A. There are a number of different kinds of properties that may pass outside the provisions of your Will.

The list includes life insurance, retirement plans, individual retirement accounts, and annuities. When you purchased or set up these types of assets and accounts, you were probably asked to fill out a form listing the beneficiaries who will receive payments upon your death. These investments will pass to the named beneficiaries regardless of whether you have a Will. However, if you don't have a beneficiary named, if the beneficiary named is your "estate," or if all the beneficiaries are dead, then those investments will be paid to your estate and pass under your Will.

Certain bank and brokerage accounts will also pass outside your Will. For instance, payable-on-death accounts (sometimes called "POD" accounts) will be distributed to the named beneficiary. Additionally, accounts set up by one or more persons as joint tenants with rights of survivorship will pass to the surviving account holder or holders.

Some banks allow you to set up what they call trust accounts even though there is no written trust agreement. These types of accounts will pass to a named beneficiary without going through probate as well.

Not all joint accounts pass to the survivor. When joint accounts are set up as tenants in common, the portion of the account that was owned by the decedent passes under his or her Will. Many people have decided to create revocable or irrevocable trusts as part of their estate plan. Virtually all such trusts are designed to pass directly to persons or other trusts named in the document rather than under a Will.

You may find that most of your estate consists of non-probate property. Therefore, it is extremely important to coordinate the beneficiaries of all these properties to make certain your assets will be distributed as you want when you pass away.

Q. Must a Will be probated if the estate is less than $5,340,000? Are insurance proceeds included in that total?

A. There is no requirement that you probate a Will no matter how much the estate is worth. Wills need to be probated only if property is not transferred by some other means.

You may be confusing probate with the filing of a federal estate tax return. Regardless of how the property is transferred at death, if an estate is valued at $5,340,000 or more in 2014, then

a federal estate tax return must be filed. And yes, you must include proceeds of life insurance owned by the decedent in computing the $5,340,000.

The probate process is primarily a method of changing title from the deceased to the person or persons who inherit the property. Some assets require probate, such as real estate and bank accounts held only in the name of the deceased, while others do not, such as life insurance policies or retirement plans payable directly to named beneficiaries.

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