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Estate Planning | Wills & Trusts

Newsletter #20 • December 2011

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Top Five Questions in Estate Planning

Some questions regarding Estate Planning are unique and based on specific family situations, but many are common questions that arise from misconceptions regarding Estate Planning. Below, you will find the top five questions that I receive from clients, along with a brief explanation of the issues related to each answer.

1. I know I need a Will—how much will it cost?

This is the most common question that I receive. Since a Will is the most popular document associated with Estate Planning, people often incorrectly assume that this is all they need.

Instead of assuming that they need a Will, clients should focus on their goals. A better question for an Estate Planning attorney would be “here are my goals, what do I need to do to accomplish them?”

The most common goals are to ensure that (a) Guardians are named for minor children and (b) the maximum amount of assets pass to their loved ones as efficiently as possible. While a Will allows you to name Guardians for your children, it fails to maximize tax exemptions, avoid probate or protect assets from a beneficiary’s creditors or divorce, and is therefore rarely the ideal answer for clients. *Please see question 2 for a discussion of how to accomplish these important goals.*

2. My estate is small—do I really need a Trust?

The benefits of Trusts go well beyond tax savings. While dual Revocable Living Trusts are the ideal instruments for maximizing a couple’s Estate Tax exemptions, use of a Trust also allows the creator (the “Grantor”) to provide the terms for distribution of the Trust’s assets and protect inheritances from the children’s creditors or divorce. Additionally, assets held by the Trust at the Grantor’s death avoid probate, allowing the estate

to minimize administration costs and transfer assets to the beneficiaries as quickly as possible.

Protecting a child's inheritance is often a priority for parents who have worked hard to build their estate. If a Will states that the individual's assets shall be left to his children in equal shares, any adult children (older than age 18) will receive the assets outright at the time of death, after probate is completed. Probate lasts a minimum of six months, which allows creditors to file their claims against the estate. A minor child's assets will be held by a Guardian on behalf of the child until he or she reaches age 18, at which time the assets will be distributed outright to the child.

Instead, by establishing a Trust, the Grantor can provide that (a) the assets shall be held in Trust for the benefit of the child, (b) the assets shall be managed and administered by the individual named as Trustee, (c) the assets may be withdrawn by the child at the stated ages in the stated amounts, (d) the Trustee may delay withdrawals if the child is involved in litigation at the time of withdrawal, and (e) if assets remain in the Trust at the time of the child's death, they shall be distributed as provided in the document.

As you can see, a Trust provides much more protection and flexibility in planning than a Will. When used properly, a Trust can greatly reduce the costs, time and headaches of estate administration for your loved ones.

3. I had a Will prepared about 10 years ago, so it should be fine, right?

Over a 10-year period, it is likely that your goals and wishes have changed. Existing documents should be reviewed when there is a significant change in your family or financial situation. Additionally, with the frequent changes in transfer tax laws in recent years, you should ideally have your documents reviewed every two to three years.

It is important to make sure that you understand your documents as written and that they meet your goals and expectations. A review by an experienced Estate Planning attorney is the best way to ensure that both of these objectives are achieved.

4. What is probate?

Probate is the process by which a court validates a decedent's Will (if the decedent had one) and administers the decedent's estate pursuant to the

Will or, if the decedent did not leave a Will, then pursuant to the intestacy laws of the state. Probate can be a complex, lengthy process which requires the court's approval for distributions of assets and the opening and closing of the estate.

As stated above, a probate estate must remain open for a minimum of six months. This window allows creditors to file claims against the estate. Additionally, probate is a public process which makes court documents available to anyone who wishes to see them.

The cost of probate will almost always exceed the cost of having a proper Estate Plan prepared. Proper planning can allow the estate and its beneficiaries to avoid probate and complete the estate administration process as efficiently as possible.

5. What happens to my estate if I do not have an Estate Plan?

When an individual passes away without a Will ("intestate"), his or her assets will be required to pass through the probate process based on the laws of the decedent's state of residence. As discussed above, probate is a complex, lengthy process which can increase the likelihood of conflict amongst family members, open the doors to creditors and delay the distribution of assets.

Under Illinois' intestacy laws, the estate's assets would be distributed in the following manner:

- a. If the decedent has a surviving spouse and one or more surviving descendants, then half of the assets pass to the spouse and half of the assets pass to the descendants, *per stirpes* (see Newsletter #1);
- b. If the decedent has a surviving spouse, but no surviving descendants, then all assets pass to the spouse;
- c. If the decedent has one or more surviving descendants, but no surviving spouse, then all assets pass to the descendants, *per stirpes*; and
- d. If the decedent does not have a surviving spouse or descendant, then the assets pass to the parents and siblings of the decedent in equal parts.

Keep in mind that intestacy laws only apply to probate assets, not to assets with named beneficiaries or joint owners or those held in Trust.

Generally, individuals want to ensure that the surviving spouse has access to all of the estate's assets before any assets pass to the children. However, under Illinois' intestacy laws, only half of the estate's assets would pass to the spouse, while the other half would pass to the children in equal shares.

To most people, it is important that their estate passes based on their own wishes rather than the laws of the state. The best way to accomplish this goal is to discuss your wishes with an experienced Estate Planning attorney and have documents prepared that will allow for your estate to be administered in the most efficient way possible for the benefit of your loved ones.



Manish C. Bhatia is an Illinois attorney focusing his practice in the area of Estate Planning. Manish has focused his education and practice on Tax Planning, Estate Planning and Business Succession Planning since the first year of law school. He has also added Asset Protection, Elder Law and Nonprofit Organizations/Charitable Giving to his fields of practice. Manish is also a member of the Chicago Bar Association, the Asian American Bar Association of Chicago and the Indian American Bar Association.

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