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ESTATE PLANNING ▪ BUSINESS CONTINUATION ▪ ELDER PLANNING ▪ ESTATE ADMINISTRATION

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Common Estate Planning Questions…and Answers!!

Whenever someone talks to me about estate planning, they start using a bunch of terms that I am unfamiliar with? What do all those words mean to me?

It is common for attorneys and other professionals to use certain estate planning terms and phrases that are familiar in the estate planning world, but can be confusing to those who don't work in it every day. So let's start by getting a few key definitions out of the way:

- **Last Will and Testament:** A Will is a fairly straightforward legal document. In your Will, you outline who your family members are, who you designate to receive your assets upon your passing, and who is responsible for administering your estate (Personal Representative) after your passing. A Will is also the document used to nominate a guardian for your minor children. Your Will has no effect during your lifetime. Once you pass away, your Will becomes active. Your Personal Representative will then be responsible for opening a Probate through the court, admitting your will to Probate, and administering your assets throughout the Probate proceedings. Ultimately, the Probate Court will distribute your assets to your beneficiaries.

- **Revocable Living Trust:** A Revocable Living Trust is a trust which you create during your lifetime. The fact that the trust is revocable means that it may be changed or terminated at your wish. More generally, a trust is a legal entity that is created to hold and manage your property during your lifetime, through an incapacity, and ultimately to administer and distribute your estate to your beneficiaries upon your passing. During your lifetime you have complete access to all assets held by your Revocable Living Trust, just as you do now. Your Living Trust holds title to all property, and allows for seamless, consolidated management of your assets during your lifetime, through any incapacity, and even after your death. While you are alive and well, you will serve as the Trustee and Beneficiary of the trust, allowing you full access and control. Should you become incapacitated, someone else will be nominated to take over as Trustee to manage the assets, and you will remain the Beneficiary. Upon your passing (or the passing of the second spouse for a married couple), you will have nominated someone to take over as the Trustee to administer your estate for the benefit of your named Beneficiaries (i.e. children, siblings, charities, nieces/nephews, other family, friends). This post death administration of your trust will be handled privately, by the person or entity you have nominated to serve as Trustee.

- **Pour Over Will:** If you draft a Living Trust, your Pour Over Will acts as a backup to ensure that all assets are distributed according to your Trust plan. This way, if you pass away with assets that are not properly funded to your trust, your Pour Over Will is able to fund them to your trust after your death. This is also the document you use to nominate Guardians for your minor children upon your passing.
- **Personal Representative:** Your personal representative is the person you nominate to be responsible for administering your will after you have passed away. They will be responsible for opening the Probate with the court, filing all required documents and paperwork, appearing at any court hearings, and ultimately distributing the assets to your beneficiaries under the guidance of the Probate Court.
- **Probate:** This is the court driven process by which an estate is administered for assets that pass under a Will. It is a public court procedure that is overseen by a judge. The process includes filing of your original Will with the Probate Court, nomination of the Personal Representative, the filing of an inventory of all assets with the court, a required publishing of a notice to creditors, a final accounting, and ultimately, the distribution of your assets to your beneficiaries. Probates can vary widely in length, but on average they last anywhere from 9-18 months from the date the Probate is started.
- **Grantor:** You are the Grantor, as it is the person who sets up the trust. It is generally also the person who funds the trust initially.
- **Trustee:** The Trustee is the person who holds legal title to the trust assets, is responsible for controlling trust assets, investing the assets and administering the trust assets in a post death situation. Initially, you will be the Trustee of your Revocable Living Trust. You will also nominate Successor Trustees to take over in the event you are incapacitated or pass away.
- **Beneficiary:** The Beneficiary is the person who has beneficial use of the trust assets. Initially, you are the Beneficiary as well. Since you are typically the lifetime Beneficiary, you will maintain use of and access to your assets during your lifetime. You will designate who the Beneficiaries of your Trust are to be after your death, and the Trustee will be responsible for distributing assets to your named Beneficiaries after you have passed away.

What does it mean for my Beneficiaries to inherit "in trust" or for me to create "asset protected trust shares" for my children?

Generally speaking, there are two ways that a beneficiary can inherit assets: outright or in trust. A beneficiary inheriting outright is very easy to comprehend, as it essentially just means they will get a check written out in their name or property titled in their name when the distribution from your estate is made.

Inheriting in trust can be a little more obscure, and can mean a lot of different things. At its simplest form, inheriting in trust simply means that rather than inheriting property titled in their name, your children or other beneficiaries will receive property titled in the name of a trust of which they are the beneficiary. From there, the design of these types of inherited trust shares can vary widely. To give you a sampling of the types of beneficiary trusts that can be created, here are a few of the more common general types:

- **Step Distribution Trusts:** The general concept here is that your beneficiary will receive your assets in trust, with a separate Trustee managing the assets. Then, at certain ages or benchmarks, portions of the Trust will be distributed to the beneficiary outright. For example, this type of trust may say that a beneficiary shall receive 1/3 of their trust share at age 25, 1/3 at age 30, and the remainder at age 35. This type of trust is designed to protect the beneficiary from spending it all at once by only giving them access to pieces of it at certain ages.
- **Asset Protected Trust Shares:** With an asset protected trust share, the goal is to protect the inherited assets from a beneficiary's liabilities, for example, a potential divorce, a bankruptcy, creditor problems, and lawsuits. The assets are titled in the name of a trust for the benefit of the beneficiary, and distributions are limited to ascertainable standards, giving the assets held by the trust protection from the beneficiary's personal liabilities. These trusts also keep the assets separate, so that they are not considered as part of any divorce the beneficiary may go through. Often times there will be an Independent Trustee up through a certain age of the beneficiary (say 25 or 30), and then at that point the Beneficiary is able to become the Trustee as well. This means that they will gain full control over the trust assets, so that they could distribute as much of it as they desire. However, the trust remains intact, so to the extent that they leave assets in the trust, they will remain protected from some of their personal liabilities.
- **Spendthrift Trusts:** In some cases, the biggest liability that parents are concerned with protecting a child from is their own spending habits. In these cases, the trust may be designed in such a way as to limit the amount of the trust that the beneficiary has access to, usually described as a certain dollar amount or certain percentage of the trust assets on an annual basis. The beneficiary may be required to meet certain requirements or incentive provisions before gaining access additional distributions or to any distributions at all.

What does it mean to "fund" my Living Trust? How important is the titling of property with respect to my plan?

When attorneys use the phrase "funding your trust", what they are referring to is the process of retitling assets and changing beneficiary designations to ensure that your trust is able to control all of your property. An "unfunded" trust is like a car with no gas – it may look nice, but it simply is not going to work! If the trust does not hold title to your assets, then it cannot control them, and therefore your assets will not be managed or distributed according to the terms of your trust. If you pass away with an unfunded trust, your estate will go through the probate process, and while your assets may ultimately get funded to your trust at this time through your Pour Over Will (see below), the cost to administer your estate will be much higher, you will lose all privacy associated with a trust, and you will have missed out on all of the lifetime benefits of having a Living Trust.

Beyond simply having assets funded to your trust, it is important to remember that how an asset is titled can have a substantial impact on its distribution upon your death. For example, if you hold asset titled as joint tenants with another person, regardless of what your will or trust says, when the first owner passes away, their interest in the property will pass to the other joint tenant. Conversely, if you hold title to assets as tenants in common, you are free to pass your interest in the property to whomever you choose through your estate planning. Also, if an asset has a beneficiary designation or transfer on death

designation attached to it, that asset will pass by contract directly to the named beneficiary upon your death, and will not be affected by the provisions of your will or trust. This is why it is imperative to ensure that your assets are properly funded in coordination with your overall estate plan.

Be sure to ask your attorney whether they will assist you in funding your trust, and if they do, whether they will charge you separately for the funding process. Remember, if your trust is unfunded, you have essentially just paid more money to end up with a Will the centerpiece of your estate plan.

What are the tax consequences of having a Revocable Living Trust?

During your lifetime and as long as you are the trustee and managing the trust all of the items which you place into the trust will be taxed using your social security number, therefore you will not see any change at all. All income will be reported on your normal income tax return as it was before you set up the trust. Proper planning with your Revocable Living Trust will allow you to minimize your estate taxes especially for a married couple.

If I want to change or revoke the Revocable Living Trust, how do I go about doing this?

Changing or revoking a Revocable Living Trust is no different than making changes to your will. Generally to amend or revoke your Trust you must have proper papers prepared to reflect any changes. If you decide that you want to change or revoke your trust you should get in touch with your attorney in order to make the changes or to properly revoke it.

What happens to my Revocable Living Trust upon my death?

Upon your death your trust will become irrevocable and is no longer able to be amended or changed. All of the assets that were in your trust will still be considered in your estate for tax purposes and the Successor Trustee will then take over duties and distribute the assets according to your particular estate plan. Please note the Trustee may also be responsible for all required steps that are part of the administration of your estate, such as ensuring that a final tax return is prepared and upon distribution of the trust that a final accounting has been done. It is a good idea for the Trustee at the time to contact your attorney to ensure that all things are properly concluded at your death.

If I have a Revocable Living Trust do I still need other estate planning documents?

As mentioned before the Revocable Living Trust is only a part of your estate plan. There are several other documents that may contribute to the make-up of your comprehensive estate plan, such as a Pour Over Will, Durable Power of Attorney (for finances), a Healthcare Power of Attorney, a HIPAA Authorization, and a Living Will. Below are some brief definitions of these documents:

- **Durable Power of Attorney (for finances):** This document is used to nominate someone to handle financial and property management decisions during your incapacity. You choose an agent to "fill your shoes" and generally grant them the power to manage your assets and day-to-day decision making in the event

that you are unable to do so for yourself. This document is also used to nominate temporary guardians for your minor children in the event that both you and your spouse are incapacitated at the same time. Without this document, your loved ones would have to go to court and begin a Guardianship proceeding in order to have someone appointed to make financial decisions for you.

- **Healthcare Power of Attorney:** Your Healthcare Power of Attorney (HCPOA) is used to nominate someone to make healthcare decisions on your behalf in the event that you are unable to make decisions for yourself. In this document, you have the opportunity to spell out some of your specific health care wishes, as well as authorize your healthcare agent to make or not make certain types of decisions on your behalf. Often the focus of the document is on what powers your grant and what your feelings are regarding end of life decision making. Without this document, no one (not even your spouse) is authorized to make such decisions for you, and your loved ones would have to go through the court driven Guardianship proceeding to have a Guardian appointed to make healthcare decisions for you.
- **HIPAA Authorization:** The HIPAA Authorization is your opportunity to authorize certain family members and close friends to have access to your medical records during a potential incapacity, so that doctors are able to communicate with your loved ones regarding your treatment and condition. Without this document, only you have access to your medical records, which means that friends and family members (including your spouse) can be shut out from information if you are incapacitated.
- **Living Will:** If you choose to execute a Living Will, you are making a statement directly to any physicians treating you that if you are in a persistent vegetative state or have a terminal condition where death is imminent, that you do not want your life artificially prolonged through the use of feeding tubes and breathing machines. This is a direct statement to healthcare providers regarding your intentions in end of life situations.

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