Estate and Succession Planning FAQ's

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Q. What is probate and how can I avoid it?

A. Probate is a court-supervised process for identifying and gathering the assets of a deceased person ("decedent"), paying the decedent's debts and taxes, and distributing the decedent's assets to his or her beneficiaries. Typically a personal representative is appointed to handle the estate administration. The personal representative is accountable to the court as well as the estate beneficiaries. Only assets owned by a decedent in his or her individual name require probate. Avoiding or minimizing probate is often a client objective. Assets owned jointly as "tenants by the entirety" with a spouse, or "with rights of survivorship" with a spouse or any other person, will pass to the surviving owner without probate. This is also true for assets with designated beneficiaries, such as life insurance, retirement accounts, annuities, and bank accounts and investments designated as "pay on death" or "in trust for" a named beneficiary. Assets held in trust will also avoid probate. When titling assets, consideration needs to be given not only to whether such assets will be subject to probate but also whether such titling works consistently with your estate planning documents and asset protection objectives.

Q. How will my assets be distributed if I die without a Will?

A. If you die without a will (this is called dying "intestate"), your property owned in your individual name will be subject to probate and distributed to your heirs according to a formula fixed by law. The intestate laws do not take into account your intentions or the needs of your heirs, do not provide for charitable gifts and do not provide for the appointment of your preferred personal representative or the creation of trusts for beneficiaries. For example, if you die intestate and are survived by a spouse and descendants and either you or your spouse have a descendant who is not also a descendant of the other, one-half of your estate passes to your spouse outright, while the remainder of your estate passes outright to your descendants (even if they are minors).

Q. What is guardianship and how can I avoid it?

A. Guardianship is a court-supervised process in which a guardian is appointed to exercise the legal rights of a minor or an incapacitated person ("ward"). A guardian of the property of the ward shall inventory the property, invest it prudently, use it for the ward's support, and account for it by filing detailed annual reports with the court. In addition, the guardian must obtain court approval for certain financial transactions. The guardian of the ward's person may exercise those rights that have been removed from the ward and delegated to the guardian, such as providing medical, mental and personal care services and determining the place and kind of residential setting best suited for the ward. The guardian of the person must also present to the court every year a detailed plan for the ward's care. Florida law requires the use of less restrictive alternatives to protect persons incapable of caring for themselves and managing their financial affairs whenever possible. If a person creates an advance health care directive and a durable power of attorney or revocable living trust while competent, he or she may not require a guardian in the event of incapacity.

Q. Why should I create a trust and transfer assets to it?

A. A revocable trust is a document (the "trust agreement") created by you to manage your assets during your lifetime and distribute the remaining assets after your death. The person responsible for the management of the trust assets is the "trustee." You can serve as trustee, or you may appoint another person, bank or trust company to serve as your trustee. The trust is "revocable" since you may modify or terminate the trust during your lifetime, as long as you are not incapacitated. During your lifetime the trustee invests and manages the trust property. Most trust agreements allow the grantor to withdraw money or assets from the trust at any time, and in any amount. If you become incapacitated, the trustee is authorized to continue to manage your trust assets, pay your bills, and make investment decisions. This may avoid the need for a court-appointed guardian of your property. Upon your death, the trustee (or your successor if you were the initial trustee) is responsible for paying all claims and taxes, and then distributing the assets to your beneficiaries as described in the trust agreement. Your assets, such as bank accounts, real estate and investments, must be formally transferred to the trust before your death to avoid having to probate such assets. This process is often called "funding" the trust and requires changing the ownership of the assets to the trust. There are many other types of trusts used in estate

planning, including irrevocable trusts created at death (under a will or revocable trust) whereby a trustee manages a beneficiary's inheritance on behalf of a beneficiary. There are many reasons to create and fund a trust, including: (i) avoiding probate; (ii) avoiding guardianship; (iii) asset protection*; (iv) protection of a beneficiary from the beneficiary's creditors or the beneficiary's addictions or spendthrift propensity; (v) control the disposition of assets upon the beneficiary's death (e.g., often used for a spouse who is not the parent of the decedent's children, or to make sure assets stay in the family); and (vi) protection from transfer taxes*.

* A revocable trust may not be used to protect your assets from your creditors or transfer taxes.

Q. Is an irrevocable trust really irrevocable?

A. Florida law allows for the modification and termination of some irrevocable trusts. Many times the reasons for creating a trust no longer exist, or continuing to administer a trust according to its terms is not practical. Trust modification and termination usually require court approval although in some cases the modification or termination can be accomplished by agreement of the interested parties.

Q. Are there special laws applicable to my Florida homestead?

A. Florida homestead laws are the laws pertaining to your principal residence which afford Florida residents creditor protection, family protection and ad valorem tax benefits. The laws are very complicated and poor planning can lead to disastrous results. If you are married or have minor children, or if your estate planning was done before you became a Florida resident, you need to consider the impact of Florida's homestead laws which prohibit certain transfers of your homestead. *Read more* *www.floridatrustsestatesblog.com/homestead/florida-homestead-planning*

Q. What is a fiduciary and what are their responsibilities?

A. Serving as a fiduciary (e.g., a personal representative or trustee) is no simple task. A fiduciary is generally required to: (i) hold property; (ii) prudently invest the property; (iii) make distributions of income and/or principal to the beneficiaries, as directed in the trust or other governing instrument; (iv) make tax elections and other administrative decisions; (v) keep records of all transactions; and (vi) issue accountings and other information to the beneficiaries (unless such disclosures are effectively limited by law or the governing instrument). Florida's Probate Code and Trust Code are very complicated and a fiduciary needs to be aware of its obligations and those provisions of the Codes which allow the fiduciary to protect itself.

Q. Who should I appoint as my fiduciary?

A. If you have a preference (as most clients do) for who should be appointed to make decisions on your behalf during incapacity or after death (such as to manage your assets, act as Trustee of trusts created by you, or act as guardian for your minor child), then you should make an effective appointment of your desired fiduciary in your estate planning documents. This includes in your Will, Revocable Trust (if you have one), Durable Power of Attorney,

Health Care Surrogate, Living Will and Designation of Pre-Need Guardian. In addition, you will want to consider whether an independent fiduciary is appropriate, whether your fiduciary has the capability to carry out their fiduciary obligations and whether limitations should be included on the fiduciary's right to compensation.

Q. Is my plan complete after I sign my estate planning documents?

A. Executing estate planning documents is only one aspect of estate planning. Equally important is the planning and implementation of "asset planning." Asset planning includes re-titling assets, transferring assets and designating beneficiaries so your assets pass consistently with your estate plan. For example, if you create a revocable trust for the purpose of avoiding guardianship and probate, you need to make sure you transfer your assets which are otherwise subject to guardianship or probate to your trust before your incapacity or death. Another example would be when you create a trust for a beneficiary to hold your assets after your death, you need to make sure your assets will pass to that trust rather than to the beneficiary directly. Sometimes transferring assets to a trust is easy as in the case of bank and brokerage accounts but in the case of real estate, especially mortgaged real estate, business interests, and assets passing by beneficiary designation (life insurance, retirement benefits, annuities, etc.), such transfers can be complicated and require special planning.

Q. Can I protect my assets from creditors?

A. There are effective ways to protect your assets from creditors. This includes planning to protect your assets from your creditors and planning to protect assets left to a beneficiary from the beneficiary's creditors. If you have significant risk of creditor exposure, or if you are concerned about the creditor exposure of a beneficiary (e.g., a child who may have a strained marriage or whose career presents significant exposure to creditors, etc.), then you should consider protective planning options such as creating and funding a trust.

Q. How will my estate be taxed?

A. Much has occurred recently in Washington, D.C., including drastic changes to the laws governing gift, estate and generation-skipping transfer taxes, as well as the income tax laws relating to cost basis adjustments at death. If you have assets in excess of $1,000,000 (including life insurance death benefits), you need to know how the transfer tax system works, both now and in the coming years as the current laws (e.g., $5,000,000 exclusion from federal gift and estate tax) are only in effect for this year and 2012. There are tremendous transfer tax planning opportunities right now for those having significant estates.

Q. What will happen to my business after I die?

A. If you own an interest in a closely-held business such as a corporation, limited liability company or partnership, you need to be aware of any transfer restrictions imposed by law or the agreements governing the business in addition to buy-out provisions. You also need to consider whether you want certain beneficiaries to become involved in the business and how the disposition of a business interest to one beneficiary may be

equalized to another beneficiary. In addition, there are many tax issues which need to be considered when planning for the disposition of a business interest.

Q. If I die first, what rights does my spouse have to my property?

A. Florida law affords a surviving spouse certain rights to a decedent's assets. Included is the right to an "elective share" which is essentially a right to thirty percent (30%) of a decedent's assets (probate and otherwise). A surviving spouse must effectively exercise their elective share in a timely manner. A surviving spouse also is entitled to the Florida homestead and certain other entitlements under the Florida Probate Code. Oftentimes a couple (e.g., a second marriage) will want to plan the disposition of their estates free of any rights a spouse may have under Florida law. In such cases, such couple may want to consider entering into an agreement effectively waiving their spousal rights. There are strict requirements governing such agreements and each spouse is encouraged to have separate legal representation.

Q. If I recently moved to Florida do I need to update my estate planning documents?

A. Yes, or at least have them reviewed by competent Florida legal counsel to make sure your out-of-state documents work as intended in Florida. Florida has some unique laws including laws governing homestead, spousal rights and trusts. We often find that documents prepared while residing in another state require changes to comply with Florida laws and to ensure estate planning intentions are carried out. In addition, a change of domicile may have tax implications so it may be necessary to take steps to affirmatively establish and maintain your Florida domicile. Finally, even though Florida does not have a state estate or inheritance tax, there are many states which do have such state death taxes. Becoming a Florida resident may mean that your entire estate is no longer subject to such state death taxes but if you still own real estate in a state with such taxes, you may likely be subject to such taxes on at least a portion of your estate. There may, however, be ways to reduce or eliminate your exposure to such state taxes.

About the Author: Robert J. Naberhaus III is Of Counsel in the Viera office and practices in trust and estate planning and administration. He is board certified in wills, trusts and estate law. He has extensive trust, estate planning and administration experience working with high net worth individuals. He also concentrates his practice in the areas of fiduciary representation, business succession planning, generational planning, charitable planning, guardianship and probate litigation. He may be reached at RNaberhaus@deanmead.com.