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ESTATE PLANNING - QUESTIONS & ANSWERS

New Jersey Non-Tax Planning

Thank you for selecting our firm to represent you. We recognize that you may have questions about the legal terms incorporated in your documents. You may also have general questions regarding Estate Planning and Estate Administration. The following discussion addresses some common questions and answers and is intended to make your documents easier to understand.

1. What does “per stirpes” mean?

Answer: In Latin, it literally means “by the branch.” This means if one of your children dies, his/her children get the share of their deceased parent.

2. What does the “age requirement” paragraph mean?

Answer: The Wills/Trusts drafted by our office often include contingent beneficiaries. For instance, if you leave everything to your son and provide that if your son fails to survive you, his share goes to his children, his children are your contingent beneficiaries. In that situation, clients usually do not want their minor grandchildren to receive their assets outright on their 18th birthday. Rather than using a formal Trust for something that may never occur, we typically put an age requirement paragraph which would specify that if any beneficiary of the Will/Trust is under a certain age, his or her share would be held in Trust until he or she attains the specified age.

3. What are reasonable fees for an Executor to be compensated for administering an Estate?

Answer: Normally an Executor is entitled to reimbursement for all reasonable expenses incurred in the discharge of his or her duties. Under state law an Executor can take a commission as specified in N.J.S.A. 3B:18-1 *et seq.* Typically an Executor is entitled to 5% of the first \$200,000; 3½% of the amount between \$200,000 and \$1,000,000; and 2% on any amount over \$1,000,000. This amount could be increased slightly. An Executor is not obligated to take this fee.

4. Please explain the term “Ancillary Fiduciary.”

Answer: Real estate owned outside the State of New Jersey may have to be probated in the state where the property is located. If probate is necessary, then an Executor can appoint another party to handle the probate of the property outside the State of New Jersey. The Ancillary Fiduciary’s job would be to handle the probate of the property outside the State of New Jersey.

5. What does the “nomination of a Successor Trustee” clause mean?

Answer: In all situations where a Trust is created, we include a paragraph which will allow our law firm to designate a Successor Trustee in the event there is no Trustee capable of serving. This is important in the event a Trustee refuses, resigns, or is unable to serve. This paragraph gives you the security of always having a backup in place.

6. Please explain the “Rule Against Perpetuities” clause.

Answer: In the past, a Rule Against Perpetuities applied in New Jersey. This rule provided that a Trust could not go on forever. However, in the Fall of 1999, the Rule Against Perpetuities was abolished. Nevertheless, we often include the paragraph pertaining to the Rule Against Perpetuities in the event that the situs of a Trust later changes to another jurisdiction which still recognizes the Rule Against Perpetuities.

7. Please explain the purpose of the “disability provision” clause.

Answer: This paragraph gives the Trustee discretion as to whether or not to distribute assets outright to a person who is suffering from a mental or physical disability. Often clients have their Wills prepared and are not aware that their beneficiary suffers from a disability. If subsequent to the execution of a Will a disability is determined, this paragraph gives discretion to the Trustee to distribute the money outright to the beneficiary or to retain a portion in a Trust for the benefit of the disabled beneficiary. There are practical and legal reasons to have this provision in your document. A practical reason is that it gives the Trustee the ability to manage funds for an individual who may not be able to manage them. A legal reason for this provision is that a disabled person who receives government benefits such as SSI or Medicaid can be disqualified from receiving his or her government benefits if he were to inherit assets outright.

8. Where shall I keep my Estate Planning documents?

Answer: Place your Will or Trust in a safe deposit box, in our office’s locked, fireproof cabinet, or a similar secure location. If desired, our office will send one copy of your Living Will to your primary care physician. You might also consider giving copies of your Living Will to your Health Care Representative. You might consider giving a copy of your Power of Attorney to your Agent. If you are uncomfortable giving a copy of your Power of Attorney to your Agent, let that person know that he or she is your Agent and give him or her the location of your documents. I would suggest that you keep one copy of your Living Will at home and that you place one copy of your Power of Attorney in a safe deposit box.

9. When should I review my Estate Planning documents?

Answer: Estate Planning documents should be reviewed by your attorney at least every five (5) years. However, it is recommended that you review your financial status on an annual basis. In addition, there are three (3) major occasions upon which an estate plan should be amended:

- A. Change in Personal Circumstances - Such changes include: marriage, divorce, or remarriage; the birth or adoption of a child; the death of a beneficiary; or the death of a personal representative such as an Executor, Health Care Representative or Agent under your Power of Attorney.
- B. Change of Assets - This includes a significant change in your income or assets, including the receipt of an inheritance or substantial gift.
- C. Change in the Laws Which Affect Your Estate Planning - You should have our office review your estate plan whenever an existing law is amended or a new law is adopted.

10. Do beneficiary designations supersede my Will?

Answer: Yes. Under New Jersey law, when you designate a beneficiary on an account the account will pass to the designated beneficiary. This will occur even if the Will specifies that your assets are to pass in some other manner.

11. Do I have to leave something in my Will to my children?

Answer: No. You are not required to leave anything in your Will to your children. In order to avoid a Will contest, you should specify in your Will that you are leaving out a child (or certain children) and the reasons for doing so. If you don't want to put the reason in the Will, you should at least have a memorandum in the attorney's file indicating that information.

12. Who should get copies of my estate planning documents?

Answer: Whether copies of your estate planning documents should be distributed is a personal decision. However, it is important to let your personal representatives know of their appointment, their responsibilities and where your documents are kept.

13. Will my estate planning documents be valid if I relocate?

Answer: If you relocate to another state, your documents should be valid in that state, since most states follow the Uniform Wills Act. However, if you relocate to another state, you should contact an experienced estate planning attorney in that state to determine if your documents need to be changed. This office will make a recommendation, if you so desire.

If you relocate within the same state, a mere change of address does not require a change in your estate planning documents. If your personal representatives, including your Executor, Trustee, Health Care Representative, and Agent under your Power of Attorney change their addresses, it is not necessary for you to change your documents.

14. What are the duties of a personal representative of a Will and whom should I select?

Answer: If your estate is modest in size, you should probably select a family member. If your estate is substantial in size, you might want to consider a professional, such as a lawyer, bank or trust company.

The Executor's job in New Jersey is to leave the Will for probate with the Surrogate's office, gather the assets, pay the bills, file any necessary tax returns and distribute the assets in accordance with the Will.

If there is a trust, you need a Trustee. The Trustee needs to manage the money for the term of the trust which is often the remaining life of the surviving spouse or until younger children reach an age of responsibility. Individuals usually do not manage money as well as financial institutions. Therefore, you might want to think of having a family member and a financial institution act as Co-Trustees if the size of the trust is substantial.

15. Can a beneficiary of a Will also be a witness to the Will?

Answer: It is not expressly prohibited, but it is not recommended. When a beneficiary is also a witness, if the Will is contested, anything the beneficiary might have received through the Will could possibly be invalidated to the extent it is more than the witness would have received if there was no Will at all.

16. Can a beneficiary of a Will also be a personal representative of the Will?

Answer: Yes, in New Jersey. However, if you move to another state, you should check the laws of that state.

17. How can I change my Will?

Answer: By Codicil or by executing a new Will.

18. Are Wills required to be registered?

Answer: No. Wills are not registered until they are presented for Probate.

19. How do I alter or revoke my Will?

Answer: A Will can be revoked by being destroyed (torn, shredded). However, if the Will is not replaced, your estate may be subject to the Laws of Intestacy. A Will can be changed by a Codicil (and a Trust can be changed by an Amendment). However, it should not be changed by handwritten or typewritten marks on the Will itself. Frequently, such changes will make the Will or Trust inadmissible.

If you wish to change or revoke your Will or Trust, please contact our office so that the change can be implemented properly.

20. When is someone unable to make a Will due to lack of mental capacity?

Answer: To have capacity to make a Will, a person needs to know the nature and extent of their holdings, the natural objects of their bounty, and be able to form a rational plan of disposition. (Who do they want to leave the money to?) (Who are their family members?) (What do they own?)

21. Is a Will executed in another state valid in this state?

Answer: Generally, a Will which is valid in the state where it is signed is valid in New Jersey.

22. What are the requirements to execute a valid Will?

Answer: To have a valid Will, the Testator (Testatrix) must be over 18 years of age and mentally competent. The Will needs to be in writing and must be signed in front of two (2) witnesses. It is a good idea to have an acknowledgment signed by a Notary Public so that the Will is self proving in almost any state.

23. Are handwritten or oral Wills valid?

Answer: Oral Wills are not valid, but handwritten Wills are valid. However, handwritten Wills cause a tremendous amount of probate litigation. The cost of having a Will professionally prepared is very small compared to the cost of the probate litigation which often results from a handwritten Will.

24. Can I make a Will in this state if I own property in another state?

Answer: You should make your Will in the state in which you have your principal residence. If you own real estate in another state, you should consider a Living Trust so that you can avoid probate in the other state.

25. I have heard that a Living (inter vivos) Trust is a good way to avoid the costs of probate and inheritance taxes. Is it a good idea?

Answer: New Jersey probate costs are minimal (\$135 to \$175). A Living Trust does not save inheritance taxes. A Living Trust is a good idea if:

- (a) You own real estate outside New Jersey.
- (b) You want to save Executor's commissions.
- (c) You want to keep something private.
- (d) You may move to another state where probate is more complex.
- (e) You may acquire real estate in another state such as a vacation home or retirement home.

26. What are the differences between tenants in common and joint tenants with right of survivorship?

Answer: Tenants in Common: This type of ownership means that the interest owned by each tenant is subject to probate. Their share will pass through their Will when they die.

Survivorship: Each of you own the whole and each you have equal rights to the property. Upon the death of one, the surviving joint tenant automatically gets the interest of the deceased joint tenant.

27. When do I have to file a gift tax return?

Answer: An individual can give any other individual \$13,000 per year without filing a federal gift tax return. Gifts in excess of this amount require filing of a federal gift tax return. However, the excess over the \$13,000 annual exclusion gift is subtracted from the Credit Shelter Amount available to persons for transfers made during the lifetime or upon death. Therefore, even though a return must be filed, there may be no gift tax due. An actual gift tax will not apply until you have given an amount in excess of \$5,000,000 over and above the \$13,000 exemption during your lifetime.

Example: If you made a \$50,000 gift to one of your children, you would file a gift tax return showing that you had made a \$50,000 gift and that \$13,000 was to be considered your annual gift and the other \$37,000 was to be subtracted from your \$5,000,000 exemption equivalent. If you made no more such gifts during your lifetime, you would only have a \$4,963,000 exemption from federal estate tax when you died, rather than the usual \$5,000,000.

28. I want my child to take care of my affairs when I am no longer able to do so. How can I make sure she will be permitted to act for me?

Answer: A Durable Power of Attorney (POA) is the best way to do this. Just creating joint accounts is not always a good choice because of possible tax liabilities and for Medicaid planning. There are many things an agent may need to do other than deal with bank accounts.

29. What is a Durable Power of Attorney?

Answer: It is a legal document whereby you give another person (called an Agent) the legal authority to manage your affairs. A Durable Power of Attorney means that the POA remains in effect if you become disabled.

30. How do I revoke a Power of Attorney?

Answer: You can revoke a POA by giving written notice to your Agent. It is also a good idea to give notice to any banks, brokerages or other places where the Agent conducted normal business on your behalf. If a POA is durable and you become incompetent, only the court can revoke the POA and then only for good cause.

31. Can my Agent under my POA be forced to act, even if he or she does not want to do so?

Answer: No. Make sure to appoint alternate Agents. The alternate agent also serves if the primary agent is unable to do so.

32. If I have given someone a Durable Power of Attorney, will it be necessary to have a guardianship proceeding if I become incapacitated?

Answer: Usually the power of attorney makes a guardianship unnecessary.

33. Can a bank or other institution refuse to honor a valid POA?

Answer: In New Jersey we have a statute whereby a bank cannot force you to use their POA; they must honor the one you have if it specifically refers to the statute and includes certain language.

34. If I give a POA to another, do I give up the right to manage my own affairs?

Answer: No. You retain full control over your affairs. You can allow your Agent to act if you so choose. And you can revoke those rights at any time. You can also have a springing power of attorney that does not become effective until a physician certifies that you are incapacitated.

35. Is a Living Will valid?

Answer: Yes, if it conforms to the New Jersey statute with respect to content and execution. This means that it can only be exercised to order the withdrawal of life support in certain circumstances, such as when a person is brain dead or has a terminal illness. It should include a list of treatments and procedures that you do and do not want. It needs to be signed before two witnesses and/or a Notary Public.

Some doctors are still reluctant to recognize Living Wills. The more specific your Living Will is, the more likely it will be honored.

36. Is a Power of Attorney for health care valid?

Answer: Yes, they are valid if they are signed in front of either two witnesses and/or a Notary Public.