Estate Planning Questions & Answers

Here are some common estate planning questions we receive, with some general answers. As you might expect, qualified answers are in order here. As one person has put it: "For every complex question there is a simple answer . . .which usually is wrong."

Question No. 1. Do I need a will?

Answer: Nobody "needs" a will because the State of Minnesota has default rules in place that govern where your probate estate will go if you don't have a will (these are known as intestacy statutes). However, in many cases, a good estate plan (which might even use a trust rather than a will) can be very helpful and can even save a lot of money. Note: Because many assets often are non-probate (e.g. controlled by beneficiary designations), an estate plan usually includes more than a will.

Often lurking in the background of this question are two common misconceptions: (1) that if there is no will, the State will take a person's entire estate and (2) that a will allows someone to avoid probate.

Intestacy statutes. In many situations, the Minnesota intestacy statutes are a close approximation of clients' desires regarding their probate estate. The surviving spouse gets the entire intestate estate if a) there are no surviving children or b) if all of the decedent's surviving descendants are also descendants of the surviving spouse and there are no stepchildren who survive the decedent. In all other situations (e.g. a second marriage situation with kids from a previous marriage), the surviving spouse gets the first $225,000 plus one-half of any balance of the intestate estate. If there is no surviving spouse, then the estate passes to the decedent's descendants, and if no descendants, then "upstairs" to parents, and if no parents, then to siblings, and so on. There also are special allowances for the surviving spouse (homestead, family allowance of up to $2,300/month for 18 months, $15,000 of property, and auto), and children (figures effective 8-1-2016).

In an Ozzie and Harriet situation (single marriage, all children from the same marriage, no challenging family problems) the intestacy scheme generally works just fine, assuming non-probate transfers are coordinated. However, for the many people who do not fit that model, a will can be part of a proper estate plan.

Some situations where an estate plan (including a will) would be most helpful:

- Unmarried couples. The intestacy statutes provide nothing for the survivor of an unmarried couple.

- Single persons. This is especially true for single parents who wish to nominate someone other than their ex-spouse as guardian, and/or wish to make sure that their ex-spouse does not end up handling the money they give to their children, or receive the estate by accident.

- Parents of young children: Many parents want to make sure that someone they know will handle money for their children, perhaps setting funds aside for college or other purposes. A trust for children created by a will can do this. Without that kind of arrangement, money will be available to the child at age 18, whether or not the child is ready to handle the money wisely.

- Second marriage situations (to ensure if possible that the client's children receive a share of the estate). Note: in situations where the spouse is receiving less than his or her intestate share and/or elective share, the spouse should sign a consent to the will.

- Taxable estate: Any situation where there is a possibility of a taxable estate. For 2016 there is a federal estate tax for estates over $5,450,000. Minnesota's estate tax imposes a tax on estates of over $1,600,000 per person (for 2016, rising to a $2 million exemption by 2018). Both Minnesota and the federal estate taxes grant an unlimited exemption for transfers to spouses).

Here are some situations where a trust might be better than a will.

- Family trouble. Where there is a contentious family situation, a trust can often prevent disputes from turning into an expensive court fight. A probate proceeding, in contrast, provides troublemakers an excellent (and inexpensive) forum to stir up trouble.

- Shorter life expectancy. Where the client's life expectancy is shorter, a simple revocable trust will avoid probate if properly implemented.

- Privacy. Trust administration, unlike the probate process, can be private, so a trust is useful if a client wants to keep the disposition of his or her assets out of the public record.

- Scattered assets. A trust can help avoid multiple probates where the clients' assets are scattered over several states.

Question No. 2. I did my will 15 years ago. Is it still good?

Answer: A will should be updated if one or more of the following events have occurred since the person last executed a will.

- Marriage: While Minnesota law provides some protections to surviving spouses, Minnesota's default plan for omitted spouses might not be consistent with the person's wishes. *Morever, there is more to review than just the will*. Fifteen years ago the person might have named a brother or parents as the beneficiaries of an insurance policy, and those beneficiary designations should be updated. It simply is not a good idea to rely on the statutes to do your planning for you.

- Divorce: Minnesota law does invalidate spousal gifts made in a will executed during marriage if the decedent was divorced from that spouse at the time of death. This would be consistent with the desires of many, but not all. Perhaps more important, beneficiary designations may not have been changed since divorce, with unintended results. For example, in a case that made it to the U.S. Supreme Court, the decedent named his second wife as beneficiary of life insurance and pension plan benefits provided by his employer (and governed by the federal law known as ERISA). The decedent died without a will two months after divorcing her and without having changed the beneficiary designations. Although a Washington state law said that this kind of transfer in favor of a former spouse would be revoked upon divorce, the Supreme Court ruled that ERISA pre-empted that law. The decedent's children were left out in the cold. *Egelhoff v. Egelhoff*, 121 S.Ct. 1322 (U.S. 2001).

- Birth of Children: Under Minnesota law, omitted children usually will be entitled to a share of the probate estate even if the will does not provide for them. However, if the old will was prepared before the person had children, it probably is time for a new will.

  However, if the will was made before children arrived, then the old will ordinarily would lack key provisions. First, it would not place a minor child's share into a trust. This, of course, would mean that the child would receives an outright distribution of their share when they turn 18. Car dealers might like that; most parents would not. Second, most wills prepared for parents of minor children will include a nomination of guardian; a will made prior to children obviously would not.

- Increase in assets: Over time, a person's assets might increase so that they will have a taxable estate under the federal and state estate tax laws. If that is so, then a review of the old will certainly would be in order. As you would expect, most wills prepared for people who do not have a taxable estate lack the tax planning features present in the estate plans of those with larger estates. While the federal estate tax exemption is increasing, the state tax remains relative low in Minnesota. In any event, Congress is always free to change its mind, so planning for federal and state estate taxes still makes sense.

- Change of heart regarding distribution plan: This one is obvious. If an old will has a distribution plan that you want to change, then obviously a new will is appropriate. Oral wills or statements of intent are not recognized in Minnesota and will not serve to amend an existing valid will. Also, a "simple" codicil (amendment to a will) may invite litigation where a beneficiary's share is cut down or written out altogether.

- A beneficiary has become disabled. If a beneficiary of a will has become disabled or is likely to become disabled, then an updated will is a good idea. A good estate plan can include a Supplemental Needs Trust (SNT), which can provide for a disabled beneficiary's needs without disqualifying the beneficiary from public assistance (see question 11).

When does a will usually not need to be updated? The above list gives examples when people should consider updating their estate plan. But sometimes there is no need to update an estate plan, even if certain circumstances have changed.

- Name Changes. Names of children, family members, and other devisees naturally change due to marriage or divorce. There is no need to revise the will to reflect the new name. Similarly, if a will names a bank as a personal representative and the bank's name changes due to a merger, there is no need to change the will just to put the bank's current name on it.

- Minor children have become adults. Many wills made by the parents of young children provide that if both parents die leaving minor children, the minor child's share is handled in a trust. While it is true that the minor's trust no longer would be needed after the children are grown, as long as the will makes outright gifts to adult children, it still reflects the parent's wishes.

- Change of residence: Minnesota recognizes the validity of a will made in another state as long as the will meets the other state's or Minnesota's procedural requirements. The mere fact that someone has moved from another state to Minnesota doesn't invalidate the "foreign" will. Caveat: if a married couple moves here *from* a community property state, community property (i.e. one-half of all property, item by item "owned" by each spouse), generally retains its character as such and a will may only control and dispose of one-half of such property.

Put another way, a will does not need to be updated merely because it was executed long ago or somewhere else. But the greater the passage of time, the more likely it is that some other kind of change has occurred that makes an updated estate plan a good idea.

Question No. 3. Several of my friends talk about setting up living trusts. Are these really a good idea?

Answer: When referring to trusts, most members of the public are thinking of a revocable trust or "living trust". Even though the federal estate tax exemption is higher than before, trusts remain a good idea for self and beneficiaries for all of the old reasons: inability, disability, creditors and predators. Also, more flexibility is available through the use of continuing trusts and proper management of significant or special family assets, such as the family cabin. Trusts also afford greater privacy, often allow a person's estate to be distributed more quickly, and can make it harder for troublemakers to block the distribution of the estate.

Many people incorrectly assume that trusts are appropriate only for those with large estates; in fact, estate size really does not bear on whether a trust is appropriate. Often we prepare trusts for people with very modest estates, and for not much more in cost than a will. Generally, even though trusts are more expensive to create, they represent an overall cost savings compared to a will-probate arrangement.

CAVEAT: It should be kept in mind, however, that there are some things that revocable trusts will not do.

1) Trusts that are revocable by the grantor will not in themselves reduce or eliminate income taxes. At best, they will be revenue neutral. Certain complex trusts, typically irrevocable, can be disadvantageous from an income tax standpoint.

2) A revocable trust also will not shield assets if the grantor and/or beneficiary of the revocable trust needs long term nursing home care. A revocable trust is considered an "available asset" of the grantor, and does not serve to reduce one's assets for purposes of obtaining eligibility for public assistance.

CAVEAT: For practical reasons, it might not make sense for younger individuals to set up a trust. Unlike most of our older clients, who tend to have a stable roster of assets, younger people tend to buy and sell assets frequently. It is thus more likely that younger clients will not keep their assets properly titled as the decades roll on, thereby defeating one purpose of a trust, namely probate avoidance.

Question No. 4. I have heard that estate taxes are no longer going to be a problem. Does that mean I can undo all that complex planning I did ten years ago?

Answer: Yes and no. In some cases, certain parts of an estate plan keyed to minimizing the Federal estate tax could be unwound (and in some cases, the old provisions *should* be changed to avoid unintended consequences). But the Minnesota estate tax remains. Furthermore, there is no guarantee there will not be some kind of federal or state estate or inheritance tax system in place at death. Even if it is not, or does not apply to the person, all of the old reasons for estate planning still remain as before, e.g.:

- Probate avoidance and privacy through the use of funded revocable trusts.
- Planning for medical assistance issues if that is a concern.
- The making of tax wise gifts.
- Assisting and protecting children and grandchildren during their lifetimes.
- Income tax planning, e.g. carryover basis/step up in basis.
- Charitable planning, now more focused on the income tax side.
- All of the good reasons set forth above for implementing trusts.

As you may be aware, the federal estate tax exemption is $5,450,000 for 2016 and is indexed for inflation. Minnesota's estate tax exemption currently (2016) is at $1,600,000 and will increase $200,000 per year until it reaches $2 million in 2018.

Question No. 5. As I get older, I am concerned about Alzheimers and "losing it". Is there anything I should be doing?

Answer: Yes, you should have a durable general power of attorney and a health care directive in place, and should update any similar documents that may be time worn. In fact, *everyone* should have a health care directive in place *well before it is needed*. An hour or two before major surgery is a really bad time to be signing that kind of document, although far better than not signing one at all.

<u>Health Care Directives</u>. People have heard of "living wills", which give directions to be followed in terminal conditions. Fewer have heard of the term "health care directive". In 1998, the legislature essentially combined the old health care power of attorney and living will into one document. A health care directive lets you give detailed instructions and to designate an agent to make health care decisions in case of incapacity, and/or operate as a living will. The health care directive statute also allows you to say if you want to be an organ donor, and to lay out your burial/cremation wishes.

<u>Statutory Short Form Power of Attorney</u>. The great advantage to the statutory form is that it is cheap, widely used, familiar to financial institutions, and imposes liability upon parties that refuse the authority of an attorney-in-fact to act on the principal's behalf.

A statutory short form power of attorney and health care directive should be part of every estate plan. They can provide directions during difficult times and avoid the intrusiveness and the cost of guardianship or conservatorship proceedings..

Question No. 6. My mother is going into the nursing home. Is the county going to get the home or will the home have to be sold?

Answer: This depends on how the home is titled, whether she is single, and if married, whether or not her spouse continues to live in the home.

<u>Single persons</u>. Medical assistance is a program for the poor, and single persons literally must impoverish themselves before qualifying for medical assistance. The homestead remains an exempt asset for six months after entry of the nursing home, and the person can file a homestead exemption notice, but if the person is unable to return to the homestead after six months, the homestead becomes an "available asset", and must be put on the market. The sale proceeds will disqualify the single person for medical assistance, requiring a reduction of the proceeds until he or she is impoverished again.

<u>Married persons</u>. The rules are different for married couples. If either spouse becomes ill, the healthy spouse ("community spouse" in DHS jargon) can retain up to $119,220 as of July 1, 2016, with a minimum of $33,851, plus exempt assets such as the home, household effects, car, and in some cases, retirement accounts. This asset allowance changes each January. The community spouse also keeps all of his or her own income (and if the community spouse's income is less than $2,005/month, part of the institutionalized spouse's income can be allocated to the community spouse to bring the community spouse's income up to $2,005/month).

The bottom line is that the "community spouse" can retain the house, as long as he or she stays in the house at the time of the medical assistance application. However, the county can stake a claim to the house after the community spouse dies, and that claim will be valid unless some advance planning is undertaken or unless certain exceptions apply.

Titling of home. As the next question points out, the titling of the home is important. Generally, if other family members such as children are joint tenants or remainder persons, DHS will consider the home to be an "unavailable asset", and its value will not be considered when the application for medical assistance is made. The timing and extent of the transfer, however, might affect eligibility, see next question.

Question No. 7. My mom "just" wants to put the home into my name. How do you do that?

Answer: It is easy – have her sign and deliver a deed. However, that might not be the best route to take.

People who want to make certain that their loved ones or charities benefit from their assets may legally arrange their affairs so as to transfer a portion of their assets and still qualify for medical assistance. The only effective way to do this, however, is to make absolute gifts, thereby parting with absolute ownership and control of an asset.

For gifts made on or after February 8, 2006, the basic rule for gifts is that assets given away more than 60 months before you require medical assistance are not counted in the calculation to determine whether or not you qualify for medical assistance. The actual calculation is: dollar value of gift divided by the monthly reimbursement rate (as of 7-1-16 the figure is $6,280, it changes each July), equals the number of months of disqualification from the date of the gift. Thus, a gift of $62,800 would render an individual ineligible for medical assistance for a period of 10 months (plus an extra month tacked on under the eligibility rules). Due to the federal law that became effective on February 8, 2006, the "ineligibility period" can begin at the time a person *applies* for medical assistance. For transfers made on or after February 8, 2006, in many cases there might have to be a 5 year "gift free" period before a person can be eligible for long term nursing home care under the medical assistance program. Even so, we believe some planning strategies still remain available.

The most significant asset for many is their homestead, and most wish to pass it (or the value it represents) on to their children.

What are some of the techniques for achieving this?

- Transfer property outright. A deed conveying the property in fee simple to a child or children (or some other third party) obviously moves the asset downstream, and if enough time passes, it will not be a disqualifying transfer for medical assistance purposes.

However, there are disadvantages to this approach; perhaps most important is the low basis or tax cost that the children might have in the property. If the parent gives away a house bought for $6,000 in 1955, that is the basis (cost) the children will have *if the gift is made during the parent's life*. The subsequent sale by the children at, for example, $100,000, will result in a taxable gain to the children of $94,000. Also, the parent no longer would have legal control of the property. In rare cases, children have sold the property against the wishes of the parent.

- Remainder interest with retention of life estate. This technique remedies some of the difficulties with an outright fee simple transfer. The parent or parents retain the right to the homestead during life, and if the property is sold after death, the remainder persons' basis is the fair market value of the whole property when of the life tenant dies. In addition, a gift of a remainder interest is a smaller gift than a gift of property in fee simple, thereby leading to a shorter disqualification period. Note: a sale during the life tenant's life results in a capital gain to the children for their portion of the proceeds which exceeds their portion of the (often low) basis in their remainder interest. Important Caveat! The Legislature in 2003 passed legislation that allows the state to impose a lien on remainder interests after the life tenant's death. This only affects transfers made after July 31, 2003.

An outright transfer in fee simple, or the transfer of a remainder interest, can work well with smaller, stable families that get along with each other. Problems, however, arise when there are many children, creditor problems, etc. For example, if the parents' intent is to give the property to all six of their children, and the decision later is made to sell the property, up to 14 people will have to sign off: the two life tenants, the six children, and their spouses. This is cumbersome, to say the least, and in some cases one or two malcontents can hold up the disposition of property. Also, sometimes the "wrong person dies first". In that case, a deceased child's spouse or creditors might end up owning their interest in the property. And if the deceased child dies intestate and leaves no surviving spouse or children, their remainder interest goes back "upstairs" to the parents.

Caution: often parents will suggest that the remainder interest or fee simple title be transferred to just one of their children. The child then is supposed to distribute the proceeds of the homestead after death. This "solution" can be fraught with problems:

- If the child dies before parents, and the child's remainder interest passes to the child's spouse, the spouse may have no interest in sharing the proceeds of the house with anyone else.

- if the child believes or decides that the parents intended her to receive all of the proceeds (given his or her greater contribution to her parents' care), the child might not share the proceeds with anyone else.

- If the child has creditor problems or marital problems, the ownership interest could end up going to someone other than the intended recipients.

The mechanics of transferring the homestead are straightforward, but each strategy involves a series of often complex tradeoffs. Often, when educated about these facts, clients decide to hold onto their homestead property after all and deal with the transfer of it later.

Question No. 8. The county says they can place a lien on my mother's house because they are paying for the nursing home. Can they do this?

Answer: Yes, in many cases. Those receiving medical assistance for long term nursing home care may find a lien placed on their assets or may have a claim made against their estate (or their spouse's estate).

In some situations, however, the state/county may not assert a claim or lien; what follows is a partial list (subject to change of course). No claim or lien will be filed if the medical assistance recipient was single and survived by a minor child or a disabled child. No claim or lien will be filed if a sibling lived in the house with the medical assistant recipient at least one year before being institutionalized and continuously since; or if a child or grandchild lived in the homestead two years immediately before the medical assistant recipient's institutional stay, helped the parent or grandparent stay in the home, and has remained in the home since; or if a claim would create undue hardship. And no lien will be filed while a surviving spouse lives in the homestead.

Question No. 9. I have been named as the "power of attorney" for my mother who recently died. Does this mean that I can be the executor of her estate?

Answer: No. This is a popular misconception and has been the source of a few family fights. The power of an attorney-in-fact to act on behalf of the principal disappears upon the principal's death. A power of attorney is not a will and is not a nomination of an executor. It's a useful tool during life, but not after death.

Question No. 10. I think I am supposed to be the executor of my mother's estate because I am the oldest son. What do I need to do?

Answer: Being oldest son does not necessarily mean you are the executor of your mother's estate. The will should nominate a personal representative. If there is no will, the court will appoint one after a petition is filed.

Many people do not realize that if there is a net probate estate of greater than $75,000.00 (effective 8-1-2016), or if real estate is involved, someone will need to petition the court for appointment as personal representative. Being named as executor in a will does not make that person the executor – the person must be appointed as executor by the court, and people cannot just grab the decedent's property and run. The probate code sets priority for appointment of an executor (now called the "personal representative"). If family members are fighting about who should serve as the personal representative, the court probably will appoint a third party such as a bank with a trust department.

CAVEAT: A probate might not be necessary if the probate estate is small enough. Small Minnesota probate estates (under $75,000, effective 8-1-2016) that do not involve real estate can be handled through an affidavit of collection. The affidavit cannot be used any sooner than 30 days after the death of a decedent, and the person who collects the assets (e.g. a bank account) must distribute the assets in a manner consistent with the decedent's will (or the intestacy statute if no will).

Question No. 11. I have heard that there is a way to provide money to disabled people without disqualifying them for public aid. Is this true?

Answer: Yes, these Special Needs Trusts or Supplemental Needs Trusts are allowed under both federal and state law, and can be useful planning tools. If a person is disabled within the meaning of the Social Security Act (e.g. eligible to receive SSI or SSDI), or meets the statutory definition of disability set forth in § 501C.1205, subd. 2(c), a "Supplemental Needs Trust" can be set up which can supplement the disabled beneficiary's living expenses without disqualifying the beneficiary from public assistance.

These trusts fall into two main categories.

<u>Trusts funded by someone other than a disabled person ("third party trusts")</u>. You can set up a trust for the benefit of a disabled beneficiary, e.g. parent for a disabled child. These "third party" trusts, however, are not valid for a disabled person who is over age 64 and a resident of a long term care facility.

<u>Trusts funded by the disabled person's money ("first party trusts")</u>. In this kind of trust, the trust assets are provided by the disabled beneficiary (for example, a person who has been severely injured in an auto accident who had received a damage award or settlement, or a disabled person who has received a hefty Social Security award).

The biggest difference between a first party trust and a third party trust is how the assets ultimately are distributed after the trust terminates. In a trust funded by a third party, the assets left over after the trust's termination may be distributed to anyone pursuant to the terms of the trust, and the state does not have any claim on that money. In a "first party" trust (funded by the disabled person's money), after the trust termination, the state has a right to recover from the assets of the trust the medical assistance payments it has made on behalf of the disabled beneficiary. For this reason, first party trusts sometimes are called "payback trusts". Still, the disabled beneficiary does get the benefit of the money in a payback or first party trust during their lifetime, so even first party trusts remain a good way to provide disabled beneficiaries with the little extras in life (travel, entertainment, conveniences, and the like).

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