

ISSUES NECESSARY TO DISCUSS WITH YOUR LEGAL ADVISOR REGARDING ESTATE PLANNING DOCUMENTS

1. Guardians and Alternate Guardians: Guardianship is a fiduciary relationship created by law for the purposes of one person, the guardian, to manage affairs of another person. Guardians are responsible for the care of your minor children in the event of a premature death. It is important that you name successive Guardians as some individuals may be unable or unwilling to serve. You should also consider whether they will care for your children at the Guardian's home, or if you would like your Guardian (and their family) to move into your home. Depending on the circumstance, you may wish to consider allocating funds, within your testamentary documents, to cover these expenses.

2. Trustees and Successor Trustees: Trustees hold and manage assets held in trust for the benefit of your minor children and/or surviving spouse. The Trustee does not have to be the same person as the Guardian and most times it is not, which allows for checks and balances. The Guardian is normally someone who knows the children best, while the Trustee is someone who is financially savvy. In choosing a trustee, it is important to keep in mind a fiduciary relationship between a trustee and the trust beneficiary. A fiduciary is legally bound to act in the best interest of the beneficiary.

3. Executors: Executors are appointed to carry out the instructions that are outlined in your Will. Typically, spouses are named as executors for each other's Wills, along with at least one successor. You should consider if you would like your executors to be compensated. If so, you could apply a limitation on their annual compensation for fulfilling this role.

4. Credit Shelter Trust (CST): Each spouse can establish a Credit Shelter Trust (a/k/a bypass trust, credit equivalent bypass trust, non-marital trust, family trust, etc.) under their Will in order to fully fund the \$5,450,000 Federal Estate Tax Exemption. Under a typical Will, CST is the primary vehicle for receiving non-marital deduction property. This is the maximum amount (2016) that each spouse can transfer at death (or during their life time) to anyone other than the surviving spouse. This Trust is frequently funded at death with the surviving spouse being named the Co-Trustee. In many instances, a corporate fiduciary may be indicated, either as sole or Co-Trustee, if the estate is sizable and/or conflicts in interest are likely to arise. Furthermore, the trustee (assuming the trustee was an independent party) may be given a power in its sole and absolute discretion to distribute principal to the surviving spouse for any reason acceptable to the trustee. Essentially, after the death of the grantor, the surviving spouse cannot have unlimited access to, or unlimited control of the assets that have been placed in the non-marital trust (CST).

- Given recent changes to Federal Estate Tax Law to allow portability of the \$5,450,000 exemption, the Credit Shelter Trust may be used to take advantage of the State Estate Tax Exemption. Most states have not adopted portability and your State Estate Tax exemption must be used at death or it will be lost.

5. Portability: The new Portability laws allow a married couple to pass any unused exemption to the surviving spouse take advantage of both \$5,450,000 Federal Estate Tax Exemptions without the need to re-title assets and establish complex Wills and Trusts (e.g., QTIP, Credit Shelter Trust, Family Trust or Funding the exemption at the first death. While this could greatly simplify your estate planning, there are some distinct non-tax benefits to using trusts. You should talk to a qualified trust and estates attorney about what makes sense for you and your family.

6. Insurance Trust: Life Insurance Trusts can be used to own a life insurance policy outside of your estate. This can have a great benefit as the death benefit should not be included in your taxable estate and should not be subject to estate tax. Similar to item 4 above, you will want to carefully consider a Trustee and Co-Trustee for this trust who will work closely with the surviving spouse and/or children and provide access to the assets in this trust as appropriate.

7. Healthcare Proxy: In a Health Care Proxy you name an individual(s) to make medical decisions on your behalf in the event you are incapacitated. Typically, spouses name each other and you should select at least one successor Healthcare Proxy.

8. Power of Attorney: In a Power of Attorney you name an individual(s) to make financial decisions on your behalf in the event you are incapacitated. Spouses typically nominate each other and you should select at least one successor Power of Attorney.

9. Living Will: A Living Will, also called an Advance Directive, or a Natural Declaration of Death enables an individual to choose what kind of life-sustaining medical care he or she wants or does not want in a terminal condition under specified circumstances.

10. Distribution of Assets: If both spouses pass away, you must establish the ages your children will receive your assets. The most common dispositive provisions would allow for interest starting at 21 and then principal distributions of 1/3 each at ages 25, 30 and 35. Although an equal distribution at age 25/30/35 is commonly the default language in many Wills, recently we have seen clients include much more restrictive provisions.

We identified several distribution patterns that we have observed in testamentary documents that you can use as a guideline (many of these might not make sense for your particular situation, but we have included them as a way for you to see a wide variety of dispositive provisions). It is, however, important to keep in mind that while common law generally supports the idea of testamentary freedom, this power is not limitless. For example, don't count on a Will provision that actively encourages divorce or a provision that pits testamentary freedom against other rights, such as religious freedom and freedom to marry being upheld in court.

- Giving your child a partial distribution at a certain age (let's say 25% at 30) and the balance would remain in Trust for the child's life. At a certain age (let's say 40) your child could become co-Trustee with the power to hire and fire co-Trustees. This would ensure that the bulk of the assets are protected from creditors and spouses but your child would gain indirect assets to the funds.
- Graduate the percentage withdrawals so that they increase with the age of your child.
- Distribute an amount equal to your child's earnings in any particular year. For example, if they earn \$50,000, they receive \$50,000; if they earn \$300,000, they receive \$300,000; etc.
- Distributions for meeting certain educational objectives (i.e.: mandatory income after receiving bachelor's degree, some principal after obtaining a graduate degree, etc.)
- Distributions for maintaining full-time student status with a GPA of 2.5 or greater on a 4.0 scale.
- Distributions for maintaining a work week of at least 35 to 40 hours in pursuit of a career.
- Distributions for having a part-time job, while attending school part-time.
- Distributions if your child should become disabled such that he/she can no longer remain a productive, contributing member of a society.
- Distributions to match charitable contributions and medical expenses.
- Distributions for the start of a business; purchase of a first home; or first marriage (although many say that these are the times when the funds should remain in Trust in order to protect them from creditors and spouses.)
- Lifetime Trusts with side letters – not-binding, but statement of some wishes, as to situations where the Trustee might consider making distributions.
- Mandatory percentage of each distribution directed to a charity (i.e.: 5%).
- Trustees "holdback" power: refusing to make 'mandatory' distributions if it is not in the best interest of the beneficiary (i.e.: should there be substance abuse, etc.)
- Naming the child as co-Trustee of his/her own Trust at age 18 to ensure that he/she understands how to manage money prior to receiving any inheritance.
- Pay a certain amount (\$25,000) every year your child spends over 100 hours doing charitable work.
- For your daughter, she receives an additional 1% if she stays at home to raise her children.

- Distributions decrease if your child gets a speeding ticket more than 20 mph over limit.
- Distributions decrease if your child gets arrested.

11. Special Bequests. You need to specify if there are any particular items (art, jewelry, heirlooms, etc.) that you want to go to specific people/ children, etc. These provisions can be included in your Will or in a Personal Property Memorandum, a side letter that can change from time to time without changing your Will. To make your memorandum legally binding, you just refer to it in your will. You also may want to include distributions to individuals other than your children or to charitable organizations. You don't have to sign the memorandum in front of witnesses as you would a will.

12. Common Disaster Clause. It is best to include a provision to direct your assets if both spouses and children are to die simultaneously and there is no certainty who died first, an important issue in the determination of the inheritance of property or the distribution of proceeds of a life insurance policy. Frequently assets will be directed to parents, siblings, nieces, nephews, etc.