

FACTORS TO CONSIDER WHEN CREATING AN ESTATE PLAN

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When individuals contemplate the transfer of their accumulated wealth, during both their lifetime and upon death, there are many factors that need to be considered to insure that their ultimate beneficiary(s) receive the benefit of the bounty. Most individuals, when preparing an estate plan, fail to consider and plan for each and every possibility; and their goals and objectives may never be accomplished. The following is a brief analysis of factors that you should consider when beginning the planning process.

Disability (Child or Adult):

The disability of a beneficiary (child or adult) is never an easy issue to address. However, the failure to plan for this possibility could result in the beneficiary losing eligibility for government (Supplemental Security Income [SSI] and Medicaid) and other benefits. The loss of benefits may require the beneficiary to spend down the inheritance possibly to not more than \$2,000 in order to requalify for government benefits.

In order to avoid this result, it is advisable to have the inheritance pass directly into a "Special Needs Trust." The Trust assets will be in the name of the trustee, not the disabled individual, who will have absolute discretion over the use and expenditure of the funds. The trustee may then, without any obligation for the care or needs of the beneficiary, make expenditures for the beneficiary's medical and dental expenses, clothing and equipment, programs of training, education and treatment, transportation and essential dietary care, housing or residential accommodations, expenditure of funds, visual and/or audio equipment for entertainment purposes (radio, television set, etc.), vacations, movies, and trips. If you are planning to establish a trust of this nature, it is important to notify friends and relatives about the plan and to advise them of the specific manner to leave something to the disabled individual.

Terms and Structure of Distributions and Ramifications:

A Last Will & Testament, unless it contains trust provisions, will typically distribute your estate outright to beneficiaries upon your death. Alternatively, the terms of a Trust may specifically provide the timetable for distributions to a beneficiary. A Trust can provide for mandatory or discretionary distributions of income or principal for the health, education, support, and maintenance of a beneficiary; protect assets from beneficiaries' creditors; protect assets in divorce proceedings; prevent assets, such as stock in a closely held corporation, from being encumbered or sold; encourage the beneficiary to act in desired ways (by providing funds only if the beneficiary earns a certain amount of income, gets married, or has children); discourage a beneficiary from acting in undesirable ways (for example, by not providing funds if the beneficiary is addicted to drugs or alcohol); protect the beneficiary from improvidence or designing persons; manage assets for someone who has become disabled due to illness or old age; and save federal transfer taxes.

The distributions may be contingent upon a beneficiary's age

and accomplishments or solely in the trustee's discretion. The Trust terms may also provide the trustee with discretion to make distributions of principal, either directly to the beneficiary or on their behalf, for the following purposes: (i) education (undergraduate and/or graduate school or training); (ii) starting a business; (iii) marriage; and (iv) purchase of a residence. In addition, the Trust may also continue perpetually for a beneficiary's lifetime and then to successive generations. There are almost no limitations that can be placed upon the plan of distribution to the ultimate beneficiary.

Situs of Your Estate:

The selection of the situs for your estate or Trust will have significant income and estate tax consequences. Several states have no income tax (currently Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming), and the establishment of your residency under their laws may allow for the avoidance of income tax on your income and amounts later distributed to a beneficiary.

From a planning perspective, a state with no estate tax will allow for the avoidance of unnecessary estate tax when an inheritance is passed to future generations. In addition, some states do not impose a tax on income retained in a Trust located there unless the beneficiary is a resident while others impose an income tax on income retained in a Trust only if the grantor was domiciled in the state at the time the Trust became irrevocable.

Trusts for Minors:

Most states require that a beneficiary reach the age of majority (18 to 21 years) prior to being able to receive an inheritance outright. When a beneficiary is under the age, his/her inheritance must be placed into an account for his/her benefit. The creation of a trust for this type of scenario, during the planning process, allows you to determine who will manage the account for the benefit of the beneficiary and avoid a court from making the decision on your behalf.

In most scenarios, it may be beneficial to appoint a family member or professional trustee to control the account investments. The trustee could also have joint investment authority with the beneficiary. This may enable the beneficiary to receive professional guidance for the time when account control and responsibility becomes theirs alone.

Drug Testing:

A Trust may require, prior to distributions to a beneficiary, that they pass a mandatory drug test. The test may be predicated upon a suspicion or knowledge that the beneficiary is involved with illegal drugs. The testing may be annually or required prior to any distribution to them. If the drug test is failed, the trustee may require the beneficiary to complete a rehabilitation program in order to receive his/her inheritance.

Titling of Accounts:

It is important to understand that assets not titled in the name of a Trust (your individual name, "Pay on Death" [POD], or "In Trust For" [ITF] accounts) as the owner or with it as the designated beneficiary ("Individual Retirement Account" [IRA] will not be

subject to the terms of the instrument. This may result in the account being immediately transferred to the named beneficiary without any restrictions and defeat the purpose of your estate plan. However, the proper titling of a Trust, as the beneficiary of an account (individual or retirement), can insure that the Trust beneficiaries are the designated beneficiary for purposes of computing minimum required distributions from any retirement account payable to the Trust.

Creditor Protection and Spendthrift Provisions:

The purpose of a provision of this nature is to protect the beneficiary from creditors and himself/herself. The objective is typically accomplished by maintaining the beneficiary's inheritance in a long-term trust, rather than an outright distribution, with income and principal distributions made solely in a trustee's discretion. The spendthrift clause protects the assets by providing that a beneficiary cannot voluntarily or involuntarily (as in bankruptcy) assign his or her interest in the asset. This will protect the inherited assets from any creditor until a distribution is made to the beneficiary. The spendthrift provision may also protect the beneficiary's interest from claims of a spouse, in a divorce proceeding, but not a claim for child support.

Second Marriage (QTIP Trust):

A QTIP Trust provision may be used in a scenario where one or more of the parties have children from his/her prior marriage, and to provide management and control of assets for a surviving spouse after the death of the first spouse. When properly implemented, the trust assets will qualify for the unlimited marital deduction, insure that an independent trustee controls and manages the assets for the surviving spouse, and determine the ultimate beneficiary(s), usually the children of the deceased spouse.

Citizenship of Spouse:

Most U.S. citizen spouses are aware that they may leave an

unlimited amount of money (unlimited marital deduction), without gift or estate tax consequences, to a surviving U.S. citizen spouse. However, when there is a marriage of a U.S. citizen and a non-U.S. citizen, there are specific estate and gift tax matters that must be addressed in the planning process. When one spouse is not an U.S. citizen, the unlimited marital deduction will not apply and the nontaxable inheritance and gifting amount will be capped. If the surviving spouse is a non-U.S. citizen, they may become a U.S. citizen, before the decedent's federal estate tax return is due, in order to take advantage of the unlimited marital deduction. Alternatively, the funds could be inherited by the noncitizen spouse under a "Qualified Domestic Trust" (QDOT) to receive the unlimited estate tax exemption.

Guardianship:

Most individuals are unaware that the commencement of guardianship proceedings terminates the ability of an attorney-in-fact (power of attorney holder) from handling financial matters on your behalf. This may result in a court-appointed guardian (family or nonfamily member) controlling the disposition of your assets. Ownership of your financial assets in a Trust may avoid this. With a Trust, should you become incapable of handling your affairs, your appointed successor can step in and act for you.

Charitable Giving:

When leaving a portion of your estate to charity, it is important to consider all of your available options. Charitable giving may be completed during both your lifetime and upon death. An outright gift, during your lifetime or upon death, can provide a one-time direct benefit to a charitable organization. Alternatively, a charitable trust or foundation can provide years of benefit to one or more charitable organizations. Charitable giving can also provide estate tax benefits by decreasing the size of a future taxable estate and the value of a bequest to your beneficiaries. ⚡