PLUNKETT & COONEY

Michigan's Law Firm

Why every person needs an estate plan

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What is the one thing you should never leave this world without? An estate plan, of course!
If you are like most Americans, you think estate planning can always be done later. However, a comprehensive estate plan is the one thing that can protect your assets, ensure that your wishes are carried out and support those you leave behind.

The following questions are designed to test your knowledge about estate planning and pique your interest in some unusual, but common scenarios:

(1) If you die intestate (without a will), is the state an heir?

(2) "I leave my vacation home to my sister provided she survives me." My sister dies prior to testator (person who makes a will). Does the vacation home pass to the sister's descendants?

(3) "I leave my estate to my wife and if she does not survive me, to her daughters (my stepdaughters)." The testator and wife divorce. The ex-wife survives the testator. Under local law, she is deemed to predecease him. Testator dies never changing his will. Can the stepdaughters claim their share of his estate?

(4) If you die within five days subsequent to a decedent, are you considered to have predeceased the decedent?

(5) If a person stored or plans to store genetic material (procreates posthumously), is the posthumously conceived child an "heir"? If a man dies in 2005 leaving frozen sperm, how long does an executor or trustee have to wait to see if sperm results in a posthumously conceived child?

(6) A holographic will (a will written in one's own handwriting) requires that the material provisions be in the testator's own handwriting. Is a preprinted fill-in-the-blank form in the testator's own handwriting?

Probate

The probate court oversees the process of transferring property in the name of a decedent to the names of designated beneficiaries. The beneficiaries are usually designated by a will, but may also be designated by state statute if the person dies without a will. The probate court is only concerned with probate property and is not concerned with the following three types of property:

1. Property placed in trust prior to death;

2. Property owned jointly with another person, with the right of survivorship. Such property passes automatically (by operation of law) to the survivor at the death of the joint owner;

3. Property passing directly to a named beneficiary by contract. Examples of this include life insurance proceeds or retirement plan proceeds; and

Therefore, if some of a person's assets are held jointly or pass by operation of contract directly to a named beneficiary (i.e., life insurance, 401(k) plan, and IRAs), then probate can be avoided.

Upon a person's death, their will is filed with the county probate court and a personal representative nominated in the will is appointed. The personal representative is given letters of authority, which enable him/her to transfer the ownership of the property held by the deceased that is subject to the probate court's jurisdiction into the personal representative's name. The process is similar if there is no will.
An inventory of that property is prepared and filed with the court and an inventory tax is also paid. After publishing notice for creditors and waiting four months for the creditors to present their claims, the probate estate can then begin the steps necessary for closing.

After making sure that all income, estate and inheritance taxes have been satisfied, the property is distributed to the beneficiaries and the estate is closed. The usual process ranges from nine months to two years, depending upon the complexity of the estate. You can just imagine the fees during this period of time, all of which could have been available for your loved ones if there had been a living trust.

Trust

A trust is a legal arrangement between a trustee, who holds legal title to property, and a beneficiary, who is entitled to the legal enjoyment or use of the property. Upon the death of a trustee, a successor trustee (usually nominated in the trust agreement) takes over and continues to operate the trust.
The trust normally provides for disposition of the assets to various individuals upon certain events, such as the death of a certain individual or the expiration of a number of years following the date of death of a certain individual. Since the legal owner of the property never dies (a successor trustee merely takes over), the probate court is not involved.

A very common arrangement is to establish a revocable living trust, under which an individual establishes a trust for his/her own benefit (as the "grantor") by having himself/herself serve as manager over the assets (as the initial "trustee").

There are several benefits from a revocable living trust arrangement. First, property placed in the trust during the grantor's lifetime avoids probate upon the grantor's death. Second, the trust contains specific provisions, which allow for the successor trustee to take over in the event of the incapacity of the original grantor. This avoids the expensive process of obtaining probate court orders to determine if someone is legally incapacitated.

The trust also provides for professional management of assets by contracting with an investment advisor or a successor trustee, which avoids the need for a formal petition in the probate court to appoint a conservator of assets in the event of legal incapacity. The trust serves as the focal point in unifying the entire estate plan as all assets are distributed through the trust and may be amended or terminated and assets may be added or withdrawn at any time prior to the grantor's death. This makes a trust a tremendously flexible estate planning tool.

When the grantor dies, the trust becomes irrevocable. As long as the trust is trusteed by the grantor, the trust is ignored for income tax purposes as all assets are registered under the grantor's social security number. When a successor trustee takes over, a new identification number is needed and separate trust income tax returns begin to be filed.

Further, the trust is the only method to delay inheritances to family members beyond the closing of the probate estate and provide for creditor and spousal protection. This is extremely valuable if you do not wish your children to inherit property at age 18, or wish other members to delay their inheritances until ages 25, 30, etc., and if a divorce occurs or a creditor appears, it will still allow your family member to benefit from your estate and not the former spouse or creditor. Finally, the trust is usually the preferred way to save federal estate taxes if the total marital estate is in excess of $1.5 million (this amount will increase to $2 million as of Jan. 1, 2006 and increase thereafter; however, in 2011, it will revert back to $1 million - see table in next column).

And now this final thought: There was a fellow who thought he could draft his own estate plan. So he did. He gave one executed copy of his will to his wife, and one to his daughters.

The one to his wife read as follows:

> "I give the farm, implements and supplies to my wife and the rest of my estate to my daughters."
>
> The one to his daughters read as follows:
>
> "I give the farm implements and supplies to my wife and the rest of my estate to my daughters."
>
> The farm was worth $5 million.

Current 2005 Applicable Exclusion Amount

New Law - Old Law - Applicable Exclusion Amount	Effective for Decedents Dying After 12/31/01:		Top Marginal Rate	Gift Tax		Top Marginal Rate
2005 $ 950,000	2005	$1,500,000	47%	2005	$1,000,000	47%
2006 $1,000,000	2006	$2,000,000	46%	2006	$1,000,000	46%
	2007	$2,000,000	45%	2007	$1,000,000	45%
	2008	$2,000,000	45%	2008	$1,000,000	45%
	2009	$3,500,000	45%	2009	$1,000,000	44%
	2010	0	0	2010	$1,000,000	35%
	2011	$1,000,000*	55%	2011	$1,000,000	55%

(*Following Dec. 31, 2010, the 2001 Tax Act is scheduled to sunset with all rates reverting to what they were under the law in existence just prior to its enactment. Since the applicable exemption amounts under prior law were scheduled to increase to 1 million in 2006, that is the amount they will be in 2011 following the sunset of the 2001 Tax Act.)