Wills, Trusts and Estates: Frequently Asked Questions*

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Your retirement years can be some of the most fun and fulfilling of your entire life. Most people look forward to retirement with increasing anticipation as the years of hard work wind down. In today's society, people are retiring young and healthy enough to enjoy the fruits of their labor for years and years.

While thoughts of national or international travel, golf, scuba diving, gardening and many other activities may fill your mind just prior to retiring, this is often the time many begin to seriously consider estate planning. But remember, it's never too early to start planning for your retirement years! As an attorney, I am often questioned about issues concerning estate planning. Over the years, I've kept track of the most frequently asked questions. Below are the questions and their answers. Although these questions are certainly very pertinent to estate planning and those entering the retirement years, the answers also contain good information for people in all phases of life.

Do I need a Will? Having a Will, which is properly drafted in accordance with Virginia's laws, offers several assurances. They include: 1) making sure your property goes to the person(s) you select; 2) allowing you to select the person(s) who will oversee your assets for your children until they reach a given age (your Trustee); 3) allowing you to select the person(s) or institution that will handle your estate (your Executor); and 4) allowing you to select the person(s) that you want to serve as guardians for your children.

What happens if I don't have a Will? If you do not have a Will when you die, the State of Virginia in effect writes a Will for you. The state treats you as having died "intestate" and designates the person(s) who will receive your property . Under current Virginia law, when someone dies without a Will, his or her property is distributed as follows:

1) To the surviving spouse. However, if the deceased is survived by children that are not the children of the surviving spouse, the deceased's children receive two-thirds of the property and the surviving spouse receives one-third. 2) If there is no surviving spouse, the deceased's children and descendants of the deceased children receive the property. 3) If there is no surviving spouse and no children or descendants of those children, the property goes to the mother and father of the deceased. 4) If there is no surviving spouse, no children, no descendants of those children, and no mother or father, the property goes to the surviving brothers and sisters and the descendants of deceased brothers and sisters.

5) If there is no surviving spouse, no children, no descendants of those children, mother, father, brother, sister, or descendants of deceased brothers and sisters, then one-half of the estate goes to the nearest living relative of the deceased's father and one half of the estate goes to the nearest living relative of the deceased's mother.

If I own everything jointly with my spouse, do I still need a Will? Yes, Joint ownership only assures that the property goes to the surviving spouse upon the death of the first spouse. When the second spouse dies or if both should die simultaneously, there is no protection for the surviving heirs. Also, you need a Will to name an Executor, set up any trusts and name Trustees and Guardians if needed.

How do I change my Will? If you want to change your Will, you should have it changed (or amended) using a "Codicil" (the legal term for an amendment to a Will) or by having a new Will prepared. You should not make changes yourself. Trying to make changes yourself, without following the proper legal form, can render the changes ineffective, cause the Will to not be accepted by the court, and result in you being treated as not having a Will.

What is the best way to leave specific items of personal property to specific individuals? If the list is small, and unlikely to change, then specific items (called bequests) can be written in your Will. Virginia law also allows for a Will to refer to a written statement or list of your personal property and who you want to receive it. This written statement or list must describe the property and the individual with reasonable certainty and must be signed by the person making the Will. It may be prepared before, or after, the execution of the Will and may be later changed by you. It should be kept with your Will or somewhere where your Executor will know where to find it.

What does an Executor do and whom should I choose? The Executor is the person that settles your estate. This person's job is to determine the estate's total assets and liabilities, how much will be needed to pay off all debts, taxes and ordinary expenses, and then distribute the remainder to the beneficiaries named in your Will. Typically a married couple will name each other as the primary executor. An alternate should also be chosen. The alternate could be a family member, a close friend , a law firm or a bank. You need to choose a person or entity that will oversee and protect the property and will be professional, reliable and fair.

What does a guardian do and whom should I choose? The guardian is the person(s) you choose to raise your minor children. This is obviously one of the most important decisions you will make. If you do not name a guardian, several problems can arise, such as: 1) no one coming forward as a guardian; 2) too many people fighting over who would be the best guardian; or 3) a person with good intentions coming forward that is not the best person for the responsibility. When selecting the person to serve as guardian, great thought should be given to the person's values, temperament, character and religious beliefs.

What does a Trustee do and whom should I choose? The Trustee is the person that manages the money for your young or incapacitated beneficiaries. He or she has the job of saying yes or no to requests for money by the beneficiaries. You should select a Trustee that will closely oversee and protect the Trust assets and deal with beneficiaries in a fair and consistent manner. While a background in money management would obviously be helpful, it is important that you pick someone who will give personal attention to the beneficiaries' needs and requests. If, like most people, the Trustee is not a professional money manager, he or she needs to have the sense to get professional help with investing the assets.

What is a Living Revocable Trust? A Living Revocable Trust can be used in estate planning to minimize or eliminate estate taxes and/or avoid probate. With regard to the probate issue, a properly drafted revocable living trust along with the proper titling of assets can allow you to pass your property to the person(s) you select while avoiding the expense and hassle of probate. This is another area where a good estate planning attorney can make the transfer of property from one generation to another a smooth one.

When do I need to start worrying about estate taxes? The first thing you need to do is determine your net worth. Net worth includes life insurance proceeds and retirement assets along with savings accounts, investments and real and personal property. If your total net worth, at death, is more than the Federal estate tax exclusion amount (i.e., $5,000,000.00 in 2011, indexed for inflation, ($5,450,000.00 in 2016)), then you have a potential estate tax problem.

What about gift taxes? The gift tax exclusion, mirrors the estate tax exclusion (i.e., $5,450,000.00 as of 2016, indexed for inflation). You may give up to $14,000.00 a year per person to any number of persons without incurring a gift tax liability. Any amount in excess of this annual exclusion amount is deducted from your gift tax exclusion amount (and your estate tax exemption upon your death). Gift tax would be due on amounts given in excess of the gift tax exclusion.

Where should I keep my Will? A safe deposit box is the safest place to keep your Will. There is a statute in Virginia that allows your next of kin and/or Executor to enter your safe deposit box to locate your Will. In any case, your Executor and/or beneficiaries should know where your Will is located and your Executor should have access to your safe deposit box.

What is a Power of Attorney and do I need one? A Power of Attorney is a document that authorizes someone else to act on your behalf regarding business affairs. It can be limited to specific subjects or be general in nature. A general power of attorney allows the person you appoint to do all the things you would do for yourself concerning bank accounts, contracts and property, among other things. A power of attorney is an extremely powerful document and should not be given to anyone without a great deal of thought. You can also elect to make the Power of Attorney contingent upon a doctor determination that you are not competent to make your own decisions. This is more protective, but creates the additional proof hurdle before it can be used.

What is an Advance Medical Directive and do I need one? This is a document, which states that if you are ever in a medical situation where there is no hope for recovery, you do not want to be kept alive by artificial means. Typically the document names a person as your medical Power of Attorney for making this decision. This will allow the person you appoint to make health care decisions on your behalf concerning end of life decisions including withholding or withdrawing medical treatment if you are incapable of making decisions yourself.

What is a Medical Power of Attorney and do I need one? A Medical Power of Attorney is a document that authorizes someone else to act on your behalf regarding medical and health related decisions. This is an extremely useful document to have in the event you are incapacitated or otherwise incapable of making your own decisions.

In Summary: Although this is not an exhaustive list of the questions I have received, it does cover some of the most frequently asked points. It can seem quite confusing and even overwhelming when you begin considering all of these issues. But with some investigating, soul searching and the counsel of a good estate planning attorney, you can develop an estate plan that will offer protection and give you peace of mind.

About the Author: Mike Hall is a partner and leader of CowanGates Estate Planning, Business & Corporate Law Team. He practices primarily in the areas of estate planning and administration, general business law, corporations, limited liability companies, partnerships, tax planning and commercial and residential real estate law. Mike provides comprehensive estate planning and tax advice to individuals and businesses. He also handles complex real estate matters including contract negotiation and construction and permanent financing. After receiving a B.S. in accounting from Virginia Tech, he attended the T.C. Williams School of Law of the University of Richmond, where he received his Juris Doctor degree in 1982.

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