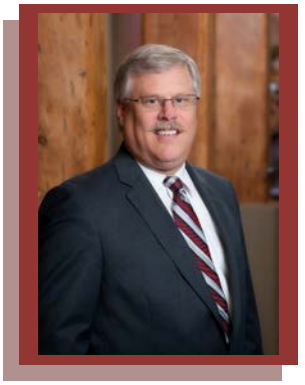

FREQUENTLY ASKED QUESTIONS FOR ESTATE PLANNING

What is Estate Planning?

Estate Planning is the organization of a person's estate by use of various mechanism, including wills, tax avoidance measures, insurance, property laws, trusts and other devices to gain maximum benefit of applicable laws while carrying out ones own wishes for the disposition of one's property upon death. Estate Planning often involves planning for incapacity during life as well.

What is my Estate?

A person's Estate is comprised of all of the property in which a person has an interest, including such things as real estate; cars, personal property and belongings; bank accounts; stocks, bonds and mutual funds; IRA's, 401(k)'s and similar qualified plans; life insurance; business interests (such as interests in corporations, partnerships and LLC's); and any other interest of any kind in property of any kind. A person's Estate may include interests in easements, licenses, patents, copyrights, contracts, and other intangible interests.

Do I need a Will?

One financial planner has been quoted as saying, "if you have children or assets, you should have a Will." With a Will, you can appoint a Guardian who you know and trust for your children and an Executor of your choosing to handle your Estate. Without a Will, you have no choice in the matter. Without a Will, a Guardianship Estate will have to be established for any assets that are to be distributed to a minor child.

What happens if I die without a Will?

Some person will need to step forward on their own initiative and take responsibility for your Estate (known as an Administrator). You will have no choice in who handles your Estate. A Probate Estate can be opened by any person who is an adult and legally competent. The person who steps forward to open your Probate Estate will handle the administration of your Estate unless challenged and removed. The assets your Estate will be distributed to your Heirs according to the Law of Descent and Distribution (also known as Intestate Succession). Neither you nor your Administrator has any choice in who will get your assets. If minor children are the lawful Heirs of your Estate, someone will need to open a Guardianship Estate for them to oversee the assets they will receive from you. You will have no choice in who becomes their Guardian.

How do I leave assets to my children who may be minors when I die?

There are two main vehicles for leaving assets to minors: 1) a Uniform Transfer to Minors Account (UTMA); 2) a Trust. A UTMA account is governed by State statute. A person may be appointed or volunteer as Custodian of the account for the benefit of the minor, and the account must be distributed to the minor at a prescribed age. A Trust is described in more detail below. It involves the appointment of a Trustee to oversee the assets for the benefit of the minor. Trusts allow great flexibility in the ability to leave instructions on how the assets are to be used for the

minors' benefit and when and how the assets are to be distributed. Trusts, therefore, are generally a preferable vehicle for leaving assets to a minor.

What is a Spendthrift Clause?

A Spendthrift Clause is a provision that is made part of a Trust that is intended to protect the assets in the Trust from the creditors, spouses and other third parties of the Beneficiary of the Trust. A Spendthrift Clause typically allows the Beneficiary to access the funds for the Beneficiary's own purposes at the Beneficiary's discretion, but does not allow the funds to be accessed against the Beneficiary's will by third parties.

What is a Spendthrift Trust?

A Spendthrift Trust goes a step further than a Spendthrift Clause and may be designed to protect the Trust assets from the Beneficiary, himself or herself, and giving discretion to the Trustee whether to allow access by the Beneficiary and for what purposes. Spendthrift Trusts are used to protect Beneficiaries from themselves and to preserve assets for the Beneficiary's needs for prescribed purposes rather than his or her whims. (See below for an explanation of what is a trust).

What is an Executor?

An Executor is a person designated in a Will to handle the administration of a Probate Estate. An Executor's responsibility begins upon death and ends when all of the Estate expenses and taxes are paid, all claims are resolved, all instructions in the Will and legal requirements are followed, and the net assets of the Estate are distributed. An Executor is entitled to be paid. The counterpart of an Executor for Probate Estates when the Decedent dies with no Will is an Administrator.

Who should I make Executor of my Will?

This is a very personal decision. You should choose someone that you trust implicitly, and it should be someone who has the time and the ability to handle the administration of your Probate Estate.

What is a Probate Estate?

A Probate Estate is comprised of assets for which no mechanism for distribution upon death is provided. It is a catch-all category of assets. Your Probate Estate does not include assets for which a legal device is provided for distribution upon death, either by your choice or by operation of law. Such non-probate assets include, but may not be limited to, the following: assets held in Joint Tenancy with a right of survivorship; assets for which you have exercised the right to choose a beneficiary (such as Life Insurance, IRA's, 401(k)'s, annuities and other qualified plans); Totten Trusts and other payable on death designations; assets held in Trust; Life Estates and other interests that terminate on death. Your Probate Estate is comprised of all the assets for which no other legal mechanism has been created to direct distribution of such assets.

What is Probate?

Probate is the process of handling the estate of a person after that person has died, including the payment of debts and expenses, resolution of claims, and the liquidation and distribution of assets to the lawful recipients. The Probate process is a court proceeding. It requires notices to Heirs, Legatees and creditors and a six (6) month "claims period" after notice is given. The Probate process allows interested parties to raise issues regarding the Decedent's Estate and to resolve those issues. The ultimate goal of Probate is to provide for an orderly administration of the Decedent's Estate and the ultimate distribution of the Estate (after all expenses and taxes are paid and claims are resolved) to the Decedent's lawful beneficiaries.

What is a Trust?

A Trust is, in its simplest terms, any arrangement whereby title to property is transferred to one person as Trustee for the benefit of another (a Beneficiary). For estate planning purposes, a Trust is created by a Grantor by the execution of a written instrument setting forth the terms of the Trust and identifying the Beneficiaries. A Trust is a legal "entity", separate and distinct from the person who created it, that is created for the benefit of Beneficiaries pursuant to terms that are memorialized in a written Trust document pursuant to the laws of the State in which the Trust document is created. A Trustee takes on a Fiduciary Duty to manage the assets that are placed in the Trust and the income generated by the Trust for the benefit of the Beneficiaries. The essential elements of a Trust include a Trustee, a designated Beneficiary and assets that are delivered to the Trustee. There are many kinds of trusts for many purposes.

Should I have a Trust?

This is a complex issue that boils down to a simple question: what benefit will you gain from having a Trust? You should not have a Trust just to have a Trust or because someone told you that you should have a Trust. You should have a reason for creating a Trust. Some of those reasons may include, but may not be limited to: avoiding Probate; privacy; protecting non-marital assets, especially in a second marriage; avoiding Estate Taxes; to provide for continuity of your Estate management during life and after death; making administration of your Estate simpler for your children after your death; and other reasons. You should understand that creating a Trust will add some measure of complexity to your life so the benefit of creating a Trust should outweigh that burden in your mind.

What is a Living Trust?

Also know as an Inter Vivos Trust, it is a Trust created and operative during the lifetime of the person who created the Trust (the Grantor or Settlor).

How will a Living Trust affect me during my life?

Since a Living Trust is a Trust set up and made operative during your life, you should understand what that means for you. First of all, you must "fund" the Trust. That means you must transfer assets into the Trust. A Trust (the document), by itself, is nothing without something (assets) in it. In order to fund a Trust, you must transfer title of assets to the named Trustee. You should consult an attorney regarding the various mechanisms for transferring different assets into the Trust. Ultimately, a Trust will not accomplish your purposes if you have not transferred any assets into the Trust.

As long as you are the Trustee and the beneficiary of the Trust, your income tax return will not change, and the assets in the Trust will be treated for tax purposes as assets that are held outright in your own name. Assets in the Trust, however, must be held according to Trust protocol. When you are exercising authority over assets in a Trust, you are exercising authority as a Trustee. Thus, any document that you sign on behalf of the Trust must be signed referencing your authority as Trustee. For example, you might sign a document as follows: [*Your name*] as Trustee of the [*Your name*] Declaration of Trust dated [*the date you sign Trust*]. If you have a checking account in a Trust, every check will have to be written with that designation. (You can have the checks printed that way).

A Living Trust can provide for continuity in the management of your affairs during your life. If you become incapacitated or otherwise unable or unwilling to handle your own affairs, the successor Trustee you have named in your Trust may take over the administration of the Trust and manage the Trust and its assets for your benefit during your life. If all or most of your assets are transferred to the Trust, your successor Trustee can effectively manage your financial affairs if you become unable to manage them yourself.

What is a Small Estate Affidavit?

The Illinois Legislature has defined "Small Estates" for purposes of determining whether a Decedent's Estate must be probated. The threshold for a Small Estate is presently set at a threshold of personal property under a value of $100,000. Real estate holdings are excluded for purposes of determining what is a Small Estate. A Small Estate does not need to be administrated through a Probate court; instead a person who wishes to take on the responsibility of administration of a Small Estate can do so by completing a sworn Small Estate Affidavit. The Small Estate Affidavit is an undertaking by a person to accept the Fiduciary Duty of administrating an Estate on behalf of a Decedent and an obligation to any third party who might have an interest in or claim against the Eestate.

What is a Fiduciary Duty?

A Fiduciary Duty is an absolutely integral concept that is essential to understanding many components of Estate Planning. A Fiduciary Duty is a duty imposed by law on someone who is appointed or who undertakes to act for the benefit of someone else. The principal requires the subordination one's own personal interest to that of the other person. Moreover, it is considered the highest standard of duty implied by law. Trustees, Guardians, Custodians from Uniform Transfer to Minors Accounts, Agents pursuant to Powers of Attorney, Executors, etc. are all Fiduciaries as a matter of law. A Fiduciary as a matter of fact is can arise out of circumstances and relationship to another person. A Fiduciary as a matter of fact is held to the same high standards as a Fiduciary as a matter of law, even though a fiduciary as a matter of fact may have never formally accepted that role. A Fiduciary as a matter of fact may arise in circumstances in which one person reposes a great degree of trust and confidence in another person. Since a Fiduciary is held to the highest standard of duty in the law, any benefit a Fiduciary derives by exercising power, control or influence over another person or their property is presumed to be a violation of that duty.

What other kinds of Trusts are there?

There are many different types of Trusts and terms used to identify Trusts. Some Trusts may be accurately identified by reference to more than one term. Below are some of the common types and terms for Trusts.

Charitable Trust –irrevocable Trust the ultimate Beneficiaries of which are tax exempt (Internal Revenue Code 501(c)(3)) organizations (generally organized and operated for charitable, educational, religious or scientific purposes). These Trusts are often used not only for charitable purposes but also to minimize or avoid Estate Taxes.

Crummey Trust - an irrevocable Life Insurance Trust used to remove the payable on death value of life insurance from the Estate of the Grantor during the Grantor's life to reduce the Grantor's Estate for Estate Tax purposes.

Declaration of Trust - a Trust that is declared (created). A Declaration of Trust is commonly used to designate the document that creates a Trust.

Family/By-Pass Trust –also known as a Credit Trust, Credit Shelter Trust or Exemption Equivalent Trust, is an Estate Planning tool whereby a portion of a deceased spouse's Estate passes to a trust for the benefit of children, rather than to their surviving spouse, to allow the Decedent to utilize the full benefit of the deceased spouse's Estate Tax Exemption (by passing assets directly to children and bypassing the surviving spouse). Surviving spouses are often given access to the by-pass trust during life but have no power to appoint the distribution of the assets upon the surviving spouse's death.

Grantor's Trust **–** a Trust in which a person transfers/conveys property in Trust to himself or herself as Trustee for his or her own benefit alone or for his or her benefit and the benefit of other named beneficiaries.

Irrevocable Trust – a trust that cannot be amended/revoked by the person who created it.

Land Trust – a way of holding title to real estate (unique to Illinois) in which a bank is named as Trustee and holds "legal title" to the real estate and the transferor is named as beneficiary. The beneficial interest is considered an interest in personal property under Illinois law.

Marital Trust –a Trust created for the benefit of one's spouse as to which the spouse receives the income and principle of the Trust.

QTIP Trust –a type of Marital Trust in which the surviving spouse receives all of the income for life and may also have access to some of the principal during life but has no power to appoint to direct how the assets are to be distributed upon death. QTIP Trusts are often used to protect assets for children in a second marriage situation.

Revocable Trust – a trust that can be amended or revoked by the person who created it. .

Spendthrift Trust –a Trust created for a beneficiary that is intended to protect the Trust assets from the improvidence or incapacity of the Beneficiary and/or from access to the assets by creditors, spouses or other third parties.

Testamentary Trust – a Trust created in a Will and not operative until the death of the person who created the Will.

Totten Trust - not really a Trust so much as a way of holding title to an asset, usually a bank account, in which the instrument creating the account includes a "payable on death" designation naming beneficiaries to whom the funds in the account shall be paid upon the death of the creator of the account

Will a Trust help me avoid taxes?

A Trust, by itself, does not avoid taxes, but a trust can be used in ways that may avoid or minimize Estate Taxes. A Family/By-Pass (Credit Shelter) Trust can be used to preserve the that portion of the Estate of each spouse from estate taxation up to each spouse's Estate Tax Exemption amount, thus doubling the amount of a married couples' Estate that can be made exempt from Estate Taxes. Irrevocable Trusts (such as a Crummy Trust, Charitable Remainder Trust, etc.) can be used to remove assets from an Estate, thus reducing the value of the Estate subject to Estate Taxes upon death. Irrevocable Trusts are used as ways of controlling how assets are used, while removing those assets from the Grantor's estate for Estate Tax purposes.

What is Estate Tax?

Estate Tax is a tax by the federal government imposed on the right to transfer property upon death. It is a tax levied on a Decedent's Estate (not on the Beneficiaries receiving property from the Decedent's Estate). Estate Tax is sometimes mislabeled an inheritance tax. Estate Taxes are based on the value of the whole Estate (gross Estate) less certain deductions. Some states also impose an inheritance tax.

What is Generation-Skipping Transfer Tax?

Generation Skipping Transfer Tax (GST) is a tax imposed on indirect or direct transfers to Beneficiaries more than one generation below that of the transferor and is designed to limit the amount of property that can be transferred upon death to remote generations, which would otherwise delay taxation of such amounts until the death of remote descendants.

What is a Living Will and should I have one?

A Living Will is a document in which you may state your instruction regarding the withholding or withdrawal of life-sustaining treatment in the event of an incurable or irreversible condition that will cause death within a relatively short time. Its value is when you are no longer able to make those decisions regarding your own medical treatment. Physicians are bound by professional obligations to preserve life by any means possible, even if it means keeping a person alive by artificial means for indefinite periods of time with no real hope for recovery. A Living Will allows you to leave instructions that a physician can follow to withhold or withdraw

artificial and extraordinary means when death is imminent without them, and when there is no hope of recovery or reversal of the condition, and to allow you to die naturally.

What are Powers of Attorney?

A Power of Attorney is a mechanism created by State statute that allows you (the Principal) to designate another person (an Agent) in writing and to give instructions and authority to act on your behalf. A Power of Attorney can be made applicable immediately or upon some future event (like your incapacity or inability to act).

What is a Property Power of Attorney?

A Property Power of Attorney is a document that allows you to designate an Agent to handle your property and/or financial affairs. For Estate Planning purposes, Property Powers of Attorney are used to plan for the possibility of your incapacity at some point in the future and are typically made effective only upon some determination made by an attending physician and/or other person(s) that you have become incapacitated and unable to manage your property and financial affairs. A Property Power of Attorney is an effective and efficient way of providing for the handling of your financial affairs without a third person having to petition a court to establish a Guardianship on your behalf. A Property Power of Attorney can be temporary in duration (if your incapacity is temporary) or last indefinitely. A Property Power of Attorney can be revoked or amended by you at any time.

What is a Health Care Power of Attorney?

The Health Care Power of Attorney allows you to name an Agent with the authority to make health care decisions on your behalf. For Estate Planning purposes Health Care Powers of Attorney are a way of planning for your own incapacity by naming a person who you trust to make health care decisions on your behalf if at any time you are incapacitated and unable to make health care decisions for yourself. A Health Care Power of Attorney allows an Agent to make a broad spectrum of decisions, from routine decisions all the way to potentially life sustaining or life ending decisions. You can tailor the Power of Attorney with your own specific instruction for the Agent to follow. An Agent has the legal right, but is not bound by law to exercise the authority given. Thus, having a Living Will is advisable even if you have a Health Care Power of Attorney.

Kevin G. Drendel
Drendel & Jansons
Law Group
111 Flinn Street
Batavia, IL 60510
(630) 406-5440
(630) 406-6179
kgd@batavialaw.com
www.batavialaw.com