OUR ESTATE PLANNING
ATTORNEY
A Law Corporation

24031 El Toro Rd., Suite 200
Laguna Hills, CA 92653
Ph: (949)863-9511
www.OurEstatePlanningAttorney.com

104 Commonly Asked Questions at Seminars

Includes Medicaid Questions

© AAEPA

TABLE OF CONTENTS

ESTATE AND LEGACY PLANNING QUESTIONS ……………………………………………………PAGE 1

TAXES: ESTATE TAXES, GIFT TAXES, CAPITAL GAINS, GST QUESTIONS …………………..PAGE 10

POWERS OF ATTORNEY & INCAPACITY PLANNING QUESTIONS……………………………. PAGE 12

ADVANCED PLANNING QUESTIONS………………………………………………………….. PAGE 15

MEDICAID PLANNING QUESTIONS ………………………………………………………….. PAGE 17

ESTATE AND LEGACY PLANNING QUESTIONS

1 What is Legacy Wealth Planning?

Legacy Wealth Planning is the creation of a definitive plan for managing your total wealth while you're alive, distributing your estate how you choose after your death, and a clear plan to pass on your legacy. Your estate includes all assets of any value that you own. This includes non-financial assets as well as financial assets, including real property, business interests, investments, insurance proceeds, retirement accounts, and personal property. Your legacy incorporates important decisions ensuring your family core values, responsible behaviors and community involvement are passed on to future generations. Keep in mind, your legacy also includes personal effects, such as family heirlooms, stories, and accumulated wisdom and life lessons of your family.

2 What is "traditional" estate planning?

Traditional estate planning (wills and trusts) focuses on the accumulation, the preservation, and the distribution of only your *financial* assets and worldly possessions. It protects material wealth from probate and minimizes taxes.

3 What is the difference between "traditional" estate planning and Legacy Wealth Planning?

Traditional estate planning is focused on financial assets and is concerned with avoiding probate and estate taxes. On the other hand, Legacy Wealth Planning is concerned with financial and non-financial assets of a family and creating a family's personal legacy plan. Legacy Wealth Planning addresses how to capture and transfer family traditions and values, as well as protecting financial wealth for current and future generations.

4 What is a Family Wealth Trust?

A Family Wealth Trust is the main component of a Legacy Wealth Plan and covers important issues other than avoiding probate.

5 How does a Family Wealth Trust differ from a Revocable Living Trust?

Most Revocable Living Trusts are primarily concerned with avoiding probate and estate taxes. A Family Wealth Trust offers lifetime benefits, and protects wealth for current and future generations.

6 What steps can I take to preserve my legacy?

The best approach is to meet with an attorney who understands the Legacy Wealth Planning process. This will ensure you address the financial and non-financial assets of your family. The right attorney will help you, first, set up a Family Wealth Trust to preserve your financial legacy. Then, you will be educated about completing the *My Legacy* workbook, to share in your own words about

© AAEPA

your life story, family history, memories, and life lessons. Finally, writing a Legacy Planning Letter to distribute your cherished possessions with sentimental value.

7 What will happen to my property if I die without a will or trust?

If you die without a will or trust, the state determines who will be your ultimate heirs. This distribution plan can be found in the intestacy statues of each state. The applicable state can be either the location of your legal residence (personal property), or the state in which your assets are located (real property). In the state of California, for example, the law requires that without a valid will or trust in place, community property goes entirely to the surviving spouse, and separate property goes to the surviving spouse and children (if any), in this order: If the decedent had only one child, the spouse gets half and the child gets half. If the decedent had more than one child, the spouse gets one-third and the children divide two-thirds among them equally. (The children, if any, of predeceased children take their parent's share.) If the decedent leaves no spouse or direct lineal descendants, parents (or their lineal descendants if they are predeceased) would take the estate.

8 How is my property transferred if I die intestate?

If you die intestate, the transfer of your property is accomplished through a court-supervised proceeding called probate that generally takes a minimum of six months, typically a year or more. These proceedings generally are expensive and time-consuming and tie up your property for several months. Probate can be avoided with proper estate planning.

9 What is probate?

Probate is the court procedure used to change title to assets from the name of an individual who has passed away into the name of the living beneficiaries. It is also where all creditors of a decedent file claims to collect their debts and where interested parties who have a complaint regarding the deceased can file their complaint (a will contest). Even without a contest, probate can be costly and time-consuming. Probate is a public proceeding.

10 Can probate be avoided?

Probate can be avoided with careful planning. There are a number of different techniques for doing so which can be used alone or in combination.

11 What is joint tenancy with rights of survivorship?

It is a form of property ownership where, upon the death of one of the owners, all of the deceased owners' interest in the property is transferred immediately to the surviving owners.

© AAEPA

12 Can a married couple use joint tenancy until one spouse dies, then set up a trust for the survivor?

Yes, but this unfortunately has several problems associated with it. There is no guarantee that the surviving spouse will have time to set up a trust after the first spouse dies, or, more to the point, will actually get around to setting up a trust, regardless of the amount of time available. This method also loses the $5.49 million Applicable Exclusion Amount tax advantage, because, like an outright gift, joint tenancy lumps all the assets in one spouse's estate (unless an estate tax return is filed and "portability" is elected). In addition, the survivor will not see the increase in basis for the survivor's interest as would happen in a community property state.

13 What if I create a joint tenancy with my child?

This is a disadvantageous way to plan an estate. The problem with putting your child's name on the title to your property as a joint tenant is that while it will avoid probate, creditors of the child will be able to reach the joint tenancy property. It may also create a taxable gift when none is expected, and may not be consistent with your ultimately desired distribution.

14 How do I know if I have a "bare bones" Living Trust?

Very few estate planning attorneys offer Legacy Wealth Planning. A "bare bones" Living Trust covers probate avoidance and usually ignores important issues to protect you, your spouse (if married) and your children. Bring your existing trust to your free one-hour consultation and we can review it for you.

15 If I have a "bare bones" Living Trust should I go back to the attorney who drafted the trust?

You can certainly go back to the attorney you worked with before, however, few attorneys offer Legacy Wealth Planning. If you want Legacy Wealth Planning, contact a member of the American Academy of Estate Planning Attorneys.

16 Why is a Family Wealth Trust better than a Power of Attorney?

A Family Wealth Trust is often recommended to clients as the key document in their estate plan. One reason for this is that the Family Wealth Trust is normally the best method for managing assets during incapacity. A major advantage of the Family Wealth Trust over the Power of Attorney is that a trustee has actual title to the assets and therefore third parties must deal with the trustee as the owner. An agent does not have title and hence third parties may refuse to deal with the agent. This is particularly true if the Power of Attorney is more than a few years old.

17 Why should I have a Family Wealth Trust?

Not only does a Family Wealth Trust provide for the disposition of your property (like a will), but it also offers the following benefits:

- Provides for the immediate transfer or trust management and distribution in the future of assets after death;
- Allows for a smooth transition of management upon incapacity or death;
- Avoids the expense and hassle of probate proceedings;
- Minimizes estate taxes and defers payment of estate taxes for married couples;
- Allows for continued control over assets after death or incapacity;
- Provides security to you and your loved ones;
- Protects your children's inheritance from their own potential divorce;
- Safeguards your estate for your kids if your surviving spouse remarries;
- Offers flexibility

18 **Will I still have control over my property if I establish a Family Wealth Trust?**

Absolutely! While you are alive and mentally competent, you have complete control over your property. You can buy, sell, improve, spend, change investments, or give away property just as you would without a trust. The trust can be modified in any manner you desire or it can be completely revoked. Upon your death, the trust becomes irrevocable so that no one can change your testamentary wishes. Upon your incapacity, the successor trustee you've named will manage your assets for your benefit. For married couples, the other spouse still has total control over his or her share of property.

19 **Who is the trustee of my Family Wealth Trust?**

While you are alive, you may act as trustee. For married couples, either one or both spouses may act as trustee or co-trustees. The successor trustee is an individual or corporation fiduciary whom you designate to be in charge of your trust in the event of disability or upon death.

20 **Who should be designated as successor trustee of my Family Wealth Trust?**

You will need to designate one or more successor trustees. These can be individuals, such as family members, trusted friends, trusted professionals, or you could designate an institution, such as a bank or professional trust company. Individuals may predecease you, while an institution will (most likely) still exist at the time of your death. Institutions provide the benefit of experience in money management and trust administration, while family members and close friends are more "personal" and have first-hand knowledge of your desires. If you choose an individual, the individual should have some business sense, or you might wish to name an individual and an institution as co-trustees. The downside to co-trustees is the possibility of disagreements.

21 **Can you be the trustee of my Family Wealth Trust?**

Technically a law firm or an attorney at a law firm is permitted to be the trustee. However, at our law firm, we never act as trustee for our clients. We think it is inappropriate.

© AAEPA

22 Will my income taxes change if I create a trust?

A Family Wealth Trust does not change your income tax liability. The Internal Revenue Service does not require any additional income tax filings when you create a Family Wealth Trust, and the same annual 1040 tax return is filed as long as a married couple files jointly and the trust holds no foreign property.

23 Do property taxes change if I create a trust?

Generally, property taxes remain the same when real estate is transferred into a Family Wealth Trust, although laws vary from state to state and county to county. Relevant state law needs to be reviewed before any transfer is made.

24 What is the annual fee for a trust?

There is no annual fee associated with maintaining a trust. Fees are involved when an amendment to the trust is made which involves changing the terms of the trust. When a spouse or trustee passes away, fees will be charged in order to handle the Trust Administration to take advantage of certain tax benefits, if applicable, and to follow the terms of the trust.

25 How do I fund my trust?

Funding a trust entails transferring assets you own as an individual into the name of your trust. For some assets, our law firm makes the transfers and prepares the documents for you to sign, for example, real estate. For other assets that our law firm is unable to change for you, we will give you instructions as to how title is changed, and will provide you with the necessary paperwork. For example, to fund your trust with bank accounts, a letter is prepared for you to take to the bank to change title of your accounts. You will have to go to the bank in person to sign a new signature card as trustee of your trust.

26 What assets are left outside of my trust?

Although there's nothing wrong with having your checking account in the name of your trust, some individuals like to have just their name on the checks. You can do so even if the account is in the trust, or you can simply choose to leave a small checking account outside of the trust. Other assets which should not be funded into the trust are IRAs and pension plans. What's important is to coordinate the appropriate beneficiary designation with your overall estate plan. This is a complex area of planning and must be based on each person's individual family circumstances and size of estate.

27 How is out-of-state property funded into my trust?

Out-of-state property is transferred into the trust by using a local attorney in that state working with our law firm. We are a member of the American Academy of Estate Planning Attorneys, a national organization with members coast to coast. Therefore, we can contact another member attorney in the state where your property is located to have it transferred to your trust with a minimum of delay.

© AAEPA

28 How are time-shares funded into a trust?

Timeshares are transferred based upon the type of ownership you have. Some timeshares are a contract and are transferred to the trust by an assignment of the contract. Other timeshares are a fee-simple, which means you have absolute ownership and it is a form of real estate. Therefore, it is transferred by deeding it to the trust.

29 If I transfer real estate to my trust can the bank call my loan?

Enacted as part of the Garn-St. Germain Depository Institutions Act of 1982 (P.L. 97-320; 96 Stat 1501) a due-on-sale clause cannot be enforced on a "transfer into an inter vivos trust on which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property." This exemption applies to residential real property containing less than five dwelling units {12 USC Sec. 1701j-3(d)}. The regulations list that the borrower in this type of situation must remain the beneficiary and occupant of the property {12 CFR 591.5(b)(vi)}. However, "occupancy" is not defined. Therefore, prudence suggests notifying the lending institution before the transfer.

30 Does a Family Wealth Trust provide asset protection?

During the lifetime of both spouses there is no asset protection provided by a Family Wealth Trust. However, there may be some protection for the survivor after the first spouse dies, depending upon the choices you select. The trust can also be created to provide creditor protection for other beneficiaries of the trust.

31 Is a Family Wealth Trust only for the rich?

No. A Family Wealth Trust can help anyone who wants to protect his or her family from unnecessary probate fees, attorney’s fees, court costs and federal estate taxes. In fact, the Family Wealth Trust offers substantial protection for your family, regardless of your total estate. In addition to savings at death, especially if your estate is over $100,000, the Family Wealth Trust also provides savings and peace of mind during life, because it avoids the expense and emotional nightmare of an incapacity or “living probate” proceeding. Also, a Family Wealth Trust can protect spouses in the event of remarriage after one spouse dies and can afford greater protection for children.

32 How do I know if my estate has enough liquidity?

Liquidity planning is part of estate planning. Generally, it is necessary to look at the estate and see if there is enough cash to pay taxes, administrative expenses, and support dependent family members. There are generally two ways to deal with the liquidity issue, either by reducing taxes and expenses which require cash, or by increasing the cash and liquidity of the estate. Techniques which reduce taxes include fully using the Applicable Exclusion Amount at death, making annual gifts, and using planning techniques such as GRATs and QPRTs. Other techniques which reduce expenses include avoiding probate and using a Family Wealth Trust. Of course, increasing the liquidity of the estate can be done through conversion of assets as well as life insurance.

© AAEPA

33 Why do I need a Pour-Over Will if I have a Family Wealth Trust?

A Pour-Over Will is used first to name a guardian for minor children. Second, it protects against intestacy in the event any assets have not been transferred into the trust at the death of the trustor/owner. Its function is to "pour" any assets left out of the trust into it so they are ultimately distributed according to the terms of the trust.

34 What are the advantages to keeping assets in a trust for my beneficiaries, instead of distributing them outright? What about the disadvantages?

The advantages include potential protection from divorce, creditors, taxing authorities, bankruptcy, beneficiary indiscretion and mismanagement, as well as assuring the assets remain in the family. The disadvantages are that there may be some small administrative burdens, such as potentially needing to file an income tax return for the trust.

35 How do I change my trust?

An actual change to the terms of a trust is called an amendment to the trust. An example would be changing the distribution from two children to just one child. A trust can also be changed by a total restatement of the trust if multiple changes are involved.

36 Will my trust need to be changed when I buy or sell assets?

Buying or selling assets does not change the trust terms. It merely changes the assets in the trust. So think of buying and selling assets as assets going in and out of the trust without changing the terms of the trust.

37 Do I have to come to your law firm to change the trust?

There is nothing that requires you to work with the attorney or the law firm that originally prepared your estate planning documents. We, of course, hope that you will return to our firm to do any work in the estate planning area, based upon our philosophy of being of service to our clients and being there when we are needed.

38 What are the fees to change my trust?

At our firm, we always charge a flat fee once we know exactly what the changes are you want. In the previous example, for an amendment changing the distribution of assets, we charge **<Insert Amount>** at the present time

39 When does a trust end or terminate?

A trust will end or terminate when the distribution of all assets is made pursuant to the trust document.

© AAEPA

40 How do I revoke my trust?

Trusts are rarely revoked. Most of the time, once a trust is set up, no one wants to revoke it. However, there are situations where it does occur, primarily in the case of divorce. A brief written agreement is prepared, indicating that the trust is now revoked. The assets are removed and put in the name of the individuals, who are free to establish new trusts if they so desire.

41 Can someone contest a trust like breaking or contesting a will?

Anyone can hire an attorney to question how legal affairs have been arranged. So, in theory, anyone can attempt to contest a trust. In practice, however, it is much more difficult than contesting a will. As all wills must be probated, any interested party can easily join the routine probate court proceedings and contest the will at that time. In contrast, someone who wants to contest a trust must take the initiative to begin his or her own lawsuit, complete with court and attorney fees.

42 What happens to a Family Wealth Trust when one spouse dies?

When one spouse passes away, at that time, the surviving spouse should contact our office so that we can set up a meeting. At that meeting we explain what needs to be done in order to follow the terms of the trust. We need to inventory all assets so that we know what is in the trust in order to divide the assets into the A Trust and the B Trust -- the survivor's trust and the family trust, if applicable. There are tremendous tax benefits associated with the A/B type of trust, which is why a snapshot is taken of the assets at the date of death of the spouse.

43 What is the cost when one spouse dies?

We charge an hourly fee based upon the time we work on the matter or a percentage of the value of the estate. It varies from client to client depending upon the nature of the assets and the complexity of the financial situation. Our fees range anywhere from **<Insert Amount>** in a simple situation to **<Insert Amount>** for a larger estate and more complicated financial picture.

44 What happens if I am single when I die?

When a single individual passes away, whoever is named as successor trustee should contact our office. In most cases, the trustee is instructed that assets need to be collected, debts need to be paid and then ultimately the distribution of assets will be made pursuant to the terms of the trust. In essence, the terms of the trust are carried out.

45 How long does it take to set up a trust?

In our firm, we like to complete the work within four weeks of our first client meeting.

© AAEPA

46 Do I work with you or a paralegal?

The first step in the estate planning process is for you to come in for your initial consultation. At that time, you will meet with me or one of the other estate planning attorneys at the firm. We will work with you and, of course, draft all of the documentation to implement your estate plan. We do also have specially trained paralegals in our law firm, who do specific jobs such as asset collection and funding and things of that nature, as well as the notarization of the appropriate documents. You will meet them as your estate plan takes shape.

47 What is the trust name?

Your trust name will be "[your name] as trustee of the [your last name] Family Wealth Trust dated [date], and any amendments thereto". An example would be "Bill and Mary Smith as co-trustees of the Smith Family Wealth Trust dated January 1, 2010, and any amendments thereto".

48 Does your law firm do wills?

At our firm our main goal is to educate clients about their options in estate planning. We then give our clients our judgment as to what is best for them. If it is appropriate a will may be prepared.

49 Does your law firm handle probate?

Whatever your estate planning needs, from start to finish, we are here to help. We handle Trust Administrations and Probates. It is often in these circumstances, when a family comes to us distraught over the loss of a loved one, that they find our probate services so very important. We can help them through the difficult and often time-consuming process of probate.

50 What happens to my trust if you or your firm is gone?

The benefit of working with our firm is that we have several attorneys who do estate planning. **<Depending upon firm size.>** In the unlikely event that the firm is not around, I am sure that we will have joined with another firm in order to carry on the business and to be able to serve our clients. If there are changes in the firm, we will in all likelihood contact you to let you know about them and how to contact us in the future.

TAXES: ESTATE TAXES, GIFT TAXES, CAPITAL GAINS, GST QUESTIONS

51 How large of an estate can pass federal estate tax-free?

The federal government allows every individual an amount free from estate tax at their death, the "Applicable Exclusion Amount," which is $5 million and is indexed for inflation. This means that in 2017, estate taxes will not be owed at the time of an individual's death unless the net value of the estate exceeds $5.49 million.

© AAEPA

52 What is the marital deduction?

The Internal Revenue Service allows an individual to leave any amount of assets to his or her spouse without taxation. At the death of the surviving spouse, however, all assets in the estate over the Applicable Exclusion Amount will be included in the survivor's taxable estate; assets above $5.49 million are taxed at 40% in 2017.

53 How can I leave my estate to my spouse tax-free?

An outright gift at death qualifies for the unlimited marital deduction for estate taxes and, therefore, there will be no tax paid on the amount left to the surviving spouse. However, the $5.49 million Applicable Exclusion Amount on the estate of the first deceased spouse is lost when the second spouse dies, unless an estate tax return is filed and “portability” is elected.

54 What is “Portability” and can I just rely on it?

“Portability” is the ability for one spouse to use the remaining unused estate tax exclusion of their spouse who died before him or her. In order to take advantage of Portability, the deceased spouse’s estate must file an estate tax return and must elect such Portability. Relying on Portability may or may not be right for you. Portability does not maximize the amount of money that may be able to pass free of estate tax. Amounts passing directly to a spouse, even if within the estate tax exclusion, may be subject claims from the surviving spouse’s creditors or new spouse. Portability is effective only for federal estate taxes and not state estate and inheritance taxes. For these reasons and others, relying on Portability may not be right for you.

55 Should I use my $5.49 million Applicable Exclusion Amount during my lifetime?

This is a complex question. The answer depends upon individual family circumstances and the size of your estate.

56 What is the Annual Gift Tax Exclusion?

The Annual Gift Tax Exclusion is an amount that can be given away annually without resulting in gift tax on the transfer. The Annual Gift Tax Exclusion amount is inflation adjusted and currently is $14,000 per recipient. There is no limit on the number of recipients to whom qualifying gifts can be made.

57 What happens if the tax law changes? Is my trust still valid?

In the event of a tax law change, the trust is still valid. However, amendments to the trust may be needed to comply with or take advantage of the new law.

© AAEPA

58 What is Capital Gains Tax?

Capital Gains Tax is an income tax paid on the appreciation of the value of an asset from when you bought it to when you sold it. If you lost money, it would be a "capital loss." The income tax rate for capital gains on property held for over a year is typically much lower than the tax rate on ordinary income.

59 What is a step-up in basis?

A step-up — or step-down — in basis is an adjustment for tax purposes to an asset's fair market value at the date of the death of the owner of the asset. For example, if you bought a share of stock for $100 that increased in value to $500 at the time of your death, your tax basis was $100 but increases to $500 at the time of death. This increase is known as a step-up in basis. If you bought the stock for $500 and it was worth $100 at the time of your death, it would be a step-down in basis.

60 Do my assets get a step-up in basis if they're in my trust when I die?

Your share of the assets held in the trust does get a step-up — or step-down — in basis upon your death. There will be another step up — or step-down — in basis of your spouse's share of the trust assets at the death of your spouse. The step-up in basis allows the person inheriting the asset to sell it without having to pay capital gains tax.

61 When is an estate tax return due?

An estate tax return is due nine months after the date of death and may be extended for six months. A return is required if assets are in excess of the Applicable Exclusion Amount remaining at death, even if the net estate is less than the Applicable Exclusion Amount. Under certain circumstances, filing a 706 is recommended even if the estate is less than the Applicable Exclusion Amount, in order to start the statute of limitations running, or to elect "portability" of the deceased spouse's unused Applicable Exclusion Amount.

62 What is the Generation-Skipping Transfer Tax?

This is a tax levied on assets that are given to individuals who are more than one generation younger than the donor. An example would be a grandparent giving an asset to a grandchild either during the grandparent's life or at death. Each donor has a $5.49 million exemption in the year 2017 from the Generation-Skipping Transfer Tax. Effectively, this exemption can allow you to skip estate tax in your child's estate.

© AAEPA

POWERS OF ATTORNEY & INCAPACITY PLANNING QUESTIONS

63 What is a Power of Attorney?

A Power of Attorney is a document authorizing someone else (your agent) to act on your behalf (the principal). The purpose of giving someone such a power is to enable the agent to act on your behalf when you cannot act for yourself.

64 Who can create a Power of Attorney?

Generally, any individual can create a Power of Attorney if over 18 years of age and legally competent. This, however, varies from state to state.

65 Who may act as an agent under a Power of Attorney?

In general, an agent may be anyone who is legally competent and over the age of 18. Usually, it is a family member such as a spouse or a child. More than one person can be named as an agent. However, sometimes naming two or more individuals to act together can prove inconvenient, particularly if a power of attorney must be exercised promptly. A better course is to name one individual as agent and then another as a backup.

66 What is the difference between a General and a Limited Power of Attorney?

A General Power of Attorney authorizes your agent to do almost everything on your behalf which you could do for yourself. A Limited Power of Attorney authorizes your agent to perform only certain acts specifically listed in the document.

67 How does an agent use a Power of Attorney?

Your agent presents the power to the other party involved in the transaction and signs any necessary documents needed for such transactions on your behalf. Your agent normally signs your name, adding thereafter "by Attorney in Fact Mary Smith."

68 What are the formalities of signing a Power of Attorney?

Requirements vary from state to state, but generally a simple notarization or signing the power in the presence of witnesses is necessary.

69 When does a Power of Attorney become effective?

This depends upon what the power says. It can be made effective at the time of signing or it can become effective at the time of your incapacity or another event.

© AAEPA

70 How does a Power of Attorney terminate?

Death revokes a Power of Attorney. You may also cancel your Power of Attorney by signing a revocation. The best way to revoke a Power of Attorney is to destroy all copies. However, third parties without notice of the revocation may still rely on the Power of Attorney. So, it is best to send a notice of revocation to anyone that had honored it in the past, such as the bank. If the power is a Non-durable Power of Attorney it will be ineffective during your incapacity, while a Durable Power of Attorney survives your incapacity.

71 Under a Power of Attorney, can my agent make a gift on my behalf?

Yes, but your Power of attorney must specifically authorize your agent to make such gifts from your assets to persons whom you would likely make gifts.

72 Must third-parties honor a Power of Attorney?

There is no way to force a third-party to accept the power. Many banks will require you to complete their own forms to authorize your agent to write checks on your account, so it is advisable to inquire as to whether your banking institution requires such forms that can be completed in conjunction with executing a power of attorney. In addition, the IRS generally will not honor any Power of Attorney unless you use the IRS Form 2848.

73 What are the disadvantages of a Power of Attorney?

First, third-parties may not recognize your Power of Attorney. Second, it can be difficult to revoke a Power of Attorney, especially if your agent has given copies to third-parties that have honored it. Third, the agent can reach your assets without court approval or supervision. Therefore, it is imperative that you select an agent with great care and have tremendous confidence in that individual.

74 Are there alternatives for managing property when a person becomes incapacitated?

There are several. One is using a Durable Power of Attorney. Another is a court-supervised proceeding referred to as a guardianship or conservatorship. Another alternative is the use of a Family Wealth Trust where assets are funded into the Family Wealth Trust.

75 What makes a Durable Power of Attorney durable?

A Durable Power of Attorney remains effective even if you become incapacitated. Generally, unless the power specifically indicates it is durable, it is not durable and will terminate upon your incapacity.

76 Should I have a Durable Power of Attorney?

Yes. The Durable Power of Attorney for property is often used in conjunction with a trust to enable your agent to transfer your assets into your trust in the event you become disabled. A Durable Power

© AAEPA

of Attorney can be made effective immediately upon being signed or can become effective at the time of your incapacity, which is also called a “springing” Power of Attorney (check relevant state law to see what is allowed).

77 What are the advantages of a Durable Power of Attorney for Property?

A Durable Power of Attorney can be a better way to deal with incapacity than a guardianship or conservatorship. It avoids the court proceeding that a guardianship or conservatorship requires.

78 Should I have a Durable Power of Attorney for Health Care?

Yes, it is important to have a Durable Health Care Power of Attorney, sometimes called a Health Care Proxy. It allows your agent to make a number of health care decisions on your behalf. Often this is accompanied with a Living Will or a physician's directive that can cover the issue of remaining on life support systems under varying circumstances.

79 What is a Living Will?

A Living Will, or sometimes called a physician's directive, is a document in which you give directions for life sustaining treatment should you become unable to communicate your wishes. Some states have combined this into the Advanced Health Care Directive.

80 What is a guardianship or conservatorship?

This is a court-supervised proceeding which names an individual or entity to manage the affairs of an incapacitated person. A guardianship may also include the duty to care for the incapacitated person.

81 What is the nomination of a guardian?

The nomination of a guardian occurs when an individual seeks court approval to act on behalf of someone who is incapacitated. This is avoided through the creation of a Power of Attorney that can be used to name a guardian in the event one is needed.

82 What are the disadvantages and advantages of a guardianship?

A primary disadvantage to a guardianship is that it is a public proceeding, thereby exposing the incapacitated individual to embarrassment as the details of their incapacity are discussed at length. It is also expensive, and is a restrictive procedure. In addition, there is no guarantee that the end result will be in accordance with the incapacitated person's wishes, and someone unacceptable to the incapacitated person could be placed in charge of his or her affairs. A major advantage to a guardianship is that the courts watch every move the guardian makes in relation to the assets. Some feel this provides increased protection as well as establishing the authority of a guardian as third parties must deal with the guardian due to the court's supervision.

© AAEPA

ADVANCED PLANNING QUESTIONS

83 What is a "C Trust" or "QTIP Trust"?

A "C Trust" or "QTIP Trust" (QTIP stands for Qualified Terminable Interest Property) is a marital trust. This is where one spouse owns more than the Applicable Exclusion Amount ($5.49 million in 2017) and wants to control that additional amount of money after he or she passes away, yet also defer the tax on the amount above the Applicable Exclusion. By putting the amount above the Applicable Exclusion into a QTIP Trust, estate taxes are deferred until the surviving spouse passes away. An important issue, often overlooked, is who pays the estate tax on the QTIP assets (the surviving spouse). A QTIP Trust is also used in connection with maximizing what is called the Generation-Skipping Transfer Tax exclusion amount.

84 What is the Uniform Transfers to Minors Act?

This is a law that establishes a custodianship for holding the property of a minor. Property is given to the custodian who manages it and uses it for the benefit of the minor.

85 What is a QDOT Trust?

A QDOT Trust (QDOT stands for Qualified Domestic Trust) is a special trust set up when a non-citizen spouse is the surviving spouse. The tax law generally does not allow an individual to obtain the marital deduction when leaving assets to a non-citizen spouse. The marital deduction is obtained if the property is held in a QDOT Trust.

86 What is a Charitable Remainder Trust (CRT)?

A Charitable Remainder Trust permits a donor to defer the income tax consequences on the sale of a capital gain property and make a charitable gift. The donor transfers property to the trust, retaining the right to receive a stream of annual payments for a term chosen by the donor. At the donor's death the remaining assets go to the charity. The two types are Charitable Remainder Annuity Trusts and Charitable Remainder UniTrusts.

87 What is a Family Limited Partnership (FLP)?

A Family Limited Partnership is a partnership made up of family members and is used in many cases to facilitate asset management, tax planning and gifting. Generally, the parents are the general partners, controlling the partnership and making all decisions. The limited partners are often children or grandchildren who receive gifts of partnership interests. This is a very popular and effective estate planning tool.

© AAEPA

88 What is a Crummey Power?

A Crummey Power is a special power regarding gifts in trust. It was named for a court case of some years ago. In order for a gift in trust to qualify for the annual gift tax exclusion, the individual recipient must have a right to withdraw the money for some certain period of time. The right to take the gift from the trust during the period of time indicated is known as the Crummey Power.

89 What is an ILIT?

ILIT stands for Irrevocable Life Insurance Trust. This is an estate planning technique, often used to ensure that life insurance proceeds will not be subject to federal estate tax. It can be used effectively to reduce the size of the taxable estate and to provide a source of tax-free funds that may be used to pay any death taxes due at the death of the insured.

90 What is a Grantor Retained Annuity Trust or GRAT?

This is a trust into which an individual transfers property and retains the right to receive annual payments from the trust for a term of years. This is a tax planning technique to reduce the size of an estate and the amount of the resulting estate tax. If the property grows faster than the assured interest rate, set monthly by the IRS, what remains in the trust passes to children or other remainder beneficiaries, free from state and gift tax.

91 What is a Qualified Personal Residence Trust (QPRT)?

This is an Irrevocable Trust into which a personal residence is transferred. The individual or couple who created the trust retains the right to use the property for the term of the trust. This is a tax planning technique to remove the asset from the estate of the individual making the trust. If the grantor survives the term of the trust, then the asset is not part of the estate.

© AAEPA

MEDICAID PLANNING QUESTIONS

92 What is the difference between Medicaid and Medicare?

People tend to confuse Medicare and Medicaid, but the two programs are not the same. Medicaid is a joint federal-state program that pays certain healthcare costs. The program is needs-based, meaning that it is available to those who meet certain financial criteria, including income and asset limits. Medicare is a federally-funded health insurance designed for people 65 and older. It is also available for younger people who have certain disabilities. While Medicare covers many healthcare expenses, it does not provide complete coverage. For instance, many people are surprised to discover that the program's coverage for long-term care is extremely limited.

93 Can't I just give away my assets and qualify for Medicaid benefits?

Some people mistakenly believe that they can simply give away some or all of their assets to their children or other relatives in order to qualify for Medicaid. While part of Medicaid planning may involve giving away some of your assets, this has to be done with extreme caution and should only be done with the advice of an experienced elder law and estate planning attorney. If you give away your assets at the wrong time, or use the wrong method, you can face tough penalties. In 2006, the federal government passed a law that included a "5-year look-back period" which imposes penalties for certain asset transfers made within the 5 years before you apply for Medicaid coverage.

94 Can't I just add my son/daughter's name to the title of my house to avoid losing my home to Medicaid recovery?

If you receive Medicaid benefits, after your death the state tries to recoup the money spent on your care. They do this by trying to collect against the assets you leave behind. Since you can have very little assets in order to qualify for Medicaid, the state usually goes after the few remaining assets left, like the home. This is known as estate or Medicaid recovery. Recovery is allowed in most circumstances and in most states on assets owned in Joint Tenancy, unless the only other joint tenant besides you is your spouse. Additionally, if you change the title on your home to your child's name alone, rather than adding them to the title, it would be considered a gift and in most circumstances would create a penalty if you applied for Medicaid benefits within 5 years. Also, keep in mind that adding your child's name to the title on your home or other assets could expose you to their creditors, divorce, and other unforeseen financial problems. Therefore, there is only a very small percentage of situations where adding a child's name to the title could work for Medicaid planning.

95 When is it too late to do Medicaid planning?

It is never too late to do Medicaid planning. However, the best way to plan for Medicaid and long-term care is to do so well before the need arises. This is pre-need planning, and it gives you the most options for preserving your assets. Crisis planning, when someone is already in a nursing home or needs immediate long-term care, can be an incredible help to those facing an immediate need for

Medicaid benefits. But, crisis planning has its disadvantages, such as the inability to take advantage of planning that escapes the 5-year look-back period, which may reduce the amount of assets you are able to preserve.

96 My parent/spouse has early signs of dementia, can we still do Medicaid Planning?

The first step is to determine their "capacity," which means someone fully understands the decisions they are going to make. When you come into our office, if there is a concern about capacity we will ask you to contact their physician and ask for a statement from them on your loved one's ability to make these decisions. If it is determined that your loved one has capacity, then we would need to ensure that there is an incapacity plan in place to preserve the ability to do future planning with the use of Powers of Attorney, etc. Then we can help you with any Medicaid planning that would be appropriate for your situation right now. However, if it is determined that they do not have capacity, we will need to see if they have an incapacity plan in place that would allow someone else to make these planning decisions on their behalf. If there is no incapacity plan in place, it may be necessary to go to court to appoint someone to make those decisions for them.

97 Does Medicaid pay for in-home care?

If you qualify for Medicaid then you can qualify for benefits that could pay for in-home care. This is called Community Medicaid and the rules and benefits can vary greatly and could be impacted by your personal situation. Therefore, we would need to meet with you personally to determine the nature of your needs and what Medicaid could potentially pay for.

98 What are the disadvantages to a Medicaid trust?

The main disadvantage is that you've made an irrevocable transfer of your assets to the trust and you cannot undo this transfer. However, typically you retain the right to income for life from the assets you've transferred and you may continue to live in your home, while preserving your home from Medicaid recovery.

99 What are the differences between a Family Wealth Trust and a Medicaid Trust?

A Family Wealth Trust can be changed at any time and you have complete control and full access to your assets titled in the trust. The Medicaid Trust may provide asset protection from long-term care costs and Medicaid recovery. Both trusts provide numerous benefits, such as remarriage and divorce protection and probate avoidance. We find that many families benefit from having both trusts created. We can give you a recommendation about what is best for you and your family when we meet with you.

© AAEPA

100 My spouse and I are healthy and we don't have a family history of dementia or disability, should we still consider Medicaid planning?

As Americans live longer lives, the possibility of needing long-term care increases considerably, regardless of family history. In fact, Americans 65 and older have a 40% chance of entering a nursing home in their lifetime. With the high risk of losing your assets and your family home as a result of paying nursing home costs without Medicaid planning, it makes sense for most families to engage in some sort of pre-need Medicaid planning to protect against the unexpected. We can discuss your personal situation further during your consultation.

101 I've heard that you have to impoverish yourself in order to qualify for Medicaid, how much can a Medicaid Trust protect?

Medicaid does have strict income and asset limits but if you plan far enough in advance, there is no limit to the amount of money that a Medicaid Trust can protect, as long as planning is done far enough in advance of needing and applying for Medicaid.

102 Is there an asset maximum for planning and qualifying for Medicaid benefits?

Yes, there are assets limits imposed by Medicaid in our state. In order to qualify for Medicaid you must pass a "means" test that reviews your assets and those of your spouse, if you're married. With proper planning, done at least ___ years before the need for Medicaid, we can reposition assets so they are exempt from being counted for Medicaid qualification. The sooner you plan, the more we can help you protect.

103 If I never end up needing long-term care and Medicaid benefits, what happens to my assets in the Medicaid Trust? Do I still have control over them? Can I undo the trust?

Whether or not you end up needing to qualify for Medicaid to pay long-term care expenses, the assets you place in the Medicaid Trust will be distributed to your beneficiaries as you had originally decided. You also retain a right to change the beneficiaries or add new ones (except yourself), however, the trust is irrevocable, which means that you cannot undo it

104 What's the difference between SSDI and SSI?

There is a lot of confusion over these two terms and benefits. SSDI is Social Security Disability Insurance and is available to people who have paid into Social Security for the required period, regardless of income or assets, and who are now disabled or blind. On the other hand, SSI is Supplemental Security Income, which is available to people who have limited resources and income, and are disabled.

© AAEPA