



Estate Planning Preliminary Questionnaire

1) *Does your client have only a Last Will & Testament as his estate plan?*

Commentary: Probate will be required of all assets transferred by a stand-alone Last Will and Testament – regardless if testamentary trust provisions are included or that the will is being used as a “pour-over” to a living trust. When someone dies with any asset(s) in his own name, even if a valid will is in place, probate will be necessary since the assets are *titled in the name of that deceased person* (unless transferred by a payable-on-death clause).

A will is not a contract that can otherwise control and transfer assets, for it becomes nothing more than a testament of the deceased. *Therefore, probate court requires that a court-approved executor enter into court-sanctioned contract with court-approved heirs* in order to retitle the decedent’s assets to the executor, who later delegates the assets to the heirs. This probate process cannot be avoided because a deceased person is obviously unable to transfer his own property; therefore, the court must make the transfers for him as his proxy.

2) *Does the value of your client’s probate estate exceed \$100,000 (which is the maximum statutory limit for allowing informal probate)?*

Commentary: A probate estate is that part (or all) of the estate that is owned outright by a decedent. If the value of a probate estate exceeds the *maximum statutory limit of \$100,000* (\$50,000 in many states) then the probate estate will have to be formally probated.

Formal probate requires several months – sometimes even years – to complete; and it includes hearings, appraisals, accountings, recordings, public notice filings, court fees, attorney fees, executor fees, and public recordings. If the value of the probate estate is less than statutory limits then the estate can be probated by affidavit. That method is generally not problematic – although it still becomes a matter of public record.

3) *Does your client share ownership of his assets with anyone else (including a spouse) as joint-tenants-with-rights-of-survivorship (JTWROS), or as tenants-in-common (without a trust)?*

Commentary: JTWROS ownership provisions were created by statutory law and exist only to provide asset owners with a probate avoidance device. When a JTWROS tenant dies, the surviving tenant receives all interest in the property without probate. However, JTWROS ownership provisions could prove to be a very bad choice because of loss of control,

forfeiture of protection, and possible transfer tax consequences. Consider the following points regarding JTWROS-owned (and tenants-in-common) property:

- (a) For purposes of satisfying a financial judgment, the *entire value* of the JTWROS property can be required of the court to meet that legal liability.
- (b) Since there are at least two vested owners in a JTWROS property arrangement, it will always require the consent and signatures of all owners to transact with the property – such as selling, transferring, or hypothecating (using as collateral).
- (c) If a JTWROS tenant becomes incapacitated then the other tenant(s) wanting to sell, transfer or hypothecate the property may have to arrange for a time-consuming and expensive court-appointed conservatorship to adjudicate the unable tenant as being incapacitated and to get appointed as the incapacitated tenant’s conservator.
- (d) When the surviving JTWROS tenant dies, the property will need to be probated at that time, and the entire asset value will be in that tenant’s estate for tax purposes.
- (e) Any asset(s) held as *tenants-in-common* by a decedent outside of a living trust must be probated regardless whether he is the first or last tenant to die.

4) *Does your client have post-mortem control issues or other planning concerns of the future that are not being addressed?*

Commentary: Without a trust in place, a decedent has essentially forfeited all post-mortem control of his estate. A trust must be used if the estate owner wants to address: (a) the needs of minor or other dependent children; (b) distribution restrictions for spendthrift children (or grandchildren); (c) special needs situations for legally incapacitated dependents; and (d) applying asset protection features for his heirs.

A living trust *funded during the creator’s lifetime* can provide post-mortem control without the intervention of probate court. A funded trust will avoid unnecessary costs, unwanted publicity, family inconveniences, loss of time, and the forfeiture of family control. The only way any trust can be funded after the death of the creator is by a pour-over will, which must go through probate – with all its issues. In any event, the trust *must be funded* in order for it to have any effect.

5) *If your client has a living trust in place, is it set up to meet his current planning needs and objectives – including being fully funded?*

Commentary: Creators of living trusts often end up not having their current planning goals and objectives adequately addressed. The reason is because they simply keep putting off getting the changes done, or they don’t want to go back to the person(s) who originally helped them. They may also have unfunded or only partially funded trusts in place and need assistance to complete the job. Again, realize that all assets not transferred to a trust during lifetime will need to be probated at death even if a pour-over will has been established in conjunction with the trust. A living trust needs to be funded *during the creator’s lifetime!*

6) *Are your client's trust and health-care documents electronically recorded on an encrypted database with 24/7 password access via the Internet?*

Commentary: Estate planning documents can easily be misplaced over time. It becomes a serious problem when the decedent's family needs access to those documents but cannot locate them, or even the lawyer who originally drafted the plan – he may be deceased himself! New technology provides electronic recording venues that can be conveniently accessed through a secure Internet platform. That technology should be utilized.

Final Analysis:

If your client answered “**yes**” to one or more of Questions 1 through 4, then a living trust should be considered as the primary estate plan for your client.

If your client answered “**no**” to one or both of Questions 5 and 6, then certain actions should be taken as to (i) restating your client's existing trust, and/or (ii) assisting him in getting the trust funded, and/or (iii) encouraging him to take the steps necessary to assure that his estate planning documents are being kept in a secure but accessible location, particularly in an encrypted database.