ESTATE PLANNING FOR THE FAMILY
DAVID M. ASH, ESQUIRE

(917) 301-8705
www.EstatePlanning4Family.com
EstatePlanning4Family@gmail.com

Frequently Asked Questions

1. **My Husband and I can't agree on a guardian. What's the big deal if I just allow my family and my husband's family to mutually decide upon a guardian after we both die?**

   Failure for spouses to agree upon a guardian often holds up the estate planning process. However, couples must consider the ramifications of failing to agree upon a guardian. If the couple cannot come to an agreement, the decision rests with the court, whose mandate is "the best interest of the child." This could result in turmoil among the families, who potentially could battle in court to gain custody of the children. In addition to the personal turmoil, a great expense would befall the families in the battle to determine the guardian for the children. Wouldn't it be better for the H and W to do their best to agree upon the guardian, rather than let the court decide for you?

2. **I thought they were getting rid of the estate tax. Is that so**

   NO! In 2023, the federal estate tax exemption is now $13M per individual, $26M per married couple. This law is effective until 12/31/25 unless Congress makes it "permanent" or it is revised down by a current or future Congress.

   If not made permanent/revised down prior to 12/31/25, on 1/1/26 the federal exemption would be slated to go back down to $5M/spouse. However, it's unknown how it will play out.

   Furthermore, while NJ no longer has its own state estate tax (at least for now), NY continues to have one with a current state estate tax exempt amount of $6.58M per individual. Note there is a potential "penalty" if one's estate exceeds the NY state exempt amount by over 5%. This is known as "going over the cliff." It's very confusing, and again, as we have no idea what NY plans to do with its own state estate tax in the future, we have to pay attention to both what the NY legislature has in store, as well as Congress. So stay tuned….

3. **When I die, I assume everything I own goes to my spouse, so why would I need a will?**

   If a person dies without a will (known as dying under intestacy), the state determines how your estate is to be distributed. If a person dies survived by only a spouse, then it is true that everything passes to the surviving spouse. However, if a person dies survived by a spouse and children, the disposition is as follows: the first $50,000 of an individual's assets goes to the spouse, with any remaining property split evenly, half to the surviving spouse, and half to the children. This is unlikely to be what the spouses intend to happen, and is a main reason why Wills are needed.

4. **I've been told there is no estate tax upon the death of the first spouse. Is that so?**

   TRUE. If both spouses are U.S. citizens, there will be no estate tax when the first spouse dies (assuming he leaves everything to his spouse). This is as a result of what is known as the "marital deduction." Thus, even if the first spouse died with an estate of $100 million dollars, there will be no estate tax when he dies, provided everything passes to his surviving spouse. Thereafter, when the surviving spouse dies, her estate will pay estate tax on the value of her estate. Without proper estate planning only the surviving spouse will have utilized her exempt amount. In order for the first spouse to die to utilize his exempt amount, a trust (either in the form of an applicable exemption trust (a.k.a., credit shelter trust or bypass trust) or a disclaimer trust), will need to be set up in his Will whereby an amount equal to the current exempt amount is set aside in a trust. Furthermore, there is now a potential of exemption portability to ensure that the first spouse to die's unused exemption is then used. This allows both spouses to take advantage of their federal estate tax exempt amount.

5. **What are the estate tax consequences where the surviving spouse is not a U.S. citizen?**

   Due to the government's concern that a non-U.S. citizen surviving spouse may escape estate taxation by taking his/her inheritance and returning to his/her native country without ever paying estate tax, the marital deduction is inapplicable unless the inheritance is left in a special trust known as a qualified domestic trust (a "QDOT"). The QDOT allows for the same deferral of estate tax that applies if both spouses were U.S. citizens. Otherwise, if a QDOT is not established, a current estate tax may apply upon the death of the first spouse.

6. **Life insurance proceeds are not subject to estate tax, correct?**

   WRONG, life insurance proceeds are not subject to income tax; the insurance proceeds are subject to estate tax. Under estate tax law, if an insured dies owning the policy, the insurance proceeds will be includible in his estate. This could be very significant. Let's say you have $3.5million in net assets and a $5 million life insurance policy. You may not feel like you are wealthy enough to pay an estate tax. However, if you die, the life insurance would be included in your estate and you'd have a $8.5 million estate. The insurance lobby provides a big loophole for life insurance placed in a trust. If you create what is known as an irrevocable life insurance trust (ILIT) during your lifetime, (naming the trust as the owner and beneficiary of the insurance policy), then upon your death, the insurance proceeds will forever fall outside of your estates. Thus, the use of an ILIT can be a very valuable estate planning tool which can result in a very significant tax savings to your estates. Again, while there would not be any federal or state estate tax at this time, the law can always change down the road in legislation.

7. **Are there additional reasons to do estate planning?**

   Absolutely.

   – In today's era of divorce in about 50% of marriages, protecting your children's inheritances in the event of a second marriage is something to contemplate.

   – Furthermore, it is sometimes prudent to protect children's inheritances from potential divorces that may arise in their own personal lives. Often gifts/bequests to children are held in trust to afford such protection.

   – Lastly, assets placed in trust are protected from a decedent's creditors, provided the assets were placed in trust prior to any acts of malfeasance by the client. The ability to protect assets from creditor claims can be a very important item to consider.

8. **Do I Really need a will? After all, it seems like a lot of money for a bunch of papers.**

   The failure to have the right estate plan drafted for you could be a serious mistake, with grave consequences.

   Furthermore, even if your estate falls below the federal (and state) estate tax level, there are still many reasons to do a Will. Specifically, non-tax reasons such as guardianship, creditor protection and trusts for minor children are still valid reasons to do a Will.

   Certainly, a couple would not want a child to inherit a lot of money and not have it under the control of somebody watching out for the child's interest until an age the parent deems appropriate. Furthermore, protection from creditors and from children's spouses in the event of divorce are also reasons to do estate planning.

   In addition, dying intestate (w/o a Will) carries a whole other set of potential expenses to consider. First, remember that in a case where the deceased is

survived by a spouse and children, effectively half goes to the wife and half goes to the kids. That is unlikely to be what the spouses intend. Second, while the surviving spouse (i.e., the natural guardian) would retain control over the person and property of the minor children, the minor's share of the property would need to be held in a guardianship account at the surrogate's court. Each time the guardian wants to use the child's money, she would have to come before the court to make a request for funds to be used for the benefit of the minor. This could be terribly inconvenient. In addition, depending upon the size of the assets passing to the minor, the guardian (even if the guardian is the minor's parent) would need to post a surety bond in court in order to ensure that the guardian not abscond with the minor's money. This surety bond, which is an annual bond until the minor reaches age 18, can reach up to $2000 per year depending upon the size of the deceased's intestate estate. A Will can specifically waive any need for a guardian or Trustee to post bond, yet another reason to have a Will.

9. **My husband and I plan on having more children in the future. Should we wait until we're finished with kids before doing Wills?**

   The Wills can be written to account for all current children, and all children born or adopted after the Wills are signed. Thus, there would be no need to later amend the Wills in that regard.

10. **Do both spouses need to do wills, or is there only one will per married couple?**

    Each individual needs to do his or her own Will.