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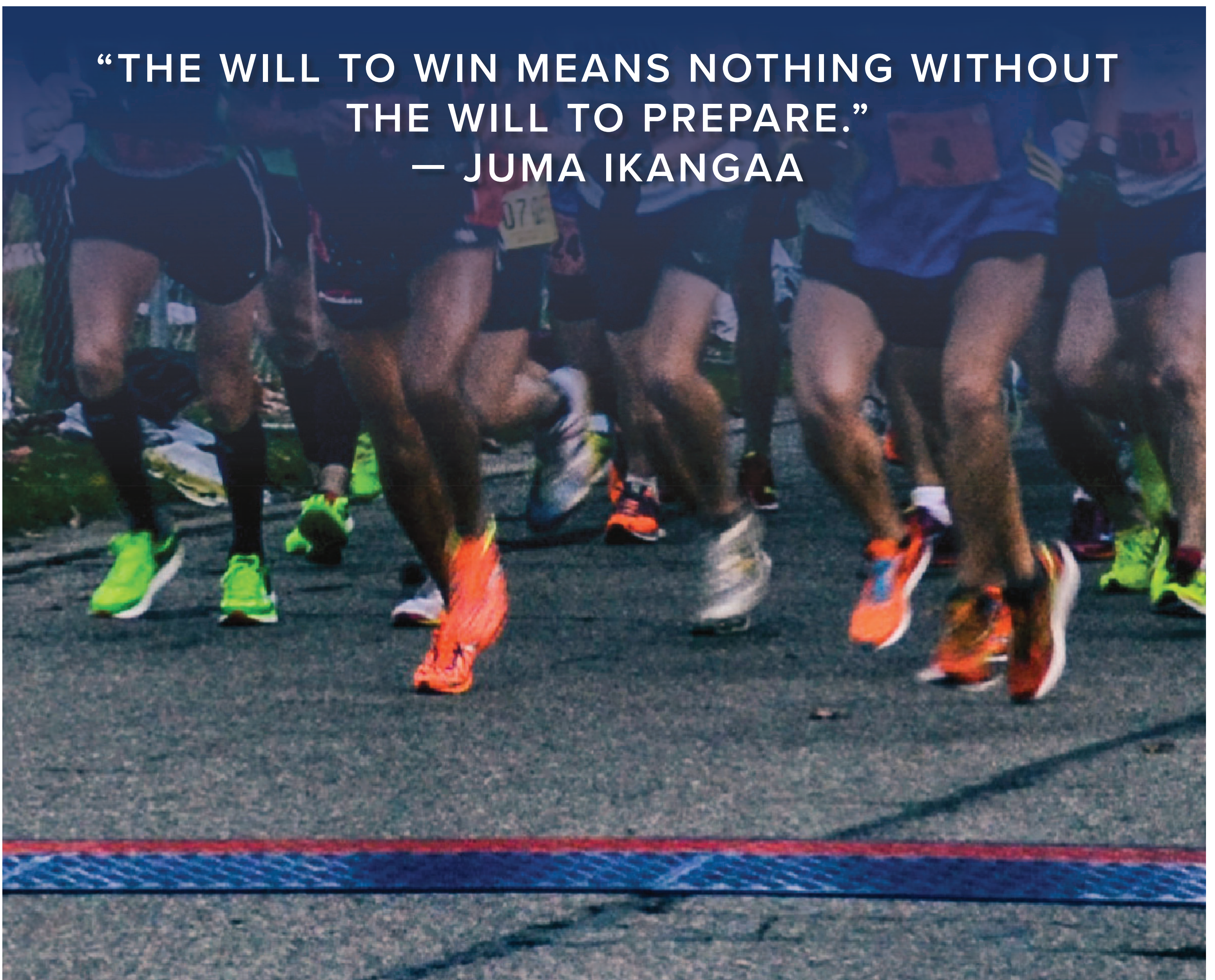
ESTATE PLANNING

YOU HAVE TO START IN ORDER TO FINISH.

BY JONATHAN J. DAVID J.D.



Estate Planning: You Have to Start in Order to Finish

Learn the basics in this short book addressing common estate planning questions

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About the Author

Jonathan J. David ("Jay") – Jonathan David is an estate planning attorney in Grand Rapids, he has prepared a wide variety of lifetime and estate planning related documents, including; wills, durable powers of attorney for both financial and health care matters, living wills, DNRs, authorizations for use and disclosure of protected health information under HIPAA, and a variety of different types of trusts. He also represents personal representatives during the administration of a decedent's probate estate and trustees during the administration of a decedent's trust.

Jonathan is also a published author on estate planning issues. He regularly contributes a legal question-and-answer column through a national news service for senior publications, as well as a regional print and online publication and has written and published ***Estate Planning: The Basics.***

Table of Contents

About the Author 2
Introduction 4
Common Terms 5
  Commonly Asked Questions 7
  Do I Need a Will? 7
  How Many Documents Do I Need? 8
  Who can be a Witness for a Will Signing? 9
  Business Owners and Estate Planning 9
  Is it Necessary to Update Estate Planning Documents after a Spouse Passes Away? 10
Probate 12
  Should I be Concerned about Probate? 12
  Probate Avoidance 13
  Does Having a Will Avoid Probate? 14
  Do I Need a Will if I have No Probate Assets? 15
  Is a Will Necessary if you have a Trust 15
  Are Assets Outside of Trust Subject to Probate? 16
  Transfer on Death Designations 17
  Retaining Assets in Joint Names or Transferring Them to Trust? 19
Durable Power Of Attorney 20
  Commonly Asked Questions 20
  Limitations Without Power of Attorney 21
  Disadvantages of Durable Power of Attorney 21
  Durable Power of Attorneys Differ by State 22
  Two Types of Durable Power of Attorneys for Financial Matters 22
  Financial vs Health Care Durable Power of Attorney 23
  When Does the Durable Power of Attorney Terminate? 23
  Banks Must Comply with Durable Power of Attorney 24
  Changing the Agent on your Durable Power of Attorney 24
  Power of Attorney and HIPAA for Young Adults 25
Marriage and Children 26
  Joint Trusts in Second Marriages 26
  Dividing Assets Equally Among Children 28

Setting Up a Trust for Children 29
Loaning Children Money 30
Disinheriting a Child 31
Insurance 32
What happens when a Beneficiary is No Longer Living? 32
How Does Putting a House in a Trust Affect Insurance? 32
Is Life Insurance Taxable? 33
What Happens When the Will or Trust Beneficiary doesn't match the Insurance Beneficiary? 34
Gifting and Tax Rules 36
2021 Gift Rules 36
Estate Larger than Tax Exempt Amount 36
Pet Trusts 37

Introduction

Why Plan? To empower and protect the ones you love.

Estate Planning: You Have to Start in Order to Finish was created as a guide to help you better understand the estate planning process. In this book we will cover commonly asked questions on topics such as: durable power of attorneys; wills; trusts; living wills; insurance; gifting and tax rules; children and marriage; pet trusts; and how to avoid probate.

This book is written in a question and answer format. Many of the questions and answers included are taken from legal columns the author has written on this subject matter since 1992. Please note that the information provided in this book does not constitute legal advice. If you have a question you would like addressed, you are encouraged to contact the author, Jonathan J. David, at jdavid@fosterswift.com or 616.726.2243.

ONE

Common Terms

Estate Planning

The process of (i) establishing who will act for a person during that person's lifetime if he or she is incapacitated, and upon death during a probate and/or trust administration, and (ii) determining who is to receive a person's estate upon that individual's death and preparing the necessary documents to accomplish these goals.

Fiduciary

In the context of estate planning, a fiduciary is someone an individual appoints to act on behalf of that individual, as well as the beneficiaries named by that individual in his or her estate planning documents. Examples of fiduciaries include, the personal representative named in a person's will, the agent named in a person's durable power of attorney for financial matters, the patient advocate named in a person's health care durable power of attorney, and the trustee named in a person's trust.

Last Will and Testament

- **Last Will and Testament.** A written instrument which allows a person, among other things, to name the beneficiaries who are to inherit that person's (testator's) estate.
- **Codicil.** An instrument that amends certain provisions of a will.
- **Pour-Over Will.** A will used in conjunction with a trust, which names the trust as the beneficiary of any assets that are subject to probate.
- **Personal Representative and Executor.** These terms mean the same thing and is the person or entity which is in charge of administering a deceased individual's estate if a probate administration is required. Some states use the term "executor" and other states use the term "personal representative".
- **Testator.** The person who writes a will.
- **Testate and Intestate.** A person who dies having made a last will and testament is deemed to have died testate. A person who dies without having made a last will and testament, is deemed as having died intestate.
- **Probate.** The court supervised process of proving the validity of a decedent's last will and testament, if there is one, as well as providing for the payment of the decedent's creditors and distributing the balance of the decedent's assets to the beneficiaries named in the will or pursuant to state law if there is no will. Probate is required any time an individual dies owning assets titled in his or her name alone. A common misconception is that probate can be avoided by preparing a last will and testament. This is not true. Having a will has no bearing on whether probate will be required when an individual dies.

Power of Attorney

- **Power of Attorney.** A written document created by an individual (the "principal") designating another person (the "agent") to act on behalf of the principal. It terminates automatically upon the principal's disability.

- **Durable Power of Attorney.** A written power of attorney which ***does not*** automatically terminate upon the principal's disability. Instead, it is designed to be used during the principal's disability and *will not* terminate until the principal's death. In order to make a power of attorney a durable power of attorney, special language needs to be inserted in the power of attorney which in essence states that the durable power of attorney shall not be affected by the principal's disability.

- **Financial Durable Power of Attorney.** A durable power of attorney that authorizes another person (known as an agent or attorney in fact) to act on behalf of the principal regarding certain specified business, financial and legal matters. This instrument can be written so that it either becomes effective immediately upon being signed or only upon the principal becoming disabled.

- **Health Care Durable Power of Attorney.** A durable power of attorney that permits an individual (known as an agent or patient advocate) to make health care decisions on behalf of the principal. This instrument *only* becomes effective upon the principal's inability to make health care decisions on his or her own behalf.

- **Living Will.** Also known as an advance directive, is not a will at all but a statement or declaration of what type of end of life medical treatment a person wants to receive, including life support, in the event he or she has a terminal illness, or is in an irreversible coma or persistent vegetative state. This instru-ment is typically given in conjunction with a health care durable power of attorney.

Trust

- **Revocable Living Trust (also known as Revocable Trust or Inter-Vivos Trust).** This is a trust created by a person (known as the "settlor" or "grantor") during his or her lifetime, which holds and manages assets on behalf of, and distributes assets to, the beneficiaries named in the trust. If the settlor transfers assets to the trust during his or her lifetime, those assets will avoid probate upon the settlor's death.

- **Joint Revocable Trust.** A revocable trust which is prepared by a husband and wife. This type of trust only becomes irrevocable upon the death of the last to die of the husband and wife.

- **Irrevocable Trust.** A trust that a person creates during lifetime (i) which becomes irrevocable at its inception, or (ii) which becomes irrevocable upon the individual's death or legal incapacity, such as a revocable living trust an individual created during his or her lifetime.

- **Settlor and Grantor.** These terms mean the same thing and is the person who creates a trust.

TWO

Commonly Asked Questions

Do I Need a Will?

DEAR JONATHAN: My husband died six months ago. We didn't have much but everything we had we held in joint names. Consequently, upon the advice of a family member some time ago, we never bothered to prepare wills because we were told that the survivor of the two of us would own everything so there was no need to have a will. Now that my husband has passed away, do you recommend that I now have a will? Also, I have received several telephone calls and letters from two different credit card companies threatening to turn me over to collection if I don't pay several thousand dollars in credit card charges my husband incurred prior to his passing. Unfortunately, my husband was a serial spender and left me with a mountain of debt. Am I responsible for his credit card balances even though the cards are only in my husband's name?

JONATHAN SAYS: I am sorry for your loss. To answer your first question, yes you should prepare a last will and testament and you should also consider preparing several other estate planning documents which I will discuss below. As you probably know, the purpose of a last will and testament is to allow you to name the beneficiaries of your estate upon your death. If you fail to have a will in place at the time of your death, your assets will pass according to state law which may not be consistent with how you want your estate to be distributed. Consequently, I encourage you to prepare a will so that you (and not the state) control who is to receive your estate upon your death.

In addition to a last will and testament, you should also have a financial durable power of attorney and a health care power of attorney. These powers of attorney allow you to name someone to act on your behalf should you become disabled and unable to handle your financial matters or health care decision making. Without having these documents in place, should you become disabled, someone would have to petition the probate court in your county to have a guardian and conservator appointed on your behalf. This takes time and money, and necessitates involving the probate court, all of which can be avoided by preparing these documents ahead of time.

Also, along with the health care power of attorney, if you don't want to be kept alive on life support in the event you suffer a catastrophic illness, you can prepare an advance directive or living will where you can specify what type of medical treatment you want to receive in that event. For example, you can indicate in an advance directive or living will that you don't want to be kept alive on life support in the event you are declared to be brain dead.

Finally, you may also want to consider setting up a trust for the purpose of holding your assets. At the time of your death, any assets titled in your name alone will need to be probated and that is where the trust comes in. If you set up a trust while you are alive and then retitle otherwise probatable assets to your trust, then upon your death, since those assets are not titled in your name anymore, they will not need to go through probate.

Besides the benefit of probate avoidance, a trust can benefit you in other ways, such as providing for children who are minors. For example, in the trust you can direct the trustee to manage the trust assets on behalf of your minor children and indicate at what ages and under what circumstances the trustee is to distribute the assets to those children.

Regarding your credit card question, if the credit cards were only in your husband's name, then you should not be legally responsible for those credit card balances. However, even though you may not be legally responsible

for that debt, you may be morally responsible if those cards were used to make purchases which personally benefited you, which, of course, is something that you will have to decide.

I encourage you to meet with an estate planning attorney to further discuss the benefits of engaging in estate planning and who can go into more detail regarding the documents I discussed herein. I would also consult with this or another attorney about your liability regarding your husband's credit card debt, and if necessary, he or she can intervene on your behalf with the credit card companies. I wish you the best of luck in your endeavors.

How Many Documents Do I Need?

DEAR JONATHAN: I went to see a lawyer because I wanted a simple will drawn up. By the time I was done, not only did I have a will, which was not the least bit simple, but I had a financial durable power of attorney, a health care power of attorney, a living will, a trust, and a rather large bill from the lawyer. I was shell shocked. Do I really need all of these documents or was I scammed by the lawyer?

JONATHAN SAYS: Generally speaking, a will, a financial durable power of attorney and a health care durable power of attorney are estate planning staples that everyone, regardless of their circumstances, should consider having.

A will allows you to name, and as a result control, who is to receive your estate upon your death, and I am assuming that was your original purpose for wanting to prepare a will.

A financial durable power of attorney is a written power of attorney which allows you to name another person to act for you if you cannot act for yourself regarding your financial and property matters. Although it's primary purpose is to allow someone to act for you if you cannot act for yourself due to a disability, it can also be prepared in a manner so that it can be used at any time even if you are not disabled.

A health care durable power of attorney is a power of attorney which allows you to name another to act as your patient advocate in the event you cannot act for yourself regarding your personal and health care matters. Both financial and health care durable power of attorneys are critical to have because should you become disabled without having them in place, there would be no one with legal authority to act on your behalf. In that instance, someone would have to petition the probate court in your county of residence for the purpose of having a guardian, for your personal and health care matters, and a conservator, for your financial matters, appointed on your behalf. By having these durable power of attorneys in place prior to becoming disabled, you avoid having to involve the court for the purpose of having a guardian and a conservator appointed on your behalf.

The other two documents you mentioned are a living will and a trust. The living will is a document which allows a person to indicate what type of medical treatment is to be administered in the event that person is terminally ill or in an irreversible coma, i.e., brain dead. It is typically prepared in conjunction with a health care durable power of attorney.

If you don't care about leaving instructions as to what type of medical treatment you are to receive in either of those instances mentioned above and you are okay with your patient advocate making those decisions on your behalf, then it is not necessary to have a living will. In my experience, however, most people want to relieve their patient advocate from having to make those types of decisions so they opt to prepare a living will.

Whether a trust is called for is determined by a variety of different circumstances. Typically, a trust is recommended if someone has minor children and there is a desire for the trust to invest, manage and control the children's inheritances until they reach a certain age at which point those inheritances can be distributed out to them. Another reason a person sets up a trust is so that his or her estate will avoid probate upon his or her death. By re-titling an individual's probatable assets into the name of their trust, those assets will avoid having to be probated when the individual dies. There are various other reasons why a lawyer might recommend a

trust, however, without knowing your particular circumstances, it is impossible for me to tell you whether a trust should have been included as part of your overall estate plan.

Hopefully, the information I have provided will give you a better understanding of the purposes of those documents which were prepared for you and why they were included as part of your estate plan.

If you have further questions or concerns as to why your lawyer recommended and prepared these documents on your behalf, I would encourage you to call him or her and discuss those concerns.

Who can be a Witness for a Will Signing?

DEAR JONATHAN: I am naming my sister as one of my beneficiaries in my last will and testament. I am signing the will at my home since it is hard for me to get out. I know I need to have two witnesses. My question is whether my sister can act as one of those witnesses.

JONATHAN SAYS: It depends upon the law of the state in which you live. Some states, like Michigan, for example, allow interested parties, i.e., someone who is named as a beneficiary in the will, to also act as a witness without invalidating the gift to that individual; some states do not. You need to check with an attorney in your state as to the laws and requirements of your state when it comes to witnessing wills.

Business Owners and Estate Planning

DEAR JONATHAN: I am a widower and 50 percent owner of a small business which employs two of my children. I am at retirement age now, however, I am not ready to stop working quite yet. I am thinking that I should probably update my estate plan because the last time I did this was over 30 years ago when my wife was still alive.

Another reason that I want to update is that my children who work at the company have expressed an interest in receiving my ownership in the business after I am gone, so I want to make sure I address that in my plan. Does this make sense? Do you have any thoughts on what type of documents I need?

JONATHAN SAYS: Yes. Estate planning is something everyone should engage in and small business owners are no exception. A typical estate plan includes a last will and testament, financial and health care durable powers of attorney, a living will (if appropriate), and many times a trust.

A financial durable power of attorney and health care durable power of attorney are important because they allow you to name an agent, in the case of a financial durable power of attorney, and a patient advocate, in the case of a health care durable power of attorney, to act for you if you can't act for yourself. The financial durable power of attorney is especially important for a small business owner because you as the owner can name an agent of your own choosing to make decisions on your behalf, including business-related decisions, if you are unable to act for yourself. Without having this document in place, a conservator would need to be appointed for you through a probate court proceeding before any decisions could be made on your behalf.

A will and a trust are important because they each allow you to control who is to receive your assets upon your death. Without a will and/or trust, you don't control who receives your assets at your death because your assets, including your ownership in the business, will pass in the manner required by state law. One of the advantages of having your assets distributed to your beneficiaries through a trust is that any assets that are titled in the name of your trust either at the time of or as a result of your death avoid probate; assets that pass pursuant to a will have to be probated before being distributed to your beneficiaries. Besides protecting trust owned assets from probate, a trust allows you to name the beneficiaries of your assets, including your business interest, at your death, and if there is more than one beneficiary, what percentage of the business each is to receive. Also, if you have other children who are not involved in the business, you can name the involved

children as beneficiaries of the business interest and the non-involved children as beneficiaries of other non-business related assets.

In addition to the aforementioned estate planning documents, you and the other owner or owners of the business should consider entering into a buy/sell agreement, which requires a business owner's interest in the company to be sold upon the happening of certain events such as death. This benefits the remaining business owners because in most cases they do not want to go into business with a deceased business owner's family members if those family members aren't already involved in the business. This also benefits the deceased owner's family members because they would rather have the cash value of such business interest than the business interest itself. Consequently, a properly prepared buy/sell agreement will provide that upon a business owner's death, his or her interest in the business is to be purchased by the business itself or the remaining business owners. Of course, in your case, since you have children working in the business who may want to become owners at some point, you will need to carve out an exception in the buy/sell agreement which would not require the sale of your ownership interest in the company at your death, allowing you instead to transfer that interest to those children upon your death.

I encourage you to consult with an estate planning professional who can go into much more depth into how to properly put your estate plan together, as well as a business succession plan.

Is it Necessary to Update Estate Planning Documents after a Spouse Passes Away?

DEAR JONATHAN: My wife passed away last year just a few months after we had updated our estate planning documents. The attorney who prepared the documents on our behalf has recommended to me that I engage in yet another update of my estate planning documents for the purpose of removing my wife from the documents as the primary beneficiary and as the primary fiduciary. I guess I kind of understand why he is recommending this, however, in all of our documents we named our children as back-up beneficiaries and fiduciaries.

Consequently, it seems to me that if I did nothing, it would be fine because all my kids are already included. Is there another reason why my attorney is recommending that I update my documents, or is this just another way for him to generate a fee?

JONATHAN SAYS: Since I have not reviewed your estate planning documents and was not privy to the discussion you had with your attorney, I don't want to second guess his advice to you. Having said that, I too typically recommend to my clients that when a spouse dies that the surviving spouse update his or her estate planning documents to remove all references to the deceased spouse as a beneficiary and/or fiduciary. This just makes for a cleaner set of documents and also proves to be helpful in cases when it is necessary to use the financial and/or health care power of attorney on your behalf.

For instance, if you named a child as a back up to your spouse under your financial durable power of attorney and you need that child to begin acting on your behalf, before that child could act, he or she would have to prove to a third party that your wife is deceased and that child is the next in line fiduciary you have appointed to act on your behalf. Although your child could certainly provide the necessary proof to a third party, via a death certificate, if you have an updated document whereby your spouse was never named to begin with, your child would not have to jump through those hoops in order to act for you.

My recommendation is to follow your attorney's advice and update your documents. This will bring them current and make it easier for your children when it comes time for one of them to act on your behalf.

DEAR JONATHAN: I have a friend whose husband is suffering from terminal lung cancer and is not expected to live much longer. As you can imagine, my friend is not handling this very well. Although she and her husband had the foresight to get their estate planning in order, I know from having had to deal with my own husband's death several years ago, that there are many things that she will need to address after he passes away, and I

know that this will be an overwhelming burden for her to have to deal with. Is there anything you can offer as a general summary which might make this process easier for her?

JONATHAN SAYS: I am sorry to hear about your friend's husband. You are absolutely correct that the things a person has to deal with after a spouse passes away can be burdensome and emotionally overwhelming. Hopefully, she has a good team of advisors who will be able to help guide her through this process. Of course, her immediate concern would be arranging for her husband's funeral and burial.

After the funeral, she should:

- Contact the Social Security Administration and apply for survivor benefits. Many funeral homes will take care of this as part of their services.

- Meet with the attorney who prepared the estate planning documents to determine whether her husband's estate needs to be probated, which would be the case if he died with any assets titled in his name alone.

  If probate is required, she will need to initiate probate administration with the attorney's help. If no probate is required, but her husband had a trust, then she should initiate trust administration with the attorney's help.

- Notify her husband's creditors and pay any undisputed bills for which his estate is legally responsible. If there is either a personal representative or a trustee involved, however, one of those fiduciaries should be the one to handle the notice to creditors and the payment of her husband's debts.

- Meet with the financial advisor(s) who managed hers and her husband's investments to determine whether her husband had any IRAs, annuities, or other tax deferred investments of which she was named the beneficiary, and if so, review her options as to how to obtain her beneficial interests in those investments.

- Apply for the benefits of any life insurance policy insuring her husband's life of which she was named as the beneficiary.

- Alert credit reporting agencies of her husband's death.

- If her husband was employed, contact the human resources department of her husband's employer to determine whether there are any death benefits to which she is entitled and for which she should apply.

- Retitle any assets that were titled in her and her husband's joint names into her sole name.

- Locate her husband's user names and passwords to access computer online accounts.

- Cancel her husband's credit cards, club memberships, cell phone plan, magazine subscriptions, etc.

- Cancel doctors and/or other appointments that have been scheduled for her husband.

- Remove and replace her husband as the beneficiary of any of her investments such as life insurance policies, annuities, and IRAs.

- Update her own estate planning documents for the purpose of bringing them current and removing her husband as a fiduciary and/or beneficiary, if necessary.

The above list is some of the more common matters that need to be addressed by a surviving spouse when his or her spouse passes away and is by no means meant to be exhaustive. I recommend that your friend meet with the attorney who drafted hers and her husband's estate planning documents as soon as possible so that that attorney can address in more depth the various matters, some of which are time sensitive, that need to be addressed due to her husband's death.

THREE

Probate

Should I be Concerned about Probate?

DEAR JONATHAN: I am a divorced mother of two children. My financial advisor is pestering me to create a trust for the purpose of holding my assets for probate avoidance. However, I am really not interested in creating a trust and I am not all that concerned with having my estate being probated. The only thing that matters to me is that my children get whatever is left of my estate in equal shares, and if my assets have to be probated first before that happens, so be it. Am I wrong in thinking this way?

JONATHAN SAYS: Not necessarily; there is no right or wrong answer here. What's more important is that you are making an educated decision as to whether to create a trust or not. If probate avoidance is truly not a concern of yours, and you don't mind having your estate pay the fees associated with probate, which include, court filing fees, an inventory or appraisal fee based on the size of your estate, executor or personal representative fees, and attorney fees which will be incurred in having an attorney represent the executor/personal representative of your estate during the probate administration, then there is nothing wrong with opting not to prepare a trust. Having said that, however, it is difficult to give you a specific answer to your question without having more information. For instance, how large is your estate? If it is sizable, that will only cause the cost of probate to go up because the inventory fees that are paid to the probate court are based on the value of your assets. Consequently, the more your estate has in value, the more your estate will have to pay in inventory fees. While you may not consider this to be a determining factor, when you add those fees to the executor/personal representative fees and attorney fees incurred during probate, that is money that could have been saved if probate had been avoided.

A more critical question to ask is what are the ages of your children? Are they adults or are they minors? This is important because if they are minors and you don't have a trust, then whatever assets a child is entitled to receive will need to be held in a conservatorship account on that child's behalf until he or she reaches the age of majority, i.e., becomes a legal adult, which is between the ages of 18 and 21 depending on what state you live in. At that time when your child becomes a legal adult, whatever share to which he or she is entitled will be distributed to him or her outright. Consequently, if you have a large estate and you don't have a trust, then you would be putting a lot of money into the hands of an 18 or 21-year-old who may not be mature enough at that age to receive a sum of money that large. If you had a trust, however, you could require that a child's trust share be distributed to him or her in increments over a series of ages, which would give the child time to mature and gain some experience in the real world before being given a large sum of money. In the meantime, funds would be available for the child's health, education, maintenance and support.

If you decide not to create a trust, you will want to at least prepare a last will and testament so that you can direct that your estate be distributed to your children in equal shares upon the completion of probate. If you die

without a will, then your estate would be distributed to your heirs according to the laws of the state in which you live.

If all of your children survive you, then the result would probably be the same whether you had a will or not, however, if any child predeceases you, you can name an alternate beneficiary in your will who is to receive that deceased child's share, which might be someone different than who would receive that deceased child's share under your state's law if there was no will.

Before making your final decision, I suggest that you meet with an estate planning attorney who can review with you the pros and cons of preparing a trust in a general sense, as well as specifically in your particular circumstances, upon which you can then make an educated decision as to whether preparing a trust makes sense for you.

Probate Avoidance

DEAR JONATHAN: I just completed the probate of my late brother's will. I was the personal representative he appointed to act on behalf of his estate. This was not a pleasant experience and in fact was quite the opposite and made me realize that I don't want to put my family through anything like this at my death. My wife and I don't have a large estate, but we are comfortable and I want to make sure that everything I own goes to my wife first and then to my kids upon her death without having to go through probate first. What do you recommend we do to avoid probate at either of our deaths?

JONATHAN SAYS: I am sorry that you had such a poor experience in acting as personal representative of your brother's estate. To answer your question, there are three ways probate can be avoided at your death. The key is making sure that you do not hold title to any assets in your name alone at the time of your death and for those assets where beneficiary designations are permitted, that you in fact name both a primary and a contingent beneficiary. The ways probate can be avoided are more fully explained below:

- Jointly Titled Property. Any jointly titled property between a husband and wife will avoid probate at the death of either the husband or the wife and the survivor of the two of them will become the sole owner of those assets at the first spouse's death. The risk of utilizing this approach is that if the husband and wife die in a common accident, then those assets will need to be probated in the estate of the spouse who is considered to have been the last to die. Even though it is unlikely for spouses to die in a common accident, it does happen, and if you want to avoid the potential of a probate estate, then you should not rely on the joint ownership method to avoid probate. Further, even if one spouse survives the other and there is no probate required at the first spouse's death, a probate will be necessary upon the death of the surviving spouse if he or she has any assets titled in his or her name at the time of death.

- Naming a Beneficiary. Another way that probate can be avoided is if an asset contractually passes to a named beneficiary when the owner passes away. So long as that beneficiary is living at the time of the owner's death, that asset will pass automatically to the beneficiary without having to go through probate. For example, if you own a life insurance policy, the death benefits of that life insurance policy will not be probated in your estate so long as you have named a beneficiary to receive those death benefits and that beneficiary is living at the time of your death. In that event, the proceeds of the life insurance policy will be paid directly to that beneficiary without going through probate.

  You should always name a primary and a contingent beneficiary so that if the primary beneficiary is no longer living, there is a backup beneficiary to receive the death benefits.

  You may also be able to set up investment accounts so that they transfer on death to a beneficiary you have named on those accounts. This is known as a TOD (transfer on death) or POD (payable on death) designation.

- Revocable Living Trust. The safest and most common way people insure that their assets avoid probate at death is to set up a revocable living trust while they are alive.

  The first step is for a person to create a living trust. Once the trust has been created, the next step is for the settlor (also known as “grantor”) of the trust to retitle his or her assets in the name of the trust. For example, if a bank or a brokerage account or a home is titled in the settlor’s name alone, he or she would retitle those accounts or home in the name of the trust.

  Once those assets are titled in the name of the trust, they will not be required to be probated upon the settlor’s death because he or she no longer owned them. Also, with a living trust, even though the assets have been retitled to the trust, the settlor does not lose any control of those assets during his or her lifetime; the assets were simply retitled for probate avoidance purposes.

  Since you are married, you and your wife could set up a joint living trust and retitle certain of your joint and individually owned assets to that trust for probate avoidance purposes.

I recommend that you meet with an estate planning attorney who can go over these concepts in more detail with you and help you devise an estate plan that will make sure that probate is avoided at either yours or your spouse’s death.

Does Having a Will Avoid Probate?

DEAR JONATHAN: My wife and I prepared wills several years ago. We thought by doing so that we were avoiding probate which was the main purpose why we prepared wills. However, a close friend of ours recently died and her estate is now being probated even though she prepared a will. This came as quite a shock to us as we thought we had everything covered. Could you please shed some light on this?

JONATHAN SAYS: Yes. Unfortunately, many people share the same misconception that by preparing a last will and testament probate can be avoided. Whether probate will be required has nothing to do with whether you have a will. Whether you have a will or not, probate ***will be*** required for any asset titled in your name alone and which does not automatically pass to a beneficiary upon your death. Probate ***will not*** be required for assets (i) which are jointly titled with full rights of survivorship between non-married individuals or titled in the name of a husband and wife; (ii) which name a beneficiary to receive those assets upon the owner’s death and the beneficiary survives the owner; or (iii) which have been retitled in the name of a revocable living trust during the trust creator’s lifetime.

I recommend that you make an appointment with an estate planning attorney who can discuss this with you in more detail.

DEAR JONATHAN: My mother died approximately one month ago and despite my diligent efforts, I have yet to locate her last will and testament. Isn’t the estate now subject to probate? What do I do?

JONATHAN SAYS: Whether your mother left a last will and testament or not has nothing to do with whether a probate is required of her estate. Probate will be required if, at the time of your mother’s death, she owned any assets in her name alone.

If that is the case, then a probate estate must be opened up on her behalf even if she had a last will and testament. If, on the other hand, she did not have any assets titled in her name alone at death, then no probate will be required.

If, based on the facts present in your mother’s case, it is clear that her estate needs to be probated, I recommend that you meet with a probate attorney in the state where your mother lived who can review all of this with you in further detail and help guide you through the legal process.

Do I Need a Will if I have No Probate Assets?

DEAR JONATHAN: I recently updated my estate planning, which included a new will, as well as a revocable living trust.

I decided to go with the trust because I want to make sure that my estate is not probated at my death. I recently read that if all of your assets avoid probate, you don't need to have a will because the will only controls assets you have to probate. Is this true? If so, why did my attorney insist on me preparing a will along with my trust?

JONATHAN SAYS: The article you read is correct in that a will only controls the disposition of assets that are known as "probate assets". Probate assets are assets titled in a decedent's sole name and which are not payable or transferred at death to a beneficiary or subject to any other type of beneficiary designation. If a decedent has no probate assets, then no probate proceeding will be required and the decedent's last will and testament will have no effect in that instance*.

Even though a will is technically unnecessary if there is no estate to probate, your attorney was correct in having you prepare one because there is no guaranty that at the time of your death there will be no probate estate. In other words, even if you have successfully retitled all of your assets to your trust so that if you died today there would be no estate to probate, there is no guaranty that that will be the case five or ten years down the road. Over that span of time, you might acquire new assets which you title just in your name, and in that event, those assets will need to be probated when you die. If that happens, you will want to have a will in place to direct those assets to your trust upon the completion of probate. The type of will that would be created in conjunction with a revocable living trust is known as a "pour over" will because upon the completion of probate it "pours over" the assets that were probated to the trust. If you fail to leave a will and you have a probate estate, then upon the completion of probate those probated assets will not end up in your trust but instead will pass to those individuals directed by state law *and not by you*.

*Even if there is no estate to probate, a will is important to have if you have minor children because in that will you can name a guardian and conservator for those children. If you don't have a will or fail to name a guardian and conservator another way (some states permit the appointment of a guardian and conservator outside of a will), there would need to be a court proceeding to appoint a guardian and conservator for your children.

For the reasons stated above, it is always a good idea and is standard practice to prepare a will in conjunction with a revocable living trust.

Is a Will Necessary if you have a Trust

DEAR JONATHAN: My husband and I recently completed our estate planning. We were able to save a lot of money by downloading forms from the internet. The forms were pretty straight forward and after doing our own research we feel very comfortable with what we did. One thing we chose not to do, however, was to prepare wills which we didn't feel were necessary because we created a trust. It is our understanding that if we have a trust our assets are protected from probate and a will isn't necessary. Are we on the right track?

JONATHAN SAYS: First of all, although this is self-serving, I never recommend that people engage in do-it-yourself estate planning. Estate planning can be a complicated process and the documents used to create an estate plan can also be quite complicated. Trying to prepare estate planning documents on your own will most likely lead to mistakes and sometimes serious mistakes. Further, estate planning forms you find on the internet cannot be relied upon to address your specific concerns, are oftentimes poorly drafted and may not even comply with the laws of your state. I would encourage you to consult an estate planning attorney to make sure that whatever documents you prepared are sufficient for your purposes and are valid under the laws of your state.

As for your specific question, you should always have a last will and testament regardless of whether you have a trust. Having a trust allows you to retitle assets to that trust during lifetime and if you do that those assets avoid probate at your death. However, if, at the time of your death, you have any assets titled in your name alone, then those assets will need to be probated, and if you don't have a will, upon the completion of probate, those assets will pass pursuant to state law and not to the beneficiaries of your own choosing. This is because when you die without a will you are deemed to have died "intestate" and the state gets to decide who receives your assets. Consequently, if you want to make sure that all of your assets eventually pass into your trust, each of you will need to prepare wills naming your trust as the beneficiary of any assets that need to be probated.

I also want to be clear that simply creating a trust alone does not by itself protect your assets from probate. Creating the trust is simply the first step. Once you have created the trust, the next step is for you to make sure that assets are retitled in the trust name. Also, for those assets which allow a beneficiary to be named such as life insurance, you might want to consider having the trust named as either the primary or contingent beneficiary. Because retitling assets can be complicated, especially when real estate is involved, I suggest that you consult with an estate planning attorney who can help make sure that your assets have been properly retitled and/or beneficiary designations have been properly made (or changed) naming the trust as a beneficiary.

Are Assets Outside of Trust Subject to Probate?

DEAR JONATHAN: My mother, who was a widow, passed away earlier this year. In going through her papers, I found a living trust she had prepared in 2014 leaving her entire estate to me. Although I was somewhat surprised that she did not provide anything to my three siblings, it wasn't a total shock because she wasn't on the best of terms with them, they are all financially well of and I have always been the "go to" person when she needed help with anything. My siblings are not amused, however, and they have threatened to take me to court. The other thing I learned in going through my mother's papers is that her home and her investments, which are substantial, are all still titled in her name and my father's name, who passed away a few years back. My question is how do I get those assets transferred to the trust so that they then can be transferred to me?

JONATHAN SAYS: First of all, probate is required any time a person dies leaving assets titled in his or her name alone. Consequently, your mother's estate will need to be probated because, as you indicated, her home and investments were jointly titled between your father and her, which, because he is deceased, means that those assets were titled in your mother's name alone. Where those assets will be distributed upon the completion of probate will depend upon whether your mother left a last will and testament or not, and if she left a will, who she named as the beneficiary(ies) of her assets upon the completion of probate.

If your mother left a will and named her trust as the beneficiary of her estate, then upon the completion of probate, all assets that were subject to probate will be distributed to the trust by order of the probate court, and once that takes place, the trust will be the owner of those assets. How and when those assets are distributed to you will be controlled by the trust agreement.

If, on the other hand, your mother left a will, but did not name her trust as the beneficiary, then upon the completion of probate, those assets subject to probate will never end up in the trust and instead will be distributed to the beneficiary or beneficiaries named in the will.

If your mother did not leave a will, then she will be deemed to have died intestate, and her assets that were subject to probate will pass to the heirs who are entitled to receive her estate under the laws of the state in which she lived at the time of her death. You didn't indicate whether your mother had any other assets besides her house and investments, but the only assets that will be controlled by your mother's trust are assets that were already owned by the trust at the time of her death, assets that automatically pass to your mother's trust at her death as a result of the trust being named as the beneficiary of those assets, such as the proceeds of a life insurance policy, and those assets that were subject to probate that will pass to the trust upon the completion

of probate. If your mother did not retitle any of her assets to her trust prior to death and did not name the trust as the beneficiary of any of her assets, or name the trust as the beneficiary of her estate in her will, then the trust will be unfunded and ineffective, and as a result you will receive nothing from the trust because it has no assets to distribute to you.

I suggest that you meet with the estate planning attorney who prepared her trust to determine whether she left a last will and testament, and whether or not her trust was funded with other assets at the time of her death or will receive any assets as a result of her death. At the same time, this attorney can review with you what else needs to be done regarding your mother's estate going forward.

DEAR JONATHAN: My mother, who was a widow, passed away several months ago. Thankfully she prepared a trust and transferred her assets to that trust so that there would be no probate to deal with at her death. While in the process of cleaning out her house, I came across a folder with several stock certificates of publicly traded companies which are titled in both of my parents' names as husband and wife. I was quite surprised to come across these since I wasn't aware they owned stock in any of these companies. I have already checked, and all of the companies are still in business and the stock has a combined value of just under $100,000. Since I was the agent under her durable of attorney, can I use that document to transfer the stock to her trust now, or is there a different or better way to transfer the stock so there are no probate issues?

JONATHAN SAYS: The good news is that the size of your mother's estate just grew by $100,000. The bad news is that you will need to open up a probate estate for that stock.

When your father passed away, all that stock automatically became your mother's without the necessity of probate because that stock was titled in both of their names. However, now that your mother has passed away, in order to get that stock out of her name and to her named beneficiaries (if she had a will) or her heirs (if she did not have a will), that stock will need to be probated. Your mother's durable power of attorney is of no help to you because it automatically terminated when she passed away and cannot be used to transfer the stock after her death.

I suggest that you meet with a probate attorney who can walk you through the process of what needs to be done to probate this stock.

Transfer on Death Designations

DEAR JONATHAN: I am a widower. My only child, my daughter, is the sole beneficiary of my estate under my will. When I prepared my will, I did not prepare a trust because quite frankly I didn't feel I had a large enough estate to warrant the cost. Now I am having second thoughts because what I do have, i.e., my house and several bank accounts, I would rather have avoid probate. Short of putting my daughter's name on the title to my house and my bank accounts, is there any other way that my estate can avoid probate without my creating a trust?

JONATHAN SAYS: Depending on where you live, you may be able to accomplish probate avoidance without creating a trust. You should check with the financial institutions where your bank accounts are held to see if they permit you to name a beneficiary on those accounts. These are known as "TOD", which means "transfer on death" or "POD", which means "payable on death" designations. If either one of those designations are permitted in the state where you live, you could name your daughter as the beneficiary to receive those investments at your death.

Getting the home to your daughter upon your death without it having to be probated first might be a little bit trickier. Some states permit the use of a beneficiary deed, sometimes known as a "TOD" deed, which allows the owner to name a beneficiary to receive the property upon the owner's death. You should check with an estate planning attorney to determine whether beneficiary deeds are permitted in the state where you live.

If not, in order for your home to avoid being probated you can either (i) add your daughter's name to the title of the home now (which I don't recommend), or (ii) create a trust and then retitle your home to that trust.

DEAR JONATHAN: My wife and I have a pretty modest estate. Basically, we have our home and a couple of bank accounts. We only have one child, a daughter, who will be the beneficiary of all of our assets. We know we don't need a complicated estate plan, but at the same time, we want to make sure that what assets we do have, pass to our daughter without having to go through probate. From doing our own research, we realize that we could set up a trust and retitle our home and bank accounts to that trust. If we do that, it is our understanding that those assets avoid probate at our death. Is there any other type of plan we could put in place that would allow us to avoid probate without having to go through the expense of setting up a trust? We have some friends who are in a similar situation as us and they prepared a beneficiary deed transferring their home at their death to their children. Is that something we should consider doing? Does it work?

JONATHAN SAYS: A beneficiary deed is simply a deed that you and your wife would sign now, which names your daughter as the beneficiary of that property upon the death of the second one of you to die.

In other words, even though you are signing the deed now, it does not transfer to your daughter until the second one of you dies. Until then, you can change your mind and revoke that deed or sell the property.

You can do something similar with your two bank accounts. You can name your daughter as the beneficiary of those accounts pursuant to a transfer on death (TOD) designation upon the death of the second one of you to die.

If, upon the death of the last to die of the two of you, your home and your two bank accounts are the only titled assets you have, then by naming your daughter as the beneficiary on those bank accounts and deed you would effectively avoid probate as to those assets because they will automatically be titled in your daughter's name at that time. In this event, the trust would not be necessary because the beneficiary designations would accomplish the same thing, i.e., probate avoidance. However, in the event your daughter predeceases you, then the beneficiary designations will fail you because there will not be a beneficiary alive to receive those assets. Consequently, those assets will end up having to be probated in the estate of the last one of you to die. This is where the trust is more advantageous because you can provide for a contingent beneficiary in the trust to receive those assets in the event your daughter predeceases you.

Beneficiary deeds are not available in all states. Consequently, you will need to check with an attorney to determine whether a beneficiary deed is available in the state where you live and if it is, that attorney can discuss the pros and cons of preparing this type of deed with you in more detail. At the same time, you may want to discuss with that attorney how having a trust, as well as other estate planning documents such as a will, a durable power of attorney for financial matters and a durable power of attorney for health care matters can benefit you and your wife.

DEAR JONATHAN: I don't have much in the way of assets, but I do want what I have to go to my only child, my daughter, upon my death without going through probate. I know all about trusts and the advantages of setting up a trust, but that is not the direction I want to go in because I don't think the assets I have justify the cost of setting up a trust. All I have are a couple of bank accounts and my brokerage account with Merrill Lynch. I have divested myself of all other assets, including my home and my car. Any suggestions on what I can do that does not involve setting up a trust?

JONATHAN SAYS: You should be able to register your bank and brokerage accounts in beneficiary form. This is accomplished pursuant to a transfer on death ("TOD") or pay on death ("POD") designation. In doing so, you can designate your daughter as the beneficiary of your bank and brokerage accounts upon your death meaning you would retain ownership while you are alive, but upon your death, the ownership of those accounts would automatically pass to your daughter without having to go through probate.

You should also name a contingent beneficiary or beneficiaries to receive those assets if your daughter fails to survive you. You should contact your bank and Merrill Lynch about setting up those TOD accounts.

Retaining Assets in Joint Names or Transferring Them to Trust?

DEAR JONATHAN: Several years ago my husband and I created a trust for probate avoidance purposes. At that time, each of us transferred certain investment accounts that were titled in our individual names to the trust, but we retained everything else that we owned in joint names and did not put those assets in the trust.

We were told at the time that any jointly titled assets we owned when one of us died would avoid probate because the survivor would automatically own those assets. Consequently, we kept many of our assets in our joint names. My husband passed away a few months ago, and I am trying to decide whether I need to now transfer those assets that were jointly titled to the trust so that they too can avoid probate when I pass away, or whether I can simply add my daughter's name as a joint owner of those assets. Does it matter? What do you recommend?

JONATHAN SAYS: First of all, you are correct in that jointly titled property between a husband and wife avoids probate upon the first spouse's death. At that time, the surviving spouse automatically becomes the sole owner of those assets without the need for probate. So there was no need from a probate avoidance perspective to transfer those assets to your trust at that time. I would like to point out, however, that even though this did not end up being a problem for you, a husband and wife who retain assets in joint names do run the risk of dying in a common accident, and in that event, those assets would have to be probated, which could have been avoided if the trust owned the assets from the outset.

Without having any specific information regarding the nature of your assets, my general recommendation is to transfer those assets that were jointly owned by you and your husband to your trust so that those assets avoid probate upon your death. Before doing so, however, I recommend that you meet with an estate planning attorney and have him or her complete a thorough review of all of your assets to determine what they are and how they are titled, as well as whether any asset permits you to name a beneficiary to receive that asset upon your death. For instance, some investment accounts will allow you to name a beneficiary, in which case, you would then have the choice of actually re-titling that investment account to your trust or leaving that account in your name, but naming the trust as the beneficiary of that account upon your death. Also, there are certain assets, such as life insurance policies and IRAs, which you would not transfer to your trust; instead, you would name a beneficiary to receive the proceeds from those investments upon your death. Further, if you have a life insurance policy or an IRA which currently names your husband as the beneficiary, since he is now deceased, you will want to make sure that you name someone else, i.e., your daughter, as the beneficiary of those investments.

You also asked about the possibility of naming your daughter as a joint owner of your assets instead of actually transferring the assets to your trust. I generally recommend against this because it needlessly complicates matters. Even though you could accomplish probate avoidance by placing your daughter's name on the title to your assets, the act of adding her name to the titles of your assets would be treated as you having made a gift to her, and depending upon the value of those assets, it could be treated as a taxable gift, which would require the filing of a gift tax return. Also, by naming your daughter to the title of your various assets, you would in effect be disinheriting any other children you have. This is because your daughter would automatically own those assets outright upon your death, and she would not be legally required to share those assets with anyone. Even if her intent now is to share those assets with her siblings, there is no guaranty that she actually will, or she could die before she gets the chance, and, in that case, those assets would now become part of her estate.

Further, even if she keeps her word and shares those assets with your other children, upon doing so, she will be deemed to have made gifts to those children and if the amount of each gift is over the annual gift tax exclusion at that time, that excess would be deemed to be a taxable gift made by your daughter to each of your other children for which a gift tax return would need to be filed.

So you can see, there are many potential complications involved when you name a child as a joint owner of an asset for the purpose of avoiding probate. The easier and safer course is to transfer the asset to the trust.

FOUR

Durable Power Of Attorney

Commonly Asked Questions

DEAR JONATHAN: What happens if the person appointed as agent under a power of attorney refuses to act and the person who made out the power of attorney now has dementia?

JONATHAN SAYS: If there is no alternate agent named, the power of attorney will be ineffective and cannot be used. Consequently, someone will have to petition the probate court in the county where the individual with dementia lives for the purpose of having a guardian and conservator appointed on his or her behalf. This is why it is always a good idea to have one or two alternates named to act in the event the original named agent is unwilling or unable to act for some reason.

DEAR JONATHAN: I want my two daughters to jointly act as my patient advocates under my health care power of attorney. Is that possible?

JONATHAN SAYS: Generally speaking, yes, unless the state in which you live prohibits the naming of co-patient advocates. Even if co-patient advocates are allowed, there is a disadvantage to naming co-patient advocates who have to act together in that they both must agree on everything they do. If they cannot agree on a course of action, then until they do, they cannot make a decision on your behalf. Obviously, this can present a problem if a decision needs to be made right away. I think the better course of action is to name one of your children as the sole patient advocate and the other one as his or her back-up patient advocate.

DEAR JONATHAN: I am an elderly gentleman who is not married and has no children. Because I have become increasingly aware of my own mortality, I have decided to engage in estate planning for the first time in my life. Interestingly, I am more concerned with those documents whose purpose is to protect me during my lifetime, i.e., financial and health care durable power of attorneys, than I am with those documents that direct where my estate goes when I die, i.e., a will and trust. More specifically, I understand the importance and the need of having financial and health care durable power of attorneys, but I am not the most trusting person in the world and admittedly a bit of a control freak, and I don’t want anyone acting for me unless I no longer have the mental faculties to act for myself. Is it possible that these documents can be drafted in such a way?

JONATHAN SAYS: Yes. The health care durable power of attorney, by its nature, is not effective until you are no longer able to act for yourself, i.e., you are mentally incapacitated. A financial durable power of attorney, on the other hand, can be drafted to either be effective immediately upon execution even though your mental faculties are still intact, or only upon your disability. Consequently, you will want to make sure that when this power of attorney is drafted, it is prepared so that it is only effective upon your disability.

This type of power of attorney is known as a “springing” durable power of attorney because it is only effective or only *springs into action* upon your becoming disabled and you can no longer act for yourself.

Because this type of power of attorney only becomes effective upon your disability, it will need to have language which sets forth what type of evidence your agent named in the document will need to obtain to show that you are disabled. A determination of disability is typically done either by a court determination or by the written certification of one or more licensed physicians.

Although using a springing durable power of attorney specifically addresses your concern that your agent is prohibited from acting on your behalf until you have been declared disabled, that is also its major disadvantage because your agent cannot act for you *until* you have been declared disabled. Consequently, if you are in fact disabled but you have not yet been certified as such by one or more physicians or determined to be disabled by a court and a financial matter of yours needs immediate attention, your agent's hands will be tied until you have in fact been determined to be disabled by a court or the requisite number of licensed physicians.

I recommend that you meet with an estate planning attorney to initiate the estate planning process, at which time you can explain your concerns regarding the financial durable power of attorney. That attorney can then explain to you the pros and cons of preparing both the "springing" and "non-springing" durable power of attorneys. This will allow you to make an educated decision as to how you want to go forward in the preparation of that power of attorney.

Limitations Without Power of Attorney

DEAR JONATHAN: I am a widow and I have one daughter. A friend of mine has been encouraging me for some time now to give my daughter my power of attorney so she can act for me if necessary. My daughter is currently on all of my bank accounts and has check writing privileges, so why do I need a power of attorney?

JONATHAN SAYS: Giving your daughter check writing privileges is very helpful and convenient, but it is also very limited. Right now all your daughter can do is write checks on your behalf. However, if she were named as your agent under a durable power of attorney, not only would she be able to write checks on your behalf, she could act on your behalf in a variety of other areas, including such things as filing your tax return, signing contracts on your behalf, buying or selling stocks or investments and signing closing documents, including a deed, if you wanted to sell your home, which are just a few examples. If you should ever become disabled where you can no longer act for yourself, without a durable power of attorney, your daughter could do nothing for you other than write checks. Consequently, she would have to petition the probate court in your area to be appointed your conservator before she would be allowed to act for you. Having a durable power of attorney already in place avoids her having to do that.

DEAR JONATHAN: My spouse and I own everything jointly. Do we also need durable power of attorneys?

JONATHAN SAYS: Yes, because other than signing checks, if either one of you became disabled, the non-disabled spouse could not act on behalf of the disabled spouse. For example, if you wanted to sell your home, the non-disabled spouse could not sign the closing documents or the deed on behalf of the disabled spouse.

So, even though you own everything jointly, you still want to have durable power of attorneys in place allowing the non-disabled spouse to act on behalf of the disabled spouse without invoking a court proceeding.

Disadvantages of Durable Power of Attorney

DEAR JONATHAN: Are there any disadvantages with durable power of attorneys?

JONATHAN SAYS: Yes. First of all, since the durable power of attorney grants your agent a right of authority over you and your financial matters, if you appoint the wrong person as your agent, he or she could abuse that power. One way to minimize that problem is by setting up the durable power of attorney so that it only takes effect upon your disability. This way it cannot be used until you are in fact disabled.

Although this approach minimizes potential abuses of the durable power of attorney, it also can be a problem if your agent needs to act for you right away. This is because your agent would not be able to act until one or more physicians certify your disability, and it could take some time before your agent is able to schedule the necessary doctor(s) appointment(s). The best way to avoid any abuse of your durable power of attorney is to name someone that you trust to act in your best interests.

Another problem associated with durable powers of attorney is getting third parties to accept them. Even if the durable power of attorney is properly prepared, sometimes third parties such as a bank, the IRS or a title agency may reject it because it doesn't include certain language they require or they require that their specific form is used. Obviously, that will be a problem if you are already disabled and are not able to sign a new durable power of attorney to comply with a third party's demands.

Another problem that comes up every once in a while is if someone has not named enough back up agents in the durable power of attorney. For instance, if the agent you have named to act is no longer available to act or refuses to act at the time you become disabled, and you don't have a backup agent named, then the document ends up being useless and of no effect because there is no one to act on your behalf. Consequently, it is always good practice to name at least one or two back up agents to minimize the possibility of this happening.

Durable Power of Attorneys Differ by State

DEAR JONATHAN: My parents are coming out to visit me next month. One of the reasons for the visit is to prepare durable power of attorneys for financial and health care matters because they want me to act on their behalf in the event they are unable to act for each other. I have no problem being named as their agent, but shouldn't those documents be drafted by a lawyer in the state where they live?

JONATHAN SAYS: Yes, you are absolutely correct. Every state has its own laws regarding durable power of attorneys for financial and health care matters, and those documents should be prepared and signed by your parents in the state where they live. And yes, it would be in their best interests to have those documents prepared by an attorney knowledgeable in the preparation of those types of documents.

DEAR JONATHAN: About a year ago, I updated my estate plan which included a new will, durable power of attorneys for both finances and health care, a living will and a trust.

I have now decided to move to another state to be closer to my daughter. Are the documents I prepared last year okay, or do I need to change them now that I am moving to a different state?

JONATHAN SAYS: Since each state has its own specific laws regarding estate planning documents, at a minimum, you should have the documents you had prepared a year ago reviewed by an attorney in the state where you are going to move to make sure that those documents comply with that state's laws. This is especially critical for financial and health care durable power of attorneys, because you want to make sure those documents are statutorily compliant and are accepted by third parties when the named agent under those documents has to act on your behalf.

Two Types of Durable Power of Attorneys for Financial Matters

DEAR JONATHAN: A few years back my mother told me that she had named me as her agent under her financial durable power of attorney. Currently she is in pretty decent health, but is starting to get a little forgetful and is no longer driving. For those reasons, she has asked me to take over all of her financial activities, i.e., paying bills, doing banking, etc. I took her power of attorney to the bank to let them know who I was and that going forward I would be handling all of my mother's banking on her behalf. Their response was that I would not be able to act on behalf of my mother until I produced a doctor's letter indicating that my mother was no longer competent.

I don't understand. I thought that this financial durable power of attorney was drafted specifically to allow me to act for my mother, whether she was incompetent or not. Could you please shed some light on this?

JONATHAN SAYS: There are two types of durable power of attorneys for financial matters which can be prepared. One is designed to take effect immediately, regardless of whether the principal, i.e., the person who created the document, has capacity or not. The second type is known as a "springing" durable power of attorney and is designed only to take effect upon the principal's disability, i.e., inability to act on his or her own behalf. Based on your question, it appears that the type of durable power of attorney your mother created was a springing durable power of attorney, which means you have no authority to act as her agent until she has been determined by one or more doctors to be disabled. You should review the power of attorney and look for a provision that addresses how your mother's incapacity is to be determined. Assuming the power of attorney that your mother created is in fact a springing durable power of attorney, and she wants you to begin acting for her now while she still has capacity, I suggest that she go back to the attorney who prepared her durable power of attorney and have him prepare a new one which allows you to act immediately on her behalf.

Financial vs Health Care Durable Power of Attorney

DEAR JONATHAN: I have been acting on behalf of my father pursuant to the authority given to me under his financial durable power of attorney which allows me to act even though my father is not disabled. Although he is still pretty sharp, he does have some memory lapses and a couple years ago he asked me if I could help him with his bill paying which over time has turned into my taking care of all his finances on his behalf. I have also been named as his patient advocate under his health care durable power of attorney and he has a medical procedure coming up. The problem is that we are not totally in agreement as to the efficacy of having that medical procedure done. As his patient advocate, do I have the right to overrule him since I think he is making a mistake? I realize that this is his health and his life, but I don't think he is thinking clearly in this regard and I want to do what is in his best interest.

JONATHAN SAYS: Unlike the financial durable power of attorney which permits you to act regardless of whether your father is unable to act for himself, the health care power of attorney naming you as your father's patient advocate only becomes effective granting you authority to act on your father's behalf at that time when your father can no longer make decisions for himself regarding his health care. Assuming your father is not yet at that point and has legal capacity, then the answer to your question is "no" and you have no authority to overrule your father's decisions regarding his medical care. Once it has been determined that your father no longer has the ability to make decisions for himself, you will then have the right to step in as his patient advocate and make his health care decisions for him. Having said the above, this does not stop you from voicing your opinion and having an open and honest conversation with him, and assuming he permits you to do so, discuss your reservations with his doctor regarding this medical procedure.

When Does the Durable Power of Attorney Terminate?

DEAR JONATHAN: I read somewhere that a durable power of attorney automatically terminates when the principal named in that power of attorney passes away. Is that true? The reason I ask is that a couple years back after my father died, I used his durable power of attorney to transfer several bank accounts that were in his name alone into a joint account in both of our names. The bank never challenged me on that so I assumed that it was okay to do. Was this wrong?

JONATHAN SAYS: Whatever article you read was correct. A durable power of attorney can only be used during the principal's (person who created the power of attorney) lifetime. Once the principal passes away, the power of attorney automatically terminates and is considered null and void. Consequently, when you transferred those bank accounts of your father's to the joint bank account, you had no authority to do so because that durable power of attorney was rendered null and void upon your father's death.

I can only guess, but I assume that the bank never challenged your use of that document because they were already familiar with you from prior dealings and they were unaware that your father had passed away.

Banks Must Comply with Durable Power of Attorney

DEAR JONATHAN: My mother prepared a durable power of attorney for financial matters just over a month ago naming me as her agent. Not long after, she suffered a stroke and is currently unable to act on her own behalf. I took her power of attorney to her bank for the purpose of accessing one of her accounts and they refused to accept it. They indicated that they would only accept the bank's power of attorney form and since my mother is not able to sign any documents at this time, my only other option was to go through the probate court and be appointed her guardian and conservator. Can they do this?

JONATHAN SAYS: Assuming the durable power of attorney was properly drafted and complies with all statutory requirements, the bank has no legal right to refuse to accept it. You should go back to that bank and ask to talk to a manager or to be put in contact with their legal department. If that gets you nowhere, then you should let them know that they will be hearing from your attorney. Hopefully, this motivates them to play ball so that you can avoid the hassle and the cost of having to involve an attorney to resolve this matter on your behalf.

Changing the Agent on your Durable Power of Attorney

DEAR JONATHAN: I named my daughter as my agent on my financial durable power of attorney and as my patient advocate under my health care power of attorney. We had a recent falling out and I no longer want her to act in those capacities. How do I get her off?

JONATHAN SAYS: If your current financial and health care durable power of attorneys name an alternate agent and patient advocate to act in the event your daughter is unwilling or unable to act for you, then you could ask her to resign as your agent and patient advocate which would allow the alternate agent and patient advocate named to step into her shoes as your agent and patient advocate. In order to make this work, your daughter will need to resign in writing as your agent under the durable power of attorney and as your patient advocate under the health care durable power of attorney. Once that is done, that will elevate your alternate agent and patient advocate to your primary agent and patient advocate. When it comes time for your alternate agent and/or patient advocate to act on your behalf, he or she will need to present your daughter's resignation to the third party he or she is dealing with as evidence that he or she is authorized to act on your behalf.

If you have not named an alternate agent and/or patient advocate in your current documents, then those documents will no longer be viable if your daughter resigns because there is no one else to act in her place. Consequently, you will be required to prepare new documents. Also, if your financial and health care durable power of attorneys are more than a few years old, you might be better served to prepare new documents anyway. The newer the document is, the more readily acceptable it will be to third parties. In addition, with new documents you would no longer need your daughter to resign because she would not be named in the new documents as your agent and patient advocate. Further, in addition to being able to name a new agent and patient advocate to act for you, you can name as many backups as you want which will assure the viability of those documents in the event the agent or patient advocate who is supposed to act for you is unable or unwilling to do so when the time comes.

I recommend that you meet with an estate planning attorney for the purpose of reviewing your current documents so that he or she can recommend the best way for you to accomplish your purpose of removing your daughter as your agent and patient advocate.

Power of Attorney and HIPAA for Young Adults

DEAR JONATHAN: I have a question about my grandson who is going off to college in the fall. A close friend of mine told me about something that happened to his granddaughter who started college a few months ago, and it really has me concerned. Apparently, she ended up being hospitalized for a period of time, and initially was in a coma – she is doing fine now. When her parents, who lived a thousand miles away from her college campus, tried to get information about her illness, they were denied because their daughter was over age 18 and because she was unconscious, she was unable to authorize the release of that information to them. This story seems a bit far-fetched to me, but my friend assured me that it is true. Could this have possibly happened, and if so, is there a way to protect against it from happening?

JONATHAN SAYS: Unfortunately, it is very possible that this took place the way it was described to you. When a child turns age 18, a parent no longer has the legal authority to make decisions for that child, including financial and medical decisions. In the eyes of the law, an 18 year old (or in some states a 21 year old) is legally an adult. Consequently, if your grandson were to get sick or get in an accident and end up in the hospital, due to federal privacy regulations promulgated under the Health Insurance Portability and Accountability Act ("HIPAA"), your grandson's parents would not have any rights to receive any information from the hospital regarding his condition. Also, his parents would not have the ability to access your grandson's medical records or intercede on your grandson's behalf regarding his medical treatment and care ***without*** his authorization.

So, if your grandson is unable to communicate or is in a coma like your friend's granddaughter, his parents would be unable to obtain his authorization to receive information about his condition, to obtain his medical records or participate in his medical treatment. In this event, one of your grandson's parents would have to petition the probate court to be appointed his legal guardian in order to act on his behalf.

The good news is that there is a relatively easy fix to this problem. Your grandson could sign a durable power of attorney for health care, naming one of his parents as his patient advocate. This would give that parent the ability to act on your grandson's behalf regarding his personal and medical care decisions if he is incapacitated and unable to do so for himself. Further, because a durable power of attorney for health care is not effective unless your grandson is incapacitated and cannot make decisions on his own behalf, your grandson should also sign a HIPAA authorization permitting his parents to discuss his medical condition with his doctors and obtain his medical records and medical information regardless of whether your grandson is determined to be incapacitated.

In addition to a durable power of attorney for health care and a HIPAA authorization, your grandson should sign a durable power of attorney for financial matters naming one of his parents as his agent so that that parent can manage your grandson's financial affairs, including, but not limited to, banking and bill paying, if your grandson is sick or injured, disabled or unavailable because he is away at college.

You should encourage your grandson and his parents to meet with an estate planning attorney so that they can further discuss the advantages of having these documents in place before your grandson goes to college.

FIVE

Marriage and Children

Joint Trusts in Second Marriages

DEAR JONATHAN: My husband and I are in our second marriage and we both have children from our first marriages. We are finally getting around to preparing our estate plan and are stuck on what type of trust to prepare. We have been advised that having a joint trust makes the most sense because it is less costly to prepare one trust then to prepare separate trusts for each of us, and it is easier to administer. We are mostly on board with that concept, but the one sticking point is knowing that the joint trust remains revocable so long as one of us is still alive, which means the surviving spouse could change the terms of the trust and deviate from the dispositive plan set forth in the trust. If that happens, then the deceased spouse's children could end up being cut out or get less than what we agreed to at the time we prepared the trust. Are we over-thinking this? If not, do you have any recommendations?

JONATHAN SAYS: No, you are not over-thinking this and in fact this is a common concern among people in second marriages who have children from prior marriages. Most people want to make sure that their own children receive a portion of their estate and that the surviving spouse honors the agreed upon plan of disposition that both spouses put together while they were alive.

It is true that preparing a joint trust is less costly than preparing two separate trusts and easier to administer, and unless there are estate tax planning issues that have to be taken into consideration, joint trusts are routinely implemented by married couples, especially in first marriage situations. However, the problem as you stated, is that unless you make the joint trust irrevocable at the first death (which I do not recommend), the surviving spouse has the ability to amend the terms of that trust at a later date, and the children of the first spouse to die could end up getting nothing or a reduced share. The following are a few ways this issue may be addressed:

- Rather than prepare a joint trust, each of you could prepare separate trusts naming the surviving spouse and the decedent spouse's children as the beneficiaries. At each spouse's death, that individual's separate trust becomes irrevocable and cannot be changed by the surviving spouse, and the assets held by the trust will be distributed to the surviving spouse and the decedent spouse's children pursuant to the terms set forth in that trust. To make this work, however, each of you will need to allocate a certain portion of your assets to your respective trusts.

- Prepare a joint trust, as well as separate trusts for your respective children. The joint trust would hold certain of your assets while your separate trusts would hold those assets that you want to make sure go to your respective children.

- Prepare a joint trust only but name your respective children as beneficiaries of certain of your assets, i.e., life insurance policies, certificates of deposit, brokerage accounts, etc.

I recommend that you meet with an estate planning attorney who can further discuss with you how to make sure that each of your children receive a certain portion of your respective estates regardless of whether the surviving spouse changes the agreed upon plan of disposition after the first spouse's death.

DEAR JONATHAN: My husband and I have been married for ten years and it is a second marriage for both of us. We both have adult children from our first marriages. We have recently been talking about putting together an estate plan, but we are having difficulty deciding how to provide for each of our respective children at either of our deaths. We each want to provide our own children with a certain portion of our assets when we die, but are not quite sure how to accomplish that. Do we just leave it to the other spouse and trust that he or she will do the right thing, or do we specifically need to leave certain assets to our children? Any recommendations will be appreciated.

JONATHAN SAYS: You could do as you suggest, i.e., have the surviving spouse provide for the deceased spouse's children in the manner agreed upon. The problem with that approach, however, is that the surviving spouse would not be legally obligated to do anything regardless of what he or she agreed to do. Further, even if the surviving spouse honors his or her obligation to distribute a portion of the assets to the deceased spouse's children, upon doing so, he or she will be deemed to have made a taxable gift to each of the children if the value of each gift exceeds $15,000, which is the current annual gift tax exclusion amount. Also, if the surviving spouse dies prior to making the distributions to the children, then those assets will be part of that spouse's estate and will never be distributed to those children unless that spouse included them as beneficiaries of his or her estate.

The two of you could set up a joint trust which would state that upon the death of the second one of you to die, your assets are to be divided between your respective children in the manner indicated in that trust. The advantage of having a trust is that probate can be avoided on any assets that are retitled to the trust during lifetime or assets that name the trust as the beneficiary upon either of your deaths. The problem with this type of trust, however, is that so long as one of you remains living, that spouse would have the ability to amend the terms of that trust, or even revoke that trust, which means that he or she could have a change of heart and change the dispositive provisions so that the deceased spouse's children get nothing or get less than what was originally intended. This is a common occurrence when the surviving spouse remarries and diverts assets originally earmarked for the children of the deceased spouse to his or her new spouse. One way to address this problem is to have each of you purchase a life insurance policy naming your respective children as the beneficiaries of the proceeds. By doing this, each of you guaranty that your children will at least receive the proceeds from the life insurance policy even if the surviving spouse were to change the terms of the joint trust at a later date.

If you want to avoid the possibility of the surviving spouse changing the terms of a joint trust, each of you could instead create your own separate trust and name your respective children as beneficiaries of that trust. The surviving spouse could also be a beneficiary of that trust or be provided for in other ways, i.e., through life insurance or as a joint owner of certain assets. By utilizing a separate trust, this eliminates any concern that the surviving spouse might change the terms of the trust at a later date because he or she will not have the ability to do so because that separate trust becomes irrevocable at the first spouse's death.

I suggest that you meet with an estate planning attorney to further discuss these ideas and see what makes the most sense to the two of you as to how best to provide for each of your children.

DEAR JONATHAN: Several years ago my wife and I completed our estate planning. At that time our estate was worth around $2,000,000 and the exemption from federal estate taxes was $1,000,000. Consequently, our attorney recommended that we prepare separate trusts which would allow each of us to take advantage of the exemption amount so there would be no federal estate taxes due at the death of the second one of us to die. I don't really remember or necessarily understand the strategy other than the fact that we had to create two separate trusts in order to avoid federal estate taxes at the second death. My wife and I are now updating our estate planning and it is my understanding that the exemption from federal estate taxes is now in excess of $11,000,000. It is my further understanding that because our estate is worth well below that amount, it is no longer necessary to utilize the separate trusts strategy in order for us to avoid incurring federal estate taxes at the second death.

As a result, we are considering preparing a joint trust to hold our assets rather than maintain the two separate trusts. Does this make sense? I should also mention that we both have children from previous marriages and we want to provide something for our respective children at each of our deaths.

JONATHAN SAYS: Your understanding is correct. In 2021, the federal estate tax exemption amount was increased to $11,700,000 per person, and $23,400,000 per married couple. Unless the total value of your estate is in excess of the married couple exemption amount, which I don't believe it is based on your question, it is unnecessary for you and your wife to engage in the two trust strategy for the purpose of minimizing or avoiding federal estate taxes.

Although there may no longer be a reason to have separate trusts for the purpose of avoiding federal estate tax at the second death, you may still want to maintain those separate trusts if you want to make sure that your respective children receive what each of you want them to receive at each of your deaths. This is because a joint trust continues to be revocable so long as one of you is still living and has legal capacity. As a result, whoever survives between the two of you would have the ability to amend or even revoke the trust and could eliminate the decedent spouse's children as beneficiaries under the trust. Therefore, if you decide to go forward with a joint trust, both of you will need to understand that the surviving spouse has the ability to change the terms of the trust and that the children of the first spouse to die may not end up receiving what that spouse intended them to receive. If both of you are okay with that and are willing to take the risk, then go ahead and prepare the joint trust. If, on the other hand, each of you want to make sure that your children actually receive their share of the estate, I recommend that each of you maintain separate trusts and provide for your respective children through those trusts. Upon your death, for example, your separate trust will be become irrevocable and your spouse will be unable to amend or revoke that trust like she would be able to do with a joint trust and as a result, your children would receive the share you have designated for them.

Another option to consider is to go ahead with the joint trust but have each of you also provide for your separate children outside of the trust. You could do this by naming them as beneficiaries of a life insurance policy or some other investment. By providing for your respective children outside of the trust, you guaranty them some type of inheritance even if the joint trust is amended to their disadvantage later on.

I recommend that you meet with an estate planning attorney in your area who can further explain the pros and cons of maintaining separate trusts and creating a joint trust, as well as other types of estate planning documents that you should consider drafting or updating.

Dividing Assets Equally Among Children

DEAR JONATHAN: I am a widowed mother of four adult children and I am in the process of making out a new will, and I have a question. I want to treat my children equally, but I have financially supported two of my children to the tune of $200,000 or more over the past several years. Consequently, unless they pay that money back to me, which I really don't see happening, I don't think it is fair to my other two children if I were divide my estate equally among them. Any suggestions as to how I might approach this?

JONATHAN SAYS: This is a common question and there is an easy fix. What you want your will to say is that your estate is being divided equally among your four children, however, if any child owes you money at the time of your death, whatever amount that child owes is to be treated as an advancement to that child. As a result, the amount owed by the child is added back to the value of your estate before it is divided among your children and upon the division, the shares of the two borrowing children will be reduced by the amount you gave them during their lifetime. For example, if the value of your estate at your death is $800,000 and each of the borrowing children owe you $100,000 at the time of your death, then those amounts would be added back to your estate, which would artificially inflate the value of your estate to $1,000,000 for division purposes. The $1,000,000 would be divided in equal shares of $250,000 for each of your four children, however, each of the borrowing children's shares would be reduced by the $100,000 they received from you during your lifetime.

As a result, of the $800,000 available for distribution, the non-borrowing children's shares would be $250,000 each and the borrowing children's shares would be $150,000 each.

When making out your will, you should seek the help of an attorney to make sure that the language is drafted properly. I also recommend that you tell your children what you are doing so there are no surprises and/or different expectations when the time comes.

DEAR JONATHAN: I am getting ready to prepare my estate plan. I am a widower and I have three children. Two of my children are financially set and don't need anything from me; my third child is irresponsible when it comes to finances and I have loaned this child money many times over the years. Having said that, my intent is to treat all three of my children equally, so each of them would get a one-third share of my estate. My other children, however, feel that I should reduce my one child's share by the amount of loans I have made to him over his lifetime, otherwise he would actually be getting a larger portion of my estate than my other two children. They also think that I should leave his share in trust and not give it to him outright because he will blow it. They make some good points. What do you think?

JONATHAN SAYS: The proposal your other two children made to you as to how to treat your one son is not all that uncommon. Many parents will reduce a child's overall share of their estate by the amount of loans that were made to that child during the parent's lifetime. You can certainly adopt that philosophy, however, you also indicated in your question that your two other children are financially set and don't really need the money, so it really comes down to what you (and not your other children) want to do regarding your son. What do you think is fair? There is no right or wrong answer.

As for retaining your son's share in trust on his behalf, as opposed to distributing it to him outright, this might make sense if he is that bad with handling money, especially if the inheritance he will be receiving will be substantial.

If you decide to go this route, however, you will need to determine whether the entire share is to be held back in trust, or just part of it, as well as when he will be entitled to receive distributions from the trust. Again, there is no right or wrong answer here.

I encourage you to discuss these questions with an estate planning attorney who can help you find answers that are fair and which you are comfortable with when determining how to provide for your son.

Setting Up a Trust for Children

DEAR JONATHAN: I am a single mom. I am preparing a trust so that if something happens to me prematurely, my assets will be held in trust on behalf of my three young children until they reach age 30. By that time, I figure, they should be mature enough to handle whatever money they get from my estate. I do have one concern though, how much flexibility does the trustee have in making distributions to my children? In other words, even though each child is not to receive his or her respective share of my estate until he or she reaches the age of 30, what if one of them needs money before that? Does the trustee have the authority to make need-based distributions to a child prior to his or her turning age 30? Also, if the trustee has the authority to make these types of distributions, how do I make sure that all my children are treated equally; if one of them receives distributions before he or she reaches age 30, won't the amount of that distribution reduce the amount available for my other children? I know if I call a lawyer in my area I could get the answers to these questions, however, I am trying to prepare this trust on my own so that I do not incur a large legal bill, so whatever help you are able to provide would be greatly appreciated.

JONATHAN SAYS: I am happy to answer your question, but I recommend you rethink your decision to draft your trust on your own.

Drafting trusts and other estate planning documents can be complicated for attorneys, let alone a lay person, and you want to make sure that these documents are not only drafted properly but in compliance with state law so that they are effective when you need them to be effective. The last thing you want to do is have the trust fail or end up in litigation if it is not prepared properly or it has ambiguous provisions.

I suggest that you at least contact an estate planning attorney in your area and find out if he or she is willing to meet with you for a free consultation (some attorneys are willing to do this), and then once you meet with that attorney, you can explain your financial concern and my guess is that you will be able to find an attorney who will be willing to work with you.

Having said the above, in answer to your question, you can draft the trust so that the trustee has the discretion and the flexibility to make distributions to your children for things like educational expenses, helping them buy a car or a home, helping them with the expenses of getting married, as well as for other legitimate purposes if it becomes necessary in the trustee's judgment to expend the money on behalf of the child prior to his or her reaching the age of 30. As for your other concern, you must include language in the trust that states which distributions made to a child prior to his or her reaching age 30 are to be treated as advancements against that child's share so that when he or she receives his or her final distribution from the trust, that share is reduced by the amount he or she received before age 30. By putting in this type of provision, any child receiving such an advancement will not be benefited at the expense of your other children.

Please consider meeting with an attorney to help you with the drafting of your trust. Also, besides a trust, there are other important estate planning documents you should consider drafting, including a last will and testament, and financial and health care durable power of attorneys.

Loaning Children Money

DEAR JONATHAN: If I loan my son $80,000 to pay off his mortgage, would either of us have an issue with the IRS? My son would repay the loan at a set amount each month. I would prefer not to charge interest. Thank you for any advice you can supply.

JONATHAN SAYS: Thank you for your interest in my column. Believe it or not, your question, which is very straight forward, has a rather complicated answer, but I will try to keep it simple. There is no problem with you loaning money to your son so he can pay off his mortgage, but to avoid running afoul of the IRS, you should:

1. Have your son sign a promissory note.
2. Include an interest rate in the note.

You want to do both of those things because the IRS does not like intra-family loans and as a general rule presumes that intra-family loans are really gifts unless proven otherwise. Further, if you do not include an interest rate with the loan, you may incur what is known as "imputed interest", which is interest considered by the IRS to have been received, even if no interest was actually paid.

To avoid having interest imputed by the IRS, you should assign an interest rate that is equal to or above the applicable federal rate ("AFR") which is the minimum interest rate you can charge. The AFR is published every month by the IRS and can be found at the IRS website at www.irs.gov. The AFR that will apply to your loan will be dependent upon the type and length of the loan, so you will want to make sure that you apply the correct AFR. If you don't have access to a computer or are unsure what AFR to apply, I encourage you to contact a tax professional in your area who can advise you as to the appropriate interest rate to charge.

Some other points to consider:

- Even though you would be charging interest on the loan, you can always gift back the amount of the interest payments your son made (or was supposed to make) over the course of the year. So long as the total amount of interest gifted back to him in any one year is not in excess of $15,000, which is the 2021 annual gift tax exclusion amount, you will not incur any gift tax consequences.
- You should consider securing the note your son gives you with a mortgage on his property.
- If you end up making a below interest or no interest loan to your son, there are many gift and income tax considerations that will need to be taken into account. In that event, I recommend that you further consult with a tax professional who can explain to you the various tax rules and consequences.

Disinheriting a Child

DEAR JONATHAN: Am I legally obligated to give all of my children a share of my estate when I die? I have four children and would like to leave my estate to just three of them. The fourth one I have not had a good relationship with for years and in my view he has already received his inheritance because I have given him so much money over the years. I want to make sure that when I pass away that this one son cannot cause problems for any of my other three children.

JONATHAN SAYS: No, you are not legally obligated to leave anything to this child or any child for that matter. However, in order to avoid him contesting your will by claiming that he was left off accidently, you need to first specifically identify him as one of your children and then specifically disinherit him in the will. In other words, in the document you would identify him as your son, but then indicate that you are intentionally omitting him as a beneficiary. This way he cannot claim that he was meant to be included as a beneficiary but that you left him off accidently.

I would also take it one step further by telling him that you are not including him as a beneficiary of your estate because you feel he has already received his share of your estate from the money you have already given him, or for whatever other reasons you care to explain to him. This way he will not be surprised to find out he is disinherited and it might help avoid having him make a will challenge at that time. Further, it might help avoid the creation of tension and/or animosity between him and your other children if he is fully aware that this is your decision and your decision alone, and none of your other children influenced you to leave him off as a beneficiary.

I encourage you to meet with an estate planning attorney in your area to make sure that the documents are prepared properly so that your son cannot come back and successfully challenge your disinheriting him as a beneficiary.

<u>**SIX**</u>

Insurance

What happens when a Beneficiary is No Longer Living?

<u>DEAR JONATHAN</u>: My father, who was a widower, passed away last month. I am the administrator of his estate and after some digging have found three life insurance policies with death benefits totaling almost $500,000. From what I can tell, my mother was the named beneficiary on all of the policies, but she died five years ago. Since she is no longer alive, who will receive those proceeds?

<u>JONATHAN SAYS</u>: It depends. Do you know whether a contingent beneficiary was named on any of the policies? If your father named a contingent beneficiary, then the named contingent beneficiary would receive those proceeds. Also, it is possible that your father may have changed the beneficiary designations on those policies after your mother passed away and if he did, then the death benefits would pass to whoever is named as the primary beneficiary if living, or if not, then to the contingent beneficiary if that person is still alive. You should contact your father's insurance agent, if he had one, or if not, then the insurance companies which issued the policies to determine who is named as the primary and contingent beneficiaries of those policies. If, upon checking, it is determined that your mother was named as the primary beneficiary and your father did not change the beneficiary designation after your mother passed away and there isn't a living contingent beneficiary to receive those death benefits, then the death benefits of each policy will need to be probated in your father's estate. In your question, you indicated that you are the administrator of your father's estate, which I take to mean that you have already opened a probate estate on his behalf. If so, you can apply to the insurance companies to have those proceeds made payable to his estate. If, on the other hand, there is no probate estate opened as of yet, then you will need to open a probate estate for the purpose of receiving those death benefits.

If the death benefits of those life insurance policies need to be paid to your father's probate estate because there isn't a living beneficiary named to receive those proceeds, then to whom those proceeds will be distributed upon the completion of probate will depend upon whether your father left a last will and testament or not. If he in fact left a last will and testament, then upon the completion of probate, those death benefits, along with any other assets being probated, will pass to the beneficiaries named in your father's will pursuant to the terms of that will. If, on the other hand, he did not leave a will, then he will be deemed to have died intestate, which means that those death benefits and any other probatable assets will pass to his heirs pursuant to the laws of the state in which he lived at the time of his death.

If you haven't done so already, I recommend that you contact an attorney who specializes in decedents estates who can help direct you as to the steps you need to take to obtain and distribute the death benefits of those life insurance policies.

How Does Putting a House in a Trust Affect Insurance?

<u>DEAR JONATHAN</u>: My wife and I have a living trust and recently after consulting with our attorney, we transferred our home, as well as our family cottage to our trust for probate avoidance. Last week as I was writing out a check for our homeowners insurance premium, it occurred to me that my wife and I are the insureds on the policy, but our trust isn't. Is that the way it should be, or now that the trust owns the home and cottage, should the trust now be the insured on the policy? I just want to make sure that we are properly covered.

JONATHAN SAYS: It was a good thought to have and a good question to ask. Anytime real estate is transferred to a trust, it is critically important that the homeowners insurance agent is contacted to make sure that the proper coverages are maintained under the homeowners insurance policy. With that said, you and your wife want to continue to be insureds on the policy and depending upon what your policy requires, you may need to name your trust as an additional insured on the policy. My recommendation is that you contact your homeowners insurance agent(s) and advise him/her of the transfer of your home and cottage to your trust and ask the agent what needs to be done to make sure that the appropriate coverages are maintained and that the policies insure both of you, as well as your trust. I would also recommend that you have your agent provide you with a written response verifying what coverages you have and who the insureds are under the policies.

Is Life Insurance Taxable?

DEAR JONATHAN: Several years ago I purchased a 20 year term life insurance policy on my life with a death benefit of $3,000,000. The premiums were reasonable and since my wife and I had saved very little for retirement, I wanted to make sure that she was taken care of if I died first. Unfortunately, my wife passed away last year. Rather than let the policy lapse, I thought I would keep it in place for my children. I recently read an article, however, that said life insurance is taxable when the insured on the policy dies. What does this mean? Are my children going to get stuck with a huge tax bill because of this life insurance?

JONATHAN SAYS: There are many rules and regulations involved regarding the taxation of life insurance, whether it is federal estate tax or federal income tax, and this area of the law can get very complicated. Generally speaking, life insurance death proceeds ***are not*** subject to federal income tax so your children will receive the death proceeds income tax free. On the other hand, life insurance death proceeds ***are*** subject to federal estate tax and are included with the balance of your other assets when determining your taxable estate. Consequently, at the time of your death, your taxable estate will be increased by the amount of the life insurance proceeds. This won't be a problem, however, unless your overall estate, including the death benefits from the life insurance policy, exceeds in value the federal estate tax exemption amount, which in 2021 is $11,700,000. In other words, if you die this year and the total value of your estate, including the $3,000,000 death benefit, is less than $11,700,000, there will be no federal estate tax due and owing.

On the other hand, if the death proceeds from the life insurance policy increases the size of your estate to an amount in excess of $11,700,000, you would now have an estate that would incur a federal estate tax at your death unless you did some type of further planning.

One type of additional planning that is indicated in this instance is to remove the value of the life insurance policy from your estate so that that policy is not taxed as part of your estate at your death. One way this is done is by setting up an irrevocable life insurance trust, known as an "ILIT". This is a special type of trust that is established for the purpose of owning (and being the beneficiary of) life insurance on the life of the person who created the trust (the "grantor"). If done properly, when the grantor dies, the trust as the beneficiary will receive the death benefits, those death benefits will not be taxed in the grantor's estate and those proceeds will be distributed to the beneficiaries named in the trust pursuant to the terms stated therein.

There are a myriad of tax rules which need to be complied with when creating and administering an ILIT in order to keep the life insurance proceeds out of the grantor's estate. One of those rules is that if you transfer a life insurance policy you already own to an ILIT, you must survive that transfer by three years in order to keep the death benefit out of your taxable estate. This is to avoid people making death bed transfers of their insurance policies to an ILIT for the purpose of avoiding or reducing federal estate taxes. This three year survivorship rule only applies, however, when transferring existing life insurance policies to an ILIT; if the ILIT purchases a new life insurance policy on the grantor's life, as opposed to the grantor transferring an existing life insurance policy to the ILIT, the three year survivorship rule does not apply in that instance.

The federal estate tax exemption amount I mentioned earlier in my answer is what is currently available. However, if this amount is reduced due to a change in the law, this could put your estate into a taxable situation. So please keep that in mind.

If you have any further questions regarding the taxation of life insurance or if you have a taxable estate and you would like to explore the idea of setting up an ILIT, you should consult with an estate planning professional who is experienced in this area.

What Happens When the Will or Trust Beneficiary doesn't match the Insurance Beneficiary?

DEAR JONATHAN: After my uncle died, I found out that I was named as a beneficiary in his trust of the proceeds from a certain life insurance policy, which he identified in his trust by name and policy number. When I contacted the attorney handling his estate about when I can expect to receive those proceeds, he advised me that even though the trust named me as a beneficiary of those proceeds, the beneficiary of the life insurance policy was someone else and not the trust, so consequently I was not entitled to anything. Is that true? Do I have any recourse?

JONATHAN SAYS: Generally speaking, the beneficiary of a life insurance policy is entitled to receive the proceeds regardless of what the insureds trust says. In other words, the terms of the trust do not control who is to receive the death benefits under a life insurance policy when the beneficiary named under the policy is someone other than the trust. In the case of your uncle's trust, in order for you to enforce your rights as a beneficiary of that trust, the trust would have had to be named as the beneficiary of that life insurance policy.

Having said the above, if the death benefits from the life insurance policy are significant, you may want to consult with an attorney to see if there are any legal theories that might be available to you to pursue a cause of action.

For instance, is there any evidence to support that someone may have unduly influenced your uncle to change the beneficiary on the insurance policy, if in fact the trust was ever named as a beneficiary under that policy? If any such evidence does exist, then you should ask the attorney as to the likelihood of your being successful if you decide to pursue this legally and what it would cost in attorney fees to do so.

DEAR JONATHAN: My uncle, who was unmarried and had no children, recently died and I was named as the executor of his estate. His will states that all of the proceeds of his life insurance policies are to be divided equally among his nieces and nephews – my cousins. However, all of his life insurance policies name me as the sole beneficiary. What does this mean? Does the will override the beneficiary designation? If not, am I morally obligated to share these proceeds?

JONATHAN SAYS: When there is a conflict between what a will states and who is named as the beneficiary on a life insurance policy, the beneficiary named on the life insurance policy typically controls. In other words, since you were named as the beneficiary on your uncle's life insurance policies and since you survived your uncle, those life insurance proceeds are legally yours regardless of what the will states. If your uncle wanted his will to control the disposition of those life insurance proceeds, then he should have named his estate as the beneficiary and not you.

Having said the above, even though those life insurance proceeds are legally yours, you will have to decide whether you are going to keep all of the proceeds for yourself or whether you are going to share those proceeds with your cousins. Do you know what your uncle's intent was, i.e., did he intend for you to be the sole beneficiary of those proceeds to the exclusion of the other nieces and nephews, or did he want you to share those proceeds with them?

Is it possible that he had named you as the beneficiary before preparing his last will and testament and by naming all of his nieces and nephews as the beneficiaries in that will, he thought that superseded the beneficiary designations on the life insurance policies? Whether you have a moral obligation to share those insurance proceeds or not depends on whether you are able to discern your uncle's intent. Even if it is clear to you that your uncle intended for you to have those life insurance proceeds, by virtue of the conflicting provision in his last will and testament, he has put you in a very awkward position.

If you come to the conclusion that your uncle's intent was for you to share the proceeds or even if there is no evidence that was his intent, but you intend on sharing the proceeds anyway, then you need to understand the consequences of doing so. Depending upon how many nieces and nephews there are and the total amount of the insurance proceeds you intend on sharing, upon dividing the same, you might be making a taxable gift to each of your cousins, which would require the filing of a gift tax return. This is because you now legally own those proceeds, and if you choose to share any of those proceeds with your cousins, you will be deemed to have made a gift to each of them. If any particular cousin's individual share is in excess of $15,000, which is the amount of the annual gift tax exclusion for 2021, i.e., the amount you can gift tax-free, then that excess amount will be deemed to be a taxable gift requiring the filing of a gift tax return.

In addition to the above, if you earn any interest on those life insurance proceeds prior to making any such gifts to your cousins, that earned interest will need to be reported on your own tax return for that tax year.

Before making any gifts to your cousins, you should take into account both the costs incurred by you in making those gifts, as well as any earned interest which will end up being reported on your tax return.

SEVEN

Gifting and Tax Rules

2021 Gift Rules

DEAR JONATHAN: What is the annual gift tax exclusion amount for 2021?

JONATHAN SAYS: The annual gift tax exclusion amount for 2021 is $15,000. This means that an individual can make gifts in 2021 of up to $15,000 to an unlimited number of people without any gift tax consequences. Married couples can make gifts of up to $30,000 per person in 2021.

DEAR JONATHAN: Is there a limit in the amount of annual exclusion gifts a person can make during a year?

JONATHAN SAYS: No, there is no limit in the number of annual exclusion gifts a person can make in any given year. A person or a married couple can make annual exclusion gifts of $15,000 or $30,000, respectively, to as many people as they want without incurring any gift or estate taxes. For example, if a person has four children who are married and 16 grandchildren, then he could make gifts of $15,000 (or $30,000 if he is married and his wife joins in the gifts) to each of those 24 individuals.

DEAR JONATHAN: What is the lifetime gift tax exemption amount for 2021? What is the estate tax exemption amount for 2021?

JONATHAN SAYS: The lifetime gift tax and the estate tax exemption, which is a combined exemption known as the unified credit, for 2021 is $11,700,000 for an individual and twice that amount for a married couple. This means that an individual can give away up to $11,700,000 and a married couple can give away up to $23,400,000 through lifetime gifts or death transfers without incurring any gift or estate taxes.

DEAR JONATHAN: What happens if I make a gift in excess of $15,000 in 2021?

JONATHAN SAYS: The amount of the gift you make in excess of $15,000 will be deemed to be a taxable gift and you will need to file a gift tax return with the IRS reporting the gift. For example, if you make a gift of $25,000.00 to someone this year, $15,000 of that gift would be gift tax free, but the remaining $10,000 would be a taxable gift for which you would need to file a gift tax return.

Estate Larger than Tax Exempt Amount

DEAR JONATHAN: I am a widower. I am retired and financially set. In fact, I have been advised that it would be a good idea for me to reduce the size of my estate because it is larger than that amount which is exempt from estate taxes. Consequently, I am considering passing along a good chunk of my estate to my children and grandchildren now. What are the current rules for gifting?

JONATHAN SAYS: In 2021, a person can gift up to $15,000 per person per year without incurring any federal gift tax and without having to report the gift to the IRS by filing a gift tax return.

As an example, if you have four children, and each of your children are married and have four kids of their own, this year you can make gifts of $15,000 to each child and his or her spouse, as well as each grandchild without any gift tax consequences. By making these gifts you will have removed $360,000 of value from your estate (24 people x $15,000).

Further, if you give away assets that are likely to appreciate in value, you are also removing all of that future appreciation from your estate. Finally, if you are so inclined, you can make gifts to the same people (or different or additional people) in 2022 and the years following.

In your question, you indicated that you wanted to pass along a “good chunk” of your estate. If your definition of “good chunk” is larger than $360,000, you can increase the number of annual $15,000 gifts you make and/or you can make taxable gifts over and above the $15,000 annual gift tax exclusion. In other words, you are not limited by the annual gift tax exclusion when making gifts, however, any gifts that you make in excess of the $15,000 annual gift tax exclusion will be deemed to be a taxable gift. Further, if you make taxable gifts, you are required to file a gift tax return with the IRS reporting those gifts. Also, the total amount of taxable gifts you make over your lifetime will serve to reduce your lifetime gift and estate tax exclusion, which is $11,700,000 in 2021.

For example, let’s say that rather than making gifts of $15,000 to each of your children and their spouses and your grandchildren, you decide you want to make gifts of $50,000 to each of those individuals. In this example, the additional $35,000 per individual ($50,000 gift less the $15,000 annual exclusion amount) will be deemed to be a taxable gift which will serve to reduce your lifetime gift and estate tax exclusion by $840,000 ($35,000 x 24). If you make gifts to the same people in the same amount for two consecutive years, you will have removed a total of $2,400,000 of value from your estate (and all future appreciation tied to the gifted assets) but you will have also reduced your available lifetime gift and estate tax exclusion by the total amount of taxable gifts made over those two years, i.e., $1,680,000.

Before making any gifts, I recommend that you meet with an estate planning attorney or tax consultant who can explain to you in more detail the pros and cons of gifting, as well as the tax implications and requirements you will need to be familiar with before entering into a gifting program. Once you have decided that you want to move forward with a gifting program, your adviser can help you put together a gift giving strategy that makes sense for both you and your family.

EIGHT

Pet Trusts

DEAR JONATHAN: I am a widower in my late 70’s who is still in pretty decent health. I updated my estate plan, which includes a will, a revocable living trust and durable powers of attorney for financial and health care matters, a couple of years ago after my wife passed away, so I think I am in pretty good shape there. However, it recently dawned on me that my estate plan does not address what is to happen to my two dogs and my cat upon my death or even if I am unable to care for them for a period of time. The only reason I am thinking about this now is that a close friend of mine ended up having a lengthy stay in the hospital, and he had no one at home who could take care of his dog and cat. I was able to help him out so it worked out okay, but it got me thinking about my own situation. What do you recommend?

JONATHAN SAYS: Your concerns are well founded and you should consider preparing a Pet Trust. Although Pet Trusts are allowed in every state in this country, the laws are not uniform so you will want to make sure that you check with an attorney to see what your state’s Pet Trust law provides.

Generally speaking, a Pet Trust can be designed as a stand-alone trust or it can be included as part of a revocable living trust such as the one you prepared.

Whether it is a stand-alone trust or included as part of a revocable living trust, a Pet Trust allows you to:

- Name a caregiver or caregivers of your choice to assume responsibility for the care of your pets.
- Provide a monetary sum to be held in trust which is to be used by your caregiver(s) for your pets' care after you are gone.
- Instruct your caregiver(s) regarding the care to be given to your pets including such things as what types of food your pets like or are required to eat, whether your pets require any type of supplements or medications, and where you would like to have your pets groomed or boarded, just to name a few.
- Instruct your caregiver(s) as to what is to happen to your pets after they have died, i.e., whether they should be buried or cremated.
- Direct where any remaining funds in the Pet Trust are to be distributed after your last pet passes away.

In addition to creating a Pet Trust, I also recommend that you create a separate durable power of attorney for pet care or revise your current financial durable power of attorney and add specific provisions in that instrument which gives your agent authority to take certain actions on behalf of your pets. Those actions can include making sure that your pets receive the same care, i.e., medical treatment, food and dietary needs, and shelter, that you would normally provide for them if you were able to. In that durable power of attorney you could also prohibit the euthanization of any of your pets except for specifically stated health reasons and only upon the recommendation of the pet's veterinarian.

I recommend that you consult with your estate planning attorney who can help you in the creation of a stand-alone Pet Trust or in amending your current trust to include Pet Trust provisions. That attorney can also help you update your durable power of attorney for financial matters to include specific pet related provisions or help you prepare a separate durable power of attorney for pet care.

Good luck.

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