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ESTATE PLANNING ISSUES

I HAVE DECIDED THAT I NEED A WILL. WHAT DO I NEED TO CONSIDER?

ANSWER: First of all, you will need to appoint an executor of the estate. This is the person who distributes your assets in accordance with the provisions of the will. Also, if you have minor children, you will need to determine who will have custody of them if both of their parents die before they reach the age of majority (the guardian). You will also need to determine who will handle the assets left to the children (the trustee). The executor, guardian and trustee can, but need not, be the same person.

WHAT IS A TRUST?

ANSWER: A trust is a vehicle through which an individual (the donor or settlor) transfers legal title to property to a trustee who manages the property for the benefit of others (beneficiaries).

WHAT PURPOSES DOES A TRUST SERVE?

ANSWER: A trust can be used to avoid probate; provide for the management of assets for minor children, grandchildren or those incapable of managing assets; and avoid or minimize Federal Estate and Gift Taxes.

ARE THERE OTHER WAYS TO AVOID PROBATE?

ANSWER: Yes, any property that is owned jointly with one or more other people with rights of survivorship (joint tenants) passes directly to the other joint tenants upon death. This is a useful and simple estate planning tool for individuals whose combined assets do not exceed the Massachusetts estate tax exclusion, which is currently $1,000,000.00.

WHAT ARE A TESTAMENTARY TRUST AND AN INTERVIVOS TRUST?

ANSWER: A testamentary trust is a trust that is established by will and takes effect upon the death of the testator (the individual who made out the will). It exists under the jurisdiction of the probate court and the trustees must file annual accountings with the court. An intervivos trust is established during the lifetime of the settlor (the individual who established the trust) and can be either revocable (able to be terminated by the settlor) or irrevocable (unable to be terminated by the settlor). Both types of intervivos trusts can be used to avoid probate. If an individual is not concerned about the estate taxes and is merely using a trust to avoid probate, a revocable trust allows him or her to maintain more control over the assets of the trust and is often the preferred estate planning tool for this type of individual.

HOW CAN I AVOID ESTATE TAXES?

ANSWER: Estate taxes (transfer taxes) are applied to property you transfer to others upon your death. There is an unlimited marital deduction for any property that passes to your spouse. In other words, no estate tax will be applied to property that passes to a surviving spouse. There is also an estate tax exclusion, which is currently $1,000,000.00 for Massachusetts estate taxes and $5,120,000.00 for Federal estate taxes if you die in 2012. In other words, an individual who dies in 2012 could transfer, upon his or her death,a total of $1,000,000.00 free of the Massachusetts estate tax and $5,120,000.00 free of the Federal estate tax. In addition, an individual can make annual gifts of $13,000.00 to anyone without incurring a gift tax. This is a useful estate planning tool for elderly people who want to reduce the size of their estate prior to death.

MY WILL PROVIDES THAT MY ENTIRE ESTATE WILL BE LEFT TO MY SPOUSE, DO I NEED TO BE CONCERNED ABOUT ESTATE TAXES?

ANSWER: Yes, if you and your spouse's combined assets exceed the applicable exclusion amount. For example, assume you and your spouse each have $1,000,000.00 in assets and your wills provide that everything goes to the surviving spouse and if the spouse is not surviving it goes to the children. If you die first (assume in the year 2012), your spouse will get your $1,000,000.00 estate tax free. However, if your spouse also dies in 2012 with $2,000,000.00 in his or her estate, the first $1,000,000.00 will be excluded from the Massachusetts estate tax but the remaining $1,000,000.00, which passes to your children, will be subject to an estate tax of up to $99,600.00. However, if you had used your $1,000,000.00 lifetime exclusion at your death, your spouse would have died with $1,000,000.00 in his or her estate which would have passed to your children free of the estate tax.

HOW CAN I USE THE LIFETIME EXCLUSION AND STILL PROVIDE FOR MY SPOUSE?

ANSWER: Through the use of a credit shelter trust. The factor that determines whether or not assets of a trust are included in one's estate is control. You can set up a credit shelter trust and name your spouse as trustee. The spouse can enjoy the income stream of the trust for life. As long as the spouse's access to the principal of the trust is limited by an ascertainable standard (e.g. for the health, maintenance and education of the spouse) and the spouse cannot amend or revoke the trust, the principal amount will not be part of the spouse's estate and the assets of the trust which pass to the children upon the death of the spouse will pass free of the estate tax.