Introduction

You, like many other people, may have questions about estate planning. The following responses attempt to answer some of these to help you better understand estate planning and how it can meet your needs. Even though much of this material may seem technical or complicated, we encourage you to take the time and make the effort to learn about estate planning.

Please note that the responses provided are general in nature and are not intended to constitute legal advice. They may or may not apply to, or be useful in, individual situations and should not be relied upon without first consulting an experienced attorney.

WHAT IS “ESTATE PLANNING”?

The term “estate planning” is commonplace today. It is part of the everyday jargon of not only attorneys but of insurance agents, financial planners, accountants and others as well. Estate planning is a generic term which may concern investment or financial planning, taxes, disability, retirement or death, or all of these which to some extent are understandably interrelated.

The attorney focuses principally upon planning for individuals in the event of disability or death. This planning is to provide for the arrangement, management and distribution of property, always with a view toward minimizing income and estate, or death, taxes to the extent consistent with other objectives. Often trusts are used for these purposes. Although the attorney is not an investment or financial advisor as such, investment and financial planning obviously has a bearing on the size of the estate, the availability of funds to carry out planning objectives and the tax consequences of any plan.

All property which has, or may produce, value needs to be taken into account in planning for events which may occur during our lifetimes and, in many instances, at or after the time of death. Planning for these events, in a general sense, is “estate planning.”

WHAT IS “PROPERTY” FOR ESTATE PLANNING PURPOSES?

“Property” is a very broad and varied concept for estate planning purposes and includes investments, cash and physical things we own, such as automobiles and furniture. It also includes contractual or other rights in insurance policies, retirement plans, annuities and other agreements or contracts where we can name beneficiaries who can take at our death.

Each of us, however modestly or extensively, acquires during our lifetimes interests in “property” of various kinds. “Property” is simply a label placed upon some bundle or configuration of rights, and to say that a person “owns” or has “interests” in property is merely to say that the person has certain rights, never without some limit. For instance, a person who “owns” a house generally has the right to use, occupy, sell, mortgage, lease or otherwise deal with the house. Such rights, however, will almost always be limited by zoning, life safety and other laws which regulate how the property may be used. If the person has a mortgage on the house, the person also gives up certain rights to the bank or mortgage company. The person’s continued use and enjoyment of the house depends upon his meeting obligations under the terms of the mortgage.

Stocks, bonds and bank accounts are other common forms of property in which the “owner” has certain rights, such as the right to the income (dividends and interest) from the property and the right to sell. In the case of stock, there are usually voting rights, and sometimes in the case of stock and other securities there are other rights, such as rights of redemption and conversion to cash or some other form of security.

Interests in real estate are called “real” property and other forms of property are called “personal” property. Stocks, bonds, cash and similar instruments are “intangible” personal property since there is no physical object involved, but rather merely some piece of paper or other record which sets forth the property rights. “Tangible” personal property, on the other hand, consists of physical objects, such as automobiles and furniture.

Besides what everyone thinks of as property (or “assets”), whether real or personal, there is also an array of other rights which are essentially contractual and, in a looser sense, can be thought of as property. There are rights, for example, under various insurance contracts (life, disability, health and casualty), annuity contracts, pension and other retirement plans, employment agreements, trusts and other contracts and arrangements.

In the process of planning, the attorney must consider all the various rights and interests which can be considered “property” and how they come into play in the event of disability or death. Since the instruments which create or control some of these property rights and interests may themselves address disability or death and create interests and obligations in others, it is important that all dispositions be carefully coordinated and made consistent.

In the preparation of estate planning documents (which may consist of a will , or perhaps a will and one or more trusts and possibly other instruments), we wish to attempt to describe briefly what kinds of instruments are available and what tax and planning problems you should consider. You may already be aware of some, or even much, of what will be discussed. We hope, however, that this discussion will be useful to you and may answer some questions you have or may suggest questions which may not have occurred to you. In all events, think of these instruments simply as useful tools or devices which facilitate the management and distribution of property in order to serve certain purposes.

DO I NEED A WILL?

A will disposes of any property which at your death you own in your own name and where you do not otherwise name a beneficiary. You should have a will if at your death you may own such property or if you wish to name a guardian for a minor child.

Clients often ask, "Do I need a will?" Usually the answer is "yes", but the question can be answered fully only after considering each individual's situation. Where you anticipate that you may, at the time of death, own or hold title to any property in your name alone or that you may be survived by a minor child, you certainly need a will .

A will can effectively dispose of any assets which you may own individually. Such assets are commonly referred to as your "probate" assets or estate . By your will, you as "testator" can also appoint an executor whose duties are principally to (1) collect all of your assets, (2) pay outstanding debts, (3) pay expenses of administration, (4) pay federal and state estate or death taxes , if any, and (5) distribute the balance of your assets in accordance with the terms of your will.

Also, by your will, you can avoid the need for a surety bond, which can be quite costly, in order to guarantee the performance by the executor of his duties. In addition, you can name one or more individuals to serve as guardian of the person or guardian of the estate of any minor child of yours. A guardian of the person has the legal right to custody and the obligation for the support of the minor, while the guardian of the estate has the obligation to manage any property which the minor may own or acquire. A guardian of the person of a minor does not have to be, but may be, the guardian of the minor's estate and vice-versa. Although the designation by will of a guardian is not absolutely binding on the court, the court usually follows the testator's wishes.

WHO ARE "DESCENDANTS"?

The "descendants" of any person refer to that person's children and the descendants of such children. Whenever property is given or left to a person's "descendants per stirpes", this means that the person's children in equal shares would first recieve the property, but the descendants of a deceased child would receive that child's share.

WHAT IS MY PROBATE ESTATE?

Included in your probate estate is all the "personal" and "real" property owned by you alone and where you do not otherwise name a beneficiary. "Personal" property, as indicated earlier , includes not only "tangible" personal property, like jewelry, clothing, furniture and automobiles, but also "intangible" personal property, like cash, bank accounts, stocks and bonds. "Real" property includes any interest in land and buildings which you can transfer by your will.

WHAT IS JOINT PROPERTY?

Property held in joint tenancy is property co-owned by two or more individuals where, at the death of one, that individual's interest passes automatically to the surviving joint tenants.

Generally, a will cannot dispose of interests in property which you own as a joint tenant. Sometimes, however, a person is killed in a common disaster with his joint tenant or tenants and it is not possible to ascertain the order of death. In these cases each tenant's interest in the property becomes part of his probate estate . Consequently, a husband and wife who "own everything in joint tenancy" (or "tenancy by the entirety", which is similar to joint tenancy) should have wills because of the possibility of a common disaster.

Joint tenancy should be distinguished from a “tenancy in common”, where the interest of one co-owner does not pass to the surviving co-owner or co-owners, but rather becomes part of his probate estate. Tenancies in common in personal property are unusual.

WHAT IF I DON’T HAVE A WILL?

Property owned by a person who has no will passes by statute to his “heirs”.

The probate property of a person who dies without a will (dies “intestate”) is distributed to his “heirs” in accordance with the Illinois statutory scheme. For example, in Illinois, if a person is survived by a spouse and descendants, one-half of the property is distributed to the spouse and one-half is distributed to the descendants “per stirpes”. “Per stirpes” means that the children of any child who dies before the decedent take the deceased child’s share. If an individual is survived by a spouse but no descendants, or by descendants but no spouse, then the spouse or the descendants, as the case may be, take all the property.

The statutory distribution scheme is necessarily rigid and frequently does not reflect a person’s wishes. That all intestate distributions are outright is particularly disadvantageous. Outright distributions to minors or incompetents can lead to the creation of clumsy, expensive and court-supervised guardianship estates which lack the flexibility of trust arrangements.

To administer an intestate estate, the court appoints an “administrator”. An administrator lacks many of the powers of an executor and, if an individual, usually must provide a surety bond. As noted above, a surety bond requires the payment of annual bond premiums which may be substantial.

SHOULD I HAVE A TRUST?

A trust is a convenient arrangement for holding property for the benefit and use of “beneficiaries”, often including the person himself who creates the trust. A trustee, who can be the creator, or settlor, of the trust, is appointed who manages the property. Successor trustees are usually named as well.

A “trust” is a special arrangement under which a “trustee” holds legal title to property for the benefit and use of one or more “beneficiaries” (which may include a person who is also acting as a trustee). A trustee generally has the duty to invest and manage the property and make mandatory, or for stated purposes (usually relating to health, support, maintenance or education) discretionary, distributions of the property or payments of income from the property.

Trusts may take many forms and may be created by a person either during his lifetime or, by will, at his death. Trusts created during lifetime (sometimes called “living trusts”) usually are very effective devices. They can provide for the welfare of the person who creates the trust (sometimes called the “settlor” or the “grantor”) or other persons, especially where beneficiaries are incapacitated or under a certain age. They also, like a will, can provide for a disposition at the death of the settlor of any assets transferred into the trust during the settlor’s lifetime, without the need for any probate. Perhaps the simplest form of such a trust is known as the “Totten” trust (named after a New York case) under which a person deposits a sum of money in a special form of a bank account in his name as “trustee” for another person. The creator of a Totten trust has control and use of the money, but at his death any money remaining in the account passes outright to another named person.

Normally, trusts are more elaborate. All trusts, as indicated, have a trustee (usually named in the instrument creating the trust) as well as a settlor. By a “self-declaration of trust” one may name himself trustee. The creation of a trust involves a transfer of property to the trustee, who holds “legal” title to it for the benefit of the beneficiaries. This means the trustee really “owns” and has the power to deal with the trust property in a manner consistent with and subject to restrictions contained in the trust instrument. All beneficiaries are considered to have an “equitable” interest in the trust property. This equitable interest gives the beneficiaries the right to go to court, if necessary, to force the trustee to perform his duties.

Since a trustee holds property for the benefit of another, he is a “fiduciary” and as such has a duty to exercise care and skill in protecting and managing the trust property. An executor is also a fiduciary, but a trustee generally has more extensive investment and discretionary responsibilities which may be exercised over a longer period of time. Often those responsibilities exist long after the death of the person who created the trust. Motivations for creating trusts vary, but generally trusts are created (1) to provide management of assets for persons who are inexperienced or who are not capable, or may become incapable, of managing property (such as minors or incompetents), (2) to receive and retain in a single place property or all interests in certain property so that it is all available for designated purposes, and (3) to permit the allocation of property among a group of persons according to need. Trusts may be created for limited purposes (such as "education" or to run a business) or for more general purposes. Likewise, the powers and duties of a trustee may be limited or broad.

WHAT ARE INSURANCE AND "LIVING" TRUSTS?

A trust (created during lifetime) at all times should have some property in it. In the case of an "insurance trust", the only property is the right of the trustee as the beneficiary of life insurance to receive the proceeds at death. A "living" trust is "funded" by transferring property into it during the lifetime of the creator, or "settlor".

An "insurance trust" is a trust created during lifetime to serve only as a receptacle at death for the proceeds of life insurance. No real transfer of "property" is made into the trust during lifetime. The law requires, however, that every trust must have something, usually called the "res", "corpus" or "trust estate" in it. This requirement is satisfied by the mere designation of the trustee as the beneficiary of the life insurance proceeds and the right of the trustee to receive those proceeds. An insurance trust ordinarily remains inactive during the settlor's life. As in the case of many "living" trusts which are "funded" (where property is actually transferred to the trustee during the settlor's lifetime), insurance trusts frequently provide that the settlor can alter, amend or revoke the trust at any time. Both insurance and funded trusts can also be receptacles for probate property. A will, by naming the trustee as beneficiary, is said to "pour over" probate assets into the trust.

Trusts prepared by The Will Shoppe are in the form of funded trusts (which include provisions for management during the settlor's lifetime) whether or not they are, in fact, ever substantially funded during the settlor's lifetime. If never funded, such trusts serve merely as insurance trusts. Funding, of course (to provide for possible incapacity, or for some other reason), could occur at any time without the necessity of amending the trust instrument.

SHOULD I BE CONCERNED ABOUT DEATH TAXES?

Depending upon the size of your anticipated probate estate, the extent of other assets subject to taxation and the identity of the persons entitled to receive any of such assets, there may or there may not be any Illinois or Federal Estate taxes payable in connection with your estate. The following discussion applies to spouses who are U.S. citizens. Modified rules apply to non-citizen spouses, particularly in connection with the application of the "marital deduction" discussed below.

NOTE: None of the plans offered by The Will Shoppe is designed to reduce or minimize death or any other kinds of taxes. They, instead, are designed to manage and utilize property for family members and other beneficiaries. If you believe, after reading the materials below and based upon any other information available to you, that your assets are such that death taxes could be a concern, these plans may not be suitable for you and you should first discuss the matter with a tax or estate planning professional.

DOES ILLINOIS HAVE A DEATH TAX?

Illinois currently imposes a tax (an Illinois Estate Tax) only to the extent that a credit is allowable (or would have been allowable in 2001) against the Federal Estate Tax for state death taxes and there are “Illinois based” assets. For purposes of Illinois taxes, the exclusion amount (see the discussion concerning the Federal Estate Tax below) is $4,000,000. This means that an Illinois tax may be due even though no federal tax is due. Other states may have death taxes as well relating to property considered located in those states.

WHAT ABOUT OTHER STATE DEATH TAXES?

Even if you die a resident of Illinois, taxes may be owing in other states should you own real or personal property considered located in those states. As in Illinois, such taxes may take the form of an estate tax (depending upon the allowance of a state death tax credit against Federal

Estate taxes
), or there may be “inheritance” taxes which may be determined not only by the value of such assets but also by the relationship of the decedent to the beneficiaries. Some states may use a combination of estate and inheritance taxes.

ARE ANY NEW STATE DEATH TAXES ON THE HORIZON?

It is possible that Illinois and other states may enact new forms of state death taxation. Since the state death tax credit has been phased out (as discussed below), the various states which “piggybacked” upon the Federal Estate Tax will lose substantial tax revenue. These states may be inclined to create death taxes to replace those lost revenues.

HOW DOES THE FEDERAL ESTATE TAX WORK?

A federal estate tax may be due in any estate (broadly defined) which, after an “exclusion amount” and deductions, exceeds a certain amount. In 2013, the exclusion amount is $5,250,000 and will be adjusted for inflation in future years. Under the concept of "portability", the exclusion amount not used by one spouse may be used by the other. An election to allow such use, however, must be made in the estate of the first to die, which likely will require the preparation and filing of an estate tax return even though a return otherwise would not be required.

The Federal Estate Tax is determined both by the size of the “estate” transferred and the rate of tax, which is 40% levied upon that portion of the estate over the exclusion amount.

The “estate” subject to tax basically includes all real property, tangible personal property (clothing, jewelry, automobiles, etc.) and intangible personal property (cash, bank accounts, stocks, bonds, etc.) which was owned by the decedent at his death. Also included is similar property in, or over, which he had a sufficient interest or power to cause the property to be taxable.

Except for property held in joint tenancy between husband and wife, all joint tenancy property attributable to the decedent's contribution is subject to the Federal Estate Tax. Only one-half of property held in joint tenancy between spouses is included in the "estate". Life insurance proceeds on the life of the decedent, regardless of who is the beneficiary, are taxable if the decedent retained in the policy any "incidents of ownership" such as the right to designate beneficiaries. Balances at death in retirement accounts are also generally taxable. Because the tax is a federal tax, the "estate" includes real property and tangible personal property outside of Illinois. All assets subject to the Federal Estate Tax, when aggregated, are referred to as the "gross estate".

The "taxable estate" consists of the gross estate less debts, expenses and deductions. A "tenative tax" is determined, based upon the sum of the taxable estate and certain lifetime taxable gifts which may have been made. The actual estate tax is determined by subtracting from the tentative tax any taxes paid in connection with such taxable gifts, a credit for taxes otherwise payable in connection with the exclusion amount and any other credits.

Without further legislation, in 2013 the Federal Estate Tax will return with higher tax rates and an exclusion amount of only $1,000,000.

No tax, however, may be due even in very large estates because deductions, particularly the " marital deduction"
, are available.

WHAT IS THE "MARITAL DEDUCTION"?

Under the federal estate tax laws, any property given or left to the surviving spouse is deductible. This includes property left to the spouse in special forms of trust.

The "marital deduction" is available for all property passing to a surviving spouse whether by will, by transfer of the decedent's interest in joint tenancy property, in the form of life insurance proceeds, by distribution of retirement accounts, in certain forms of trust or otherwise. Since, however, as mentioned above, no Federal Estate Tax is due unless the taxable estate exceeds the exclusion amount, it is not necessary to take full advantage of the “unlimited” marital deduction in order to eliminate the necessity of paying any Federal Estate Tax. For example, if an individual leaves an estate (after taking all other deductions) of $7,000,000, the property given to the surviving spouse need not exceed $1,750,000 (assuming a $5,250,000 exclusion amount), since a taxable estate of $5,250,000 would produce no tax. Of course, more property could be given to the surviving spouse if such a gift would not be likely to cause any additional taxes at the death of the surviving spouse. If, however, in the example given, the entire $7,000,000 were given the surviving spouse and he or she died without having consumed much of the property, the surviving spouse could have an estate in excess of his or her exclusion amount. To the extent that the surviving spouse’s estate exceeds the exclusion amount, the excess would be taxed at a rate currently of 40%. Sometimes, as you can see, there may be somewhat of a “gamble” involved in deciding how much to leave a surviving spouse. Tax savings in the estate of the first to die could lead to far greater taxes in the estate of the survivor if tax rates were to increase or if the marital gift to the surviving spouse were increased in order to eliminate Illinois or other state estate taxes which may have a lower exclusion amount. Illinois, however, provides for the use of a special "QTIP" marital trust (see below) just for Illinois estate tax purposes.

In order to qualify for the marital deduction, property must pass to a surviving spouse so that, unless consumed, it will be taxable in the estate of the surviving spouse. Normally the property is given outright or in a special form of trust called a “marital trust”. All of the income from a marital trust must be paid to the surviving spouse, and the surviving spouse may be given the power to dispose of (or consume), as he or she chooses, all or some portion of the property in the trust during lifetime or by will or both. Property over which the surviving spouse does not have an unrestricted power of disposition (called “Qualified Terminable Interest Property” or “QTIP” property) will qualify for the marital deduction only if the property in the trust may be distributed to no one but the surviving spouse during his or her lifetime and, in the estate of the deceased spouse, the executor elects to have the property qualify. The will, however, can direct the executor to make the election. Property left to a surviving spouse or in a martial trust (whatever is left) will be taxable in the surviving spouse’s estate. Proper use of the marital deduction can result in significant tax savings.

Property in the estate which is not given to the surviving spouse (and, hence, is not taxable in the estate of the surviving spouse) may, however, be left in another trust from which the surviving spouse may receive substantial benefits, including income and limited amounts of principal with, if desired, a limited power of disposition during lifetime or at death (a "power of appointment") in favor of descendants or other beneficiaries.

WHAT ARE FEDERAL GENERATION-SKIPPING TRANSFER TAXES?

Generation-skipping transfer (GST) taxes may be imposed where transfers (beyond an "exemption" amount) are made to persons two or more generations below the transferor, even if interests are created for persons only one generation below. The exemption amount in 2013, like the estate tax exclusion amount, is $5,250,000 and will be adjusted for inflation in future years.

This tax is a flat tax at the Federal Estate Tax rate. The simplest example of such a transfer would be a direct gift from a grandfather to a grandchild.

Because of the substantial exemption, the tax does not impact many estates. Since, however, wills and trusts may act upon future-acquired property (and appreciation) and estates tend to grow in size, and there is no certainty that Congress will not reduce the amount of the exemption, prudent planning requires that the application and consequences of the GST tax at least be considered.

There is no spousal exclusion "portability" as there is in the case of the estate tax.

WHAT IF I MAKE GIFTS OF PROPERTY DURING MY LIFETIME?

A person, of course, need not wait until death to dispose of property. Gifts can be made during lifetime. Gifts, however, while not currently taxable in Illinois may be subject to Federal Gift Taxes if the gifts are substantial. The same rate applies to lifetime gifts which applies under the Federal Estate Tax laws to gifts made at death. Taxable gifts made during a decedent's lifetime, with some exceptions, are added to the taxable estate in order to compute the amount of Federal Estate

Taxes payable. A credit, of course, is given for any gift taxes paid. The tax structure is said to be “unified”. The exclusion amount for gift tax purposes is the same as the estate tax exclusion amount, as is the rate of tax.

There still are, however, incentives to making gifts. In 2013, up to $14,000 given each year to any person is completely excludible from gift and estate taxes. If a spouse joins in the gift (and does not make a separate gift) up to $28,000 may be given. There is no limit upon the number of persons to whom gifts can be made in any year. The amount of the annual exclusion is indexed for inflation. Gifts directly made for certain educational and medical expenses beyond the annual exclusion may also be excludible. More substantial gifts may serve to keep future appreciation out of an estate, since only the value of the gift at the time it was made is considered under the unified system. Of course, all income earned on such property is also removed for both income and death tax purposes. Gifts between spouses result in no gift taxes. In instances where one spouse is the owner of substantial assets and the other has few or no assets, a gift from the former to the latter ultimately could result in reduced income taxes on any gain realized on the sale of the assets given, if the spouse to whom the gift is made lives for at least a year and dies first. This is so because property in the estate of a decedent receives a new “tax cost” or “basis” equal to its value for Federal Estate Tax purposes.

As in the case of so-called “death taxes”, special tax rules also apply in connection with lifetime gifts to non-citizen spouses.

WHAT OTHER PLANNING CONSIDERATIONS ARE THERE?

Planning, apart from tax considerations, is driven by a desire to use one’s property in a thoughtful way to meet their own needs and the needs of loved ones.

Within certain limits, a person generally may dispose of property in any manner he or she chooses. Dispositions at death occur not only by will or pursuant to the provisions of trusts created during the settlor’s lifetime but also through the use of joint tenancies, life insurance, private annuities, retirement plans and other methods.

The selection of the beneficiaries under any of these forms, and the extent of their interests, must be considered in connection with any plan of disposition provided for by will or in a trust. In many instances, clients choose to funnel all of these property interests which pass at death through their wills or through trusts created during their lifetime. In this way, all such property is collected, administered and distributed in a similar manner. Other clients prefer to employ other methods, like those previously mentioned, for the disposition of some assets and to make necessary adjustments in a will or trust.

However accomplished, your goal should be to provide for the disposition of all your property interests in a way which will benefit your beneficiaries as nearly as possible in accordance with your wishes. Normally, a person desires to provide for a spouse and descendants in such a way that their future needs will be best satisfied. Tax considerations, particularly Federal Estate Tax considerations, sometime mitigate against that desire or impose a cost. Sometimes people plan for the greatest tax advantage, regardless of the resulting loss of flexibility. Generally, some balance between competing objectives can be achieved.

HOW ARE TRUSTS USEFUL IN PLANNING?

Trusts are very convenient and flexible arrangements to plan for one’s own needs and the needs of others. Trustees can be given broad discretion to utilize trust property to meet contingencies and needs as they arise.

Except for planning designed specifically for tax purposes, trusts offer a broad opportunity to provide for one’s family in a tailored, thoughtful way. Of course, property can be given outright, but gifts of any significant size should never be given to persons who may be unable or ill equipped to manage their financial affairs, whether because of tender years, immaturity or physical or mental incapacity. Trusts can also be used to create incentives, and certainly should never serve to create disincentives. Finally, trusts can be designed to protect against claims of creditors, and others, or to provide for loved ones but yet control the ultimate disposition of your property.

Because it is not always possible to anticipate and provide for all of the uncertainties which life sends our way, trusts allow us to leave to the judgment of others how best to deal with situations, and needs, as they arise long after we are gone. Trustees can be given broad discretion within standards of need you choose, relating to health, support, maintenance or education. Also, trusted family members or other individuals (whether or not also acting as Trustees) can be given powers, called “powers of appointment”, to redirect property among designated beneficiaries as future circumstances may warrant. Unlike a Trustee’s discretionary powers, powers of appointment do not require or depend upon any standards related to need. It is common, for example, for spouses to give each other such powers, so that the survivor is free to make appropriate adjustments in the estate plan.

ARE THERE SPECIAL PLANNING CONSIDERATIONS FOR CHILDREN AND OTHER DESCENDANTS?

Trusts for children and other descendants should be designed to meet their needs, create incentives if possible and not create disincentives.

Planning for children and other descendants, we believe, should be conservative. Usually property left to descendants is held in trust for them until certain ages are reached at which time the property is distributed to them outright. For example, a child’s share could be held in trust for him until he reaches age 30. Perhaps one-half could be distributed to him at age 25 with the balance at age 30 (other ages can also be used, and more than two distributions can be provided for). In the meantime, all of the trust assets, and the trust income, would be available for the child’s health, support, maintenance and education. The child is not disadvantaged in any way except that a Trustee must first agree to the use of any trust funds for the child’s welfare.

A single trust for children (or grandchildren, for that matter) can also be created which does not divide into separate shares for the children until the youngest child reaches a certain age (such as 25). This allows younger children who may have greater needs, particularly educational expenses, to draw down the “common pot” (as is usually the case when the parents are alive) for some period of time without having to deplete their separate shares.

Although the future of death taxation is uncertain, and it is always difficult to do effective planning even in our own estates, we should always at least consider the impact of our planning upon our children and their own planning or need to plan. Such an assessment often is easier if our children are grown and established and are already engaged in their own planning. It obviously is only conjectural or speculative when our children are young. Any property distributed outright to children, or other descendants, would become part of their own estates and, depending upon laws in effect at the time, may be subjected to estate, or other death , and gift taxes. There may be opportunities, however, to restrict gifts (using trust arrangements) to children or other descendants in such a way so as to reduce, or avoid, taxes at their deaths. For example, under present law property can be left to children in a form of trust often referred to as a generation-skipping transfer tax trust ("GST trust") and in an amount equal to the unused portion of the GST tax exemption (discussed above). Such property can be left in a GST trust for children for their lives, or indefinitely, either in a single trust or in separate trusts. At the death of a child (or a more remote descendant if left indefinitely), again under present law, no federal estate or generation-skipping transfer tax will result.

Such special tax-driven planning, of course, adds to the complexity of the estate plan, and possibly the cost, and ultimately may serve to result in no real benefit. On the other hand, very substantial tax savings could result in future generations many years down the road.

ARE THERE SPECIAL PLANNING CONSIDERATIONS FOR SPOUSES?

Apart from simply leaving property outright to a spouse, through the use of trusts not only can taxes sometimes be reduced or minimized, but spouses can be substantially provided for and protected from claims of possible creditors. This can be done while being able to control the disposition of the trust property at the surviving spouse's death.

Planning for spouses involves considerations of need, taxes and protection. The marital trust (discussed above) obviously is driven by tax-savings. The form of the marital trust, however, can be very broad, giving the surviving spouse unrestricted access to trust property, or very restricted, giving the spouse an income interest only, or somewhere in between. Income only is usually considered too restrictive, unless there is no question that the spouse is adequately otherwise provided for and the principal of the marital trust will never be needed for the spouse's care.

Sometimes, totally apart from tax considerations, there may be incentives to restrict property given to or for the benefit of a spouse. These may include concerns related to, and the desire to control, the ultimate distribution of property. Sometimes, while wanting to be certain that our spouses are provided for, we equally want to be certain that property (whatever is left) ultimately passes on to other beneficiaries, such as our children. The potential for remarriage of surviving spouses, for example, and the possible blending of new families and commitments sometimes create some concern. In second marriage situations, especially where there are existing families from prior marriages, there may be special concerns that, if spousal gifts are not restricted, the family of the first to die could be excluded in the survivor's planning.

Restrictions on gifts to spouses can also afford protection from potential creditors. Because of what are known as "spendthrift" provisions in the trust document, creditors of the beneficiary spouse (of a trust created by the first spouse) generally cannot reach the spouse's interest in the trust. This is not to suggest a need to protect only "spendthrift" spouses, but potential claims could be asserted arising out of misfortune with respect to business dealings, health problems or lawsuits. A claim, for example, in excess of insurance coverage in connection with an automobile accident could be devastating.

SHOULD I PLAN BEYOND MY SPOUSE AND DESCENDANTS?

It generally is prudent, in an uncertain world, to plan for others in the event, however unlikely, that neither one's spouse nor one's descendants are living before all property is distributed.

Many people are unmarried, divorced or widowed and may not have any children or other descendants. Also, even with respect to married persons, with or without descendants, contingencies, even rather remote contingencies, should be considered. A man, for example, finds it painful to think that his wife and children may either predecease him or die before all property, held in trust or otherwise, is distributed. Unfortunately, such events do occur. Another contingency which should be considered in an age of extensive family travel is the possibility of a common disaster involving husband, wife and children. Although your first reaction may be that it really doesn't matter what happens to one's property should unfortunate events occur, prudence dictates that provision be made for a disposition of the property. In most cases, there are other relatives, such as parents, brothers and sisters and nieces and nephews, who have needs which can be met in a manner far preferable to the statutory scheme.

WHAT ARE POWERS OF ATTORNEY AND “LIVING”WILLS”?

The law allows us to name agents to make health care and property-related decisions for us at any time we are unable to. We, if we wish, can also declare our desire to have life-prolonging or death-delaying procedures withheld under certain circumstances.

In addition to wills and trusts , powers of attorney relating to property interests are useful supplementary devices, particularly in the event of incapacity, in order to permit an agent (the “attorney-in-fact”) to deal with assets which have not already been placed in some kind of trust and to otherwise represent a person’s financial affairs. Such a power, if desired, can be made to take effect only in the event of incapacity and, if a "living" trust exists, the agent can be instructed to exercise the power by transferring assets into the trust in order to permit broader and more flexible management.

Finally, the management and disposition of property are not always the only concerns of many people. They are equally concerned about health care decisions and decisions concerning the institution and withdrawal of life-support and life-sustaining procedures. For those who have these concerns, statutory “Living Wills” and “Powers of Attorney for Health Care” may be prepared. The “Living Will” is a declaration of intent regarding the prolongation of life in situations where death is likely or imminent. The “Health Care” power also covers such situations, but, where a person may not have the capacity to make any decisions concerning health care, permits the appointment of an “agent” who may make such decisions. The agent may even be authorized to make decisions concerning the gift or disposition of body parts after death.