ESTATE PLANNING

Basic Information and Techniques

This outline discusses some basic concepts for prudent estate planning in New Jersey and some common techniques and instruments used to put effective estate plans into place.

WILLS, TRUSTS AND PROBATE

What is "estate planning" and when should I start thinking about it?

Most narrowly, estate planning is the process by which you arrange to pass the property that you accumulate during your lifetime to the people you want to receive that property after your death – and at the least tax and administrative cost. More broadly, it includes planning for wealth accumulation during life (e.g., for college tuition, retirement, etc.), asset protection (e.g., from creditors), health care planning (e.g., living wills, health directives, long-term care insurance), asset control and management (e.g., living trusts, powers of attorney), business succession, liquidity concerns, gifts and possible planning for incapacitated family members. Given the number of issues that may affect any particular individual or couple, giving thought to the best courses of action should happen sooner rather than later.

I don't have a Will. Won't my spouse get all my property anyway?

If you die without a Will ("intestate," as opposed to "testate," meaning to die having left a Will) as a resident of New Jersey, the answer is "not necessarily." Before March 1, 2005, a New Jersey resident who died without a Will and left a surviving spouse and no children or grandchildren would, in fact, have succeeded in passing all property held in his or her sole name to the surviving spouse. However, if that resident left any surviving children or grandchildren, then the spouse would have received the first $50,000 of estate assets but equally divided the balance with those children or grandchildren.

As of March 1, 2005, the New Jersey intestacy rules changed. The assets of a New Jersey resident who dies on or after March 1, 2005, will pass in full to his or her surviving spouse only if (i) no parent or descendant (e.g., child, grandchild, etc.) of the decedent is living or (ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and that spouse has no other descendant. If that decedent left parents surviving but no descendants, the spouse would receive (i) the first 25% of the estate (but not less than $50,000 or more than $200,000) and (ii) three-quarters of the balance. The surviving parent or parents would receive the rest of the assets.

If (A) that decedent had any descendants who were not descendants of the surviving spouse (e.g., children from a prior marriage) or (B) all the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has any descendants who are not also descendants of the decedent (e.g., again, perhaps children from a prior marriage), then the surviving spouse would receive (i) the first 25% of the estate (but not less than $50,000 or more than $200,000) and (ii) one-half of the balance. The surviving descendants of the decedent would receive the rest of the assets.

For example, the property of a New Jersey decedent who died on or after March 1, 2005, without a Will and with a $1,000,000 probate estate, leaving a spouse, an 18-year-old child from a prior marriage and three minor children from the current marriage, would pass as follows: (i) first $200,000 to the surviving spouse (the ceiling amount from the first 25% of the estate); (ii) one-

half of the $800,000 balance (i.e., $400,000) also to the surviving spouse; and (iii) the $400,000 balance to the decedent's four surviving children in equal shares ($100,000 per child). If all four children had been children of the current marriage (and neither spouse had any other children), then the surviving spouse would receive the entire intestate estate. If the decedent left no children surviving but left a surviving spouse and surviving parents, the spouse would receive $200,000 plus three-quarters of the $800,000 balance ($600,000), with the parents equally dividing the $200,000 balance ($100,000 per parent).

In short, the intestacy statute may well produce unintended results. In fairly common family situations, not only would the surviving spouse not get the benefit of all of the decedent's assets, with a significant portion passing to children or parents, but no sort of express trust would be established for any beneficiary (e.g., a minor child, who would receive all of his or her inheritance upon attaining age 18, or the spouse, who might remarry and perhaps leave some or all of the property he or she inherited to the new spouse). In addition, without a Will, anyone who applies to be the administrator of the estate may be required to post a bond – i.e., a kind of insurance policy that protects the estate from an administrator's possible malfeasance – which means that premiums will need to be paid. Additional documents will also likely need to be filed (and costs incurred) in the course of administering and winding up the intestate estate.

I have a Will that leaves everything to my spouse. Do I need to do more than that at this point?

That depends. An important part of estate planning is estate tax planning. If you and your spouse together don't have assets in excess of $5,000,000 (the amount in 2011 that an individual can pass free of federal estate tax), then a simple Will that leaves everything to a surviving spouse may be adequate (though that depends on what happens with the federal estate tax laws with respect to 2013 and later years, as discussed below). However: (i) in calculating the amount of your assets, be sure to include things like the equity in your house (i.e., the actual current market value less any mortgage), the proceeds of insurance policies on your life that you own, the assets in your retirement plans, the value of any jewelry or art collections, as well as the value of any taxable gifts you may have made in the past; and (ii) all of the property passing from the deceased spouse will be owned outright by the surviving spouse – and therefore at risk in the event the surviving spouse remarries or is a second spouse and not the parent of the deceased spouse's children. For instance, a subsequent divorce for the surviving spouse or the marital rights acquired by the surviving spouse's new husband or wife (if he or she outlives the surviving spouse) could cause assets intended (eventually) for the children of the marriage to pass to that new husband or wife.

If you have assets in excess of $5,000,000, you may certainly wish to consider tax planning for your estate (a topic discussed in more detail below). And the New Jersey Estate Tax (discussed below) now imposes a tax on assets in excess of $675,000, so planning for state death taxes might also be desirable.

I've heard that probate is something to be avoided, so my spouse and I have all our assets in joint names. Isn't that good estate planning?

Holding all your assets in joint names (so long as it includes all assets) is an effective way to avoid probate. However, there is little reason to avoid probate in New Jersey. This state's probate procedures are simple, inexpensive and streamlined, and they require little court or other official involvement (unlike, say, the probate procedures in Florida or New York). And holding all your property in joint names has all the potential disadvantages of a simple Will that leaves everything to the surviving spouse – i.e., there would be little estate tax planning that could be done (if needed), and all the family property would eventually be held in the surviving spouse's sole name, with all the potential disadvantages that such ownership entails. In short, attention to how property is titled is always essential to a good estate plan; however, joint ownership of all assets may not be the best solution.

If you have minor children, there is another important – but non-economic – reason to have a current Will in place: in the event you and your spouse die in a common accident (or within a short time of each other), you would want to designate a guardian to care for those minor children until they attain age 18. Doing so does not guarantee that the person appointed will take office, since the designated guardian could decline to undertake the responsibility or the Court could determine that the person designated was not suitable. But choosing a potential guardian carefully, discussing the appointment with the person chosen and having a husband and wife in agreement on the choice are all prudent steps. And having a valid Will that makes the appointment is essential.

And if you and your spouse do have minor children, another reason to have good Wills is to provide that your assets will be held in trusts for their benefit in the event your spouse does not survive you. You can prescribe the terms of those trusts, determine how long they will last and specify how funds should be distributed (or not). Without a Will (and the trust terms it could contain), if your spouse does not survive you – or dies soon after you do without a Will – your assets would pass to your minor children outright and would require court supervision during their minority. And, at age 18, each child would receive his or her share outright, to save, spend or (possibly) squander.

What is probate?

Probate is simply the process for "proving" a decedent's Will (the word "probate" is related to "probing," as in "testing" or "proving") and officially installing an executor to take over the decedent's economic affairs, pay his or her debts, gather his or her assets and "execute" the instructions contained in the decedent's Will. It usually involves an appearance at the office of the Surrogate (a county official who is part judge and part clerk) with an official death certificate and the original Will. The designated executor then signs certain papers that state that he or she will faithfully discharge an executor's duties, appoints the Surrogate as an agent for the estate to receive legal documents and pays a small fee. The Surrogate's office then issues Letters Testamentary – the official instrument that demonstrates that the executor has taken office and has the power to manage the decedent's assets and liabilities.

Bear in mind, however, that if someone opposes the probate of a Will or if the Will is sufficiently out of the ordinary (e.g., having cross-outs or additional writings on an otherwise typed page or pages missing, etc.), the probate process would be much more complicated, perhaps requiring the involvement of the Superior Court. So, even if you have a Will, you should keep it and any codicils (those documents that change the provisions of existing Wills) in good order.

What is a trust, and should I be creating trusts at this point in my life?

A trust is a legal relationship between the grantor of the trust and the trustee – i.e., the person designated by the grantor to take legal control over certain assets titled in the name of the trust. The relationship is usually formalized by a trust agreement or other document (e.g., a Will), and, after the agreement is formalized or the Will takes effect, the trustee then acts as a fiduciary, with important responsibilities and legal obligations to the beneficiaries of the trust.

Trusts can be created for many reasons – for probate avoidance (as discussed above), for asset management, for the benefit of a minor child or grandchild, for an incapacitated family member or for some estate tax avoidance or gift minimization purposes. Trusts created during one's lifetime are commonly referred to as "inter vivos" or "living trusts" (not to be confused with "living wills," discussed below). However, some of the simplest estate tax avoidance goals can be accomplished with trusts whose terms are contained in your Will – so-called "testamentary" trusts – that do not have to be established during life at all. These basic estate planning trusts will be discussed in more detail below.

Can I put all my assets in trust and avoid probate that way? I can do effective estate tax planning, protect my assets for my children and still not leave a lot of administrative work to be done.

Yes, you can avoid probate by putting all your assets into a revocable trust that you create during your lifetime and of which you can act as trustee. Such probate avoidance is touted in lots of "Avoid Probate" books and articles, and it can, in fact, be a useful and economical device for residents of some states (or for New Jersey residents who own real property in other states) and may speed access to certain assets. But as noted above, avoiding probate in New Jersey does not need to be a high priority. And, even with assets in trust, there are still plenty of administrative steps that are not avoided – most importantly, the filing of estate tax returns. Bear in mind that avoiding probate does not mean avoiding estate taxes.

Doesn't putting my assets into a revocable trust for myself protect them from creditors and from estate taxes?

Certain trusts carefully established in states such as Alaska and Delaware can permit the person who creates that trust (the "grantor") also to be the beneficiary of the trust and to keep the assets in that trust safe from certain creditors of the grantor. Those trusts cannot yet be established in New Jersey, although they can be established by New Jersey residents (but with trustees located

in the other state). As "asset protection" trusts, these instruments are still not completely tested. New Jersey residents who have creditor concerns can certainly consider using such trusts – but probably not with all their assets and certainly not if creating such a trust would defraud any existing creditors. And certain debts – such as child support payments – cannot be avoided in this way. However, in any kind of trust where the grantor is also a beneficiary, estate taxes will almost certainly not be avoided. Asset protection trusts are not estate tax avoidance trusts.

So does it matter how my spouse and I hold our assets if we have good Wills?

Yes, it is important that some thought be given to how assets are held. The most skillfully drafted Wills might not be effective if all of a couple's assets are held jointly or if they are held primarily by one spouse but the other spouse dies first. For example, suppose a couple has $9,000,000 of assets – with all but a few small checking accounts in the husband's name. Husband and wife were careful not to hold all their assets in joint name and took pains to get good estate planning Wills prepared and kept up-to-date. But suppose the wife dies first. There will be little property governed by the terms of the wife's Will, because almost all the family assets are already owned by the husband. There will therefore be little (if any) property available to pass into a so-called "bypass" or "credit shelter" trust (discussed below) for the benefit of the husband, and the estate tax advantages of those carefully drawn Wills might be lost (although the "portability" provisions (discussed below) of the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act," which was signed into law on December 17, 2010 (the "2010 Tax Act") might prevent that loss). Note that, if the husband had died first, there would not be a similar problem, since he would have plenty of assets to fund the bypass trust for the wife. But no one can safely predict the order of death. Therefore, careful asset allocation between husband and wife is essential. While the division of property between husband and wife does not need to be equal, having sufficient assets in each spouse's name to permit all available tax advantages (i.e., estate and/or generation-skipping tax) – which may change from year to year – to be effectively used regardless of the order of death should be an important goal.

Bear in mind also that many of what may constitute your largest assets – e.g., 401(k) plans, IRAs, insurance and annuity policies – pass by beneficiary designation. The financial arrangement itself asks that you name a primary beneficiary to receive the assets upon your death and often asks you to name a secondary or contingent beneficiary in the event the primary beneficiary is not alive. It is extremely important to coordinate your beneficiary designations with the other elements of your estate plan in order not to waste tax advantages or have unanticipated results. For instance, if you own a large insurance policy on your own life with your spouse named as primary beneficiary and your children (all currently minors) named as secondary beneficiaries and you and your spouse die in an accident in which he or she predeceases (or is presumed to predecease) you, then your children will be the recipients of the insurance proceeds. And regardless of the fact that you and your spouse's Wills contain very well-drafted trusts for your children that provide detailed instructions about the use of your assets for their benefit, the terms of those Wills are irrelevant. The insurance proceeds will be payable to your minor children outright and therefore need to come under the management of a court-appointed guardian and will become the property of the individual beneficiaries as each one attains age 18 – which may not have been your intention at all.

WEALTH TRANSFER TAXES

I'm a New Jersey resident. What death taxes do I need to be concerned about?

The main focus of estate tax avoidance for New Jersey residents will usually be the federal estate tax, although the New Jersey Estate Tax may deserve attention also. New Jersey actually has two death taxes of its own: the New Jersey Inheritance Tax and the New Jersey Estate Tax. The Inheritance Tax is a tax imposed on beneficiaries of a New Jersey estate based on the assets each beneficiary receives. However, property received by spouses, parents, children, grandchildren and charities is exempt from the tax, which means that many estates do not incur the Inheritance Tax at all. The New Jersey Estate Tax was, at one time, a tax based on a credit allowed against the applicable federal estate tax. That is, estates that were in the position of paying federal estate tax were granted a reduction in that tax (based on a sliding scale) for state estate taxes. If, for example, there is a gross amount of $100 of federal estate tax payable but a state death tax credit of $10 available, New Jersey (and every other state) would have imposed a so-called "pick-up" or "soak-up" state estate tax of $10 to take advantage of the exact amount of that credit. The end result to the tax-paying estate was still $100 of estate taxes payable – but $90 to the IRS and $10 to New Jersey instead of $100 to the IRS. So the New Jersey Estate Tax was also not an important independent factor in estate planning for New Jersey residents. (The New Jersey Estate tax was and remains reduced by the amount of any Inheritance Tax paid, to prevent double taxation.) As discussed below, this is no longer the case; the New Jersey Estate Tax has now become more important in the planning process.

How does the New Jersey Estate Tax now work and how can it be avoided?

For decedents dying after December 31, 2001, the New Jersey Estate Tax is no longer based on the amount of the applicable federal estate tax state death tax credit. At the federal level, the credit for state death taxes disappeared completely in 2005 and was replaced with a deduction for state death taxes paid. As a result, the amount payable as New Jersey Estate Tax, which was based on that federal credit, was reduced to zero. Because of that change in federal tax law and the loss of state tax revenue it caused, New Jersey "decoupled" the state estate tax from the federal credit and now bases the tax on the federal rates and exemptions in effect on December 31, 2001. That means that: (i) estates not subject to federal estate tax in 2002 and later years may still be subject to the New Jersey Estate Tax, requiring considerably more administrative effort and expense; and (ii) estates that would have paid no federal or state death tax at the death of the first spouse may now be facing a sizable New Jersey tax .

For example, the estate of a New Jersey resident decedent who dies in 2011 with a $6,000,000 taxable estate and takes advantage of the maximum federal applicable credit amount (i.e., $5,000,000 in 2011), with the balance of the estate passing to the surviving spouse outright, pays no federal estate tax and, under prior New Jersey law, would have paid no New Jersey Estate Tax. Under the current law, that estate now must pay a New Jersey Estate Tax of $391,600.

Estate plans that take advantage of the applicable credit to the maximum extent by funding a "bypass" or "credit shelter" trust (discussed below) with the largest amount that can pass free of federal estate tax (i.e., $5,000,000) will pay New Jersey Estate Tax as follows:

2011	$391,600
2012	$391,600
2013	$33,200 (assuming return to $1 million federal estate tax exemption)

In fact, the New Jersey Estate Tax may be even higher, since the bypass trust funding amount set forth in a decedent's Will may include the amount of the tax payable, so that, after the payment of the New Jersey tax from that bypass amount, the full federal maximum is left. For example, if a New Jersey resident dying in 2011 funded his or her bypass trust with a formula amount intended for maximum federal estate tax benefits, and the New Jersey Estate Tax was payable from that bypass trust (a common provision in pre-2005 Wills), then the amount on which the New Jersey Estate Tax would be calculated would be $5,444,091, which would generate a New Jersey Estate Tax of $444,091. The reason is that older formula provisions and pre-2005 estate tax payment clauses would likely not have taken the current deductibility of state death taxes into account, since, at that time, those taxes provided a tax credit but were not deductible for federal estate tax purposes.

New Jersey Estate Tax could be avoided at the death of the first spouse by not using the maximum federal applicable credit amount (e.g., creating a "bypass" trust funded with only $675,000 rather than $5,000,000 at the first death). However, underutilizing the federal credit at the first death could mean substantially higher federal estate taxes at the second death (in addition to higher New Jersey Estate Tax at that time). This result would depend on a variety of factors, including the "portability" of federal estate tax exemption (discussed below) and the exemption amounts and tax rates applicable at the second death.

The increased federal estate tax exemption enaacted as part of the 2010 Tax Act is in effect for 2011 and 2012, but – as was the case before that law was enacted – the federal estate tax is scheduled to return to 2001 rates in 2013. Federal estate tax rates and exemption amounts may well change for 2013 and beyond. These questions and answers will continue to refer to scenarios and examples taking place in 2011.

For the time being, for many clients, the best advice for minimizing the combined effect of the New Jersey and federal estate taxes may be to have an estate plan that incorporates maximum flexibility at the death of the first spouse – if the family situation is appropriate. In that way, a decision could be made at or after the first death (instead of when the instruments are signed) to incur New Jersey Estate Tax now and minimize federal estate tax later, or vice versa. For example, a plan that permits funding the bypass trust for the benefit of the surviving spouse with an amount that the surviving spouse disclaims allows a second look at the overall estate plan at the death of the first spouse. By use of a prudent and timely disclaimer, the bypass trust could – at the election of the surviving spouse – either be funded to the maximum extent (which would

likely cause New Jersey Estate Tax to be payable but might minimize federal estate tax at the death of the surviving spouse) or the funding of that trust could be cut back (which could eradicate any New Jersey Estate Tax but might incur higher federal estate tax later). In either case, the assets of the estate would still pass to or in trust for the benefit of the surviving spouse, but the optimal tax situation could be re-assessed at the latest possible date rather than being locked in at the execution of the planning instruments.

On the other hand, for clients with larger estates where estate tax is inevitable or who face an unsettled family situation (e.g., a spouse who might opt not to disclaim), it may be more beneficial to forgo the flexibility of a disclaimer plan and simply opt to set up a fully funded credit shelter trust at the first death. This alternative approach would insure that the surviving spouse would receive the full advantage of the available federal estate tax exemption (even if that meant paying some New Jersey Estate Tax) and would also allow more flexibility in the terms of the credit shelter trust for the surviving spouse's benefit (e.g., inclusion of a testamentary power of appointment for the surviving spouse, which – owing to the federal rules governing disclaimers – would not be available in a disclaimer trust).

Is there a New Jersey gift tax?

No, New Jersey does not have a gift tax. However, it does have a "contemplation of death" rule for gifts made within three years of death. That is, if substantial gifts were made within three years of death, those gifts will be presumed made as part of a plan to avoid New Jersey Inheritance Tax and will therefore be included in the computation of that tax (but not necessarily in the computation of the New Jersey Estate Tax). That presumption can be rebutted if the gifts were not in fact made in contemplation of death as part of the donor's testamentary plan, but the burden of proof is on the taxpayer. (If the gifts made were not "substantial", they may still be subject to tax, but the taxpayer is relieved of the presumption that they were made in contemplation of death.) However, bear in mind the exemptions to the New Jersey Inheritance Tax: if those gifts were made to a spouse, child, grandchild, parent or qualified charity, they will still remain exempt from the Inheritance Tax, even if presumed to have been made in contemplation of death and therefore subject to the computation of that tax.

How does the federal estate tax operate?

The federal estate tax is a tax imposed on all of the property owned or controlled by citizens and other residents of the United States (including resident non-citizens) – the "gross estate" for estate tax purposes. The gross estate includes the current value of homes, proceeds of insurance policies owned by a decedent, cash, stocks, bonds, cars, art collections, IRAs, other qualified plans and all other assets owned or controlled by the decedent, whether located in the United States or elsewhere.

A federal estate tax return is required to be filed for all decedents whose gross estate total is equal to or above the applicable exclusion amount in the year of death ($5,000,000 in 2011 – a figure that corresponds to tax credit that reduces the federal estate tax to zero), even though no tax may be payable owing to applicable deductions and credits. It is important to remember that

the federal wealth transfer system is a unified system – i.e., it governs both lifetime gift transfers and transfers at death. The applicable exclusion amount applies both to lifetime gifts and testamentary bequests, and that amount is again the same for gifts and bequests: $5,000,000. That is, if you have given away $3,000,000 in taxable gifts during your lifetime and you die in 2011 with $3,000,000 of property, the lifetime gifts used up $3,000,000 of your $5,000,000 lifetime gift tax exclusion amount, and you paid no gift tax; but you also used up $3,000,000 of the credit available against the federal estate tax. Therefore, the $3,000,000 of assets remaining at your death will be fully subject to federal estate tax, to which you could apply the remaining $2,000,000 of applicable credit equivalent, leaving $1,000,000 subject to estate tax at the maximum 35% tax rate.

However, in addition to the applicable exclusion amount, there are also important deductions available to reduce the estate tax. The most important of these deductions is the marital deduction, for property passing to, or in certain qualifying trusts for the benefit of, a surviving spouse.

Finally, the 2010 Tax Act has added the concept of "portability" to the federal estate tax system. Before 2011, in order not to lose the value of the unified credit of the first spouse to die, that spouse usually had to create a separate trust to hold the unified credit amount (the "bypass" or "credit shelter" trust referred to in this booklet), with that trust designed to exclude the assets held in trust from the gross estate subject to federal estate tax on the death of the surviving spouse. Under the 2010 Tax Act, the first spouse to die does not necessarily need to create that "credit shelter" trust but can elect to let his or her surviving spouse use any of his or her unified credit amount that was unused at the first death. However, as discussed below, although portability offers the possibility of simpler estate plans, there are a number of potential pitfalls and drawbacks that need to be taken into account.

How does the marital deduction operate?

The federal marital deduction permits property left outright to a surviving spouse or in certain kinds of trusts (so-called "qualified terminable interest property (QTIP) trusts" or trusts that grant the surviving spouse a broad power to dispose of trust assets, referred to here as "marital trusts") for the benefit of a surviving spouse to be exempt from tax at the death of the first spouse to die. However, at the death of the surviving spouse, property owned by that spouse (including property inherited from the first spouse to die) or remaining in the marital trust will be subject to federal estate tax.

The federal marital deduction has a number of technical requirements that must be fulfilled, especially if the deduction is desired for property passing into a marital trust for the benefit of the surviving spouse. For instance, in a marital trust, the surviving spouse must receive all the net income, and the trust cannot terminate upon the occurrence of an event other than the death of the surviving spouse (e.g., the spouse cannot lose the benefit of the trust income if he or she remarries). For marital deduction planning, you should consult your attorney, accountant or other estate planning professional.

How does portability operate?

For 2011 and 2012, the federal estate and gift system incorporates "portability" – the ability of the first spouse to die to pass to the surviving spouse any of his or her unused federal unified credit against the gift and estate tax.

For example, suppose a couple has $9,000,000 of assets – with all but a few small checking accounts in the husband's name. Husband and wife were careful not to hold all their assets in joint name and took pains to get good estate planning Wills prepared and kept up-to-date. But suppose the wife dies first in 2011, with only $100,000 in a brokerage account held in her sole name. There will be little property governed by the terms of the wife's Will (i.e., just that $100,000 brokerage account), because almost all the family assets are already owned by the husband. As a result, only that $100,000 would be available to pass into a "credit shelter" trust for the benefit of the husband, with the remaining $4,900,000 of the wife's unified credit equivalent lost.

However, under the 2010 Tax Act, the wife could – on a timely filed estate tax return – elect to pass along her unused unified credit to husband, so that he could have his deceased wife's unused $4,900,000 credit equivalent to add to his own $5,000,000. Therefore, taking into account the $100,000 credit shelter trust, the wife's $4,900,000 of unused credit equivalent and the husband's $5,000,000 of credit equivalent, the full $9,000,000 of family assets could pass free from federal estate tax.

So are there any problems with portability?

Despite its apparent simplicity, there are some potential drawbacks to portability compared with the creation of a credit shelter trust on the death of the first spouse to die. For instance, instead of relying on portability, prudent allocation of family assets and use of a credit shelter trust:

1. Can help protect the assets in the trust from the creditors of the surviving spouse.

2. Can help preserve the assets in the trust for children of the marriage in the event the surviving spouse remarries (in which case that surviving spouse could leave family assets to or in the control of the second spouse or subject to a property settlement in the event of a divorce).

3. Can help preserve family assets in the event of a remarriage whether or not family assets are directed away from children. Portability permits a surviving spouse to use the unused exemption of the most recently deceased spouse. In the example given above, wife passed along $4,900,000 of unused exemption to her surviving spouse. However, if that surviving spouse remarried, and his second wife predeceased him leaving none of her exemption to him (e.g., because she used it up during her lifetime or on bequests to her children from a prior marriage), the $4,900,000 of exemption from the first deceased wife would be lost, since she was not the "most recently deceased spouse".

4. Can preserve any appreciation in family assets. When wife in the example above passes along her $4,900,000 to surviving spouse successfully, he will be able to protect $8,900,000 of assets in his name plus the value of the assets in the credit shelter trust (originally $100,000 in the example above). If that $100,000 grew by 25% over balance of husband's life (i.e., so the trust assets were $125,000 at husband's death), the total amount of family assets he could pass to the next generation free of federal estate tax would be $9,025,000. If husband's assets had also grown but the unified credit amount did not (or worse, owing to a future change in tax law, had actually decreased), a large amount of family assets could be subject to federal estate tax. However, if wife had died with sufficient assets to create a $4,000,000 credit shelter trust, at husband's later death, the trust would shelter $5,000,000 of family assets (assuming the same 25% growth), and husband would still have his own $5,000,000 plus (if elected) the wife's unused $1,000,000 of exemption. As a result, a total of $11,000,000 could be sheltered from federal estate tax using that well-funded credit shelter trust compared with only $9,025,000 when using a badly underfunded credit shelter trust and portability, resulting in federal estate tax savings (at the 35% marginal rate) of about $690,000.

5. Can preserve the exemption from the federal generation-skipping transfer tax (discussed below) of the first spouse to die, which is not portable.

6. Can preserve assets from the New Jersey Estate Tax, which does not recognize portability. For smaller estates, the ability to preserve $675,000 from the New Jersey Estate tax has significant value.

7. Can preserve assets in the event that portability in the federal estate tax law does not endure past December 31, 2012. No one can predict now what will happen to the unused "portable" exemption amounts held by surviving spouses who die after that date.

My spouse and I have assets that total about $10,000,000. Since we each will have a federal exclusion amount of $5,000,000 in 2011 and can take advantage of the marital deduction, do we need anything more than a simple Will that leaves all our property to each other?

Consider this scenario: you die in 2011 with $5,000,000 of assets in your name (your spouse owns the other $5,000,000), leaving all your property outright to your spouse. You will certainly pay no federal estate tax or New Jersey Inheritance or Estate Tax, because your estate is completely sheltered by the federal exclusion amount and the property passes to a surviving spouse in a way that qualifies for the federal and New Jersey marital deduction. However, assume your spouse dies later in 2011 with an estate of $10,000,000 – and a federal exclusion amount of only $5,000,000. Without electing portaiblity, a federal tax applies to your spouse's property in excess of $5,000,000. The federal tax will be $1,376,340, and the New Jersey Estate Tax will be $1,067,600 – a total of $2,443,940. Your children will receive the balance of the $10,000,000 after the payment of those taxes: $7,556,060.

If you elected maximum portability, you would have eliminated the federal estate tax, though the New Jersey Estate Tax would remain $1,067,600, and your children will receive the balance of the $10,000,000 after payment of that tax: $8,932,400.

If you had a Will that provided that an amount equal to your federal exclusion amount passed into a trust for the benefit of your spouse (instead of to him or her outright), then, upon your death in 2011 with $5,000,000 of assets, there are no federal death taxes payable, and your estate of $5,000,000 (reduced by New Jersey Estate Tax of $391,600) would pass into trust for your spouse. Upon your spouse's death in 2011, the assets in that trust (if properly drafted) would be ignored for federal estate tax purposes and could pass to the remaindermen (i.e., your children) without reduction for federal or state death tax. The estate of your spouse would total only $5,000,000 and would therefore not be subject to federal estate tax (but would be subject to $391,600 of New Jersey Estate Tax). The result is that your children would receive the $10,000,000 of family assets unreduced by federal death taxes (but, as noted above, subject to the New Jersey Estate Tax in an aggregate amount of $783,200) – a net total of $9,216,800, representing a savings of about $284,400 over the portability scenario.

In short, this kind of "bypass" or "credit shelter" trust is an important, yet fairly uncomplicated, way to avoid federal estate taxes. And it permits use of the lower tax brackets of the New Jersey Estate Tax over two deaths instead of pushing a larger amount into the higher brackets when all the family assets are subject to that tax at the second death.

And note that any appreciation in the value of the assets in the credit shelter trust between the first death and the death of the surviving spouse increases the estate tax savings of the credit shelter trust technique, since more assets are being sheltered from tax inside that trust.

What are my options for gift-making in 2011?

Before the changes brought about by the 2010 Tax Act, exemption from the federal gift tax was only $1,000,000 – far less than the $3,500,000 exemption from the federal estate tax that applied in 2009. In 2011 and 2012, the federal estate and gift tax is once again a fully "unified" system: the federal gift tax exemption is the same $5,000,000 amount as the federal estate tax exemption.

The new $5,000,000 gift tax exemption amount is not a separate additional exemption on top of the $5,000,000 federal estate tax exemption; there is a single $5,000,000 exemption from federal gift and estate tax. A taxable gift of $5,000,000 would use up the exemption in its entirety, so that any assets remaining at death (barring an increase in the estate tax exemption) fully subject to the federal estate tax.

However, this new larger federal gift tax exemption permits larger lifetime gifts, including gifts to grantor retained annuity trusts ("GRATs"), qualified personal residence trusts ("QPRTs"), intentionally defective grantor trusts ("IDGTs"), etc., as discussed below – any of which might also include generation-skipping provisions for longer-term planning.

I've made substantial gifts in past years and have used up my $1,000,0000 federal gift tax exemption -- though my gifts total less than $5,000,000. Can I give additional gifts in 2011 and not pay federal gift tax?

Yes. The new $5,000,000 gift tax exemption amount enacted by the 2010 Tax Act for 2011 and 2012 will certainly allow you to make additional gifts free from federal gift tax. In fact, the new law changed the computation of federal gift tax, so that donors who made gifts when the gift tax was imposed at higher rates (e.g., in 2009, when the gift tax rate could reach 45%) are not at a disadvantage -- as was the case in past years -- compared with donors making large gifts when the gift tax rates are lower. In general, if you did not make any taxable gifts before 1977, you can give an amount equal to the difference between: (i) the total of your taxable gifts made before 2011 and (ii) $5,000,000. For example, if you made a $2,000,000 taxable gift in 2009, you can make a further $3,000,000 of taxable gifts in 2011 and 2012. However, after 2012 -- when the changes made by the 2010 Tax Act sunset -- no one knows what the federal gift tax exemption will be or what the gift tax rates will be like.

I have a Will with a "bypass" trust that dates from 1987. My spouse is a Canadian citizen. Is my current plan sufficient?

To the extent that the "bypass" takes advantage of the applicable federal credit by means of a formula that adapts to the current annual amount (which has changed over the years and may change again in the future), your plan may still be in satisfactory condition. (Although the tax payment clause may well be out of date.) However, as noted above, the federal marital deduction rules are complicated. To the extent your estate exceeds the "bypass" amount and you wish to utilize the federal marital deduction, your Will may not be current. In 1988, the rules for the marital deduction for non-citizen spouses (including U.S. resident non-citizens) were changed: the marital deduction is no longer allowed for property passing outright to non-citizen surviving spouses. To qualify for the deduction, that property must instead pass into a trust for the surviving spouse's benefit that complies with certain strict requirements in addition to the usual QTIP requirements for marital deduction trusts. Consult your estate planning professional to be sure that your plan still works as intended.

Also bear in mind that, if asset allocation between the spouses is an issue, it is not so easy to simply make sizeable gifts to your spouse in order to ensure that he owns sufficient assets to make use of all of his applicable credits in the event he dies first. For couples who are both U.S. citizens, moving assets between the spouses in outright transfers is simple, because those transfers qualify for the marital deduction. And a non-citizen spouse can transfer his or her assets to a citizen spouse, since the marital deduction for transfers to citizens would apply. However, if a citizen spouse tries to transfer title to assets (which is a form of gift-making) to the non-citizen spouse, the limitations on the marital deduction do apply. However, instead of the usual annual gift tax exclusion (which is currently $13,000 indexed for inflation), non-citizen spouses can currently receive up to $136,000 per year (as adjusted for inflation) in 2011 outright under a special gift tax exclusion. Therefore, substantial asset-shifting and gift-making can still take place, though it may need to be spread out over several years, depending on the amounts being transferred.

What is the generation-skipping transfer tax you mentioned?

Imagine a very wealthy individual who wants to leave his considerable property for his children, grandchildren and succeeding generations. He could leave his property to his children, who could in turn leave the property to their children, and so on down the generational line. But at each generation level, upon the death of the current asset owner, there would be an estate tax that reduces the family wealth. So instead, that wealthy individual leaves his property in trust at his death. There is an estate tax to be paid at that time, but then his wealth passes into trusts for his children, grandchildren and so on. And, after the initial estate tax at the wealthy individual's death, there would be no further estate taxation as the family wealth passed from generation to generation inside the trusts. That scenario – the creation of substantial family trusts effectively exempt from estate tax – was a common one. The IRS perceived this technique as a significant loophole in the federal wealth transfer laws, so, in 1976, the first federal GST tax was enacted. However, that tax was practically unworkable, so it was repealed and re-enacted in a new form in 1986. That 1986 version of the GST tax remains in effect.

The GST tax imposes a flat tax at the highest current federal estate tax rate (35% in 2011) on certain transfers of wealth that "skip" an intervening generation level in which estate tax might have been levied. For instance, a $100,000 outright gift to a grandchild would qualify for the $13,000 gift tax exclusion, which would allow a corresponding $13,000 exclusion from the GST tax. However, that leaves $87,000 subject to federal gift tax (against which the donor's applicable exclusion could apply to negate that tax) and $87,000 separately subject to the GST tax (against which the donor's exemption from GST tax could apply to negate that tax). If the donor had exhausted his $5,000,000 estate and gift tax exclusion and his $5,000,000 GST tax exemption, then there would be federal gift tax to be paid on the $87,000 subject to tax (a tax of $30,450 at the applicable 35% gift tax rate) and a separate GST tax at the maximum 35% rate, or an additional $30,450. In fact, there is an additional gift tax on the amount of the GST tax paid by the transferor, costing another 35% of the GST tax paid of $30,450, or about $10,657. In other words, the donor would have to spend $71,557 in taxes to pass $100,000 to a grandchild – a total cost of $171,557.

In addition to the $5,000,000 exemption from the GST tax that each individual possesses and the $13,000 annual exclusion that may apply (depending on the form of the gift), there are other exemptions from the GST tax. Most important is the "predeceased child" rule. If, in the above example, the donor's child who was the parent of the grandchild/beneficiary was deceased at the time of the gift, there would be no GST tax incurred (although gift tax would still apply). And irrevocable trusts established prior to September 25, 1985, are "grandfathered" – i.e., so long as those trusts are not substantially changed or added to, they are exempt from GST tax.

Under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), which was signed into law on June 7, 2001, a number of rules regarding the allocation of GST exemption were changed, and those rules need to be considered when doing GST planning, of which the most important may be the "automatic allocation" rules. While these rules were intended (and often do) help taxpayers avoid incurring GST tax, certain common trusts – such as insurance trusts that provide a trust for the surviving spouse, followed by trusts for children that

get distributed to the children during their lifetime – will need to "opt out" of automatic allocation or else waste valuable GST exemption.

My father died in 2010, and I am the executor of his estate. Is his estate subject to estate tax or not?

If your father died a resident of New Jersey, there are certainly the New Jersey Transfer Inheritance Tax and the New Jersey Estate Tax to be considered.

With respect to the federal estate tax, you – as executor of the estate – have a choice under the 2010 Tax Act: (i) you can opt not to be subject to the new federal estate tax system, with its $5,000,000 exemption amount; or (ii) you can allow the estate to be subject to federal estate tax.

Why would anyone actually choose to be subject to federal estate tax?

For persons dying in 2010 with taxable estates of $5,000,000 or less, opting to be subject to that tax means that there is no tax to pay and the estate assets get a step-up in income tax basis to their value at the decedent's date of death. If the estate assets have very low income tax basis, a step-up in basis – when no estate tax is being paid – can save considerable income tax for the estate or the beneficiaries. In fact, even if federal estate tax is payable, it makes sense to compare that tax against the potential income tax that would be payable (unless the estate assets will likely be held for a long time by the beneficiaries, in which case an accurate projection of the income tax is not feasible). If the estate tax payable is lower than the likely income tax under the "no-tax" regime, paying the estate tax may result in lower overall taxes.

For persons dying in 2010 with taxable estates well above $5,000,000, where the federal estate tax is certainly larger than the potential income tax, opting for the "no-tax" regime is likely the better choice.

What happens if I opt not to be subject to federal estate tax for a 2010 decedent? How does basis step-up work and what is the alternative?

For 2010 decedents who opt to be subject to the federal estate tax (and all decedents in other years), property subject to federal estate tax (with some exceptions) receives a "step-up" in income tax basis (i.e., the adjusted cost of an asset used for computing capital gains for income tax purposes). That means stock or a house with a value of $1,000,000 at the owner's death but a basis of only $100,000 would be subject to estate tax based on the $1,000,000 current value – but the income tax basis would be increased from $100,000 to the $1,000,000 level. The property could then be sold by the estate or the beneficiary for its $1,000,000 value income-tax free. Or, if the property continued to appreciate to $1,200,000 and was then sold for that amount, income tax would be payable only on the $200,000 of post-death appreciation,

For executors who opt not to be subject to the federal estate tax for the estates of their 2010 decedents, the basis step-up would be subject to an aggregate cap of $1,300,000 (with an

additional $3,000,000 of basis allocable to property passing to a surviving spouse). For instance, in the above example, the step-up was $900,000 (the difference between the $1,000,000 value and the $100,000 basis). If the taxpayer had a second property with a value of $800,000 and basis of $200,000, the step-up (which could have been $600,000) would in effect be limited to $400,000, since the total step-up would be limited to $1,300,000 ($900,000 plus $400,000).

Given the choices faced by executors of 2010 decedents, it is important to know the basis of the estate assets. For instance, owing to the recent economic downturn, opting into the federal estate tax and the potential step-up system might in fact result in a step-down (since basis adjusts to the value at date of death or – in certain cases – six months from the date of death, whether up or down). A step-down in basis might impose a capital gains cost on beneficiaries.

Moreover, EGTRRA did not change the rules regarding "income in respect of a decedent" ("IRD"), which is property that would not receive a step-up in basis even if the executor opts into the federal estate tax system. Property such as qualified plan assets and IRA accounts are examples of IRD items, which typically require special attention.

GIFTS AND TRUSTS

I want to make some significant gifts to my grandchildren, all of whom are minors. How can I do that?

With the increase in the exemption from the federal gift tax increased to $5,000,000 in 2011 and 2012, gifting programs offer interesting opportunities. And there are a number of ways to make gifts. But bear in mind, in making gifts (other than gifts that qualify for the marital deduction), it will often be very desirable to have the gift qualify for the $13,000 annual exclusion from the gift tax. Gifts having a value of up to $13,000 can be given by a donor to any number of persons each year without any gift tax consequence. Not even the filing of a federal gift tax return (Form 709) would be required (though in some cases it still might be desirable, depending on the kind of property being given away). For example, if you have five grandchildren and wish to make gifts to all of them in 2011, you can give up to a total of $65,000 (up to $13,000 each) without any gift tax consequence. If you are married, you can give a total of $130,000 to those five grandchildren (up to $26,000 each) if your spouse consents to "split" gifts with you (i.e., agree to have half of the gifts that ~~you~~ make treated as having been made by him or her). However, gift-splitting does require the filing of a Form 709, which will include your spouse's formal consent to gift-splitting treatment.

The annual exclusion applies most easily to outright gifts. Gifts made in trust can qualify for the exclusion, but special attention must be given to qualifying gifts in trust for that benefit.

One simple way to make gifts to minors is to establish a Transfers to Minors account at a bank or brokerage house and make gifts into that account. The account needs a custodian (who should not be the donor or the minor's parent if estate tax exclusion of the gift amount is an issue), and the account assets will become the property of the minor when he or she attains age 21 (or some specified earlier age of 18 or older). The custodian will control distributions from the account (if any) for the minor's benefit. Once the minor attains age 21 (or earlier age of distribution), the property in the account must be turned over to him or her – a potential disadvantage when dealing with substantial amounts.

One alternative to establishing a Transfers to Minors account is to create a trust for the minor. The Internal Revenue Code contains express provisions that allow gifts to certain trusts (sometimes referred to as "Section 2503(c) trusts") for minors to qualify for the $13,000 annual gift tax exclusion; however, such trusts also require the assets to pass to the beneficiary's control at age 21 – although the trust might be drafted such that, if the beneficiary does not actually request an outright distribution within a certain reasonable time after attaining age 21, the assets would remain in trust for his or her benefit. Of course, the beneficiary would need to be given a realistic chance to exercise that right; however, he or she might also be persuaded by the possible advantages of the trust to allow that withdrawal right to lapse.

A second alternative is a variation on the minority trust described above. Instead of relying on the Internal Revenue Code section referred to above to qualify gifts for the $13,000 annual exclusion, the trust agreement might contain a withdrawal right (a so-called "Crummey power")

over contributions to the trust. That withdrawal right could be exercised by the minor's parent, if desired, and would lapse after a reasonable time (i.e., 30 or 60 days). Depending on the amount contributed, some amount of the power might not lapse until some later time when it could do so without gift tax effect (a so-called "hanging power"); however, apart from the amount of possible withdrawal amounts left "hanging," the assets in the trust would not be required to be distributed to the beneficiary outright at any future time unless so desired. One of the benefits of these "Crummey trusts" is that, unlike custodial accounts or Section 2503(c) trusts, they can be structured for the benefit of multiple beneficiaries. For example, you would be able to create a flexible Crummey trust for the benefit of all your children that would not divide into separate trusts for their individual benefit until the occurrence of a stated event (e.g., the death of the survivor of you and your spouse) or until the children attain a certain age (e.g., until the youngest living child attains age 21).

Trusts permit considerably more flexibility than Transfers to Minors accounts, although Transfers to Minors accounts are simpler, especially for smaller gifts anticipated to be expended for the benefit of the minor before he or she attains the distribution age.

Can the trust I establish be for educational purposes?

Certainly it can. But bear in mind that the Internal Revenue Code also provides a separate, unlimited exclusion from gift tax – i.e., in addition to the $13,000 annual exclusion – for gifts made directly to educational organizations for education and training costs of the beneficiary. (That provision also permits direct payments to medical providers to be exempt from gift tax.)

Other education-oriented gift vehicles include education IRAs and Section 529 plans. The latter are income-tax advantaged plans managed and administered by individual states that allow income tax deferral on earnings until withdrawal. In fact, under EGTRRA, withdrawals from such plans after December 31, 2001, for college and graduate school tuition and related expenses will be entirely exempt from federal income tax. (This tax exemption was scheduled to expire on December 31, 2010, but was made permanent by the Pension Protection Act of 2006.) Section 529 plans are intended expressly for higher education expenses and may involve penalties for early or unauthorized withdrawals. Also, if the intended beneficiary opts not to attend college, the beneficiary can be changed to another member of the beneficiary's family without penalty – although there may be complications if there are no such eligible family members. Consult your tax or investment professional for more information about education IRAs and Section 529 plans.

The IRS has also ruled that prepaid, nonrefundable tuition paid directly to an educational institution will qualify for the unlimited exemption from the federal gift tax (and, in the case of gifts by grandparents, from the exemption from the GST tax). Bear in mind, however, the risk: the payment must be nonrefundable even if the child (or grandchild) fails to enroll at or leaves the school for any reason.

My insurance agent keeps talking about establishing a life insurance trust. Why would I want to do that?

As mentioned above, all your property – including the proceeds of insurance policies owned by you (regardless of who the named beneficiary is) – is included in your gross estate for federal estate tax purposes. However, a life insurance trust can possibly prevent the proceeds of an insurance policy from being included in your gross estate. A properly drafted trust agreement establishing a trust that is carefully administered can exclude all proceeds of insurance policies owned by the trust from federal estate tax.

A successful insurance trust requires: (i) a trustee who is not the insured; (ii) a trust agreement that does not give the insured any prohibited power over the policy (of which there are many); (iii) an effective funding mechanism to provide for payment of annual premiums (usually by annual gifts to the trust that qualify for the $13,000 annual exclusion owing to inclusion of Crummey withdrawal powers in the beneficiaries); (iv) new policies applied for and owned by the trust or existing policies that are transferred to the trust by the insured more than three years before death; (v) careful administration (e.g., Crummey withdrawal powers may require annual written notice be given to each powerholder by the trustee); and (vi) monitoring of gift tax consequences. Regarding this last aspect, the gift tax consequences of creating and funding an insurance trust require the consideration of the value of any existing policies transferred to the trust (whole life policies may have significant cash value for gift tax purposes), as well as the annual funding for premium payments. In short, any contribution into the insurance trust will be a gift that will need to be carefully planned for.

The purpose of the life insurance trust will vary with the purposes of the insurance itself. A common type of insurance trust would hold "second-to-die" insurance – i.e., insurance that would not pay any proceeds until the death of the survivor of a husband and wife. Such policies typically have lower premiums than single life policies, because the joint life expectancy defers the actuarially predicted payoff date. A second-to-die policy would not be useful where the proceeds are needed to maintain the lifestyle of the surviving spouse; however, they are very useful where the intended purpose is to fund estate tax payments. Federal estate taxes are – with few exceptions – payable in full nine months from the date of death. In the case where an estate consists largely of illiquid assets (e.g., a business, real estate, partnership interests), the executor may have a hard time finding the cash to make the required tax payment in just nine months. The liquid proceeds received by the insurance trust following the death of the insured would be available to be borrowed by the estate or to purchase illiquid estate assets, and so provide the cash for the tax payment.

Insurance may have a number of uses and applications in estate planning. Consult your tax or insurance professional for more information.

I have a disabled grandchild who is receiving certain state-funded benefits. Can I set up a trust for him?

Yes. However, such a trust will not only require attention to all the issues presented in establishing a trust for a grandchild but will also need to be carefully drafted to avoid

disqualifying the beneficiary for his state benefits. Such trusts – commonly referred to as "special needs" trusts – would provide benefits in the discretion of the trustee in addition to (but not in substitution of) public benefits. These trusts could be established during your lifetime or could be testamentary trusts included in your Will.

I like the idea of establishing a trust, but I don't like the idea of all the fuss involved in maintaining it. What exactly is involved?

A trust needs a trustee (i.e., someone you trust) and a set of instructions, as well as a "corpus" (the property that comprises the principal of the trust). The trustee can be an individual (or more than one individual) or a banking institution. The trustee will be entitled to commissions that are either determined by state statute or, in the case of a banking institution, by its rate schedule. Statutory commissions consist of a 6% annual commission on income earned and corpus commissions of two varieties: (i) an annual corpus commission equal to 0.5% of the first $400,000 of corpus value and 0.3% on corpus value in excess of $400,000; and (ii) a termination commission of between 1% and 2%, depending on how long the trust lasted. The rates charged by banking institutions are usually higher – although they may offer additional investment services.

A trust is a separate tax-paying entity and will file its own annual income tax returns (unless it is a "grantor" trust for income tax purposes, in which case the items of income and deduction are included on the income tax return of the grantor of the trust).

The trustee has significant fiduciary duties involving administering and investing the trust assets; keeping accurate records; carefully executing the terms of the trust as set forth in the trust agreement; sending and keeping records of Crummey notices (where needed); and filing necessary tax returns. With respect to their investment duties, trustees are specifically required to invest trust assets "prudently," as determined under the New Jersey Prudent Investor Act.

However, despite the additional effort and attention involved in creating and administering a trust, consider that $1,000,000 of insurance proceeds on a policy owned by a decedent in the 35% estate tax bracket would incur $350,000 of estate tax, leaving $650,000 for the decedent's family. If that policy had been held in an effective insurance trust, the decedent's family would receive the entire $1,000,000, unreduced by estate tax.

I think a trust might be appropriate for my estate planning situation, but who should I designate as trustee?

Your spouse may be a possible trustee in many situations, including a traditional, single-life insurance trust. In other situations, family members can function as trustee, even if not necessarily financially savvy, since the trustee is able to employ professional help in performing his or her duties (e.g., accountants for income tax return preparation or investment advisors for asset management assistance) and can formally delegate certain functions, such as investing, to more expert parties. If you absolutely do not want to use a family member or friend as trustee, a corporate trustee is still an option. Although a bank or trust company is likely to have its own

commission schedule, with fees higher than the statutory fees permitted to individual trustees, it also provides return preparation and investment management as a matter of course. If you have an existing banking relationship, you might inquire about your bank's own trustee services. You should inquire specifically about the fees involved, the firm's investment philosophy and its results over time and the level of attention that your trust would receive.

You might also consider naming a corporate trustee as a successor, to take office after the death of all available family members or friends. In that way, you have provided for the trustee of your choice in the distant future. In the alternative, you can permit a trustee to choose his or her own successors, although (obviously), in that case, you – as the grantor of the trust – have delegated the responsibility for choosing your trustee to someone else.

I own some income-producing real properties. I would like to start giving interests in those properties to my children, since I don't need all the income they generate, and I expect them to appreciate even more over time. Shouldn't I start giving some properties away so I don't have them included in my gross estate?

First things first: you need to consider the gift tax consequences involved in such a gift, the income tax consequences and the estate tax consequences.

Gift taxes obviously must be considered. And bear in mind that, for estate tax purposes, taxable gifts still affect the estate tax by pushing the taxable estate into higher tax brackets. (Recall that this is a "unified" gift and estate tax system. See the next question for a more detailed explanation.) And you also need to consider the income tax basis of the property. If you have two properties, one of which you plan to give away and the other you plan to retain indefinitely, and if those properties are otherwise equivalent except that one property has a low income-tax basis and the other has a high basis, it is generally better to give the high-basis property. Such a gift would permit the recipient to have a lower income tax cost if the property is ever sold and would allow the donor to possibly retain the lower-basis property till death, when it would receive a step-up in basis.

There may be a number of advantages to making significant lifetime gifts. First, the income earned by the gifted property no longer belongs to the donor. That may mean it gets taxed at lower income tax brackets, and it certainly means that the income no longer accumulates in the donor's estate and causes his or her estate to grow. Moreover, the gift tax is computed on the value of the property at the date of the gift. If the property appreciates, the appreciation on top of the gift tax value is not subject to tax – as it would have been if the donor had held onto the property until death. In fact, even paying gift tax might provide a benefit, since gift tax paid more than three years before death is excluded from the decedent's gross estate, making it a significantly cheaper tax than the estate tax.[1]

Additionally, making gifts may allow use of discounting techniques. For example, if income-producing property is placed in a limited partnership or limited liability company ("LLC") and then "non-controlling" interests in those partnerships or LLCs are given away, the gifted interests may be subject to valuation discounts (e.g., for lack of control and/or lack of marketability, etc.) for gift tax purposes of perhaps 30-40%. Such discounts can significantly reduce the tax cost of

passing the property to one's intended beneficiaries – without sacrificing present control of the partnership or LLC itself.

One drawback to gifting is that the income tax basis of gifted property is the carry-over basis – i.e., the basis in the donor's hands carries over and becomes the basis in the donees' hands. Had the property been retained until death, it would have received a step-up in income tax basis (discussed above). However, so long as maximum capital gains tax rates are significantly lower than maximum estate tax rates, gift-making will likely retain its benefits for wealthy taxpayers.

You referred to "taxable gifts"? What are they?

Taxable gifts are gifts that do not qualify for any applicable deduction (e.g., the marital deduction or the charitable deduction) and exceed or do not qualify for the annual exclusion. For instance, a gift of $30,000 to a child may qualify for the gift tax annual exclusion to the extent of $13,000 – but that leaves a taxable gift of $17,000. That $17,000 excess will use some of the donor's applicable exclusion from the gift tax ($5,000,000 in 2011) or, if the donor has already exhausted his or her applicable exclusion, will generate a gift tax that will need to be paid by April 15 of the year following the year in which the gift was made. Since there is only one applicable exclusion for each taxpayer (not a separate one for gift tax and another for estate tax), taxable gifts are included in the taxable estate for purposes of calculating the estate tax. Taxable gifts are <u>not</u> subject to tax again at death; they are simply used in the calculation of the estate tax to ensure proper use of the applicable credit amount.

My tax advisor mentioned to me that I might want to consider giving my house to my children in some kind of trust. Why would I want to do that and what kind of trust was she talking about?

If you have sufficient assets (other than your house) and income to live comfortably and you are concerned about reducing the size of your estate for estate tax purposes, then you might wish to consider making substantial gifts for the reasons discussed above. An important consideration in making substantial gifts is to minimize the value of the gift for gift tax purposes. Consider this example: If your house is worth $500,000 (and there is no mortgage) and you give it to your children, you have made a gift of $500,000. If you are 60 years old and put the same house in a "qualified personal residence trust" ("QPRT") in January 2011 and retained the right to live in the house for, say, 10 years and thereafter it passes to your children, then you made a gift of only about $337,000. (Note that the value of the gift may vary from month to month, based on the IRS assumed rates of return used measure such gifts. In January 2010, the value of the gift would have been only about $318,000 compared with $337,000 a year later.) The difference in gift value is due to the 10-year delay in the effective transfer. The IRS recognizes that such delays reduce the value of the gifts made, and those reductions are determined under IRS tables.

However, for the QPRT to be effective you <u>need</u> to survive the 10-year term of the trust. And if you do not like the idea of moving from your home under any circumstances, bear in mind that you need not vacate your house after the 10-year term. You could (if you desire) stay on there as a tenant, paying a fair market rent to your children – which permits you to shift even more of

your assets to your children in rent payments.[2] Moreover, you are not locked into living in the house for the retained term of the trust. The house originally contributed can be sold and a new house purchased by the trust, or, if the house is sold and no new residence purchased, the trust can retain the sale proceeds and pay you an annuity for the balance of the term.

The term of the QPRT can vary: the longer the term, the smaller the gift – but the less likely actuarially that you will survive the term. And the income tax basis of the house in the hands of your children will be the same as it was in your hands. Had you held the house until your death, it would have qualified for a step-up in basis. However, the discount in the value of the gift into the QPRT may offer significant transfer tax savings that you may wish to consider.

Are there other ways to get valuation discounts for gifts?

Yes. If, for instance, you own a controlling interest in a business, you can give away non-controlling interests in that business that might qualify for discounts for minority interests, for lack of control and for lack of liquidity. If the business is worth $100,000, and you give away a 10% interest, mathematically, the amount of the gift is $10,000. However, the discounts available may reduce the value of the 10% gift to $6,000 or $7,000. The amount of the discounts will vary (and may well be challenged by the IRS), but the theory for such discounts is simple: no one would pay $10,000 for that partial interest in a business where they do not have control over what happens in the business and the interest is not easily liquidated and turned into cash. Therefore, the real value of a piece of the business is not the mathematical 10% (i.e., $10,000), but the smaller price that a real-world purchaser would pay.

There are many types of interests that may qualify for a variety of such discounts. But bear in mind that the IRS can challenge the amount or rationale for any such discount taken; therefore, valuation discounts need to be carefully documented to minimize the risk of IRS challenges (which may occur regardless of precautions).

There are also other vehicles for split-interest discounts, such as those for the QPRT discussed above. For example, a donor can contribute property to a trust and retain an annuity interest (i.e., a fixed pay-out payable annually) for a term of years, with the property remaining in the trust passing to his or her children or other remainder beneficiaries at the end of the term. If $500,000 is placed in such a trust (a "grantor retained annuity trust" or "GRAT") in January 2011 for a 10-year term, with $25,000 (i.e., 5% of the initial gift) paid to the grantor every year, the value of the gift into the trust for gift tax purposes is not $500,000 but is only about $220,000 – a significant discount. However, for this trust to be successful in its overall goals: (i) the grantor must outlive the term; and (ii) the assets in the trust must appreciate above the chosen pay-out rate. Bear in mind that assets are returning to the grantor ($25,000 per year for 10 years) and must be paid from the GRAT – if not from income then from the principal of the trust. If the trust assets were to shrink or not outperform the pay-out rate, the grantor might be worse off (from an estate planning perspective) than before the GRAT was created.[3]

As with QPRTs (discussed above), GRATs are very sensitive to the monthly interest rates set by the IRS and may be more attractive in the current low interest rate environment than previously (i.e., because the lower assumed rates may be easier for the GRAT's investments to surpass,

requiring a lower payout to the grantor and permitting more property to pass to the remainder beneficiaries). Multiple GRATs can also be used in sequence – so-called "cascading" – so that property paid out from one GRAT gets recycled into another.

But, of course, before embarking on any kind of valuation-oriented gift plan, you need to consult your tax or estate planning professional and be fully informed about the significant risks that are involved.

SPECIAL PLANNING SITUATIONS

I like the idea of making gifts of my income-producing real property, since I don't need that income, and I expect significant appreciation over time. But I really want to retain control over that property. Is there a way to do that?

You might want to consider forming a family limited partnership or limited liability company (LLC). You could then give interests in the partnership or LLC to family members and possibly qualify for important valuation discounts in the gift tax value of the interests given away. However, you should be aware that the IRS has recently been successful in challenging these techniques where the donor retained management control over the partnership or LLC and where the transaction appeared to lack a legitimate business purpose. "Deathbed" transactions, partnerships or LLCs administered as though they were the primary donor's personal accounts and entities funded with only cash and securities (e.g., instead of business interests, real estate or other illiquid assets) add significantly to the risk of challenge by the IRS. But while the IRS regards these techniques with suspicion and sometimes seems to be targeting family partnerships and LLCs for extra scrutiny, when used prudently and with careful documentation and administration – including the required surrender of control, funding with appropriate assets and existence of a valid business (not just estate-planning) purpose – taxpayers may see discounts in the value of their gifts that result in significant gift tax savings.

You could also "freeze" the value of assets you expect to appreciate by using a "intentionally defective grantor trust" ("IDGT"). This fairly complicated technique involves the creation of a trust that is a "grantor trust" for income tax purposes (i.e., such that all trust income is taxed directly to the creator of the trust). The IDGT would be funded (via gift) with a significant amount of liquid assets. The trustee of the IDGT (who would <u>not</u> be the grantor) then purchases the (presumably) appreciating asset from the grantor for a promissory note. The appreciating asset is then gone from the grantor's estate, replaced by a promissory note that will <u>not</u> appreciate in value.

The IDGT has a number of technical requirements, as well as needing to meet certain economic expectations. For example, the asset sold to the IDGT must not only appreciate for the technique to be successful but should also produce the return necessary to make the payments on the promissory note.

In short, as with all the situations covered in this section, you need to discuss your particular needs and circumstances with your tax or estate planning professional. And, if you decide to proceed with a particular estate-tax savings program, you absolutely must fulfill all of its technical and "housekeeping" requirements.

I own a business with my brother. Are there any estate planning issues I need to be aware of?

Probably a lot of them. For instance, what happens to your interest in the business if you die? Could the business continue? Do you have a partnership, shareholders' or "buy/sell" agreement that specifies what happens to the interest of a deceased shareholder or partner? Is the value of the business a substantial part of your estate, so that liquidity for estate tax payments would be a problem? This situation needs to be discussed with your tax or estate planning advisor.

I'm the sole owner of my business, so I don't have a partner to worry about. However, my daughter has worked hard in my business (which is my main asset) for many years, and I would like her to inherit it. But I also want to treat my son fairly, even though he has never worked in my business. What can I do?

This problem is not unusual, but it has no simple solution. You might consider equally dividing your assets between your children, so that your son gets a part of your business – but requiring him to sell his share to his sister for a promissory note. This technique works so long as the business can produce enough cash to allow your daughter to make payments on the note – although setting the terms ~~of~~ a note to exist in the future (when you don't know about future economic conditions or the condition of your company) can be difficult.

If you are insurable, you might also consider insuring yourself to provide more liquid assets that could be used for your son's benefit. Any insurance policy should almost certainly be held in a trust (as discussed above), and premium payments would need to fit into your overall plan.

Again, this situation is quite complicated, and you should consult your tax or estate planning advisor.

I have children from my first marriage, one of whom is currently in an unstable marriage. And I don't have a prenuptial agreement with my second wife. However, I do want to take care of her after I'm gone – though I don't want my assets passing to her children, who were all well taken care of by her late husband. What can I do?

This situation is not uncommon. The first thing to be aware of is that your surviving spouse has certain rights under New Jersey law regardless of what your Will says. For instance, if your Will left nothing to your surviving spouse, she would have the right to elect to take up to one-third of your "augmented estate" (i.e., your probate estate plus certain other property that you may have transferred) – though that amount would be reduced by the value of the surviving spouse's own property and the value of any property received as a result of your death (e.g., insurance proceeds, qualified plan benefits, etc.). A valid prenuptial agreement could have changed that result, but you did not execute one. You might enter into a post-nuptial property settlement agreement, but you said that you want to take care of your spouse in any event. (And there is some question under New Jersey law that a post-nuptial – as opposed to a pre-nuptial -- agreement would be enforceable.)

The solution to your problem is to have a Will that will place assets passing to your spouse into a trust (or perhaps trusts) for her benefit. (Bear in mind that the need for a trust in this asset-control situation is independent of the need for any trusts for estate-tax savings purposes; however, the same trust or trusts can serve estate-tax planning purposes and asset-control purposes simultaneously.) The trust would last for your wife's lifetime, with the assets remaining at her death passing to your children (and not to hers at all). Moreover, assets passing to your child in the unstable marriage could pass into further trust for his or her benefit. In that way, in the event of a possible divorce, the trust funds would not likely be included in any division of marital assets.

I have substantial assets, but the vast majority of them are held in qualified plans established by my employer and in IRAs. My spouse is the designated beneficiary on all the accounts. How can I do effective tax planning in these circumstances?

You can still do substantial estate planning – although qualified plan assets like yours present particular complications and concerns. One important aspect of these plans is that they will be considered "income in respect of a decedent" at your death. As such, they will be subject to estate tax, just like any other asset, but also subject to income tax upon distribution from the plan, just as if you had withdrawn the funds yourself. No step-up in income tax basis will apply. However, the recipient of the property (who will be subject to that income tax) will also be entitled to an income tax deduction based on the estate taxes paid, which is intended to mitigate (though may not entirely eliminate) the double tax burden.

Qualified plan assets are subject to many special rules – though careful planning and drafting can permit those assets to be placed in trust and otherwise used in an effective estate plan. For instance, one danger is that imprudent use of those assets to fund a trust can result in premature and immediate acceleration of all the income tax. A correctly drawn trust and beneficiary designation can avoid that expensive result. Also, federal law requires that the participant's spouse be the primary beneficiary of certain types of qualified plans – a result that cannot be changed without the written consent of the spouse. That consent must be carefully documented.

Given the complications presented by qualified plan assets, other assets are better used to fund a "bypass" trust (discussed above), owing to the built-in income tax cost. But sometimes, as in your case, other assets are simply not available. Moreover, passing qualified assets directly to a surviving spouse can permit that spouse to take measures that increase the income tax deferral available. Therefore, it is not uncommon to have the spouse named as the primary beneficiary of the qualified assets, with a trust named as secondary or contingent beneficiary. In that way, upon the death of the participant, the surviving spouse may have the opportunity to "disclaim" (i.e., officially refuse to accept certain assets – which must be done within nine months of the participant's death and comply with certain other federal and New Jersey requirements) some or all of those assets and allow them to pass into the designated trust if desired. Again, this area is fraught with complications and potential problems. You should consult your tax or estate planning professional before taking any action.

I own several pieces of real property in Florida. Does that complicate my estate planning?

Those properties may not necessarily complicate your planning – certainly not as much as assets held in another country. However, they will certainly complicate your estate administration to a certain extent. Your executor will likely need to qualify as ancillary personal representative in Florida (which may be a problem under Florida law if your executor is not a close family member) and comply with certain Florida probate procedures. (Note that this result is caused by real property in a foreign state; a bank account or other intangible property in Florida would not cause the same result.) To avoid probate (which may make sense in this case), you might consider placing the properties in a revocable trust during your life, of which you could be the sole trustee. Then, at your death, the successor trustee of the trust would retain control over the Florida real property without the need for dealing with probate procedures in a foreign state.

Another alternative would be to put the property in joint names (with right of survivorship) with the person or persons you would want to receive it at your death. That way, the property would pass to the joint tenants automatically at your death, without the need for probate. Bear in mind, however, that creating a joint ownership situation may have other consequences that would make it undesirable (e.g., granting immediate ownership rights in the property to the other joint owners and preventing the property from passing in trust under your Will).

My husband and I have no children, but we have strong charitable interests and substantial assets. What estate planning steps can we take to promote our charitable interests?

There are a number of estate planning options available to individuals with charitable interests. Which option you choose will depend on your family situation, your financial situation, your income tax situation and the charities you wish to benefit.

For instance, there are trusts that can be established that would pay one or more charitable beneficiaries an annual amount for a set term or over the course of some measuring life, with the assets remaining after the expiration of the charitable interest payable to some non-charitable beneficiary (a so-called "charitable lead trust"). Or, you could establish a trust that pays some annual amount to a non-charitable beneficiary (including yourself and/or your spouse) for a set term or for life, with the assets remaining after the expiration of the non-charitable interest payable to some charitable beneficiary (a so-called "charitable remainder trust"). Both charitable lead and charitable remainder trusts are bound by many rules and restrictions but may offer income tax advantages and estate planning opportunities. For example, a person holding a large amount of low-basis, low-dividend securities but seeking higher income could sell her securities, pay the capital gains tax and re-invest the net proceeds in a higher-yielding investment. However, the tax bite could be substantial, which would reduce the amount of income that could be produced. Instead, that person might be able to establish a charitable remainder trust funded with those low-basis securities that would be able to escape capital gains tax on the sale of those securities and provide an annuity to the donor far larger than either the dividend income produced by the original low-basis securities or the higher yield of the after-tax re-invested securities.

Individuals looking for more permanent charitable funding vehicles might also consider creating and funding a private foundation, which is a privately controlled charitable entity (formed as a trust or a non-profit corporation) that – most typically – receives charitable contributions from the family of the creator and then makes annual contributions (subject to certain minimum distribution rules) to public charities. (Other forms of private foundations can also be established, including operating foundations – i.e., foundations that do not make charitable distributions but actually operate a non-profit business, such as a museum or historic site.) Private foundations are subject to many operating rules and restrictions, and contributions to them are entitled to more limited charitable deduction rules than contributions to public charities. However, private foundations permit long-lasting, private control of charitable assets.

A simpler alternative to creating a private foundation is to establish a donor-advised or philanthropic fund with a community foundation, such as the Community Foundation of New Jersey. Contributions to such funds permit significant controls over the distribution of the charitable contributions, but without many of the restrictions that apply to private foundations.

The charitable income tax deduction and the establishment of charitable entities are some of the most heavily regulated areas into which individuals can venture. If you are interested in establishing any kind of charitable trust or non-profit corporation or even making a substantial charitable contribution in any year, it is essential that you consult your tax or estate planning professional.

I'm gay and in a long-standing relationship with my partner. We both have substantial assets, and we want to do some prudent estate-planning. What steps should we take?

In New Jersey, civil-union couples (i.e., same-sex couples – or opposite-sex couples where both parties are over age 62 – who have complied with the requirements of the applicable New Jersey statutes) are, since February 2007, entitled to the same rights as married couples with respect to state (but not federal) laws. Therefore, a surviving civil-union partner would be treated as a nontaxable beneficiary for purposes of the New Jersey Inheritance Tax – but would <u>not</u> be entitled to the federal marital deduction. So, for example, if you had an estate of $675,000 that you were leaving to your partner, that amount would pass free of federal and New Jersey death taxes if you had been in a civil union. If not, that $675,000 would incur New Jersey Inheritance Tax of $101,250 at the 15% rate for Class D beneficiaries, since your partner would not be treated as any kind of family member. In short, if appropriate for your personal lives, you might want to consider civil-union status – though, of course, that is a very personal decision that should not be driven by tax considerations.

As noted above, assets passing even to a civil-union partner will <u>not</u> qualify for the federal marital deduction. Therefore, if you have assets in excess of $5,000,000, you might want to especially consider strategies that shelter assets from inclusion in the federal gross estate – for example, an insurance trust, if only to replace amounts that would be lost in payment of federal estate tax.

With respect to other typical estate-planning instruments, you will want to be very sure that any power of attorney or health care directive (see the next section) that names the other of you as

attorney-in-fact or medical decision proxy is kept up to date and in each of your medical records. Family relationships that are currently cordial can change in the midst of emergent situations, and you may each therefore need to take extra care that your wishes regarding who makes financial and medical decisions for you are respected.

HEALTH CARE DIRECTIVES, POWERS OF ATTORNEY AND OTHER MATTERS

I executed a living will some time ago. Is that the same as a health care directive?

Probably. A living will is a set of instructions for your medical care that is intended to be used when you are no longer able to make medical decisions yourself. Most commonly, the living will contains instructions to "pull the plug" – i.e., cease life support and heroic measures once your quality of life has eroded, and there is no hope of recovery. (The living will could, of course, also state the opposite – i.e., to take all heroic measures possible and maintain you on life support regardless of prognosis.)

However, a complete health care directive may do more than a living will. It may include a health care proxy also, which is a designation of someone (typically a spouse or child) who can make medical decisions for you when you are incapacitated, including decisions for which you left no explicit instructions. For example, your living will may contain express instructions about what to do in the event you are unconscious and have no hope of recovery from your medical condition. But those instructions may have no application to a situation where you may well recover from your medical condition, but your doctors would like to use an unorthodox or new treatment to speed that recovery. Your health-care proxy would be empowered to make the decision about whether to allow that treatment or not, based on his or her understanding of your desires.

Bear in mind that, so long as you are able to make medical decisions for yourself, the health care directive and your health-care proxy are not relevant. You can even verbally revoke a health-care directive. However, without a health-care directive, the courses of action available to your doctors may be constrained by law and/or hospital policy in dealing with your condition if you cannot make decisions yourself.

Bear in mind also that your health care proxy will likely be considered a "personal representative" under the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). In that case, HIPAA would permit only that person to have access to your private medical records. If you wanted anyone else to have that access (e.g., your attorney-in-fact, as discussed below), other steps would need to be taken.

What is a power of attorney and why would I need one?

A power of attorney is a written instrument that permits another person (your "attorney-in-fact") to deal with your property during your lifetime in the ways expressly stated in the instrument. A power of attorney can be very limited (e.g., to permit someone to sign a deed at a real estate closing that you are unable to attend) or very broad (e.g., permitting virtually any act with respect to your property, including making gifts) or anywhere in between.

If you were incapacitated or could not be located (for instance, after some kind of disaster), your attorney-in-fact could access your accounts, pay your bills, change your investments, sell property, buy property – any action permitted under the terms of the instrument. The power could be effective immediately upon executing the instrument, or it could be delayed until you were actually incapacitated (a so-called "springing power" – because it "springs" into existence only at a future date or the occurrence of a future event).

The power of attorney should expressly state that it is a "durable power," which means that it remains in existence even if you are incapacitated (when, in fact, it would likely be most desired). However, bear in mind that, upon your death, the power is immediately invalidated. Your attorney-in-fact may be the same person as your executor, but, once you have died, the power of attorney is ineffective in allowing that person to deal with your assets.

That said, you should be aware that your attorney-in-fact may face problems in getting custodians of your assets (e.g., banks, brokerage houses, etc.) to respect your power of attorney and accept instructions from your attorney-in-fact. Brokerage houses may respect only their own forms of power of attorney. You should consider dealing with that possible issue in advance.

In addition, New Jersey is one of the few states to include a period of time after which financial institutions may refuse to act or rely upon a power of attorney. If the power of attorney is first presented more than 10 years after its creation or if is has been stagnant for a 10-year period, the bank may refuse to act upon it unless the attorney-in-fact is a spouse, parent, or descendant of a parent of the principal. Despite the bank's authority to refuse the power of attorney, there is no actual expiration date on the instrument (unless one is expressly provided). But because a financial institution may refuse to honor a New Jersey power of attorney in favor of a non-family member if it was executed more than 10 years from its proposed use, it would be a good practice to continuously update those instruments to avoid their becoming stagnant and ineffective.

Moreover, as noted above, unless your attorney-in-fact is also your personal representative for purposes of HIPAA or your Power of Attorney includes an express waiver, he or she would not have access to your private medical records.

And a word of caution about joint bank and brokerage accounts for lifetime use: although you might assume that a joint account permits either owner to access the account and write checks on it, that might not be the case. The joint account application form might require a box to be checked or some other indication made if only one signature is required on checks; otherwise, it could be presumed that both joint owners need to sign all checks. In that case, if one joint owner were incapacitated or unavailable, a power of attorney would prove very useful in permitting the other joint owner to access the account, despite what the account records say.

I'm interested in being an organ donor, and I have some specific instructions about my funeral. How can I go about giving the right instructions to the right people?

The key to giving organ donation or funeral instructions is to put those instructions in a place where they can be found in a timely manner. Your directions for organ donation – which are extremely time-sensitive (i.e., must be executed in a matter of hours or minutes) – can be carried on an organ donation card or by checking a box on your driver's license. You can also leave

more detailed directions in a letter, but: (i) someone has to know that such a letter exists, and (ii) that letter has to be accessible and delivered in a timely manner.

Do not put organ donation in your Will. A Will is not typically looked at until long after an organ donation must be made.

Funeral instructions are less time-sensitive than organ-donation directions. However, the same principles apply: someone has to know that you have written instructions and must know where those instructions are located. Also, you can, in your Will, appoint a person to carry out your funeral wishes – and that person does not need to be your executor nor does your Will need to have been probated. But, as noted above, a Will may not be examined immediately. If you choose to designate a person to carry out your funeral or other disposition wishes (e.g., cremation), that person (or other family members) or your designated executor should know about that instruction and where to locate your Will.

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[1] For instance, if you have $2,000,000 and make a gift of $1,000,000 on which you pay gift tax at (for the sake of simplicity) a 50% rate, the donees receive $1,000,000, you pay $500,000 in tax and retain $500,000. At your death, that $500,000 is subject to estate tax at 50%, so your beneficiaries receive another $250,000, and $250,000 is paid in estate tax. The beneficiaries receive a total of $1,250,000, while taxes total $750,000. Had the entire $2,000,000 been held till death, you would have paid $1,000,000 in estate tax at the 50% rate, and the beneficiaries would receive only $1,000,000. The $250,000 difference is owing to the $500,000 of gift tax that was excluded from the taxable estate in the first example.

[2] The QPRT can also be structured so that the house passes into further trust for the benefit of the grantor's children (or other beneficiaries) at the end of the retained term, with that trust designed to be a "grantor trust" so that the rental payments are not taxable income to the beneficiaries.

[3] It may also be possible to create a GRAT that completely eliminates the gift tax value of the transfer – a so-called "zeroed-out GRAT." In a zeroed-out GRAT, if the trust assets outperform the IRS interest tables, then assets left in the trust at the end of the term pass to the beneficiaries free of transfer tax. If the assets fail to outperform the IRS tables, then the grantor will receive all the gifted assets back during the retained term, and the GRAT will have failed to achieve its intended purpose – though the only downside would be the transaction costs involved in creating and running the GRAT and any wasted opportunity to pursue an effective alternative to the GRAT.