Estate Planning:
Frequently Asked Questions

Q. What happens if I die without a will?

A. If you do not plan your estate and die without a will, the law will create a plan for you. The law prescribes both the persons to whom your property will pass and the division of your estate among those persons. The distributions provided by law are inflexible and may not satisfy your desires as to distribution of your estate.

Q. Why should my will be more than one page long?

A. Any lawyer should be able to turn out a pair of "one-pagers" for a relatively small fee.

The problem, however, is that such a will may not accomplish your objectives for your beneficiaries. I prefer to draft trusts to cover the various factual and legal situations that reasonably may arise. The alternative is to hope that, by coincidence, the will may fit the facts at your death.

Accordingly, I may present you with a lengthy instrument. This "burden" may be a possible blessing to your family when they later find that you have anticipated and planned for what might have been cumbersome problems.

Q. What property will not pass under my will?

A. Proceeds from life insurance policies and retirement benefits will pass in accordance with the beneficiary designations and not under your will. In addition, property held as joint tenants with right of survivorship accounts (e.g., joint bank or brokerage accounts with right of survivorship) will pass to the surviving account holder and not under your will.

Q. What is a living will?

A. A living will is a document that provides instructions to your attending physician to provide, withhold, or withdraw life sustaining procedures in the event of a terminal or irreversible condition. The living will also allows you to specify the types of treatment, like artificial hydration and nutrition, that you would like to have provided or withheld. We advise you to consult with your personal physician in completing the directive to physicians.

Q. What is a living trust?

A. A "living trust" is a trust that a person (the "Grantor" or "Trustor") establishes during his or her lifetime. A living trust may be for the Grantor's own benefit or for the benefit of others. The trust may be funded either during the Grantor's lifetime or at the Grantor's death.

Q. What are the pros and cons of forming a revocable living trust?

A. One of the biggest advantages of using a revocable living trust is to avoid the restrictive rules and proceedings of probate. A revocable living trust gives your loved ones almost immediate access to cash during a difficult time, as opposed to waiting several weeks or months waiting to open a probate estate and gain access to bank accounts through the court system.

Another advantage is avoiding guardianship or conservatorship court proceedings. As people are living longer and longer, families are stepping up to take control over financial assets in the event of incapacity. Rather than subjecting loved ones and property to the restrictive rules of guardianship, a fully funded revocable living trust avoids interference by a judge and allows loved ones to take control over trust assets without court involvement.

Finally, a revocable living trusts keeps your affairs private. Probate proceedings are conducted in the public eye and probate files can be viewed by anyone. A revocable living trust does not need to be filed with a court, so it will not become a public record.

One disadvantage of a revocable living trust is that the upfront costs are higher than a simple will. In the long run, however, the time and money spent on the trust will be lower because your loved ones will avoid a costly court-supervised guardianship in the event of disability, and a costly court-supervised probate proceeding after your death. Aside from the money, the trust will let your loved ones mourn and heal without the emotional difficulties and turmoil of dealing with court proceedings at your death.

Another potential disadvantage of a living trust is that funding the trust is cumbersome and time consuming. This is often stated as the most significant drawback. Without funding the trust, a revocable living trust is not worth the extra money spent on creating it.

The other disadvantage is that a will and testament is still needed in case the trust is only partially funded when you die. The Faulkner Firm automatically provides this will, called a **Pour Over Will,** to "catch" the assets you hold at death that are not already in the trust and "pour" them into your trust. The Pour Over Will is a stop-gap provided to fully protect your family in case you acquire additional assets after your estate plan has been drafted, but will not need to be probated unless changes occur after your trust has been funded.

Q. What is a health care surrogate designation and why do I need this?

A. A health care surrogate is a person you appoint to make health care decisions for you if you become unable to make the decisions yourself. A power of attorney is used to appoint someone to handle your business dealings; a health care surrogate is someone you designate to handle decisions concerning medical treatment on your behalf if you are unable to do so. This is very helpful if you become incapacitated.

Q. What is a durable power of attorney and why do I need one?

A. A power of attorney is a designation of a person to sign and contract on your behalf to handle your business and financial dealings. This designation is called an "attorney in fact," and is different and separate from your family attorney. You are still able to handle your affairs even though you have signed a power of attorney. The document specifies what you authorize your "attorney in fact" to do on your behalf.

Most power of attorney documents given to spouses or adult children give complete power to manage all of your affairs. The power of attorney is effective as soon as you sign it and deliver it to your designated attorney in fact. A *durable* power of attorney means that your designated attorney in fact will have the power to continue managing your affairs if you become incapacitated or disabled. The power of attorney terminates at the time of your death.

A durable power of attorney is an important part of estate planning because it allows your designate to pay your bills and manage or sell your assets to pay for your care if you ever become disabled. Spouses may give each other durable powers of attorney so that if one becomes disabled, the other spouse can handle the sale and management of jointly owned property that typically requires both signatures.

Since the attorney in fact can potentially abuse the power and use it to dispose of your assets, you should not appoint anyone as your attorney in fact unless you have the utmost confidence in them to use the power of attorney as instructed.

Debbie Faulkner, Esq.