Estate Planning
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Legal Matters®

Have you picked the right person as your executor or trustee?

Before you name someone as an executor or a trustee in your will – or before you agree to be an executor or a trustee – it's a good idea to review exactly what responsibilities are involved.

These are serious jobs, and sometimes people don't give enough thought to which person should be chosen.

Often, people simply name a spouse, a child, or a family friend. This might seem like a logical choice, and the person might expect to be given such a role, but that doesn't mean they're necessarily the best person for the job – particularly if they're not detail-oriented, good with figures, and adept at handling money. Many people who quickly agree to act in these roles later come to regret it.

An executor's job typically lasts about a year, and involves a lot of responsibility. Most executors hire an attorney and sometimes other professionals to help them through the steps and make sure they don't make any mistakes. However, you'll still want to pick someone who is willing and responsible enough to handle the often difficult and time-consuming tasks.

These tasks typically include:

➤ Locating the deceased person's will (the original, not a copy) and filing it for probate.

➤ Obtaining a death certificate, obtaining an estate tax ID number from the IRS, and setting up an estate bank account.

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➤ Notifying beneficiaries and other potential heirs.

➤ Placing an ad in a newspaper to provide information to potential creditors.

➤ Making a list of all the estate's assets and liabilities, collecting assets (which may be in other people's hands), liquidating bank and other accounts, and protecting all assets from loss or harm.

➤ Obtaining appraisals to determine the value of the property.

➤ If the property includes a business, making sure the business

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Creating ‘conservation easements’ to save taxes is easier

If you own land that you want to pass on to your heirs, but you also want to make sure that some historic, scenic, or agricultural value will be maintained and not destroyed by future development, you might be able to accomplish this with a “conservation easement”…and also save taxes at the same time.

A conservation easement is a restriction on your land that says it can never be developed in certain ways. When you create such an easement, you give it to a charity – usually one that has been created to preserve some historic, scenic or agricultural heritage. In some cases you can also give the easement to a government agency.

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Protecting real estate from future development can also be a good way to reduce estate taxes.

After that, the charity or agency has the right to enforce the easement and prevent such future development.

Despite giving away the easement, you still own the land and you can engage in any activities there that aren’t prohibited by it. You or your heirs can also sell the land, although any buyer will be subject to the same easement.

There are two big tax advantages to a conservation easement. The first is that it’s a charitable contribution, so you can take a charitable deduction on your income taxes. Second, the easement reduces the value of your property, because instead of your property being valued based on its potential for development, it has to be valued subject to the easement. So when you pass away, the value of your estate will be smaller, and your family may have to pay less in estate taxes.

The big drawback to a conservation easement is that it’s forever – so if your heirs someday decide they want to sell the property for development, they won’t be able to.

Recently, a federal appeals court in Washington, D.C. issued a decision that makes these easements easier.

The case involved two row houses in a historic district in Washington. The owner gave a “façade easement” to a charity interested in architectural preservation. The easement stated that the historic façades of the buildings could not be changed. However, the agreement also said that the charity had the right to consent to such changes if it chose to do so at some later point, even if they weren’t historically consistent with the area.

The IRS claimed that this wasn’t a real conservation easement because the charity had the option not to enforce the deal.

But the court sided with the taxpayer. It said the fact that the charity had the ability to agree to necessary but unforeseen changes in order to make the property livable and useable for future generations didn’t undermine its essential purpose.

This flexibility should help preserve the value of easement land, and make charities more willing to make such agreements, without losing the tax advantages for landowners.

What if you want to keep a farm, ranch, or similar property in the family for a number of years, but you don’t want to completely give up the right to develop it in the distant future? You might still be able to gain an estate tax advantage with something called a “special use valuation.”

This valuation allows an estate to value land for tax purposes based on its current use for farming or ranching, rather than its presumably much higher value for development. To obtain this valuation, your heirs have to promise not to develop the land for a certain period of time. (If they break this promise, the IRS can come back and collect additional taxes.)

The special use valuation is not a charitable contribution, and while it might save on estate taxes, you won’t get an income tax deduction. However, it provides more flexibility for your heirs down the road than a permanent conservation easement.

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Have you picked the right person as your executor or trustee?

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continues to run successfully.

➤ Paying valid claims from creditors. If nothing else, it will be necessary to pay funeral expenses, probate fees, professional fees and taxes out of the estate's funds.

➤ Filing tax returns on time, including any income tax and estate tax returns.

➤ Distributing property to heirs. This can include selling property to fund a bequest. It can also include setting up trusts as indicated in the will.

➤ Keeping detailed records of all expenses, and filing an accounting with a court.

An executor is entitled to be reimbursed for reasonable expenses, and in some cases can receive compensation.

The job of a trustee can be even more important, because it doesn't end when the estate is closed – it continues for the life of the trust.

A trustee is responsible for managing the assets of a trust for the benefit of the beneficiaries, while acting in accordance with the trust's terms. If a trustee makes a mistake and a beneficiary loses money as a result, the trustee could potentially be legally responsible – which is one reason why being a trustee is such a serious job.

Here are some of the issues that trustees can run into:

- Trustees are usually required to keep detailed records of assets, income and distributions. Further, they often have to provide copies of these records at regular intervals to all beneficiaries – including people who may become beneficiaries only years later. This is a big job.
- Trustees have a duty to use good judgment in managing the assets. That includes understanding and using basic investment principles such as diversification of assets. This can be an issue, for instance, if a trust is funded with stock in a family-run company. While everyone might want the trustee to keep the stock, the trustee might have a legal duty to sell some of it to reduce the risk of having the trust assets heavily concentrated in a single investment.
- Trustees have a fiduciary duty, which means they must always act in the best interest of the beneficiaries – and never in their own interest.
- Trustees sometimes have to manage conflicting expectations. For instance, suppose a trust provides income to a second spouse during the spouse's lifetime, after which the trust assets go to the children from a first marriage. The second spouse might pressure the trustee to invest so as to maximize current income, while the children might want the trust invested for long-term capital gains. A trustee typically has to be fair to all beneficiaries while acting within the terms of the trust – which might not make him or her the most popular person in the family.
- Trustees may be entitled to compensation, but it's very important to make clear upfront how that compensation will be calculated in order to avoid future conflicts. Will the trustee be paid annually? Will he or she receive a set fee, or a percentage of the trust assets? Will this change over time?

Executors and trustees have important jobs, and in many ways they're the linchpin of a successful estate plan. It's worth thinking carefully about the people you choose in order to make sure they really are, or still are, the best person for the job.

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Trust property could be tied up by a long-term lease

A Texas man put some ranch property into a trust. The trust was designed to pay regular income from the property to the man's son. When the son died, the ranch was to go to his grandson.

The trustee (a bank) entered into a long-term lease for the property. The result was that when the son died, the grandson didn't get the ranch all to himself; instead, he inherited it subject to the lease, which meant he couldn't immediately sell it.

The grandson sued the bank trustee. But a Texas appeals court sided with the bank. It said there was nothing in state law or in the trust agreement that said the trustee couldn't enter into a long-term lease, if that was otherwise an appropriate use of the property and a good way to provide income to the son.

The moral of the story is that if you're setting up a trust and you want the ultimate beneficiary of the assets to have an unlimited right to them when the time comes, you'll want to limit the power of the trustee to tie up the property in such a way.

Now's a good time to review your beneficiary designations

Did you know that your will does *not* determine who gets your IRA or your 401(k) account when you die?

That's right – these accounts are "non-probate" assets, which means they're not covered by your will. Instead, they will generally go to whatever person you named as the beneficiary when you set up the account.

Similarly, your will doesn't determine who gets your life insurance – that will go to the named beneficiary on the policy. And your brokerage account might have a beneficiary as well.

So as part of your estate plan, it's essential from time to time to review your beneficiary designations.

For example:

➤ You've remarried, but you want to leave your 401(k) to your children from your prior marriage. Under federal law, even if you name the children as beneficiaries, your account will go to your new spouse – and *not* your children – unless your new spouse signs a waiver.

➤ Is one of your beneficiaries a trust? If so, it's a good idea to have this reviewed. There have been a lot of developments in the law recently, and you might want to change the way the trust is set up in order to make sure you're still getting all the possible tax advantages.

➤ Is your estate listed as your IRA or 401(k) beneficiary? This is generally a bad idea, because you can often save a lot of taxes by naming individual beneficiaries instead and stretching out payments over time.

➤ Is one of your beneficiaries a minor? This could require going to court and setting up a guardianship, which can be time-consuming and expensive. There are better alternatives.

➤ Do you plan to leave money to charity? It might be wise to leave IRA or 401(k) assets to charity, rather than other assets. That's because heirs who receive IRA distributions have to pay income tax on them, whereas they probably won't have to pay tax on other assets.

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