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QUESTIONS AND ANSWERS ABOUT WILLS AND ESTATE PLANNING

1. What is a will?

   A will is the document by which you may direct what happens to your property after your death.

2. Can I do this with any kind of directions to my family or friends?

   No. The law requires that certain things be done to make a will valid.

3. Why?

   It is too easy for someone to lie about what you intended, and it is too easy for a document that you never intended to be a will to be construed as a will after your death. Perhaps no one in your family would lie about your intentions, but some people have friends or relatives who would lie: the law applies to everybody. In addition, the law wants to prevent mistakes.

4. What happens if I do not have a will?

   Every state has a law telling where a person's property goes when the person dies without a will. For example, if you have a spouse and three children, your spouse gets one-third of your estate and your children divide the remaining two-thirds. If you would not want your property divided in this manner, you must have a will.

5. What if I want my property to go the way the state law says?

   You may still need a will.

   (a) Your family may have disputes over how to divide the property. For example, your daughter may believe you wanted her to have a certain item of jewelry. Your son may believe you intended his daughter to receive it. A will can give them guidance.

   (b) If a court ultimately must divide the property, it needs guidance.

   (c) You can appoint as executor anyone you believe will divide your property fairly. Otherwise, the court will appoint an administrator (who might be the same person you would have appointed, but it is up to the court).

   (d) A creditor can become administrator if you do not appoint someone.

(e) If you do not appoint an executor and excuse bond, the court will require the administrator to post bond, even if it is a family member.

(f) If you have an estate that is large enough to be taxed, a will is very important to help the estate take advantage of all tax rules.

6. Do I have to have a lawyer write my will?

No, but it is a good idea. There are a number of things you may want to say in a will that are not valid. For example, "I give my house to John, but he cannot sell it." A lawyer can tell you how to express your wishes in a way the courts will accept. In addition, there are many things that you might forget to put in a will. Suppose you forget to excuse your executor from posting bond. This can be rather expensive. If your estate is large, you need a lawyer (and a CPA or some other professional) to show you how to save estate taxes.

7. Can I change my will?

Yes. There are two ways to change a will. You can tear up your old will and write a new one. If you have major changes or if the law has changed drastically since you made your last will, this is the best thing to do. If you have minor changes, you can write a "codicil." This is an amendment to a will. It must have the same elements as a will to be valid (see question 4).

8. Why should I change a will?

A will should anticipate many of the things that happen in a person's life that would affect their will. For example, we always tell what happens if a beneficiary dies before you do or if you and a beneficiary die together. We tell what to do with people born after you make your will or after your death, as well as many other things that may happen. When they do, you do not have to change your will. Sometimes, however, things happen that we do not anticipate. A divorce or a sudden change in the type or amount of property you own could give you a reason to change your will.

In addition, the law may change. You may have a will that makes a certain type of gift in trust to take advantage of the tax laws. The Internal Revenue Service might make this trust illegal or reduce the benefits it once offered. We periodically review our clients' wills to see if they are affected by changes in the law; if the law changes, we will tell you about it so you can decide if you want to change your will.

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INTESTACY VERSUS WILL

Advantages of Intestacy:

1. No expense of a will
2. No need to think about death
3. All joint property to surviving joint owner (usually to spouse)

Disadvantages of Intestacy:

1. Expense of a probate proceeding with an administrator
2. Inability to provide for the various advantages available with a will

Advantages of a Will:

1. Power to dispose of property according to testator's wishes
2. Appointment of guardian for minor children
3. Appointment of executor
4. Powers to executor to carry on business, sell assets, make tax decisions
5. Allocation of death taxes in best way
6. Elimination of executor's bond
7. Waiver of inventory, accountings and other reports
8. Creation or exercise of powers of appointment
9. Gifts to relatives, individuals, or charities, none of which are covered by intestacy laws
10. Tax saving through marital deduction
11. Tax saving through credit-shelter "by-pass" trust
12. Providing for descent of property for children of those who die before testator
13. Establishing testamentary trusts instead of expensive guardianships, with spendthrift clauses
14. Keeping property out of hands of future spouse of a survivor

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WHAT IS "PROBATE" AND DO I WANT TO AVOID IT?

1. What is probate?

   Technically, probate means proving that someone's will was actually their will. However, the term is commonly used to describe the court procedures necessary to administer an estate. This common definition is the one we will use.

   Even if you do not have a will, your estate must be probated. Tennessee law provides that no one can "administer" an estate without the court's approval. A court could find that family members who chose to divide a deceased person's property without going through probate were violating this law.

2. What happens to my property when I die?

   Regardless of whether you have a will, your estate must be formally administered. This is commonly called "probate." Sometimes family members have no argument with each other over how to divide property, and they do not actually go to court to divide it. Tennessee law does not say, "When someone dies, the estate must be administered in court." So some people say it is all right to avoid probate. But the law <u>does</u> say that no one can administer an estate without the court's approval. This suggests that all estates must go through the probate court.

3. What happens in probate?

   The probate court is only concerned with your "probate estate." This includes only property you own alone and insurance proceeds payable to your estate rather than an individual. Jointly owned property is not part of your probate estate.

   The probate court lets the executor run the estate, but the court always watches out to see if it is done correctly. The executor has to list all of the assets in the probate estate, file a tax return, pay creditors of the estate, and distribute all of the property to the beneficiaries under the will (or under the statute if there is no will).

4. How long does probate take?

   From six months to several years, depending on how large or complex the estate is.

5. What does probate cost?

   The actual probate fees are usually around $500.00. Lawyers' fees vary. Many lawyers use a fee schedule published by the probate court. This is based on a percentage of the assets of the estate. This office, and some others, charge a regular hourly fee for the administration; and this fee is usually lower than the probate court fee schedule. An executor should always compare the fee schedule with a fee estimated at hourly rates.

6. Does probate help?

<u>How Probate Helps:</u> When probate procedures are completed, the family can be more confident that all of the deceased person's debts are paid. In addition, disputes are resolved over who receives what portion of the estate.

<u>How Probate Hurts:</u> The type and amount of your estate will become a matter of public record. Probate can also be a time-consuming and expensive procedure. Sometimes an executor or administrator must be paid. Lawyer fees also come out of the assets of the estate.

7. Do I want to avoid probate?

Avoiding Probate: Some people try to reduce the amount of property they own so probate will be easier and less expensive. In reality, these attempts may reduce probate time and cost but result in expensive and complicated procedures outside of probate. Thus, avoiding probate may not accomplish your real goals.

There are two common ways to avoid probate:

(1) Put your assets in a living trust. This will reduce your probate estate. However, a transfer to a trust could result in a taxable gift if you give up all control over the trust property. If you do not give up all control, the property is still part of your estate for tax purposes. In addition, professional trustees charge a fee for administering your property.

(2) Put your assets into joint names. This is hard to do with personal property. Also, there can be severe detriments to the original owner by putting property into joint names--the effect of joint ownership is discussed in another memo.

8. Other issues.

There are other considerations, however. Do you want to give up sole control over your property? What if you give all control to a trust and then change your mind about where your property should go? Do you want to burden someone else with responsibility for your property before you die? In other words, avoiding probate just for the sake of simplifying your estate may not in fact simplify anything.

If your total estate is valued at less than $50,000.00, or the only probate asset is real estate in Tennessee, probate proceedings are substantially less complicated and expensive.

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SHOULD I PUT PROPERTY IN JOINT NAMES?

Tennessee recognizes several types of joint ownership in property:

1. Tenancy in Common - Suppose John and Bill own property in this way. When John dies, his one-half interest goes to his estate. Bill still only owns one-half of the property.

2. Joint Tenancy - When John dies, Bill gets all of the property. John's interest does not pass to his estate. A conveyance of a joint tenancy must specify that there is this "right of survivorship." Otherwise, John and Bill are tenants in common.

3. Tenancy by the Entireties - This is available only to husbands and wives. When one spouse dies, the other gets all of the property. The deceased spouse's interest does not go to the deceased spouse's estate. Therefore, tenants by the entireties also have a "right of survivorship."

The rest of this discussion will assume that you want to create a joint ownership with a right of survivorship. This is what people usually consider when they want to explore the effect of joint ownership on their estate.

People usually give three reasons for joint ownership of property:

1. You can assure that the person you want to get certain property after your death will get it.

2. The value of your probate estate is reduced, thus simplifying probate (but not tax) procedures.

3. If you are incapacitated, you will have someone responsible for your property.

We generally feel that there are better reasons for avoiding joint ownership:

1. The joint owner immediately has the same rights that you have to the property. For example, if a joint owner wanted to spend all of the money you put in a joint bank account, he could do so. The creditors of the new joint owner can attach to the asset. For example, if Mom wants to add Son to her bank account and add his name to her house and then Son gets sued or files bankruptcy, Mom's bank account and house are subject to Son's creditors.

(1) You may have to get the joint owner's permission to do certain things with the property.

(2) You can obtain the conveniences and some of the advantages of joint ownership sometimes by simply having a proper durable power of attorney.

(3) If the joint owner dies before you do or if the joint owner is a spouse you later divorce, the joint owner must be replaced. Some people do not want to take the chance that they would forget to do this or that they would be physically or mentally incapacitated and could not transfer the property before their death.

(4) The joint owner will get the property when you die. No one else will have a right to the property. Care must be taken to ensure that the joint owner is the person who should get the property.

(5) It is hard to put personal household property in joint names. This type of property will be divided by the probate court. The court will not object to the way the family chooses to divide it unless a family member objects to his share. Having a will that describes how to divide property can help the family avoid this problem.

(6) You may be putting a burden on the joint owner. For example, when someone dies, an inheritance tax return must be filed. All jointly owned property must be listed. If the joint owner dies before you, that property must be listed in the joint owner's estate for tax purposes. The joint owner's estate will not owe tax on the property if you paid for it but owning property jointly increases the paperwork for the joint owner's estate. In addition, sometimes it is hard for the joint owner's estate to prove he did not pay for the property. Then the joint owner's estate must pay estate tax on the property.

(7) It is hard to put personal household property in joint names. This type of property will be divided by the probate court. The court will not object to the way the family chooses to divide it unless a family member objects to his share. Having a will that describes how to divide property can help the family avoid this problem.

(8) When you put the property into joint names, you have made a gift that may be immediately taxable, depending on the value of the property.

(9) When property is owned jointly at least one-half of the total value is subjected to death taxes when one owner dies (and perhaps the entire amount will be taxed) and then the entire amount is taxed at the death of the second owner. At a <u>minimum</u>, joint ownership subjects property to 1 1/2 times the normal death tax.

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THE USE OF TRUSTS IN ESTATE PLANNING

There are two types of basic estate planning documents: wills and trusts.

Your will accomplishes a variety of functions (both tax and nontax) to transfer property in your probate estate to your designated beneficiaries. A will is nothing more than your list of instructions on how to conduct the probate process. It is your basic instrument for transferring property at death. Your will might also provide for the creation of testamentary trusts. Proper drafting of your will may save some probate costs. Estate tax savings provisions may or may not be contemplated by your will. If you do not have an effective will, your probate property will pass under applicable laws of descent and distribution (intestate succession).

Property may also be transferred through non-probate arrangements. Such transfers avoid the probate process and are not affected by the existence of your will. For example, to reduce probate costs you may place substantial properties into a revocable living trust. At your death, your property is distributed (or maintained in trust) in accordance with your instructions spelled out in your trust instrument, avoiding the probate process. Below is a description of certain types of trusts used in the context of estate planning (that is, avoidance of probate and reduction of estate taxes). To the extent trusts are used as vehicles for lifetime gifts, they may also have an estate tax savings impact. This is because the gift, if made properly, removes property from your taxable estate and may also remove the appreciation which takes place in the property from the date of the gift to the date of your death.

Trusts can be created for a variety of estate planning reasons:

1. To conserve property for beneficiaries and to protect them against their own mismanagement

2. To manage investments

3. To avoid guardianship proceedings (and related probate procedures) for the transfer of property to minors and other persons legally incapacitated

4. To minimize probate costs by transferring property outside the jurisdiction of the probate court (the “living trust”)

5. To assure privacy in the transfer of property at death (also a “living trust” function)

6. To save taxes, including federal income and estate taxes, and state income, inheritance, and estate taxes

In general, trusts can be categorized as "living trusts," or "testamentary trusts." The living or inter vivos trust may be (i) revocable or (ii) irrevocable. The testamentary trust (created under your will) comes into existence as of the time of your death, and is irrevocable.

REVOCABLE LIVING TRUSTS

Revocable living trusts are of substantial value and are commonly used in estate planning. Since the trust is revocable (changeable), you can cause trust assets to be returned to you whenever you desire. This trust may be created with only a nominal corpus, say, $100.00. The balance of the trust corpus is added at the time of your death. This balance may be received under a will which directs the "pour-over" of your residuary estate into the trust. This may also be accomplished by designating the trustee as the beneficiary of life insurance on your life.

A revocable living trust may also be funded with a substantial part of your property during your lifetime. It is only the assets which are actually in the trust before you die that will avoid the probate problem.

IRREVOCABLE LIVING TRUSTS

Various irrevocable living trust arrangements have developed in response to tax benefits available under specific income and gift tax provisions. Among these are split-interest charitable trusts, minors' trusts, and Crummey trusts. In general, irrevocable trusts are intended as vehicles for lifetime gift giving.

Irrevocable living trusts are also commonly used to keep life insurance proceeds out of your estate. These trusts may also be used to receive other property at your death by beneficiary designation or by "pour-over" from your will.

TESTAMENTARY TRUSTS

A testamentary trust is created under your will. Although technically it comes into existence at the time of your death, it is usually not activated as an entity for income tax purposes until assets are received by the trustee upon a distribution from your estate. Distribution normally does not occur until the initial phases of probate administration have been completed.

Similar to living trusts, the testamentary trust may also function as a receptacle for non-probate assets. For example, insurance proceeds may be made payable to the testamentary trust, revocable living trusts might be consolidated into the testamentary trust, and benefits under an employer's qualified pension or profit-sharing plan may be made payable directly to the testamentary trust. However, some or all of the properties put into the testamentary trust may be subjected to the probate process.

An estate planning attorney will be able to provide you with more details on the role of trusts in your estate planning.

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USE OF REVOCABLE LIVING TRUSTS

The revocable living trust, a trust created during life, has become a popular estate planning tool. The usual arrangement provides for a transfer of part, or sometimes all, of the grantor's property during life to a trust created by the grantor. The grantor usually reserves the right to amend the trust instrument and to revoke it entirely during life. In other words, during life the grantor can take all or part of the assets out of the trust or add property to it. The terms of the trust instrument generally provide for payment of the income or principal, or both, by the trustee to pay expenses for the grantor's health, support, and maintenance.

Although revocable and amendable by the grantor during life, the trust generally becomes irrevocable at death. Ultimate disposition of the trust property is either outright or by continuation of one or more trusts.

Revocable living trusts are created for one or more of the following reasons:

1. To avoid probate of the trust assets along with the attendant effort, time, and expense.

2. To avoid the cost and burden of multiple probate proceeding if real property is owned in more than one state.

3. To provide for more effective lifetime management of the assets transferred into trust.

4. To provide for integrated management of property upon the death of a spouse. This purpose also can be accomplished, if appropriate, by proper drafting of a will.

5. To provide a repository for selected employee benefits.

6. In a joint transfer of property, to provide assurance that the bulk of the estate will pass to the children. (The trust would become irrevocable in whole or part on the date of death of the first spouse.) This also can be accomplished in other ways.

7. To test the management of the trustee while the grantor is alive, to ensure that upon the grantor's death the surviving spouse will receive adequate management advice.

8. To avoid the publicity that accompanies probate of a decedent's estate.

9. To provide for the ill or aging grantor relief from the responsibilities of property management.

10. To fix the state law applicable to the trust property, and to relieve the mobile grantor from the burdens of property management.

The assets transferred to the trust do not escape death taxation, and the transfer is not subject to gift tax. The income of the trust is taxable to the grantor during life. Since the grantor retains the right to revoke and amend, the grantor has not given up significant power or control over the assets. The grantor is still considered the owner for income tax purposes.

The desire for flexibility and to minimize probate expenses are the major reasons for the popularity of the revocable living trust. In certain cases, however, expenses may equal or exceed the probate cost savings.

If the trustee is a bank or trust company, the trustee's management fees during the grantor's life may exceed the probate cost savings. The grantor, however, can be trustee during life. In addition, probate costs often are not as great as expected. If the executor is a beneficiary-family member, the executor's fee may be waived.

Although trust accounting is relatively simple, annual information tax returns must be filed, generating accounting fees. Federal estate and inheritance tax returns also will still be required.

A transfer of substantial assets to a revocable living trust minimizes the opportunity to time distributions from the estate created upon the grantor's death to minimize post-death income taxes. The estate is a separate taxable entity, with its own tax rates. If there is proper post-mortem planning, income from the estate not distributed can be taxed at rates lower than those of the ultimate beneficiaries. When distributed in a subsequent year, the income is not subject to additional taxation. This can have a cumulative effect, because estates often are kept open for several years.

Estates are not subject to the trust "throwback rule," which basically taxes a distribution from a trust of prior years' income to a beneficiary as if it were received by the beneficiary in those years. Sometimes this can minimize the favorable effect of trust income accumulations. Trusts have less flexibility than estates in determining their own tax liability and that of their beneficiaries. When post-mortem income-splitting is appropriate, the loss of the estate as an effective tax entity may be more costly than the savings achieved through minimizing probate costs.

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IRREVOCABLE LIFE INSURANCE TRUSTS (ILIT'S)

Irrevocable life insurance trusts (ILIT's) are one of the most commonly used, and one of the most effective, estate planning devices available. The reason for their popularity is simple: massive transfer tax savings. While there are non-tax related benefits to an ILIT such as flexibility, spendthrift protection, and professional management, the tax benefits are clearly the primary benefit.

How Does It Work?

What an ILIT does is remove from the insured's gross estate the value or benefits of the insurance policy when the insured dies. For example, if Joe Smith has a policy on his life worth $1,000,000 and he is the owner and the insured, and his wife and children are the beneficiaries, that $1,000,000 is included in his taxable estate. An ILIT can produce the same results, with some variations, and remove the $1,000,000 from Joe's estate. As a matter of fact, the $1,000,000 will be in no one's estate, assuming the trust beneficiaries of the next generation live their normal life spans and have the opportunity to be the beneficiaries of the trust for a number of years.

The Formation And Structure

The key to achieving success with an ILIT is following the IRS's rules. There are certain technical aspects to forming and administering an ILIT that <u>must</u> be followed in order to reap its tax-associated benefits. The policy and the eventual proceeds are removed from the insured's estate by eliminating any "incidents of ownership" possessed by the insured. "Incidents of ownership" is defined broadly, but in addition to outright ownership of the policy, it also includes the right to change the beneficiary of the policy, to borrow money against the policy, or to use the policy as collateral for a loan.

The process of establishing an ILIT begins with the proposed insured establishing and executing an irrevocable life insurance trust. The insured is the grantor of the trust and the beneficiaries are usually the spouse and/or children and grandchildren of the insured. The trust then applies for, and becomes the owner of the policy—not the insured; this is extremely important. An insured can transfer an existing policy into an ILIT, but the insured must live three (3) years from the date of transfer or the proceeds will be brought back into the insured's estate. Another requirement to follow is the grantor cannot be the trustee of the trust. Often a close advisor or trusted individual of the insured will be the trustee during the grantor's lifetime. During the insured's life, the trust does not hold any liquid assets to be invested such as stocks or bonds—it merely holds the insurance policy.

After the insured dies and the proceeds from the policy are distributed to the trust, it is common to have an institutional trustee such as a bank or trust company, administer the trust to utilize their expertise in administering trusts and handling investments. Sometimes the original, individual trustee will continue to serve, with a corporate fiduciary added as Co-Trustee.

During the lifetime of the insured, and after the trust is established, the premiums for the policy are paid directly by the trust. The insured contributes the necessary amount to the trust, and indirectly pays the premiums. For example, a premium come dues on Joe Smith's policy that is held in his ILIT. The trustee notifies Joe that a premium is due. Joe still pays the premium, but indirectly, he makes his check payable to and delivers it to the trust and trustee, not the insurance company. The trustee writes a check in the name of the trust and pays the premiums to the insurance company.

***Crummey* Powers**

One last but extremely important aspect of an ILIT is to include *Crummey* powers in the trust agreement, and to follow through to assure all necessary parties abide by them. Whenever the insured or grantor contributes funds to the trust for paying the premiums, he is in effect making a gift to the trust and indirectly a gift to the beneficiaries of the trust. The goal is to have this "gift" qualify as an annual exclusion of the insured or grantor, to avoid creating a current gift tax liability. Every person is allowed to give a certain amount every year to an unlimited number of donees, with no current gift tax consequences. This is called the annual gift tax exclusion, and for the years 2018 and 2019 the amount is $15,000. Spouses can "split" their gifts and give twice the amount to any recipient, or $30,000 per donee per year, even if the gift comes from only one spouse. In order to qualify under the annual exclusion, gifts must be of a "present interest," meaning that the beneficiary or donee of the gift (in the case of an ILIT, the beneficiaries) must have the unrestricted present use of the gift. A gift to a beneficiary in trust, or to a trust for a beneficiary, normally is a future interest, not a present interest, and usually does not qualify for the annual exclusion.

In order to overcome this obstacle, a properly drafted ILIT will allow the beneficiaries of the trust to withdraw their respective share of any gift for a limited amount of time, usually thirty (30) days. When the grantor of an ILIT makes his check payable to the trust and delivers it to the trustee, the trustee will then in turn send a notice to all beneficiaries of the trust, a so called "*Crummey* letter." This letter will inform the beneficiaries that a gift has been made to the trust, and they have certain withdraw rights pursuant to the ILIT agreement. Usually the beneficiaries know what is going on, and realize that if they, in fact, exercise their withdraw rights, they will upset the estate plan of the grantor and can cause the premium to not be paid and in turn, cause the policy to lapse. They will then not be the beneficiaries of the much larger principal amount of the policy, the proceeds, when the grantor-insured dies.

Conclusion

While the process of executing and administering an ILIT might seem a little bizarre because of the technical procedures which must be followed, it is important to realize that they must be followed to achieve the end result—having the policy proceeds excluded from the grantor's taxable estate, thereby increasing the overall size of the estate which can pass to future generations. Life insurance is often a substantial part of a person's estate, and the use of an ILIT is an extremely effective and cost efficient way to administer it.

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REASONS FOR ESTATE PLANNING OTHER THAN ESTATE TAX ISSUE

Most people think that estate planning is only for the wealthy and only if they have a taxable estate, i.e. $1 million or more for Tennessee purposes, however, below is a list of non-estate or inheritance tax reasons for estate planning:

- Number one goal is to protect and preserve the family
- To avoid probate, especially if you own real property in more than one state
- Disability protection
- Appointing appropriate fiduciaries—Executors, Trustees, Guardians, etc.
- Asset protection planning for you and/or other family members
- Planning for second marriages, your own or other family members
- Planning for minors or for other family members whose financial abilities are unproved or impaired
- Minimizing the sources of potential family conflicts, i.e. personal property dispositions
- Life insurance planning
- Charitable giving
- Placing reasonable, flexible restraints on inherited wealth
- Building balance and flexibility into an estate plan to permit modifications in the future
- Income tax planning

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TENNESSEE INVESTMENT SERVICES TRUST

On May 10, 2007, Governor Phil Bredesen signed into law the "Tennessee Investment Services Act," which became effective on July 1, 2007. The legislation creates a new era of trust and creditor's rights law in Tennessee. Under this new act, Tennessee becomes one of only a handful of states to enact legislation permitting the creation of self-created, or self-settled, asset protection trusts.

Prior to this new law, a Tennessee resident who wanted to protect assets from creditors had to use another state's law, or set up an offshore trust account such as in the Bahamas or the Jersey Islands, actions that are both burdensome and expensive.

Under prior law, if an individual created a trust under which he is also the beneficiary, a self-settled trust, the assets of the trust were subject to the claims of his creditors. Therefore, if someone spent years building up his assets, they could possibly be lost in the event they were subject to the claim for damages, such as from an automobile accident, or business creditors.

The new law allows a person to create a self-settled trust, called an "Investment Services Trust" (IST), that subject to meeting certain technical requirements, will protect the assets placed in the trust from the claims of creditors. An IST is an irrevocable trust into which an individual transfers assets while retaining one or more of the following rights:

- Direct the investment of the IST assets
- Receive trust income
- Request up to 5% of trust principal annually
- Receive additional distributions of principal, under certain circumstances, based upon the discretion of the trustee or another appointed advisor
- Live in a home owned by the trust
- Veto distributions to another beneficiary
- Direct the distribution of the trust assets upon death to any one or more persons other than the settlor's creditors, estate or creditors of the settlor's estate
- Remove the trustee and other trust advisors and appoint their successors, provided they are not related or subordinate to the settlor

While the settlor cannot serve as Trustee of the IST, the settlor's spouse can be the Trustee, assuming he or she is a Tennessee resident; and the settlor may serve as the investment advisor in order to retain control of the investments of the IST. In addition, to qualify as an IST, the trust agreement must:

(a) Appoint a qualified Trustee (a Tennessee resident or a corporate Trustee authorized to do business in Tennessee);

(b) Expressly incorporate Tennessee law to govern the trust;

(c) Provide an affidavit which must include, among other things, a statement that by creating the trust he does not intend to defraud a creditor and he does not have any pending or threatened court action against him other than those identified in the affidavit;

(d) Be irrevocable;

(e) Have at least some assets administered in Tennessee; and

(f) Contain the spendthrift provision.

It should be notated that an IST does not provide asset protection for assets transferred to it until four years after the transfer. After the four years have expired, the settlor's creditors are prevented from seizing the assets of the IST to satisfy claims against the settlor. It is important to note that there are three additional limitations on the protection afforded by an IST:

- Federal bankruptcy law has a 10-year period to set aside transfers which could apply to an IST under certain circumstances.
- Mandatory distributions (and discretionary distributions once made) may be garnished.
- The law is unsettled whether a court of another state is required to recognize the creditor protection of an IST under the full faith and credit clause of the Constitution.

The new legislation also extends the period for which any trust can exist from essentially 90 years to 360 years (referred to as the *Rule Against Perpetuities)*. This allows a settlor to place property in trust to ensure its assets are available to benefit not only his children and grandchildren, but also future generations of his descendants.

This new law provides an opportunity to protect assets from unknown and unforeseen claims by transferring them to a friendly individual Trustee, such as a spouse, while at the same time retaining the right to the trust distributions and the benefit of the assets, as well as to manage the trust assets.

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DIGITAL ASSETS

A new, but critical, area of estate planning is attending to a client's digital assets or legacies. Digital assets are defined as any online accounts that you own, or any file that you store in your computer or in a cloud drive. While many of these assets have no monetary value whatsoever, they often have sentimental value to family members. In today's tech savvy society, more and more people are using online banking for routine transactions, automatic bill paying, etc. If one spouse primarily does this and the other one does not know the login and password information, that can provide a great obstacle if that spouse were to die first. In most cases, the other spouse, and quite commonly, their heirs, simply may not know of the existence of each and every online banking or financial account, the location of online photos, movies, and other data that the deceased may want to pass on at their death.

There are several ways to address the management of digital assets after death or incapacity of a family member. One way is to have specific language under a person's financial or business matters power of attorney that authorizes the attorney-in-fact to have access to the principal's online digital assets and accounts. Obviously, this is a new area so no one can predict how smoothly this will work in the real world, but it cannot hurt to have this language in a person's power of attorney.

Another way would be in a client's will, if the primary or favored Executor is not internet and electronically savvy, they could name a specific Executor solely for the purposes of dealing with their digital and online accounts and assets.

In addition, there are also websites such as legacylocker.com or securesafe.com to store your information, and upon your death there is mechanism to e-mail that information to a named individual. In the alternative, you could make a list of all your online accounts and passwords and put it in a safe place, such as a safe deposit box, which can be found upon your death by your Executor.

To date only five states have enacted laws that relate to digital assets with regard to estate planning. The rights of Executors, agents, guardians and beneficiaries with regard to accessing digital assets are muddy at best. In addition, there is no real consensus regarding ownership and transferability of digital assets with a category property in which digital assets belong. Some say they are intellectual property, while others say they are intangible property.

CONFIDENTIAL ESTATE PLANNING QUESTIONNAIRE

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I. FAMILY DATA (Please list your name as you would like to have on legal documents) DATE:________________

HUSBAND:____________________________ **D.O.B.** ____________ **S.S. #**____________________

WIFE:____________________________ **D.O.B.** ____________ **S.S. #**____________________

CHILDREN:____

ADDRESS:____**PHONE:**__________________

II. ESTATE PLANNING GOALS: Please describe your overall estate planning goals:

____

____

Do any family members or beneficiaries have any disabilities?________________________________

III. ASSET SUMMARY: Please use Fair Market Value and round to nearest $1000.

Asset	Husband's Name	Wife's Name	Joint
Real Estate (Residence)			
Real Estate (Other)			
Cash, Bank Accounts, CDs, etc.			
Stocks, Bonds, Mutual Funds, Brokerage Accts.			
Household goods, Personal Effects & Misc.			

Tax Deferred Annuities, 401(k) Plans, IRAs and Other Retirement Accounts

Husband: Description	Value	Primary Beneficiary	Contingent Beneficiary

Wife: Description	Value	Primary Beneficiary	Contingent Beneficiary

LIFE INSURANCE

On Husband's Life:

Policy Owner	Type	Face Value	Cash Value	Beneficiary	Annual Premium

On Wife's Life:

Policy Owner	Type	Face Value	Cash Value	Beneficiary	Annual Premium

IV. APPOINTMENT OF AGENTS FOR:

Husband's Choice

	FINANCIAL POWER OF ATTORNEY		HEALTH CARE POWER OF ATTORNEY	
	Name	Relationship	Name	Relationship
#1				
#2				

Wife's Choice

	Name	Relationship	Name	Relationship
#1				
#2				

V. APPOINTMENT OF EXECUTOR Whom do you want to be in charge of administration of your estate?

Husband's Choice

	Name	Relationship	Address
#1			
#2			

Wife's Choice

	Name	Relationship	Address
#1			
#2			

VI. APPOINTMENT OF TRUSTEE If your will creates a trust for your spouse or other family members, who do you want to manage this inheritance? This can be the same person as your Executor. Trustee choices should be same for both husband and wife.

	Name	Relationship	Address
#1			
#2			

VII. APPOINTMENT OF GUARDIAN Whom do you want to raise your children if both you and your spouse die with minor children?

	Name	Relationship	Address
#1			
#2			

VIII. BENEFICIARIES OF SPECIAL GIFTS Do you want to make a gift—cash or a specific item to a charity, foundation or a religious foundation? Do you want to give any specific items to a family member or other individual?

Name of Beneficiary	Charitable Amount	Specific Gift

IX. RESIDUARY AND CONTINGENT BENEFICIARIES Whom do you want to receive the rest of your estate after these special gifts have been distributed? Whom do you want to receive your estate if you and your spouse outlive the people you have named to be the residuary beneficiaries?

Name of Beneficiary	Amount or Percentage	Contingent Beneficiary	Amount or Percentage