



# Preparing for the Estate Planning Process: Questions to Consider Before Meeting With Your Attorney

THE PROCESS OF ESTATE PLANNING AND LIFETIME GIVING CAN BE BOTH TIME CONSUMING AND INTIMIDATING, FORCING YOU TO CONFRONT POTENTIALLY UNCOMFORTABLE ISSUES OR MORTALITY. HOWEVER, IT CAN ALSO BE ONE OF THE MOST IMPORTANT PROCESSES YOU UNDERTAKE DURING YOUR LIFETIME AND WHEN COMPLETE, CAN PROVIDE YOU WITH SIGNIFICANT PEACE OF MIND.

BEFORE MEETING WITH YOUR ATTORNEY TO BEGIN THE ESTATE PLANNING PROCESS, YOU MAY WANT TO PREPARE BY ASKING YOURSELF THE FOLLOWING SERIES OF QUESTIONS. KEEP IN MIND, THERE ARE NO RIGHT OR WRONG ANSWERS; ESTATE PLANNING IS A FLUID PROCESS. BY CONSIDERING THESE QUESTIONS IN ADVANCE, YOUR ESTATE PLANNING PROCESS SHOULD PROCEED MORE SMOOTHLY.

## 1. What Time Frame Should I Use When Creating My Estate and Gift Plan?

Most people will revisit and revise their estate plan multiple times, either at periodic intervals or upon major life events (e.g., birth of a child or grandchild, change in marital status, etc.). Each time, it helps to define a time horizon. We suggest keeping the process simple and focusing on a 5 - 10 year time frame for these decisions. Ask yourself, "If I were to die in the next few years, how would this impact my decisions about distributions of assets to my children or other beneficiaries?" This approach may focus you on current tradeoffs about estate and gift planning, while providing flexibility to change your stance in the future.

If you are young and healthy, you have the flexibility to use this 5-10 year time horizon to decide family issues, such as determining guardians or the ages at which you feel comfortable giving children free access to assets. Given the likelihood that you will live many years, you need not focus on developing complex strategies for disbursing assets in a short time frame. As your children age and mature, your position on granting access to funds may change, and you can revise those details accordingly during a subsequent review of your documents. Likewise, your own needs will change over time, making you more or less willing to make transfers. In contrast, if you are getting older or are in poor health, you might need a more focused and complex plan.

## 2. Do I Have Enough Wealth?

To achieve the tax benefits of a gift, you must relinquish control over the asset, making the gift irrevocable. Thus, lifetime gifting often begins with a cash flow analysis and some forward projections of your income needs. In addition, you should assess your comfort level with the amount of portfolio risk needed to help ensure sufficient cash flow from your retained investments.

A good starting point for this process is to identify your assets and any considerations attached to them, your income needs for yourself and your family, and your potential beneficiaries. With this information in hand, ask yourself, "Do I have enough wealth to satisfy my future liquidity needs and maintain a comfortable lifestyle? If sufficient assets are available to meet my needs, should I consider gifts to others as part of the planning process?"

## 3. How Much Wealth is Enough?

A lifetime gifting program can move substantial assets out of your estate over time and enable your heirs to enjoy the use of this wealth during your life. Many people are concerned, however, about the influence of wealth on their children. For this reason, your giving strategy may involve the use of trusts, which are tremendously flexible and can incorporate age parameters and distribution restrictions, and may provide you with sufficient comfort to make larger gifts.

Still, the questions of “How much is enough?” and, more importantly, “How much is too much?” are commonly asked in the gifting process. Unfortunately, there is no right answer, the amounts and goals will depend on your personal situation, your level of comfort with giving up control, and your knowledge of your children or other beneficiaries. Some people approach these questions in terms of lifestyle (“I want my children to be able to have a house or pay off a mortgage”), while others quantify their gifting goals in terms of dollar amounts (“I want my children to have \$X by the time they are age Y, because they will be buying a home or raising a family, and so I need to fund \$Z dollars over the next several years”). Some families try to nurture entrepreneurship by creating pools of money to be used as a bank for business endeavors, requiring family members to present business plans and obtain approval from a board of advisors.

When setting up trusts to hold assets for your beneficiaries, be sure to consider the potential growth of your gifts, whether through investment performance or compounding. These trusts often require income to be paid out to beneficiaries upon reaching a certain age (often 21) and then make distributions of principal in later years (such as ages 25,30 and 35, possibly pushing distributions out to 40 and beyond). This extended time frame may allow the assets to grow significantly, resulting in far larger distributions than were intended by the grantor.

After analyzing the potential payouts of their trusts, many parents opt to give trustees discretion over distributions. The trustees, in turn, may delay principal distributions by a number of years or escalate the amount of distributions, providing children with progressively larger sums over time, as they presumably become more capable of handling wealth prudently.

#### 4. Am I Willing to Relinquish Control?

Gifting has many advantages, but there are trade-offs. As mentioned earlier, lifetime gifting, like most estate planning strategies, requires you to relinquish control permanently over the use of the gifted assets. This means that assets transferred to your children can no longer be used for your benefit. In many strategies, however, you can continue to make investment decisions on behalf of your children or designate a corporate trustee to make investment decisions.

#### 5. Are Your Beneficiaries Ready for the Responsibility of Wealth?

If your beneficiaries are young, they may not have the maturity to be responsible stewards of your assets. In this case, what lessons in financial management and stewardship are necessary? With trusts, you can choose to delay access to assets until a predetermined time or allow trustees to decide when your children are financially responsible. You may also wish to consider making smaller outright gifts at a younger age to help teach children the fundamentals of money management and stewardship. Watching how your children are able to learn from and cope with smaller amounts given to them at younger ages can help you decide what protective parameters should be in place in your broader estate plans and ultimately, how much to leave to them.

#### 6. How Can I Make Sure My Wishes Are Followed?

Some individuals opt to set up “incentive trusts,” which impose conditions on distributions to encourage a certain action by beneficiaries (e.g., paying out a dollar for every dollar earned or passing a drug screening) rather than setting age-related distributions (e.g., distributing one-third of principal at age twenty-five). While incentive trusts may provide the grantor with more control over distributions, they may also exert too much control or fail to keep pace with the times.

Incentive trusts may also have unintended consequences. For example, purchasing a child's home within his or her trust can be a great tax strategy and can often act as a de facto prenuptial agreement, but it also places decisions about the home's tenancy in the hands of trustees, potentially depriving the child of a desirable sense of ownership, stewardship, and responsibility. Play devil's advocate with yourself when making these decisions and see if you remain as committed to your strategy given the range of potential outcomes.

Some practitioners advise leaving full discretion over distribution decisions with the trustees. In these situations, the grantors will often leave a side letter to the trustees laying out their wishes in clear statements. While not legally binding, a side letter can assist the trustee in administering the trust in accordance with your wishes. It can also prevent the need to add significant, complex provisions to the trust document that will impose your wishes. Parents also may choose to write a side letter to children to explain the thinking behind a trust's structure. As with the side letter to trustees, these letters are not binding, but can ensure your voice is heard.

## 7. When and How Should I Tell My Children?

There is no right time or way to discuss family wealth with your children. As they grow, most children will begin to ask questions. In some cases, public disclosures required by securities laws, the power of the Internet, or simply a prominent family heritage will ensure that children are aware of family money from an early age.

You may consider broaching this topic directly, perhaps by sharing your views on wealth, philanthropy, and social values in a controlled, structured environment. Some families have a dedicated annual family meeting. Others simply make time to tell stories of family history ("When we were first starting out, we had to put every nickel back into the business; our big night out was when we had coupons for the local diner"). Either technique can teach decision-making skills and instill values in the next generation.

Another way to instill values is through engaging in philanthropic activities as a family, perhaps by working together on grant-making or community outreach projects. By setting up a donor advised fund or private family foundation, for example, you and your children can establish a mission statement together, and your children can research their interests and propose causes to support. Direct participation with charities through site visits or volunteering can provide a firsthand view of the impact of your family's gifts. Family members can also help oversee investments of foundation assets, learning the principles of asset allocation and investment management with money that is not theirs to spend.

## 8. Who Should Serve as Trustee?

Given the predominance of trusts in estate planning and the many factors that need to be considered, the selection of a trustee is one of the most important decisions you will make. While you or your spouse may be able to serve as trustee, in many situations, a third party is needed to ensure the assets are not included in your estate for tax purposes.

The trustee's responsibilities include receiving assets, safeguarding accounts and assets, managing assets as a prudent investor, making discretionary distribution decisions, and filing income tax returns for the trust. These responsibilities are ongoing for the tenure of the trust, which may be a set term of years or continue in perpetuity.

### WHAT SHOULD I LOOK FOR IN A TRUSTEE'S SKILL SET?

Trustees manage the complex technical requirements of trust administration, from investing trust assets to filing tax returns. They also need to be capable of identifying, understanding, and responding to the various personalities of the individual beneficiaries. It is also essential that trustees can recognize and resolve potential trustee/beneficiary conflicts and be efficient in dealing with intra-family conflicts. The trustee also has a responsibility to educate beneficiaries and interpret the grantor's wishes.

### WHAT ARE THE PROS AND CONS OF DESIGNATING A CORPORATE TRUSTEE VERSUS A FAMILY MEMBER OR FRIEND?

Many families look at corporate or institutional trustees with a degree of suspicion as cold, impersonal administrators of matters that are central to the family. Yet family members or friends acting as trustees are often swayed by personal considerations that might conflict with the goals of the trust. Individual trustees may lack sophistication when it comes to investments, particularly if they do not have the same level of wealth. Additionally, a trustee's age may be a concern, especially when setting up a long-lived

trust for children or grandchildren. Institutional trustees remain objective and regulated by law, and provide continuity—a trust company does not have the same issues an individual trustee would have such as death, disability, or personal concerns that might make them unable to continue as trustee.

Many families compromise by appointing an institutional trustee and an individual trustee as co-trustees. The trust document can outline the responsibilities of each trustee and can limit or define which trustees have overriding decision-making authority in certain areas, such as investments or distributions. This strategy can help maintain family harmony. For example, an institutional trustee can help an individual trustee refuse inappropriate or excessive requests from beneficiaries, such as a request for a new Ferrari every year.

You may also want to designate a person or group of people who may remove trustees, especially when using a corporate trustee. Over time, the corporate trustee may merge with or be acquired by another company, and may no longer meet your family's needs. Subject to some limitations, a spouse, child, relative, or a committee may be given removal power.

#### SHOULD I LEAVE A SIDE LETTER FOR THE TRUSTEE(S)?

As mentioned earlier, side letters allow parents to lay out their beliefs and values and outline decisions they would like the trustee(s) to make. Parents can indicate their approval, for example, of a distribution to make a down payment on a house, but not to buy it outright, or to provide money to travel or attend a private college of choice. Sometimes side letters can bring to light situations of particular concern, such as drug use or other potentially avoidable behaviors. These letters should be shared with your attorneys either in physical form or verbally. Your attorneys can then help you decide whether your concerns should be addressed by the legal language of the trust document or are better left "to the side."

## 9. Who Should Serve as Executor?

Your executor will manage the probate of your estate, often with the support of your attorney. The executor is responsible for assembling assets that were held in your own name (not in a living trust) at the time of your death; determining debts, assembling tax returns, and making distributions to beneficiaries as set forth in your Will. The role of an executor demands a significant time commitment (from one to three years) and knowledge of legal issues. An abundance of patience and an objective viewpoint are other important qualities to consider.

Some individuals designate an individual or a trust company as sole executor, while others prefer to have co-executors. With co-executors, two or more persons (or a corporate executor) will act jointly. A corporate executor can provide the financial responsibility and oversight, investment acumen, and professional demeanor you desire while freeing family members from having to arbitrate situations that can cause discord. You also need to think about alternative or successor executors in case your designees are eventually unwilling or unable to serve.

## 10. What About Guardians for Minor Children?

Most states differentiate between a "guardian of the person" and a "guardian of the estate." The guardian of the person of a minor child is responsible for seeing to the child's personal well-being and education. This individual makes day-to-day personal decisions, such as educational or medical decisions, for the child and usually cannot be a bank or trust company. A guardian of the estate, on the other hand, is responsible for the investment and management of the assets registered in the name of the minor. Oftentimes this may be the same person or corporate fiduciary named as trustee in estate planning documents. In a well-designed estate plan, however, no assets should be listed in the minor's name and no guardian of the estate should be necessary.

## 11. How About Doomsday or Disaster Planning?

Your estate plan should include provisions, sometimes referred to as "doomsday" planning or the "common disaster clause" that direct the disposition of your estate if your family perishes in a common disaster. It is worthwhile to consider who should be your beneficiary (e.g., distant family or charity) in these instances and how to structure these transfers (e.g. outright or in trust).

## Conclusion

Once you have thought about key persons for appointments and considered the above topics, you will be better prepared for your discussions with your attorney and be able to make more thoughtful decisions. By articulating your goals ahead of time, your estate planning process should run more smoothly.

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