THE ESTATE PLANNER

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Asset protection
PRESERVING WEALTH FOR YOURSELF AND YOUR HEIRS

Do you need to file a gift or estate tax return?

Of sound mind
Take steps now to minimize the chance of a contested will after death

Estate Planning Red Flag
You haven't substantiated your charitable gifts

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Asset protection

Preserving wealth for yourself and your heirs

There are many techniques you can use to protect your assets, from giving them to loved ones to placing them in offshore trusts. Whichever strategy you choose, however, it's critical to start planning now. The earlier you implement asset protection, the more effective it will be.

It's important to understand that asset protection isn't about evading legitimate debts, hiding assets or defrauding creditors. Rather, it's about preserving your hard-earned wealth in the face of unreasonable creditors' claims, frivolous lawsuits or financial predators.

Assess your risk

The first step is to assess the risk that creditors, former spouses or opportunists will go after your assets or those of your beneficiaries. If your risk is relatively low, but you seek added peace of mind, you might consider simpler techniques, such as changing the way assets are titled or gifting them to your loved ones. If your risk is higher — for example, if you own a business, are in a profession with a high degree of malpractice risk or are involved in other activities that expose you to potential financial liability — you might consider more sophisticated approaches.

If you wish to protect assets while retaining some control over them and also shielding them from your loved ones' creditors, consider an irrevocable trust.

Basic asset protection

One of the most effective techniques is simply to give assets to your spouse or children. This places them beyond the reach of your creditors, so long as you don't violate fraudulent transfer laws. (See "Watch out for fraudulent transfer laws" on page 3.) Disadvantages of this approach are that 1) you'll lose control over the assets and any benefits they offer, and 2) it does nothing to protect the assets against the *recipients'* creditors.

Another technique is to change the way title to assets is held. For example, some states allow married couples to hold a residence or other property as "tenants by the entirety." This form of ownership protects assets against either spouse's separate creditors, but not against joint creditors.

Also, consider making the maximum contributions to qualified retirement plans — such as pension, profit-sharing or 401(k)

Watch out for fraudulent transfer laws

Most states have fraudulent transfer laws, which prohibit you from transferring assets with the intent to hinder, delay or defraud any creditor, including a *probable* future creditor. Typically, these laws also prohibit "constructive fraud," which is when you transfer assets, without receiving reasonably equivalent value in exchange, and you're insolvent before or after the transfer.

To ensure that your asset protection efforts are successful, be sure that you're solvent before and after any transfer and that you transfer assets at a time when there are no actual or potential creditors' claims on the horizon.

plans. In addition to building a nest egg for retirement, assets socked away in these plans generally are protected against claims by creditors, both in and out of bankruptcy.

IRAs offer more limited protection. Outside bankruptcy, the level of protection provided by an IRA depends on the law in your state. In bankruptcy, federal law exempts IRA assets up to a specified threshold (as of this writing, nearly $1.3 million, although this limit doesn't apply to rollovers from a qualified plan).

Sophisticated asset protection

If you wish to protect assets while retaining some control over them and also shielding them from your loved ones' creditors, consider an irrevocable trust. Transferring assets to such a trust places them beyond your creditors' reach (provided it's not a fraudulent transfer and you're not a trust beneficiary). And by including a "spendthrift" provision, you can also protect the assets against claims by your *beneficiaries'* creditors. A spendthrift provision prohibits your beneficiaries from selling or assigning their interests in the trust, either voluntarily or involuntarily.

To provide even greater protection for your beneficiaries, consider using an independent trustee and giving him or her full discretion over distributions from the trust. Suppose, for example, that you establish a trust for the benefit of your child and authorize the trustee to make scheduled distributions or to distribute funds for your child's "health, education, maintenance and support." Typically, a fully discretionary trust avoids inclusion in the marital estate, although in some states this trust type may be treated as part of the marital estate to be divided in divorce.

To obtain asset protection without giving up control, consider an irrevocable domestic asset protection trust (DAPT) or offshore trust. Several states authorize DAPTs, which are designed to function similarly to an offshore trust. They provide asset protection even if they're "self-settled" — that is, if *you* are a discretionary beneficiary of the trust. The downside is that some uncertainty remains over whether these trusts are enforceable, particularly if you're not a resident of the state whose DAPT law you're relying on.

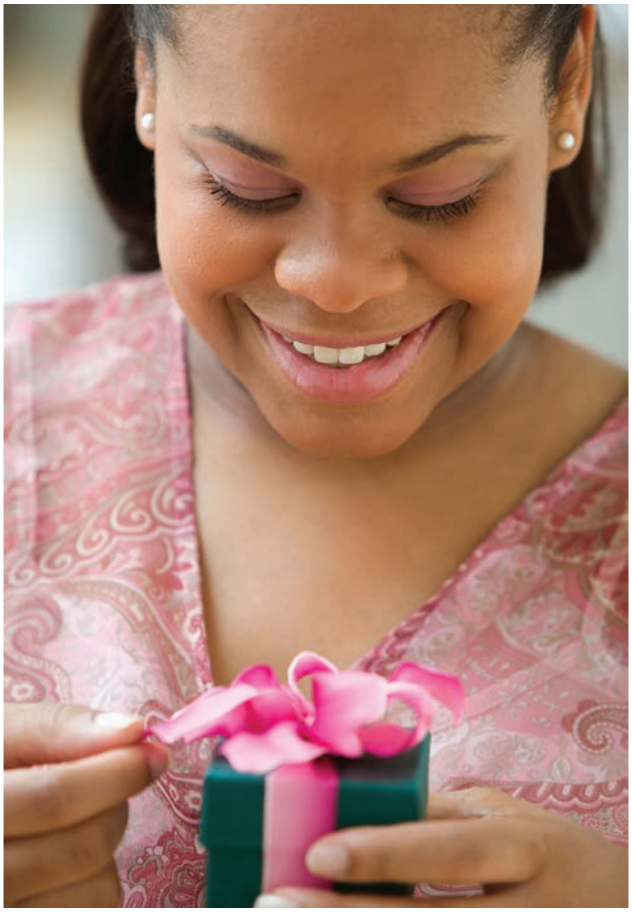
Offshore asset protection trusts offer greater certainty in that they have more of a history than the DAPTs. Typically, they're set up in foreign jurisdictions that don't recognize judgments from U.S. courts and whose laws are otherwise unfriendly to foreign creditors.

Start planning now

If you wish to protect your assets, start planning now. The sooner you begin, the more likely you'll set aside your assets before any possible claim is made.

Do you need to file a gift or estate tax return?

If you've made substantial gifts to your loved ones, or if you're the executor of someone's estate, it's important to understand the rules surrounding gift and estate tax returns. Determining whether you need to file a return can be confusing, and in some cases it's advisable to file a return even if it's not required. Here's a brief summary of the rules.



Gift taxes

Generally, a federal gift tax return (Form 709) is required if you:

- Make gifts to or for someone during the year (with certain exceptions: for example, gifts to U.S. citizen spouses are excluded) that exceed the annual gift tax exclusion (currently, $14,000); there's a separate exclusion for gifts to a non-citizen spouse (currently, $148,000),
- Make gifts of *future* interests, even if they're less than the annual exclusion amount, or
- Split gifts with your spouse, regardless of amount.

The return is due by April 15 of the year after you make the gift, but the deadline may be extended to October 15. Being required to file a form doesn't necessarily mean you owe gift tax. You'll owe tax only if you've already exhausted your lifetime gift and estate tax exemption (currently, $5.45 million).

In some cases, it's a good idea to file a gift tax return even if you're not required to do so. For example, suppose you give $10,000 worth of closely held stock to each of 10 family members, for a total of $100,000. Each gift is within the annual exclusion amount, so you don't file a gift tax return. However, 10 years later, the IRS determines that the value of each gift was actually $20,000 and assesses penalties for failure to file a gift tax return (plus taxes, penalties and interest if you've exhausted your lifetime exemption).

Had you filed a properly completed gift tax return at the time you made the gifts, it would have triggered the three-year limitations period for auditing your return. Without a return, there's no time limit on how long the IRS can wait to challenge the valuation of your gifts.

Estate taxes

If required, a federal estate tax return (Form 706) is due nine months after the date of death. Executors can seek an extension of the filing deadline, an extension of the time to pay, or both, by filing

Form 4768. Keep in mind that the form provides for an *automatic* six-month extension of the filing deadline, but that extending the time to pay (up to one year at a time) is at the IRS's discretion. Executors can file additional requests to extend the filing deadline "for cause" or to obtain additional one-year extensions of time to pay.

Generally, Form 706 is required only if the deceased's gross estate plus adjusted taxable gifts exceed the exemption. A return is required even if there's no estate tax liability after taking all applicable deductions and credits.

Even if an estate tax return isn't required, executors may need to file one to preserve a surviving spouse's portability election. Portability allows a surviving spouse to take advantage of a deceased spouse's unused estate tax exemption amount, but it's not automatic. To take advantage of portability, the deceased's executor must make an election on a timely filed estate tax return that computes the unused exemption amount.

Preparing an estate tax return can be a time consuming, costly undertaking, so executors should analyze the relative costs and benefits of a portability election. Generally, filing an estate tax return is advisable only if there's a reasonable probability that the surviving spouse will exhaust his or her own exemption amount.

In some cases, it's a good idea to file a gift tax return even if you're not required to do so.

Handle with care

Determining whether a gift or estate tax return is necessary or desirable can be complicated. When in doubt, consult your estate tax advisor to discuss your options.

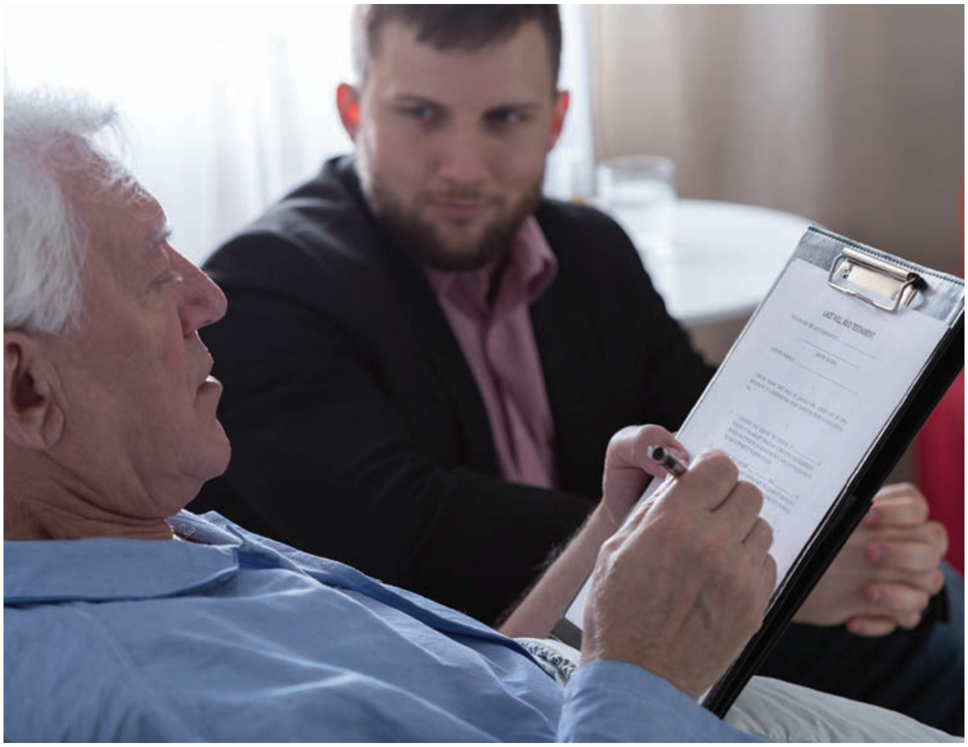
Of sound mind

Take steps now to minimize the chance of a contested will after death

Regardless of how harmonious your family may be during your life, there's always a chance that a disgruntled family member may challenge your estate plan after your death. Contests over wills typically occur if an estate plan operates in an unexpected way, such as if a large amount of assets is willed to a nonfamily member and nothing is left to a child. To avoid a challenge, and the possible outcome of a judge ultimately deciding the distribution of your assets, consider these strategies.

What does "undue influence" mean?

It's important to recognize that a certain level of influence is permissible, so long as it doesn't rise to the level of "undue" influence. For example, there's nothing inherently wrong with a daughter who encourages her father to leave her the family vacation home. But if the father is in a vulnerable position — perhaps he's ill or frail and the daughter is his caregiver — a court might find that he's susceptible to undue influence and that the daughter improperly influenced him to change his will.



leave a substantial sum to a close friend who acts as your primary caregiver. To avoid a challenge, prepare your will independently — that is, under conditions that are free from interference by all beneficiaries. People who'll benefit under your estate plan, including family members, shouldn't be present when you meet with your attorney. Nor should they serve as witnesses — or even be present — when you sign your will and other estate planning documents.

Here are several steps you can take to avoid undue influence claims and ensure that your wishes are carried out:

Use a revocable trust. Rather than relying on a will alone, create a revocable, or "living," trust. These trusts don't go through probate, so they're more difficult and costly to challenge.

Establish competency. Claims of undue influence often go hand in hand with challenges on grounds of lack of testamentary capacity. Establishing that you were "of sound mind and body" at the time you sign your will can go a long way toward combating an undue influence claim. Be sure to create your estate plan while you're in good mental and physical health. Have a physician examine you, at or near the time you execute your will and other estate planning documents, to determine if you're mentally competent.

Avoid the appearance of undue influence. If you reward someone who's in a position to influence you, take steps to avoid the appearance of undue influence. Suppose, for example, that you plan to

Talk to your family. If you plan to disinherit certain family members, give them reduced shares or give substantial sums to nonfamily members, meet with your family to explain your reasoning. If that's not possible, state the reasons in your will or include a separate letter expressing your wishes. Family members are less likely to challenge your plan if they understand the rationale behind it.

It's important to recognize that a certain level of influence is permissible, so long as it doesn't rise to the level of "undue" influence.

To deter challenges to your plan, consider including a no-contest clause, which provides that, if a beneficiary challenges your will or trust unsuccessfully, he or she will receive nothing. Keep in mind, however, that you should leave *something* to people who are likely to challenge your plan; otherwise, they have nothing to lose by contesting it.

What are your options?

No matter how carefully you plan, there's the possibility of an upset beneficiary who feels he or she deserves more of your estate than you provided. To minimize the chances of an undue influence claim, discuss your options with your estate planning advisor.

ESTATE PLANNING RED FLAG

You haven't substantiated your charitable gifts

As the end of the year approaches, many people's thoughts turn to charity. To avoid losing valuable charitable deductions, be sure to familiarize yourself with the substantiation requirements.

Cash gifts under $250: Use a canceled check, receipt from the charity or "other reliable written record" showing the charity's name and the date and amount of the gift. There's no need to combine separate gifts of less than $250 to the same charity (monthly contributions, for example).

Cash gifts of $250 or more: Obtain a *contemporaneous* written acknowledgment from the charity stating the amount of the gift, whether you received any goods or services in exchange for it and, if so, a good faith estimate of their value. An acknowledgment is "contemporaneous" if you receive it before the earlier of your tax return due date (including extensions) or the date you actually file your return.

Noncash gifts under $250: Get a receipt showing the charity's name, the date and location of the donation, and a description of the property.

Noncash gifts of $250 or more: Obtain a contemporaneous written acknowledgment from the charity that contains the information required for cash gifts plus a description of the property. File Form 8283 if total noncash gifts exceed $500.

Noncash gifts of more than $500: In addition to the above, keep records showing the date you acquired the property, how you acquired it and your adjusted basis in it.

Noncash gifts of more than $5,000 ($10,000 for closely held stock): In addition to the above, obtain a qualified appraisal and include an appraisal summary, signed by the appraiser and the charity, with your return. (No appraisal is required for publicly traded securities.)

Noncash gifts of more than $500,000 ($20,000 for art): In addition to the above, include a copy of the signed appraisal (not the summary) with your return.

Saving taxes isn't the primary motivator for charitable donations, but it affects the amount you can afford to give. Substantiate your donations to ensure you receive the deductions you deserve.

MACLEAN & EMA P.A.
Attorneys and Counselors at Law

IN PETS WE TRUST

"There are three faithful friends: an old wife, an old dog, and ready money."
- Benjamin Franklin -

Have you included your pet in your estate plan? A recent survey has found that sixty-five percent of Americans have a pet, and nearly ninety percent of owners consider their pets to be part of their family. When planning for their family's future, pet owners should chew over: *what will happen to their pet if something happens to them?*

Your estate plan can provide for your pet in the event of an emergency, incapacity or death. You can include your pet as an outright gift in your will. However, because a will is only effective at death, it does not protect a pet in the event of an emergency or incapacity. Therefore, you should consider establishing a pet trust to plan for the care and maintenance of your pet in the event of an emergency, your incapacity or hospitalization, or even the time period between your death and the administration of your estate.

Florida has a pet trust statute wherein a trust may be established for a pet's lifetime to provide for the care and maintenance of the animal. If the trust has been established to care for more than one animal, the trust will continue until the death of the last animal. The pet trust can designate a trustee; or, in the absence of an appointed trustee, the court can designate a trustee. In addition, a trust protector may be appointed to enforce the terms of the pet trust or to remove a trustee who is not following the trust's terms.

In establishing a pet trust, you need to consider the funding necessary to care and maintain your pet and provide for the expenses, fees, or compensation for the trustee, trust protector, and even your pet's caretaker. The amount of money necessary for the care of your pet will depend on numerous factors, such as the type of pet you own; your pet's life expectancy; the standard of care you desire for your pet, including food, boarding, and grooming; and your pet's medical treatment.

The pet trust can provide an outright distribution of money to your pet's caretaker for the benefit of your pet. In the alternative, the trust can allocate a dollar amount or a percentage of your estate to be paid directly to your pet's caretaker or to the trustee to be managed as part of an ongoing pet trust.

You may wish to leave your entire estate for the benefit of your pet. The pet trust would be administered for the purpose of investing, managing, and distributing your estate assets while your pet is living. When your pet passes away, the trust would terminate and any remaining trust assets could then pass to your family or to a charity.

Although Florida law authorizes pet trusts, there are federal hurdles and tax implications. Under the Internal Revenue Code, the income of a pet trust is taxable. Moreover, assets passing to a pet trust due to the pet owner's death are included in the decedent's taxable estate. Further, the IRS has determined that no portion of money passing to a pet trust qualifies for the charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity. Accordingly, a pet owner should consider how estate taxes attributable to a pet trust will be paid.

In establishing a pet trust, you will also need to consider the appointment of a caretaker who will be responsible for the care and protection of your pet in your absence. Although the appointment of a caretaker is not governed by Florida law, it is as crucial as the appointment of the trustee. The appointment of the trustee and the pet caretaker guarantee the success of the pet plan to meet your needs and, in the end, your pet's needs. The pet caretaker should be a person or organization willing and able to provide daily care and maintenance to your pet in the event you are unable to do so yourself. The pet caretaker should be someone willing and able to provide for your pet's needs in a manner consistent with the care, love, and affection you provide your pet. You should also consider a successor pet caretaker in the event the pet caretaker is unwilling or unable to assume care for your pet.

At MacLean & Ema, we want to ensure your estate plan provides for everyone you love. This includes some of the most precious members of your family, your pets. We encourage you to consider establishing a plan, or including a provision in an existing estate plan, for your pet in the event of an emergency, incapacity or death. Pet trusts are a viable tool in this regard and provide pet owners the peace of mind that comes with knowing their pet will be loved and cared for throughout its life. If you want to provide for your pet in the event something happens to you, contact MacLean & Ema to speak with an attorney regarding your wishes, desires, and ability to support the needs of your pet.