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## Choices When You Make Your Estate Plan

Before we can finish your estate plan, you will need to select individuals or institutions (such as a bank or a trust company) to fill several important roles. If you're married, you will usually name your spouse to fill these roles so you're likely choosing alternates to serve if your spouse can't. If you're a parent, you will need to select ages at which any trusts for your children will terminate.

Because of my experience, I'm able to provide some insights to help you make these decisions and have included those insights in this description of the following decisions you will need to make.

### Who Will be Your Minor Childrens' Guardian?

The guardian is the person that you nominate to take care of your children if you and your spouse have both died. Although you nominate the guardian, the court appoints the guardian. If your child is 14 or over, Kentucky law requires the judge to ask your child about his or her preference. However, the court usually follows your choice.

The guardian does all the things that a parent does, including staying up at night with a sick child, celebrating successes, and helping a child become a mature adult. Because other provisions of your estate plan will be designed to ensure that enough money is available

to care for your children, the guardian does not *have* to be someone with a lot of money. But, the guardian will be part of the team teaching your children about money so the guardian's financial skills are important.

### Who Will be the Personal Representative of Your Estate?

The personal representative (also called the executor or executrix) has the relatively straightforward job of gathering your assets. This may include selling your car, other personal belongings, and home. It may include collecting money that is owed to you. Under Kentucky law, the personal representative must provide the probate court with an inventory of your assets at their fair market value approximately two months after being appointed as personal representative.

After that appointment, creditors have six months to present claims to the personal representative for amounts that they say you owed them during your lifetime. During this six-month period, the personal representative must preserve the assets of the estate. After the six-months, the personal representative must evaluate the creditors' claims, pay the ones that deserve to be paid, and defend the ones that do not deserve to be paid.

The personal representative is also responsible for filing any tax returns that are required and paying any taxes that are due. These tax returns can include Federal estate, state inheritance and estate, individual income, and estate income tax returns. (Not all of these are required in every estate.)

After collecting the assets, paying creditors, and taking care of taxes, the personal representative can finally distribute the estate to the beneficiaries. The beneficiaries can include individuals, trusts, and charities.

The personal representative's job takes anywhere from nine months in an uncomplicated estate to several years in a large estate that is aggressively audited by the Internal Revenue Service. When the personal representative is ready to close the estate, the personal representative must be able to provide a complete accounting of all of the assets received, all of the bills paid, and all of the distributions made to beneficiaries. *The personal representative must be a very organized person.*

#### At What Ages Should Children Receive Property Free of Trust?

If a child is left without parents, there should be a trust for the child's benefit. The role of the trustee is discussed in the next section. That discussion follows this one because the choice of trustee must be considered in light of how long the trust will last. There are two answers to this question.

The first is to leave the money in trust for the child's lifetime so the child has to ask the trustee for income and principal but has no absolute right to receive either. The main advantage of this type

of trust is that the money never becomes available to a child's creditors and can't be divided between the child and the child's spouse in a divorce.

The second and more common answer is to give the trustee complete discretion until a child reaches an age in the 20 to 25-year-old range. This allows the child to complete college. At that age, the trustee begins mandatory distributions of income, such as dividends and interest that the trust investments earn, to the child. The trustee continues to have discretion whether to distribute the principal of the trust, meaning the investments—or the proceeds from their sale—that generate the income, to the child until an age in the 35 to 40-year-old range.

To avoid distributing a large amount of money to a child at one time, I recommend that the trust direct the trustee to distribute the principal at two different ages. Typically, these ages start around age 30 and the final distribution is made around age 40. There is no requirement that the two principal distributions be of equal size so you can front load or back load the distributions as you wish.

*In sum, you will need to decide whether the trustee will have discretion to make distributions during your child's life. Alternatively, you may decide to require that the trustee distribute income and principal to your child. Then, you will need to decide the age for the trustee to start mandatory income distributions and the ages for the trustee to start mandatory principal distributions.*

#### Who Will be the Trustee?

The trustee wears two quite different hats. One is the analytical role of making wise investments or making

wise choices of investment advisors. The second more subjective role is making decisions about the appropriate use of the trust's money. For example, a child might want to pursue a culinary degree in France or Italy. The trustee would have to decide if there is enough money for that venture, whether it is a serious goal or a lark, and whether you would have wanted your money to be used for that type of education.

Depending on the ages you set for the trusts to terminate and the ages of your children, the trustee may have to fill this role for several decades. Although it is important to select a back-up person for all of these positions, it is especially important that you have one or more back-up trustees in case the initial trustee is unable to carry out that role for such a long period of time. A bank or trust company is well-suited to serve as primary or back-up trustee because it doesn't age, it follows internal procedures that are reviewed by state and/or federal agencies, and it will generally use an internal committee to make decisions about discretionary distributions.

#### Who Will Make Financial Decisions for You if You Can't?

The attorney-in-fact manages your financial affairs if you are not able to do so for yourself. This can be the result of a short-term, pleasant occurrence such as a vacation abroad, or a long-term, regrettable occurrence such as a devastating illness.

- The attorney-in-fact will have access to your bank accounts and may be able to make gifts or set up trusts on your behalf.

- Your attorney-in-fact can do almost anything you can do except agree to your marriage or make a will for you.
- The attorney-in-fact's role can be as limited in duration as signing a real estate deed on your behalf at a particular closing or as long-term in nature as managing your finances during a lengthy nursing home stay.

Although you should select persons you trust for all of the roles discussed in this memo, I have found that many clients are most concerned about picking an attorney-in-fact about whose honesty and integrity they have no doubts. It is also possible to design a trust so that a trustee can serve during your lifetime and fill these same roles if you are disabled. The choice of that lifetime trustee would be subject to the same parameters as the choice of attorney-in-fact.

#### Who Will Make Health Care Decisions for You if You Can't?

Your health care surrogate makes decisions about your healthcare, including whether or not to terminate life-sustaining treatment in the event of a terminal condition when you are not able to make that decision for yourself. Your health care surrogate may also consent to donation of your organs. None of us cares to imagine the terrible situation in which this decision might have to be made. Your health care surrogate must use his or her best judgment and make a decision that he or she believes you would have made for yourself. Your health care surrogate should thus be someone with whom you are comfortable talking about the types of care you do and do not want. The health care surrogate's role is often a short-lived, but emotionally draining, one.

## Common Themes

Some common themes to keep in mind are that it is usually better to name one person to fill one of these positions rather than to name two or more people. Some of these difficult decisions are simply not suited for a committee. Naming one person does not mean he or she can't get input from others in your family.

In fact, many people find themselves naming one person in the family to many or all of the roles. This should not be a concern because one thing that families do for each other is to take care of each other during difficult times. Any concern you may have about overloading someone can be reduced by attention to the next step.

You should ask a person about filling the role before nominating him or her. Along the same lines, you should not be concerned that naming one person will hurt an omitted person's feelings. If the omitted person is not up to the task, you would not be doing him, her, yourself, or anyone in your family a favor by giving that person a task beyond his or her abilities.

## Conclusion

I hope this discussion helps start you thinking about these important decisions. It is not meant as legal advice for your specific situation but as a starting point for a live conversation as part of my representing you. I look forward to that.