My Top Ten Favorite Planning Ideas That I'm Willing To Talk About

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Questions

10. How can I use a revocable trust to avoid probate but yet not transfer assets into the trust during lifetime?

9. My client is a widow, and she wants to give her son a general durable power of attorney but she doesn't want her son to be able to exercise the power unless she's really incompetent. Durable powers of attorney are presently exercisable, and the durable power of attorney statute prohibits springing powers of attorney. How can I accomplish what my client wants to do?

8. How can you draft an irrevocable life insurance trust so that it can be amended or revoked at any time?

7. My client has a closely held business that he wants to preserve for his descendants after his death. He created an irrevocable life insurance trust which owns an insurance policy to make tax-free cash available to pay the estate tax on the closely held business interests. How do I know that the personal representatives of the estate will actually get their hands on the cash from the life insurance proceeds that will be paid to the trustee of the irrevocable life insurance trust, so that the personal representatives can use that cash to pay estate taxes? What if the beneficiaries of the life insurance trust demand that the trustee invest the cash in marketable securities and bonds, and tell the trustee that they will sue it for breach of fiduciary duty if it uses the cash to purchase illiquid minority interests in the closely held business?

6. My client wants me to create an irrevocable trust for her children that won't be included in her gross estate when she dies, but which will be defective for income tax purposes so that she can pay the income taxes on the trust income and capital gains without incurring gift tax and which will allow the trust to grow on an income tax-free basis. What's the easiest and best way to do this?

5. I'm doing a prenuptial agreement for the person who has all the money. He wants his fiancé to waive her rights to alimony and separate property, and in exchange he wants to make some provisions for her that will give her some financial security in the event of divorce or his death. Is there a "win-win" way for him to set aside amounts for her which he can control without really giving her anything until the time comes? If he sets aside money for her and she dies while they are married, is there a way that he can benefit from what he gave her without paying estate tax? Are there any income tax problems we need to be concerned with?

4. My client is divorced, and his former wife is the ex-wife from hell. They have a minor child who is ten years old. My client lives in a very expensive house which he owns in his sole name. I told him that if he dies now, title will vest automatically in his minor child's name because of the Florida homestead provisions, and that most likely his ex-wife will move into the house as the child's guardian, and will control the sale proceeds if she gets guardianship court approval to sell the house. My client got really upset when I told him this, and said that I have to come up with something to avoid this. But my client doesn't want to give up sole ownership of his house, he doesn't want to lose his homestead protection from creditors, and he doesn't want to lose the cap on annual increases in his real property taxes which he has under the Save Our Homes amendment. How can I get my client out of this situation without him losing his own homestead benefits?

3. My client wants to create a QTIP marital deduction trust when he dies that will be for the benefit of his wife during her lifetime, and for his children after his wife's death, but he doesn't want his children to get trust accountings or to be able to interfere with the trust administration during his wife's lifetime. Really, he would prefer that his children not even know about the existence of the trust until his wife dies. Is there a way to do what my client wants?

2. I'm a lawyer and I've done estate planning work for my client for a number of years. Over that time I've developed a really strong understanding of my client's family relationships and testamentary wishes. Just recently my client asked me if I would serve as personal representative of my client's estate when my client dies. I really am the most qualified person to serve under the circumstances. Can I just draw a simple codicil to my client's will that designates me as personal representative?

1. A young doctor is killed in a horrific car crash in which a drunk driver ran a red light. An investigation showed that the driver's side airbag in the car failed to deploy due to a faulty design, and that the husband might have survived the accident (although with severe injuries) if the airbag had worked properly. The husband was survived by his wife and their one minor child. The wife retains a personal injury lawyer to bring a wrongful death suit against the drunk driver, the drunk driver's insurance company, and the manufacturer of the automobile. The personal injury lawyer brings a probate attorney in to open an estate administration proceeding so that a personal representative can be appointed to bring the wrongful death action. The husband had only recently started his medical practice, and he owed substantial amounts for student loans, so his estate is actually insolvent. The personal injury attorney tells the probate attorney that the case will almost certainly settle for damages between fifteen and twenty million dollars. Because death was immediate, there was no pain and suffering, and no medical expenses, and so damages payable to the estate will be minimal. The damages payable to the wife and child belong to them under Florida law, not to the decedent's estate, and because the husband's estate is insolvent, there will be no estate tax. The personal injury attorney believes that the damages will be apportioned equally between the wife and the minor child (and probably with a structured settlement for the minor child's portion). The probate attorney does not handle tax matters. Should the probate attorney have a client engagement letter? If so, what should it say?

Answers

Answer 10. Set up the client's accounts so that they are payable on death to the trustee of the client's revocable trust. See Florida Statutes section 655.82 (pay on death accounts) and Chapter 711 (the Florida Uniform Transfer-on-Death Security Registration Act).

Answer 9. Have the client execute the durable power of attorney but deliver all copies to an escrow agent, to be held in escrow until conditions specified by the client have been satisfied. The following is an example of such an arrangement.

Escrow Agreement and Directions

I, Client's Name, have executed a durable power of attorney today, which names my son _____ as my attorney-in-fact. It is my wish that as long as I am alive and able to manage my own affairs, the power of attorney granted to my son shall not be exercised by him.

Therefore, I am delivering all original powers of attorney executed by me today naming my son as my attorney-in-fact, to the law firm of Heckerling & Associates, 1 Camino de los Ladrillos Amarillos, Coral Gables, Florida 33134, to be held in escrow by that firm as Escrow Agent upon the following terms. The Escrow Agent shall release all of the original powers of attorney held by it to my son upon receipt of a letter signed by two physicians practicing in Miami-Dade County, Florida stating that they have examined me and that I am unable to manage my personal affairs or assets because of a mental or physical impairment (whether temporary or permanent in nature). The Escrow Agent will have no duty or responsibility to monitor whether I am able to manage my personal affairs or assets, or to question the correctness of any such statement by the physicians, or to monitor how my son exercises the authority I have given to him, and the Escrow Agent will not be liable to anyone for my son's use of (or failure to use) the power of attorney I have given to him.

This agreement is executed by me on March 21, 2013.

_____
Client's Name

Accepted by Escrow Agent on March 21, 2013.

_____
By:

Answer 8. Grant a limited power of appointment in the trust instrument to someone other than the settlor which will allow the powerholder to appoint the trust assets to another trust without tax consequences to the powerholder. This technique is far more flexible than relying on trust decanting. The following is an example of such a provision.

During my lifetime while my husband and I are married to each other, and after my death (but only if he survives me as my husband) during his lifetime and upon his death, my husband (in his individual capacity and not as Trustee) can make gifts from the trust estate, subject to the following rules.

(a) He can make gifts to anyone who would be an heir at law of his if he died then, intestate, and a resident of the State of Florida under Florida law then in effect. For this purpose the term "heir" includes a person who would actually inherit from my husband, and it includes the descendants of that person, but it does not include any other person who is a remote heir who would inherit only if a more direct heir were deceased or disclaimed an intestate interest. The gifts can be outright or in trust.

(b) My husband cannot make gifts to himself, his estate, his creditors, or the creditors of his estate.

(c) My husband can make gifts to a trust for the benefit of one or more of his heirs and in which he also has a beneficial interest, but only if the trust satisfies all of the following requirements.

(c)(1) The trust may permit distributions to my husband or for his benefit but only if limited for his health, education, support, or maintenance.

(c)(2) The trust must prohibit distributions in discharge of my husband's legal support obligations.

(c)(3) The trust must give my husband the continuing right (exercisable by him alone) to appoint all or any part of the trust estate to any one or more of my descendants as beneficiaries of the trust, whether or not he has the right to appoint any part of the trust estate to other persons.

(c)(4) The trust must prohibit my husband from appointing the trust assets to himself, his creditors, his estate, and the creditors of his estate.

(d) My husband can make gifts under this clause only while he is alive and while we are married to each other.

Answer 7. Have the client individually, the trustee of his revocable trust (which probably is the client alone), and the trustee of the irrevocable life insurance trust enter into an agreement requiring the trustee of the life insurance trust to purchase assets from the client's estate or revocable trust. The following is a simple example of such an agreement.

Stock Purchase Agreement

This Agreement is entered into between Joe Smith, individually ("Joe") and as grantor and sole trustee of the Joe Smith Revocable Living Trust dated March 21, 2013 ("Joe's Revocable Trust"), and Sally Smith, as trustee of the Smith Family 2013 Irrevocable Trust dated March 21, 2013 (the "2013 Insurance Trust"), on March 21, 2013.

1. Definitions. The following terms used in this Agreement have the meanings set forth below.

a. "Smith Companies" means _____; any other company which is related to any of those companies within the meaning of Internal Revenue Code section 267; and any corporation, partnership, company or other type of entity in which Joe, his wife, or any of their descendants collectively own (directly or indirectly) ten percent or more of the equity interests or ten percent or more of the voting or managerial rights.

b. "Bona fide sale" means a transfer that is made or to be made pursuant to a legally binding written agreement with a third party to purchase all or a portion of shares of stock owned by a shareholder, which written agreement must be contingent upon the options to purchase or participate in a sale as provided in this Agreement. At a minimum, the third party must place in escrow as earnest money at least fifty percent of the proposed purchase price to be paid for the selling shareholder's shares and must provide written evidence of the third party's financial ability to complete the purchase of the shares.

c. "Fair market value" with respect to shares of stock of the Smith Companies means the value determined by an independent appraiser with recognized credentials in the field of valuation of closely held businesses mutually selected by the selling shareholder and the trustee of the 2013 Insurance Trust, determined in the same manner used (or that would be used) to determine the value of those shares for federal estate and gift tax purposes. If an independent appraiser cannot be selected by mutual agreement, or if the fiduciary of the selling shareholder is also the sole trustee of the 2013 Insurance Trust, one shall be appointed by a court having jurisdiction over the selling shareholder. The Smith Companies, or the one or ones of them that are being appraised, shall pay the cost of the appraisal.

d. "Stock in the Smith Companies" includes all units of ownership interests in the Smith Companies, such as shares of stock in corporations, general and limited partnership interests in partnerships, membership interests in limited liability companies, and any other form or interest of equity ownership.

e. "Third party" means a person (or entity or trust) who is not related to Joe, or any of his descendants within the meaning of Internal Revenue Code section 267.

f. "Transfer" means to sell, pledge, assign, gift, distribute or otherwise dispose of or transfer stock in any manner. If a trust is the shareholder, a "transfer" for purposes of this Agreement occurs if there is a change in the terms of the trust or in circumstances which results in the individuals who are the primary beneficiaries of the trust no longer being the primary beneficiaries or the persons currently serving as trustee no longer serving as trustee.

2. Background. Joe is married to Mary Smith. Sally is their daughter. In addition, they have two other children: Jim and Julia.

Joe individually or as trustee of Joe's Revocable Trust owns stock in the Smith Companies. He has determined that the long term interests of his family and the Smith Companies will be served best if ownership and management of the Smith Companies are maintained in one or more trusts under common control for the benefit of his family.

Joe has designated Joe's Revocable Trust as the residuary beneficiary of his estate in his last will and testament. Joe's Revocable Trust as in existence on the date of execution of this Agreement provides for the trust assets to be divided upon Joe's death into two separate trusts if Mary survives him. One trust will use Joe's remaining federal estate tax unified credit, and the other trust is intended to qualify for the federal estate tax marital deduction, so that there should be no estate tax owed on Joe's death.

When Joe and Mary have both died, all of the assets held in trust under Joe's Revocable Trust (and the trusts created under it) will be distributed to the trustee of the 2013 Insurance Trust, to be divided among Joe's descendants. Each share set aside for a descendant will be held in trust for the benefit of that descendant by the trustee of the 2013 Insurance Trust.

The 2013 Insurance Trust owns or may own insurance policies that will pay death benefits upon the death of Joe or Mary or upon the death of the survivor of them. It is likely that there will be significant liquidity needs when both Joe and Mary have died, to pay estate taxes and administration expenses, especially because of the concentrated holdings of stock in the Smith Companies held in Joe's Revocable Trust. The death benefits to be collected on the insurance policies held in the 2013 Insurance Trust will be an important source of liquid funds that can be used to pay those taxes and expenses, and use of those funds to purchase stock from Joe's Revocable Trust will preserve ownership of the Smith Companies within Joe's family.

The parties are entering into this Agreement to require the 2013 Insurance Trust to purchase stock of the Smith Companies from Joe, Joe's estate, and Joe's Revocable Trust (and the trusts created under it), and to create a legally binding and enforceable obligation on the fiduciaries of Joe's estate and those trusts to sell that stock, as provided below.

Joe has named Sally to serve as a personal representative of his estate and as a trustee of Joe's Revocable Trust upon his death. Joe has authorized and directed his personal representatives and the trustees of Joe's Revocable Trust and the 2013 Insurance Trust to enter into the transactions governed by this Agreement, and he has intentionally named those persons to serve in those fiduciary capacities because he has confidence they will carry out his intentions. The performance by Joe's personal representatives and those trustees of their obligations under this Agreement will not be voidable or subject to challenge because the same persons may serve in several of those fiduciary capacities.

3. Right of First Refusal After Joe's Death. Beginning on Joe's death, as long as any shares of stock of the Smith Companies are held as part of Joe's estate, Joe's Revocable Trust, or any trust created under Joe's last will and testament or Joe's Revocable Trust, no such shares can be transferred except in accordance with the following provisions.

a. Notice. The personal representatives or trustees proposing to transfer shares of stock of the Smith Companies must give the trustees of the 2013 Insurance Trust not less than 180 days advance written notice of any proposed transfer, and must notify them of all terms and conditions of the proposed transfer, including the price (if any) and the identity of the proposed transferee (and in the case of a transfer to a transferee that is not an natural person, must disclose all beneficial interests in the transferee). True, correct, and complete copies of all documents

setting forth the terms and conditions of the proposed transfer must accompany the notice, or the notice will be void.

b. Bona fide sale. If the proposed transfer is a bona fide sale to a third party, the trustees of the 2013 Insurance Trust will have the right to purchase all or any portion of the stock proposed to be transferred upon the same terms and conditions as the proposed offer.

c. Exception for Certain Transfers. The provisions of this clause 3 will not apply to a distribution made by the personal representatives of Joe's estate to fund a residuary bequest to the trustees of Joe's Revocable Trust; to the trustees of Joe's Revocable Trust in making distributions to fund bequests to continuing trusts (such as a marital deduction trust or a trust to use Joe's unified credit); or to a sale to the 2013 Insurance Trust as provided in clause 4. The provisions of this clause 3 will otherwise apply to the personal representatives of Joe's estate and the trustees of Joe's Revocable Trust, including funding bequests that are to be distributed free of trust, and they will apply to trustees receiving bequests.

d. Certain Transfers During Mary's Lifetime. If a transfer other than a bona fide sale to a third party is proposed to be made during Mary's lifetime from a trust that was elected to qualify for the federal estate tax marital deduction (in whole or in part) the trustees of the 2013 Insurance Trust will have the right to purchase all or any portion of the stock proposed to be transferred at fair market value. The trustees of the 2013 Insurance Trust shall pay the full purchase price in cash at closing. If the fair market value of the shares purchased by the trustees of the 2013 Insurance Trust as of the date of purchase is finally determined for federal estate and gift tax purposes to be worth more or less than the purchase price paid, the number of shares transferred shall be reduced or increased (as the case may be) to reflect the correct number of shares that should be transferred based upon the purchase price paid.

e. Closing Date. The trustees of the 2013 Insurance Trust will set the closing date for any shares elected to be purchased. The closing must occur within the period of the notice of the proposed transfer, or (if applicable) within 60 days after the completion of the appraisal of fair market value if that occurs after the notice period, unless extended by agreement of the parties.

f. Continuing Restriction. If the trustees of the 2013 Insurance Trust do not purchase all of the shares proposed to be transferred by the expiration of the deadline for closing, the balance of those shares may be transferred to the proposed transferee but only on the same terms and conditions set forth in the original notice to the trustees of the 2013 Insurance Trust. If the proposed transfer is not completed within 60 days after expiration of the deadline for closing, the restrictions on transfer under this clause 3 will apply again to the shares not transferred.

4. Mandatory Purchase by Insurance Trusts. Whenever the trustees of the 2013 Insurance Trust collect benefits from life insurance policies held on the lives of Joe or Mary, they shall be obligated to use all of those benefits to purchase shares of stock of the Smith Companies (and the parties to this Agreement owning those shares will be obligated to sell those shares), as follows.

a. Purchase by 2013 Insurance Trust. The trustees of the 2013 Insurance Trust shall use all such benefits collected by them first to purchase all such shares with voting rights held as part

of Joe's estate; then next, all such shares with voting rights held as part of Joe's Revocable Trust upon his death prior to those shares being used to fund bequests made in Joe's Revocable Trust; then next, if Mary survives Joe, all such shares with voting rights held as part of the trust created for Mary under Joe's Revocable Trust which was elected (in whole or in part) to qualify for the estate tax marital deduction; then next, all such shares with voting rights held under any other provisions of Joe's Revocable Trust. If death benefits remain after purchasing shares with voting rights as provided above, the trustees of the 2013 Insurance Trust shall use the remaining benefits to purchase shares without voting rights in the same order of priority listed above.

c. Purchase for Fair Market Value. The trustees of the 2013 Insurance Trust shall pay fair market value for all shares they purchase. If the fair market value of the shares purchased is finally determined for federal estate and gift tax purposes to be worth more or less than the purchase price paid, the number of shares transferred shall be reduced or increased (as the case may be) to reflect the correct number of shares that should be transferred based upon the purchase price paid.

d. Payment Terms. The purchase shall be made within 90 days after the death benefits are collected by the trustees of the 2013 Insurance Trust. The full purchase price shall be paid in cash at closing.

5. Superior Contractual Rights. Joe acknowledges that the contractual rights given to the trustees of the 2013 Insurance Trust under this Agreement are being extended to maintain common control of the Smith Companies for the benefit of his family. Joe agrees that the rights and interests of his estate, Joe's Revocable Trust, each trust created under his last will and testament or Joe's Revocable Trust, and the beneficiaries of his estate and those trusts with respect to the stock of the Smith Companies shall be subordinate to the contractual rights given to the trustees of the 2013 Insurance Trust under this Agreement, except that they shall have no rights with respect to any shares of stock passing to a trust for Mary's benefit which is elected to qualify for the federal estate tax marital deduction (in whole or in part) that would cause those shares or that trust to fail to qualify for the marital deduction.

6. Governing Law. This Agreement will be governed and controlled solely by Florida law (excluding Florida law concerning choice of law).

7. Amendments. This Agreement may be amended or revoked only by written instrument signed by all of the parties. This Agreement cannot be amended, revoked, or modified in any manner by oral statements or agreements, or by conduct, even if the other party acts in reliance upon those oral statements, agreement, or conduct.

8. Binding Effect. This Agreement shall inure to the benefit of and shall be binding upon all of the parties, their heirs, legal representatives, successors, and assigns. No party may assign this Agreement or any of that party's rights, interests, or obligations under this Agreement without the prior written approval of all the other parties.

9. Counterparts. This Agreement may be executed by the parties in one or more counterparts, each of which will be an original and all of which will constitute but one constitute but one agreement.

Joe Smith, individually and as trustee of the Joe Smith Revocable Trust

Sally Smith, as trustee of the Smith Family 2013 Irrevocable Trust

Answer 6. Include a power to reacquire assets in the trust instrument. See Internal Revenue Code section 675(4)(C) and Revenue Ruling 2008-22. The following is an example of such a provision.

A. I reserve the right, exercisable by me in a nonfiduciary capacity and without the approval or consent of the Trustee or any other person in a fiduciary capacity, to acquire or reacquire by bona fide purchase the whole or any part of the trust estate at its then fair market value for adequate and full consideration payable in money or money's worth of other property, subject to the following.

1. I shall not have any right, however, to acquire or reacquire any stock with voting rights of a controlled corporation as defined in section 2036(b) of the Internal Revenue Code.

2. The Trustee must determine that the cash or other assets transferred by me in exchange for the assets of the trust estate acquired or reacquired by me are of equivalent value. If the Trustee determines that the values are not equivalent, it shall take steps to ensure that appropriate adjustments or payments are made to ensure that the exchanges are of equivalent value.

3. My right cannot be exercised in a manner that can shift benefits among the beneficiaries of any trust under this trust agreement.

4. I can release this right at any time or times, in whole or in part, by a written instrument signed by me and delivered to the Trustee. Each such release will be irrevocable, permanent, and binding upon me.

5. My rights under this clause can be exercised by a person named by me in a durable power of attorney or by a court appointed guardian.

Answer 5. Provide in the marital agreement for periodic contributions to an inter vivos QTIP trust for the benefit of the settlor's spouse. The settlor can serve as trustee of the trust during the marriage and manage all investments of the trust estate. If the settlor spouse is concerned about the beneficiary spouse's mandatory entitlement to all income of the QTIP trust annually, that right will be satisfied if the beneficiary spouse is given a right to withdraw the income, even if the trust agreement provides that the income will remain in the trust if not withdrawn by the beneficiary spouse. If the settlor survives the beneficiary spouse (whether or not they are

married when the beneficiary spouse dies), the trust assets can remain in trust for the benefit of the settlor after the beneficiary spouse's death without inclusion in the settlor's gross estate, because the beneficiary spouse is deemed to become the transferor of the assets included in the beneficiary spouse's gross estate under Internal Revenue Code section 2044, even though the settlor spouse retained a beneficial interest in the trust after the death of the beneficiary spouse. Be careful to advise the parties to the marital agreement that a timely QTIP election must be made with respect to each contribution to the QTIP trust. Note that the trust will be a grantor trust for income tax purposes as to the settlor spouse during the marriage. Even if the parties later divorce, the beneficiary former spouse will be taxable on the fiduciary accounting income of the trust, but the former spouse who was the settlor will remain taxable on the capital gains of the trust even though the parties are divorced. See Internal Revenue Code section 682.

Answer 4. Create an irrevocable inter vivos trust for the benefit of the client's minor child with the same beneficial terms that the client has in his will or revocable trust. Name a friendly person as the trustee, and have the client retain a power to remove and replace trustees. Have the client deed his homestead property to the trustee of the irrevocable trust but reserve a life estate in the deed of conveyance. The reserved life estate preserves the exemption from creditors and the homestead property tax exemption. The trust instrument should provide for mandatory distribution of the homestead property back to the client on the first to occur of his child's death or his child's eighteenth birthday (when the child is no longer a minor and the homestead restrictions on devise go away). To avoid a completed gift of the entire value of the residence (despite the retained life estate) under Internal Revenue Code section 2704, be sure to have the client retain an inter vivos (not testamentary) power of appointment over the trust corpus in order to make the gift to the trust an incomplete gift and thus not subject to immediate gift tax. Note and follow carefully the provisions of Florida Statutes section 732.4017.

Answer 3. Provide for a designated representative to represent the interests of the children and to receive accountings and other information on their behalf. See Florida Statutes section 736.0306. The following is an example of such a provision.

A. I do not believe that it is in the best interests of my wife or of my children for anyone other than my wife to know about the existence of the Marital Trust or how it is administered while my wife is alive. Therefore, I am designating a representative to act on behalf of my descendants with respect to the Marital Trust, and to receive all notices, information, accountings, and reports on their behalf. I direct that none of my descendants be informed of the existence of the Marital Trust during my wife's life unless she gives her prior approval. I further direct that no information about the Marital Trust ever be furnished to any of my descendants while my wife is alive, such as a copy of this trust agreement, trust accountings, tax statements or reports, or any other documentation or information of any nature whatsoever concerning any such trust, unless my wife has given her prior approval. The designated representative may override this direction to the extent that she or he believes necessary and appropriate for the best interests of my descendants, but only after taking into account and giving priority to my wife's best interests.

1. I appoint my brother Anthony as the initial designated representative for my descendants. Anthony can appoint successor and alternate successors to succeed him as designated representative, and he can remove anyone designated to serve as a successor. At

Anthony's option, successor designated representatives named by him may be given the same right to name and remove successor and alternate successor designated representatives.

2. If Anthony fails or ceases to serve as designated representative, and if all designated representatives named by him or by his successors fail or cease to serve, my siblings who are then legally competent will serve as a committee, with the authority to appoint one or more successor and alternate successor designated representatives. The committee members serving from time to time will have the authority to name anyone to fill a vacancy on the committee or to serve as an additional member. If at any time there are no members of the committee then serving, the Trustee may appoint two or more persons to serve as members of the committee. Each person appointed to the committee by the Trustee must be a descendant of my parents or a spouse or surviving spouse of any such descendant.

3. No person who is then serving as a Trustee can act as designated representative or serve as a member of the committee authorized to appoint successor designated representatives.

4. Any designated representative then serving may resign by giving at least thirty days written notice to the persons then having the authority to appoint successor designated representatives and to the Trustee.

5. Each designated representative will serve without compensation.

6. No designated representative will be liable for her or his actions or failures to act made in good faith.

7. The Trustee and each person employed by it to advise and assist it in the administration of any trust created under this trust agreement may act in reliance upon the designated representative's actions and failures to act without any duty to determine whether those actions or failures to act were made in good faith. I direct that the Trustee and all persons employed by the Trustee be held harmless and indemnified from the trust assets for any liability, damages, attorney's fees, expenses and costs incurred by reason of relying upon the designated representative's actions or failures to act.

Answer 2. An attorney who draws a will which names that attorney or another person in the attorney's firm to serve as personal representative may have a conflict under the ethics rules, thus triggering the requirements for an informed waiver by the client. See the comment to Florida Rule of Professional Conduct 4-1.8:

> This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 4-1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer

> should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

It is highly advisable to give a written disclosure and obtain a written waiver from the client. The following is an example of such a letter.

Dear Client:

This letter will confirm that you have instructed me to revise your will and your revocable trust agreement to change the provisions governing appointment of your personal representatives (under your will) and the succession of trustees (under your revocable trust agreement).

Currently Existing Documents

Presently, under your existing documents before making these changes, your children A and B would serve as the personal representatives under your will upon your death. If one of them failed or ceased to serve, the other one of them would serve alone. If both of them failed or ceased to serve, Corporate Fiduciary would serve alone.

Daughter A and Corporate Fiduciary would serve as successor trustees under your revocable trust during your lifetime if you became incapacitated, and after your death during the period of administration of your estate. If Daughter A stopped serving (and did not appoint a successor to herself), Son B could appoint a successor trustee to Daughter A (and he could appoint himself as a trustee if he wanted to). Daughter A can remove Corporate Fiduciary at any time. If she is unable to do so, Son B can remove Corporate Fiduciary at any time. However, a corporate trustee is required to serve at all times.

When the distributions are made from your revocable trust after your death to the separate trusts for your children, the trustees of your revocable trust will stop serving, and the trustees under the separate trusts for your children would take over each child's inheritance. For example, the trustees of your revocable trust would distribute Daughter A's share of the trust assets to the trustees of her dynasty trust (Daughter A and Corporate Fiduciary). The same thing would happen for Son B's share (Son B and Corporate Fiduciary are the trustees of Son B's dynasty trust).

The Revised Documents

Under the revised will, I and Corporate Fiduciary will serve as your personal representatives. If I fail or cease to serve, Corporate Fiduciary will be your sole personal representative.

Under the revised revocable trust, I and Corporate Fiduciary will serve as your successor trustees when you stop serving. If I fail or cease to serve, Corporate Fiduciary will be your sole trustee. A corporate trustee is required at all times after you have stopped serving. I have the

right to remove Corporate Fiduciary as trustee, but I must replace it with another corporate trustee.

Under the revised trust, I and Corporate Fiduciary (as the nominated successor trustees) will have the authority to retain a board certified medical doctor to determine your capacity. Under the currently existing trust, that authority is given to your children. If the doctor determines that you are no longer legally capable of managing your own affairs, I and Corporate Fiduciary would step in as your successor trustees. You would still have the ability to challenge any such determination by taking it to court, and of course, if we had wrongly believed you to be incompetent, you would be free to terminate our employment and service as your trustees.

As your personal representatives and trustees, both I and Corporate Fiduciary will be entitled to reasonable compensation for our services. In my case, I would be entitled to receive reasonable compensation for my services as personal representative and trustee in addition to reasonable compensation for my or my firm's separate professional services for legal work. Florida law gives a percentage fee guideline for personal representatives in probate estates, but the guideline is not mandatory, and your personal representatives could be paid for their services on some other basis (such as a fixed fee, or a reduced percentage, or based on time spent). For trustees, Florida law provides only that they are entitled to reasonable compensation. Generally speaking, when you have two or more personal representatives and trustees, the amount of fees paid to them is greater than if you had only one personal representative and trustee. The guideline for personal representative fees in the Florida Statutes generally limits the total compensation for all personal representatives combined at twice the amount that one personal representative would receive, but again the statute is only a guideline.

The persons bearing the impact of the payment of personal representative and trustee fees (in your case, the trusts for your children) will have the opportunity to object to the amount of all fees and to have the court determine the amount of compensation.

Your existing trust prior to these revisions provided that an individual Trustee will be liable only for actions or failures to act that are made in bad faith, whereas a corporate Trustee will be liable for its actions or failures to act that are negligent or that breach its fiduciary duty. Thus individual Trustees are held to a less strict standard of liability than a corporate Trustee. The reason for this difference is that the individuals you have named as your Trustees are not in the business of serving as Trustees. On the other hand, a corporate Trustee is in the regular business of serving as a trustee and therefore should be held to ordinary negligence standards in determining whether it should be liable for the consequences of its actions and omissions. You want to encourage your individual Trustees to serve by requiring only that they act in good faith by paying proper attention to the purposes of the trust and your best interests and the interests of your beneficiaries. As noted above, this provision has been in your trust instrument for a long time before you decided to ask me to serve as a successor Trustee. It was not inserted or included to protect me specifically, but will apply to all individuals who ever serve as your Trustee.

You are always free to change the designation of who will serve as your personal representatives and successor trustees, as well as the standard of conduct and liability to which

they are held. It is not necessary that you name me as a personal representative or trustee. You are free to name any one or more of your family members as personal representatives even if they are not Florida residents (but for those relatives who aren't Florida residents, only relatives within a certain degree of relationship, such as your children and grandchildren, and your siblings and their descendants). You are free to name anyone who is a resident of Florida as a personal representative even if not related to you. There are no restrictions under Florida law on who you can name as trustees of your revocable trust.

If you are still in agreement with the appointment of me as a personal representative and successor trustee together with Corporate Fiduciary, instead of having your children serve, I would appreciate you signing a copy of this letter so that I may place it in our files.

Sincerely yours,

Attorney

I have read the preceding letter, and I am signing my name below to express my understanding and agreement.

Signed by me on March 21, 2013.

Witnessed by:

_____ _____

Client's Name

_____

Answer 1. The probate attorney should have an engagement letter which at the very least should make it clear that the probate attorney is not being retained to give tax advice or to handle any estate tax matters, and that the probate attorney has no responsibility for those matters. The engagement letter should be signed by the wife both individually and in her capacity as personal representative (and if someone other than the wife is appointed as personal representative, by that other person). The engagement letter should recommend that a professional adviser with expertise in federal estate tax matters be retained to advise the wife and the personal representative.

Why should an engagement letter for an obviously insolvent estate not only disclaim any responsibility for estate tax matters, but also affirmatively recommend that a professional with expertise in estate tax matters be retained? Suppose that no estate tax return is filed for the husband's insolvent estate, and the wife's share of the wrongful death damages is ten million dollars. Suppose that the wife dies a year after the recovery, with her ten million dollar recovery intact. What are the estate taxes for the wife's estate? The estate tax will be 40% of the wife's taxable estate that remains after deductions and after applying her applicable exclusion amount,

which is $5 million (indexed for inflation), and so her estate tax will be in the range of approximately $2 million.

What would the estate tax for the wife's estate have been if an estate tax return had been timely filed for her deceased husband's insolvent estate? If an estate tax return had been timely filed for the husband's estate, his full $5 million estate tax exemption (indexed for inflation) could have passed to his wife because of portability under Internal Revenue Code section 2010, and no estate tax would have been owed by the wife's estate. The failure to elect portability results in damages to the beneficiaries of the wife's estate in the approximate $2 million amount of estate tax owed by her estate.

It may be reasonable to assume that an attorney retained to represent the personal representative of a married decedent's estate has a duty to advise the personal representative of the necessity to timely file an estate tax return in order to make the portability election and to avoid wasting the husband's unused applicable exclusion amount that was made possible under the portability provisions made permanent in the American Taxpayer Relief Act of 2012. For the personal representative to waive the duty (if there is one) of the attorney to advise on portability, the personal representative must have a general understanding of what portability is, and what the potential consequences are if the portability election is not made. A waiver made by a person who does not understand what is being waived will not be enforceable. Therefore the engagement letter must set forth a general explanation of portability and the consequences of making or not making the election that will be sufficient to convince a judge or a jury in a later suit against the attorney that the personal representative had an understanding of the topic that was sufficient to waive any duty of the attorney to give advice about portability. The client should sign the engagement letter, and the attorney should keep a copy of the signed engagement letter so that the attorney can prove that the client did in fact make a knowing and voluntary waiver.

If the personal representative fails to timely file an estate tax return to make the portability election, the person responsible for advising the personal representative on the portability election (whether the attorney or an accountant or other tax adviser) should advise the personal representative to seek relief under Internal Revenue Code section 9100 for authority to file a late return to make the election. If the probate attorney does not obtain a waiver of any duty to advise the personal representative about the election and then discovers that the election was not made, the probate attorney should advise the personal representative to seek section 9100 relief. Relief should be available if the amount of the gross estate was not large enough to require the filing of an estate tax return, but not available if the gross estate was large enough that an estate tax return was required. See T.D. 9593 (July 9, 2012): "When an executor is not required to file an estate tax return under section 6018(a), the Code does not specify a due date for a return filed for the purpose of making the portability election. The temporary regulations in §20.2010-2T(a)(1) require every estate electing portability of a decedent's DSUE amount to file an estate tax return within 9 months of the decedent's date of death, unless an extension of time for filing has been granted." Because the requirement to make the portability election on an estate tax return for an estate under the threshold filing size is regulatory and not statutory, section 9100 relief should be available.