

THE LAW OFFICE OF KENNETH S. FEDERMAN, LLC

Review of Estate Planning Considerations

The following outline generally describes considerations that are central to the estate plan. Please note that this outline is not intended to - and does not - provide a comprehensive discussion or analysis of the estate planning process or of all the considerations that may be germane to any individual situation. No decisions are to be made or planning techniques implemented based solely on the information provided.

NOTE: This form is at the user's discretion. Possession or Use of this form does not create or imply the creation of an attorney-client relationship, and none is hereby created. Do not provide any personal or confidential information prior to the establishment of an attorney-client relationship. Use of this form constitutes agreement herewith.

Ø Last Will and Testament

- **Personal Representative:** Your "Personal Representative" carries out the provisions of your Will. Specifically, the Personal Representative winds down your affairs, files necessary income and estate tax returns, and arranges for your assets to pass to the individuals or trusts named as beneficiaries. You should name a primary Personal Representative and a successor Personal Representative.

§ Your Personal Representative may need to make decisions regarding:

- Payments of debts, collection of assets (potentially including lawsuits), and tax elections;
- Distribution of tangible personal property (e.g., clothing, cars, furniture, photos, collections, and items of a personal and sentimental nature); and/or
- Raising liquidity to pay estate taxes.

- **Guardian for Minor Children:** The "Guardian" is the person (or persons) who will become legally responsible for your children who are under age 18 and for children who may be in need of a Guardian as adults.

§ Clients often find this determination to be the most difficult decision in the planning process. It is also advisable to name at least one alternate.

Ø Trusts

○ **The Case for Trusts**

§ The basic planning decision is whether to leave assets outright to your beneficiaries or to place some or all of your assets into one or more trusts. Trusts allow naming of a trustee who will have management control of the assets titled in the trust (in accordance with the provisions of the trust). In addition, trusts can be tailored to address your specific goals, including:

- Estate, Gift, and Income Tax reduction;
- Control of business interests;
- Protection of trust assets from a beneficiary's potential creditors;
- Protection of trust assets from the Settlor's potential creditors;

○ **Revocable or Irrevocable?** Generally, trusts are structured as revocable (because of the ability of the "Settlor" to amend the terms of the trust) unless the trust needs to be irrevocable to attain specific planning goals.

§ Revocable Trusts are often utilized to receive assets (via terms of the Will) upon the Settlor's death or (if assets are re-titled to the trust prior to the individual's death) to avoid the probate process. Once the Settlor has died, the revocable trust becomes irrevocable.

§ Irrevocable Trusts are generally utilized where the transfer of assets by the Settlor during his/her lifetime needs to be a "complete" transfer, usually for gifting and/or asset protection purposes.

○ **Trust Distributions.** You will need to consider how the trustee is directed to distribute the assets from the trust. Subject to certain requirements to attain certain desired tax treatment, you can direct the trustee to hold or distribute the trust assets in any manner you wish. Following are some common considerations.

§ Generally, the trustee will be directed to make "mandatory" or "discretionary" trust distributions. A mandatory distribution is, for example, a direction to the trustee to distribute trust assets immediately after both spouses have died. A discretionary distribution is one where the trustee has authority to decide (in accordance with trust provisions) when and if distributions will be made.

§ The determination of which structure to implement, while not an easy one, will reflect your priorities and principles.

- A mandatory distribution will (i) allow your beneficiary to make his/her own decisions as to investments and spending of the distributed property but (ii) expose the distributed assets to the

beneficiary's creditors. Mandatory distributions may be called for where Settlor is both confident that the beneficiary will make wise spending choices and is not, from a personal or business aspect, at risk for loss.

- A discretionary distribution structure leaves it up to the trustee as to when and for what reason distributions to or for a beneficiary will be made. The Settlor can offer guidance, either in the trust itself or in a "side letter", but the ultimate decision is in the trustee's hands. This structure offers the beneficiary a measure of protection from his/her spending habits and from potential creditor claims.

§ You may also direct a combination of mandatory and discretionary distributions. For example, you might direct that income be distributed annually, but that principal be held in trust and distributed only in the trustee's discretion. Or, you might direct that 20% of the trust is distributed at age 30, and the balance held pursuant to the trustee's discretion. You get the idea.

○ **Trust Investments**

§ Generally, the trustee is required to invest both with the purpose of the trust and fiduciary investment standards in mind.

§ You may also provide specific instructions for investments. These may authorize the trustee, for example, to retain assets passed to the trust, or may provide specific direction regarding an ownership interest in a family business or regarding specific assets.

- **Trustees:** The trustee will control the assets in the trust. Generally, the trustee will need to become familiar with the beneficiaries and the needs of each, make decisions regarding distributions to (or for the benefit of) each beneficiary, make investment decisions, file necessary income (and GST) tax returns, and provide the beneficiaries with annual reports.

§ Generally, the Settlor is the trustee of a revocable trust during his/her lifetime. The revocable trust provides no tax benefit or asset protection, so the Settlor is free to continue to control the assets he/she has placed in the trust. Should the Settlor, through a disability, become unable to control the trust assets, the successor trustee will step in.

§ For irrevocable trusts and revocable trusts that have become irrevocable:

- Naming a beneficiary as the sole trustee allows the beneficiary to control trust assets, but can cause tax complications, and provides little (if any) protection from the beneficiary's potential creditors.

- Naming a “related party” (as defined by the Internal Revenue Code) as trustee can also create tax complications, but may provide a measure of protection from the beneficiary’s potential creditors.
- Naming an “independent” trustee is less likely create tax complications and (depending on the specific identity of the trustee, other provisions of the trust, and the administration of the trust) is more likely to provide a greater level of protection from the beneficiary’s potential creditors. An independent trustee can be an individual or an entity such as a bank or trust company.

§ Rights to Become a co-Trustee.

- A beneficiary (such as a surviving spouse or a child who has attained a specific age) may be authorized to act as a co-trustee along with the Independent Trustee. This would allow the beneficiary to be involved in trust decision-making (other than discretionary distribution decisions). In the case of a child, this can also provide a platform for the child to become familiar with handling and investing of funds.
 - Including this feature in a trust can lessen the “asset protection” benefit of the trust.
- **Rights to Remove and Replace an Independent Trustee:** In order to introduce flexibility into your trusts, you can also authorize a beneficiary (such as a surviving spouse or a child who has attained a specific age) to remove the Independent Trustee and appoint a successor. This can avoid issues regarding an unwanted trustee, and will allow each beneficiary to essentially choose his or her own Independent Trustee.
- As with a beneficiary’s right to become a co-trustee, including this feature in a trust may lessen the “asset protection” benefit of the trust.
- **Trustee Reviewer:** A Trustee Reviewer is an individual that a beneficiary (such as a surviving spouse or a child who has attained a specific age) can turn to in order to request the removal a trustee who is being unreasonable, or who should be replaced but will not resign. The Trustee Reviewer is not obligated to remove the trustee, but can investigate and make an independent determination.
- § A Trustee Reviewer can be utilized as a complement to, or instead of, a beneficiary’s right to remove and replace the independent trustee.

- **Contingent Disposition:** Although unlikely to occur, the trust should provide for distribution of any remaining assets in the event none of your named beneficiaries is living. There are really no restrictions on what can be done. Some people direct property to their extended families such as brothers and sisters, to specific relatives with particular needs, to friends, to charitable causes, or a combination of these possibilities.

Ø **Estate, Gift, and Generation Skipping Taxation**

- Estate, Gift and Generation Skipping Taxation reduction techniques are woven into the trusts and transfers that you decide to make as part of your plan. The tax reduction techniques appropriate to your financial and personal situation will be discussed, and those you choose can be implemented.

Ø **Charitable Planning**

- Structured gifts to charitable entities can promote your personal goals in a tax-advantaged fashion.

Ø **General Durable Power of Attorney**

- The purpose of the General Durable Power of Attorney is to allow the designated individual to make decisions regarding your legal and financial affairs if need be, without first having to become a court-appointed conservator and/or guardian.
- The General Durable Power of Attorney is a very powerful document. Depending on the terms of the document, your attorney-in-fact will be able to access all of your assets, and make decisions on your behalf. Accordingly, you should carefully consider whom to name as attorney-in-fact and the terms of the document.
- The General Durable Power of Attorney can authorize the attorney-in-fact to make gifts on your behalf.
- The General Durable Power of Attorney can be drafted to take effect only in the event you were to become disabled and unable to address your legal and financial decisions.

Ø Health Care Proxy

- A “Health Care Agent” is the person you name in your Health Care Proxy to make medical decisions for you if you are too ill to make them yourself. You should consider whom to name as primary agent and as successor agent.

Ø Living Will

- The Living Will states that if you are in a medical condition where there is expected to be no recovery and that death is imminent, that you do not wish heroic measures to be taken (e.g., artificial life support).
- There is currently no Massachusetts law validating the effectiveness of a Living Will; however, the document may be useful in that it expresses your desires and intentions.

Ø Retirement Accounts

- Retirement accounts are unique assets. These funds have the advantage of income-tax deferred growth, but are subject to complicated rules regarding required withdrawals.
- A trust can be named as the beneficiary of retirement assets, but the issue will need to be specifically addressed first.

Ø Life Insurance

- Life insurance is an important aspect of estate planning, as it can be used in various structures integrated with your estate plan documents.
- Life insurance can, for example be used to:
 - § Replace earnings lost as the result of the death of the insured;
 - § Provide liquidity for payment of living expenses and taxes;
 - § Effectively reduce tax liability;
 - § Provide financial security for adults with special needs.

Ø Special Needs

- Providing for the financial security of children with special needs presents a unique challenge. The rules under which such trusts must be drafted and under which trustees must operate in order to preserve the availability of government benefits are often seen as overly restrictive. This can be discussed and various structures can be considered.

Ø **Asset Protection.** As indicated, trusts can be structured to provide for aspects of protection of trust assets. Other, simpler techniques, can also be implemented, such as:

- Asset Titling;
- Homestead Declaration;
- Property & Casualty Insurance;
- Liability Umbrella Insurance;
- Disability Insurance;
- Long Term Care Insurance; and
- Specialty Insurance Coverage.

Ø **Foreign Affairs**

- If you own assets or accounts located in foreign countries, or have signature authority over accounts located in foreign countries, special reporting requirements need to be complied with.

-----END-----