

Estate Plan Review Checklist

22 Important Questions to Ask

by Attorney Sean O'Bryan

Your estate plan is an investment in you and your family's future. As years pass, your family will grow, your assets will change, and new laws will be passed. Everyone should review their estate planning documents once every 3 to 6 years.

This Checklist focuses on the foundation of your estate plan, including documents such as a Last Will and Testament, Revocable Trust, Financial Durable Power of Attorney and Health Care Power of Attorney. (Note that references to a "Will" on this Checklist are generally interchangeable with the term "Revocable Trust", which can also be used as the centerpiece of an estate plan.) However, irrevocable trusts - such as a Life Insurance Trust - and other estate planning vehicles should also be reviewed periodically to see if they are performing as expected.

Below are some questions you should ask yourself when reviewing your existing estate planning documents:

1.) Have you moved since you last updated your estate planning documents? If you moved from one state to another, there may be questions of the interpretation or validity of your existing estate planning documents in your new state of residence. Generally, estate planning documents executed in one state will be valid in another state, but your new state of residence may have specific statutes or tax laws that are not addressed in your existing estate planning documents. You may want to contact an attorney in your new state of residence to advise you as to what might need to be

updated. If you moved within Michigan, does the deed to your new house reflect your trust?

2.) Do you have a separate personal property designation?

This is a separate writing where you indicate who should receive specific items of your personal property such as photographs, jewelry, art work, etc. If you have one, you should review it and make sure that it is still an expression of your wishes. If you don't have a personal property designation, you may want to consider creating one so that specific items will go to specific people. I have also suggested on many occasions that clients take pictures of important personal possessions, place the pictures on pages within your estate plan with your notes about each item. This helps your family to better understand your wishes.

3.) Is any person receiving your personal property a minor (under

18)? If so, your estate plan should make provisions for that property to be held by the minor's Guardian until he or she attains an appropriate age.

4.) Do you have any specific gifts or bequests you want to make? Any gift of a cash amount or of an asset other than personal property should be stated in your Trust. If you have given away a specific asset to a person in your existing Trust (i.e. your shore house), be sure that the asset still exists. Also, your Trust should provide for what happens if the specific asset is sold during your lifetime.



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5.) Are your total combined assets, including life insurance death benefits, greater than \$1,000,000? If so, you potentially have a taxable estate -- depending on Congressional actions in the upcoming year. If you have a taxable estate your estate plan should contain specific provisions to reduce taxes.

6.) Do you own assets held in joint accounts, or where you have a named beneficiary? These assets will not be distributed in accordance with your Will or Trust. Instead, all joint assets will pass to the surviving joint owner, and all assets with a beneficiary designation will pass to that beneficiary. Accordingly, if you have a convenience account with one of your children, the assets in that account will pass to that one child at your death, regardless of what your Will or Trust might say. You should carefully review the ownership and beneficiary designation of all of your assets to be sure that the assets will be distributed to the right people at your death.

7.) Are your residuary beneficiaries correct? Residuary beneficiaries are the people who receive the balance of your estate after (1) all the debts, expenses, and taxes have been paid, (2) any specific bequests have been made, and (3) joint accounts or any assets with beneficiary designations have been distributed to the appropriate people. You should review this section of your estate planning documents carefully. If one of the beneficiaries were to predecease you, will that beneficiary's share pass to his or her children, your other children, or otherwise?

8.) Are assets being distributed to your beneficiaries outright or in trust? If assets are distributed to a beneficiary outright, the beneficiary can do whatever he or she pleases with the assets. However, those assets are at risk from the beneficiary's creditors, spouse in a marital action, and poor judgment. It is possible to create trusts that give the Trustee (who may also be a beneficiary) great flexibility in distributing the assets to the beneficiaries, and at the same time protect

those assets from a beneficiary's immaturity, misuse, creditors, divorce, etc. Also, trusts may be used when you want to direct how assets will pass upon the beneficiary's death. For instance, many times in a second marriage a trust will be established for the benefit of the spouse, but provide that upon the spouse's death the assets will pass back to the decedent's children. You should speak with your attorney about the benefits and drawbacks of using a trust to distribute your assets to your beneficiaries.

9.) If you currently have a trust established, are the terms still appropriate? Many

people establish trusts for young beneficiaries. You should look at the ages when the assets will be distributed outright to the beneficiaries, keeping in mind that assets distributed to somebody who is 18 are likely to be spent differently than if distributed to a person who is 25, 30 or older. It may be appropriate to increase or reduce the ages at which the beneficiaries will receive an outright distribution from the

trust. Alternatively, it may be appropriate to give the beneficiary an income stream, or give the Trustee greater discretion to make distributions from principal. For example, a trust might say that a child will receive the income from the trust starting at age 25, and that the principal must be distributed to the child outright at age 30 and 35. Prior to age 35, the trust principal could be used for the beneficiary pursuant to the terms of the trust. By structuring a trust this way, the beneficiary has an opportunity to learn how to manage money.

10.) Do any of your beneficiaries have special needs? If you have a beneficiary who is elderly or disabled, that beneficiary may need to qualify for public benefits in order to maintain their standard of living. If a person who is receiving public benefits receives an inheritance directly, the public benefits will cease, and the person must exhaust the inheritance to pay for the care that the public benefits would otherwise have provided for. Once the inheritance is exhausted, the person must then reapply for benefits. This can be a

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traumatic and expensive process. Instead, you should consider leaving assets in a purely discretionary Special Needs Trust for the person, drafted in such a way that it does not interfere with the person's ability to receive public benefits. By using this approach, the trust becomes a security blanket for the beneficiary, not a burden.

11.) Does your estate plan contain provisions to allow you and your family to be as flexible as possible in meeting your goals?

It is impossible to say now what the future will hold. You can be sure that the future will bring new laws and changes to your beneficiaries. Since your estate plan will come into effect when you are no longer here to change it, a comprehensive estate plan must make provisions for an unknown future. If a trust is being used as a way of sheltering assets from taxes, or to hold assets until the beneficiary reaches an appropriate age, you need to look at the level of guidance and flexibility you are giving your Trustee. A flexible trust created for the benefit of your spouse and your children might contain such things as a disclaimer provision, a limited power of appointment, and the option for the spouse to appoint an Acting Trustee. As a result of these provisions, your spouse has the decision making authority over whether or not to set up the trust, the ability to distribute the assets to your children without restriction, and the right to appoint a third party who may distribute assets to your spouse without restriction.

12.) What authority does the Trustee have to distribute the assets in the trust? Is the Trustee's authority to make distributions limited to health, maintenance, education and support, or are distributions within the Trustee's total discretion? If the beneficiary is also serving as Trustee, then distributions to the beneficiary/Trustee must be limited to health, maintenance, education and support. If the beneficiary and the Trustee are separate people, you may want to give the Trustee

more flexibility in deciding how to distribute assets. You should also let the Trustee know what your goals are in terms of the distribution of assets. If the trust is for the benefit of the spouse and children, is the primary beneficiary the spouse, the children, or both? If the trust is for the benefit of minor children, is the goal of the Trustee to hold the assets until the child reaches a certain age, or to use them for certain things along the way such as education, marriage, etc?

13.) Are your alternate beneficiary designations appropriate?

In the event that all of your primary beneficiaries pass away, who will your assets go to? Many people take the approach that 1/2 of the assets will pass to one spouse's siblings and their children, and the other 1/2 of the assets will pass to the other spouse's siblings and their children. However, this approach may not work for you, in which case you should make sure that your assets are directed to one or more specific people or organizations. This desire should be stated in your Will.

14.) Are your Executors, Trustees, and Guardians still the appropriate people, in the appropriate order? Over time, people and relationships change, so it may be appropriate to rearrange your Executors, Trustees and/or Guardians.

You have the ability to appoint one or more people to serve in these roles, as well as Successors for those people. In addition, if addresses are listed, you should verify that they are current.

15.) If you have a taxable estate (assets exceeding \$1,000,000), have you and your spouse reallocated ownership of and title to your assets to minimize estate taxes? Estate planning for a taxable estate will normally include the formation of a trust upon the death of the first spouse. However, if all of your assets are in joint names, there will be no assets available to fund that trust because all of the assets will pass by operation of law to the surviving spouse. This means that the estate tax exemption of the first spouse will be wasted. Accordingly, if



you have a taxable estate it is critical that you re-title your assets pursuant to your attorney's recommendations. By doing this, upon the death of one spouse, he or she will have sufficient assets in his or her individual name to fund the trust(s) that will create the estate tax savings in the future.

16.) Is your General Durable Power of Attorney more than 10 years old? If so, banks in many states are not required to accept it. We recommend that your General Durable Power of Attorney and Living Will be refreshed every 3 to 6 years.

17.) Does your General Durable Power of Attorney continue to name appropriate attorneys-in-fact? You are allowed to name one or more attorney(s)-in-fact to act in your place with reference to your financial matters in the event that you are unable to do so. You should verify that your named attorney(s)-in-fact and any successors have current addresses.

18.) Does your General Durable Power of Attorney allow for Medicaid planning? Many seniors want the ability to engage in asset protection planning to shelter assets from the cost of nursing home care. Your General Durable Power of Attorney should specifically grant your attorney(s)-in-fact the power to engage in this type of planning. We are recommending to all of our clients that they update their General Durable Power of Attorney if it does not specifically authorize this type of planning in the future.

19.) Does your Health Care Power of Attorney continue to name appropriate Health Care Representatives? You are allowed to name one Health Care Representative at a time to make medical decisions for you in the event that you are unable to do so. You should verify your named Health Care Representative and any successors have current addresses.

20.) Does your Health Care Power of Attorney reference the Health Insurance Portability and Accountability Act ("HIPAA")? The HIPAA privacy rules have created a new category of private information called

"Protected Health Information" (PHI) or "Protected Medical Information" (PMI). In order to avoid any issues about the persons to whom your health care provider may divulge your PHI, you should specifically state who has the right to receive your PHI. We are recommending to all of our clients that they update their Health Care Powers of Attorney to include a HIPAA provision to avoid any inability of a Health Care Representative to receive information in the event of medical emergency.

21.) Does your Living Will clearly state your desire about what medical treatment you want to receive or refuse in a terminal situation? You have a right to direct your care if you are terminally ill. You should make sure your Living Will clearly states your desires.

22.) Does somebody know where all of your estate planning documents are? If you have the greatest estate plan in the world, but nobody knows how to access your documents in the event of an emergency, it is going to be useless to you. One or more trusted people should know where they can find originals and copies of your Trust, Last Will and

Testament, Financial Durable Power of Attorney and Living Will/Health Care Power of Attorney. In addition, we recommend having copies of your Health Care Power of Attorney and Living Will placed into your medical record with your primary care physician. Note that your original General Durable Power of Attorney is a very powerful document and could allow somebody to access your accounts while you are alive without your permission. As a result, it may be best not to have the original of the General Durable Power of Attorney easily accessible.

Your estate plan is an investment. If your estate plan does not address your current situation, or if it was not completed through the appropriate re-titling of assets, then that investment may have little or no value. The law gives you the right to direct what happens to your assets upon your death, and gives you the ability to minimize any tax consequences. You should take advantage of the law to make sure that your estate plan meets your needs today and into the foreseeable future. 🧠

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