

# **Florida Wills, Trusts & Probate Questions and Answers**

Copyright 1997-2011 by James W. Martin, Esq.

## **WILLS, TRUSTS AND PROBATE**

1. What is a will?
2. What is a personal representative or trustee?
3. What is probate?
4. What is a testate estate?
5. What is an intestate estate?
6. What is a revocable living trust and how does it avoid probate?
7. What are joint tenancies and how do they avoid probate?
8. What is a bank account held "in trust for" and how does it avoid probate?
9. Do life insurance proceeds avoid probate?
10. Do retirement account proceeds avoid probate?
11. What is elective share?
12. How does homestead pass upon death?
13. What is a pretermitted spouse or child?
14. What is exempt property of a decedent?

## **GUARDIANSHIPS**

15. What is a guardianship?
16. What is a durable general power of attorney?
17. What is a declaration of preneed guardian?

## **ESTATE TAXES**

18. What are estate taxes?

## **PLANNING FOR HEALTH CARE**

19. What is health care planning?
20. What is a health care surrogate or proxy?
21. What is a living will?

## **ASSET PROTECTION**

22. What is asset protection planning?
23. How should motor vehicles be titled in Florida?
24. How should a married couple hold assets?
25. Should the homestead be held in a living trust?
26. What is a personal liability umbrella insurance policy?
27. How should life insurance be owned?
28. How much title insurance should I have on my real estate?
29. What is Medicaid planning?
30. What is a prenuptial agreement?
31. How can depletion of assets left to a younger generation be avoided?

## **WILLS, TRUSTS AND PROBATE**

### **1. What is a will?**

A last will and testament is a writing that specifies who is to receive the assets of a deceased person (the decedent). Of all the legal documents prepared by lawyers, wills still require the most formality in signing. Wills not signed in accordance with the requirements of Florida law are void. Florida residents must sign wills at the end of the document in the presence of at least two witnesses who are both present at the same time and place with the testator (person making the will). Wills are usually signed in the presence of a notary public in addition to the witnesses so that the will is self-proving in case of death. Self-proving wills can be admitted to probate after the death of the testator without having the witnesses come to the courthouse.

The testator should keep the original will in a safe place because it must be presented to the court at the time of death. A copy of the will may not be admitted to probate (except in unusual circumstances). Florida has no provision for pre-filing wills prior to death so the testator should keep the will in a safe deposit box at a bank or another safe place.

### **2. What is a personal representative or trustee?**

The personal representative is the person or company appointed to administer the affairs of a decedent's estate. The antiquated terms administrator and executor are no longer used in Florida. The court appoints a "personal representative" whether the decedent died with a will or without one.

The trustee is the person or company named to administer a trust. The will and trust should name a close relative, bank, trust company, or Florida resident as personal representative and trustee, and it should list several alternates to serve in case any of those named predeceases the testator.

The will may name a nonresident as a personal representative only if he or she is the testator's parent or lineal ascendant, child or lineal descendant, spouse, brother, sister, uncle, aunt, nephew, or niece, or the spouse, lineal ascendant or lineal descendant of any of the foregoing.

While this list seems long, there are many relatives who cannot serve as personal representatives in Florida unless they are Florida residents. For example, if a married couple names the husband's nonresident brother as personal representative of both their wills, Florida law allows the brother to serve as personal representative for the husband's estate but not for the wife's. Very few states still have this restriction, so there have been comments by lawyers suggesting that this law be changed. This restriction does not apply to trusts: a nonresident may serve as trustee of a trust in Florida.

### **3. What is probate?**

Florida law requires a probate proceeding upon the death of an individual if the individual owns any assets. The probate proceeding is the law's way of assembling the decedent's assets, paying debts and taxes, and passing title to the decedent's beneficiaries.

Many of the disadvantages of probate have been eliminated in Florida. For example, the inventory of assets owned by the decedent and the accounting of financial transactions are now sealed from public view, and probate proceedings for most estates must generally be completed within one year and are often completed within six months. Nevertheless, probate avoidance is still desirable in many cases and can be accomplished in a number of ways.

#### **4. What is a testate estate?**

If a Florida resident dies with a will, he or she has died testate. The will names the personal representative and beneficiaries of the estate. Making a will is the means by which an individual determines the beneficiaries who will inherit his or her property at death and the personal representative who will be responsible for collecting the assets, paying claims and expenses, and distributing the assets.

To be effective, a will must be filed with the court after the individual dies and an order admitting the will to probate must be entered by the court. Thus, the estates of persons who die with wills must be probated just the same as the estates of persons who die without wills. The only difference is that those with a will have the ability to name the beneficiaries who will receive their property at their death and to name who they prefer to be the personal representative.

#### **5. What is an intestate estate?**

If a Florida resident dies without a will, he or she has died intestate. Because there is no will, the law specifies who will receive the decedent's assets, instead of the decedent's will specifying this.

Generally speaking, the law of intestacy in Florida says that the following persons are entitled to receive the residue (what is left after payment of claims, debts, taxes and expenses) of the probate assets of a Florida resident who dies without a will:

- If the decedent leaves a surviving spouse but no descendant (child, grandchild, etc.), then the surviving spouse is entitled to receive the residue.
- If the decedent leaves at least one descendant but no surviving spouse, then the descendants are entitled to receive the residue.
- If the decedent dies before 10/1/11 and leaves a surviving spouse and one or more descendants, all of whom are descendants of both spouses, then the surviving spouse is entitled to the first \$60,000 and one-half of the remaining residue, and the descendants share the other half.
- If the decedent dies on or after 10/1/11 and leaves a surviving spouse and one or more descendants, all of whom are descendants of both spouses, and if the surviving spouse has no other descendant, then the surviving spouse is entitled to receive all of the residue.
- If the decedent leaves a surviving spouse and one or more descendants, one or more of whom are not descendants of both spouses, then the spouse is entitled to one-half of the residue and the descendants are entitled to the other half.

Florida law provides that the surviving spouse is entitled to preference in being appointed the personal representative of an intestate estate. If there is no spouse, then a majority of the heirs may select the person entitled to preference. In any case, the court makes the final decision.

Florida intestate estates commence with the heirs or creditors filing a petition for administration with the court asking for appointment of a personal representative.

## **6. What is a revocable living trust and how does it avoid probate?**

A revocable living trust is a writing that creates a form of ownership in which assets originally owned by the grantor of the trust are legally re-titled in the name of a trustee who manages the assets for the benefit of the trust's beneficiaries named in the writing.

Creating a revocable living trust, also called an "inter vivos trust", or just a "living trust", is the most effective means of avoiding probate and guardianship with respect to the trust's assets. It is safer than using joint ownership to avoid probate because the trustee named by the grantor does not personally own the assets of the trust, as is the case with joint property. The trustee holds title to the assets IN TRUST for the benefit of the beneficiaries named in the trust so creditors of the trustee cannot reach the trust assets.

Frequently, the living trust names the grantor as the initial trustee and initial beneficiary. This means that the grantor both manages the trust assets as trustee and is entitled to the benefit of the assets as beneficiary for life. However, instead of naming the grantor as the initial trustee, a grantor may name a bank, trust company or individual as the initial trustee.

The trust also lists the beneficiaries entitled to receive the assets when the grantor dies. This part of the trust is similar to a will's dispositive provisions (the paragraphs of a will that say who gets what). The trust also names who will be the successor trustee after the initial trustee dies or becomes incapacitated.

A trust is created by signing a written trust agreement. After the trust is created, assets of the grantor must be transferred to the trust. The trust avoids probate as to the assets placed in the trust because upon the grantor's death or incapacity the assets of the trust are owned by the trust and not by the grantor. Of course, assets which have not been transferred to the trust and which remain titled in the grantor's name at death are subject to probate after the grantor's death the same as they would be without a trust. Therefore, most assets should be placed in trust if probate and guardianship avoidance is the primary goal.

However, special attention needs to be given to assets such as homestead, life insurance, annuities, IRAs, retirement accounts, and other assets that avoid probate on their own through valid death beneficiary designations.

In the early 1990's, Florida law governing trusts changed so that after the grantor dies the trustee named in the trust must file a notice of the existence of the trust (but not the terms

of the trust) with the probate court. Creditors have two years to file claims unless there is a probate proceeding with notice to creditors published and served, in which case most creditors have just 3 months to file claims. For that reason, it is advisable to open a probate proceeding for the purpose of administering the claims process upon the grantor's death, even when there is a living trust.

### **7. What are joint tenancies and how do they avoid probate?**

Joint tenancies are any form of ownership involving more than one owner, such as joint tenancy with full rights of survivorship, tenancy in common, and tenants by the entirety. Joint tenancies may be held in many types of assets, including real estate, bank accounts, stocks, etc.

Assets held jointly with full rights of survivorship pass automatically by operation of law to the surviving joint owners and do not require probate. Bank accounts, stocks, and mutual funds are frequently held as joint tenants with full rights of survivorship.

It should be noted that joint assets held as tenants in common do not avoid probate. Assets in which an individual's name appears as a tenant in common must be probated.

Assets held by a husband and wife as tenants by the entirety pass automatically by operation of law to the surviving spouse and do not require probate. In addition to probate avoidance, separate creditors of just one spouse cannot reach tenancy by the entirety property in Florida (Florida is one of the few states that recognize this concept, which has added to its reputation as a debtors' haven.)

One disadvantage of jointly-held property is that probate is not avoided when the last joint owner dies. Probate will be required upon the death of the last surviving joint owner.

Another disadvantage of joint ownership is that it constitutes true ownership. This means that any joint owner can withdraw, sell or convey his or her interest in the asset without approval of the original owner (except for tenancies by the entirety in real property). Adding a child's name to a bank account as joint owner can constitute a gift to the child and can be dangerous since the child's creditors could reach those assets. Similarly, the child's spouse could claim an interest in the assets jointly held with a child if the child divorces.

Another disadvantage of joint ownership is that it does not avoid a guardianship. For example, if a married couple owns a home and one of them becomes incapacitated, necessitating the sale of the home to pay medical bills, a guardianship may be required since one spouse alone cannot sign a deed conveying the home.

These disadvantages of joint ownership have led Florida residents to create living trusts to avoid probate and to avoid the disadvantages of joint ownership.

### **8. What is a bank account held "in trust for" and how does it avoid probate?**

Bank accounts that are set up "in trust for" named beneficiaries to whom the balance in the account shall be paid at death are called Totten trusts and do not require probate. A Totten

trust account owner is allowed to make withdrawals from the account during his or her lifetime, which makes this trust different from other types of trusts. One disadvantage of a Totten trust is that if the beneficiary dies before the account owner dies, then probate will be required. Another disadvantage is that a Totten trust may avoid probate, but it will not avoid a guardianship and it is not a substitute for a power of attorney. The beneficiary cannot have any access to the account while the account owner is alive, even if the account owner is incapacitated and needs the beneficiary's assistance in withdrawing funds to pay medical bills. A guardianship or power of attorney would be required in that case.

### **9. Do life insurance proceeds avoid probate?**

Life insurance proceeds payable by valid death beneficiary designation to someone other than the insured's estate need not be probated. This does not mean that the proceeds avoid estate taxation. It just means that the proceeds are paid directly by the insurance company to the beneficiary without going through probate.

### **10. Do IRA, 401(k), Keough and Pension, Profit Sharing and other retirement account proceeds avoid probate?**

The owner of an individual retirement arrangement (IRA), 401(k), Keough, pension, profit sharing and other retirement account may designate the beneficiary entitled to receive the account at his or her death by signing a written beneficiary designation. The proceeds of the retirement account would then be paid directly to the beneficiary without going through probate. They are usually still subject to estate tax, and often income tax as well, so taxes greatly dilute the value of these assets upon the owner's death.

### **11. What is elective share?**

Florida law does not require an individual to leave any property to anyone other than the surviving spouse. Thus, an individual can cause children and other relatives not to inherit anything by making a will that omits them. But, there are a few exceptions to this.

Florida law provides that the surviving spouse is entitled to take an elective share in an amount equal to 30% of the elective estate. The determination of what is meant by "elective estate" is a legal question best left to an attorney.

### **12. How does homestead pass upon death?**

Florida law provides that the decedent's homestead cannot be passed by will to anyone if the decedent is survived by a spouse or minor child, except that it can be passed to the spouse if there is no minor child. If the decedent leaves no will and is survived by a spouse and lineal descendants, the spouse receives a life estate and the lineal descendants own the remainder.

### **13. What is a pretermitted spouse or child?**

If a Florida resident marries after making a will and the will does not provide for the spouse, the spouse is generally entitled to a share of the estate as a pretermitted spouse. This share is equal in value to the share the spouse would have received if the resident had died without a will. Thus, it is important to make a new will after getting married.

Similarly, if a child is born to or adopted by a Florida resident after making a will and the will does not provide for the child, the child may be entitled to a share of the estate as a pretermitted child. This share is equal in value to the share that the child would have received if the resident had died without a will. Thus, it is important to make a new will after a child is born.

#### **14. What is exempt property of a decedent?**

The following exempt property of a deceased Florida resident is exempt from the claims of his or her creditors (except for persons having liens on these items): household furniture, furnishings and appliances in his or her usual place of abode up to a net value of \$20,000, two motor vehicles held in the decedent's name and regularly used by the decedent or his or her immediate family as their personal vehicles, and certain other property. Unless the decedent's will leaves the exempt property to others, the surviving spouse is entitled to the exempt property. If there is no surviving spouse, the decedent's children are entitled to it.

### **GUARDIANSHIPS**

#### **15. What is a guardianship?**

Guardianship is to the living what probate is to the deceased -- a court proceeding to oversee the rights and property of an individual who is unable to manage on his or her own. The court may appoint a guardian for a minor (someone under the age of 18 years). The minor's parents are often appointed guardians. The court will also appoint a guardian for a person who has been found to be incapacitated. Florida no longer uses the term incompetent to describe those who are unable, through mental or physical disability, to care for themselves or their property.

Guardians must file many papers with the court and must follow many rules. The guardian must file annual accountings with the court, and the court must audit the accountings. These requirements are intended to protect the ward (minor or incapacitated person), but the expense and public nature of a guardianship can be counter-productive to the ward. For this reason, guardianship avoidance through the use of more effective estate planning techniques, such as living trusts, have become popular.

#### **16. What is a durable general power of attorney?**

One person (the principal) may give another person (the agent or attorney in fact) the power to sign documents, write checks and do other acts for him or her by signing a written power of attorney. Most powers of attorney cease to be effective when the principal becomes incapacitated. However, a durable power of attorney remains effective when the principal is incapacitated so the agent can continue to sign documents, write checks and do other acts for the principal. Thus, a durable power of attorney may avoid a guardianship. However, all powers of attorney cease when the principal dies, so a power of attorney will not avoid probate.

#### **17. What is a declaration of preneed guardian?**

Florida law allows an individual to sign a declaration naming the persons, banks or trust companies the individual would prefer to act as guardian of the person and property in

case the individual is determined to be incapacitated. Such a declaration of preneed guardian must be signed and filed with the Clerk of Court before becoming incapacitated. The law also allows a parent to name a guardian for his or her minor children by filing a declaration of preneed guardian for minor.

## **ESTATE TAXES**

### **18. What are estate taxes?**

It is important to remember that probate avoidance does not mean estate tax avoidance. A federal estate tax return must generally be filed for anyone who dies after 2010 owning a total of more than \$5,000,000 in assets, including such things as joint accounts, IRAs, 401 (k)s, pension and profit sharing plans, real estate, bank accounts, stocks, bonds, mutual funds, and life insurance. The first \$5,000,000 is generally not taxable because the unified credit for estate taxes offsets the tax on about \$5,000,000 in assets.

Florida has no state estate tax and no inheritance tax so only the federal estate tax is applicable to Florida residents. (Florida has no state income tax for individuals, either.) Of course, if a Florida resident owns property in other states or countries, then the estate or inheritance taxes of that jurisdiction may apply.

No estate tax is payable upon assets left to the surviving spouse outright or in a trust qualifying for the marital deduction. Therefore, no matter what the value of the estate, it is possible to leave the entire estate to the surviving spouse without incurring estate taxes on the first spouse's death.

## **PLANNING FOR HEALTH CARE**

### **19. What is health care planning?**

Planning for health care provides a means of dealing with the possibility of disability. Until relatively recently, individuals did not have the legal right to name a guardian or health care surrogate to make decisions about their personal care. They could create a living trust and name someone to manage their assets, but they could not name someone to make their health care decisions. Today, however, Florida residents have the legal right to make a number of decisions about their health care, and these rights are constantly increasing by new laws and court decisions.

### **20. What is a health care surrogate or proxy?**

Florida allows an individual to name a health care surrogate to make health care decisions for the individual in case the individual is unable to make or communicate a choice regarding a particular health care decision. The law also allows a health care proxy to do this if no health care surrogate is named.

### **21. What is a living will?**

Florida recognizes a statutory form of living will which can be signed by a person to state whether or not his or her life should be artificially prolonged if he or she is incapacitated and has a terminal condition or end-stage condition or is in a persistent vegetative state

and his or her physicians determine there is no reasonable medical probability of recovery. Many individuals state that they would not want life sustained in this situation, but some individuals prefer to sign a living will specifying maximum treatment as their preference. Either way, it is the choice of each person to state in writing his or her preference.

Sometimes a living will is confused with a living trust. They are quite different legal documents. A living trust has to do with property; a living will has to do with health care.

## **ASSET PROTECTION**

### **22. What is asset protection planning?**

A primary financial goal is to earn and retain sufficient assets to pay for living expenses and medical care for one's lifetime. Asset protection planning tries to prevent the loss of family capital through unexpected events. Dissipation of principal is a concern for many families today.

### **23. How should motor vehicles be titled in Florida?**

Motor vehicles should be titled in the name of the principal driver only. In Florida, everyone whose name appears on a vehicle title is legally responsible for the negligent acts of the driver. This is called the dangerous instrumentality doctrine. A husband should own his car, and a wife should own hers. Their cars should not be jointly owned. Children should own the cars they drive if they are over the age of eighteen (18) years.

### **24. How should a married couple hold assets if they do not have living trusts?**

A husband and wife should own their joint property as tenants by the entirety and not as joint tenants with full rights of survivorship if their primary goal is to protect their assets during their lifetime. In Florida the creditors of just one spouse cannot reach property held as tenants by the entirety, but they can reach assets held in other forms of joint ownership. Florida recognizes tenancy by the entirety for both real property and personal property, but the married couple must intend that ownership be a tenancy by the entirety. It is wise for married couples owning property jointly to sign tenancy by the entirety agreements as evidence of this intent. This form of ownership also avoids probate on the death of the first spouse.

### **25. Should the homestead be held in a living trust?**

Homestead property titled in a living trust might lose the homestead exemption. In Florida, homestead property is exempt from the claims of creditors and also qualifies for a tax exemption and Save Our Homes cap. If homestead property is placed into a living trust to avoid probate and guardianship, it might lose its status as homestead property. Therefore, special attention needs to be given when transferring homestead property to a living trust.

### **26. What is a personal liability umbrella insurance policy?**

Most auto insurance and homeowner liability policies limit their coverage to less than a million dollars, but claims exceeding that amount are not unusual today. Liability claims in excess of the policy amount must be paid by the insured. A personal liability umbrella insurance policy can be obtained from one's insurance agent to raise the coverage to a

higher limit. In addition, one should ask his or her agent to include uninsured motorist coverage as part of the umbrella policy to increase the insured's own protection from uninsured drivers, of which there are many in Florida.

### **27. How should life insurance be owned?**

The person whose life is insured should be the owner of the life insurance policy, and the policy should name a beneficiary other than the estate of the insured, in order to avoid creditors claiming life insurance cash value and proceeds for payment of the insured decedent's bills. In Florida, cash value of life insurance owned by the insured is exempt from the claims of the insured's creditors. In addition, creditors of an insured cannot reach the proceeds of life insurance on the insured if someone other than the insured's estate is named as beneficiary. However, cash value of life insurance owned by an individual's spouse or anyone other than the insured is not exempt from claims of that owner's creditors and, therefore, can be reached by creditors of the spouse or other owner of the life insurance. In addition, the proceeds of life insurance that are paid to an individual's estate may be reached by the creditors of the individual.

### **28. How much title insurance should I have on my real estate?**

Title insurance should be maintained equal to the fair market value of the real estate. Most people remember to increase homeowner's insurance coverage when they receive their annual premium statements, but title insurance premiums are paid only when the policy is issued (usually when the real estate is purchased) so most people forget to increase title insurance coverage. This means that the coverage on their home for defects in title is limited to the amount stated on the policy when they bought their home.

### **29. What is Medicaid planning?**

Even if one's assets are substantial, it is possible that future medical needs or other bills will deplete assets. By using certain techniques, the individual's assets may remain for the family's future while the individual's nursing care is paid for by Medicaid. There are complicated rules that must be followed, so the earlier planning starts the better. This type of planning is complicated and time-consuming, but it can result in substantial savings to the family. Medicaid planning requires expert legal guidance and should not be tried without advice from a lawyer since every case is different.

### **30. What is a prenuptial agreement?**

A prenuptial agreement is a contract entered into by a couple before marriage that sets forth their financial agreement in case of separation, dissolution or death. Florida recognizes prenuptial agreements if a number of conditions, such as full financial disclosure, are met. Prenuptial agreements are frequently entered into when either person has children from a prior marriage. Prenuptial agreements frequently provide that the assets owned by each person at the time of marriage remain separate assets and that each person waives any interest in the other's estate or that each agrees to leave certain assets to the other. Prenuptial agreements are sometimes modified or even terminated several years after marriage by mutual agreement of the spouses.

### **31. How can depletion of assets left to a younger generation be avoided?**

The share of an estate that passes to a person under the age of 18 years in Florida will be held in a guardianship for minor until the minor reaches the age of 18, at which time the minor will be paid the entire share in full. Since some 18 year olds are not financially wise, this result can be avoided by providing in a will or a living trust that the share of anyone under a certain age shall be held in trust until that person attains the desired age.

A typical trust for minors provides that a named trustee shall hold the minor's share until the minor reaches the age of 30 years. Income on the share is used by the trustee for the minor's benefit until the minor reaches the age of 21 years; unused income is accumulated. When the minor reaches 21, the income is paid to the minor at least quarterly. One-half of the principal is paid to the minor at the age of 25 years, and the balance is paid to the minor at the age of 30 years. The trust provides that the trustee may pay the minor any or all of the trust principal at any time before the age of 30 if the trustee, in its discretion, so determines. This gives the trustee much the same control as the person creating the will or trust would have had if still alive.

### **OTHER QUESTIONS**

If you have other questions of a general nature that you would like to see added to this article, please contact:

James W. Martin, P.A.  
Attorney at Law  
City Center, Suite 102N  
100 Second Avenue South  
St. Petersburg, Florida 33701  
Tel (727) 821-0904  
Fax (727) 823-3479  
Email [james.martin@jamesmartinpa.com](mailto:james.martin@jamesmartinpa.com)  
Internet [www.jamesmartinpa.com](http://www.jamesmartinpa.com)

**Caution: This article is not intended as legal advice but is provided for general educational information about its subject matter. There is no warranty of any type regarding this article. If you require legal or other advice, then you should engage a lawyer in your state to advise you. The sale or purchase of this article does not constitute engaging a lawyer, does not constitute legal advice, and does not create an attorney-client relationship.**

7/2/11