ANSWERS TO FREQUENTLY ASKED ESTATE PLANNING QUESTIONS

These are some of the most frequently asked estate planning questions to help you better understand the estate planning process. While some of the answers to the questions which follow may not apply in your situation, you may find the answers to be informative nonetheless.

Once Your Will and/or Trust is Signed:

Q. Where is the best place to keep my signed original estate planning documents?

A. The best place is probably in a safe deposit box because it will protect the documents from theft, fire, accidental loss, and most other types of damage or harm. A potential problem, though, is getting it opened after your death.

If you decide to keep your estate planning documents in a safe deposit box, consider naming a family member or your Executor or trustee as a joint holder on the box. That should simplify matters following your death because someone will be able to get into the box without delay. Also, if you live in a flood zone, be sure to put the document in a water-tight plastic bag. As many shocked clients have learned, water damage caused by flooding can ruin the contents of a safe deposit box.

Another place to keep your original estate planning documents is with the attorney who drafted them. However, I have decided not to retain original documents because of concern over theft, fire, flood, storms, or other loss of the document. It would also be prohibitively expensive to store hundreds or thousands of original documents. Also, what would happen if I were to die or my law firm were to cease operations?

Many people keep their original estate planning documents at home in a secure place. If you have a safe at home, that can be a good place to keep them. Be aware though, when thieves enter your home and discover a locked safe, they often take the whole safe thinking they'll find cash and jewelry. The last thing they want is a file containing your estate planning documents, but that's one of the things they'll get if you keep them in your safe. Therefore, unless your safe is bolted to the foundation of your house, it may not be the best place to keep your originals.

Another option with regard to a Will is to deposit it with the county clerk's office. Taking this approach can be a great idea, except that you need to be sure your records at home clearly indicate where the original can be found. Moving to a different county or changing your Will can cause problems as well.

More people than you would expect keep original Wills and other estate planning documents in an air-tight plastic bag at the bottom of their freezers. Freezers are well insulated and heavy, and have a way of withstanding fires, hurricanes, and tornadoes. Also, they don't die or move away, and they are stolen far less frequently than in-home safes.

Q. If someone's Will is in a safe deposit box at a bank when he or she dies, how do you get access to it?

A. There are three ways to get the Will out of the box.

The easiest way is if another person is named as a joint holder of the box. That person can retrieve the Will with no problems or delays.

If no other person has access to the box, Texas law allows a spouse, child, grandchild or the Executor named in the Will to examine the contents of the box while in the presence of a bank employee. If a Will is found, the bank will be required to send it to the court. Note, though, some banks will give it to your lawyer and allow that lawyer to file it with the court.

Another option is to go to court to request that a judge order an examination of the box. If a Will is found, it will be sent to the court. This should be the option of last resort because it takes longer, requires the filing of papers with the court, and usually involves a lawyer and the associated legal fees.

Q. Should I give copies of my Will and other estate planning documents to my children and to the Executors of my estate?

A. For some people, their estate planning documents are as private as their income tax returns, and nobody is ever given copies. For other people, estate planning documents are no different than a spare key to the house, and every family member and Executor and/or trustee named in the documents is given a copy.

If you are the type of person who values your privacy, who does not especially trust your children, Executor, or trustee, or if you have written a Will or trust which does not treat all the children equally, then it may not be a good idea to hand out copies. Also, you may have more money than your children expect, and depending on how your Will or trust is written, giving them a copy may be letting them know too much about your personal business.

On the other hand, if you have a fairly open relationship with all your children, you regularly discuss finances with them, and you are leaving your estate to them in equal shares, then go ahead and give everyone a copy. Of course, if you decide to change your Will or revocable trust, you should be sure to give all the same people copies of the new documents. If you don't, then there may be some arguments following your death over which document controls the disposition of your estate.

Q. I have a Will and I want to make a minor change. Is there a way for me to make the change myself without hiring a lawyer?

A. Yes, there are a few ways. One way is to make the change yourself by writing an amendment to your Will (called a "codicil") entirely in your own handwriting. You should be sure to date and sign the new document and clearly state which section of your Will you are modifying. When you write a codicil by hand, no witnesses or notary are required. You could also type the codicil, but if you do, you will need two witnesses to the signing.

Of course, if the change is important and you want to be sure it's done right, you should not try to make the change yourself, but instead you should hire a lawyer to prepare a codicil for you.

Guardianship Questions:

Q. If my husband and I die together, where would our children live for the first day or week or month until a judge can determine who will be their guardian? What if there are relatives we absolutely don't want them to live with, even temporarily?

A. There is no simple answer to your question because where your children would live depends on when you die and where your children are when you die.

For instance, you and your husband may be with your children when you both die, thereby leaving them without immediate supervision. Or your children may be at day care, at school, or with a babysitter, and that means the supervision they are receiving would soon be coming to an end. In these types of situations, it is likely that the police will show up and take charge.

The police would allow your children to be placed in the care of a relative or friend as long as they are convinced that person is not unfit to care for the children. The police can use the computer in their car to obtain this type of information. For instance, a relative who has a criminal record would probably not be allowed to take the children.

If your children are old enough to tell the police who to call, the police would likely do so and attempt to leave the children with the proper party. But if your children are too young to know phone numbers, addresses, or even complete names, or if no temporary guardian is available, then the police would take your children to Child Protective Services (CPS).

CPS would care for your children until a suitable family member or friend is located. CPS may place your children in foster care, if necessary, until a judge determines who the permanent guardian will be.

It may be the case that your children are already in the care of a relative or close friend when you both die. In such a situation, the police and CPS may never get involved with the care of the children. Instead, the children would most likely remain with that family until a judge makes a determination as to permanent guardianship.

You mentioned that there may be relatives you don't want your children to live with, even for a brief period. The problem is that if the police don't know how you feel, and if the relative otherwise checks out, the children may be placed in that person's temporary care. Unfortunately, it is too often the case that relatives want to control the children's inheritance, and they know funds will be available if they are acting as guardians.

You could prepare a witnessed and notarized document stating your intention regarding who you do and do not want to serve as guardian. In fact, that information is often contained in a person's Will. But the problem is that this document will probably not be available when it's needed. Most people don't think to send their kids to school, daycare, or a friend's house with a copy of their Will or other legal documents, and even if they did, the police may not be inclined to rely on the document's validity.

If the police show up and several relatives or friends demand to take care of the children, the police will most likely not make a choice between them, but will instead deliver the children to CPS. An investigation will then be conducted by CPS to determine who is most suitable to take care of the children until a guardian is formally named by the court.

You should be sure to state in your Will who you want to serve as the guardian of your children in the event you and your husband pass away before your children are legal adults--age 18 in

Texas. You can name any person you want, and you can also provide a list of persons in order of preference. You can even name two persons to serve, but they must be married to each other. Please note the answer to your question may be different if you don't live in a large Texas city.

Gifts:

Q. What gifts can I make without having to pay gift taxes?

A. Every year, you can give any person you want as much as $13,000 without any gift tax consequences. This dollar amount is known as the annual exclusion, and it is now indexed for inflation. It will be increasing from time to time in $1,000 increments.

If you are married, the amount you can give to each person doubles to $26,000 since the person receiving the gift can receive $13,000 from each spouse. Gifts can be in the form of cash, stocks, bonds, real estate, or anything else of value. Buying real estate or bonds in the names of one or more other persons is the same as making a gift of that property to them. The value of the gift would be the amount of money you spent to buy the property or the bond.

You can also make tuition payments for any person you choose, and these payments do not count toward the $13,000 annual limit. Payments you make for medical expenses don't count against the $13,000 limit either. However, if you make a tuition or medical payment, be sure to pay the school, hospital or doctor directly, as a check made payable to a person which is used for tuition or medical care counts towards the $13,000 annual limit.

If you want to give more than $13,000 to any one person, to the extent your gifts exceed $13,000, you will use up a portion of your $5,120,000 lifetime exemption. This is the amount each person can give away without having to pay gift or estate taxes. By way of example, if you give one of your children $45,000 this year, you can exclude the first $13,000 under the annual exclusion, and the other $32,000 will leave you with a remaining lifetime exemption of $5,088,000.

Keep in mind that if the gifts to any person exceed $13,000 during a single calendar year, you will be required to file a gift tax return by April 15th of the following year to report the gift. That is how the IRS keeps track of how much of your $5,120,000 lifetime exemption is still available. Once you have given away more than the $5,120,000 lifetime limit, you must start paying gift taxes. The estate and gift tax rate is presently 35%.

Before making large gifts, it is often a good idea to talk to an estate planning attorney. Once gifts are made, you can't go back and do things a better way. For instance, if you are planning to make really large gifts, then it may be wise to create trusts for the benefit of your children. There are a number of important advantages to creating trusts, with few downsides.

Q. What are 529 accounts, and are they really as good as everyone seems to think?

A. Yes, 529 accounts may be that good. In fact, they may be one of the best ways--and many people think they are the best way--to save for a child's education.

You have a number of options when it comes to saving for college. There are Uniform Transfers to Minors Accounts, education IRAs, and prepaid tuition plans, to name a few. All the options have their advantages, yet 529 accounts seem to combine the best features of all of them to make a fairly good investment vehicle.

The main advantage is that the earnings and most withdrawals are income tax free. Even though you must use after-tax money to create the accounts, all capital gains, dividends, and interest are generally tax free. Withdrawals are subject to income taxes only when they are not used for tuition, room, board, and other authorized expenses.

Another advantage is that gifts to a 529 account not only qualify for the $13,000 annual gift tax exclusion, but you can even make five years worth of gifts today and elect to treat them as being made equally over a five year period. In other words, if a married couple with four grandchildren can give as much as $130,000 to each grandchild right now, for a total of $520,000 to the four grandchildren. Each grandchild will be treated as receiving $26,000 per year for five years.

As far as estate taxes are concerned, all amounts you contribute to the account will be excluded from your estate even though you are the person controlling the account. However, you should note that if you elect to spread your contributions over five years for gift tax purposes, and you die within that five year period, a portion of the gift will be included in your gross estate.

You can also designate a successor to yourself to control the account should you die before a grandchild goes to college.

There are a few downsides worth noting. Unlike some of the other alternatives available for saving for college, 529 accounts don't let you choose the investments yourself. All you can pick is the type of investment portfolio the account will maintain. Also, if you use funds in the account for non-qualified purposes, a 10% penalty will apply to the portion of the withdrawal which constitutes investment gains. Importantly, as well, some of the tax laws which make 529 accounts so great may expire in 2011 if Congress fails to extend the new tax laws, and other key benefits can always be changed during a future session of Congress.

Overall, 529 accounts present you with an unbeatable combination of features. The accounts offer income tax free growth and withdrawals with no gift taxes, no estate taxes, retained control of the funds, and flexibility in the future should circumstances change.
Call your broker or financial planner for details on how to set up the 529 accounts.

Revocable and Irrevocable Trust Questions:

Q. For whom are living trusts most appropriate? What are the pros and cons?

A. For starters, while it is true that probate can be expensive and time-consuming in some other states, in Texas, we have a streamlined system of probate. As long as you hire a lawyer with experience in probate court, you have a well-written Will, and nobody files a lawsuit after your death, then probate is typically not so bad.

Stories you read in the paper may lead you to believe otherwise. The heirs of multi-million dollar estates frequently fight it out in court for a larger inheritance. Also, bookstores carry dozens of books which talk at length about the delays and high costs associated with probate.

Even so, living trusts are useful estate planning tools, and they do have their place in many people's estate plans. If you find any one of the following benefits appealing, then a living trust may be appropriate for you.

Benefit #1: No Court Involvement. When a person dies, most properties pass either under a person's Will or under a living trust. Some properties--such as life insurance, IRAs, and certain types of bank and brokerage accounts--pass directly to named beneficiaries. If property passes under a Will, then the Will must be probated at the courthouse. Probate typically entails hiring a lawyer, filing a number of papers with the court, attending one or more hearings, and providing a written inventory to the court valuing the properties which passed under the Will.

Some people don't want this type of involvement with the court, so they opt for a living trust. By transferring all properties which would otherwise pass under your Will to a living trust, you can avoid the court entirely. For estates which don't owe estate taxes, there is usually less work for the lawyers, and that translates into reduced estate administration costs.

Benefit #2: Privacy. As mentioned above, when a person dies with a Will, an inventory must be filed with the court. You may not want your friends, neighbors, or the media to be able to read a listing of what you own and what it is worth. After all, an inventory is a public record. With a living trust, your properties and their values are all kept private.

Benefit #3: Plan For Future Incapacity. You may be worried that one day you won't be able to manage your own finances, and you may want to name someone to handle these types of matters for you. You can address this potential problem with a power of attorney or with a living trust. A power of attorney will usually be accepted by banks, title companies and the like, but there is always the risk that an institution's legal department will reject it. The same person who may be denied the ability to use a power of attorney will likely be allowed to do anything he or she wants when acting as trustee of a living trust.

Benefit #4: Harder to Challenge. If you are planning to disinherit one of your children or grandchildren, you may be better off with a living trust because there is nothing filed at the courthouse. Also, it is a little harder to contest a living trust than a Will. Many people are interested in doing as much as possible to prevent a successful challenge to their estate plan.

Benefit #5: Avoid Out-of-state Probate. If you own property in another state, you can avoid a costly probate proceeding in that state by transferring the property to a living trust.

Before you establish a living trust you need to understand the downsides, which include the following:

Disadvantage #1: Time-consuming to Set Up. Depending on how many different types of properties and accounts you own, it can take quite some time to switch everything over to the name of your living trust. Also, some financial institutions in Texas are not geared up to handle living trusts, so you can expect a little trouble and frustration in getting the trust fully established.

Disadvantage #2: Complicated. Wills are usually shorter and simpler to understand than living trusts. Also, with a Will, you can sign it and forget about it. But with a living trust, you need to put your property into the trust and run your life out of it for as long as you live. For many people, this downside outweighs all the potential benefits.

Disadvantage #3: Time-consuming to Revoke. A year after you set up the living trust, you may decide you don't want it any more. At this point, you will need to return to every bank and brokerage house, and undo everything you had done to establish the trust. You can expect more lawyers' fees too.

Disadvantage #4: Post-Death Costs Not Eliminated. If you have a taxable estate (which is generally an estate over $5,120,000), there will be a lot of work to be done after death regardless of whether probate is required. Typically, there are tax returns to file, trusts to establish, assets to value, and more. Avoiding probate will only marginally reduce the cost of administering a taxable estate.

Disadvantage #5: May Still Need to Probate Will. If you leave just one bank account or one piece of real estate out of the trust, probate will still be necessary. And probate takes about as long when there is one asset as when there are twenty.

Q. What is the difference between a Living Trust and a Bypass Trust?

A. A Living Trust is a revocable trust created while a person is alive, whereas a Bypass Trust is typically an irrevocable trust created at death. A Bypass Trust can be created by a Living Trust or by a Will. (Yes, a Living Trust can create a Bypass Trust, but a Bypass Trust would never create a Living Trust.)

A Living Trust is simply an ownership arrangement where property is held in the name of a "trustee" rather than in the name of the person who really owns the property. People almost always create Living Trusts for their own benefit, with the goals of avoiding probate, addressing the possibility of future incapacity, and keeping matters private.

Normally, the person who creates a Living Trust names himself or herself as trustee and as beneficiary. Upon that person's death, all or a portion of the property which remains in the Living Trust passes according to the terms specified in the trust agreement.

Bypass Trusts are most often created when a husband or wife dies in order to save taxes when the other spouse passes away. When a married person dies and leaves everything to his or her spouse, that surviving spouse may then be too wealthy to pass everything to their beneficiaries tax free. Being "too wealthy" typically means the married couple is worth over $5,120,000. The Bypass Trust is a way to shelter the first spouse's $5,120,000 exemption from taxation when the surviving spouse dies, thereby doubling the amount that can be left tax-free to $10,240,000.

Bypass Trusts do have non-tax benefits though, and for some people, saving taxes is not the motivating factor in creating one. For instance, Bypass Trusts protect the trust property from creditors' claims, and they allow the deceased spouse to direct where the trust property passes when the other spouse dies.

There are some exceptions to the statements contained in this answer. For instance, Bypass Trusts are not always created at death. Some wealthy people create them during life, and other people use their estate tax exemptions for different purposes rather than the creation of a Bypass Trust. Also, in answering your question, I have assumed that when you said "Living Trust," you meant the standard type of revocable trust people across the country regularly create and not another unusual type of trust which may be created while someone is living.

Q. What is a Miller Trust, and how does it work?

A. A Miller Trust is a written trust agreement which makes it possible for people to obtain Medicaid nursing home coverage even though they actually make too much money to qualify for Medicaid. Importantly, they are not actually called Miller Trusts anymore. Instead, they now go by the name Qualified Income Trusts.

The rule in Texas is that you must have both limited resources and limited income in order to qualify for Medicaid coverage. These are two distinct tests that must be met, and if you don't satisfy both of them, then Medicaid nursing home coverage will not be available.

The first of the two requirements--that you must have limited resources--has nothing to do with Qualified Income Trusts. Basically, if you have more than $2,000 worth of assets, you are too wealthy to qualify for Medicaid no matter how little money you earn.

Cash, stocks, bonds, retirement accounts, non-homestead real estate, and other investments are included in the $2,000 figure, but your homestead (no matter how much it is worth), $2,000 of personal property, a burial plot, a small amount of life insurance, and a car are generally not counted.

People with more than $2,000 can give away properties or convert them into properties which are not counted. However, depending on the date of the transfer, there may be a 36 month or 60 month look-back period. The look back period is a way to keep you from giving away all your property and then applying for Medicaid the next day. For transfers made prior to February 8, 2006, the 36 month look-back period continues to apply unless the transfer was made to a trust, in which case the longer 60 month look-back applies. For transfers on or after February 8, 2006, a 60 month look-back applies to all transfers.

Also, there are rules which generally allow the spouse of someone trying to qualify for Medicaid to retain about $2,841.00 worth of property. A spouse's property is not counted when determining the total value of assets for the $2,000 resources test.

The second of the two requirements--that you can earn no more than a certain dollar amount of income per month--is where Qualified Income Trusts enter the picture. Under current law, the monthly dollar limit is $2,022. People who earn more can't qualify for Medicaid unless they have a Qualified Income Trust.

What you do is assign your income to the Qualified Income Trust, and the wording of the trust limits how much of the income can be distributed. This way, a person who makes more than the monthly limit will be treated as earning less than that amount, thereby satisfying the Medicaid income test. The trust can allow for certain payments, including insurance premium payments, other payments to support a spouse, and $60 each month for the beneficiary's personal needs.

Money remaining in the trust after those payments are made must be paid to the nursing home for the beneficiary's care, with Medicaid picking up the balance. With Qualified Income Trusts, people can get the government to cover the portion of the nursing home costs that they can't afford.

Lawyers prepare Qualified Income Trusts. Therefore, everyone who needs one must first meet with a lawyer to discuss the specifics of the trust and all the other planning that goes with it. To learn more about Qualified Income Trusts, search the internet for the words "Texas qualified income trust." You can also call the Texas Department of Human Services at 888-834-7406 or visit their website at www.dads.state.tx.us. They have a summary of Qualified Income Trusts, and they also publish a "Medicaid Eligibility Handbook" which contains other helpful information.

Q. What are the tax advantages to setting up an irrevocable trust to own an insurance policy?

A. Although life insurance is generally not subject to income taxation upon the death of the insured, it is subject to estate taxes if the insured owns the policy (or has other ownership rights). Owning a life insurance policy results in all or a portion of the insurance proceeds being included in the insured's estate and therefore taxed when death occurs, thereby substantially defeating the purpose of buying the life insurance.

While it is true that life insurance which is received by a spouse is not subject to estate or inheritance taxes because of the unlimited marital deduction (assuming the surviving spouse is a citizen of the United States), those same proceeds will be included in the spouse's estate later on when he or she dies. Therefore, life insurance trusts are often a good idea even when there is a surviving spouse to receive the proceeds.

Life insurance trusts offer a number of significant advantages over outright ownership. For starters, the trust will insulate the proceeds from the claims of creditors and from spouses in a divorce.

Also, life insurance trusts can be written to last for children's lifetimes and then pass without estate taxes to additional trusts for grandchildren. This is a feature commonly referred to by estate planning lawyers as "generation skipping planning." Your children shouldn't be alarmed by the words "generation skipping" because you are not skipping them. Your children can serve as trustees of their trusts, and they can be given the power to make distributions to themselves or their children according to fairly liberal standards. Normally, trusts like the ones being described would allow your children to make distributions for their health, education, maintenance and support. And your children would be the ones determining how much money it takes to maintain and support themselves. Even though the life insurance proceeds will be held in a trust, your children would not be prevented from using the trust funds.

Custodial Account Questions:

Q. I created a Uniform Transfers to Minors Account for my son a few years ago, and it is now worth about $80,000. My son has no idea about the account, but I know he is legally entitled to the funds when he turns 21 later this year. I realize it's not exactly legal to put the $80,000 back in my name, but I don't want him to get the funds because I have a suspicion it will be spent in a matter of weeks. Is there anything legal I can do to maintain control of the account and keep him from having full access at age 21?

A. There are two realistic options available to you.

For starters, you could invest the $80,000 in a limited partnership controlled by you. When your son reaches age 21, he will not receive the $80,000, but instead will become the owner of a limited partner interest. As a limited partner, his rights can be severely restricted, thereby allowing you to control the funds for as long as the limited partnership exists. The limited partnership agreement can be written so that your son has no right to demand a distribution or veto your investment decisions.

One of the downsides to creating a limited partnership is that you are introducing a bit of complexity into your life. Many people find this type of business arrangement too complicated for their tastes. Also, the fees to set up a limited partnership can be costly. And once the limited partnership exists, you will need to file annual income tax returns to report the partnership's income to the IRS.

Not only that, but many people create a corporation or limited liability company to serve as the limited partnership's general partner. If you choose to create this additional entity, the fees to form and maintain the limited partnership arrangement will be even higher.

A word of caution: Your son may be the type to hire a lawyer to represent his best interests. If he does, it is possible--although highly unlikely--that your son might sue you to recover any funds you have placed in a limited partnership which limits his rights. In theory, your son would have a compelling argument. After all, most people would agree that receiving $80,000 in stocks and cash is better than receiving a limited partnership interest with all the associated restrictions.

Another option is to tell your son about the existence of the account, but make it clear that he would be making a huge mistake by not letting you continue to control the funds. If he puts up too big a fuss and demands the money, you can modify your estate plan and completely cut him out as a beneficiary of your estate. There is nothing illegal about you managing your son's investments for him, assuming he has the right to ask for the money at any time.

Q. I set up custodial funds in my children's names to pay their college expenses, with me as custodian. The mutual funds I invested in have done so well that the accounts far exceed what they'll need for college. Can I legally give money from these funds back to myself? If so, how?

A. No, even though there is nobody to stop you from giving the money back to yourself, doing so would be illegal. Gifts to custodial accounts are irrevocable.

If you were to return the funds to yourself, your children would have the right to sue you, and they would probably win. Of course, they would probably never know what you did, and most kids don't sue their parents (especially if they think there may be a lot more money to come one day).

Fortunately, you can start spending the money in the custodial account on things for your children which you may now be paying out of your own funds. For instance, if one of your children wants to spend the summer studying in France or if one of your children needs a new car, use the money in the custodial account to pay for these expenses, not your own money.

Tax Questions:

Q. Could you explain how stock values are "stepped up" as a result of death? My father has a lot of stocks that he bought decades ago, and I'll be inheriting them when he dies.

A. Getting a stepped-up cost basis on inherited stock allows you to save taxes when the stock is sold.

For instance, if your father bought a stock at $10 a share, and it is now worth $100 a share, when he sells the stock, he will owe a capital gains tax on the $90 the stock has appreciated. If your father gives you the stock before his death, the gift will be valued at $100 a share, but you will take his cost basis of $10 a share. That means you will owe a capital gains tax when you sell the stock.

If your father waits to give you the stock until after his death, the stock will be valued in his estate at $100 a share, and you will have a new cost basis of $100. Your father's $10 cost basis gets "stepped-up" to $100 as a result of his death. This is true even if your father's estate is not required to file a federal estate tax return. When you later sell the stock, you will only owe capital gains if the value of the stock is higher than $100.

If your father is married, rather than leaving the stock to you, your father might leave the stock to his wife (presumably, your mother). In that case, your father and mother would probably own the stock as community property, with each owning one-half of the stock. Upon your father's death, your mother will not only get a stepped-up cost basis on your father's one-half of the community property stock, but she will get a stepped-up cost basis in her half of the stock as well. This is a benefit which is generally available only in community property states.

There are two exceptions worth noting. First, after your father's death, if his estate owes estate taxes, it is possible to value the stock six months following his date of death. If the stock is worth less at that time, you can use this lower value as a way to pay less estate taxes. But if you do, the basis in the stock is also the lower value--not the higher date of death value.

Second, if you own $20,000 worth of stock that you purchased for $1,000 years ago, you may be hesitant to sell the stock because you don't want to pay capital gains taxes (typically 15% of $19,000, or $2,850). Your idea may be to give the stock to your father, who is very ill and near death, and then have him leave it to you when he dies, thereby getting a stepped-up cost basis. As you might expect, the IRS doesn't like this, and there is a rule which says if your father dies within one year of being given your stock, then you receive the stock with your old cost basis. If your father makes it more than a year, then you do get the stepped up cost basis.

Q. A relative recently died and left me some stock. How is the tax handled on this transaction? Do I pay the tax when I sell it? Her basis in the stock was very low.

A. When you inherited the stock, you received what is commonly referred to as a stepped-up cost basis. That means your relative's low basis in the stock is forgotten, and instead, your new basis is the stock's value on the date of death.

Technically, your cost basis is the average of the stock's high and low trading prices on the date of death, not the stock's closing price. If your relative died on a weekend or holiday, then a weighted average of the two nearest open market trading days is used to determine your cost basis. For instance, if your relative died on a Saturday, the average of the high and low trading price on Friday is multiplied by two-thirds, and the Monday high and low average is multiplied by one-third. The two resulting numbers are added together to arrive at the new cost basis.

As a general rule, no taxes are due until you sell the stock unless your relative had a taxable estate, which in 2012 is an estate over $5,120,000. And when you do sell the stock, you will have a short term capital gain or loss if you sell the stock within one year of your relative's death, or a long term capital gain or loss if you wait longer.

Note: there are several exceptions to the general rules in this answer.

Power of Attorney Questions:

Q. What is the difference between a Medical Power of Attorney and a Directive to Physicians?

A. A Medical Power of Attorney is a document that allows you to name an agent to make medical treatment decisions for you in accordance with your wishes if you are not able to do so yourself.

A Directive to Physicians is a document that allows you to address what kind of medical treatment you would like to receive if you ever face a terminal or irreversible medical condition. It is often referred to as the document where you tell the doctors to "pull the plug." Most people request that all treatments other than those needed to keep them comfortable be discontinued or withheld so they can be allowed to die as gently as possible.

The main difference between the two documents is that the Directive to Physicians is where you actually express your own specific preferences as to the use of life sustaining treatment, and the Medical Power of Attorney is where you name one or more persons to make most medical decisions for you.

Within a Directive to Physicians, it is also possible to name an agent to make medical treatment decisions for you in accordance with your personal wishes if you do not also have a Medical Power of Attorney. Even so, most people go ahead and sign both a Directive to Physicians as well as a Medical Power of Attorney, and they do not name an agent within a Directive to Physicians.

Q. If I name someone to make medical decisions for me in a Medical Power of Attorney, can that person later decide not to turn off the machines even though I have signed my Directive to Physicians?

A. If you have both a Directive to Physicians and a Medical Power of Attorney, there certainly can be some overlap.

For instance, a decision made by your agent under a Medical Power of Attorney may have the effect of ending your life within hours or days even though you may not yet have reached the point at which your Directive to Physicians would have applied to your medical condition.

In situations where there is overlap, Texas law states that your attending physician and the agent you have named to make medical decisions must act in accordance with your directions. Presumably, this means that if your physician has determined you are in a terminal or irreversible condition, your Directive to Physicians should be honored. However, since the law is not as clear as it could be, it is a good idea to include a provision in your Medical Power of Attorney requiring your agent to comply with a validly executed Directive to Physicians.

Probate Questions:

Q. Which assets are handled outside of probate?

A. There are a number of different kinds of properties that may pass outside the provisions of your Will.

The list includes life insurance, retirement plans, individual retirement accounts, and annuities. When you purchased or set up these types of assets and accounts, you were probably asked to fill out a form listing the beneficiaries who will receive payments upon your death. These investments will pass to the named beneficiaries regardless of whether you have a Will.

However, if you don't have a beneficiary named, if the beneficiary named is your "estate," or if all the beneficiaries are dead, then those investments will be paid to your estate and pass under your Will.

Certain bank and brokerage accounts will also pass outside your Will. For instance, payable-on-death accounts (sometimes called "POD" accounts) will be distributed to the named beneficiary. Additionally, accounts set up by one or more persons as joint tenants with rights of survivorship will pass to the surviving account holder or holders.

Some banks allow you to set up what they call trust accounts even though there is no written trust agreement. These types of accounts will pass to a named beneficiary without going through probate as well.

Not all joint accounts pass to the survivor. When joint accounts are set up as tenants in common, the portion of the account that was owned by the decedent passes under his or her Will. Many people have decided to create revocable or irrevocable trusts as part of their estate plan. Virtually all such trusts are designed to pass directly to persons or other trusts named in the document rather than under a Will.

You may find that most of your estate consists of non-probate property. Therefore, it is extremely important to coordinate the beneficiaries of all these properties to make certain your assets will be distributed as you want when you pass away.

Q. Must a Will be probated if the estate is less than $5,120,000? Are insurance proceeds included in that total?

A. There is no requirement that you probate a Will no matter how much the estate is worth. Wills need to be probated only if property is not transferred by some other means.

You are confusing probate with the filing of a federal estate tax return. Regardless of how the property is transferred at death, if an estate is valued at $5,120,000 or more in 2012, then a federal estate tax return must be filed. And yes, you must include proceeds of life insurance owned by the decedent in computing the $5,120,000.

The probate process is primarily a method of changing title from the deceased to the person or persons who inherit the property. Some assets require probate, such as real estate and bank accounts held only in the name of the deceased, while others do not, such as life insurance policies or retirement plans payable directly to named beneficiaries.

Q. I'm named as the executrix of my father's Will. What do I do when he dies?

A. There are some steps you must take and other steps you may need to take. Exactly what you must do depends on the types of assets your father owns and the size of his estate.

Find the Will. Locating an original Will can sometimes be difficult. Many people keep their Wills in a safe deposit box, while others keep them at home or some place else. It may be a good idea to talk to your father and find out where his is kept. If it's at the bank, be sure you're authorized to enter the box, otherwise it may be harder to get the Will out.

Hire a Lawyer. Most of the time, it's necessary to hire a lawyer. The judges in some smaller counties allow people to represent themselves in probate matters, but you still may have trouble preparing all the necessary forms that are required. It's safe to say, therefore, that lawyers must be hired in the vast majority of cases.

Application For Probate. The first document your lawyer will prepare is an application for probate. The original Will is filed at the court house along with the application and a filing fee. The application is usually several pages long, and it describes certain facts about your father, his Will, and his property.

The Probate Hearing. After a ten day mandatory waiting period, a probate hearing will be held. Your lawyer will schedule this hearing for you. Under ideal circumstances, you can get your hearing two weeks after the application is filed. However, it often takes three weeks or longer to schedule a hearing because of the backlog in the courts and other scheduling conflicts. In larger counties, the hearings are held in a crowded courtroom, and dozens of cases are heard one after another. In smaller counties, the hearings are often less formal, with the judge often shaking your hand at the door to his or her office, and then showing you to a chair right there in the office.

Testimony and Order. At the hearing, your lawyer will ask you a number of routine questions. Most of the time, the judge will then sign an order admitting the Will to probate. The order is a document which your lawyer will have prepared and brought to the hearing. You will also be asked to sign the written document containing your testimony.

The Oath. After the hearing, you will need to sign an oath stating that you will fulfill your duties as independent executrix of your father's estate. The word "independent" means that you will not need to ask the court for permission to sell estate assets or to conduct any other duties as executrix.

Letters Testamentary. After your oath is filed, you will be able to order "letters testamentary" from the county clerk. The letters will authorize you to close bank accounts and collect and claim other estate assets. You can order as many letters as you think you will need.

Notices. Within 30 days of receiving letters testamentary, you must publish a "notice to creditors" in a local newspaper. This notice lets creditors of your father's estate know where they may file claims to recover money they are owed. It must be published even if your father has no creditors. Certified letters must also be sent to all of the charities named in your father's Will. Proof that you performed these tasks must be filed with the court as well.

File the Inventory. Within 90 days of qualifying as executrix, you must file an Inventory with the court. The Inventory lists all the assets which pass under your father's Will. Importantly, the inventory doesn't always list everything a person owns, since you don't have to list assets that pass directly to named beneficiaries. For instance, life insurance, retirement plans, some joint accounts, and many other properties are designed to pass directly to a named beneficiary. After the Inventory is filed, the judge will sign an order approving the Inventory.

Tax Returns. Estates valued at over $5,120,000 must file a federal estate tax return and a Texas inheritance tax return within nine months of death. Taxes will be owed if the net estate exceeds that amount. The tax rate on assets over $5,120,000 is 35%. You may also be required to file income tax returns for the estate. Often, the lawyer handling the estate will also prepare the estate and inheritance tax returns. However, few lawyers prepare income tax returns.

In answering your question, I have assumed your father's Will was executed, witnessed and notarized properly, and that it contains all the right language. Not all probate proceedings are as easy as this answer indicates. For instance, you may find yourself in the middle of a Will contest, or your father's Will may have been written in another state, thus complicating the probate.

One more thing: Not all Wills need to be probated. You may find that everything your father owns passes directly or automatically to named beneficiaries. If the only assets left are his household goods and other personal items, there is no need to hire a lawyer and go through probate.

Q. For years, I've heard that probating a Will in Texas is simple and can be done by a lay person, but in response to a recent question on the subject, you said the first step is to hire a lawyer. To clarify, can a lay person probate a simple Will in Texas without the need to hire a lawyer?

A. The answer to your question depends on where you live.

In densely populated counties, the courts are extremely busy, and they have adopted policies of not allowing people to probate Wills without a lawyer. But in smaller counties, the judges will often let people probate Wills on their own.

The courts in the larger counties simply don't have the time to explain the probate process to all the people who call asking for help. More often than not, when people try to conduct a probate proceeding without a lawyer, forms are prepared incorrectly or not at all, and the required court hearings are slowed to a crawl.

Courts justify this decision in a number of ways. Some courts say the "client" in a probate matter is the estate of the person who died and not you, the Executor. You may be allowed to represent yourself in a legal matter, but you cannot represent another party--which is the estate in a probate matter--unless you are a licensed attorney.

Other courts say that because many probate proceedings are not straightforward or because witnesses may need to be deposed or cross-examined, a lawyer should be present. Judges are sometimes unwilling to let non-lawyers handle the representation and conduct the court hearing.

Q. I was told that a Muniment of Title could be used to settle an account with a brokerage house. I tried that approach with my wife's estate, of which I am the Executor. The brokerage firm would not accept the Muniment of Title because I was not appointed by the court to be the Executor, and they wouldn't look at the Will at all, where my role is laid out. What did I do wrong?

A. It's hard to say what was done wrong. Wills are probated as muniments of title--which is a simplified way of going through probate--all the time, and they usually work just fine.

Let's review the steps you should have taken in probating your wife's Will as a Muniment of Title. Perhaps you'll discover what went wrong as you read through the process.

You should have started by filing the original Will along with an application for probate with the county clerk's office. The application should have stated (among other things) that there is no necessity for administering your wife's estate and that there are no debts of the estate other than those secured by real estate. (You can probate a Will as a Muniment of Title if there is a mortgage on your home.)

After a mandatory 10 day waiting period, you should have attended a hearing where you or another person would have testified before the court about certain facts relating to the decedent. Most people hire lawyers to prepare the paperwork and handle the scheduling and conducting of the hearing. In fact, most courts don't allow people to appear in court without a lawyer.

Assuming all went well at the hearing, the judge then would have signed an order prepared by your lawyer directing that the assets owned by your wife be distributed as provided in her Will. It would have been advisable to add language to the order specifying the name of the brokerage firm, the account number, and the person or persons to whom the securities must be distributed. The order should have also contained a provision waiving the requirement that you report back to the court once the brokerage account has been distributed. Courts will routinely waive this requirement, but you must remember to ask for the waiver.

Once the probate hearing was over, you should have ordered a certified copy of the Will and the signed order from the clerk's office, and then forwarded those documents to the brokerage house. They may prefer for you to be the court-appointed executor of your wife's estate, but when presented with a court order requiring them to disburse the account, they should do as directed.

According to Texas law, the order admitting the Will to probate as a Muniment of Title is sufficient legal authority for banks, transfer agents, brokerage houses or other businesses holding assets of the estate to pay those assets to the person or persons named in the Will.

Other Common Estate Planning Questions:

Q. What is a holographic Will, and how does it work?

A. A "holographic" Will is a Will that is written entirely in your own handwriting.

No witnesses are required, and no portion of the Will may be typed. If you type some or all of the words, or you incorporate other markings or other documents into the text, you could inadvertently invalidate the Will. The idea behind holographic Wills is that since the entire document is in a person's handwriting, there is no need for witnesses to sign it to establish its validity. Holographic Wills don't need to be notarized either, but they do need to be signed.

Most lawyers would tell you it's a bad idea to write your own Will because you can easily create ambiguities and other defects that can lead to litigation following your death. This is especially true in second marriage situations when one or both spouses have children from prior marriages or relationships.

If you decide to write your own Will, you should be sure to say in the introductory sentence that it is your Will, and that you are revoking all prior Wills. If you don't revoke all prior Wills, your handwritten Will and any other Wills that have not been revoked will be looked at together to determine who inherits your estate. As you may expect, problems arise when the various documents conflict.

Be sure to identify each bequest clearly and to give away all of your property. A frequent problem with handwritten Wills is that they list some accounts and properties, but then leave out others. Property that you don't mention in your Will passes to your heirs as determined by our legislators in Austin. Your heirs may not be the same persons named in your Will. Also, going to court and figuring out who your heirs are can be an expensive and time-consuming matter.

It's often the case that handwritten Wills don't name an executor, and the ones that do may fail to state that the executor should serve as an "independent" executor. Failure to name an "independent" executor could result in an administration of your estate which is fully court supervised, expensive, and lengthy.

Another important provision that is often left out of a holographic Will is a waiver of bond. When you don't request a waiver, the judge can require that your executor post a bond. Sometimes, it's not possible to even get a bond, and if your executor can get one, it will undoubtedly be expensive.

Lastly, it should be noted that handwritten Wills are almost always more difficult to probate than typed Wills because courts require two witnesses who are familiar with your handwriting to testify that the Will was, in fact, written by you.

Q. I've moved to Texas from Florida, where I had a simple Will drawn with my daughter as the only beneficiary. Do I need to get a new Will made in Texas?

A. Yes, you should prepare a new Texas Will.

While it is true that Texas recognizes the validity of a Will executed in Florida, your daughter will have an easier time probating your Will if you have a new one prepared using correct Texas language.

For instance, there is almost no chance your Florida Will names your daughter to serve as the "independent executor" of your estate. In fact, she is probably called your "personal representative" which is the lingo used in Florida. Being an independent executor means she will not be supervised by the court, the preferable way to administer an estate. If you don't state in your Will that your daughter will be your independent executor, she can still make a special request to the judge after your death asking that she be allowed to act independently, but there is no guarantee that her request will be approved.

Also, the end of your Will should have what is called a "self-proving affidavit" which is a long statement discussing the signing ceremony. Texas has its own unique form of "self-proving affidavit" and it is different from the one used in Florida. It is possible that the judge will refuse to recognize Florida's "self-proving affidavit" thereby causing your daughter unnecessary delays and expenses.

Q. My sole assets are a car, personal belongings and a savings account with less than $50,000 in it. Do I need a Will?

A. You would think there's a simple yes or no answer to your question. But as with so many other legal questions, the answer is: maybe, maybe not.

With regard to your bank account, you can set it up so that it passes to one or more persons who are named as the beneficiaries. This type of account is normally called a "payable on death" or "transfer on death" account. Most, if not all, banks allow their customers to establish this type of account.

If the persons you have named are alive when you pass away, all they will need to do is present the bank with a death certificate, and they will be given the money. However, if you die without having named a beneficiary or if all of the beneficiaries you have named die before you, then some sort of probate will be needed.

In that situation, if you die without a Will, your estate would probably be small enough to qualify as a small estate. That means the normal probate process could be simplified by filing a Small Estate Affidavit. The Affidavit will list the properties you owned, and it will state who your heirs are under Texas law. Once an order approving the Affidavit is signed by a judge, your heirs can claim the money by presenting a certified copy of the order to your bank.

If your estate does qualify as a small estate, but you have a Will, then your heirs can't file a Small Estate Affidavit. Instead they must take the more expensive route of probating your Will. So, depending on the expected size of your bank account, you may be doing your family a disservice by having a Will. Wills that transfer property must be probated, and in nearly all situations, that means hiring a lawyer and paying court costs and other fees.

Also, a Small Estate Affidavit will not be available if your savings account contains more than $50,000 upon your death. In such a case, it would be necessary to conduct a formal probate at the courthouse, and having a Will would make the probate process far simpler than not having one.

As far as your car is concerned, it can be transferred at death without the need for probate by completing a Form VTR-262 "Affidavit of Heirship for a Motor Vehicle." Your heirs can obtain this form at any county court annex or online at www.dot.state.tx.us. This Affidavit will establish that the car was owned by you, and the persons who inherit your estate will need to sign it. When completing the form, your heirs might also be asked to provide other documentation such as a certificate of title, release of lien, affidavit of physical inspection, bill of sale and/or proof of liability insurance.

The problem with letting your heirs simply use the VTR-262 form is that the car may not be passing to the person or persons you would want. For instance, if you have two children, but you want your car to go to only one of them, then you may want to execute a Will which names the one child who will get the car.

Your personal property does not have title, so it's not necessary to probate a Will in order to validly transfer ownership to your heirs. It's unfortunate, yet true, that personal belongings are available on a first come, first serve basis to your children, friends and neighbors. You may want to limit the number of people who have keys to your residence and also make a list of who gets what particular items. But don't forget, it's often a free-for-all following a person's death.

Note, however, that if you have minor children, my answer would be yes, you need a Will. With a Will, you could name guardians as well as a person to serve as trustee or custodian over the children's inheritance.

So, if you set your bank account up properly, if your car will be passing as you would want, and your beneficiaries are all adults, then you don't need a Will. On the other hand, it can't hurt to have one just in case it's needed.