THE ESTATE PLANNER

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Asset protection
PRESERVING WEALTH FOR YOURSELF AND YOUR HEIRS

Do you need to file a gift or estate tax return?

Of sound mind
Take steps now to minimize the chance of a contested will after death

Estate Planning Red Flag
You haven't substantiated your charitable gifts

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Asset protection

Preserving wealth for yourself and your heirs

There are many techniques you can use to protect your assets, from giving them to loved ones to placing them in offshore trusts. Whichever strategy you choose, however, it's critical to start planning now. The earlier you implement asset protection, the more effective it will be.

It's important to understand that asset protection isn't about evading legitimate debts, hiding assets or defrauding creditors. Rather, it's about preserving your hard-earned wealth in the face of unreasonable creditors' claims, frivolous lawsuits or financial predators.

Assess your risk

The first step is to assess the risk that creditors, former spouses or opportunists will go after your assets or those of your beneficiaries. If your risk is relatively low, but you seek added peace of mind, you might consider simpler techniques, such as changing the way assets are titled or gifting them to your loved ones. If your risk is higher — for example, if you own a business, are in a profession with a high degree of malpractice risk or are involved in other activities that expose you to potential financial liability — you might consider more sophisticated approaches.

If you wish to protect assets while retaining some control over them and also shielding them from your loved ones' creditors, consider an irrevocable trust.

Basic asset protection

One of the most effective techniques is simply to give assets to your spouse or children. This places them beyond the reach of your creditors, so long as you don't violate fraudulent transfer laws. (See "Watch out for fraudulent transfer laws" on page 3.) Disadvantages of this approach are that 1) you'll lose control over the assets and any benefits they offer, and 2) it does nothing to protect the assets against the *recipients'* creditors.

Another technique is to change the way title to assets is held. For example, some states allow married couples to hold a residence or other property as "tenants by the entirety." This form of ownership protects assets against either spouse's separate creditors, but not against joint creditors.

Also, consider making the maximum contributions to qualified retirement plans — such as pension, profit-sharing or 401(k)

Watch out for fraudulent transfer laws

Most states have fraudulent transfer laws, which prohibit you from transferring assets with the intent to hinder, delay or defraud any creditor, including a *probable* future creditor. Typically, these laws also prohibit "constructive fraud," which is when you transfer assets, without receiving reasonably equivalent value in exchange, and you're insolvent before or after the transfer.

To ensure that your asset protection efforts are successful, be sure that you're solvent before and after any transfer and that you transfer assets at a time when there are no actual or potential creditors' claims on the horizon.

plans. In addition to building a nest egg for retirement, assets socked away in these plans generally are protected against claims by creditors, both in and out of bankruptcy.

IRAs offer more limited protection. Outside bankruptcy, the level of protection provided by an IRA depends on the law in your state. In bankruptcy, federal law exempts IRA assets up to a specified threshold (as of this writing, nearly $1.3 million, although this limit doesn't apply to rollovers from a qualified plan).

Sophisticated asset protection

If you wish to protect assets while retaining some control over them and also shielding them from your loved ones' creditors, consider an irrevocable trust. Transferring assets to such a trust places them beyond your creditors' reach (provided it's not a fraudulent transfer and you're not a trust beneficiary). And by including a "spendthrift" provision, you can also protect the assets against claims by your *beneficiaries'* creditors. A spendthrift provision prohibits your beneficiaries from selling or assigning their interests in the trust, either voluntarily or involuntarily.

To provide even greater protection for your beneficiaries, consider using an independent trustee and giving him or her full discretion over distributions from the trust. Suppose, for example, that you establish a trust for the benefit of your child and authorize the trustee to make scheduled distributions or to distribute funds for your child's "health, education, maintenance and support." Typically, a fully discretionary trust avoids inclusion in the marital estate, although in some states this trust type may be treated as part of the marital estate to be divided in divorce.

To obtain asset protection without giving up control, consider an irrevocable domestic asset protection trust (DAPT) or offshore trust. Several states authorize DAPTs, which are designed to function similarly to an offshore trust. They provide asset protection even if they're "self-settled" — that is, if *you* are a discretionary beneficiary of the trust. The downside is that some uncertainty remains over whether these trusts are enforceable, particularly if you're not a resident of the state whose DAPT law you're relying on.

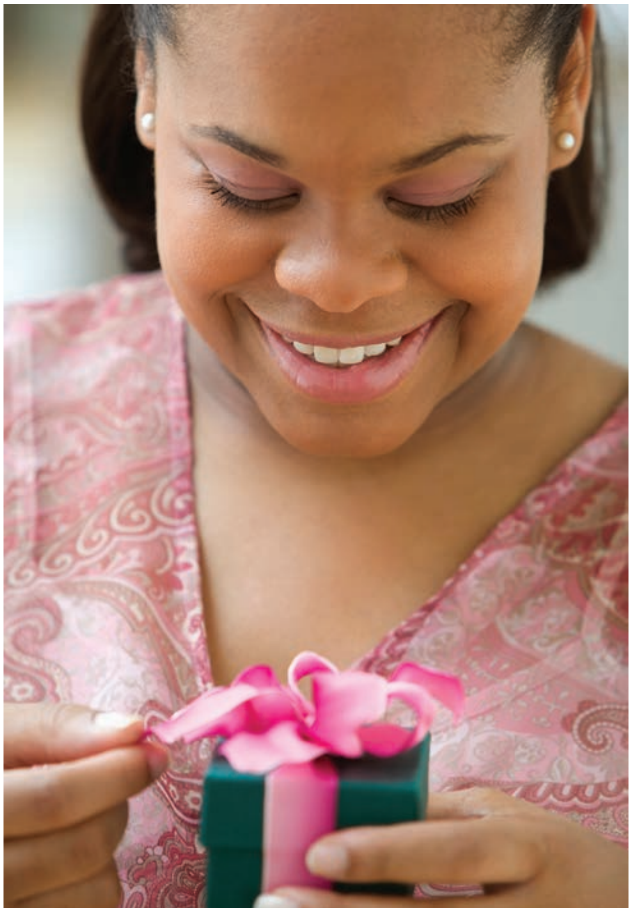
Offshore asset protection trusts offer greater certainty in that they have more of a history than the DAPTs. Typically, they're set up in foreign jurisdictions that don't recognize judgments from U.S. courts and whose laws are otherwise unfriendly to foreign creditors.

Start planning now

If you wish to protect your assets, start planning now. The sooner you begin, the more likely you'll set aside your assets before any possible claim is made.

Do you need to file a gift or estate tax return?

If you've made substantial gifts to your loved ones, or if you're the executor of someone's estate, it's important to understand the rules surrounding gift and estate tax returns. Determining whether you need to file a return can be confusing, and in some cases it's advisable to file a return even if it's not required. Here's a brief summary of the rules.



Gift taxes

Generally, a federal gift tax return (Form 709) is required if you:

- Make gifts to or for someone during the year (with certain exceptions: for example, gifts to U.S. citizen spouses are excluded) that exceed the annual gift tax exclusion (currently, $14,000); there's a separate exclusion for gifts to a non-citizen spouse (currently, $148,000),
- Make gifts of *future* interests, even if they're less than the annual exclusion amount, or
- Split gifts with your spouse, regardless of amount.

The return is due by April 15 of the year after you make the gift, but the deadline may be extended to October 15. Being required to file a form doesn't necessarily mean you owe gift tax. You'll owe tax only if you've already exhausted your lifetime gift and estate tax exemption (currently, $5.45 million).

In some cases, it's a good idea to file a gift tax return even if you're not required to do so. For example, suppose you give $10,000 worth of closely held stock to each of 10 family members, for a total of $100,000. Each gift is within the annual exclusion amount, so you don't file a gift tax return. However, 10 years later, the IRS determines that the value of each gift was actually $20,000 and assesses penalties for failure to file a gift tax return (plus taxes, penalties and interest if you've exhausted your lifetime exemption).

Had you filed a properly completed gift tax return at the time you made the gifts, it would have triggered the three-year limitations period for auditing your return. Without a return, there's no time limit on how long the IRS can wait to challenge the valuation of your gifts.

Estate taxes

If required, a federal estate tax return (Form 706) is due nine months after the date of death. Executors can seek an extension of the filing deadline, an extension of the time to pay, or both, by filing

Form 4768. Keep in mind that the form provides for an *automatic* six-month extension of the filing deadline, but that extending the time to pay (up to one year at a time) is at the IRS's discretion. Executors can file additional requests to extend the filing deadline "for cause" or to obtain additional one-year extensions of time to pay.

Generally, Form 706 is required only if the deceased's gross estate plus adjusted taxable gifts exceed the exemption. A return is required even if there's no estate tax liability after taking all applicable deductions and credits.

Even if an estate tax return isn't required, executors may need to file one to preserve a surviving spouse's portability election. Portability allows a surviving spouse to take advantage of a deceased spouse's unused estate tax exemption amount, but it's not automatic. To take advantage of portability, the deceased's executor must make an election on a timely filed estate tax return that computes the unused exemption amount.

Preparing an estate tax return can be a time consuming, costly undertaking, so executors should analyze the relative costs and benefits of a portability election. Generally, filing an estate tax return is advisable only if there's a reasonable probability that the surviving spouse will exhaust his or her own exemption amount.

In some cases, it's a good idea to file a gift tax return even if you're not required to do so.

Handle with care

Determining whether a gift or estate tax return is necessary or desirable can be complicated. When in doubt, consult your estate tax advisor to discuss your options.

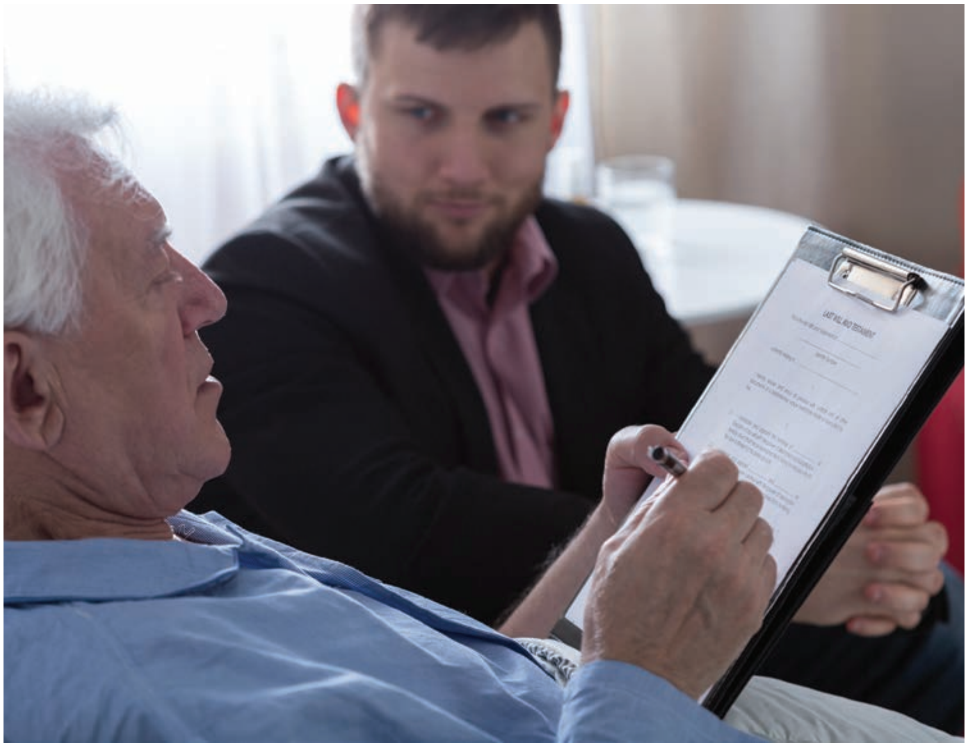
Of sound mind

Take steps now to minimize the chance of a contested will after death

Regardless of how harmonious your family may be during your life, there's always a chance that a disgruntled family member may challenge your estate plan after your death. Contests over wills typically occur if an estate plan operates in an unexpected way, such as if a large amount of assets is willed to a nonfamily member and nothing is left to a child. To avoid a challenge, and the possible outcome of a judge ultimately deciding the distribution of your assets, consider these strategies.

What does "undue influence" mean?

It's important to recognize that a certain level of influence is permissible, so long as it doesn't rise to the level of "undue" influence. For example, there's nothing inherently wrong with a daughter who encourages her father to leave her the family vacation home. But if the father is in a vulnerable position — perhaps he's ill or frail and the daughter is his caregiver — a court might find that he's susceptible to undue influence and that the daughter improperly influenced him to change his will.



leave a substantial sum to a close friend who acts as your primary caregiver. To avoid a challenge, prepare your will independently — that is, under conditions that are free from interference by all beneficiaries. People who'll benefit under your estate plan, including family members, shouldn't be present when you meet with your attorney. Nor should they serve as witnesses — or even be present — when you sign your will and other estate planning documents.

Here are several steps you can take to avoid undue influence claims and ensure that your wishes are carried out:

Use a revocable trust. Rather than relying on a will alone, create a revocable, or "living," trust. These trusts don't go through probate, so they're more difficult and costly to challenge.

Establish competency. Claims of undue influence often go hand in hand with challenges on grounds of lack of testamentary capacity. Establishing that you were "of sound mind and body" at the time you sign your will can go a long way toward combating an undue influence claim. Be sure to create your estate plan while you're in good mental and physical health. Have a physician examine you, at or near the time you execute your will and other estate planning documents, to determine if you're mentally competent.

Avoid the appearance of undue influence. If you reward someone who's in a position to influence you, take steps to avoid the appearance of undue influence. Suppose, for example, that you plan to

Talk to your family. If you plan to disinherit certain family members, give them reduced shares or give substantial sums to nonfamily members, meet with your family to explain your reasoning. If that's not possible, state the reasons in your will or include a separate letter expressing your wishes. Family members are less likely to challenge your plan if they understand the rationale behind it.

It's important to recognize that a certain level of influence is permissible, so long as it doesn't rise to the level of "undue" influence.

To deter challenges to your plan, consider including a no-contest clause, which provides that, if a beneficiary challenges your will or trust unsuccessfully, he or she will receive nothing. Keep in mind, however, that you should leave *something* to people who are likely to challenge your plan; otherwise, they have nothing to lose by contesting it.

What are your options?

No matter how carefully you plan, there's the possibility of an upset beneficiary who feels he or she deserves more of your estate than you provided. To minimize the chances of an undue influence claim, discuss your options with your estate planning advisor.

ESTATE PLANNING RED FLAG

You haven't substantiated your charitable gifts

As the end of the year approaches, many people's thoughts turn to charity. To avoid losing valuable charitable deductions, be sure to familiarize yourself with the substantiation requirements.

Cash gifts under $250: Use a canceled check, receipt from the charity or "other reliable written record" showing the charity's name and the date and amount of the gift. There's no need to combine separate gifts of less than $250 to the same charity (monthly contributions, for example).

Cash gifts of $250 or more: Obtain a *contemporaneous* written acknowledgment from the charity stating the amount of the gift, whether you received any goods or services in exchange for it and, if so, a good faith estimate of their value. An acknowledgment is "contemporaneous" if you receive it before the earlier of your tax return due date (including extensions) or the date you actually file your return.

Noncash gifts under $250: Get a receipt showing the charity's name, the date and location of the donation, and a description of the property.

Noncash gifts of $250 or more: Obtain a contemporaneous written acknowledgment from the charity that contains the information required for cash gifts plus a description of the property. File Form 8283 if total noncash gifts exceed $500.

Noncash gifts of more than $500: In addition to the above, keep records showing the date you acquired the property, how you acquired it and your adjusted basis in it.

Noncash gifts of more than $5,000 ($10,000 for closely held stock): In addition to the above, obtain a qualified appraisal and include an appraisal summary, signed by the appraiser and the charity, with your return. (No appraisal is required for publicly traded securities.)

Noncash gifts of more than $500,000 ($20,000 for art): In addition to the above, include a copy of the signed appraisal (not the summary) with your return.

Saving taxes isn't the primary motivator for charitable donations, but it affects the amount you can afford to give. Substantiate your donations to ensure you receive the deductions you deserve.

Weston Hurd LLP
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Angela G. Carlin is the Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. She focuses her practice on estate, trust and probate administration and litigation, and tax matters. Angela is the author of the Merrick-Rippner Probate Law publication which is the recognized authority in Ohio on probate law. She received the Nettie Cronise Lutes Award from the Ohio State Bar Association in 1996 as the Outstanding Woman Lawyer and for many years, she has been named as an *Ohio Super Lawyer* by Thomson Reuters and a *Leading Lawyer* by Inside Business Magazine.

Karen A. Davey focuses her practice on estates, trust and probate administration. She also handles litigation in probate related matters, such as will contests, trust contests, and power-of-attorney disputes.

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Gary W. Johnson advises clients on matters involving commercial litigation, business entities creation and maintenance, land use, construction law, zoning, estate planning and probate. Gary has been recognized as an *Ohio Super Lawyer* in the area of Business Litigation by Thomson Reuters.

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Carlin Comments

ANOTHER DISAPPOINTED ILLEGITIMATE HEIR (PART 1)

By Angela G. Carlin

As many readers of this publication have noted, this author reviews recent statutes and cases affecting the inheritance rights of adopted and illegitimate children of decedents. A State of Georgia case was reviewed in this publication where through a "virtual adoption" in *Sanders v. Riley*, No. S14A1314, decided March 16, 2015, a daughter of the decedent inherited a portion of the latter's estate along with the decedent's other two natural children. Also emphasized in that article was that Ohio has not accepted the theory of "virtual adoption" and requires a formal statutory and court approved proceeding by a prospective parent of a child. The Supreme Court in Georgia defined in the *Sanders* case, that "virtual adoption" had been a valid equitable remedy in Georgia for more than a century where a person may adopt a child as his own without a statutory adoption, where a relationship of parent and child has been acted upon by all concerned parties for many years, and which may be enforced in equity after the obligor's death by decreeing that the child is entitled to the obligor's property undisposed of by a will. The Supreme Court warned not only that certain conditions must be met before a recovery by the child is ordered, but also cautioned the "virtual adoption" does not result in a legal adoption, or the creation of a legal parent-child relationship, and the equitable remedy may be invoked by the child only after the death of the "virtually adopting parent." While Ohio does recognize the doctrine of "equitable adoption," where a contract or agreement for adoption has been performed for the child's benefit citing *Spregel v. Flemming*, 181 F. Supp. 185 (1960), Ohio has not recognized the doctrine of "virtual adoption."

In *In re Estate of Burdette*, 2016-Ohio-5866, the Second District Appellate Court in Montgomery County, Ohio, in September 2016, upheld the probate court overruling a purported daughter's efforts to inherit from her father's estate. Appellant Jackie Marie Burdette Wright ("Wright") contended that the probate court erred in ruling that she could not inherit from her father's estate by failing to accept her birth certificate listing her father as prima facia evidence of the parent-child relationship, and violating her constitutional rights in failing to treat her with equal standing to decedent's two natural children. Her father's estate, as Appellee, responded that Wright did not prove a legally established parent-child relationship through: 1) a paternity action, or 2) any other statutory relationship.

I.V. Burdette, Jr. ("Burdette") died intestate (without a will) in July 2009. When the estate was opened his two natural children were notified as next of kin. Wright was neither listed as a next of kin or notified of the proceedings. The probate court approved a settlement of a wrongful death/medical negligence claim for $135,000 which was divided by decedent's two natural children after payment of costs and attorney fees. The probate court approved the final account and the administration was completed. Wright moved for relief from judgment 14 months later averring that she was a natural child of Burdette, that she had no notification of estate proceedings, nor was she aware of the medical negligence claim or its settlement. Wright filed her birth certificate listing Burdette as her father. Prior to the hearing on Wright's motion, the parties agreed to genetic testing with the results submitted through an agreed entry reflecting that Wright was the biological child of Burdette.