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There are many misunderstandings of the laws that govern individuals and their property. We have turned a few of the most common ones into a true/false quiz and challenge you to the test: are you smarter than an estate planner?

1. If I title my assets in the name of my revocable trust, they won't be subject to estate tax at my death.

False. The general rule of Internal Revenue Code ("I.R.C.") § 2036 is that assets in an individual's revocable trust over which the person retained a right to use the property (i.e., receive the income and/or principal, withdraw the property), to change the beneficiaries, or to terminate the trust is included in that person's estate for estate tax purposes. This myth arises from the fact that assets titled in an individual's revocable trust at death are not "probate" assets and are not administered at death in the Probate Court. By transferring assets to a revocable trust, the person transfers ownership to the Trustee (thus does not own them for probate purposes) but retained rights over the property (thus the estate tax inclusion).

2. I have a trust and have transferred all my property to it, so I don't need a Will.

False. There are always good reasons to have a Will. First, the Will distributes to beneficiaries any property not already owned by the trust (common examples are cars, tangible personal property, or tax refunds received after death). The Will could also include a "pour over" provision which would transfer such miscellaneous assets to the trust rather than distribute them outright to beneficiaries. Second, the Will nominates the Executor. Finally, and importantly, if the decedent has minor children, the Will nominates the guardian of the minors.

3. If I have a Durable Power of Attorney I don't need a Will because my Agent can just take care of things when I die.

False. An agent under a Power of Attorney ("POA") may act only during the principal's lifetime, and at the moment of the principal's death, the agent's authority terminates. Once a person dies, the executor or administrator of that person's estate will have authority (under order of the Probate Court) to administer the decedent's assets.

4. People with less than $3,500,000 don't have to worry about estate taxes.

True AND False. This is true as to Federal estate tax but false as to Ohio estate tax. Under current federal law, the estate of an individual who dies in 2009 with assets in value less than $3,500,000 (and assuming he has not made any taxable gifts during lifetime) are not subject to Federal estate taxes. However, the estate of an individual who dies domiciled in Ohio with assets equal to or greater in value than $338,333 will be subject to Ohio estate taxes. O.R.C. § 5731.02 sets forth the rates, and the maximum tax rate is 7%.

5. People with less than $3,500,000 shouldn't consider having a trust.

False. While trusts are often used for estate tax planning, there are many non-tax reasons why a trust is a vital part of an estate plan. An individual may want to have a trust during lifetime to provide for management and distribution of assets for that person's benefit in the event of incapacity during life and to avoid a need for a guardianship or reliance only upon an agent under a POA. After a person's death, a trust could be used to protect the beneficiaries (i.e., spouse, children, grandchildren) by directing the timing of distributions and the conditions authorizing a distribution (examples include health, support and education). A trust can also provide protection from the beneficiaries' creditors (including ex-spouses in divorce), and name Trustees and Trust Advisers. This control over assets and their distributions is attractive to individuals who may have concerns about making direct transfers to certain beneficiaries.

6. My life insurance policy will not be subject to any taxes when I die.

True AND False. True, the proceeds of life insurance received by the beneficiaries will not be subject to federal income taxes at the death of the insured. Also true, per O.R.C. § 5731.12, that there will be no Ohio estate tax if a beneficiary (other than the decedent's estate) is designated to receive the insurance proceeds.

This is also false, however, as to federal estate taxes. Per I.R.C. § 2042, life insurance policies owned by a decedent will be subject to federal estate taxes at the owner's death, regardless if the insured is the decedent or a third party. However, life insurance owned by a correctly formed Irrevocable Life Insurance Trust ("ILIT") will generally not be subject to estate taxes, as long as the decedent did not transfer the life insurance policy to the trust within three years of death.

7. Only cash gifts count for gift tax purposes.

False. I.R.C. § 2501 provides that the gift tax applies to any gratuitous transfers of property. In addition to cash, taxable gifts include lifetime transfers of tangible items (your old car, the heirloom piano), intangible items (stock, LLC units) and interests in real estate. Gifts can be made directly or indirectly, and outright or in trust. Gifts can even be made inadvertently (paying for the family vacation with children and grandchildren, naming a third party as a joint owner on real estate)!

There are many exceptions to the gift tax rules. First, gifts to a spouse will generally not be subject to gift tax because they qualify for the unlimited gift tax marital deduction. However, special rules apply for gifts made to a non-citizen spouse. Second, in 2009, the gift tax annual exclusion amount (see I.R.C. § 2503(b)) excludes the first $13,000 of gifts by any one person to any other person from gift tax. The $13,000 limit applies to the aggregate of all gifts made by one person to another during the year. For example, if a parent gives a child $10,000 in March and a used car worth $6,500 in May, those gifts are added up for purposes of the $13,000 limit. Anything over the $13,000 limit is a "taxable" gift and applied against a $1,000,000 lifetime taxable gift credit. Caution: if a person uses any of this $1,000,000 gift credit during life, it will reduce by that amount the federal estate tax exemption (i.e., $3,500,000 in 2009) available at death.

In addition, per I.R.C. § 2503(e), direct payments of medical expenses and tuition (but not books, room and board and other expenses that are not considered tuition) are excluded from the gift tax regardless of the amount. These amounts do not count towards the $13,000 annual gift exclusion amount and can be in excess of $13,000, as long as they are made directly to the school or medical provider. Care should be taken that the expense qualifies as a tuition payment or medical expense. For example, summer camp is not generally a qualifying tuition expense. Lastly, gifts to qualifying charitable organizations are exempt from gift tax.

There are many complications to the gift tax rules, including split gifts for spouses, generation-skipping transfer tax considerations, gifts to trust and special rules for gifts to Section 529 college savings plans, just to name a few.

8. My estate planner gave me a "Crummey" trust so it must be poorly written.

False. A Crummey trust is actually brilliant and is a trust with special withdrawal powers based on the holding in *Crummey v. Commissioner*, 397 F.2d 82, (9th Cir. 1968). Under gift tax laws, only gifts of a "present" interest qualify for the annual gift tax exclusion amount (explained above). A problem arises with gifts made to a trust since by their nature such gifts are of a "future" interest in the property. In very basic terms, when a trust beneficiary has a current power to withdraw assets contributed to an irrevocable trust (known as a "Crummey" power), even if it is for a short period of time (i.e., 30 days), the beneficiary is considered as having a "present" interest and eligible for gift tax exclusion (even if the property is not withdrawn but still held in trust for the beneficiary) instead of a "future" interest. Trusts with these Crummey powers require careful analysis of the generation-skipping transfer tax and general power of appointment rules, and complex drafting is generally required to address these issues.

9. Even if I name only one of my four children on a joint bank account for convenience, all four of them will share the account when I die because that is what my Will says.

False. A joint account, with rights of survivorship, will pass to the child who is the surviving joint tenant on death (absent undue influence, duress, fraud or incapacity), to the exclusion of the other children irrespective of what the Will provides. This common problem generally arises when one of the children is local or helps with finances and is put on the account for "convenience." If all of the children are agreeable, this problem can usually be solved post death with

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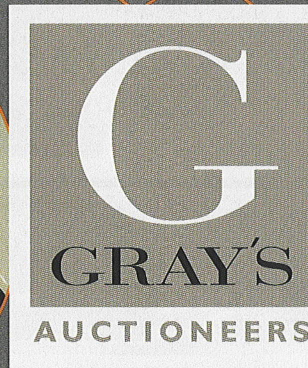

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disclaimers, but it is a time-consuming and expensive way to solve a problem that does not need to occur. The bigger problem is created (which is the source of significant litigation) when the child who is the joint tenant chooses to keep the proceeds of the joint account to the exclusion of the others. A POA is a good alternative and will allow the agent to act with respect to the account. Then, at the account owner's death, the assets remaining will be part of the estate and subject to distribution under the Will.

10. My daughter is 22 and financially irresponsible. Obviously, I don't have to tell her about the custodial account I set up for her when she was 2, because I know she's not ready to handle the money herself.

False. Per O.R.C. § 5814.04, a custodian holding property for a minor (someone under 21) is required to deliver the property to the minor at age 21. A custodian serves in a fiduciary capacity and must follow the provisions of O.R.C. chapter 5814. The chapter also provides guidance on the management of the account, including investment authority, record keeping, and distributions. If parents are concerned about the ability of their children to be financially responsible at age 21, a trust should be used instead of a custodial account as the trust will allow the parents to set the timing (beyond 21 years of age) and amounts of outright distributions of property and the scope of discretionary distributions. If a custodial account is already in place, once the minor turns 18, the minor can execute a trust and assign the rights to the custodial property to the trust. When the minor turns 21, the custodial property can be put into this trust. The minor can name the parent as a Trustee or Trust Advisor to provide guidance as to investments and distributions.

11. Mom's Will didn't provide for a charitable gift, but we decided to give her furniture to charity because we couldn't use it. The estate will get a charitable deduction.

False. A charitable gift must be directed in the Will in order for the Estate to get a charitable deduction for both estate tax and income tax purposes. The Will can provide that the Executor has the right to choose the charity, but the Executor has to be given the power to make the donation. If the document is silent, no charitable deduction is allowed. The better solution is to distribute the property to the beneficiaries, and let them each make charitable donations. In such instances, the beneficiary (but not the estate) will receive a charitable deduction. If an individual has charitable intent, there are many ways to do lifetime or death time charitable transfers, whether outright or in trust, but such planning must be done prior to death.

Well, that's it! How many did you get correct? Hopefully, we have helped clear up some misconceptions that your clients, or even you, may have about the laws governing the estate planning and administration While we won't be grading your test, if you got them all correct, you either are, or should be, an estate planner! ■

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