APPENDIX E

FAQs

The following are not intended as specific legal advice but illustrate some common concerns we hear from clients and their families.

1. *My aunt died and had a trust, and my brother is the trustee. He won't tell me anything or give me a copy. What can I do?*

Had the trust included specific instructions for the brother as to his legally required duties as trustee, this likely would not have happened. All too often, we see the attitude of the named trustee, the "one in charge," as being secretive. In truth, the trustee's actions are supposed to be totally transparent insofar as the assets of the trust relate to the inheritance left to the particular trust beneficiaries. So while you have no right to decision-making regarding the trust, you certainly should be entitled to a copy of the trust document relating to your inheritance. Typically, someone in your position would submit a written request for copies and an accounting of assets, and if that fails, have an attorney send a similar demand letter. As a last resort, your attorney could ask the local court to intervene and force your brother to comply with the law and even account for all the assets and expenses of the trust.

2. *My parents left a simple instruction in their trust saying that everything be divided equally among the four of us adult children. The problem is not with the money but with the personal stuff, like furniture, family heirlooms, and my*

dad's gun collection. Some is valuable while others just have sentimental value. Can the trustee just do whatever she wants? She is planning on having an auction.

One of the problematic areas is personal property. When the heirs cannot agree on how things should be divided, then the auction is a sort of last resort. The problem is that the kids are in a position then of having to bid against strangers for the family things. One way this is solved is with an agreement where the four of you draw straws to see who goes first, second, third, and fourth, and then choose items one at a time in order until everything anyone wants is gone; then you can auction or tag sale the rest. Your parents, as the makers of the trust, could have specified who would get certain specific items in their trust paperwork, which would have eliminated this problem. They also could have specified the procedure to be used to dispose of personal property.

3. *What happens if the trustee who is to take over after the death of the trust maker refuses the job or dies and there is no second choice named?*

Typically, there is a default provision in a trust that states that in the event there is no named successor trustee willing or able to act as trustee, then the beneficiaries, by majority vote, can pick a trustee to administer the estate. If there is no such provision in the trust and no surviving successor trustee, then the courts have the ability to name a trustee to wrap up the estate. If you are forced to petition the court, be sure to request the appointment of one of the beneficiaries as the new trustee so that the court does not appoint an expensive public administrator or attorney to that job. Check with your attorney for local practice and procedure in this case.

4. *My wife and I have a premarital agreement that specifies what happens to our individual assets at our deaths. That was several years ago, and now we want to make a trust to avoid probate but want to do something different than what was agreed before we married. Can we do this?*

Yes. In most cases, if you both agree and there is no fraud or coercion involved, you may nullify a premarital agreement and make a new plan. This can be in the form of a trust-based estate plan and may or may not have to include a postmarital agreement. The terms can be whatever the two of you agree upon.

5. *My mother keeps threatening to disinherit me, but I have a copy of her will, and it says I get an equal share with my brother. Is she bluffing? I don't think she can do it.*

She can do it. Wills can be changed so long as a person is mentally competent. The disinheritance has to be done properly, however. In most states, if she just left your name off the new will, you could go into court and ask for your statutory share for the same amount you would have gotten if there was no will at all, the assumption being that she mistakenly left off the natural object of her affection—one of her children. But if in the will and trust she specifically names you and says no part of her estate is to go to you, then you are disinherited. Be nice to your mother; your copy may mean nothing other than what she intended at that time.

6. *Along that line, can I disinherit my wife? We are separated but not divorced, and I don't want her getting any of my stuff and would rather everything go to our children.*

This is an interesting question that has a surprising answer. In most states, you cannot disinherit a wife with a will, but you can with a trust. If you left her nothing—or not very much—in a will, a wife (and in most cases a husband as well) has what is called a "right of election." This means she can accept what was left to her in the will or elect to take what the state law would have given her if you died intestate—that is without a will. This applies to your separate property since jointly owned assets would go to her automatically anyway. The intestate share varies by state and depends upon whether or not the person who died had children. A quick Internet check can give you the intestate share of a spouse in your state. In the situation you describe, since you have children, your spouse would generally get one-half your assets and the children would get the other half. Or she might get the first $50,000 and half the balance. But again, it depends on state law, and the rules vary. However, this applies only to probated assets. As we know from this book, assets in a trust are not probated; therefore, at least in most states, you can put your assets in a separate trust of your own and leave them to whomever you want and leave none of them to your spouse if you like. I have to repeat, though, that state laws change all the time and are not uniform, so ask your lawyer.

7. *My father was married to my mother for 45 years before she died. Now he*

has remarried to a woman with her own adult children. My concern is that he, being much older than her, will die first, leaving everything to his wife, then she will leave it all to her children at her death. She and I do not get along, and it seems unfair to have her move in on what should be my inheritance.

This is a common situation that has both a legal and nonlegal answer. The nonlegal answer is that in a marriage of older people, the couple are usually most concerned with caring for each other. Your father would likely want his assets left to care for his wife before he worries about you. So she would be a natural heir, and laws in most states recognize that and protect her in various ways. The legal answer is first that your father's assets belong to him, not you. You have zero right to any claim whatsoever unless he either dies intestate or leaves you something specifically in his trust or will. There are numerous ways he could provide for you if he choses to do so. For example, he could name you as a beneficiary of a life insurance policy or as a pay-on-death beneficiary of a particular investment or asset account. He could make you a co-owner with right of survivorship on a parcel of real estate. He could create a trust that allows his wife the use of all his assets for her lifetime with the remainder to you at her death. There are many things he could do, but you can't make him do any of them. Wouldn't hurt to let him read this book to give him some ideas.

8. *My mother died and my father is still alive, but he has dementia and lives with me. Dad was married before and had two children by that marriage whom he never sees. Dad has no will, and I am worried that when he dies, my half siblings will show up and want part of his estate. What can I do?*

See a lawyer. Your father cannot now make a will or trust due to his mental incapacity. Unfortunately for you, half siblings share equally if there is no trust or will. There are situations where a person has made a power of attorney that specifically allows an attorney-in-fact to make gifts or even create wills or trusts for a person without it being called self-dealing. And it may be that your father has already provided in his own legal documents for this situation. But you need legal advice to see what your options are. I can't give specific legal advice to anyone via this book since there are so many unknowns and specific circumstances in addition to the complexity and conflict of laws in the various states.

9. *I have no children and am very close to my dogs. I want to set up a plan so that after my death, all my pets are taken care of for their lifetimes.*

All states except Minnesota allow you to create a trust for a pet, whether the pet is a dog, cat, alligator, or whatever. The trust provides a certain amount of money to be set aside in an account for the pets with a trustee who carries out the distribution of the money to the caregiver, who is often also the trustee. You may specify the kind of care you want given, including the type of food, exercise, medical treatment, grooming—anything. It's important to specify the pets by name and have implanted microchips, or you can just say any pets you own at the time of your death. There should be a remainder-man—that is, the person or organization that gets any funds left over after the animals die. You may specify a sum to be paid to the caregiver for acting as such, either a set amount or an annual amount. These trusts typically can last no more than twenty-one years, but state laws vary.

As an aside, there is the story of a person who set up a trust for her cat, leaving a large annual payment to the caregiver for the lifetime of the cat. The bank trustee would visit annually to check on the pet's welfare. After thirty-two years, the bank became suspicious and eventually discovered the caregiver had substituted a new identically looking cat when the first one died, then again when the second died. The annual payments stopped.

10. *We own a summer cottage and have taken our four children there many times over their lifetimes. We would like to keep the cottage in the family for use by them and their children and even their grandchildren. Can we do this with a trust?*

Yes, but it is not necessarily a good idea. I hear this frequently, but I also hear from the next generation down who wish their parents had never set the cottage up that way. There are many issues that occur after your deaths. The children often move away from the area where they grew up and have their own families. It may be that the cottage is many hundreds or thousands of miles from where they end up, and so they use the cottage little or not at all. Often there is one family that uses the cottage a lot and others not so much. But it is in a sense jointly owned, so the joint assets in the trust that take care of the property are benefitting some of the children but not all. If no fund were set up to cover things like taxes, insurance, utilities, and maintenance, all of the children would be responsible for paying those expenses, even though they may not get any benefit from those expenses. But if it is set up in

a trust, it may be difficult to do anything differently. Then at the death of one of your children, their children may have little or no interest in the cottage or may be minors with no way to pay for the expenses. People have this romantic idea of carrying on what was a wonderful experience for them, but that rarely works smoothly.

But yes, it can be done. To make it work, you would need to answer all the "what if" questions you can think of. What if one of the children wants to opt out? Would they get anything for their share? And if so, from where would the money come? What if one of them refused to pay their share? Do the others have the right to foreclose their interest or make them pay somehow? If one of them dies, does their spouse have the rights to the cottage for his or her lifetime? Can a child sell his or her share to a nonrelated person or borrow against it? Is there money available to set up a permanent fund for cottage expenses? Who decides how to spend that fund? How many generations would this arrangement go on? State laws often limit the length of a trust of this kind. So as you can see, I advise against it. You should consider leaving the cottage to the four children equally and let them figure it out, which is a better plan than tying it up in trust. My opinion, of course.

11. *We have minor children and want to decide who would be their guardian in the event of our deaths. We have someone in mind. Can this be done with a trust?*

It is possible to do it with a trust, but a better practice is to include those wishes in your pour-over will. As discussed earlier in this volume, we always make a pour-over will as a fail-safe mechanism to direct assets that were left out of the trust to pour into the trust to be distributed in the same manner as the other trust assets. Wills have to be probated if they meet the state dollar amount threshold for probate; in most cases, the trust is fully funded, so there are no assets to probate by will. However, the directives as to guardianship of minors that are contained in the will would be used by the court to set up the guardianship and conservatorship for those children. So while the will would not be probated, it would still be used for the guardian appointment.