

COMMON QUESTIONS AND ANSWERS FOR FLORIDA RESIDENTS

Compliments of:

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1. **Q.** What happens to my assets if I die without a valid will?
A. Florida law basically provides for distribution to the closest family members. A surviving spouse inherits all property if there are no children. If there are children (minors or adults), the spouse shares the estate with them. When there is no spouse, then the children (or grandchildren in lieu of a deceased child) share the estate. Whenever there is no spouse, children, or grandchildren, then parents, brothers and sisters, nieces and nephews, and so on, inherit the estate assets. This process is called “intestate succession.”

2. **Q.** Who must be left property in my will?
A. Florida residents do not have to leave anything to any family member (including children) EXCEPT: A surviving spouse, if left out, may request, by petition to the Court, and receive 30% of a probate estate. This is known as the “elective share.”

NOTE: In Florida, the family homestead real property is subject to special rules relating to a spouse and / or minor children.

NOTE: Also, effective 2001, new laws were passed increasing the assets subject to the 30%. Trust assets and other assets (including insurance and IRA’s) are now included in the 30% elective share amount.

3. **Q.** Is there any size estate that is not subject to a full-scale probate?
A. Yes. It is known as a Summary Administration. The amount is \$75,000. If property in your individual name is valued at less than this amount, then summary administration could take place (instead of the normal formal administration).

4. **Q.** Is probate a matter of public record?
A. Yes, probate records (with the exception of the inventory) are open to the public. Normally, anyone can look at court files, including a will. This is how the media gets information regarding celebrities or the very wealthy when their will is being contested.

5. Q. How long does probate take in Florida?
- A. For an estate that does not need a federal estate tax return (under \$5 million in 2011), about eight months. For those estate needing a federal estate tax return (Form 706), normally a minimum of 15 months.
6. Q. In Florida, what are “probate estate” assets?
- A. *
- * Bank accounts in the sole name of the decedent.
 - * Stocks and bonds in the sole name of the decedent.
 - * Life insurance payable to the estate.
 - * Real estate in the sole name of the decedent, except where homestead applies.
 - * Tangible personal property owned by the decedent.
 - * Any other asset owned solely by the decedent.
7. Q. In Florida, what are non-probate assets?
- A. *
- * Jointly held property (with rights of survivorship).
 - * Homestead property.
 - * Life insurance proceeds payable to a named beneficiary.
 - * Pension benefits payable to a named beneficiary.
 - * Profit sharing benefits payable to a named beneficiary.
 - * Annuities payable to a named beneficiary.
 - * IRAs payable to a named beneficiary.
8. Q. Who can be my personal representative (executor) in Florida?
- A. Anyone who is a resident of Florida. Any non-Florida personal representative must be a blood relative or married to your blood relative. Out-of-state banks and out-of-state Trust Companies cannot serve as a personal representative (they must be a Florida Corporation, N.A. or a Federal Savings Bank).
9. Q. What is a codicil?
- A. A codicil is an amendment to your will. Even though it appears simpler than a new will, you might want to prepare a new will instead of a codicil if you are switching beneficiaries. Why? The beneficiary who is being excluded could be tempted to contest the codicil. Hard feelings sometimes develop when a beneficiary learns his/her share of an estate has been reduced in a codicil.
10. Q. What is a “pour-over will?”
- A. Normally, it is a will of a person who has a revocable living trust. The property added to a trust via a pour-over will is put through probate, but is later distributed according to the trust’s directions. The pour-over will is a safety net to gather up loose ends.

- 11. Q.** What is a “Prenuptial Agreement?” Is it valid in Florida?
- A.** It is valid in Florida. It is the written contract executed before marriage that outlines what property rights apply when a death or divorce occurs. All spousal rights could be contracted away if the agreement is valid. Both persons involved should have their own attorney. This is one way of getting around the 30% elective share.
- 12. Q.** What is a “Durable Power of Attorney?”
- A.** This document allows an individual, normally a close relative (spouse, child, parent, brother, sister, niece, or nephew), to handle your finances if you become ill. This is a significant document that everyone should have to guard against incompetency, especially if they do not have a revocable living trust.
- NOTE: If you only want the agent to act after a doctor has signed off on your incapacity, then request a “Springing” Power of Attorney.
- 13. Q.** What is a “Living Will?”
- A.** This document directs your family and physician to end a life-prolonging procedure if you become terminally ill. This has been legal in Florida since 1984, and is now approved in a majority of the states.
- 14. Q.** Does Florida have an inheritance tax?
- A.** No.
- NOTE: Florida residents used to be subject to Florida’s Intangible Tax. That tax was imposed against the “fair market value” of certain intangibles estimated each January 1st - it has since been revoked.
- 15. Q.** Does Florida law require that I own Florida real estate to be a resident?
- A.** No. There are several factors to be considered, but you do not have to own real estate to be a resident.
- 16. Q.** Does the law require that I spend six months or more per year in Florida to be a state resident.
- A.** No, there is no time requirement, but there is a “factors” trust.

17. **Q.** Why should I set up a new brokerage account in Florida? Isn't my account "up north" identical, since all account assets are held in "street name" and thus physically located on Wall Street?
- A.** You need a Florida account to insulate your estate from a possible tax attack by that northern state, which will ask, "Why are you doing business with an Indiana broker, if you are a Florida resident?" The State of Indiana may freeze your account at your death.
18. **Q.** After I die will my safe deposit box be sealed?
- A.** No. In Florida, the box is normally not sealed. Co-Signers have access to it. The personal representative (the executor) also has access if there are no other co-signers. This is not the case in some states.
19. **Q.** If my safe deposit box is not sealed and inventoried, how do tax authorities know what was there?
- A.** In any large estate, where federal taxes are likely to be due, the federal estate tax return (Form 706) specifically asks if any safe deposit box existed – and, if so, what are the contents.
20. **Q.** Why should I consider appointing a bank's trust department or other corporate trust department as my personal representative (executor) or as my trustee?
- A.** There are many important factors to take into consideration:
- * The bank has tax, probate, and investment expertise.
 - * The bank is local; your children may be scattered around the country or world.
 - * The bank will not get sick and is always available.
 - * The bank is bonded; it must follow federal and state rules.
 - * The bank is impartial and immune to pressure. Thus, no matter what, family jealousies will not prevail.
21. **Q.** If I use a bank trust department as my trustee, what happens if the bank fails?
- A.** A trust account handled by a bank's trust department is legally separate from the bank's assets. The bank's creditors can not make a claim against the trust assets. If the bank fails, your assets are not at risk. The bank's successors (supervised federal and state officials) assume the trust management without any loss to your beneficiaries.
22. **Q.** Why do financial advisors want to sell me life insurance as part of my estate plan?
- A.** Many new insurance products are surprisingly economical and possess a number of sound investment features and returns. Well-constructed insurance plans are usually an excellent way to handle estate tax problems at discounted rates. Insurance is also

- a way of equalizing estates among beneficiaries.
23. Q. What do the terms “Grantor,” “Settlor,” and “Donor” mean?
- A. These terms mean the same thing and are interchangeable. They are the words attorneys use for the person who creates a trust agreement.
24. Q. How do I establish a Florida domicile?
- A. It is important to remember: An individual might be a resident in many states, but he/she can only have a domicile in one state. The distinction is very important. There are several steps that a new resident should take, the more the better?
- * Go to the courthouse and sign a “declaration of domicile,” which states that, under oath, you now consider yourself a Florida resident.
 - * Register to vote (and then actually vote whenever you can).
 - * Change your driver license and auto tags.
 - * File federal income tax returns in the Atlanta IRS office.
 - * Execute a new will and/or trust declaring a Florida domicile.
 - * Minimize financial contacts in other states by transferring as much as possible to Florida – bank accounts, safe deposit box, stock brokerage accounts, and IRAs.
 - * Maximize social, civic, and fraternal activities in Florida. In other words, join a church, temple, club, local association, etc.
25. Q. When I make a gift to my child, who pays the taxes?
- A. If the gift is less than \$13,000 (or \$26,000 from any married couple making separate gifts) in one year, there is no gift tax. When the gift exceeds this amount, the gift tax is the responsibility of the donor. There is no income tax to children for gifts and there is no income tax deduction for the donor on gifts to children. Once the donated property is in your child’s name, he/she then pays income tax on the earnings from the donated asset. Only gifts to charity give a donor an income tax deduction. Also, gifts maintain a carryover basis.
26. Q. Can my spouse and I “double up” and give \$13,000 each (\$26,000 total) to a child free of any gift tax?
- A. Yes, the law allows this.
27. Q. Do I have to pay a gift tax if I make a gift to my spouse?
- A. No. Since 1982, there has been no limit put on gifts between spouses. There is an “unlimited gift tax marital deduction.” However, your spouse must be a U.S. citizen.
28. Q. What factors decide if I should have a will or living trust?
- A. Every person over 18 should have a will. As far as having a living trust, the older or wealthier you happen to be, the more sense it makes to have a Living Trust. Any

person 50 or older with investment assets worth \$300,000 should consider a living trust to avoid probate and incapacity issues.

29. Q. I realize that living trusts cost more than wills; do I have to pay a large fee if I want to amend my trust?

A. No. A trust can be changed with a document known as a “trust amendment.” This is a relatively low-cost item.

30. Q. Can I be the Trustee of my own revocable living trust?

A. In most states (including Florida) you can be the Trustee of your own trust while you are able to do so. This increases the flexibility of the living trust.

31. Q. What is a “joint” living trust and how is it used?

A. A “joint” living trust is one created by two donors (normally spouses). It generally states that both are Co-Trustees and both control the trust together until one dies. After the first death, the surviving Co-Trustee continues the trust and has full control over the assets. After the death of the second spouse, a successor Trustee distributes the trust property. A joint living trust can be utilized by a married couple to circumvent probate. A joint trust guards against probate if both die simultaneously (in an auto accident, for example) and also provides safeguards against possible incompetency for the surviving spouse. The joint living trust is a probate avoidance tool giving couples of modest means a way to guard against incompetency and pass their assets on to loved ones.

NOTE: There is a potential loss of federal estate tax planning for large estates if a joint trust is exercised. Therefore, caution should be used if the joint estate exceeds the exemption amount. (For 2011 the amount is \$5 million.)

32. Q. How “portable” is a living trust? If I move out of state, will it still be valid?

A. Probably. But to play it safe, once you become established in your new location, visit an attorney and let him/her check it over to see if it meets that state’s particular requirements.

33. Q. Who can be a Trustee?

A. In Florida, any individual or trust department can act as your Trustee. It does not legally matter if the individual is located in Florida.

34. Q. What does a Trustee do?

A. While you are alive, the Trustee invests the trust assets and follows your instructions. If you become incompetent, the Trustee is then responsible for trust financial matters. If you die, the Trustee pays final bills and taxes, and distributes assets as outlined by the trust instructions.

35. Q. What is an “irrevocable trust” and when is it used?
- A. An irrevocable trust is what its designation implies; it cannot be revoked or changed once it has been instituted. An irrevocable trust is frequently used to lower estate and/or income taxes. Incidentally, the vehicle can be used in place of a gift to some heir. Example: You want the money managed by a Trustee rather than a beneficiary who is a child; or an adult who cannot (or should not) handle funds.
36. Q. What is a “testamentary trust?”
- A. It is a trust that is part of your will (which does not avoid probate).
37. Q. If I create a living trust, should I file a separate income tax return each year for the trust?
- A. If you are your own Trustee, you do not need to file an additional tax return. Just file your normal personal tax return (Form 1040) and register the trust assets under your own social security number. Upon death, a 1041 fiduciary return is required.
38. Q. If I establish a living trust on September 2, 1999, how will my assets be re-registered in the trust?
- A. “John Does, Trustee U/T/D dated 9-2-99, f/b/o John Doe.”
U/T/D = under trust dated
f/b/o = for benefit of
39. Q. When should I review my will or trust?
- A. Never set aside and forget an estate plan. It requires constant monitoring, typically every five years. You should automatically re-evaluate your estate plan when:
- * You plan to marry.
 - * You consider divorce.
 - * A child is born or adopted into the family.
 - * You move to another state.
 - * New tax laws are passed.
 - * Your estate undergoes a significant change.
 - * An heir’s financial status changes greatly.
 - * A beneficiary becomes very sick or dies.

CAUTION: The above answers are general in nature and should not be considered to be legal advice. Please consult a Florida Estate Planning Attorney for suggested solutions to your specific questions.

NOTE: For decedents dying in 2010 there are two options regarding estate tax exemptions and basis adjustments.