1. What is probate?

Probate is a process that allows for the transfer of the assets of a decedent (a person who has died) to the beneficiaries of the estate. Often, one of the objectives of estate planning is to avoid probate. The "probate" process gets its name from the court that oversees it. The Probate Court is responsible for: (1) confirming whether there is a will and whether it is valid, (2) determining the identity of the decedent's heirs, and (3) appointing an executor, or, if there is no will, an administrator, who is empowered by the court, with the issuance of *letters of office* to act on behalf of the estate. Once an executor or administrator is appointed, that person is responsible for (1) collecting the probate assets, (2) paying a decedent's debts and legitimate claims filed, and (3) distributing the remaining probate assets to the estate's beneficiaries. More often than not, once an executor or administrator is appointed, the probate court generally allows the executor or administrator to act independently, with limited oversight from the court. If there are disputes or problems that arise with the estate, however, the court may take a more active role in the administration of the estate by supervising the representative or administrator.

2. What property is subject to probate?

Property that is subject to probate includes those assets that were owned in decedent's own name upon the decedent's death and assets payable to the decedent's estate at death (these assets are referred to as "probate assets"). Only probate assets pass pursuant to the terms of a will or, if there is no will, under the rules of intestate succession (see FAQ titled "What is intestacy?" below). A will does not dispose of non-probate assets such as (1) property held as joint tenants with right of survivorship or tenants by the entireties, and (2) property subject to a beneficiary designation (such as a typical IRA, retirement plan or insurance policy), a Payable on Death (POD) designation, a Transfer on Death (TOD) designation or a Transfer on Death Instrument for residential real estate, unless the beneficiary designation names the owner's estate or defaults to the owner's estate when the other designated beneficiaries fail to survive the owner. Property owned by a trust is disposed of according to the terms of the trust, not by a will.

3. What is a will?

A will is a legal document that becomes effective upon a person's death. It contains instructions, to be followed after a person's death, for the payment of the deceased person's debts, the distribution of the deceased person's remaining assets, the nomination of a guardian for minor children (subject to the court's approval), and the nomination of an executor of the will. The will should provide answers to at least three basic questions: "Who gets what?", "How and when do they get it?", and "Who's in charge?"

4. What are the requirements to make a will?

In Illinois, a person who has attained age 18 and is of sound mind and memory can make a will. In Illinois, a will must be in writing, signed by the testator (or by at the direction of the testator by another person in the testator's presence) and attested in the presence of the testator by two or more credible witnesses.

5. What is an executor?

An "executor" is an individual, bank or trust company named in a decedent's will and appointed by the court after the decedent's death to administer the probate estate of the decedent. More than one individual or entity can act as co-executors. In some states the executor is called the "personal representative." If a person does not name a personal representative in his or her will, or dies without a will, a representative can still seek to be appointed by the probate court, but Illinois law establishes who has priority in seeking appointment, and generally, all persons in a position of equal or higher priority must receive notice before a person with the same or lower priority can be appointed. When the will does not nominate an executor or personal representative, or if there is no will, the person appointed by the court may be called an "administrator". In common parlance, the term "executor" can be used to refer to an executor, personal representative or administrator, all of whom have similar duties.

6. What are the duties of an executor?

An executor administers the decedent's probate assets by (1) collecting the decedent's probate assets; (2) managing the decedent's probate assets during the period of administration; (3) paying claims against the estate including the decedent's debts and any spouse's or child's awards authorized under state law; (4) paying expenses of administering the estate, including investment management, attorney's and executor's fees; (5) filing the decedent's final income tax returns and income tax returns for the estate; (6) filing any required estate or inheritance tax returns; (7) accounting to the court and the beneficiaries for all of the assets, liabilities, receipts and disbursements of the estate; and (8) distributing the probate assets after payment of debts, claims and expenses to the beneficiaries entitled to such assets under the decedent's will, or if the decedent died without a will, pursuant to the intestacy (see FAQ titled "What is intestacy?" below) statute of the relevant state. As noted above, an executor is appointed by the court and after the executor has completed the administration of the estate the executor is formally discharged by the court. Thus, the executor's job is of a limited duration, although commonly it takes a year or two, and sometimes longer, to administer an estate.

7. What happens when a person dies without a will?

Without a will, a deceased person's estate passes by the laws of intestacy, which may not reflect the deceased person's true wishes. The laws of intestacy which generally apply are the laws of the state in which the person resided at death. The persons who receive the deceased person's property by intestacy receive it outright (except for minors or disabled persons, for whom property will usually be held in a guardianship until age 18 or until the disability has ended). This may not be what the deceased person would have wanted. Finally, if a person dies without a will, the deceased person's estate will be managed by an administrator selected by the court, and that administrator may not be the administrator the deceased person would have selected. Illinois law establishes who has priority in seeking appointment by the court, and generally, all persons in a position of equal or higher priority must receive notice before a person with the same or lower priority can be appointed.

8. What is intestacy?

The estates of persons who die without a will are said to be "intestate," and their estates are distributed according to state law. The default rules of distribution under state law represent an

attempt to be fair, but may not be consistent with any person's specific goals and desires. For example, in Illinois, the laws of intestate succession provide for the division of a married parent's property one-half to the surviving spouse and one-half among descendants (i.e., children or the children of a deceased child).

9. Who can prepare a will?

A will is generally prepared by an attorney. There is no prohibition on someone preparing their own will, but using an experienced attorney helps prevent oversights, mistakes, and invalid wills. There are countless examples of people who have drafted do-it-your-self wills who, despite best trying to cover all the essentials for a valid and effective will, have ultimately failed. The failure can be as simple as not having the appropriate witnesses for the will or not including basic provisions that any experienced estate planning attorney would have ensured were included. Those simple mistakes can lead to serious, unintended consequences.

10. What is a trust?

A trust is a legal relationship in which an individual or a bank or trust company holds money or other property for the benefit of certain individuals or charities ("beneficiaries") subject to the terms of the trust. The person who creates the trust (the "settlor" or "grantor" or "donor") transfers legal ownership of property to the trustee so the trustee can hold and manage the property for a specified period of time (which may be forever, if the trust is an Illinois qualified perpetual trust) for certain specified purposes. The trustee agrees to hold and manage the property for the benefit of the beneficiaries specified by the settlor in the written agreement, usually referred to as a "trust agreement" or "declaration of trust," subject to the terms of the trust agreement. The trustee has a legal duty to administer the property as required by the trust agreement and state law. The trust may be created during the settlor's life (for example, a "living trust") or may be created upon the settlor's death (a "testamentary trust").

11. Who are the parties to a trust?

A trust generally involves three roles: (i) the person who creates the trust is called the "grantor," "settlor," or "donor," (ii) the person who owns and administers the trust property is the "trustee," and (iii) the person who benefits from the trust is called the "beneficiary." A trust may have more than one settlor, trustee or beneficiary. Further, an individual may serve in more than one role. For example, a settlor or a beneficiary may also be a trustee.

12. What is a trustee?

A trustee is a party to a trust, who is also referred to as the "record owner" of the assets. A trust is a legal arrangement in which a person known as the settlor appoints a trustee to hold property subject to the terms of the trust (which should be memorialized in a written document) for the benefit of the trust beneficiaries. The trustee may be an individual or a trust company, or both. More than one individual or entity may act as co-trustees.

The trustee is the legal owner of trust property. The trustee acts for the beneficiaries who have the beneficial interests in the trust.

A trustee is a fiduciary, meaning that the trustee owes special duties to the settlor and the beneficiaries.

13. What are the duties of a trustee?

The duties of a trustee are defined in the trust instrument and under the law of the state governing administration of the trust. The terms of trusts and state law can vary, but in general the trustee has the following duties:

- Duty to Administer Trust by its Terms. The trustee has a duty to administer the trust by its terms and by applicable law. Distributions are to be made to the beneficiaries only pursuant to the trust terms. The trust may also contain special instructions about trust investments and trust administration.
- Duty of Loyalty. The trustee must administer the trust in the interests of the trust beneficiaries and not for the benefit of the trustee's personal interests.
- Duty to Avoid Conflicts of Interest. The trustee has a duty not to administer the trust in a manner that creates a conflict between the interests of the beneficiaries and the trustee's personal interests.
- Duty of Impartiality. Unless otherwise directed by the trust instrument, the trustee has a duty to treat the beneficiaries impartially. Thus, the trustee must fairly balance the interests of different current beneficiaries, as well as the interests of the current beneficiaries and the future beneficiaries, without favoring one beneficiary or group over the other.
- Duty of Care. The trustee has a duty to exercise reasonable care, skill and caution in administering the trust. This duty also requires the trustee to exercise confidentiality with regard to trust matters.
- Duty to Enforce Claims and Defend Actions. The trustee has the duty to defend the trust from suit, and to bring actions where the trust has an interest.

- Duty to Invest Prudently. The trustee has the duty to invest the trust assets prudently. Unless the trust otherwise directs, the trustee generally has a duty to diversify investments. A trustee generally may hire an investment advisor to assist with trust investments.

- Duty to maintain accounting and furnish information. The trustee must keep accurate records of trust investments, income and distributions, and provide this information to beneficiaries and tax advisors on usually at least an annual basis.

14. What is the difference between an executor and a trustee?

An executor administers the will of a deceased person, is appointed by a court, is subject to court supervision, generally acts for a shorter period of time than a trustee and generally has narrower investment responsibility than a trustee. An executor's job terminates after the executor completes the duties described in the FAQ titled "What are the duties of an executor?" Once the executor completes these duties, the executor is discharged by the court.

A trustee administers a trust (which can be a trust established by the property owner during the lifetime of or upon the death of the property owner), is usually not appointed by a court, rarely is supervised by a court, and generally acts for longer periods of time and with greater investment responsibility. Although some of a trustee's duties are similar to those of an executor, a trustee's main focus typically is administering the trust assets for a period of years and sometimes even for the lifetimes of the beneficiaries. Trustees' responsibilities include investing trust assets and distributing income and/or principal to the beneficiaries in accordance with the provisions of the trust.

15. What is the difference between a revocable and an irrevocable trust?

Under Illinois law, a trust is irrevocable unless the trust specifically says it is revocable. A trust that is revocable may be terminated and/or changed by the settlor or one or more other person granted authority to make changes.

An irrevocable trust cannot be changed or terminated by the settlor. Irrevocable trusts have less flexibility, and are often part of estate planning when the goal of the settlor is to avoid estate taxes or protect assets from potential, future creditors.

16. What are some types of trusts?

- Revocable Living Trusts. Revocable Living Trusts are perhaps the most common type of trust. These trusts enable a person to be the settlor, beneficiary and trustee of the trust.
- Marital Trusts. Assets may be placed in a marital trust for the settlor's or decedent's spouse to defer estate taxes until the spouse's death. There are various types of marital trusts. The most common are qualified terminable interest property ("QTIP") trusts and general power of appointment marital trusts.
- Credit Shelter Trusts. Upon the death of one spouse, assets equal to the decedent's remaining estate tax exemption may be placed in a credit shelter trust for the benefit of the surviving spouse. At the surviving spouse's death, the assets will not be subject to estate taxes. Credit shelter trusts are so named because they "shelter" the unified "credit" of a decedent. Credit shelter trusts are still utilized but have become less common now that a surviving spouse has the ability to use the deceased spouse's unused estate tax exemption (sometimes referred to as "portability").
- Generation-Skipping Trusts (a/k/a Dynasty Trusts). Generation-Skipping Trusts are irrevocable trusts designed to benefit grandchildren, great-grandchildren, other more remote descendants. With proper planning, the assets in Generation-Skipping Trusts can provide benefits for generation after generation without ever being subject to estate taxes or generation-skipping transfer taxes.
- Irrevocable Life Insurance Trusts ("ILITS"). ILITs own life insurance policies and are designed to prevent the proceeds from the policies from being subject to estate taxes upon the death of the insured. The proceeds of the life insurance policy are used for the benefit of the settlor's designated beneficiaries.
- Charitable Trusts. Charitable Trusts are trusts created to benefit charitable organizations. Often these trusts will be structured as so-called "split-interest"

trusts, which provide a benefit to a charitable organization and to an individual. Split-interest trusts can be structured as charitable lead trusts, which provide an income stream to a charitable organization for a fixed term or a term based on a person's life, with the remainder distributed to an individual. They can also be structured as charitable remainder trusts, which provide for an income stream to an individual for a fixed term or a term based on a person's life, with the remainder distributed to a charitable organization.

17. When is a trust helpful?

Trusts can be helpful in all sorts of situations to help individuals and families achieve their estate planning objectives. For example, upon death, a trust usually remains a private document available only to the trustee and the trust's beneficiaries. By comparison, in Illinois a person's will must be filed with the local probate court upon the person's death, and becomes a public record.

18. What is a guardian?

A guardian is a person (either an individual, a trust company, a public agency or a not-for-profit corporation) appointed by a court to be responsible for making personal and/or financial decisions for an individual who is a minor (a person under the age of 18) or an adult who has been adjudged by the court to be unable to care for himself or herself (a "disabled adult"). The minor or disabled adult in a guardianship is often referred to as the "ward." An individual can designate a guardian for his or her minor children. Usually, the designation of a guardian for minor children must be done in a valid will or in a document executed using the same formalities as a will. An individual can also designate a guardian for himself or herself to act at a future date if the individual becomes disabled. If a guardian is necessary for minor children or for an adult, the guardian must be appointed by the court in order to have the authority to act.

An individual acting as guardian must be 18 or older, a resident of the United States, of sound mind, and not adjudged disabled.

19. What are the differences between a guardian of the person and the guardian of the estate?

If the guardian is charged with the care of an individual, the guardian is referred to as a guardian of the person (or personal guardian). If the guardian is charged with the care of the assets of an individual, the guardian is referred to as the guardian of the estate (or estate guardian). The same party can be the guardian of the person and the guardian of the estate, but often there are different parties serving in those capacities.

20. What are the duties of a guardian of…

…a minor?

The guardian of the person of a minor is charged with the custody, nurturing and education of the minor. The guardian of the estate of a minor is responsible for the care, management and investment of the minor's assets. The guardian of the estate represents the minor in all legal proceedings unless another person is appointed as representative or next friend by the court. All

of the activities of a guardian of the person or a guardian of the estate are subject to control by the court.

…a disabled adult?

The guardian of the person of a disabled adult is charged with the custody of the disabled adult and his/her minor and adult dependent children. The guardian of the person provides or arranges for the disabled adult's support, care, comfort, health, education and maintenance, and assists the disabled adult in the development of maximum self-reliance and independence. The guardian of the estate is to apply the income and principal of the disabled adult's assets for the comfortable and suitable support and education of the disabled adult, his/her children and persons related by blood or marriage who are dependent on the disabled adult or entitled to support from the disabled adult or for any other purpose the court deems to be for the best interests of the disabled adult. The guardian of the estate represents the disabled adult in all legal proceedings unless another person is appointed as representative or next friend by the court. The court may authorize the guardian to exercise any powers over the business affairs and estate of the disabled person that the ward could exercise if not under disability, including making gifts, changing beneficiaries for insurance and retirement plans, etc., creating revocable or irrevocable trusts for the benefit of the disabled adult or others, and modifying trusts or wills. All of the activities of the guardian are subject to control by the court.

21. What are short-term guardians and temporary guardians?

A short-term guardian of a disabled adult is designated by the acting guardian without court approval to assume the guardian's duties as guardian of the person (but not as guardian of the estate, except as to benefits from any governmental unit or charity) when the guardian is unavailable or unable to carry out his/her duties. The short-term guardian of a disabled adult may act for a cumulative total of 60 days within any 12-month period.

With respect to a disabled adult if, prior to the appointment of a guardian, there is a showing of necessity for the immediate welfare and protection of the alleged disabled person or his/her estate, the court may appoint a temporary guardian for up to 60 days. The temporary guardian has all of the powers and duties of a guardian of the person or estate as are specifically provided by court order.

22. What are the different ways that property can be owned by more than one person?

Illinois law recognizes three ways that you can own property with others: Joint Tenancy, also known as Joint Tenancy with Rights of Survivorship or JTWROS ("JT"), Tenancy by the Entirety ("TBE"), and Tenancy in Common ("TIC"). All three are available for real estate ownership (see restrictions on TBE in the FAQ entitled "What is Tenancy by the Entirety"), but only TIC and JT are available for personal property. JT and TBE avoid probate, because on the death of one of the co-owners the property passes to the surviving co-owner(s) by law. Probate proceedings generally are required to pass a co-owner's share in a TIC if passing under his or her will or by the laws of intestacy, if he or she did not have a will.

23. What is Joint Tenancy?

When co-owners own property in joint tenancy, each co-owner has an equal share of the property and survivorship rights. All two person joint tenancies are 50/50, all three-person joint tenancies are 1/3, 1/3, and 1/3, etc. Each joint tenant has the right to use the entire property or, in the case of a jointly owned account, to withdraw the entire value of the account. Rights of survivorship mean that a deceased co-owner's share is divided equally among the surviving joint tenants. For example, Mai, Jan and Ted own a house as joint tenants. Upon Ted's death, Ted's 1/3 share would automatically be split evenly between Mai and Jan. Mai and Jan would then own the house 50/50, as joint tenants. Upon Mai's subsequent death, if Jan survived Mai, Jan would be the sole owner of the house. To own property as joint tenants with rights of survivorship, all owners share the asset in equal proportions.

24. What is Tenancy by the Entirety?

Tenancy by the Entirety (TBE) is the same as Joint Tenancy (JT), but with some additional features. First, TBE, in Illinois and in many other states, is only available to married couples and parties to a civil union and only for ownership of the couple's primary home. As with JT, upon the death of one spouse or party to a civil union, the surviving spouse or surviving party to a civil union would own the entire house. The extra benefit TBE provides is a limited amount of creditor protection: if the transfer into TBE was not done to defraud existing creditors, a creditor of one spouse or party to a civil union cannot force the sale of the house to repay the debt owed to the creditor unless the other spouse or party to a civil union is also liable for the debt. Once a TBE is established, an independent sale, lifetime gift by one of the TBE owners, or a divorce will transform the nature of the interest to a Tenancy in Common. After the death of one spouse or party to a civil union, TBE is terminated and the property is owned individually by the surviving spouse or the surviving party.

25. What is Tenancy in Common?

Tenancy-in-common is "a shared tenancy in which each holder has a distinct, separately transferable interest." For example, if three individuals own a parcel of land as tenant-in-common, each person would have a distinct and separate, transferable interest in the property.

26. How are the different forms of ownership created?

In order to create a tenancy of your choosing, you must specify the type of ownership, i.e., Tenancy by the Entirety (TBE), Joint Tenancy (JT), or Tenancy in Common (TIC), as applicable, on the deed, if real property is involved, or other document (e.g. account agreement for a checking account). Once a JT is established, an independent sale or lifetime gift by one of the co-owners will transform the nature of the interest to a TIC. A divorce, dissolution of a civil union, will transform the TBE to a JT.

27. What are Payable on Death (POD) and Transfer on Death (TOD) accounts? What is a Transfer on Death Instrument for residential real estate?

In Illinois, an owner of a bank or security account may transfer the account to one or more beneficiaries upon his or her death by using a "payable on death" ("POD") or "transfer on death" ("TOD") designation. POD accounts may be used to transfer assets held in a bank, savings and loan, or credit union to a beneficiary, and are sometimes called "Totten trusts." TOD registration

is used exclusively for securities and investment accounts. At the owner's death, the named beneficiary becomes the owner of the POD or TOD account without having to go through probate.

POD and TOD accounts allow the owner to retain control over the entire account during the owner's lifetime; the owner can cancel or change the beneficiary without notifying the beneficiary. A person can open a new POD or TOD account or convert an existing account to a POD or TOD by contacting their banker, broker, or financial advisor for the proper forms.

Commencing on January 1, 2012, Illinois allows for the transfer of residential real estate by beneficiary designation in a form of deed called a "Transfer on Death Instrument." Special rules apply to the form of the deed and the acceptance of the real estate by the beneficiary after the death of the owner. Similar to the POD and TOD the owner retains control over the real estate and can cancel or change the beneficiary without notifying the beneficiary.

28. What is a Power of Attorney? What are the types of Powers of Attorney?

A power of attorney (POA) is a legal document where an adult (age 18 or older), known as the principal, gives authoritative power to another adult, known as the attorney-in-fact or agent, to act for the principal. POA's can be general or specific in scope and can be revoked by the principal as provided in the Illinois Power of Attorney Act. There are powers of attorney for property (for financial matters) and powers of attorney for health care decisions. A power of attorney which continues after the incapacity of the principal is referred to as a "durable power." An agent's authority under a power of attorney for property will end at the death of the principal unless the POA provides for an earlier termination.

Illinois has statutory forms for both powers of attorney for property and powers of attorney for health care, but you are free to use other forms to create powers of attorney.

29. Who should act as Agent under a Power of Attorney?

When selecting an agent to act under your power of attorney (POA), you should choose someone you trust to make financial, business or health care decisions consistent with your wishes. Therefore, you should talk with your agent so that he or she understands your wishes and feels comfortable with carrying them out.

An attending physician, any other health care provider or health care professional of the principal cannot act as agent for a patient under a health care POA, but a person not administering health care to the patient may act as agent, even though that person is a physician or other health care provider or health care professional.

At all times, your agent must exercise the authority granted to him or her under the POA in a manner which your agent believes is consistent with your intentions and desires. An agent is not legally required to exercise the powers given to him or her under the POA.

If using the statutory Illinois forms, the principal cannot appoint co-agents. Successor agents, however, may be designated in the statutory forms.

30. What is a Power of Attorney for Property?

A Power of Attorney for Property (POA-P) authorizes an adult to act as your agent to make decisions involving your property and financial affairs either immediately or upon the occurrence of a specified event, such as a specific date or the principal's incapacity. Property and financial affairs may include paying bills, filing tax returns, managing real estate, handling investment decisions and other money matters.

31. How much authority is given to the agent under a Power of Attorney for Property?

A Power of Attorney for Property (POA-P) can be very specific in nature detailing only certain actions the attorney-in-fact or agent may take. Alternatively, it may be broad in scope giving the agent the authority to manage all of the principal's financial affairs. It can become effective at the time of execution, or it can "spring" into effect when triggered by a specified event, such as disability. Any acts authorized in the POA-P, when performed by the agent, bind the principal as if he or she personally took the action. However, a principal may take action against the agent, if the agent acts improperly.

32. Are there any requirements under Illinois law for signing a Power of Attorney for Property?

In Illinois, A Power of Attorney for Property must be signed in the presence of a witness and a notary public. In addition, if the instrument will be used to transfer real estate, the name of the person who prepared the instrument must be included. None of the following may serve as a witness to the signing of a Power of Attorney for Property:

(1) the attending physician or mental health service provider of the principal, or a relative of the physician or provider;

(2) an owner, operator, or relative of an owner or operator of a health care facility in which the principal is a patient or resident;

(3) a parent, brother, sister, or descendant, or the spouse (or party to a civil union) of a parent, brother, sister, or descendant, of either the principal or any agent or successor agent, regardless of whether the relationship is by blood, marriage, or adoption;

(4) an agent or successor agent.

33. What powers are granted to an agent under a Power of Attorney for Health Care?

Under a Power of Attorney for Health Care, you can give your agent limited or broad authority to make decisions concerning your health care and personal well-being. An agent's authority may include the ability to carry out one or more of the following on your behalf:

- Consent (or withhold consent) to any and all types of medical care, treatment or procedures, including the withdrawal or withholding of life-sustaining treatment;

- Admit (or discharge) you from any and all types of hospitals, institutions, residential or nursing facilities, treatment centers and other health care institutions
- Contract for any and all type of health care services and facilities;
- Examine and copy those medical records that your agent deems relevant to the exercise of his or her powers, and to consent to their disclosure.

You also can give your agent authority to do one or more of the following after your death:

- Make anatomical gifts;
- Request or consent to an autopsy;
- Direct the disposition of your remains;
- Permit access to medical records.

34. What authority does an agent under a Power of Attorney for Health Care have regarding life sustaining treatments?

In Illinois, the statutory Power of Attorney for Health Care (POA-HC) gives the agent the power to make decisions regarding the withdrawal or withholding of life-sustaining treatment, subject to any restrictions in the POA-HC. The Illinois statutory POA-HC contains an optional section where you can express your wishes about life-sustaining treatment, and the circumstances in which you would like it administered, withheld, or withdrawn.

35. When does a Power of Attorney for Health Care become effective?

The current statutory Power of Attorney for Health Care provides the following three options regarding when a health care agent's authority becomes effective: 1) the agent's authority becomes effective upon a physician's determination that the principal lacks capacity; 2) the agent's authority to access the principal's medical records becomes effective immediately, and all other authority becomes effective upon a physician's determination that the principal lacks capacity; and 3) the agent's authority becomes effective immediately.

36. Who can act as agent under a Power of Attorney for Health Care?

The person whom you designate as your agent must be at least 18 and cannot be your doctor or someone who is providing you with health care services.

37. Are there any requirements for signing a Power of Attorney for Health Care?

You must sign the Power of Attorney for Health Care in the presence of at least one witness. No witness may be under 18 years of age. None of the following licensed professionals providing services to the principal may serve as a witness to the signing of a health care agency:

(1) the attending physician, advanced practice nurse, physician assistant, dentist, podiatric physician, optometrist, or psychologist of the principal, or a relative of the physician, advanced practice nurse, physician assistant, dentist, podiatric physician, optometrist, or psychologist;

(2) an owner, operator, or relative of an owner or operator of a health care facility in which the principal is a patient or resident;

(3) a parent, sibling, or descendant, or the spouse of a parent, sibling, or descendant, of either the principal or any agent or successor agent, regardless of whether the relationship is by blood, marriage, or adoption;

(4) an agent or successor agent for health care.

38. What is the difference between a Living Will, a POLST (formerly a DNR), and a Power of Attorney for Health Care?

An Illinois Living Will is a written declaration that instructs your physician to withhold or withdraw death delaying procedures in the event you have or develop a terminal condition.

A Power of Attorney for Health Care (see above FAQs for more detail) is a written agreement where you (the "principal") grant powers to another person (the "agent") to make specified personal and health care decisions for you. A Power of Attorney for Health Care could permit an agent to request to withhold nutrition and/or hydration whereas a Living Will does not permit a physician to withhold nutrition and/or hydration.

A properly executed POLST permits you to direct when and under what conditions resuscitation should be attempted and what type of medical intervention and/or care should be administered to you in cases where you are found unconscious. Proper execution of a POLST requires both a witness and the signature of a licensed medical practitioner.

39. Do I need a Living Will if I have a Power of Attorney for Health Care?

The Illinois Power of Attorney Act provides that if the principal has a Living Will created under the Illinois Living Will Act, the Living Will is not operative so long as an agent is available who is authorized by a Power of Attorney for Health Care to deal with the subject of life-sustaining or death delaying procedures on behalf of the principal. If the principal would like to have a Power of Attorney for Health Care and a Living Will, the principal should consider contacting a legal advisor to discuss the interplay between these two documents.

40. What is an organ donation?
How do I make an organ donation?

In Illinois, any individual who is of sound mind and who has attained the age of 18 may give all or any part of his or her body ("donor") to a physician, hospital, medical school, dental school, chiropractic school, mortuary school, bank or storage facility for medical or dental research, education, therapy or transplantation, to a federally designated organ procurement agency or tissue bank for medical or dental research, education, therapy or transplantation, or to a specified individual. A gift of all or part of a person's body may be made by will or by a written, signed document other than a will. A written, signed document other than a will may be part of the donor's driver's license or it may be a separate card or form completed by the donor. The statutory Illinois Power of Attorney for Health Care also allows a person to indicate whether or not he or she would like to be an organ donor. The donor may also make an effective gift of all or any part

of his or her organs or tissues by consenting to have his or her name included in the First-Person Consent Organ/Tissue Donor Registry maintained by the Illinois Secretary of State. The web site for the Illinois Secretary of State's organ/tissue donor registry is www.LifeGoesOn.com. If a person does not make such a gift of all or part of his or her body, then certain specified persons, including an agent under a Power of Attorney for Health Care, may consent to organ donation.

41. Why is life insurance part of the estate planning process?

(1) Provide support for dependents: The most essential function of life insurance is to assure the necessary financial support for dependents in the event of the insured's premature death.

(2) Preserve assets that would otherwise have to be sold to pay any estate taxes. Whether or not your assets are illiquid, if your estate is subject to estate taxes, a large percentage of your assets may have to be sold within nine months of your (or a surviving spouse's) death to pay estate taxes. Life insurance can provide cash that may be needed to pay estate taxes.

(3) Equalize or balance the value of your children's individual inheritances: If only some of your children will inherit certain assets – for example, a family business or a home (including a second residence) – life insurance for the benefit of other family members can be used to equalize the distribution of your estate.

(4) Fund a buy-sell agreement or business succession plan: Business buy-sell agreements or succession plans create rights and obligations to transfer or purchase business ownership interests under certain circumstances, including the death of an owner. Life insurance can be used to fund this obligation.

(5) For estate tax purposes, the death benefit of life insurance on one's own life, if owned by the decedent, is includable in calculating the value of a decedent's estate for estate tax purposes. Hence, it must be considered in devising a plan.

42. What are the different types of life insurance?

Life insurance can be divided into two main categories: term and permanent (sometimes referred to as a whole life policy).

(1) Term Insurance is generally the least expensive (in the short term) and the least complicated type of life insurance. Coverage is typically provided for a specific term (period of time) – for example, for 5, 10, 15, 20 years or even longer. The premium may be level for the full-term period or may increase over time. Coverage will end if the insured is still alive at the end of the term. Many term policies include a "conversion option," which guarantees the policy owner the right to convert the policy to permanent coverage without having to re-qualify. However, conversion options vary among carriers and products as to both the latest date for conversion and the choice of products available for conversion.

(2) Assuming that an individual has a permanent need for life insurance, permanent insurance may be appropriate. There are many different types of permanent insurance, and variations within each type, including whole life insurance, universal, variable, whole/term blends, and guaranteed death benefit. If permanent insurance is needed, it is advisable to speak to a knowledgeable agent about the most appropriate type for your needs. In addition, life insurance may insure just one life or may be "joint and survivor" insurance, which pays at the death of the survivor of two individuals (generally husband and wife).

43. **Do states impose death taxes?**

Some, but not all, states impose death taxes. Many states, including Illinois, establish a taxable estate threshold for assessing estate taxes. For example, the threshold for imposition of an Illinois estate tax is $4 million. Calculating the tax in Illinois is complicated. The marginal rate for estate tax in Illinois begins at 28% but then levels out at approximately 16%. In determining the tax, the decedent's executor can deduct debts, expenses of administration, amounts passing to charity, amounts passing to a spouse (there are special rules if the spouse is not a U.S. citizen) and taxes paid to any state. The threshold for estate tax in some states is lower than in Illinois, and some states impose no state estate tax whatsoever. This may be a factor in an individual's decision to establish residency in one state versus another.

44. What is the federal gift tax?

The federal gift tax is tax that may be imposed on lifetime transfer of wealth by any individual to a donee. This tax is determined based on the fair market value of property transferred. The tax may apply to direct and indirect transfers of real and personal property, both tangible and intangible. The fair market value of the transfer is determined as of the date of the gift. In general, gifts to spouses and gifts to charities are not taxable gifts, nor are gifts valued at or below the gift tax exclusion of $15,000 (as of January 1, 2020). Furthermore, gift tax will only be assessed if the value of the taxable gift exceeds the donor's available gift tax exemption. In 2020, the individual gift tax exemption is set at roughly $11,580,000. The amount by which a gift exceeds the donor's available gift tax exemption is subject to a 40% tax. The donor is responsible for filing a federal gift tax return and paying any federal gift tax.

45. What is the federal estate tax?

The federal estate tax is a tax imposed on the transmission of property at the death of an individual (the "decedent"). The estate tax rate is 40%. In 2020, the first $11,580,000 (subject to certain adjustments) (the "exemption") passes free of estate tax. The estate tax is due nine months after death. Generally, the estate tax is imposed on all property that the decedent owned at death (referred to as his or her taxable estate). In determining the tax, the decedent's executor must include a proportional value of any jointly held property, retirement and non-retirement assets, including real estate, and the death benefit of life insurance on the decedent's life, but can deduct debts, expenses of administration, amounts passing to charity, amounts passing to a spouse (there are special rules if the spouse is not a U.S. citizen) .

46. My same-sex partner and I are planning to get married. Do we still need estate planning?

Congratulations! You still should utilize all the standard estate planning strategies that married different-sex couples use including pre-nuptial agreements, wills, revocable trusts, and powers of attorney.

There are a few additional issues you may want to consider. If your partner and you have a domestic partnership agreement it may no longer be enforceable. If your partner and you created certain types of irrevocable trusts motivated by the fact that you could not take advantage of the unlimited marital deduction for spouses, you may want to consult an attorney about terminating those trusts. Finally, you might want to consider whether amending past years' income or gift tax returns is an option.

47. Do all states recognize same-sex marriages?

In 2015 the United States Supreme Court, in a landmark civil rights case, held that the right to marry is a fundamental right, and from that time on, marriage is available to persons of the same sex in all 50 states. After same sex marriage became available in Illinois, if you were a party to a same sex civil union you could opt to convert your civil union into a marriage at no cost.

It should be noted that an Illinois civil union will only enjoy all benefits enjoyed by married couple in Illinois, but this may not be the case in all states.

48. What are digital assets and can I designate someone to handle my digital assets in the event of my incapacity or death?

Illinois adopted the Revised Uniform Fiduciary Access to Digital Assets Act (2015) ("RUFADAA"), effective August 12, 2016. RUFADAA defines "digital asset" as an electronic record in which an individual has an interest. "Electronic" is defined as technology having electrical, digital, wireless, optical, or similar capabilities. "Record" is defined as information that is inscribed in a tangible medium or that is stored in an electronic or other medium and is retrievable. Digital assets include the individual's email accounts, accounts with Facebook, Instagram, Twitter, and others, and information stored in "the cloud."

RUFADAA allows an individual ("user") to provide a direction in a will, trust instrument, or power of attorney requiring that the custodian of any of the user's digital assets disclose the digital assets to the user's designated fiduciary (the executor, trustee, or agent under power of attorney). The "custodian" is a person who carries, maintains, processes, or stores the user's digital asset.

The user may direct the custodian to disclose some or all the user's digital assets in the following priority order:

- The user may use an online tool. If the online tool allows the user to modify or delete the direction, the direction in the online tool overrides a contrary direction in a will, trust, power of attorney, or other record.

- If the user has not used an online tool or if the custodian has not provided an online tool, the user may allow disclosure to a fiduciary in a will, trust, power of attorney, or other record.
- If the user has not used an online tool and has not allowed disclosure to a fiduciary in a will, trust, power of attorney, or other record, a provision in a terms-of-service agreement will control so long as the terms-of service agreement does not require any other affirmative act by the user.

Appropriate language in a will, trust, or power of attorney can authorize the user's designated fiduciary to access and administer the user's digital assets.