ESTATE PLANNING

What Individuals and Their Families Need to Know to Control and Protect Assets

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INTRODUCTION

Everyone should have an estate plan in place. Even a simple estate plan is essential. These materials are designed to give the reader an overview of the estate planning process and the options available. It contains basic information about wills and trusts, the two most common ways for the distribution of your assets. These materials are intended as a general reference only.

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By planning ahead now, you can retain more of your assets, protect your estate and leave a lasting legacy for your family.

I. What is Estate Planning?

Estate planning is a method by which you ensure that:

You control your property while you are alive;

You and your loved ones are taken care of if you become disabled; and

You give what you have to whom you want, the way you want and when you want.

II. What are the Goals of Estate Planning?

The most common goals of estate planning are:

1. Retain control over your assets;
2. Plan for your incapacity and preserve your autonomy;
3. Give your property to whom you want;
4. Reduce or eliminate taxes;
5. Protection of assets from creditors; and
6. Protection of assets from long-term care costs.

III. What Tools are Used for Estate Planning?

Some of the tools available to Estate Planning Attorneys include:

1. Wills
2. Powers of Attorney
3. Health Care Proxies
4. Revocable Trusts
5. Irrevocable Trusts
6. Life Insurance
7. Long-Term Care Insurance
8. Homestead Declarations
9. Jointly-Owned Assets
10. Charitable Gifts

IV. Management of Personal Affairs During Lifetime

A. Durable Power of Attorney

A durable power of attorney is a document that allows you (the "Principal") to appoint an individual (your "Attorney-in-fact") to act as your agent on financial matters should you ever become incapacitated. The powers can be as broad or limited as you want them to be. If you want to appoint more than one person you can require that they must act together or permit them to act separately. With this instrument, your agent will be able to take advantage of estate and Medicaid planning options that may be available at that time. The only alternative may be a conservatorship, which is costly and cumbersome.

Most powers of attorney take effect when executed even though the usual intent is for them to be used only in the event of the incapacity of the grantor. You have the option of executing a "springing" power of attorney that will only become effective when your physician states that in his or her opinion you have become incapacitated.

If you do not have a power of attorney and you become incapacitated, your family would have to file a conservatorship proceeding with the probate court in order to make financial decisions for you. Putting aside the legal expense and aggravation this would cause your family, conservatorship would also bring the courts into your private matters. The power of attorney is an effective way of avoiding this situation.

B. Revocable Trust

A revocable trust is an arrangement created by one person (the "trustmaker") who transfers his or her assets, which could include real estate, to another person or institution (the "trustee") to manage the assets for the benefit of the trustmaker or others (the "beneficiaries"). The trustee is obligated to manage the trust assets for the benefit of the beneficiaries. A trust can be *revocable* (the grantor can modify or terminate the trust at any time) or *irrevocable* (the grantor gives up the power to modify or terminate the trust.)

The advantage of a trust is that the trustmaker can provide for the management of his or her funds and payment of debts and other expenses. With certain types of trusts, you can also exercise continuing control over the trust. A trust can avoid the need for a conservator if the trustmaker becomes disabled. In addition, a trust can avoid probate at death, which is a popular goal, and in some instances, can be used to achieve tax savings and charitable goals. Trusts are often used to manage assets for disabled children. If someone is receiving public benefits such as SSI and Medicaid, a properly drafted trust can supplement these programs without affecting the beneficiary's eligibility.

C. Health Care Proxy

At some point during life a person may become unable to make his or her own medical decisions. Whether due to a terminal condition or a temporary unconscious state, there are numerous circumstances that would require another to make such decisions.

A Health Care Proxy is a document in which one person (the "Agent") is designated to make medical decisions for another (the "Principal"). Some of these decisions include such vital matters as the level of care and the commencement or withholding of any treatments, when the Principal is unable to decide. The Agent should be someone who has an understanding of the type of treatment the Principal would desire and what would be in the Principal's best interests. Usually, the Principal's spouse is an appropriate Agent with an adult child as the alternate Agent.

D. Guardian and Conservator

All adults are presumed competent until a court of law determines otherwise. This means that unless there is an emergency or a judicial determination of incompetence by a probate court, no one else can make a decision for an adult. The fact that an adult occasionally or even routinely makes what most of us would consider to be bad decisions is not the basis for seeking a guardianship or conservatorship. Nevertheless, in the roundabout way these proceedings work, bad decisions may be evidence of incompetence, especially if they are inconsistent with decisions the individual has made in the past.

Guardianship or conservatorship is usually sought when the proposed "ward" is unable, due to mental retardation, mental illness, or physical incapacity, to act for him or herself in the areas of personal, medical, and financial decision making. Court intervention of this sort dramatically limits the civil liberties of the ward. Once appointed by the court, the conservator is, with few exceptions, able to make all financial decisions. The guardian is able to make all medical and housing decisions for the ward. It is the most restrictive alternative available when dealing with an "incompetent" person.

A family member does not have to serve as guardian or conservator. The final decision on who to appoint is with the probate judge, who must be convinced that the person appointed will act in the ward's best interests. If no one is nominated, the court will appoint a "suitable person" who is often an attorney known by the court.

One of the major responsibilities of the conservator is the requirement to file an inventory of the ward's assets and annual accounts that detail the income and expenses of the ward. The account lists all funds that have come into the ward's accounts and all funds that have been paid out. All the accounts must be balanced to the penny.

Guardianship and conservatorship can be fraught with a loss of dignity and privacy, it entails substantial commitment by the person appointed and can be very expensive. In almost every circumstance, it is possible to avoid guardianship or conservatorship by engaging in very simple estate planning while still competent to do so. As explained above, by planning for a disability when competent a person can almost always avoid the need for guardianship or conservatorship.

V. Estate Planning and Distribution of Assets At Death

A. What is Probate and When is Probate Required?

Probate is the process by which a Will is reviewed by the court, debts of the estate are paid, and final distributions are made to the heirs. People often want to avoid probate in order to bypass legal fees and the time involved in the process. Depending on the size of the estate, legal fees can easily be a few thousand dollars and it can take approximately one year to probate a Will. In addition, if the decedent was receiving Medicaid prior to death, Medicaid may be able to recover from the assets from the probate estate.

Probate is required whenever a person dies owning an asset in his or her name alone. The probate estate includes all property held in the decedent's name. Certain kinds of property, such as a life insurance that names a beneficiary, are not subject to probate.

B. Avoiding Probate - Probate Assets vs. Non-Probate Assets

A way to avoid probate is to make sure that when you die, there are no assets solely in your name. Generally assets must be owned in a way that automatically passes the assets to another at death. Some examples of these kinds of assets include the following:

1. **Joint ownership with rights of survivorship** or tenancy by the entirety (where the surviving joint owner inherits the asset). These assets may include real estate and bank accounts.

2. Assets controlled by **beneficiary designation**, such as IRA accounts, pensions, profit sharing plans, and life insurance proceeds. These assets will pass directly to the named beneficiaries in accordance with designated beneficiary elections.

3. Assets held in a **Trust**. If the Trust is the owner of an asset when the decedent dies, the Trust continues to exist and its terms will govern the ultimate disposition of the asset.

C. Intestacy

If you die without a Will, you are said to have died intestate and the laws of the state in which you lived at death will determine how your assets will be distributed. Sometimes known as the "poor man's will," the intestacy rules distribute assets to the decedent's relatives based on their relationship: first to the surviving spouse and children, if none to the surviving parents, if none to siblings, and so on. If this is not what you want, it is crucial that you have a Will that clearly indicates how your assets are to be distributed.

D. Last Will and Testament

A Will is the legal document that supersedes the intestacy laws. In the Will, gifts to beneficiaries are made, and the Personal Representative (Executor) of the estate is appointed. The Personal Representative ("PR") is the person authorized by the will (and the law) to deal with the assets and wind up the affairs of the decedent. The PR is obligated to handle matters in the best interests of the estate and the heirs. He or she must assemble the assets, pay the bills, file estate and income tax returns, and finally, distribute any remaining assets to the proper heirs and account for all of his or her actions. A Will should contain provisions which ease the administration of the estate, saving time and money. Having a Will does not mean that you avoid probate. Again, whether a probate will be required depends on how assets are titled at the time of death. A Will simply contains your instructions for distribution of the assets that are subject to probate.

CONCLUSION

By planning ahead, a person can (1) retain more assets, (2) protect his or her estate, and (3) leave a lasting legacy for family members. The purpose of this handout is to explore the basics of estate planning. A "one-size-fits-all" approach is dangerous. Proper planning requires a detailed analysis of a person's assets and financial situation, as well as his or her hopes and plans. Every plan must be individually designed, weighing all objectives and alternatives. Once a plan is in place, it must be reviewed periodically – rules change, as do personal circumstances.

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Elder Law
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Wills & Trusts
Long Term Care Planning
Medicaid Planning
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Probate of Estates
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Real Estate Law
Business Law
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