

Fundamentals of Estate Planning

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Estate Planning in General

- ▶ Estate planning and financial planning complement each other.
 - ▶ Your estate planning attorney and financial advisor typically work together to ensure a cohesive plan.
- ▶ There are four documents that I generally recommend all clients have in place:
 - ▶ Advance Medical Directive
 - ▶ General Power of Attorney
 - ▶ Last Will and Testament
 - ▶ Revocable Trust (depending on assets, goals, and family dynamics)

Advance Medical Directive

- ▶ An Advance Medical Directive governs who can make medical decisions on your behalf when you “lack the ability to make an informed decision”.
 - ▶ The determination is typically made by two doctors.
 - ▶ Gives your agent the power to handle your medical affairs – your agent stands in your shoes and can make any decision that you could otherwise make.
 - ▶ Typically sets forth your preference as to organ donation.
 - ▶ Addresses your preference on life-support (avoiding the Terry Schiavo scenario with dueling family members).

General Power of Attorney

- ▶ A General Power of Attorney is sometimes referred to as a Financial Power of Attorney.
 - ▶ This document sets forth who can make financial and business decisions on your behalf.
 - ▶ Your agent owes a fiduciary duty to act in your best interests.
 - ▶ Two types: Durable and Springing
 - ▶ A Durable Power of Attorney does not wait for you to become incapacitated before your agent can act on your behalf.
 - ▶ A Springing Power of Attorney requires that you lack capacity before your agent can act.

General Power of Attorney, contd.

- ▶ Issues Surrounding Durable and Springing Powers of Attorney:
 - ▶ Durable Power of Attorney:
 - ▶ Your agent can act immediately at any time, whether you are traveling, admitted to a medical facility (even if you are not incapacitated), or simply not available to address your affairs.
 - ▶ Ensuring you have a responsible person serving as your agent.
 - ▶ Springing Power of Attorney:
 - ▶ Requires that you lack capacity.
 - ▶ Difficulties arise in obtaining a physician's evaluation on capacity.
 - ▶ Acceptance of capacity determination by third parties.

Last Will and Testament

- ▶ A Last Will and Testament (“Will”) is a written document that is effective upon death and:
 - Disposes of property after death
 - States burial preferences
 - Names executor
 - Nominates guardian(s) for minor/disabled children

Last Will and Testament, contd.

- ▶ How is a Will created?
 - ▶ Testator (person making the Will) must be over 18 years and mentally competent.
 - ▶ Witnesses must be over 18 years and mentally competent.
 - ▶ Will is signed by the Testator in front of two (2) disinterested witnesses and Notary Public, and signed by both witnesses.
 - ▶ Self-proving affidavit: witnesses attest that the Testator is over 18 years old, Testator signed of his/her own free will, Testator is competent and of sound mind.

Last Will and Testament, contd.

- ▶ How is it created continued:
 - ▶ Executor named in your Will to act upon your death:
 - Must be over 18 years and mentally competent.
 - Can be anyone you know and trust to carry out your wishes.
 - If you do not name an executor, the court will appoint an administrator.
 - You may have more than one executor or co-executors.

Last Will and Testament, contd.

- ▶ To whom may I leave my property?
 - ▶ You may leave your property, or any part of it, to any person or organization you wish, such as a relative, friend, or charitable organization.
 - ▶ You are not required to leave anything to anyone – see note below for the only caveat.
 - ▶ NOTE: If you are married at the time of your death and fail to provide for your spouse (and don't have a prenuptial or post nuptial agreement pertaining to your assets), your surviving spouse will be entitled to a portion of your estate.

Last Will and Testament, contd.

- ▶ A Will governs what happens to your probate assets on your death.
- ▶ In order to address your probate assets, your Will must be admitted to the court where you last resided at death.
- ▶ An estate will be opened and your executor will be appointed by the court. An estate administration proceeding will follow.

Last Will and Testament, contd.

- ▶ Probate v. Non-probate Asset:
 - ▶ **Probate** assets are those that are in your individual name and for which you do not have beneficiary designations in place.
 - ▶ **Non-probate** assets are those that either have beneficiary designations or are owned by you with another person with a right of survivorship. These assets are not governed by the terms of your Will (your Will has no control over the disposition of those assets). Examples:
 - Property co-owned with surviving co-owner(s)
 - Examples: Financial accounts, savings bonds, real property, cars
 - Property with a named beneficiary
 - Examples: Financial accounts that are Payable On Death (POD) or Transfer On Death (TOD), savings bonds that are POD/TOD, life insurance policies with named beneficiaries, brokerage and retirement accounts with named beneficiaries

Last Will and Testament, contd.

- Real Property:
 - Need to know how real property is titled, not who is on the mortgage.
 - How the property is titled will determine whether real property is probate property (passes pursuant to the terms of the Will) or is non-probate property (passes outside the terms of the Will)
 - 3 types of ownership:
 - Solely titled in your name.
 - Jointly owned with right of survivorship (if married, tenants by the entirety)
 - Jointly owned with no right of survivorship (tenants in common)

Last Will and Testament, contd.

- ▶ Estate Administration:
 - ▶ Average length of a proceeding is 1.5-2 years.
 - ▶ Generally requires the filing of an Inventory and Accounts (generally annually) until all assets have been distributed.
 - ▶ Costly process between the court fees, attorneys' fees (typically your executor will hire professional counsel), and sometimes surety bond fees.
 - ▶ Difficulties arise with minors inheriting under a Will.
 - ▶ Your Will and information detailing your assets become public record.
 - ▶ Process can be avoided with a Revocable Trust (provided you have funded the trust).

Revocable Trust

- ▶ A Revocable Trust ("Trust") can be used in conjunction with a Will.
 - ▶ A primary goal with a Trust is to avoid or minimize the likelihood of estate administration by utilizing a Trust.
 - ▶ The Will is used only as a backstop for assets not already transferred into the Trust or for which the Trust is not named as the beneficiary.
 - ▶ The Will names the Trust as the beneficiary of the estate, so the Trust governs the ultimate distribution of your estate (it lists the persons and organizations that you intend to inherit your assets).
 - ▶ In an ideal scenario, no estate administration will need to be opened with the court (there are no probate assets).
 - ▶ A Trust is not required to be provided to the court, and therefore remains a private means of transferring your assets.

Revocable Trust, contd.

- ▶ How does it operate?
 - ▶ The Trust is an *inter vivos* trust, which means that the Trust comes into being when you sign the trust document.
 - ▶ It uses your SSN, so there are no tax ramifications of having a Trust during your lifetime. Any income earned by an asset in your Trust is reported on your 1040.
 - ▶ You are the Trustee (until such time as you lack mental capacity), which means you control the assets. You can add assets, sell assets, remove them from the Trust, etc.
 - ▶ Your financial advisor should be involved with asset retitling and beneficiary designations (and should have a copy of your Trust).
 - ▶ Since the document is revocable, you can modify or revoke it as needed going forward (so long as you have mental capacity).

Revocable Trust, contd.

- ▶ What happens when I lack capacity?
 - ▶ Your successor Trustee will assume all trust management going forward.
 - ▶ All income is still reflected on your 1040.
- ▶ What happens when I die?
 - ▶ Your Trustee will obtain a new TIN/EIN for the Trust, which will then begin to have its own tax filing requirement (1041).
 - ▶ Your Trustee will then administer the Trust according to the terms you've dictated in the Trust (outright distribution, holding assets for a beneficiary until he/she reaches a certain age, holding assets in a supplemental needs trust, etc.).

Issues with Minors

- ▶ Issues with Minors who inherit under a Will or by a beneficiary designation:
 - ▶ The court and/or the financial institution will require that a legal guardian of the minor's estate be appointed by the court. The process varies by jurisdiction, but it is a costly endeavor.
 - ▶ The court generally restricts the usage of the funds while under guardianship (in VA, it severely restricts the uses).
 - ▶ Depending on the jurisdiction, there are annual accountings required (with annual court fees), as well as an annual surety bond for the guardian.
 - ▶ The minor inherits the funds outright at the age of 18, regardless of financial maturity/fiscal prudence of the minor.

Issues with Minors, contd.

- ▶ Minors who inherit under a Trust:
 - ▶ You can control when the minor inherits funds outright.
 - ▶ The assets can be used for the benefit of the minor for various purposes during the period of minority, in the Trustee's discretion.
 - ▶ The court has no involvement, therefore, no legal guardian needs to be appointed.
 - ▶ Assets with beneficiary designations can name the Trust (of which the minor is a beneficiary), thereby avoiding the necessity of a legal guardian in that scenario.

What if I have no descendants?

- ▶ A common issue that arises is “who do I name as my agent/executor/trustee if I have no descendants?”. There are a number of options available in this situation:
 - ▶ Friends
 - ▶ Other Family Members – siblings, nieces/nephews, etc. (preferably your generation or younger)
 - ▶ Professionals – Banks and Trust Companies often serve as executor/trustee; accountants and attorneys often serve as agent/executor/trustee; and some private companies that specialize in the provision of healthcare also serve as agent/executor/trustee. Note that professionals always charge a fee for this service.

Adult Guardianship/Conservatorship

- ▶ What is an adult guardianship/conservatorship proceeding?
 - ▶ This occurs when you lack capacity and do not have estate planning documents in place (specifically, you lack an Advance Medical Directive and General Power of Attorney) or are refusing to let your agents under those documents do what they need to do.
 - ▶ Someone petitions the court seeking the appointment of a guardianship/conservatorship on your behalf.
 - ▶ The court then appoints a Guardian *ad litem* ("GAL") to act as an independent third party in the case. This person is generally an attorney.
 - ▶ During such a proceeding, a physician's evaluation is obtained concerning your capacity (whether you lack the ability to manage your personal and financial affairs).
 - ▶ The GAL reports to the court after interviewing the parties and reviewing the medical records and financial records.
 - ▶ The court determines whether to appoint a guardian/conservator for you.

Adult Guardianship/Conservatorship, contd.

- ▶ Who pays for this proceeding?
 - ▶ You do, so long as the matter was brought in good faith. This includes the petitioner's attorneys' fees, the GAL's fees, and the court fees.
- ▶ What happens if a guardian/conservator gets appointed?
 - ▶ You lose a number of rights, depending on your capacity issues (vote, marry, drive, etc.).
 - ▶ Your guardian/conservator will make decisions concerning your medical care and financial affairs going forward.
 - ▶ The guardian/conservator will generally remain in place until your death.
 - ▶ The guardian/conservator will generally be required to file annual reports with the court, resulting in annual court fees.

Adult Guardianship/Conservatorship, contd.

- ▶ How can I avoid this type of proceeding?
 - ▶ The best way to avoid it is to have an Advance Medical Directive and General Power of Attorney in place. The court prefers the least restrictive method, and these documents are generally sufficient to handle your affairs without court involvement. This is also the least expensive means of handling your affairs.
 - ▶ A Trust is another document that can ease the likelihood of these proceedings. Any assets held in the trust can be used by the Trustee for your benefit without court involvement (and all the fees that accompany these kinds of proceedings).
 - ▶ We have seen an uptick in these proceedings in recent years due to the aging population, increase in financial crimes (elder financial abuse and scamming), and a lack of proper estate planning.

Online Software

- ▶ There are a number of online software companies that offer estate planning services.
- ▶ While cost effective, we have seen a number of issues arise from these documents:
 - ▶ The provisions appear to be of the “pick and choose” variety. As most consumers are not familiar with the terms and the interplay amongst the terms, certain language is missing that is needed (which can result in court proceedings) or is inappropriate.
 - ▶ The documents are not drafted based on your particular circumstances, thus certain issues may not be addressed (minors inheriting under a Will; need for a supplemental needs trust; lack of spendthrift provisions; etc.).

The Takeaway

- ▶ Estate Planning is critical for a number of reasons:
 - ▶ It avoids unintended consequences (distant relatives inheriting your assets – happens more often than you can imagine).
 - ▶ It sets out who you trust to manage your affairs (you get to pick rather than the court).
 - ▶ It minimizes the burden on your agents by planning – they know what you want them to do, and you've structured your plan to minimize the time they would otherwise spend sorting out your affairs.
 - ▶ It avoids expensive court proceedings (estate administration, minors inheriting, and guardianship/conservatorship proceedings). It is less expensive to plan than to cleanup!

My Information

- ▶ If you would like to contact me, my information is as follows:

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- ▶ I am licensed in VA, DC, and MD.