TPC

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Introduction to Estate Planning

Estate planning involves the discussion of subjects that most of us would rather avoid: death, disability and taxes. Many people do not give a single thought to the certainty of their own death, yet it will happen to each and every one of us. Most of us will also face a period of disability or incapacity. Estate planning forces us to face the financial and emotional consequences of death and take action to minimize the effect on our families. This handout is designed to help answer some of the most common questions about planning an estate.

What is Estate Planning?

Estate planning is the creation of a definite plan for managing your wealth while you're alive and distributing it after your death. When we talk about an estate, we mean all assets of any value that you own, including real estate, business interests, investments, life insurance, retirement plans, personal property (eg. boats and cars) and even your personal effects (eg. jewelry and furniture).

These assets may be owned by you separately or jointly with others. Below are some examples of how married couples often hold title to property:

- Separate Property: Entire interest owned by one of the spouses. Property was often acquired prior to marriage or was a gift or inheritance to one spouse alone after the marriage.
- Joint Tenancy: Individual interest owned by any two or more people in which the survivor acquires the entire interest upon the death of the other joint tenant.
- Community Property: Undivided one-half interest owned by each spouse.

Why do Estate Planning?

If you become INCAPACITATED, you can:

- maintain control of assets (through an agent of your choice)
- make medical care decisions (through your agent)
- AVOID COURT APPOINTED GUARDIAN/CONSERVATOR
- How?
    - Durable Power of Attorney
    - Advance Medical Directive and HIPAA Release
    - Living Will / Terminal Condition Directive

If you are concerned about Nursing Home Costs, you can provide for mechanisms to preserve and stretch your assets.

At DEATH, you can:

- control:
    - WHO receives your assets
    - HOW they receive your assets
    - WHEN they receive your assets

- minimize or eliminate:
    - legal fees and probate taxes and expenses
    - estate taxes

Who Needs Estate Planning?

Estate planning is for EVERYONE. Not just the "older" client and not just the "wealthy" client. Young couples with children need to plan for what happens if both parents die before the children are adults. Spouses with children from prior marriages need to plan for the protection of assets and division between the spouse and children. Individuals with children or other beneficiaries who are disabled or who have other "special needs" need to plan for protection of the assets if the beneficiary is receiving government assistance such as Medicaid or SSI.

What evils are we trying to avoid?

All of us face three principal obstacles in planning our estates:

- Living Probate (the expensive court proceeding to manage your assets if you are disabled)…i.e. court-appointed guardianship
- Death Probate (the expensive and often lengthy proceeding to manage and distribute your estate at death)
- Death Taxes (the taxes the government demands at your death if your estate exceeds a set limit. Based upon tax changes made in December 2012, the federal estate tax rate is 35% for,

estates in excess of $5 million (adjusted for inflation). It is impossible to predict what Congress may do in the future.

What are your estate planning Options?

There are five basic methods you can use to plan your estate:

- Do nothing
- Hold title to your assets in Joint Tenancy w/Survivorship
- Create a Will
- Establish a Revocable Living Trust
- Establish an Irrevocable Trust

What happens if you do nothing?

Believe it or not, a majority of Americans choose to do nothing. Experts report that 70% of all Americans have no written estate plan. And, of those who have planned, many have created a simple will or rely on joint tenancy ownership of assets to distribute their estates. Unfortunately, for the majority of people who have no plan in place, state law will dictate how their estates are to be distributed at death. As you might imagine, the government's plan of distribution has no particular concern for the best interests of your family. Doing nothing can also result in higher probate costs, attorney's fees, and delays, but most people don't realize that there can also be major problems as a result of creating merely a simple will or holding title to your assets in joint tenancy. Additionally, if you become incapacitated prior to death, the court will need to appoint a guardian and conservator to handle your affairs until your death, at a cost of $4,000 to $5,000, or more if contested.

What is Joint Tenancy and why do so many people use it?

Joint tenancy ownership is where two or more people hold title to an asset together. But unlike other forms of joint ownership, upon the death of one of the owners, the entire interest passes automatically to the surviving joint tenant(s). The full name for joint tenancy is Joint Tenancy with Right of Survivors (JTWROS). Right of survivorship means that whoever dies last owns the whole property.

Because a joint tenant's interest passes to the surviving joint tenants immediately at death, it is not controlled by the owner's will. For example, let's say two good friends (or two brothers), Bob and John, own a piece of property as joint tenants. Bob dies and his will says that upon this death all of his estate should go to his wife,

Mary. What happens to his interest in the real property he owns with John? Because the title passes automatically at death to the surviving joint tenant, John will own the entire property and Mary will get nothing.

Joint tenancy can work well for many married couples, but it does not solve all estate planning problems. If a husband and wife were to die in a common disaster, like a car accident, or one were to die and the other become disabled, transfer of title remains a problem.

Some people believe joint ownership of other assets like bank accounts eliminates the need for estate planning. An elderly parent may add an adult son's name to her account for this reason. But what happens in the event that son goes through a divorce, has creditor problems, or simply decides to use the money himself?

Is creating a Will a good idea?

Many people plan their estates by creating a document called a Last Will and Testament. A will is essentially a legal document that lays out how you want your assets distributed at your death. A will doesn't control the distribution of all your assets. Joint tenancy property and other assets with beneficiary designations such as life insurance proceeds and retirement plan assets will pass outside your will. Wills also don't take effect until you die, so they are no help with lifetime planning. Upon your death, your will must be filed with the court; it then becomes a matter of public record. Once your will enters the probate process, your estate is no longer controlled by your family; it is in the hands of the court, probate attorneys or other administrative personnel, and the Commissioner of Accounts. Because a will generally means that your estate will go through probate, it is not the best estate planning document for many families.

For clients with concerns regarding nursing home costs, particularly when one spouse may already be disabled, special will planning can be used to help protect assets while maintaining eligibility for benefits. However, such planning is complex and is best done with an attorney who is familiar with Medicare, Medicaid, and social security rules.

What is a Revocable Trust?

Revocable trusts are alternatives to wills, but they are also much more. Trusts have built-in disability features that will provide for who controls your assets during any period of disability, and how your assets are used (i.e. applied for your care and those of dependents). Additionally, your trust can provide direction to your trustee regarding your desires for long-term care arrangements (i.e. stay in your home), and your trust can direct your trustee to make gifts or transfer assets to your spouse or others as needed for estate tax and Medicaid planning.

Trusts can also avoid probate at death. Here's how it works: when you set up your living trust, you transfer the title of all of your major assets (stocks, bonds, real estate, etc.) from your name to the name of the trust. You then name yourself as both the trustee and beneficiary. That gives you, and you alone, total and complete control of all your assets. You can buy, sell, trade – whatever you want – just like you do now.

At death, your trust, like the simple will, will direct how your estate is disposed of, but the trust allows for more flexibility and control. If properly funded, your trust will avoid probate and associated administration, thus reducing administrative costs and the time it takes to administer your estate and distribute your assets to your beneficiaries. And, if your estate does not pass through probate, your assets and their disposition remain private. A trust may be particularly helpful if you expect someone may try to contest your wishes, for example, someone you chose to exclude from your estate or if you wish to leave more to one child than to another. Will contests are common; challenging a trust is much more difficult.

Some clients benefit from a particular type of revocable trust which provides the benefits of trust planning combined with aspects of Medicaid planning – you should consult an experienced estate planning attorney to help you determine whether this type of revocable trust is best for you.

Trusts cost a little more to establish, and take a little work on your part to fund, but the extra cost and time spent now will reduce the cost incurred and time spent later by your executor and beneficiaries. **It may surprise you to learn that most Americans who are preparing estate planning documents**

today are using trusts rather than wills because of the clear benefits of trust planning.

In a nutshell, what are the primary benefits of a Revocable Trust?

- Maintains Control and Ensures Privacy
- Avoids Probate
- Difficult for disgruntled heirs to attack
- Works in every state
- Provides detailed instruction to trustees on how/when assets are to pass to beneficiaries
- Can provide divorce and/or creditor protection for beneficiaries

What about Estate Taxes?

For those concerned about avoiding estate taxes, a revocable trust is generally the easiest, least expensive and best estate planning tool for married couples. The December 2012 tax changes raised the exemption from estate taxes to $5 million per person (and this amount is further indexed for inflation), which means most Americans do not have to worry about estate taxes – ***for now***. However, Congress can revisit this issue at any time and may choose to decrease the exemption amount to pre-2010 levels to combat the country's substantial debt. Relevant factors include the fiscal strength, or weakness, of our economy, and the political party in power at that time. There are flexible ways to plan to take such changes into account.

What is an Irrevocable Trust?

Unlike a revocable trust, an irrevocable trust generally requires turning control of assets over to someone else. In addition, you give up the ability to change the trust document once it is created. Many folks are uncomfortable with this loss of control, for which reason this type of trust is used in limited situations where the benefits of the irrevocable trust outweigh the loss of control - for example, for certain Medicaid planning purposes, for asset protection, or to further minimize estate tax exposure. This type of trust is sometimes used for "advanced planning," meaning it is created in addition to a revocable trust. Irrevocable trusts are also often used to hold life insurance policies in order to keep the insurance out of the insured's estate.

What is "Long Term Care Planning?"?

Folks who are concerned about long- term care issues, including providing care for a loved one whose health is declining, or those worried about nursing home costs or obtaining Medicaid benefits, or if a loved one recently diagnosed with a terminal

condition does not have any estate planning documents, should request a **Long Term Care Planning consultation.** How does this differ from an estate planning consultation? Think of it as an estate planning consultation "plus." In addition to addressing customary estate planning issues, we will review and evaluate the individual's financial circumstances to determine whether there are steps that can and perhaps should be taken to better prepare for long term care issues. Our recommendations may include a Medicaid plan, an irrevocable trust, a guardianship proceeding or other options based upon the situation.

Will a Power of Attorney protect me if I'm disabled?

A Durable General Power of Attorney is a very powerful instrument which gives the "agent" of your choice legal authority to sign checks, deeds, contracts and other legal documents on your behalf, especially if you become disabled and unable to handle your own affairs. You obviously need to name as agent one or more persons in whom you have complete faith and trust to handle your financial and legal affairs. This can be a great help in the event of your disability, but it also gives tremendous power to someone who can access your savings, change your investments, take out a loan in your name, or otherwise control your financial affairs. Particularly for seniors, it is important to be certain someone can make decisions to arrange for care in your home or in a long term care facility, but it is also important to discuss safeguards to protect you and your assets.

What is an Advance Medical Directive?

An Advance Medical Directive (sometimes called a Health Care Power of Attorney) appoints someone to make health care decisions for you if you become disabled or unable to speak for yourself. The powers include:

- giving, withholding, or withdrawing consent to medical treatment
- hiring and firing medical care personnel
- moving you to a health care facility
- authorizing the administration of pain relieving medication
- donating organs at death
- obtaining access to your medical records and health information.

What is a Living Will?

A living will states your desire to have the artificial means of keeping you alive (such as machines and/or nutrition and

hydration through a feeding tube and IV) removed when it has been medically determined that you have no chance of survival on your own and that there is no likelihood of recovery other than in a persistent vegetative state. A living will is protected by state law in Virginia and must be honored by anyone who is aware of its existence.

What is HIPAA?

HIPAA, often called the "Privacy Policy," restricts the release of your medical and health insurance information by your doctor, hospital and insurance company to only authorized individuals. Who does that include? You cannot assume it will include your spouse, adult child, partner, parent or any other person. A Universal HIPAA Release identifies precisely to whom such information should be released. This is important, as you want to ensure that the people you have chosen to make your health care decisions if you cannot do it yourself (your Health Care Agents, discussed above) can get important information regarding your diagnosis, prognosis and medical options from all of your health care providers and insurers, in order to make the best medical decisions on your behalf.

How Do I Protect My Digital Assets Upon My Passing?

A social media will is a fairly new concept which allows a person to direct what happens to his "digital assets" upon his passing. Most people have an average of 25 different password-protected accounts ranging from email accounts to social media accounts to financial accounts to business accounts and websites. Some examples include Facebook, Twitter, Paypal, Gmail, ITunes, Linkedin, etc. I have a special program on my phone to keep track of all of my password protected accounts because I can't remember all the passwords. But that in itself is password protected. So what happens to these accounts when you die? Some accounts are closed for inactivity, but others stay open until directed to be closed by next of kin. Some social media sites have developed policies and procedures for closing accounts, including when accounts are closed and who has the authority to close accounts. With Facebook, friends and relatives can actually request an account to be "memorialized" which means that the confirmed friends can continue to view the profile and post comments on it. Social Media Wills are the newest thing. Beginning in May, 2012, the U.S. Government is actually encouraging people to create social media wills in which a person would name an "online executor" to close online accounts, social media profiles, email accounts, etc. after

death. There is no set format for a social media will, and they are not, as yet, recognized by law. The purpose is merely to ensure that someone has access to your personal accounts, user names, and passwords and knows how you would like each handled upon your passing. This information should be given to the person you are designating as your online executor or, better yet, kept with your will or trust.

As you can see, estate planning gives you the opportunity to decide for yourself how you would like your financial affairs and your medical care to be handled if you become unable to manage your own affairs, naming those you wish to be in control. Your estate planning attorney can help you determine which of these documents can best accomplish your objectives. Your failure to plan means that you are giving up your right to decide who will get your assets when and how and accepting the state's plan for you.

This publication is intended for general information purposes only and is not to be construed as providing legal advice. You must consult an attorney to discuss how the laws apply to your specific situation and how to best implement a plan that will meet your individual goals and objectives. If we can be of assistance in that regard, please call us at (757) 969-1900 to schedule a consultation appointment.