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We Hope You Find This Book Helpful.

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INTRODUCTION

We hope you will find this book helpful and informative. We have designed this book to help you to identify some of the major issues that we all face in life; we will also highlight the ways in which proper estate planning can effectively address these issues.

In addition to answering many questions you may have regarding the process of estate planning, this book will probably raise many questions as well. This book is yours to keep and to use as a reference tool regarding the process of estate planning. Additionally, we offer a complimentary consultation to answer any further questions you may have, or we can use that time to begin formulating a specific strategy that will meet all of your estate planning needs.

WHAT IS ESTATE PLANNING

We define Estate Planning in this way:

Estate Planning - n. - The process of planning one's affairs so as to reduce the cost, delay and uncertainty in the management of one's financial, health care and personal affairs during one's life and in the distribution of assets to one's heirs at death.

Proper estate planning should create **SECURITY** and **CERTAINTY** in your mind that any medical difficulties or personal tragedies during your life will be addressed in an orderly manner and with a minimum of cost and delay, and your wishes will be followed regarding the distribution of your assets at your death.

LIFETIME ISSUES

Most people associate estate planning with the distribution of one's assets at death. However, this is only a subset (albeit an important subset) of the general process of estate planning. An effective estate plan will also assist you in the management of your affairs during your life, particularly during any serious medical illness or condition.

Why Estate Planning is Important

In the event that you or your spouse (or both) should become mentally incapacitated, who would handle your financial and medical affairs? Who would make decisions on your behalf? Surprisingly, the law doesn't always provide helpful answers in time of critical need. Even the spouse of an incapacitated individual could be prohibited from making certain medical decisions or maintaining control of the assets of an incapacitated individual.

Guardianship and Conservatorship

In the absence of proper planning, a guardianship and/or conservatorship is often the only way to acquire the proper authority to gain access to necessary funds or to make critical decisions on an incapacitated individual's behalf. A guardianship is a court order allowing one individual to make certain personal and medical on an incapacitated individual's behalf. A conservatorship is similar but applies to financial decisions. In order to obtain a guardianship or conservatorship, an application to an appropriate court (typically a probate court) must be made. In many ways, the guardianship and conservatorship process is similar to a probate proceeding to administer an estate. All interested parties must be notified; typically, a bond must be posted; public notice is often required as well. Because of the multiple steps required to establish a guardianship or conservatorship, they are not a good solution when time is of the essence regarding one's medical or personal care.

DURABLE POWERS OF ATTORNEY AND LIVING WILLS

Thankfully, a few simple documents can help you to avoid these difficulties. Through the use of durable powers of attorney and living wills, you can make provisions for your care during any period in which you are unable.

Through a **DURABLE POWER OF ATTORNEY**, you can grant a trusted individual the power and authority to act on your behalf in legal and financial matters. The power of attorney could be effective immediately upon your incapacity to manage assets needed for your care. Granting such power over one's assets to another makes many people understandably nervous. However, your power of attorney could be drafted to act on your behalf **ONLY** in the event of your incapacity; otherwise you and you alone would have access to your assets.

Similarly, a **HEALTHCARE POWER OF ATTORNEY** allows another trusted individual to make certain medical decisions, gain access to your medical records and make provisions for your care during any period of disability. By executing a healthcare power of attorney, you can ensure that your care will be administered efficiently and effectively if you lack capacity due to accident or illness, and any necessary decisions regarding your care can be made immediately without the need for a court-supervised guardianship.

Unfortunately, a situation may arise in which you are unconscious, perhaps due to a serious accident, and it is determined that you will not regain consciousness, or that you would need to use artificial means to keep you alive.

A **LIVING WILL** can be used to address such situations. Under a living will, you can direct your physicians to terminate the use of any artificial means to prolong your life if there is no possibility of recovery. By executing a living will, you can keep your loved ones from having to make such a difficult decision; additionally, the living will can save thousands of dollars that could be incurred in prolonged, unwanted medical care.

Additionally, a **LIVING TRUST** (or revocable trust) can assist in the management of your affairs during any illness. Under a comprehensive estate plan, most assets are transferred into the individual's living trust. You will serve as the “**Grantor**” of the Trust, meaning you have established the trust and have contributed your assets to the trust. Second, while you are able, you will serve as the “**Trustee**” of the trust to manage the trust assets, and you can appoint the “**Successor Trustee**” to serve when you are no longer able. The **Successor Trustee** will have access to all Trust assets to provide for your care.

REVIEW:

Important Lifetime Estate Planning Documents

- * **Financial Power of Attorney**
- * **Healthcare Power of Attorney**
- * **Living Will**
- * **Living Trust**

ESTATE DISTRIBUTION

In addition to ensuring that you and your assets will be properly cared for and managed in the event of your incapacity, effective estate planning also will help preserve your estate and provide for efficient distribution to your beneficiaries upon your death.

The Need for Planning

After death, each of us wants our property to be distributed to our loved ones in a cost-effective, efficient, and orderly manner. However, without proper planning, your estate could be significantly reduced by the time your heirs receive it. This can occur, in part, to the problems associated with the **probate process** and the imposition of estate taxes.

Probate is Expensive

The probate process can be very expensive. States typically allow for “Statutory Fees”, allowing attorneys to take a percentage of the estate value as payment for legal services. These statutory fees range from 2% to 10%. Even relatively modest estates are hit hard!

Probate Creates Delay

The probate process takes time. First, numerous documents are filed with the local probate court to initiate a probate estate. Then the court appoints the proper person to serve as the Personal Representative (also referred to as an Executor) of the estate. After the probate process has begun, notice is given to all potential creditors through public notice that the estate has been opened. The probate estate may not be closed until the creditor notification period has passed (typically six to nine months).

Additionally, if any real estate held by the estate is located in another state, a separate probate in that state (or states!) must be

opened. Because of these potential time delays, the probate of your estate can often take several years.

Will Contests

If any disagreements occur between the heirs and/or the Executor, further proceedings will be necessary to resolve the conflict, causing further delay. A dispute over the distribution of a decedent's estate can wind up in court even if the assets are nonprobate assets. However, disputes over probate assets virtually always ensure that a court will be involved in the resolution of the conflict.

Probate invades your Privacy

Probate rules require that the will of the decedent be kept on file for public record. Additionally, a public accounting of all of the decedent's assets is usually required as well. (Believe it or not, you can obtain a copy of Elvis Presley's probate documents at the Shelby County records in Memphis, Tennessee!) And, as noted earlier, public notice (usually through newspaper ads) must be given to notify any potential creditors.

ESTATE AND GIFT TAX PLANNING

Lack of planning can cause your estate to incur estate and death taxes that could be easily avoided with simple estate tax planning.

What Should You Do?

Suffice it to say that these are trying economic times, and this uncertainty should not be an excuse to put off making or updating your estate plan – the consequences of having no estate plan, or having an outdated plan are simply too great. A comprehensive estate plan can be flexible to change as your life and the laws change.

Life Insurance

Without proper planning, life insurance proceeds are included in your estate for estate tax purposes. For many families, life insurance can cause an otherwise tax-exempt estate to incur estate tax. When calculating whether your estate is taxable for gift and estate tax purposes, remember to include the value of the PROCEEDS or death benefit of any life insurance policy owned by you and/or your spouse. Fortunately, simple tax planning can shield your life insurance proceeds from estate tax through the use of life insurance trusts and other strategic transfers of the ownership of life insurance policies.

Gift Tax Exclusion

The current estate and gift tax law includes an exclusion allowing you to give up to \$14,000 per year (indexed for inflation) to an unlimited number of donees free of federal and gift taxes and will not reduce an individual's current \$5,340,000 lifetime gift/estate tax exemption. Spouses are allowed to "split gifts", thereby allowing them to double the amount of gifts (up to \$28,000 this year) per recipient free of gift and estate tax.

ESTATE DISTRIBUTION

The law provides four basic methods of asset distribution at your death:

1. **Intestacy**
2. **Joint Tenancy**
3. **Will**
4. **Living Trust**

Intestacy

By doing nothing before your death, your assets will be distributed according to state statute, called the Laws of Intestacy. Do you know your state's Intestacy Laws? If you have not established an estate plan, you should look them up, because that is the way in which your assets will be distributed at your death. For individuals with young children, lack of planning can be particularly problematic. Without estate planning documents that contain provisions for the management of funds designated for minor children, your underage heirs will receive 100% of their share at the age of majority. Additionally, if you fail to address the issue of guardianship in your estate planning documents, a judicial court may determine the guardian of your children.

Intestacy introduces the unwanted element of chance into the administration of your estate, as well as other problems:

1. **Delay caused by probate process**
2. **Costs created by probate process**
3. **Lack of privacy created by probate process**
4. **Guardianship of minor children determined by court with no input from deceased if both parents deceased.**
5. **Potential estate taxes due because of lack of planning.**

WILLS

The most common estate distribution document is the will. A will is a document that directs the distribution of property owned in your name alone at your death. With a will, you can address a number of estate planning issues, including determining the timing and distribution of your assets, eliminating or minimizing estate taxes, and naming a guardian for your minor children.

Using just a will does not, however, address the issue of probate or protect you if you become incapacitated. Property cannot be transferred to the named beneficiaries under a will unless and until a probate court has authorized the distribution.

Advantages of Wills

- 1. Control of distribution of assets**
- 2. Control of Guardianship of minor children**
- 3. Minimization of estate taxes**

Disadvantages of Wills

- 1. Delay caused by probate process**
- 2. Costs created by probate process**
- 3. Lack of privacy created by probate process**
- 4. Does not protect you in the case of incapacity.**

REMEMBER: A WILL ALWAYS ENSURES PROBATE.

JOINT TENANCY

Joint tenancy is one of the most common forms of asset ownership; families often hold title in "Joint Tenancy with Right of Survivorship" as a method of transferring assets at death. While joint tenancy has the advantage of simplicity, it has many drawbacks as well.

When you change title to property, you are giving the joint tenant full access to the asset. For example, if the asset were a bank account, the joint tenant could withdraw all of the funds in the account - with or without your authorization! Additionally, the jointly held asset could be subject to the claims of the new joint tenant's creditors, or may be subject to division upon the divorce of the new joint tenant.

Joint tenancy is often used as a mechanism to avoid probate. When a husband and wife place an asset in joint tenancy, the surviving spouse will automatically take title to the asset upon the death of the first deceasing spouse. However, upon the surviving spouse's death, probate will be necessary to transfer the asset to the couple's heirs. The surviving spouse could name children and other heirs as new joint tenants; this, however, makes it almost impossible to distribute the family's estate equally among the heirs, unless the jointly held assets going to each heir are of the exact same value.

Additionally, when you change title to property to jointly held status, you are making a gift to the new joint tenant, creating potential gift tax liabilities. The property may also then lose many of its income tax benefits as well. For example, the favorable tax status afforded to a Principal Residence could be lost if a portion of the title is transferred to a joint tenant, and the deductions available to owners of rental property could be lost or reduced as a result of joint tenancy.

LIVING TRUSTS

A revocable trust, often referred to as a living trust, avoids many of the problems that arise under the other methods of estate distribution. Many people are confused by the use of the term "Trust", but a trust is merely a document, much like a will, that describes the way in which your property should be held, managed and distributed. However, unlike a will, a living trust has benefits during your life.

After setting up a living trust, you transfer title to all of your assets into the name of the living trust. Typically, you would name yourself (or you and your spouse) as Trustee of your living trust. (The "Trustee" is the individual with the ultimate authority to manage and distribute the assets held by the living trust.) Since you are the creator (or "Grantor") of the living trust, you retain all of your previous rights to buy, sell, spend, or transfer any of your assets, regardless of whether or not you choose to act as Trustee.

The living trust is a very powerful document and serves several functions while you are living. If you become incapacitated, your "Successor Trustee" (the person you name to act in the event you are unable) can immediately step in to manage your assets and expend funds for your benefit while you are unable, avoiding the need and expense of a conservatorship.

A Living Trust Avoids Probate

After your death, the assets held by your living trust can be directly distributed to your heirs without the need to pass through probate. Your living trust holds title to your assets; therefore, no assets are in your name to pass through probate. Your Successor Trustee serves the same function as the Executor of a will, but without the need to act under the supervision of a probate court.

Much like a will, the living trust will set forth how your assets are to be distributed upon your death. Through the inclusion of "testamentary trusts", your living trust can set forth instructions to hold back assets for young beneficiaries until an appropriate age, or can set forth provisions to hold and manage funds for the benefit of a surviving spouse. Your living trust can also include provisions to eliminate or minimize estate taxes through the inclusion of marital trusts and other tax savings.

Review of Living Trust

The Living Trust:

- * **Avoids need for conservatorship if Grantor becomes incapacitated; Successor Trustee manages assets for Grantor's benefit.**
- * **Avoids the Cost, Delay and Publicity associated with Probate**
- * **Can contain "Testamentary Trusts" designed to hold property for a young beneficiary until an appropriate age.**
- * **Can contain provisions to eliminate or minimize estate taxes.**

CONCLUSION

It is important to have a comprehensive estate plan in place to address a variety of issues, both during life and after death. Consult a competent professional to ensure that all of your affairs are managed in an efficient and cost effective manner. The choice of a lawyer is an important decision and should not be based on advertisements alone.

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protecting your family's assets.*

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