ESTATE PLANNING: DO I REALLY NEED IT?

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I am an estate planning attorney who works with people committed to plan for the future management of their assets -- individuals who want to secure the future economic well-being for themselves and their loved ones. My clients initially are curious about "estate planning" and among the questions I am asked are:

- ***What is estate planning?***
- ***Isn't estate planning only for the very rich?***
- ***How can estate planning benefit me?***

First, one should know that under our centuries old Anglo-American system of law, deceased persons cannot own property. This gives new meaning to the old adage that "you can't take it with you." If ownership of property extended beyond the life of the owner, such property could very likely be withdrawn from use in our economy. For this and other reasons, the law requires a decedent's property to be distributed to persons who have capacity to use the property in our economy. Such living persons are known variably as heirs, legatees, devisees, or beneficiaries. The distribution of such property (called the "**estate**" of the decedent) is supervised by the courts under a system called "**probate**."

Estate planning can be defined by looking at the purposes –***the goals***— of such planning. In planning for the future use and disposition of my own property, I consider the following statement to define my goals:

I want to control my property today while I am alive and healthy. If I should become disabled, I want my property to be available for my benefit and for that of my loved ones. When I die, I want to give what I want to whom I want, when I want, and in the manner I now believe is most appropriate. I want to accomplish these goals in private and with no interference from a governing body. And if I can, I want to save every last tax dollar, professional fee and court cost possible.

I believe that ***anyone*** may agree with me about the importance of such goals, which includes lifetime planning as well as distribution planning after death. Contrary to popular belief, estate planning is for the ***living*** and not just for the dead and dying. When a client takes control of planning so as to achieve the goals stated above, the client is happier by virtue of eliminating the doubt and confusion that infects those who do no planning at all, or those whose "plans" are tainted by uncertainty. People with properly planned estates may go forward in life unburdened by the fear and worry regarding how they will be cared for if disabled, and knowing that their children will have a legacy available to them at appropriate times during their lives.

Disability

Perhaps one of the most frightening aspects of living in modern times is, ironically, the very real possibility that we will ***survive*** an accident or serious illness which renders us incapacitated. Indeed, medical technology increasingly assures survival of strokes and traumatic head injuries that may leave one **legally incompetent** (incapable in the eyes of the law to contract on one's own behalf). Without a plan for such a contingency, and if such circumstances arise, someone typically would have to petition a court for appointment of a **guardian** of the injured individual, or **conservator** of his property. The guardian or conservator is appointed by the court to make decisions and enter into contracts for the benefit of the incompetent person (known as the "ward"). Besides the high legal costs associated with guardianship proceedings, the process of petitioning the court for guardianship is often a dehumanizing and degrading experience for the ward, who is thereafter adjudicated by decree of the court as being incompetent and may regain "competency" status through yet another legal process.

The real pity about guardianship is that it can be avoided if disability is a considered contingency during the planning of one's estate. In fact, one may not only avoid the necessity for guardianship, but one could realistically pre-plan the details of his or her lifestyle during a period of such disability. To do so, however, important decisions need to be made: "W*ho* would be my agent for handling my legal affairs and managing my property? W*here* would I live in the event of disability? How would I finance my care?" Nearly everyone would rather make such decisions themselves rather than rely upon the choices of others; but these important life decisions can be made only by "competent" persons and therefore must be made *prior* to an incapacitating injury and preserved in a *legal instrument* such as a **Durable Power of Attorney** or a **Living Trust**. These legal documents must be created and executed while one is legally competent. If one does not pre-plan, the most common alternative available is a guardianship proceeding, where one's control over his or her property and lifestyle is legally assigned to another (not by the choice of the ward, but by appointment of the court) and where the ward's property—not the ward's care—is monitored and supervised by the court.

Taxes

Hardworking people like you and me pay taxes—lots of taxes. Income taxes are probably the most recognized of all taxes. In addition to taxes paid on earnings, however, we also pay taxes on purchases, use of utilities, and on property ownership, just to name a few. After you die, your "estate" may owe the federal government up to 40% (the highest marginal gift and estate tax in effect on January 1, 2013) of the value of your net taxable estate in ***wealth transfer taxes***. The taxable portion of your estate is generally the value of assets in excess of $5,000,000 that the decedent owned or had an interest in at death.

The wealth transfer taxes at the federal level are called the Federal Gift and Estate Tax. At the state government level, there may be some form of "inheritance" tax. It is said that taxes, like death, are unavoidable. That statement is only partially true. Some taxes are ***completely avoidable***. With proper planning, income taxes can be minimized on a year-to-year basis and estate taxes *especially* can be minimized, and oftentimes totally eliminated.

Wealth Transfer Taxes

Planning for the lawful avoidance of estate tax liability is accomplished primarily through the *proper* use of t**rusts** coupled with strategic ownership planning of assets. Trusts are powerful tools that give great flexibility in the control and safety of the ownership of assets. Too often people with seemingly wonderful (and expensive) Wills and/or Trusts end up incurring estate tax liability needlessly because the strategic ownership of assets phase of their planning was ignored or not completed. Beneficiaries in such cases take an unnecessary tax hit.

Death and Probate

Although death is a ***certainty*** and not merely a ***possibility***, it is important to plan for the contingency of a premature death. If you are like most people, death's certainty does not spur you quickly into making plans for its occurrence. Despite the unpleasantness of its inescapable reality, everyone needs to provide for the transfer of his or her property upon death. People who support families need to plan for the replacement or continuation of such support.

As stated in the early paragraphs above, a decedent's *individually owned* property (called the Estate) is distributed to persons named in a Last Will and Testament (the "Will"); or, if there is no Will, then to related persons according to the "statute of descent and distribution." A Will is a set of instructions to a person called the "**Executor**" of the estate, who is nominated in the Will and is responsible for paying the debts of the estate and distributing the property that was once owned by the decedent to those beneficiaries named in the Will.

If there is no Will, the person responsible for paying debts and making distributions is called the "**Administrator**" of the estate, who is appointed by the court to pay the debts of the estate and distribute the estate's property to the heirs identified in the statute of descent and distribution. Although the court generally prefers a "next-of-kin" as administrator, any "interested party" is eligible to serve, including creditors of the estate. After the debts of the estate are satisfied, the remaining property is distributed, according to statute, first to the surviving spouse if the decedent had children by a prior marriage. If the decedent had children by a prior marriage, then his current surviving spouse would receive one-third of his estate, with two-thirds to the decedent's children. The statute provides for distribution to others in the event that there is no spouse and no children. A person dying without a Will has no say in the distribution of his or her property. It is distributed by default to the classes of beneficiaries as provided by statute.

In most cases, a Will is the foundation of a good estate plan. The Will is a very important document and care should be taken to ensure that it is both properly written and executed with all the formality as required by law. Wills are too often drafted by lawyers who use primarily "boilerplate" language, or who give little consideration to the legal effect of the language used. A poorly drafted Will may, on the one hand, leave out provisions that ultimately cost the beneficiaries thousands of dollars in needless expenses. On the other hand, the drafting attorney may be too wordy, or use language not decipherable to the layman, or include provisions that needlessly expose a majority of the decedent's assets to probate and the consequential costs of probate; or worse, expose the Will to lawsuits to determine its validity or interpretation.

In some states, probate is expensive and overly cumbersome, even for moderate or small

estates. While Virginia's system of probate is not overly expensive, it remains yet another bureaucratic labyrinth which, if not properly planned for, can be exceedingly and unnecessarily burdensome – but it may actually be avoided altogether (which is preferred). The probate process begins with the Executor presenting the Will for probate to the Clerk of the Circuit Court in the city or county in which the decedent owned real estate, or where the decedent resided if he did not own real estate. The Executor "qualifies" as the fiduciary of the estate and the Will is examined and recorded as a public record. The Executor is required to give bond to the extent of up to twice the value of the estate. Surety (an insurance policy) on the Executor's bond is required unless waived by the Will or unless one of the limited statutory exceptions applies. The Executor is required, as well, to provide a preliminary listing of the assets of the estate and a list of heirs-at-law, who have to be notified that the Will is being probated. Within four months of qualification, the Executor will have to file an Inventory of the Estate to the Court's Commissioner of Accounts, who oversees the distribution of the estate, and will thereafter have to account for the decedent's assets and the distribution and disbursement of such assets. Once the debts of the estate have been paid and the assets distributed, the administration of the estate is finalized and closed, a process that may take years depending on the complications that arise.

Probate is overly cumbersome due to the myriad of required filings, and it is fully public in that the Will, the inventory and all the accountings become a matter of public record and will be available to anyone who cares to visit the Court's records room to view these documents. Probate is absolutely *required* if the decedent has property left in his name that cannot be transferred by any other means. The Administrator or Executor, as the case may be, is empowered to take possession and assume control over such property to sell or distribute it as the law requires.

Avoiding probate is possible through the effective use of a **Living Trust**, which is a relationship between at least three parties, occurring when a **grantor** gives property to a **trustee** for the benefit of a **beneficiary** or beneficiaries. The grantor, trustee and beneficiary may be the same individual. When property is transferred to the trustee to hold in trust, it is no longer the property of the grantor, thereby eliminating the need for probate. When the grantor dies or becomes incapacitated, the directions to the trustee in the trust instrument provides for the continuation of the management of the trust property. If the grantor is serving as trustee, a substitute trustee steps into his shoes to manage the property so that the trust continues unhindered by the death or disability of the grantor. So long as **all** property is owned by the trust, or is subject to survivorship beneficiary designation, there is no need for probate.

Conclusion

The importance of doing **proper** estate planning cannot be overstated, and the fees paid to compensate the various financial and legal professionals comprising a team of experts is money well spent. The costs of the legal services range very widely among attorneys, but the cost of your estate plan actually bears little on its effectiveness. An unfunded trust, for example, is a good example of a very expensive dust collector because the intentions of a trust can only be realized if there is property in it to manage.

So please act now to protect your hard-earned assets from the uncertainties that the future holds. Do not delay, for the need is present—act now while you still have the legal capacity to do so. Act now while you are motivated to do so. Act now so that I may help you accomplish the planning goals that you and your family deserve.

The planning process begins with the collection of information needed to analyze and advise regarding the most efficient legal structures available that will assist you in attaining your estate planning goals. You will be asked to complete a confidential questionnaire that will provide me with some preliminary information that we can discuss. The questionnaire is designed to help you to focus on the goals that are compatible with your intentions. The estate planning process invites the participation of all members of your advisory team, including your financial advisor, life insurance agent and accountant. I encourage frank discussion among your team to foster cooperation and guarantee success in the planning process. I look forward to working with you.