FAQs for Estate Planning

I have a Last Will & Testament ("Will"). Do I need a new one?

Whether or not you need a new Will depends upon whether your current Will carries out your intentions in full. Many times beneficiaries die before we do, or the extent of our property changes such that we want to do more or less with it upon our death. It's a good idea to have your Will reviewed by an attorney every few years or in the event of a life change, such as marriage or the birth of a child.

Do I need anything other than a Will?

A Will becomes effective only upon the death of the willmaker (called "**testator**"). While alive, certain circumstances may require other legal documents to be in place. For example, a **Durable General Power of Attorney** can appoint and authorize a trusted agent to conduct your business affairs for you in the event of your disability or **incapacity**. Absent this appointment power, disabled people may be subjected to **guardianship** or **conservatorship** hearing in court, which can be extremely expensive and subject the "ward" to what may end up being a humiliating experience.

A **Living Will** may allow your agent to "pull the plug" if you incur a mortal brain injury rendering you comatose with your life being sustained only by medical equipment. The Living Will is also known as an "**Advanced Medical Directive**" and is often coupled with a "**Special Durable Medical Power of Attorney**", which appoints an agent to make health-care decisions if you are unable to.

Because your health care provider may need to share your medical information with a family member or an agent under a power of attorney, you should execute a general **HIPPA Release** which will allow such information to be shared with those who are named in the document.

What is "probate"?

Probate is the process by which the government oversees the distribution of a decedent's estate to the beneficiaries under a Last Will & Testament, or to the heirs of a decedent if the decedent dies without a Will (died "**intestate**").

How does probate work?

In Virginia, probate is supervised by the **Commissioner of Accounts** for the decedent's proper jurisdiction (city or county in which the decedent last resided or owned real estate). If the decedent died "**testate**" (with a Will), then the person named as **Executor**

of the Will presents the will to the Probate Clerk at the local Circuit Court. If the decedent died without a Will ("**intestate**"), then a person in interest (usually a related person) will apply to qualify as the **Administrator** of the decedent's estate. Whether an Executor or Administrator, such a person has to be appointed by the Court as the Estate's "**personal reprentative**."

What are the duties of the personal representative?

The personal representative ("PR") is charged with the responsibility to (1) marshal and protect the assets of the estate, (2) pay the decedent's debts, including death taxes, and (3) distribute the remaining property to the beneficiaries under a Will or the heirs under an intestate estate. A personal representative is a fiduciary and owes a duty of loyalty to the beneficiaries or heirs.

What is required of the personal representative by the Commissioner of Accounts?

Within four months of qualification as PR, an **inventory** of all the decedent's property is reported to the Commissioner in a form prescribed by the Commissioners of Accounts. Within twelve months thereafter, an **accounting** must be filed with the Commissioner, which shows the inventory as the beginning balance, and with a listing of all disbursements and distributions made for a period of no longer than one year after the death of the decedent. The PR must also provide all supporting documentation for the inflow and outflow of the estate account.

Can probate be avoided?

Yes. Because probate involves the *distribution* of personal property that was *individually* owned at death, if the need for distribution is avoided, then probate can be avoided. For example, property that is jointly owned with rights of survivorship does not pass through probate. Similarly, if a living person is named as a beneficiary of an account or insurance policy, the rights to the proceeds of the account or policy pass directly to the named beneficiary upon the death of the owner, and thus outside of probate.

What is the downside to joint ownership?

"Joint" ownership requires that property be owned by more than one person. Not everyone wants to own all their property with other people. In addition, if all one's property is titled jointly with rights of survivorship, the decedent loses all rights to control the disposition or use of the property after his or her death. For example, Husband, H, owns all his property with Wife, W, as joint owner with rights of survivorship. H & W have three children. If H dies, W becomes full owner of all the

property that was shared by H & W during H's lifetime. If W remarries, she may effectively disinherit their children by making no provision for them in her Last Will & Testament.

Is there a way to avoid probate and retain control of my property?

Yes. By using a trust as an ownership vehicle, one may retain full control of all his or her property, without transferring any of it to joint ownership with another. If a trust plan is properly executed, all the property is owned by the trust and controlled by you, the trustmaker, who also serves as trustee of the trust. If all property is in trust at the death of the trustmaker, there is no need for probate because the trust hasn't died, the trustmaker died—but he did not own anything individually. The trust is still the owner, with an appointed successor stepping into the shoes of the trustmaker to carry the plan that was provided in the trust document. This type of trust is called a **Revocable Living Trust** ("RLT").

Will my Estate be liable for estate taxes?

There are at least two taxes related to the value of an estate. The first is a Virginia "death tax" that assesses a charge of 10 cents for every $100.00 of value of the estate. For example, if the decedent's **inventory** reports an estate valued at $300,000.00, the Virginia tax owed would be $300.00. The federal gift and transfer tax applies to estates that are valued over a certain amount. In January of 2013, the American Taxpayer Relief Act of 2012 was signed into law setting that amount at $5,000,000 per taxpayer. The highest marginal tax rate was set at 40%.

What if my estate is valued over the federal exemption amount?

If you have potential exposure to federal transfer tax liability, then plans must be implemented at once to limit the amount of liability. This can be done with proper trust planning.