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ESTATE PLANNING

A Renewed Focus on Non Tax-Planning Goals

Statutory changes have shifted the spotlight from tax planning to planning for disability and asset management

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Traditionally, estate planning involved assessing tax planning and non tax-planning goals. The increases in the estate and gift tax exemptions and the possible repeal of the estate taxes under the 2001 Economic Growth and Tax Relief Reconciliation Act have, in some cases, reduced the importance of tax planning in the estate planning process. Nevertheless, the fundamental nontax reasons for developing an estate plan remain. This article focuses on the nontax reasons behind creating a current and comprehensive estate plan, including planning for your disability, planning for the care and management of assets for your spouse and children, and planning for the transfer and management of your assets at death.

What Is an Estate Plan?

For an average individual, a basic estate plan should consist of the following documents: Last Will and Testament,

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Power of Attorney and Living Will. Each document provides a set of specific responsibilities and instructions to a designated individual in specific situations. In a perfect world, they are carefully drafted by an estate planning attorney and provide a comprehensive set of guidelines. These guidelines are written in accordance with the client's wishes, and delegate the individual named in the document the authority to handle either: disposition of an individual's assets after they die; management of their finances during their lifetime; and/or decision-making authority relating to an individual's health care.

As an individual's wealth increases, more sophisticated planning techniques, such as life insurance trusts, family limited partnerships, etc. may be implemented. The motivation behind the use of these sophisticated devices, from the attorney and especially the client's prospective, is the avoidance or minimization of estate, inheritance or gift taxes. Other than tax-motivated planning purposes, there are other fundamental reasons why the average person should consider implementing an estate plan.

Living Wills

In recent weeks, a national debate about the rights of incapacitated people

has arisen over the Terri Schiavo case. The seven-year legal battle between Terri Schiavo's parents and her husband, Michael Schiavo, centered around speculation and opinion of what Terri's wishes were concerning her health care treatment. Unfortunately, because no specific written instructions concerning medical decisions had been executed by Mrs. Schiavo, the debate ensued over what she would want.

If Mrs. Schiavo had executed a living will, the legal battle that developed over the past years could have been avoided. The New Jersey Advance Directives for Health Care Act allows an individual, age 18 or older, to specify in writing, decisions concerning their medical treatment in the event of illness, unconsciousness or mental incapacity. By executing an advance directive, you provide a detailed set of your wishes in the event that you are unable to make your own health care decisions. By preparing the directive, you have added assurance that your named health care agent will follow your wishes and intentions.

There are three kinds of advance health care directives: (1) a proxy directive; (2) a living will; and (3) a combined directive. A proxy directive names the person who you authorize to make medical decisions on your behalf, in the event that you are unable to do so. This individual is known as your health care representative. A living will provides your health care representative with a statement of your intent concerning your medical deci-

sions. It sets forth in advance certain circumstances in which you want your wishes adhered to and whether you want to accept or refuse medical treatment. A combined directive, as defined, combines both the proxy directive and the living will. It provides your named health care representative with specific instructions concerning your medical decisions.

Regardless of which type of directive you choose, it is important to discuss with your named health care representative and other family members the course of your medical treatment in the event you are unable to make your own medical decisions. Failure to execute a living will renders issues concerning one's health care unresolved and can initiate a long and unnecessary legal battle among family members, as evidenced by the recent events involving Terri Schiavo.

Powers of Attorney

A Power of Attorney is a document that gives someone else the authority to act on your behalf concerning management of your finances in the event that you are unable to make those decisions. The power can be specific to a certain task or broad to cover many financial duties. For example, the document can be limited to authorize an attorney-in-fact to sign necessary legal documents on behalf of a buyer or seller in a real estate transaction if they are unable to be present at closing. This is known as a nondurable power of attorney.

The person you appoint is known as your attorney-in-fact. Under the New Jersey Power of Attorney statute, unless otherwise specified in the written document, your attorney-in-fact has the authority to do anything regarding the financial management of your affairs or finances that you yourself could do but for a disability or mental incapacity. Typically, these documents are drafted as "durable," which means they become effective immediately upon signing and are not affected by a subsequent disability or incapacity on the part of the principal. A power of attorney is effective until it is revoked, or, as with the living will, until the death of the principal.

A springing power of attorney

becomes effective upon the happening of a stated future event. Generally, the stated future event is the subsequent mental incapacity or disability of the principal. Although this serves to protect the nominated attorney-in-fact from squandering the assets of the principal, it also can prove to be a time-consuming process. In situations where a springing power of attorney is necessary, time is of the essence and obtaining medical opinions concerning the disability of the principal from a physician is not always an easy process.

Another important reason to execute a power of attorney is to avoid a guardianship proceeding. In the event that an individual who has not executed a power of attorney becomes incapacitated and is unable to manage his or her financial affairs, a formal court proceeding, known as a guardianship proceeding, will have to be initiated. Typically, substantial legal and administrative costs are incurred in these matters. By executing a power of attorney, these unnecessary, costly and time-consuming proceedings can be avoided.

Trusts

Testamentary trusts. A fundamental nontax reason for estate planning is planning for the transfer and management of your assets after your death. As the definition of family continues to evolve, it becomes clear that every family has its own unique financial needs and concerns. Successful estate planning requires a concentrated effort to understand the unique aspects of each client's family. Without a properly drafted will, assets will be distributed in such shares and to such beneficiaries as set forth under state law. In the alternative, under a comprehensive will or trust, you can designate the person or corporation responsible for the management and transfer of your assets and set forth the conditions of distribution of your assets.

Marital trusts. Protecting an inheritance for children from a prior (or current) marriage often requires the inclusion of a marital trust in your will. A marital trust may help to satisfy the competing interests of providing for your spouse while

ensuring that your assets will ultimately pass to your children or other beneficiaries. If one or both spouses express an intent that the trust be used to maintain the surviving spouse's accustomed standard of living, then an inquiry should be made as to how this intent is satisfied.

Marital trusts should be drafted to give the trustee the discretion to make principal invasions that will enable the surviving spouse to maintain customary standards of living. Caution should be exercised in outlining the purposes for these discretionary invasions. By describing certain customary events of the spouse, the trustee is relieved of the obligation to question the surviving spouse about life events. This will make the trustee's decision much easier and take the burden off of the surviving spouse to justify his or her request. If a description of customary standards is not given and the remaindermen object to a sizable request by the surviving spouse, then family turmoil may result if the surviving spouse makes invasion requests not anticipated by the terms of the trust.

Trusts for children. One primary purpose in creating a trust is to provide management assistance for those lacking financial maturity or ability. Trust provisions are commonly included in wills to provide support and asset management for minor beneficiaries, avoiding costly guardianships. These support trusts often continue past the age of majority to allow the beneficiary to mature before receiving assets. The timing of trust distributions can be used to encourage attainment of certain goals, such as graduation from college, attainment of career success or to gradually educate the beneficiary in the management of his own financial affairs.

In executing a trust for the benefit of your children or spouse, you can also provide them with some measure of creditor protection. Without a trust, any assets you pass on to your children or spouse can be used to satisfy their creditor's claims and such assets will be included among their assets in assessing equitable distribution claims in divorce actions. By establishing a trust, you can protect those assets you pass on to your family from their creditors or any soon to be or future former spouse of a child. For the beneficiary with current

creditor concerns, a trust can safeguard inherited assets from judgments and liens. Family members in high-risk professions or positions where lawsuits are a threat will particularly benefit from the creditor protection afforded by a trust. In addition, a well-drafted "spendthrift" provision in a trust can protect a beneficiary from himself by prohibiting a pledge, assignment,

sale or other transfer by the beneficiary of the beneficiary's rights in trust assets or income. Generally speaking, if the beneficiary cannot compel the trustee to make a distribution from the trust, a court and the divorcing spouse will be unable to do so.

While tax-planning concerns are involved in the estate-planning process, non tax-planning reasons encompass

many of the fundamental motivational factors behind creating an estate plan. Planning for your disability, the disability of a spouse, the care and management of assets for your minor children, the transfer and management of assets at death, and creditor protection are essential elements in providing for your family's financial future. ■