

ESTATE PLANNING OUTLINE

By

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I. Estate Planning

A. Overview of issues

1. Last time Will or Living Trust was executed or no instrument at all.
2. Changes to estate and family circumstances.
3. Beneficiaries of pension and IRA funds, and effect of transfer for income and estate tax purposes.
4. Changes in law affecting prior plan.
5. Financial security.
6. Tax advantages available in overall planning.

B. Disability and incompetency

C. Health care directives

II. Property Passing By Survivorship

- A. Bank accounts where both spouses have executed a card stating that the account passes to the survivor will pass automatically as a result of death.
- B. Insurance where a beneficiary is named passes automatically to that beneficiary.
- C. Pension plan distributions will pass automatically to the beneficiary under the plan.
- D. Other property will not pass by survivorship. Therefore, even though such property is in both names jointly, it will *not* pass to the surviving spouse in the event of death. Such property will pass through the decedent's estate.
- E. Stock options and restricted stock.

III. Wills

- A. A Will which is valid in Texas will be valid in another state. However, due to the varied state probate laws, changes would be applicable to make the probate process easier in the state where a person resides. Other property laws may affect structure of Texas Will.

- B. Should a person die without a Will, their property passes by intestate succession. This means the State of Texas by statute determines where the property will pass. In a typical scenario where a person dies with a spouse and children, the result under the Texas intestacy laws should be as follows:
 - 1. Separate property: The spouse would receive one-third (1/3) of the personal property and a "life estate" in the real property with the remainder of the separate property passing to the children.
 - 2. Community property: Spouse would retain their one-half (1/2) with remaining one-half (1/2) to the children.
- C. However, under new section 45 of the Texas Probate Code, the community property estate of the deceased spouse passes to the surviving spouse if:
 - 1. No child or other descendant of the deceased spouse survives the deceased spouse; OR
 - 2. All surviving children and descendants of the deceased spouse are also children and descendants of the surviving spouse.
- D. A handwritten Will may be valid if it properly disposes of property, is signed by the decedent and dated. If the intent of the decedent is not clear, the Will may be voided.
- E. The original of the Will would be required to be probated. Copies are generally not acceptable since Texas law presumes that Will was revoked if it cannot be found.

IV. Living Trusts

- A. Revocable Living Trust
- B. Trustee holds legal title to property
- C. Grantor retains right to receive income and principal at his/her discretion during lifetime and has right to revoke all or part of trust. There must be one current beneficiary and one future (remainder) beneficiary.
- D. Trust Agreement is a written document wherein a person grants to him/her the right to hold certain property on behalf of a beneficiary.
- E. A trust is funded with assets during lifetime or can be funded through a power of attorney when a person becomes incapacitated. Typically, a "pour-over" Will is prepared to "pour over" all assets into a trust that have not been funded during a grantor's lifetime.

- F. Reasons for using a revocable trust
 - 1. Asset management during incapacity
 - 2. Avoiding probate in Texas
 - 3. Privacy
 - 4. Avoiding ancillary probate in another state
 - 5. Avoiding contest of the estate plan
 - G. The trust is tax neutral.
 - H. No asset protect for trustor during lifetime.
 - I. Transfers made upon death -- testamentary trusts (family and marital)
 - J. Characterization of property
 - K. Beneficiary designations
- V. Planning Considerations -- Personal
- A. Who are the heirs? Children and Grandchildren.
 - 1. Who does the testator want to benefit? Initially, the spouse is typically the recipient of the property either outright or in trust with the remainder passing to the children.
 - 2. Questions raised about passing property to children.
 - a. Maturity
 - b. Creditors
 - c. Divorce possibilities
 - d. Education
 - B. Specific bequests to family member, parents, persons in need.
 - C. Charitable gifts, i.e., Church or Fraternal Organization or CRUT and/or Charitable Foundation.
 - D. Gifts during lifetime to set up educational fund for children or grandchildren.

- E. How will pension benefits be paid and what benefit would be available for surviving spouse in event of death. It is important that the rollover possibility be considered or equalizing estate assets by passing part of the distribution to the estate.
- F. Appointment of Executors, Trustees and Guardians.
 - 1. Executors administer the Will and prepare appropriate documents necessary to probate the Will. They are appointed by the Probate Court.
 - 2. Trustees invest and reinvest funds that are set aside in a trust account and pay the beneficiaries of that trust income and principal as set forth in the trust document.
 - 3. The Guardian is the person who has custody of the person and property of a minor. This person is usually the surviving spouse.
- G. Consideration must be given to estate growth since last Will was drafted. Review of Will is generally appropriate every five (5) to seven (7) years.
- H. Is the life insurance protection adequate to meet the future income needs of spouse, pay off existing debt or pay estate taxes. How can it be used effectively in estate plan? Who are the beneficiaries of the insurance?

VI. Planning Considerations -- Taxes

- A. Estate and gift tax schedules.
- B. Each person is entitled to an estate tax exemption which will shelter property up to the following amounts:
 - \$3.5 million in 2009
 - No tax in 2010
 - \$1 million in 2011
- C. A lifetime exemption of \$1 million can be transferred by gift or at death without incurring any transfer tax.
- D. Annual gifts of up to \$13,000 per donor (indexed by inflation) can be made without utilizing the tax exemption amount for that year. A married couple can make a \$26,000 gift to any number of donees.
- E. Above \$3.5 million, the minimum tax bracket is 45% for 2009.

- F. Estate tax is deferred when property passes outright or in qualified trust for the benefit of the surviving spouse. When the surviving spouse dies, the estate tax deferral ends.
- G. Valuation of assets for estate tax purposes is made at their fair market value as of the date of death or six (6) months following the date of death. Therefore the appreciated value of such assets is considered not the *cost* of them.
- H. Debts are netted out for estate tax purposes. That portion of the debt representing the decedent's portion of the community is considered.
- I. The estate tax return (IRS Form 706) is required to be filed nine (9) months following the date of death for estates that exceed \$3.5 million through 2009. All joint accounts, insurance, pension funds are accounted for on this form as part of the taxable estate. If the estate is less than \$3.5 million through 2009, no estate tax return is required to be filed.
- J. The estate will also be required to file an income tax return based on the selected fiscal year between the date of death and the termination of the estate.

VII. Trust Planning

- A. The use of trusts can be helpful in preserving the \$3.5 million estate tax exemption (through 2009) for each spouse and managing estate assets.
- B. A trust is an account of funds or other property which is supervised and controlled by a trustee who is appointed by the Will. It is a separate taxable entity with an identification number of its own. A surviving spouse, children or banking institution with trust powers may serve as trustee.
- C. Beneficiaries of trusts are distributed funds on a mandatory or discretionary basis based on the standard set forth in the trust instrument or Will.
- D. In order to preserve the \$3.5 million estate tax exemption, it is necessary for a Will to set up a testamentary trust which sets forth an ascertainable standard of health, maintenance, support and education on which distributions are based. The surviving spouse does not therefore own the trust assets at death and the value of the trust will pass estate tax free to the children or other beneficiary.
- E. For estates in excess of \$7 million, the first \$3.5 million would pass in trust with the remaining portion of the community property (or separate property) passing outright or in trust for the benefit of the surviving spouse.

- F. Qualified Terminable Interest Property Trusts (QTIP). The amount exceeding the \$3.5 million exemption is placed in a QTIP trust. The QTIP pays income at least annually to the surviving spouse and thereafter guarantee that the principal remaining in the trust passes to the descendants of the decedent. Principal may be paid to the surviving spouse for his/her health, maintenance and support. This trust would be taxable at the death of the surviving spouse.
- G. Possible disclaimer available for property bypassing surviving spouse in favor of children or to rectify problem in Will.
- H. Living trusts are created to avoid probate, consolidate investments, maintain the privacy of family affairs and/or provide for the inability of an elder individual to manage his or her own affairs. Generally the grantor is the trustee and beneficiary of income or principal during his or her lifetime. A properly drafted trust instrument should provide for successor trustees as well as a testamentary plan upon the grantor's death.
- I. Generation Skipping Tax. Must be aware of generation skipping tax consequences of transfers that result in a taxable termination or distributions from trusts to a second generation.

VIII. Instruments To Be Used In The Case Of Disability

- A. Natural Death Act -- Directive to Physicians (changed as of September 1, 1999)
 - 1. A competent adult person may, at any time, execute a directive for the withholding or withdrawal of life sustaining procedures in the event of a terminal condition. (Article 4590(h) Vernon's Revised Civil Statutes)
 - 2. A terminal condition is generally defined as an incurable or irreversible condition caused by injury, disease or illness which, without the application of life sustaining procedures, would, within six (6) months, produce death and where the application of life sustaining procedures shows only to postpone the moment of death of the patient.
 - 3. A written directive can be signed by the declarant in the presence of the two witnesses and should be notarized by a notary public.
 - 4. This form generally expresses the desire of the patient not to be kept alive by a life support system if their death is imminent.
- B. Medical Power of Attorney (changed as of September 1, 1999)

1. This document delegates to an attorney-in-fact the authority to make medical decisions on behalf of a patient. This decision means consent, refusal to consent or withdrawal of consent to health care, treatment, service or procedure to maintain, diagnose, or treat an individual physical or mental condition.
2. The authority of an attorney-in-fact may be limited with respect to a medical care decision on that form.
3. An attorney-in-fact may exercise authority only if the principal's attending physician certifies in writing, and files the certifications in the principal's reasonable medical judgment, the principal lacks capacity to make health care decisions.
4. This can be revoked by oral or written notification at any time by the principal to the agent or certified health or residential care provider or by any other act evidencing the intent to revoke the power.
5. A disclosure statement is required prior to a principal executing this document. It must be read and understood by the principal.
6. There must be two witnesses, none of whom can be the agent or the principal's health or residential care provider or the provider's employee.
7. There must be a HIPAA authorization for review of the principal's medical file and communication with medical personal about the medical treatment for the principal.

C. Durable Power of Attorney

1. The durable power of attorney was changed as of September 1, 1995 by the Texas Legislature.
2. A durable power of attorney is authorized pursuant to Chapter XII of the Texas Probate Code.
3. The requirements of a durable power of attorney are as follows:
 - a. It must be in writing;
 - b. It must be signed by a principal who is an adult;
 - c. It must be acknowledged before a notary public.

4. A durable power of attorney may be revoked by the principal upon actual notice to a third party relying upon power of attorney.
5. A durable power of attorney survives disability or incompetence and has the same effect to bind the principal as if the principal were not disabled or incompetent.
6. A durable power of attorney should indemnify the attorney-in-fact or agent with respect to actions they are taking on a principal's behalf in the same manner and to the same extent as the third party would transact with the principal.
7. Filing for real estate transactions.

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