

# Estate and Disability Planning

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# What is estate planning?



- ✧ Estate planning is planning for the process of accumulating, managing, conserving and transferring assets during your lifetime (in the event of incapacity) or at your death, while taking into consideration your objectives, including tax and legal issues.

# Goals of Estate Planning



- ❧ To transfer your assets to whom you want to receive them upon death
- ❧ Minimize taxes (income, gift, estate, etc.)
- ❧ Minimize costs of transferring assets (to lawyers, accountants, courts, etc.)
- ❧ Provide money available for funeral expenses, taxes, and final medical expenses

# Goals of Estate Planning, Continued



- ❧ To carry out an individual's health care wishes
- ❧ To allow someone else to handle an individual's property/finances in the event of incapacity

# DOCUMENTS VIRTUALLY EVERYONE NEEDS



Virtually all individuals need three basic documents as part of an estate plan:

## 1) A will.

☞ A will tells where property will pass upon death, whom is named as Executor (who handles the probate process), who will serve as guardians for minor children, and may establish one or more testamentary trusts.

# DOCUMENTS ALL INDIVIDUALS NEED, cont.



## 2) A power of attorney

- ☞ A power of attorney gives another person the authority to handle the principal's financial affairs while he or she is living. The power may be effective now or upon incapacity. It always ends upon death.

## 3) A Georgia Advance Directive for Healthcare

- ☞ A Georgia Advance Directive for Healthcare is a fill-in-the-blank form that comes from Georgia law. It primarily serves to name someone to make healthcare decisions for a person if he or she can't make them, and it gives guidance about life support wishes.

# DOCUMENTS SOME CLIENTS NEED



- ❧ A Living Trust
- ❧ Special Needs Trust
- ❧ Irrevocable Life Insurance Trust
- ❧ Another Type of Trust (pet trust, etc.)
- ❧ Power of Attorney for Care of Minor Child
- ❧ Psychiatric Advance Directive

# THE PROBATE PROCESS



- ❧ Probate is the legal process of changing title to a deceased person's assets (if title is not changed in another way) from the deceased person to his or her heirs/beneficiaries
- ❧ Probate involves:
  - ❧ Providing the validity of a will (if one exists)
  - ❧ Supervising the distribution of assets to heirs/beneficiaries
  - ❧ Giving heirs/beneficiaries clear titles to inherited property
  - ❧ Protecting creditors to make sure valid debts are paid first
- ❧ Probate occurs in the county in which the individual resided at death
- ❧ In Georgia, the probate process can be simple – many wills don't actually need to be probated because everything passes automatically, or if it is probated, it could be simple – but it can also be a nightmare



# THE PROBATE PROCESS, CONTINUED



- ❧ If you die owning real estate in several states, probate must be done in each state in which you own property, unless it's held in a revocable living trust or another form of ownership

# WAYS TO TRANSFER PROPERTY UPON DEATH



- ❧ Through a Will
- ❧ Through a Revocable Living Trust
- ❧ Through Joint Ownership of Assets
- ❧ Through Beneficiary Designations

# Legal Requirements for Wills in Georgia



- ❧ Must be 14 years old
- ❧ Must be of sufficient mental capacity to execute the will
- ❧ Will must be written
- ❧ Will must be signed by testator (you) and two disinterested witnesses (and preferably also a notary)

# Limitations of Wills



- ❧ They can be contested
- ❧ Some state statutes may override parts of the Will (Year's Support)
- ❧ Debts must still be paid

# “REVOCABLE LIVING TRUSTS” AS A WILL SUBSTITUTE – DO YOU NEED ONE?



Probate avoidance technique:

- ❧ Probate process can be simple - often no need to avoid probate
- ❧ Trust is ineffective if not “funded” during life
- ❧ Avoids ancillary (secondary) probate of Will to convey title to out-of-state real property
- ❧ Still need a Will to dispose of non-trust assets and to appoint Guardian for minor children, if relevant
- ❧ Trust need not be part of “public record”

# “REVOCABLE LIVING TRUSTS” AS A WILL SUBSTITUTE – DO YOU NEED ONE?



- ❧ Trust can be challenged just like a Will (but is sometimes harder to challenge than a Will)
- ❧ Trust does *not* save estate taxes
- ❧ Same tax saving opportunities as with a Will
- ❧ Same estate tax liability and estate tax return requirements with Trust or Will
- ❧ Trust does *not* save legal fees or administrative costs

# “REVOCABLE LIVING TRUSTS” AS A WILL SUBSTITUTE – DO YOU NEED ONE?



- ❧ Bottom line – many clients do NOT need one. I usually recommend them in cases where clients own out of state real estate, in some cases where incapacity is definitely going to be an issue later, in some blended family situations, or in some other unique family situations.

# PRIMARY DUTIES AND RESPONSIBILITIES OF AN EXECUTOR



- ❧ Probate original Will
  - ❧ Overview of probate procedure
  - ❧ Probating “out-of-state” Wills
- ❧ Gather together, value and safeguard assets
- ❧ Hire professional advisors, if necessary
- ❧ Pay valid claims and debts
- ❧ Deal with federal and state taxing authorities
- ❧ Distribute estate as directed by Will
- ❧ Final accounting to heirs and beneficiaries
- ❧ Compensation for services as Executor



# WHAT HAPPENS IF I DIE WITHOUT A WILL?



- ❧ 70% of population dies intestate (without a will)
- ❧ Court decides on who the administrator is, and court approval often required for many administrative tasks
- ❧ Estate passes to blood relatives only if there's no will
  - ❧ Spouse and children inherit equally (but spouse receives no less than 1/3 of estate)
  - ❧ Parents (if any), then siblings (if any) inherit if decedent leaves no spouse or children
  - ❧ No benefits for charity or friends
- ❧ No provisions for trusts
  - ❧ Court-supervised Guardian for minor beneficiaries must be appointed to handle inheritance
  - ❧ Entire inheritance distributable at age 18
  - ❧ No ability to address "special needs" of disabled beneficiaries

# WHAT HAPPENS IF I BECOME INCAPACITATED WITHOUT A POWER OF ATTORNEY OR HEALTHCARE DIRECTIVE?



- ❧ If a person becomes incapacitated without a power of attorney or healthcare directive, the court may have to appoint a guardian and/or conservator for him or her – expensive alternative and may not be in alignment with individual's wishes.

# LONG TERM CARE PLANNING



- ❧ Medicaid will pay for nursing homes regardless of work history, but only for individuals who meet income and asset tests. Medicaid will impose a look back period of 60 months to make sure Medicaid recipients haven't transferred assets for less than fair market value. If they have, a penalty may apply.
- ❧ Certain individuals who have served in the military during certain time periods may qualify for nursing home care from the VA.
- ❧ Some people should consider purchasing long-term care insurance, which would pay for nursing homes or in-home care. Many options are available which could reduce the cost of the insurance.

# PLANNING FOR INCAPACITY



- ✧ Incapacity can occur at any time to anyone at any age, either because of an accident or a medical condition. Planning for incapacity is just as important (more so in some cases) than planning for death.
- ✧ In general, people need two forms for their general protection in the event of incapacity – a power of attorney and an advance healthcare directive. Those will help loved ones make financial and healthcare decisions for an incapacitated individual.

# PLANNING FOR INCAPACITY



- ❧ In a few cases, a revocable living trust would be helpful.
- ❧ It's also a great idea to visit each financial institution with whom you do business and see if they have their own power of attorney form.
- ❧ If a person fails to do any incapacity planning, and then becomes incapacitated, his or her loved ones will have to seek a guardianship and/or conservatorship – this is expensive, can be lengthy, and the individual doesn't to decide who handles his or her affairs.

# FEDERAL ESTATE AND GIFT TAXATION BASICS



- ☞ The **estate tax** is levied on transfers of property at death; the **gift tax** is levied on transfers of property during life. The “**generation-skipping**” tax is levied on transfers (during life or after death) that attempt to avoid taxation in one or more generations below that of the transferor.
- ☞ In 2023, \$12,920,000 of property per person can be transferred free of estate taxes, gift taxes, or generation-skipping taxes. This amount can be combined for married couples for a total of over \$24 million. This ability to combine the exemptions is called “portability”, and in prior years this could only be accomplished with marital trusts.
- ☞ Qualified transfers to, or for the benefit of, qualified charities, during life or after death, are sheltered from gift or estate taxation by means of the “charitable deduction.”

# Role of Gifts in Estate Planning



- ❧ They can reduce the value of your estate
- ❧ They can be taxed, but there are exclusions and exceptions
  - ❧ Annual exclusion
  - ❧ Lifetime exclusion
  - ❧ Gifts to spouses
  - ❧ Charitable gifts
  - ❧ Certain transfers towards education and medical expenses

# What if you have a smaller estate?



- ☞ People with smaller estates (who may think they don't have an estate to plan) still need the three basic documents (will, power of attorney, healthcare directive)
- ☞ Even those people without a lot of financial resources still need to plan for incapacity & death
- ☞ Wills are important for smaller estates too, because they name executors, tell where your property should go, and can make the probate process simpler by waiving a few requirements
- ☞ Estate planning for smaller estates doesn't have to be expensive, but it does need to be done



# Planning for Special Needs Children & Grandchildren



- ❧ *For special needs children:*
  - ❧ Set up a special needs trust (can be funded with life insurance or other assets)
  - ❧ Do a “Letter of Intent” each year
  - ❧ Set up plans for a backup guardian, conservator, caregiver, etc.
- ❧ *For special needs grandchildren:*
  - ❧ Set up a special needs trust – either a “stand alone” trust or a testamentary trust
- ❧ What not to do: name the individual directly in your will or as an owner of an asset or beneficiary of an account

# What should you tell your family about your affairs before you pass?



- ❧ How much or how little you tell your family is a personal decision which will be dictated by the intricacies of your particular relationship
- ❧ However, at a minimum you should tell family members:
  - ❧ where your documents are located or whom to contact to get them
  - ❧ if they are named to do a particular duty (executor, guardian, attorney-in-fact, health care agent)
  - ❧ your wishes about health care and life support – something many of my clients have horror stories about
- ❧ With your documents, you should leave a “Memo to Your Loved Ones” (email me at [sarah@lawyersarah.com](mailto:sarah@lawyersarah.com) for a copy) or a similar form with details of your financial affairs, etc.

# The Most Common Mistakes I see in Estate Planning



- ❧ Failure to do any planning whatsoever
- ❧ Failure to update the estate plan once it's completed, in the event of a divorce, a beneficiary dying, life circumstances changing, etc.
- ❧ Failure to change beneficiary forms
- ❧ Drafting a living trust but failing to fund it
- ❧ Poorly drafted documents, often from computer programs

# The Most Common Mistakes I see in Estate Planning



- ❧ Improperly titled assets
- ❧ Failing to plan for long-term care
- ❧ Failing to properly sign and notarize the documents
- ❧ Failing to let anyone know whether the documents have been prepared, and if so, where they are
- ❧ Failing to let loved ones know about financial affairs, debts, assets, etc.
- ❧ Failing to do any planning to avoid estate taxes

# Questions? Comments?

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