To The Point

Contemporary Estate Planning

www.darslaw.com | 410.995.5800

Introduction

It used to be that executing a Last Will and Testament was all that was needed to have an estate plan. Not anymore! There have been so many changes in our laws, in our tax system, in our society, and in our medical care, that estate planning is now needed no matter how much property you have, and no matter where or how you live. Importantly, in our world, where we often lament our lack of control over our lives, we can exercise some control with an effective estate plan.

The purpose of this pamphlet is to outline, briefly and To The Point, many of the considerations that should be included in your estate plan. If nothing else, this pamphlet should raise serious and substantial questions in your mind about your estate plan. It will take action on your part, however, to create a plan that will meet your needs and the needs of your family.

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Estate Planning

Throughout your life, you have been building an estate. Perhaps you have put away some savings for a rainy day; perhaps you have contributed to your retirement accounts; or, perhaps, you purchased a home, maybe even a vacation home too. Whatever you have been able to save and accumulate is your estate. The process of building your estate is one part of estate planning. The other part, which is equally important, is organizing your accumulated assets in such a way as to protect them and manage them for your use and for the use of your family.

A person's estate plan contains several components, all of which are coordinated to allow you to control how your assets are to be managed, both during your lifetime and upon your death. In addition, estate planning now addresses such issues as health care decision-making, online identities, business succession, and long-term care planning. The goal of a properly crafted estate plan is to give you peace of mind, knowing that you have taken all the steps necessary to protect both you and your family.

There are many documents available to incorporate into your estate plan. A Will is typically considered the primary estate planning document; however, there are also a wide variety of trusts that you may want to consider as well. Every estate plan should also include general powers of attorney to allow for asset management during any period of disability, and advance medical directives, to make sure that your health care can be managed in accordance with your wishes if you are unable to make health care decisions yourself. Finally, consider writing informal "letters of guidance" to your children, to your personal representatives, to your trustees, to your agents, or to anyone else you believe may need some further direction or understanding about your wishes, as part of your estate plan.

Since your family's situation is continually changing due to births, deaths, changes in marital status, relocations, changes in your family wealth, and changes in the law, estate planning is a continuing process that will require a basic understanding of the estate planning tools available to you to accomplish your estate planning goals. It will also require your life-long attention.

Your Estate

Your estate includes everything you own. This may sound obvious, but this concept is often overlooked. Homes, bank accounts, investment accounts, and personal property are often remembered when a person completes a financial statement describing their estate. However, life insurance, qualified retirement accounts, annuities, and property held jointly with others or in trust may also be part of your estate. Correctly and fully identifying all of the assets in your estate is the first step in developing your estate plan. This will require not only identifying each asset, but also determining how each asset is titled (individually, jointly with another, or in trust). It will also mean that you should check each asset that has a designation of beneficiary to make sure that you have designated the correct beneficiaries for each asset. Indeed, this aspect of your estate plan is as important as any other part of the planning process.

Many people do not realize that much, if not most, of their estate is not governed by their Will. Generally, only property titled in your name alone will be distributed in accordance with your Will. This means that you cannot change how the proceeds of a life insurance policy, retirement account, or a joint bank account will be distributed upon your death by changing your Will.

Another name for the part of your estate that is controlled by your Will is "probate

property." Probate property is subject to administration through the probate process (discussed below). Life insurance proceeds, retirement accounts, jointly-owned property, and property held in trust (including a revocable living trust) are all examples of non-probate property that will generally not be controlled by the distribution provisions of your Will, and, in turn, will not be subject to the probate process. Non-probate assets will be distributed directly to the co-owner of a jointly owned asset or to the beneficiary of an asset under the terms of a beneficiary designation clause, by operation of title, or per the provisions of a trust agreement.

The Will

In old movies, the Will is read by a solemn, gravely-voiced lawyer to a bereaved family seated around a mahogany conference table. In Maryland, we do not have such formal Will readings; however, the end result is the same, the Will is the document used for directing how one's estate is transferred after death.

A Will is a very formal legal document that must meet certain minimum legal requirements. In order to be effective, the Will must be in writing (no oral wills or "cyber wills"- sorry), and signed by the person making the Will in front of at least two witnesses. If these formalities are not met, then the entire Will is invalid. In order to amend a Will, a Codicil that meets these same formalities must be signed. Penning in and initialing changes won't work, and they could even have the effect of invalidating part or all of the Will.

The Will identifies your beneficiaries and describes how each beneficiary will benefit from your estate. Sometimes, it may be appropriate to distribute the estate outright to your beneficiaries, and other times it may be better for the estate to be distributed to a trust created within the Will for the benefit of someone who is too young, too financially incompetent, or has a disability which inhibits being able to handle an inheritance.

Important appointments are also made in your Will. You will appoint your Personal Representative (sometimes called the Executor or Executrix–which means the same thing), who is the person responsible for shepherding your estate through probate, as well as one or more trustees to manage any trusts created under your Will. The Will is also the only place where you can appoint a Guardian to care for your children who are under the age of 18. If you fail to name a Guardian in your Will, then the court must appoint one. The Personal Representative, Trustee and Guardian can all be the same person or you can name different people in each role. You should keep in mind, however, that these are very different roles that may demand different talents or abilities from those who fill each role. In addition to naming your primary appointments, you should also select successor appointees for each appointment.

There are numerous other issues that you may want to address in your Will. Wills are very individualized documents, and should include provisions that reflect your wishes or desires, from designating who should

receive a family heirloom to making funeral arrangements. Care should also be given to how you may wish to distribute any guns that you may own. Not everyone owns a gun, but for those persons who do, identifying proper (and legal) beneficiaries for those guns will be an important part of the estate planning process.

Throughout the remainder of this pamphlet, there will be other suggestions to consider. It is up to you to decide how simple or complicated you want to make your Will. Your attorney is always ready and more than willing to explain these optional provisions to you.

Letters of Instruction or Guidance

Many of the tools in your estate plan will be formal, legal documents, such as Wills, Powers of Attorney and Advance Medical Directives. These documents will allow your chosen family members or others to implement your estate plan. However, these documents often do not include the reasoning behind your choices, all the information you may wish your family to have about particular issues, or the details you think will be needed to implement your estate plan as you have directed, in case of disability or death.

Some clients are now writing letters to the members of their families to be opened at the time the client dies or, in some cases, becomes disabled. For example, while it may be that your Will can very effectively distribute your property to your children, you may also wish to share with them some of your values, some of what made you who you are.

Regarding issues raised in your Will, you may wish to provide information about your wishes for a funeral or memorial service. Or, you may have some ideas about how your antiques, jewelry or photographs should be distributed. If you have younger children, you may want to write a letter to the guardians

you have designated to care for them, giving some guidance that may be helpful in raising your children.

What happens if you become disabled? While legal documents such as powers of attorney and advance medical directives can provide the legal authority to your designated agents to act on your behalf, how should they do so? Do they know where to get the information that they will need to help you? Where are your financial records? Can they get access to your e-mail and internet accounts? Do you have any charitable or family obligations that you would like to continue even if you are disabled? What would you want to know if someone appointed you as their agent? These questions are but a few that you might want to address in a Letter of Instruction or Guidance.

Especially important may be a statement of your wishes regarding your medical care should you become incapacitated. Or, you may wish to provide some further statement about your wishes concerning the use of artificial life-support equipment when there is no reasonable hope or expectation that you will recover.

There is no limit to the topics you may wish to address. The important thing is to do it and incorporate these Letters of Instruction or Guidance as part of your estate plan.

Charitable Giving

In designing your estate plan, keep in mind that it is an excellent opportunity for you to participate in any planned giving program

sponsored by your university, religious institution, or community non-profit. Most charitable organizations are actively reaching out to their members or persons who are somehow affiliated with them and asking those people to include a bequest in their Wills, add them as a contingent beneficiary to a retirement account, or use some other planned giving technique that will benefit that organization upon the death of the donor.

If you wish to include a charitable bequest as part of your estate plan, particularly if it is a significant bequest, we recommend that you include your family in discussing this part of your estate plan. An important aspect of your estate plan is to pass on to your loved ones some of your values, some of what has been important to you. By including them in this discussion, they may have additional ideas that you may wish to consider. More importantly, you can help them "buy in" to the concept of charitable giving.

Same-Sex Marriage

In 2012, Maryland expanded the civil institution of marriage to allow same-sex couples to legally marry. Under Maryland law, same-sex married couples now have the same estate planning and estate preservation options that were previously available solely to heterosexual married couples.

One issue that same-sex married couples should review immediately, especially if they were an unmarried couple prior to 2012, is how they have their assets titled. Homes, bank accounts, and other property that were titled as "tenants-in-common" or "joint tenants" can be changed so that they are held as "tenants-by-the-entireties." This arrangement can provide many benefits, not the least of which is protection from creditors.

Tax planning for same-sex married couples has also been made easier. Now the Maryland Inheritance Tax no longer applies to same-sex married couples. The Maryland Inheritance Tax was a 10% tax rate on assets inherited by one member of a same-sex couple from the other member. Likewise, as discussed in further detail in the Estate Tax Planning section of this brochure, now each same-sex spouse may inherit the other spouse's estate without paying any Maryland Estate Tax.

In 2013, the Supreme Court ruled in Windsor v. United States that same-sex couples who are legally married under state law must be recognized as a married couple under federal law. Same-sex married couples living in Maryland, whether married here or not, can now qualify transfers of assets made during lifetime or upon death from one same-sex spouse to another for the unlimited federal marital deduction. Same-sex spouses can also take advantage of the portability election with regard to their deceased spouse's unused Federal Estate and Gift Tax Credit.

Same-sex married couples also now have the benefit of Maryland's various laws regarding the identity of guardians should a guardian of the person or property need to be established, or should a surrogate decision-maker be needed in a medical situation. However, as has always been the case, same-sex married couples should take affirmative steps in their estate plans to ensure that maximum authority can be given their spouses should there be a disability.

Unmarried Partners

In our modern world, not every couple chooses to or is able to get married. Yet, many of our laws regarding couples assume that marriage is the only way for couples to live together. For example, until recently, a domestic partner, whether heterosexual or same-sex, had no statutory right to make health care decisions, unless named in an advance directive. In addition, it should be noted that except for a transfer of a jointly owned residence to a domestic partner, the Maryland Inheritance Tax is applied to any inheritance from one domestic partner to the other.

An unmarried couple can use agreements to address a wide variety of issues that may arise while the couple cohabits together. Such agreements can set expectations for both members of the couple in such areas as finances, child rearing, working outside the home, and other important matters. In addition, when a home or other property is purchased by the couple, such an agreement can be used to allocate any profits, losses, or costs associated with the ownership of such property.

If the couple separates, what happens? Just like married couples who have entered into a premarital agreement, unmarried couples who enter into a co-habitation agreement are able to provide for some certainty with

regard to those issues that are most important to the couple, while reducing the friction of misunderstandings and even litigation. Having a well drafted co-habitation agreement in place could go a long way towards minimizing the costs and frustrations associated with the ending of a long-term relationship.

Finally, the trust, commitment, and reliance that each domestic partner may have for the other will need to be reflected in those partners' estate planning documents. Naming each other as agent under a general power of attorney, health care agent under an advance medical directive, trustee or successor trustee under a revocable living trust, personal representative or executor under a last will and testament, or any other role that may be necessary should the other partner become disabled or die could be critical to the well-being of both domestic partners.

Estate and Inheritance Taxes

Over the past several decades, the Federal Estate Tax has gone through several changes, the results of which were to reduce significantly the impact of this tax for most taxpayers. In 2017, the Federal Estate Tax went through one of its most significant changes during this period – as of 2020, all taxable estates of less than $11.58 million will be excluded from paying any federal estate tax. For married couples, this means that taxable estates of up to $23.16 million are excluded. Note that these exclusions will increase over time with cost-of-living increases.

This doesn't mean that tax planning is no longer necessary. For example, the current tax law is set to sunset after 2025, with the estate tax reverting to the level it would have been if the 2017 change in law had not been passed. This would reduce the exclusions to about $7 million for individuals and $14 million for couples. Still pretty good, but for some, this sunset could require additional planning.

Not to be forgotten is the Maryland Estate Tax. While it was the goal of Maryland to tie the Maryland Estate Tax to the same exclusions as those at the federal level, when the federal exclusions soared to over $11 million per person, Maryland reacted by capping its exclusion to $5 million per person. Unlike the federal level, this cap will not increase with cost-of-living increases. Under Maryland law, taxable estates in excess of $5 million ($10 million for a married couple) are subject to a 16% estate tax.

The uncertainty at the federal level, hopefully, will only affect some clients, and for those, we have some estate planning techniques that can reduce, if not eliminate, the impact of the federal estate tax on their estates. For the rest, the current and foreseeable tax impact of the federal estate tax will allow us to prepare estate plans with a greater focus on the needs of your family, rather than on complex and ever-changing tax-planning alternatives.

Please note that in addition to the Unified Federal and Estate Tax and the Maryland Estate Tax, there is a Maryland Inheritance Tax. This tax is limited to distributions from estates to collateral relatives, such as nieces, nephews, aunts, uncles and cousins, as well as friends or anyone else not related to you. If this tax applies, it is significant – 10% of the value of the distribution.

In dealing with estate tax issues at either the federal or state levels, there are several terms that need to be understood. These include:

Taxable Estate. Your taxable estate includes everything that you own or in which you have an ownership interest. These would be assets titled in your name, such as your home, brokerage accounts, bank accounts, automobiles, and savings bonds. Also included are life insurance policy proceeds, retirement accounts, life estates, property held in a revocable trust, and at least a portion of jointly-held property. The safe rule is that if you have any doubts about whether certain property is part of your taxable estate, assume that it is.

Unified Credit. Congress has decreed that a taxpayer may give away a limited amount of his or her estate during lifetime or upon death. The Unified Federal Gift and Estate Tax Credit, or just the Unified Credit, is used to keep track of all taxable gifts during your lifetime, and then upon your death, limit the amount that can be distributed without paying estate taxes. For example, if you give away $1 million to your children during your

lifetime, a gift tax return must be filed with the IRS, and $1 million of your Unified Credit is used. Then, upon your passing, what remains of your Unified Credit can be used to shelter the balance of your estate from the estate tax up to the amount designated by Congress (which, as of 2020, is $11.58 million).

Unlimited Marital Deduction. This is a tool that allows transfers of property between U.S. citizen spouses during lifetime or upon death without having to pay any estate or gift taxes. These transfers may be done as often as the spouses wish, and there is no maximum or minimum. Because of the unlimited marital deduction, upon the death of one spouse, there typically are no estate taxes to pay.

Portability. If one spouse dies without using his or her full Unified Credit, the unused portion of that deceased spouse's Unified Credit can be used by the surviving spouse. For example, assume Husband dies in 2020 and, and at his death, $2 million of his taxable estate is distributed to his children so that $2 million of his Unified Credit is used. At her death, Wife's estate may use the balance of her Husband's Unified Credit, which would be $9.58 million, plus her own Unified Credit to protect her estate from the Federal Estate Tax. In sum, a married couple can exempt up to $23.16 million from the federal estate tax. Note, Maryland adopted portability as well so that a married couple may protect up to $10 million from the Maryland Estate Tax.

Portability means that most married couples will be able to use the full extent of their collective Unified Credit to protect their combined estates. The good news is that tax planning will no longer be necessary to secure this protection; however, it will be necessary to file a federal estate tax return at the time of the first spouse's death in order to provide the means for the surviving spouse to get the benefits of portability, even though no tax will be due.

There are also other types of trusts that can be useful when your taxable estate is large enough that the estate tax cannot be eliminated with the higher estate tax limits. These types of trusts are irrevocable in nature, which means once the trust is established, you cannot change any of the terms of the trust. Examples of these irrevocable trusts include life insurance trusts, charitable remainder trusts (CRTs), spousal lifetime access trusts (SLATs), grantor retained annuity or unitrusts (GRATS and GRUTS), and trusts set up to take advantage of making gifts to maximize the annual exclusion gifts, which are currently $15,000 per recipient per year. These trusts can be discussed with your attorney if your estate requires additional protections from the Federal or Maryland Estate Tax.

When you meet with your attorney, tax planning strategies will be discussed if your taxable estate currently could be affected by these so-called "death taxes," or if your estate could be so affected in the future.

Digital Inventory

More and more, in the age of the internet, people are establishing "online identities." Some do online banking and some manage their investments, apply for loans and mortgages, or perform a wide variety of other types of financial transactions online. Others use internet service providers such as Gmail, Yahoo, Hotmail, and AOL to share e-mails, pictures, and other written documents. People are also using social media, such as Twitter, Facebook, and LinkedIn to communicate with friends and acquaintances.

What all of these have in common, besides the need to use computers and smartphones, is that each has a password associated with it, and sometimes a unique user name. Each password was specifically chosen by you to make it unlikely that a stranger or "hacker" can have access to your information.

Of course, this means that members of your family would also be unlikely to access this

information should you be unable to do so. The success of your estate plan could depend on enabling members of your support network to have access to your online accounts. It is becoming more and more common for banks, investment brokers and other financial institutions to not only allow online access to their clients and customers, but those financial institutions are now using the internet to deliver monthly statements and tax information. In this modern day and age, it is likely that others upon whom you depend may not even know about your financial accounts since there may not be a paper trail.

It is highly recommended that you prepare a digital inventory of all of your online accounts. These include bank accounts, mortgage accounts, credit card accounts, investment accounts, and retirement accounts, to name just a few. Your digital inventory should also include access to your e-mail accounts, without which very important information and notices may be lost, as well as your social media connections. Wherever you use a "user name" and a "password" to access an online account of any type, you should include this information on your digital inventory.

Your job will not be done once your digital inventory is created because it will continually change. Often, passwords need to be updated and new accounts need to be added.

Where you keep your digital inventory will require some thought. You will need to keep it in a safe place, but convenient so that you can continue to update it on a regular basis, and so your family will know where to find it should something happen to you. There are online services available for this purpose; just make sure that they have a high level of security associated with the service provided.

Trusts for Children and Others

If you have minor children or other beneficiaries who are under 18 years of age, setting up a trust within your Will is absolutely necessary. If you do not establish such a trust (or, at least, a custodianship under the Uniform Transfers to Minors Act), then upon your death, a court most likely will intervene and establish a guardianship estate for your minor beneficiaries. A trust for minors is often better than guardianship or a custodianship since there is much greater flexibility in designing the distribution provisions of such a trust, and any age may be chosen for terminating the trust. Usually, we recommend that a trust for minor children or other young beneficiaries not be terminated until those beneficiaries reach at least 25 years of age. By using a trust, you can design a structure that will truly meet the needs of your child or children.

Trusts for minors are often called "discretionary trusts." Such trusts are managed by persons of your choosing who are called the trustees. The trustee will manage the trust assets and will make distributions to or on behalf of the beneficiary only if the trustee is satisfied that any such distribution is for the benefit of that beneficiary. In other words, the trustee may

say "no." This is why it is very important that whoever is selected as trustee who knows your children and can make decisions in their best interests. It is also important that your trustee has the basic ability to manage investments.

As a planning option, some parents choose to keep a trust in existence for the lifetime of their children. Some of the benefits of using a trust in this manner are that the assets in such a trust are protected from the future creditors of your children, a bad marriage, or from the children wasting the trust assets due to bad influences in their life (e.g. alcohol or drug abuse, or a gambling addiction).

If your beneficiary is mentally, emotionally or physically disabled to the point that he or she may be eligible for governmental benefits programs, such as Medicaid or SSI benefits, it may be appropriate to use what is called a special needs or supplementary needs trust. These trusts can be designed to provide your disabled beneficiary with benefits that would not otherwise be provided through one of these governmental benefit programs. If you have a beneficiary in this situation, see a further discussion of this type of trust later in the next section of this pamphlet, and be sure to discuss this matter with your attorney.

If estate tax planning is an important part of your estate plan, then there are a whole array of trusts that can be used to maximize your estate tax savings, while still providing for your family's needs. A description of these trusts is beyond the scope of this pamphlet. Be sure to ask your attorney about these trusts, however, if maximizing your estate tax savings is important to you.

Special Needs Trusts

In accord with the Maryland Trust Act, it is now the stated policy of Maryland "to encourage the use of a special needs trust or

a supplemental needs trust by an individual of any age with disabilities to preserve funds to provide for the needs of the individual not met by public benefits and to enhance the quality of life."

If you have a child or other beneficiary who suffers from a permanent physical, mental or emotional disability such that your beneficiary will be unlikely to ever work and live on his or her own, a trust will be needed to manage that beneficiary's finances when you will no longer be able to do so. If that beneficiary receives, or is eligible to receive Medical Assistance or SSI benefits, that trust will have to be carefully created so that your beneficiary will not be disqualified from receiving these governmental benefits.

A special needs trust is similar to a discretionary trust, as described in the preceding section, but with two important differences. One is that the assets held in such a trust will not disqualify a beneficiary from receiving Medical Assistance or SSI benefits. The other difference is that because there is no disqualification for governmental benefits, the assets in the trust cannot typically be used for shelter or food for a beneficiary since that is the purpose for the governmental benefits.

Note that these are trusts that you can set up for your children or other beneficiaries, using assets from your estate. If a child of yours or other beneficiary who is receiving governmental benefits inherits money from someone else, receives a monetary award for medical malpractice or other type of negligence case, or otherwise comes into receipt of money, it is probable that your child or other beneficiary may be disqualified from continuing to receive governmental benefits. This could be a disastrous result, especially if your child or other beneficiary is receiving medical benefits. If you or your child is facing such a situation, a different kind of special needs trust can be used to help preserve available governmental benefits. Please contact your attorney if such a situation develops.

Premarital Agreements

In recent years, premarital agreements (sometimes called prenuptial agreements or antenuptial agreements) have been playing an increasingly larger role in estate planning. In this age of second and third marriages, blended families, and more complicated ownership arrangement of property, such agreements can be vitally important to set expectations and put dispute resolution processes in place at the beginning of the marriage.

Yes, premarital agreements are not considered to be romantic – they will never compete with a diamond – but they can represent a sound investment that can set expectations and provide some certainty at the beginning of a marriage, an investment that can actually strengthen a marriage if done properly.

A premarital agreement can address any issue that a couple finds important to their marriage, from financial matters down to who does the dishes. Typically, however, they address what happens to the prospective spouses' individual property interests if the

marriage ends by divorce or by death.

For example, the couple may agree that whatever property each person brings into the marriage, including any income or gain in the value of that property during the marriage, remains that person's sole property, and should not be considered as marital property in the event of divorce. Or, the couple could agree that if the marriage ends in divorce, that neither will request alimony or, if alimony is requested, a method for determining the amount of the alimony can be included. Or, the couple could address what rights each may have in the other's retirement accounts upon the death of one of them. Each couple will have their own unique set of issues.

While a couple may be able to use the same attorney to help them design and implement an estate plan, when the couple is dealing with the preparation of the premarital agreement, each prospective spouse should have his or her own independent counsel. Very important issues will be addressed in this agreement, and each prospective spouse should receive independent legal advice regarding the impact on those issues.

As part of preparing a premarital agreement, each prospective spouse is required to provide full disclosure of all his or her assets, liabilities, and sources and amounts of income. The basic premise is that only with full disclosure can each prospective spouse provide his or her informed consent to such an agreement.

The Probate Process

A lot has been written about how onerous the probate process is, but few people understand why. Probate is the process by which a person's estate is settled upon his or her death. It ensures that creditors of the deceased are paid and that the deceased's beneficiaries receive what they are entitled to receive under a Will, or, for those who die without a will, in accordance with the intestate laws (discussed below). In Maryland, the Register of Wills in the county in which the deceased lived

oversees the probate process. The Register of Wills is a county agency under the jurisdiction of the Orphans' Court in that county.

When a person dies, someone must take responsibility for winding up the deceased person's worldly affairs. This someone is the Personal Representative (also known as the executor or executrix). The Personal Representative has the responsibility for identifying and appraising the assets in the probate estate, paying all debts and applicable taxes on behalf of the estate, and making distributions to the beneficiaries. In return for performing these services, a Personal Representative is entitled to a commission that normally cannot exceed 9% of the first $20,000 and 3.6% of the balance of the value of the probate estate. If the Personal Representative chooses to have an attorney help with settling the probate estate, any attorney's fees incurred to help in the administration of the estate must be approved by the Orphans' Court and, depending the estate, may be deducted from the total allowable commissions.

Probate provides an orderly process for winding up one's affairs in a public forum. Typically, probating an estate takes approximately nine months to one year from start to finish. The probate rules require timely filing of estate inventories and accountings with the Register of Wills, and the Personal Representative must obtain Orphans' Court permission before taking certain actions. The exacting rules and legal expenses associated with the probate process have led to a popular sentiment that probate is a cumbersome and expensive process that should be avoided. However, with a little planning, the demands of the probate process can be reduced or even, in some cases, eliminated.

If you would like more information about the probate process, there is a pamphlet that provides more detail about the probate process available on our website or you can ask us for a paper copy to be sent to you.

Dying Without a Will – Intestacy

Everyone has a Will – in one form or the other. Hopefully, a person consults with an attorney and has a Will prepared that reflects that person's wishes regarding the disposition of his or her estate. However, if a person has not taken the time to prepare a Will, Maryland will provide that person with a Will at the time of that person's death. This Will is not a document, but a set of laws, called the intestate laws, that provide a substitute or

surrogate Will for anyone who dies without a Will.

Under the intestate laws, it is still necessary to open a probate estate, appoint a Personal Representative, and administer the probate estate through the probate process, just as if there had been a Will. You cannot, however, choose your Personal Representative or a Guardian for your minor children (both must be appointed by a court), and you have no say as to the distribution of your assets. With no Will, the Personal Representative must distribute your property in accordance with Maryland's intestate laws. For example, if you have a spouse and adult children, your spouse will receive only 50% of your estate; your children will receive the rest. The intestate distribution provisions vary significantly, depending on who is in your family. Suffice it to say that it is the rare situation where the distribution provisions under the Maryland intestate laws match what a person really wants.

By the way, it is a common misconception that, if you die without a Will, your property passes to the State of Maryland. This only results if there are no living heirs at all, in which case your estate goes to the Board of Education in the county in which you resided.

Joint Ownership

Jointly-owned property is not subject to the probate process, but passes by right of survivorship to the other joint owner or owners. People often use joint ownership for convenience purposes (e.g. bill paying during any period of disability) or to avoid probate. If these are your concerns, we can recommend better tools to accomplish these purposes. Often, such joint accounts are titled as "joint tenants with rights of survivorship," with the acronym "JTWROS."

Also, there is a common misconception that a Will governs joint accounts. This is not the case. Instead, upon the death of one owner of a joint account, the other owner becomes the sole owner of that account, with the result that the joint account is not subject to probate or the provisions of a Will.

For a married couple, it is often desirable to hold property jointly. Assets held jointly by both spouses (known in the law as "tenants by the entireties"), insulates the jointly-held property from the claims of creditors of one of the spouses. If one spouse is sued, for example, the marital assets cannot be seized by the creditors of that individual spouse. Of course, if both spouses are sued, the creditor can seize all of the marital assets.

Generally, we advise against holding property jointly with anyone other than a spouse. Property held jointly with someone else (e.g. a son or daughter) is subject to the claims of either one of the joint owner's creditors. Joint ownership may also enable some third party (e.g. a joint owner's spouse) to exert undue influence over one of the joint owners to dip into those assets. Unlike using powers of attorney and trust arrangements, joint accounts are not held in a fiduciary capacity. The joint owner of a bank account is simply a co-owner and, as such, has the absolute legal right to withdraw all the funds from that account.

Joint ownership can also have adverse tax implications for property that has or will appreciate in value. If you die owning 100% of an appreciated asset, the tax basis of that asset "steps up" to its fair market value of that asset on the date of your death. Depending on when the asset is sold, this can dramatically reduce or even eliminate any capital gains tax. If, however, you die owning the same asset jointly with someone else, there may only be a partial step up in basis, which can result in higher capital gains taxes for your heirs.

Revocable Living Trusts

There are many magazine articles and seminars about the wonders of revocable living trusts. Unfortunately, the usefulness of these trusts is sometimes overstated, and one must be careful of falling into the trap of "purchasing" a legal "product" that may or may not meet one's estate planning needs. On the other hand, in proper situations and with sufficient guidance, these trusts may be very useful to meet a wide range of needs.

A revocable living trust is a trust that you set up during your lifetime. It is revocable or amendable during your lifetime, and you retain full control over your assets while you have the capacity to do so. The principal benefit of using a revocable living trust is that it provides an excellent tool to manage your assets during any period of disability. It also provides a means for avoiding probate for any of the assets held in such a trust because trust assets are non-probate property.

The revocable living trust is a good asset management tool to use during your disability because you can identify a successor trustee to step in and continue managing the trust assets for your benefit. This makes managing your disability much easier for your family, and it ensures, as best possible, that your assets will be used for your benefit, even when you cannot manage the assets yourself. Although you could use a general power of attorney to accomplish this same goal, revocable living trusts provide more certainty since there is no question that a trustee may manage assets effectively and efficiently within a trust.

A second benefit is that upon your death, your revocable living trust acts as a "Will substitute." This means that you can use the trust to distribute your estate to your beneficiaries, outright or in trust, just like a Will, without having to go through probate. It is this benefit that is so strongly advertised in many magazines and newspapers using the rationale that probate is a costly and time-

consuming process that deprives your family from using your estate during the probate process. In reality, probate in Maryland is not the monster described in these advertisements; but, as is usually the case, there is some truth in these claims.

A third benefit often mentioned for using a revocable living trust is that the use of such a trust can keep your estate plan private. Probate is a public process, and anyone is free to go to the courthouse and review probate files. Since property held in a revocable living trust is not subject to probate, all of the provisions of such a trust can be kept private, as can the nature and extent of the property that is held in such a trust.

It should be noted that in most circumstances, no separate tax return has to be filed for a revocable trust. In fact, the trust is a "see through" entity from the perspective of the Internal Revenue Service for income tax purposes. Contrary to popular myth, however, the revocable living trust does not, by itself, provide a mechanism for reducing or avoiding estate taxes.

There are several considerations that should be taken into account before deciding to use a revocable living trust as your primary estate planning tool. One is that using such a trust will require you to spend more time learning the vocabulary and concepts associated with these documents than you might if you just used a Will. This is because you will be using your revocable living trust on a regular basis in dealing with your financial affairs. Although it is your attorney's responsibility to help you through this educational process, it will require commitment and effort on your part.

A second consideration is that you must transfer your assets into your revocable living trust. Your attorney can provide the paperwork for transferring your home and other real properties into your trust; however, you will have to visit your banks and investment

brokers to make sure that your accounts are properly transferred into your trust. The good news is that this part of the process in not as onerous as it once was because banks and other financial institutions have become more familiar with these types of trusts.

A third consideration is that estate plans that incorporate revocable living trusts usually cost more to put together and implement than an estate plan that uses only Wills. Your attorney will spend more time drafting the appropriate documents for you and making sure you understand all of the important concepts associated with these documents. Although a revocable living trust can be an excellent estate planning tool, it is not for everyone. When you meet with your attorney, be prepared to discuss your financial, family, and health situations. If you are still in doubt about using a revocable living trust after that meeting, but you think you have had your questions answered, then a good old fashioned Will-based estate plan may be the better plan for you.

Powers of Attorney

A power of attorney is a document in which you appoint someone else as your agent to make financial decisions for you if you are unable or unavailable to do so yourself. A "general power of attorney" provides your agent with broad powers to manage your property on your behalf. A "limited power of attorney" grants your agent power to take specific actions (e.g. only to sell your home). A general power of attorney should be an integral part of your estate plan since it is a

very effective tool for allowing someone else to manage all of your financial affairs upon your disability.

In 2010, Maryland enacted the General and Limited Power of Attorney Act. This Act, among many other things, provides statutory forms that may prove to be useful in case of your disability. For example, if one of the statutory forms is used, and your agent is unable to get your bank to recognize your agent's authority to handle your banking, the agent may ask a court to intervene and, if successful, the court can order the bank to reimburse your agent's attorney's fees, among other things. Therefore, everyone should have one of these statutory forms as part of their estate plans.

Now, for a reality check. These statutory forms were not drafted very well and the law limits the degree to which the forms can be modified. Indeed, the law requires that the statutory form used by a client be

"substantially in the same form" as what is in the statute, whatever that means. And that's the problem. Nobody can provide the legal definition for what "substantially in the same form" means. Since powers of attorney are used in an ever-growing variety of situations that were not contemplated by the General Assembly when it passed this law, it would be surprising if the form would meet all of your future needs.

Based on this concern, a "two document" solution is being recommended. This simply means that your estate plan should include the statutory form that meets your needs, as well as a broader general power of attorney that can be drafted on your behalf to address all those other situations not covered in the statutory form. The two powers of attorney are coordinated so that there should be no confusion. Please ask if you have any questions about how these two documents can be effectively used to meet your needs.

You can revoke your power of attorney at any time, provided you notify your agent and anyone who has accepted your agent's authority under your power of attorney. Although this revocation can be done orally, it should be in writing. Also, you should be aware that your power of attorney terminates upon your death.

Often the term "durable" is used to describe a general power of attorney. This means that the power of attorney can still be used when you are incompetent or disabled. Under Maryland law, all general powers of attorney are presumed to be durable.

Advance Medical Directives

The ability to make decisions about one's health care is one of the most important aspects of estate planning. A tool that is highly recommended for everyone is the advance medical directive. This document allows someone else (your health care agent) to make health care decisions for you when you are unable to communicate effectively with your physician, that is, you are unable to provide informed consent.

Your health care agent may make almost any decision you could have made if you were competent to do so, such as request second opinions, provide consent or withhold consent to medical procedures, hire or discharge physicians and other health care providers, and comply with your wishes regarding the use of artificial life support equipment during end-of-life situations.

If you do not have an advance medical directive, there is a provision in the law that allows someone in your family or a friend to make health care decisions on your behalf. This process is called the "surrogate decision-making" process. There are two main problems with this process.

First, there is a priority list of who can make these decisions for you. If you are married, your spouse has priority. If you are not married, then your adult children have priority to make these decisions. If you have no adult children, then a variety of other classifications of relatives or friends are identified in the law. Sometimes, a person with priority is not the person you want to make decisions for you.

Also, if there is more than one person in a priority class (for example, adult children), then all the persons in that class must agree on a course of action for you.

Second, any decision regarding your health care must be made on the basis of your wishes, if known, or otherwise in your best interests. If your wishes are not made known, in an advance medical directive or otherwise, then your wishes may not ever be fulfilled, despite the best attempts of your family members or friends. In other words, the decision you would want to be made may not be made because you did not communicate your wishes regarding your health care.

The advance medical directive can also include a Living Will that states your intentions with regard to the use of artificial life support equipment, including the use of artificial nutrition and hydration, in certain "end-of-life" situations. Under the law, you have the absolute right to direct that artificial life support equipment be removed in certain circumstances. However, if you are incapacitated you may not be able to make your wishes known to your physicians. Advance medical directives allow you to direct in advance how your health care is to be administered in these situations.

Maryland's Health Care Decision Act, which became effective on October 1, 1993, has expanded your options with respect to both Living Wills and Health Care Powers of Attorney. Under this law, your Living Will or advance medical directive can provide for the use or withdrawal of artificial life-sustaining procedures if you are in a persistent vegetative state, if you have what is called an end-stage condition, or if you have a terminal condition. Under the old law, the Living Will was limited to terminal conditions.

If you signed a Living Will or a Health Care Power of Attorney before October 1, 1993, you may want to sign an advance medical

directive that takes advantage of the increased flexibility available under the revised law.

There are two other types of advance medical directives that are commonly used, but both are in the nature of physician orders rather than legal documents. One is the Do Not Resuscitate Order ("DNR") and the other is a Medical Order for Life- Sustaining Treatment ("MOLST"). In both cases, a physician, a nurse practitioner, or a physician assistant may enter an order that restricts medical care in certain situations should you wish that care to be restricted. For example, if you have a heart attack, you may not wish to be resuscitated if you are also suffering from a degenerative disease such as Alzheimer's. In that case, you can have your doctor sign a DNR blocking emergency medical technicians from resuscitating you. Or, if your medical situation is such that you do not wish that antibiotics be used in certain cases, you can have your doctor or nurse practitioner address your wishes in a MOLST.

Long-Term Care Planning

Whether you are concerned with the long-term care needs of your parents or yourself, steps should be taken now to make sure that future long-term care costs can be paid when the time comes. There is a high probability that we or someone we love will require some long-term care. With average costs ranging from $7,000 to over $15,000 per month, a lifetime of savings can be wiped out quickly.

There are generally four ways that these costs are paid. The first method is simply

to pay for such care from your own savings. Whether you stay at home, live in an assisted living facility or group home, or are placed in a nursing home, supplemental care will most likely be needed to provide the care and services necessary to maintain a reasonable quality of life. These added services can be costly, which is why the range of anticipated cost is so wide.

The second method is to purchase long-term care insurance. This type of insurance has been gaining wider acceptance in recent years due to product improvement and the growing recognition that long-term care costs need to be paid somehow. Most policies today provide benefits whether the person receives care at home, is living in an assisted living facility, or is residing in a nursing home. There are many variations on the types of policies that can purchased, but the sooner a policy is put in place, the better since you must be "insurable" at the time of application.

A third method is that you can choose to live in certain types of continuing care retirement communities ("CCRC's). In such a community, persons may live independently in their own apartments, but share meals or other communal activities. If the time comes when a person needs some help with their activities of daily living, that person may move to assisted living within the same building. If the person's condition worsens so that nursing home care is required, such care is also available. In such a CCRC ("Type A"), your monthly living expenses will not change substantially based on your level of care needs. Note, not all CCRC's are the same. Some CCRC's will charge market rates for each level of care that you may need ("Types B, C, or D). Thus, for planning purposes, the "Type A" CCRC that maintains level payments is much more predictable than those that use market rates for each level of care.

The final method is to spend one's savings until depleted, and then rely on the Medical Assistance Long Term Care Program (Medicaid) to supplement the financial costs associated with staying in a nursing home. Note, to qualify for Medicaid, one must meet strict financial requirements and have a medically- substantiated need for long term care assistance. Sometimes, if this option is chosen or is the only one available, there are planning opportunities to preserve some of the assets of the disabled person, but these opportunities are becoming fewer and fewer and require some time and effort to implement effectively.

Insurance

Insurance can be an important tool in planning your estate. Health insurance, including Medicare and supplemental (gap) insurance, can be used effectively to pay your health care costs. In addition, long-term care insurance can cover at least some of the costs for home care or nursing home costs if you require a certain medical level of care due to

illness or injury. Disability insurance may provide a degree of financial security that is no longer provided by many employers.

Life insurance is an excellent and cost-effective tool to provide your family with financial security or to reduce the impact of taxes upon your death. It should be kept in mind, however, that life insurance proceeds are part of your taxable estate. This means that the value of all life insurance proceeds will be added to the total value of your estate for tax purposes and may be subject to the Maryland Estate Tax, depending on the total size of your taxable estate. Even if you have little or no financial net worth, you may have substantial life insurance coverage through your employment.

Conclusion

We have attempted to answer many of the questions often asked by clients during the estate planning process.

Since everyone's situation is unique, you will need to work closely with your attorney to be sure that your estate plan will meet your specific needs. Your attorney will help you choose the best plan for you and your family, draft the appropriate documents incorporating the elements of your plan, and explain what needs to be done to implement your plan. In addition, your attorney will also be available to work with other members of your family, your accountant, your insurance agent, or your financial planner to ensure that your needs and your family's needs are properly addressed and that your estate continues to work for you.

If you have any questions about your estate planning needs, please feel free to call us at **410-995-5800** or visit **www.darslaw.com.**

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10211 Wincopin Circle | Suite 600 | Columbia, Maryland 21044