Basics About "Estate Planning"

There are generally two types of professionals that call themselves "estate planners." First, are the financial advisors who give people advice on investments, for the general purpose of helping those people obtain as much growth in the value of their estate as possible or to accomplish a certain financial goal. The other are attorneys, such as at Dammeyer Law Firm, P.A. whose professional advice is obtained in order to help people protect their estates from problems primarily due to death, incapacity and taxes. These estate planning attorneys provide people with wills, trusts, powers of attorney, health care powers of attorney, and specialized instruments for a variety in other issues. This article gives the basics about wills, trusts, powers of attorney, health care powers of attorney, and a couple of other specialized instruments.

Trusts versus Wills

Putting aside tax issues for a moment, this article is designed to give you an overview of the purpose of trusts and wills and the differences between the two.

The general purpose of a trust or a will is to determine in advance of death **who** will receive your assets when you die, **when** and under what circumstances, and **who** will be in charge of that whole process. Both a will or a trust can be drafted that will accomplish those goals. They are different in the procedure that is used, but both will have the same outcome. Both can deal with any tax issues you may have (see **Estate & Gift Taxes** below). Neither a will nor a general trust have any tax advantage over the other. There are important differences, however.

What is Probate?

Probate is a legal process that must be used when a person dies owning property in their own name, ***if*** there are no named beneficiaries surviving, no joint owner, and no "private legal contract" created for the transfer of assets or benefits. Assets that don't have to go through probate include such things as:

- Life Insurance or annuities with named, surviving beneficiaries (a "private legal contract")
- "Pay On Death" bank accounts with named, surviving beneficiaries(a "private legal contract")
- "Transfer On Death" securities with named, surviving beneficiaries(a "private legal contract")
- Jointly owned assets with "rights of survivorship" where there is a surviving owner (a "private legal contract")
- A Trust (a "private legal contract")

For these assets, a will is not required in order to transfer rightful ownership upon your death. However, if you became mentally incapacitated, there are problems

that even the first four types of ownership on that list will not help. *And a will does not help in that case either*. (See **Powers of Attorney)**

For assets that aren't like these, where the only owner is you and there is no beneficiary or no private legal contract for transfer, probate will be required.

Probate is the legal process through which rightful ownership is determined after the death of the current owner, (1) when there is no surviving joint owner who has rights of survivorship, or (2) where there is no beneficiary, or (3) no "private legal contract" for transfer that was put in place before the owner died. Probate is the process of determining who is entitled to those assets. It involves the courts system and usually involves lawyers. It is lengthy and it is costly.

A will does not avoid probate. A will allows you to state who should receive your estate, but its validity and interpretation requires that an estate governed by a will must still go through the probate system. It cannot be used for any purpose before you die, so it does nothing to help in the event of incapacity.

Trusts avoid probate because the creation of a trust creates a new legal "entity" which can actually own assets. A trust is not mortal, like people, so if everything you own is transferred to your new trust, the new owner (your trust) will never die. Therefore, probate is not required. You own your trust and are in complete and exclusive control of it while you are alive and able, so you still have total control and use of everything. If you become mentally incapacitated or die, the trust document should say who takes over from there – someone you picked. After your death, the trust determines who gets all the estate assets, and when. The trust should also provide who is in charge of that process. All of this can be done without probate, so there are usually no court costs and the legal fees are greatly reduced. It can go much faster than probate as well.

The type of trusts which we are talking about here are general trusts which are usually called "revocable trusts" or sometimes called "living trusts".

While you are alive, able and acting as your own trustee, these trusts have no tax consequences, good or bad. You do not need a separate tax ID number and you don't have to file your taxes any differently. If you need some type of tax planning, that can be added to your trust, in the same way a will can be changed.

<u>Powers of Attorney</u>

Powers of attorney are used to plan for situations where you are unavailable to authorize financial transactions or to gain access to information or make decisions. Being "unavailable" includes times when you might be away and unreachable, such as people in international business, missionaries and people in the military, but most commonly it is about times when you are mentally

incapacitated. Things can happen, such as illness or accident, which leave you unable to make decisions or authorize things.

That “unavailability” or incapacity might be temporary or it might be “indefinite” or permanent. In either case, it can happen and usually it is unexpected. By planning ahead and signing a power of attorney in advance of such problems, you can authorize others to act on your behalf.

When you give someone authority under a power of attorney, you give authority but you don’t give up any of your own. You are not giving them your property as their own either. You maintain your own authority, but share your authority with someone you trust, in order to allow them to help you take care of things when you need help.

Regardless of age or health, everyone should have powers of attorney. Even if the odds of needing one are low, the downside of not having one if it was ever needed is really serious. Sometimes, people have to have probate proceedings even before they have died, because they made no plans for incapacity (See the article on **Conservatorships and Guardianships**).

Powers of attorney generally refer to issues surrounding property, business, assets, income and all manner of financial issues, including the ever-growing issues about access to information. For medical issues and personal care, Minnesota requires a separate type of power of attorney, called a health care directive and/or a medical power of attorney. Federal privacy laws also come into play. A good current health care directive/power of attorney ought to be drafted to provide for these federal requirements as well.

Health Care Directives

Health Care Directives (sometimes called a “living will”) are powers of attorney regarding medical decisions, statements of your personal views on extreme health care issues as it pertains to yourself, and appoints advocates you choose to speak for you, providing them with access to medical information. A person can name someone to act or decide things regarding medical care if they use the correct legal form. This form should also be used to authorize access to medical information, especially in light of the new “HIPPA” privacy laws.

In addition, Health Care Directives can be used so that you can state your views, in advance, with regard to medical care issues. These are often referred to by medical people as “advance directives.” For example, you can state what you would or would not want to happen in the event you are terminally ill and unable to make decisions and a medical procedure needs to be considered, such as tube feeding or CPR (Cardiopulmonary resuscitation). You can get into as much detail as you want and you can also make very general statements. When you do, the person you name must comply with your instructions and medical people

must also try to comply with your instructions, within the bounds of what is considered normal medical practices.

Today, with new laws ever tightening restrictions on giving out medical information to persons other than the patient, even immediate family members may be faced with medical records which cannot be disclosed because of these laws. Having a Health Care Directive in place which includes proper information release authorization is becoming more and more critical.

Regardless of your age or health, you should have a valid and current Health Care Directive in place. At Dammeyer Law Firm, we make sure all of our estate planning clients have a health care directive. They are included in all out estate planning packages.

Guardianship for Minors

People who have minor children need to provide for who would have custody of them in the event there was no surviving parent while they are still children. If the child has another surviving parent whose parental rights have not been terminated, that person still has the first priority to seek custody of their own child. Minors who are over 14 also have a say in the selection process. Minors who have been legally emancipated are their own legal guardians.

But most of the time, this is the most important issue a parent can consider: The parent has the right to nominate their own replacement, a guardian, in the event that parent is unavailable, incapacitated, or deceased. There are a number of ways to do this. Although the courts system has the ultimate authority to determine who ought to be appointed guardian, parents have the right to nominate who that is. By and large, the person the parent(s) nominate is the most likely to be appointed (unless of course the person nominated is somehow unfit for that duty).

The person who is named guardian does not have to be the one who has custody, but that is usually the plan. The guardian could, however, be a person who is the trusted person to decide “who” without necessarily being the person(s) to have custody.

The most common way of nominating a guardian for a minor, is by including a provision in your will for that purpose. It can also be put in a trust, if the trust is properly executed.

“Temporary guardianship” (Called a “custodian” in Minnesota) can also be given by a separate document. A document which is effectively a power of attorney to take care of minor children in the absence of a parent can be given by separate forms as well.

A Delegated Parent Contract can also be obtained and, oddly enough, it can be noted on your driver's license that you have one, much in the same way that your license can show if you are an organ donor. This Delegated Parent Contract is actually a child custodian appointment. It gives your selected friend or family member immediate right to custody if you died. Its authority lasts for a year, giving the custodian more than enough time to obtain judicial appointment of a permanent guardian. The form is also yoru nomination, giving them firt priorty to be appointed as permanent guardian by the courts. This form can be obtained from the Minnesota Department of Transportation and is easy to fill out. You can get them wherever you renew your license or get car license plate tabs. The cost to add the notation to your license is small.

Trusts for Children

If circumstances lead to a minor inheriting property, Minnesota law does not allow them to have legal control over that property. They cannot enter into contracts, transfer real estate or hold cash or investments accounts by themselves. A will or a trust can provide a solution to this potential problem.

A child or other intended beneficiary may also be too young, even if not a minor, and you may have the wisdom to postpone their inheritance to a more mature age or limit it to certain circumstances. A will or a trust can provide a solution to this potential problem.
A child or other intended beneficiary may also be mentally incapacitated, even if not a minor, in a condition not expected to improve, even as they mature. You may have the wisdom to postpone their inheritance to a more mature age or limit it to certain circumstances, or, as in many cases, simply appoint someone or more persons to make financial decisions on their behalf. A will or a trust can provide a solution to this potential problem.

Generally, there are two types of trusts for this purpose:

The first is a trust provision in your will. It is a trust that does not go into effect only when you die, not until then. This is typically referred to as a "contingent trust will". The existence of the trust is *contingent* upon your death *and* your predetermined decision as to what is "too young" or "the right conditions" or gives the financial authority to "the right person" or a trust institution.