Estate Planning Basics

The Will

A will is a written declaration by an individual (testator) of his or her intentions for the disposition of assets after death. If the will was prepared and executed in accordance with legally required formalities, and if the testator was competent and not under duress, the probate court will generally order that the testator's plan be carried out by the executor. (Note: Many states provide rights to spouses and dependent children that may have the effect of "modifying" the amount due them under the will or beneficiary designations.)

A will usually does not direct the disposition of all of a person's property. The most common examples of property that does not pass by will are jointly held property and assets with a named beneficiary such as annuities, retirement plans, and life insurance. While a will is an essential part of almost any estate plan, it should be viewed as only one part of the total picture.

Purposes of a Will

A will does more than provide a plan for the disposition of property. These important advantages should not be overlooked:

- A will can help to minimize or avoid estate costs--taxes, administration expenses and shrinkage of assets.
- A will may nominate a guardian for minor dependent children if there is no surviving parent.
- Specific assets—e.g., family heirlooms—can be bequeathed to an appropriate heir.
- The testator can make a bequest to charity.
- The testator can nominate an executor or personal representative to carry out the terms of his will during the probate process.
- The executor can be granted specific powers in the will that he or she would not otherwise have under state law, e.g., the power to continue operating the decedent's business.
- A will provides an opportunity to make the best use of the unified credit and the marital deduction.
- A will may be used to provide income for the care of a mentally or physically handicapped child, parent or spouse.
- A will can provide for the close-in-time deaths of spouses, which may affect distribution of assets.
- The will can describe how estate settlement costs are to be paid, so they are not charged against particular heirs or bequests.

Intestacy

If a person failed to execute a will or died without a valid will, he or she is said to have died intestate, and his or her property will be distributed under the intestate succession statutes of the state. These statutes do not take into consideration the decedent's unique personal situation, and the distribution is unlikely to be in total accord with what the decedent would have wished.

The intestacy statutes only take into consideration family relationships; they do not take into account such factors as taxes, administration costs, or estate shrinkage.

The Price of Dying Intestate

Suppose a husband has a wife and two minor children. If he were to die without a will, he would probably be shocked to learn that, in many states, his wife would only receive one-third of his probate property. The other two-thirds would go to the children under the intestacy laws.

Suppose a widow leaves two children, one healthy child and one with a physical handicap. A will could recognize the greater needs of the handicapped child, but the intestacy laws will generally treat the children equally.

Aunt Martha would like a brooch to go to her favorite niece. She can accomplish this by will, but the intestacy laws would not recognize Aunt Martha's intentions for specific assets.

The will allows the decedent to nominate an executor, but in the absence of a will, the court will appoint an administrator. This may or may not be someone the decedent would have named.

Intestacy can make estate administration more difficult, and that could translate into higher fees for the administrator of the estate and higher legal fees. The administrator will have the minimum powers granted by law, not the broader powers that could be extended by will. So, the administrator generally has less flexibility in dealing with estate assets, and this may result in loss of value or sale of estate assets at a liquidation price.

Property Ownership in General

The form of property ownership is very important in estate planning. It determines how and to whom the property passes at the death of an owner, and the extent to which the value of this property is included in the deceased owner's gross estate for federal estate tax purposes. While joint ownership is often looked upon favorably--especially by spouses--it can cause some estate planning problems.

In the U.S., property may be owned in several different ways:

1. sole, outright ownership, also called "fee simple"
2. joint tenancy with rights of survivorship
3. tenancy by the entirety, which also has rights of survivorship (not available in all states)
4. tenancy in common
5. partial interests such as life estates and remainder interests

6. community property (not available in all states).

Methods 2-6 are forms of co-ownership among two or more people.

Advance Medical Directives

Modern medical science has made advancements in life-sustaining medical treatments. These procedures have raised new ethical and legal questions about a patient's wishes to receive such treatment during terminal illness or incapacity. To answer the question, "What sort of treatment would the patient want if competent?" the legal community has created new documents collectively referred to under the umbrella term "advance medical directives."

Advance medical directives include living wills, health care powers of attorneys, and medical directives, and sometimes instructions about organ donations.

The Living Will

A living will is a document that allows people to specify the life-sustaining treatments they would find acceptable in the final days of terminal illness or incapacity. Forty-seven states and the District of Columbia have living-will laws (all states except Massachusetts, Michigan, and New York).

This statutory right has arisen because modern medicine can keep people alive beyond any reasonable expectation of recovery. Courts have struggled with determining who has the right to make decisions that will maintain the dignity and respect the wishes of dying patients.

These two equally powerful forces have produced a shift in public opinion on death and dying which has affected public policy. Today people are not only concerned with providing for the disposition of their property at death, they are also seeking to leave clear advance directives on their wishes as they relate to life-sustaining care while they're alive.

Durable Power of Attorney for Health Care

Because of these restrictions and other shortcomings in statutory language, living wills often fail to leave families and physicians with clear directives as to what the competent person considered as it relates to the decisions these care-givers and family members must make. In addition, many living will statutes are explicit on the life-sustaining procedures which may not be withheld or withdrawn. For this reason, a durable power of attorney for health care (or health care proxy) is often used alone or in conjunction with a living will to fill this gap.

Durable Power of Attorney

A durable power of attorney is a document that allows one person (the principal) to authorize another person (the attorney-in-fact or agent) to act on his or her behalf with respect to specified legal obligations even if the principal subsequently become incompetent. This document names the person(s) authorized to make decisions and specifies those decision-making powers it confers.

A durable power of attorney can play a significant role in estate planning. Once in place, the power grants financial decision-making powers immediately upon execution to an appointed agent for the life of the principal. A springing durable power of attorney can also be created to become active at a future date, usually when the principal is deemed to be incompetent. By granting these rights to a family member, an advisor, or a trusted friend, the principal is assured that transactions, which might otherwise have been impossible, can occur even if the principal becomes incompetent or incapacitated. As such, having a durable power of attorney can overcome considerable obstacles for an elderly, incompetent, or dying person. Today people are not only concerned with the disposition of their property at death, but also with the management of their property during their lifetimes.