ESTATE PLANNING PRIMER

REVOCABLE TRUST

Revocable Trusts can allow your estate to avoid probate, guardianship, and in certain cases estate taxes. Their use has been diminished by changes in the law that allow the use of competent adult beneficiaries on financial accounts (TOD – Transfer on Death, POD – Payable on Death), by the portability election law which allows a surviving spouse to claim the last deceased spouse's unused estate tax exemption on a timely filed estate tax return, and by the increase in the estate tax exemption (currently $5,430,000 for 2015 and which is adjusted for inflation).

Revocable Trusts, however, are still important for situations where you own assets other than financial accounts and your home. This would include assets such as second homes, rental property, small businesses that are not publicly traded (LLCs, corporations), and stocks individually held. The attorney fee to probate such assets is at least 3% of the gross value.

Revocable Trusts are also important where your beneficiaries are too young or cannot manage money and should not be beneficiaries on financial accounts. A Revocable Trust will own or be the beneficiary of such assets.

Where the estate primarily consists of non-qualified (tax-deferred) assets and a home, a Will with a Testamentary Trust is often used since the beneficiary of non-qualified assets can be the Testamentary Trust and probate is minimal in such an estate.

DURABLE POWER OF ATTORNEY

A Durable Power of Attorney can allow someone to act for you to make financial and health care decisions. The Durable Power of Attorney is effective immediately. The benefit of a Durable Power of Attorney is the avoidance of a guardianship proceeding and attorney fees in the event of incapacity.

The Durable Power of Attorney is more effective than a Designation of Health Care Surrogate since the Designation of Health Care Surrogate is only effective upon your incapacity and cannot be used while you are competent and recovering. The Durable Power of Attorney can cover both financial and health care decisions while a Designation of Health Care Surrogate can only cover health care decisions.

Financial institutions can be held liable for damages, costs, and reasonable attorney fees for an unreasonable refusal to honor a Durable Power of Attorney.

Durable Powers of Attorney should be as specific as possible so that the holder's authority cannot be questioned.

LIVING WILL DECLARATION

A Living Will Declaration allows you to remove a mechanical device (i.e., respirator, feeding tube) where there is no reasonable hope of recovery and you have (1) a terminal condition, (2) an end-state condition where there is severe and permanent deterioration, or (3) where are in a persistent vegetative state and have no ability to communicate.

The removal of life support under a Living Will Declaration requires the independent examination and concurrence of the attending physician and another physician and the permission of your surrogate named in your Living Will Declaration (usually a family member).

A "Do No Resuscitate" order is different from a Living Will Declaration in that it must be obtained from a physician, you must be terminal (expected to die within 12 months), and no life support is to be applied. With a Living Will Declaration, life support will be applied to determine if you meet the criteria for removal of life support.

Where there is no Living Will Declaration or Durable Power of Attorney with Health Care Provisions, there must be clear and convincing evidence for the removal of life support.

LAST WILL AND TESTAMENT

A Last Will and Testament directs the distribution of assets which are not jointly titled with right of survivorship or assets which do not have a beneficiary. Assets that pass under a will do go through probate. If assets passing under the will are minimal ($75,000 or less of assets, excluding the home for relatives), the costs for probate will be minimal as well. Such an estate qualifies for Summary Administration which costs approximately $1,600 and can be completed within 30 -60 days.

A will can designate a Guardian to care for minor children and a Testamentary Trust to receive and manage assets. Property that is managed by a Testamentary Trust (probate or non-probate) avoids a costly guardianship proceeding and has the flexibility of extending management of the child's inheritance beyond eighteen (18) years of age. Testamentary Trusts can also be used for adult beneficiaries who have financial difficulties. A Spendthrift clause in the Testamentary Trust protects the assets from the beneficiary and the beneficiary's creditors.

Step-children or other non-relatives cannot inherit probate property without being named in the will.

Where appropriate, extensive use of beneficiary designations on financial accounts in conjunction with a will appear to be better estate plan than a Revocable Trust since a Revocable Trust requires payment of creditors. A beneficiary on a financial account does not have the legal obligation to pay creditors and creditors would have a difficult time locating a beneficiary.