

**PRACTICAL ESTATE PLANNING
FOR THOSE FACING DISABILITY & TERMINAL ILLNESS**

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As The United States population ages, more estate planners are coming into contact with the estate planning needs of those facing disability and terminal illness. This article will provide some practical aspects of planning for those facing eminent disability and a terminally illness.

Many of the approaches in this area are distinctly different from the normal estate planning approaches. For example, in most estate planning situations, the testator's legal capacity is not a major issue. It is perhaps the most pivotal issue in this area.

In this type of planning, there are a number of practical rules, which the estate planner should use in preparing a client's estate plan. These include (but are not limited to) the following:

- * Perhaps the most important aspect is to quickly determine the estate planning needs of the client. Health and capacity of the client are preeminent issues that must be immediately addressed. The practitioner must determine both the client's current capacity to make material decisions and to the degree to which the client will be able to retain that capacity in the future.

If the practitioner, because of other work, is unable to move quickly to address the estate planning needs of the client he or she should review not undertaking the engagement.

- * Diminished mental capacity and related health issues often limit the client's ability to fully understand the points discussed with his or her counsel. Because of these concerns, the practitioner should provide simplified descriptions, such as diagrams and charts to describe the current situation and any proposals. Many of the modern word processing systems (e.g., WordPerfect version 5.1) have the capacity of preparing simple flow charts.
- * Failure to properly document estate-planning recommendations can result in a malpractice claim against the unwary practitioner of a deceased client who can no longer vouch for the discussions with counsel. Recommendations should be made in writing and letter should document decisions from meetings and any recommendations.
- * Immediately prioritize the client's needs. For example, if death is near, review the possible savings in time and expense of adopting approaches that avoid probate. If surgery is near, review the use of Medical Powers of Attorney to the extent allowable under local law.

PRIORITIZING THE PLANNING PROCESS

Probably the biggest issue that an estate planner needs to address is the immediate prioritization of the needs of the client. Provided below is a general outline of the issues, which must be addressed as a part of this, planning process.

Legal Capacity. Most of the immediate issues revolve around the issue of the client's health, his or her current capacity and his or her future capacity to make decisions and the dispose of property.

The first assessment, which must be made, is the determination of the client's capacity to make decisions and to execute documents. This question of capacity is central to all the issues in the planning process.

If the client lacks capacity to make decisions, it may be appropriate to have a guardian appointed. Local statutes should be consulted to determine whether or not it is possible to implement estate-planning approaches using a guardian.

Using a guardian can be costly and cumbersome. However, it may be less expensive than not doing anything and incurring estate taxes and other costs which could have been avoided. For example, assume Mr. X, a widower, has ten descendants, and no longer has the legal capacity to make decisions on the disposition of his property. If allowed by state law, the appointment of a guardian to make ten (10) annual exclusion gifts of \$10,000 could save up to \$55,000.00 in estate taxes for each year gifts were made, more than enough to justify the cost of a guardian.

If the client has the current capacity to make decisions it is also necessary to evaluate whether or not he or she will retain legal capacity. For example, if the client is undergoing drug treatment or if medical procedures which could result in diminished capacity, the planner must make sure to implement the appropriate estate planning steps before the client's capacity is limited.

Consult local law to determine the legal requirements to execute a will and sign related decisions (e.g. living will). In general capacity to make a will revolves around the following issues:

1. Does the client understand what property he owns?
2. Does the client know those who are related to him by blood and affection and can he name them?
3. Is the client able to express in unambiguous and uncontradicted manner how he intends to dispose of his assets?

Particularly in this area, it is imperative that the attorney anticipates the client's capacity being questioned. The following are some of the means by which the attorney can validate the client's capacity in anticipation of a later contest:

1. If the client is under current medical treatment, obtain a statement from the doctor indicating whether or not the doctor believes the client is capable of making decisions over his or her

property and life. If the client is intermittently disabled, (e.g., because of drug treatments) consider having his doctor attend any document signing and serve as one of the witnesses.

2. If the client is under current drug treatment, it may be important at the time any decisions are made or documents are executed that the attorney receive a doctor's statement stating the client is not then incapacitated by the drugs.
3. It may be appropriate to prepare a list of written questions that are asked of the client during any document execution and have that set of written questions signed by the client and witnesses.

The questions asked of the client should specifically address the requirements to prove capacity under local law. For example, the client should make a general statement for the witnesses outlining the various properties he or she owns. The client should name their family members, possibly to include grandchildren, although this is sometimes a problem for the elderly. Finally, the client should specifically describe for the witnesses the disposition of assets under his or her will.

4. In extreme cases affidavits of the witnesses and video taping of the ceremony may be appropriate. However, the videotaping of the signing can be counterproductive if the client appears disoriented or confused in the meeting.
5. Discuss the documents thoroughly with the client. Do not rush. Allow the witnesses to fully observe the client and his or her understanding of your explanation.

The practitioner should also recognize that the capacity to execute other legal documents may differ from the capacity to execute a will, or other special procedures may be required. For example, in many states the legal capacity to establish a trust may be less than that to sign a will.

DOCUMENTS.

The following are some of the documents that generally should be immediately addressed:

Living Trust. A "Living Trust" a trust designed to deal with disability and avoid probate. It is generally a revocable trust. In dealing with a client facing disability or a terminal illness, it is an excellent tool. Among the advantages of a living trust are:

- * Privacy - unlike a will, the trust is not generally a part of the public record
- * Reduced Expenses - a living trust may reduce legal and administration expenses by avoiding the probate process
- * Management - the living trust provides the grantor a continuous

management of assets, even upon disability

- * Avoidance of ancillary administration - if the client owns real property in other states, the use of a trust to hold his or her property will eliminate the need of probating a will in the other states
- * Revocable - the trust is generally revocable, allowing the grantor to change his mind

If a living will is used, make sure that a pourover will is still executed so that any overlooked assets are placed in the trust. In addition, the instrument should provide that it becomes irrevocable upon the grantor's disability so that a guardian cannot modify the trust terms.

Living Will. Most states have now adopted living will statutes allowing an individual to make a decision prior to their incapacity to require life support to be removed from them. Given the recent United States Supreme Court decision in Cruzan v. Director Missouri Department of Health a living will is often the first document to be executed.

Local law should be consulted to make sure that exact local statutory form is followed. For example, many statutes may require certain procedures be adopted if the client is a patient in a health care facility or nursing home. Restrictions may also exist on the use of a living will by a pregnant woman.

Medical Power of Attorney. A fairly recent phenomenon has been the use of powers of attorney for making health care decisions. Typically a power of attorney has dealt only with the property of an individual not the treatment of the body. In the absence of statutory approval, some health care providers have refused to follow the decisions of a power holder. Before using a Medical Power of Attorney local law should be reviewed to make sure it is permissible within the jurisdiction and meets all the statutory requirements.

An issue that will often arise within the context of a Medical Power of Attorney is whether or not the grantor of the power should also execute a living will. It is this author's opinion that a living will should always be executed, even if a Medical Power of Attorney is used:

- * Local law may not give the holder of a Medical Power of Attorney the right to remove life support systems.
- * The power holder may not be capable of making the decision to remove life support. For example, a spouse may be unwilling to withdraw life support because of the emotional trauma or may be injured an unable to make decisions.
- * The decision to remove life support is an extremely traumatic one for a family and very often it is easier for the family if the dying family member has already made the decision by a living will.

Property Power of Attorney Where diminishing capacity is an issue, it

is particularly important to address the client's property dispositions. In some cases there may not be sufficient time to draft all of the estate planning documents which might be appropriate and therefore a stop gap measure may be to adopt a power of attorney granting broad powers to the power holder to make estate planning decisions for the grantor, including the ability to make gifts on behalf of the grantor and to transfer assets into other estate planning vehicles such as living trusts.

Local law should be consulted to determine whether or not the power can be a "durable power" (i.e., one which is sustained even after the disability of the Grantor).

The counsel should make sure the client is appraised to the fact that the use of a power of attorney is merely a temporary measure and the death of the client will destroy the viability of this approach.

Review existing documents. A review of each significant existing document in the current estate plan of the client should begin immediately. Existing wills and trusts should be reviewed to determine applicable provisions, the impact of the death of the grantor and approaches that may need to be adopted on a pre-mortem basis. For example:

- * Any existing will should be reviewed to determine whether or not it is self-proven (i.e., will be submitted to probate without further documentation of the witnesses). If the will is not self-proven the counsel should make sure that the witnesses can be located and that the will can be admitted to probate. The inability to bring the witnesses into the court personally or by discovery may invalidate the will.
- * If a will was executed prior to September 12, 1981, and provides for the "maximum marital deduction", the will may be interpreted under the pre-Economic Recovery Tax Act of 1982 rules and therefore limit the marital deduction amount to 1/2 the estate or \$250,000.00 whichever is greater, with the possibility of an inadvertent estate tax being incurred by the estate.

REDUCING ESTATE TAXES

If a client's estate may be subject to federal estate taxes, the following are some of the simpler approaches, which can be adopted to reduce the estate tax burden:

- * Annual Exclusion. Section 2503 of the Internal Revenue Code allows each donor to gift up to \$10,000.00 per year per donee. If the taxpayer is married they can "gift-split" the gift so that a married couple can give \$20,000.00 per year per donee.

For example, a married taxpayer having three children and five grandchildren could give a total of \$160,000.00 each year without incurring any federal transfer tax. For a taxable estate this could result in an estate tax saving of up to \$88,000.00.

- * Medical and Tuition Gifts. Section 2503 (e) allows a taxpayer to

make medical or tuition gifts without having those gifts be treated as taxable gifts.

- * Unified Credit Each taxpayer has the opportunity to give the equivalent of \$650,000.00 (in 1999, increasing to \$1,000,000 by 2006) to anyone other than his or her spouse without incurring federal transfer tax. Where a married couple has a combined estate in excess of \$650,000.00, the practitioner should make sure that he that each estate has fully utilized the available unified credit.

For example, if the will of a terminally ill client provides that all assets pass to a spouse, all of the tax liability will be due from the surviving spouse's estate, possibly incurring estate taxes which could have been avoided by setting up a "By-pass Trust" in the first spouse's estate.

- * Post Mortem Elections. One of the greatest mistakes a practitioner can make is not evaluating post mortem elections before the client's death. The practitioner should determine those post mortem elections which may be applicable to the taxpayer and then assure that the client's affairs are structured to take advantage of those rules.

For example if a taxpayer has an estate tax liquidity problem and the deferral of estate taxes under section 6166 would be advantageous, the practitioner should make sure that all of the requirements of 6166 are fully met.

OTHER ISSUES

In addition to the above points, the following are a few practical considerations that should be addressed:

Organizing. Perhaps one of the greatest difficulties in probate is the confusion, which occurs from trying to organize disorganized information in an estate. To the degree a practitioner can be sensitive to the client and his or her family needs, the practitioner should try to begin the organization of the estate. By being able to consult with the client, some of the confusion and resulting cost for the estate can be reduced.

One of the easiest methods of beginning this process is to use the federal estate tax return (form 706) to gather together the information required for the filing of the form. As an adjunct to the preparation of the form, the various documents and other information needed from the client can be determined and hopefully easily located.

Safety Deposit Box. Determine what safety deposit boxes the client has, the property in those boxes and the persons who have access to the boxes. It may be advisable to add additional persons as signators on the box.

Safes. If the client has a safe at his home or business make sure that someone has the combination to the safe or keys.

Fiduciary. If the client is a fiduciary, determine the manner in which

the successor fiduciary will take office. It may be advisable to have the client resign and have his successor be immediately appointed to avoid time delays.

Beneficiary designation. Check the designated beneficiaries on life insurance policies and qualified plans. Make sure that the designated beneficiaries are appropriate.

For example, if an insured with a \$500,000 life insurance policy has been predeceased by his wife and has named his minor child as secondary beneficiary, it is probably advisable to modify the designation and to set up a trust for the benefit of the child.

Jointly held property. In some cases a significant portion of a client's assets will be held as joint tenants with right of survivorship. The practitioner should review the ownership of the client's assets and make sure that there are sufficient assets in the probate estate to fund any unified credit trust established by the will.

If the use of jointly held property results in insufficient assets being in the probate estate, it may be advisable to change the ownership to either individual ownership or a tenancy in common.

Retain gifts. If gifts have been made, with the grantor retaining possession or use, review having the grantor give up possession or use of those assets.

This provides two benefits. First, it reduces the possibility of conflict within the estate over the true owner of an asset. This issue is often found in a personal property context. Second, section 2036 provides that if a gift is made but an interest is retained, the gift is pulled back into the estate of the Grantor. By relinquishing rights, it may be possible to remove such an assets from the Grantor's estate.

Liquidity. As soon as possible do a liquidity study of the estate to determine whether there are sufficient liquid assets in the estate to fund any taxes, administration expenses, funeral and medical expenses and short term family need. If a liquidity shortfall is evident, begin developing a plan to increase the liquidity.

For example, if the owner of a closely held business is terminally ill, the employees are generally more likely to negotiate a reasonable purchase price during the owner's life.

DEATH BED ESTATE CHANGES

In dealing with an elderly or terminally ill client, the practitioner must remain extremely cautious in making major changes in the client's estate plan prior to death. Questions of capacity, undue influence, and mistakes of understanding are continual problems in making significant changes to the estate plan.

In addition, many states limit the ability of a testator to make

significant changes that are proximate to death. For example, in Georgia the ability of a testator to leave his estate to charity pursuant to a will executed within ninety days of death are limited.

In the event of a significant change in the estate plan, the various protections discussed in the article should automatically be adopted as a part of the execution process.

In addition, in extreme cases the client should review with the client the possibility of adopting an "In Terrorem Clause" in his or her will. An in terrorem clause provides that anyone contesting the will be automatically disinherited. In approaching such a plan it should also be important to provide that the in terrorem provision cover other estate planning dispositions such as a living trust. In terrorem clauses are generally strictly construed on a public policy basis and the practitioner should make sure that he has thoroughly reviewed the state law prior to using such a provision. In addition, it may be wise to have a provision within the clause indicating that if the courts refuse to enforce the in terrorem clause that it is a severable provision of the instrument and does not invalidate the entire Last Will and Testament.

SUMMARY

This article has attempted to provide some general and practical advise on representing a client who is facing disability or death. Planning for such clients necessitates a tremendous degree of sensitivity and promptness in attempting to avoid problems for the survivors.