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ESTATE AND LONG TERM CARE PLANNING BASICS

WHAT IS ESTATE PLANNING?

"Estate planning" used to be used as the general phrase given to planning for the transfer of assets at death. Nowadays, it also includes planning for incapacity and lifetime management of your person and property in the event you are unable to take care of yourself. It includes preparation of advanced directives (health care proxies, living wills, powers of attorney) and documents or the implementation of mechanisms for the distribution of your assets why you die. The is no "right" estate plan – what you choose to do and how you decide to make that happen is specific to you and your circumstances. Understanding the various components is important so you can make decisions that are right for you.

COMMON TOOLS USED IN ESTATE PLANNING

Health Care Proxy. This document designations someone to make medical decisions for you when a doctor determines you cannot make medical decisions for yourself. If possible, you should name a primary agent, and at least one successor/alternate agent in this important role.

Living Will. This document serves as clear and convincing evidence of the decisions you wish to have made on your behalf at the end of your life.

Power of Attorney. This document designates another person to handle your financial affairs. This is a contract between you and your agent, and can specific the scope of authority that your agent has. The Power of Attorney can be used if you become incapacitated, but it does not take away your legal rights to do this. The document can also be used by your agent as a convenience to you, such as allowing your agent to handle a particularly complex or time-consuming financial matter you do not want to do. While a complex document, the power of attorney is a very valuable tool and an important part of your estate plan.

Last Will and Testament. Your Last Will and Testament is a written document, executed in accordance with New York law, that directs how assets held in your name, individually, are distributed at death. New York State has very specific requirements with respect to the proper execution of a Will. The law provides the presumption of proper execution when an attorney supervises the execution of the Will. One of the most significant advantages of using a Last Will and Testament to distribute assets at death is that the Testator (the person

signing the Will) does not have to retitle assets or take additional steps during lifetime. A Last Will and Testament can be changed at any time before the Testator's death, provided the Testator has the legal "testamentary capacity" to do so. Testamentary capacity means that you know who your family is (even if you opt not to leave anything to them!), you generally know what assets you own and you can understand that your Will distributes the assets after your death.

Probate. The process by which a person's Last Will and Testament is accepted by the Surrogate's Court as valid. After a person dies (the "decedent"), the person named in the Last Will and Testament to serve as Executor must formally present legal documents to the Court. Once a Last Will and Testament is accepted into probate, the estate is formally opened. A statutory creditor period exists to allow the decedent's creditors to file claims with the Surrogate's Court. Once this seven month period has passed and after all administrative tasks have been completed, the estate may be closed. There are significant misconceptions about probate, and discussing these will be important before you decide whether the use of a Last Will and Testament is right for you.

Intestate Succession. When a person dies without a Last Will and Testament, but with assets held in that person's individual name, that person dies "intestate." The laws of the State of New York determine how the assets are distributed. The Surrogate's Court is involved in the administration of your assets at death, just as it would be through the probate process. Administration is the formal process by which the Surrogate's Court oversees the estate distribution process for someone who dies intestate. The law provides a list of persons entitled to serve as Administrator and then the Administration process is very similar to probate, with the exception that an Administrator may need to be bonded to insulate the estate from theft. The statutory creditor period still applies. Administration is very similar to probate, but denies the decedent of the opportunity to determine how assets are distributed as the decedent would have had if a Last Will and Testament had been executed.

Testamentary Substitutes. A testamentary substitute is a mechanism for the distribution of assets at death without the use of a trust or a Will. A beneficiary designation on a life insurance policy is an example of a testamentary substitute. Joint ownership of assets, a "transfer on death" or "payable on death" designation on a brokerage or investment account or an "in trust for" designation on a bank account are all testamentary substitutes. Except in very limited circumstances, the testamentary substitute designation governs the distribution of the asset regardless of any provision of your Will or trust.

***Inter Vivos* Trusts**. An *inter vivos* trust is any trust created and effective during your lifetime.

Revocable *Inter Vivos* Trust. Commonly referred to as a "Living Trust" or a "Revocable Living Trust," a trust of this type allows you serve as the Grantor (creator) and the Trustee. Most often used to avoid probate, these trusts enable you to remain in full control of the assets and income of the Trust, and the entirety of the trust is available to you until your death.

A Revocable Living Trust is a legal entity created by you, as the Grantor, during your lifetime and provides you will full control and authority over it and the assets it holds. Most

often, you are Trustee as well. The creation of the Revocable Living Trust is followed by the critical step of funding the Trust.

Funding the Trust requires you to transfer of assets into the name of the Trust and out of your individual name. So, instead of holding an account as JulieAnn Calareso, the account would be titled "JulieAnn Calareso, Trustee of the JulieAnn Calareso Revocable Trust." In this example, I would serve as Grantor and as Trustee, I remain in control of the assets in the Trust, and I can change the beneficiaries at any time and as many times as I wish. If I decide I want to reclaim any or all of the assets into my individual name, I can easily do so.

A Revocable Living Trust is most often used to avoid probate and is ideal when there is a strained family dynamic or when assets are owned in multiple states. However, Revocable Living trusts only avoid probate on those assets that are retitled into the Trust or have the Trust listed as beneficiary. If you own assets individually at the time of your death, probate will still be required.

The title to your home, bank accounts, stocks, life insurance and all other major assets must be changed so that the records indicate a transfer has been made to the trust. This does not mean that you will lose control and possession of the property transferred into the Trust. The major advantage of the living trust is the elimination of most types of court interference. If you become disabled, the living trust avoids the necessity of having the court appoint a guardian to administer your financial affairs. If you die, the living trust avoids the necessity of probate.

The primary disadvantage of the Revocable Living Trust, unfortunately, is that the effort and expense falls to you. Understanding and executing a trust is a more complex legal process requiring a heightened level of capacity and understanding. This results in Revocable Living Trusts being more expensive to create. In addition, once the document is signed, you bear the responsibility and have the obligation to transfer and retitle assets to your trust. You must also maintain the trust for the remainder of your life, including the proper titling of any assets purchased after the creation of the trust. In short, you must be willing to place a bigger burden on yourself in order to lessen the burden on your heirs at the time of death.

Using a Revocable Living Trust also brings the possibility of mismanagement by the Successor Trustee. Since the Court is not overseeing the handling of your Revocable Living Trust, the risk of mismanagement increased. You can mitigate this risk by selecting an individual (or individuals) who are trustworthy and honest. If desired, a bank or trust company may be called upon to serve as the Successor Trustee. It is important to know that a Revocable Living Trust offers no long term care planning and no Medicaid or other asset protection.

Irrevocable *Inter Vivos* Trust. This type of trust is most often used for long term care planning, but some irrevocable *inter vivos* trusts are used for tax planning, planning for lifetime gifts, planning for persons with disabilities, or for creditor protection. In general, you forgo being in control of your assets to achieve your specified objective. The Trust has provisions for how your assets are distributed after your death and, therefore, achieves probate avoidance on the Trust assets. Depending on the type of irrevocable trust and the purpose of the trust, the provisions will be customized to achieve that purpose.

Testamentary Trust. A testamentary trust is created through your Last Will and Testament and only comes into existence when the Surrogate's Court accepts your Will into probate. The Court issues "Letters of Trusteeship" to your named Trustee and the trust springs to life, ready to receive whatever bequest you have made to it in your Will. Common examples of testamentary trusts are trusts for minors or young adults (assets held in trust until a grandchild reaches a particular age) or trusts for a disabled person. Many times, despite the language of a testamentary trust being in the Will, the conditions requiring the trust are inapplicable. For example, if your Will directs that a bequest to a grandchild be held in trust until the grandchild turns age 25, and the grandchild is already aged 25 at the time of your death, no trust will come into existence.

LONG TERM CARE OR MEDICAID PLANNING

Long term care planning, also called Medicaid planning, involves the protection of assets from potential home care and nursing home expenses. As Medicaid eligibility in New York currently has a five year "look back" on assets, it is preferable to begin your Medicaid planning when it is likely that you will have five years before needing long term care paid for by the government. Planning comes in two main types: long range planning and crisis planning. Long range planning involves the creation and funding of an irrevocable trust, along with discussions of asset titling, types of assets more likely to be protected under the Medicaid eligibility rules and an understanding of the gifting rules.

Crisis planning is available when a person faces immediate need for long term care and has not engaged in planning more than five years ago. This crisis plan is available even after a person has been admitted to a nursing home and can yield savings in some circumstances of approximately one-half of the individual's assets.

The Medicaid rules are complex and ever evolving. Your supplying us with detailed and accurate asset and income information will permit us to make the most appropriate recommendations for you to achieve your goals.

ESTATE TAX PLANNING

The federal estate and gift tax exemption (the amount a person could pass without paying federal estate and gift tax) is $12.92 Million per person indexed for inflation. In addition, each person may gift up to $17,000 annually to as many recipients as he or she chooses without even filing a gift tax return. Under the federal rules, "portability" permits spouses to use each other's exemptions, meaning that a married couple can fully utilize the full $25.18 Million of federal exemption.

New York States does not have a gift tax but it does have an estate tax that brings back gifts made within 3 years prior to death as part of the estate tax calculation. The New York State estate tax exemption is currently $6.58 Million matching the federal exemption under the 2014 federal tax laws. Additionally, New York's estate tax law requires estates valued at 105% of the exemption to lose the exemption in its entirety with New York estate tax calculated on the full value of the estate (essentially meaning there is no state estate tax exemption for these estates).

New York does not recognize portability, so planning must be implemented for each spouse to use both spouses' New York exemptions.

ARRIVING AT THE PLAN THAT IS RIGHT FOR YOU: DETERMINATION OF GOALS, COORDINATION OF COMPONENTS AND IMPLEMENTATION OF A COMPREHENSIVE PLAN

As you can see, there are many factors to consider when thinking about your estate plan. Tax advisors often recommend one strategy; bankers and financial advisors another. I welcome the chance to evaluate all of your objectives and work with you and your other professionals to determine the best approach to achieve your goals. I hope that this memo has provided you with some initial guidance and things to consider. I look forward to meeting with you to discuss your estate planning goals.