FAIRFIELD AND WOODS, P.C.

DO I NEED AN ESTATE PLANNING ATTORNEY?

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With the recent tax law changes that reunified the estate and gift tax exemptions and increased them to $5 million, with "portability" between spouses, only couples with more than $10 million in assets need to do any estate planning now, right?

Congress was certainly generous in this bill to try to help most Americans with their estate tax concerns. However, when it comes to taxes, nothing is ever simple. While doing nothing, or printing off prepared computer forms might be easy for you, if they don't work for your assets, your family and your intentions, they can do more harm than good to those you leave behind.

If a couple has more than $10 million in assets (or an unmarried person has more than $5 million), you still need to do some estate tax planning. Even if a couple has only $5 million in aggregate assets, they need to do some estate tax planning. Assets for this purpose includes the fair market value of all real estate, business and investment interests, retirement accounts and the death benefit value of life insurance policies. If you don't die in 2011 or 2012 and Congress doesn't extend the current law, you will need to do some estate tax planning if any person's taxable estate exceeds $1 million. Making gifts before this tax law sunsets could lock in this $5 million per person exemption amount and has additional tax and family benefits.

What if I don't have $5 million in assets?

If you have children, you should name someone to be their guardians in case you're not around. If any minor child is going to inherit more than $10,000, you need to create a trust or a conservator will have to be named by a Colorado court. If you don't want your children to receive their inheritance outright at age 18 (while many are still in high school), you need a trustee to manage their assets until they're older. If you don't want your surviving ex-spouse to manage your children's inheritance from you, you need to create a trust for your child. Only licensed attorneys can legally prepare a trust for you. Every state bar association or supreme court attorney regulatory agency has a web site where you can find out if a person is a licensed attorney.

If any child or other beneficiary of your estate is disabled, you will need to protect their inheritance in a special trust. Otherwise, their inheritance will likely disqualify them for government assistance until their inheritance is spent.

If you are concerned that your spouse might remarry and give your assets to a new spouse instead of your children, you need to put the spouse's inheritance in a trust. If your spouse or any other beneficiary is a spendthrift or might get divorced or sued, a trust can help protect their inheritance from such creditors. Some family owned entities can also be used for creditor protection, when appropriate.

Trusts are also useful to maintain control over assets when family members may not agree. The creator of the trust can direct how the assets will be used by whom and when. The Trustee then has the legal authority to carry out those wishes regardless of what the beneficiaries want. A trust can even be used to maintain family harmony and prevent bullying.

Are there standard trust forms I can use? You can probably find countless kinds of special trusts for unique purposes based on different state and federal laws. Will the one you choose say what you need for your specific intentions? If you modify it for your family purposes, it may no longer accomplish what it was designed for. Or it could be totally ineffective because of another legal document or law you didn't consider. Or worse, the document creates a conflict in provisions or among beneficiaries that must be resolved by litigation. All of the above problems are common among do-it-yourself-ers.

What happens if I die without a will and I don't have a lot of assets? The laws of the state in which you live, die or have assets will determine that for you. Not having a will will not avoid probate. Typically, everything passes to your surviving spouse, unless you have children with someone else. Then things get tricky. Children are next in line after a spouse, but if they're minors, they probably will need to have guardians and conservators appointed by the court to manage what's left after the court and attorney costs until they are 18. If you aren't married and don't have children, everything typically passes to your parents, even that estranged or remarried parent, and certainly not your unmarried significant other, best friend or (unless your parents are both deceased) any sibling of yours. If you own a business, that passes under intestacy law, too, unless you've done legal documents to provide otherwise.

Does an existing estate plan need to be updated? Only if any of your family, your finances, your desired disposition, the named fiduciaries, the law or your residence have changed since you signed it. And you still need to check all the beneficiary designations on insurance policies and retirement accounts, and joint, POD and TOD accounts, to see if they work under recent changes in those laws and your desired disposition.

Don't joint accounts and POD and TOD designations avoid probate? Yes, but only for those assets, if no creditors come after them, but if there's not a contingent beneficiary named, even those assets will revert to your probate estate. Everything without a beneficiary designation must pass under your will or intestacy law and may require a probate proceeding. Further, your need to check every one of those assets each time you want to change your estate disposition or have a family or financial change.

If you have life insurance policies or retirement accounts, you need to make sure the beneficiary designations coordinate with your desired estate disposition and don't trigger unnecessary taxes. It would also be nice to have retirement plans pay out over the life of your beneficiary and not be taxed all at once. Retirement plans have especially complex requirements to accomplish these things and standard forms typically won't help you get this right. If the death benefits of life insurance trigger an estate tax, you could be paying too much in premiums for the after-tax benefit to your family.

If you want to make gifts of anything other than cash, there are many special requirements that must be met to avoid having the gift brought back and taxed in your estate at its appreciated value at your death. These gifts are especially useful in 2011 and 2012 because you can now give up to $5 million in assets to a trust or family members without paying a gift tax. With discounted values or other leveraging, much more than $5 million can actually pass to your beneficiaries.

If your estate needs to make transfers to save estate taxes or for your Medicaid qualification, you will need to have a valid Power of Attorney in place so your agent can make those transfers if you're incapacitated (see below). Some state laws require certain powers be expressly listed or your agent can't exercise them. Elder lawyers are a specialization of estate planning that specialize in asset protection planning for Medicaid qualification. With the cost of nursing home care, a good elder lawyer may be the difference between your spouse living comfortably or in poverty. But scams abound here, so you should get a reliable referral and check the attorney's licensing.

Powers of Attorney appoint someone to make decisions for you beginning immediately, or only upon your incapacity. Everyone should have current (within 3 years) powers of attorney (see below) because you never know when you might not be able to make or express your own decisions. Once you need them, it's too late to sign them. If you don't understand all the wording on a form Power of Attorney, you probably shouldn't sign it.

The Powers can be broad and cover any decision you could ever make, or limited to financial matters, health care matters or a specific matter like selling a house or consenting to medical care of your minor child. A power of attorney can specify how "incapacity" is determined without a court order. If the court has to make such a finding, it will have to hold a full hearing with witnesses and doctors to determine your mental abilities which can be emotionally and financially destructive.

Why should I pay an attorney to prepare Powers of Attorney? Because you want to understand the document you're signing and it would be nice if it said what your intentions actually are in a legally enforceable way. If the document isn't properly drafted for your state requirements and your specific needs, it may be ineffective and discovered when it's too late to sign a new one. Every state has different execution requirements to be legally effective and underlying state law that can restrict or enlarge the powers you think you are giving. If it isn't carefully drafted, a court may still have to determine incapacity which can cost much more than you saved on attorney costs.

If you don't want anyone to have a power of attorney for your finances, a court will need to appoint a conservator when you are unable to handle those matters yourself, for any reason. Even if all you have is social security income, someone will need legal authority to sign checks on the direct deposit account. If you are married, your spouse already has that power over all jointly held assets, but won't be able to work with banks, Social Security, Veterans Benefits or Medicare/Medicaid to obtain benefits or change accounts without a power of attorney. If you aren't married, then you will need to evaluate your best options. Getting a conservator appointed will cost your estate for attorney, doctor and court costs to appoint the conservator,

and the conservator will be entitled to compensation for all of its actions, including regularly required reports and accountings to the court.

The hospital gave me a document to sign – was that a power of attorney? Maybe, but usually they only ask you to sign a Living Will. In Colorado, that's called a Directive for Medical and Surgical Treatment and only directs the removal of life support equipment, treatment, and nourishment. It doesn't appoint an agent to make any decisions for you.

You will still need a Medical Power of Attorney so someone can make decisions about your providers, residence and treatments before you are terminal or in a persistent vegetative state. If you are ever unconscious, irrational or incoherent without a Medical Power of Attorney, the doctors may rely on those members who are to make urgent or minor decisions for you, but someone will need to have legal authority to consent to a surgery or other major decisions. Without a Power of Attorney, a Guardian would need to be appointed by a court. This is a similar, but not the same as a proceeding to appointing a Conservator.

Minor children are "legally incompetent" meaning an adult is needed to make their medical decisions. If a parent is not easily accessible, and has not provided a Medical Power of Attorney to the child care provider, only emergency stabilization treatments will be provided.

I want no resuscitation or CPR. Ok, these are not documents your attorney can prepare. Your attorney might be able to provide a form to you, but your doctor will have to discuss it with you and sign it.

In addition to the wills, trusts and powers of attorney described above, estate planning attorneys can prepare documents for pre-nuptial agreements, post-marital agreements, business liability and asset protection, business succession planning, lifetime gifts, wealth transfer plans, charitable planning, probate pleadings for decedents, post mortem tax planning and asset protection planning. The 2010 tax law change did not end your need for good estate planning advice and document preparation.