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GENERAL ESTATE PLANNING GUIDE

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Introduction

Effective estate planning requires a basic understanding of planning issues. With this information, you will be able to make better decisions regarding your estate plan.

This information is aimed primarily at individuals or couples with estates less than the amount subject to federal estate taxes. It is important to review one's assets periodically to determine whether estate taxes are or will be an issue. All assets should be considered for this purpose, including personal property, real estate, stocks, bonds, retirement plans, insurance, annuities or other assets.

The Schmiedeskamp Estate Planning and Administration Group

This form has been provided for the convenience of clients and friends of the Schmiedeskamp, Robertson, Neu & Mitchell LLP Estate Planning and Administration Group. Our clients are families and individuals from all walks of life, along with individual and corporate executors, trustees, and fiduciaries, as well as public and private charities. The Group provides estate planning and administration services from the simple to the complex. Services relate to wills, trusts, beneficiary arrangements, and other estate planning techniques and approaches. We advise our clients regarding the effective and efficient transfer of wealth and succession planning. We work closely with our client's accountant, financial, insurance, and other advisors. For more information about the Estate Planning and Administration Group and all our lawyers, please visit www.srnm.com.

Some Questions You Should Ask …

- ✓ What would be the ideal disposition of my estate?
- ✓ Are my intended beneficiaries able to manage their likely inheritances?
- ✓ Do I want to restrict a spouse's interest in assets to assure that children by a prior marriage ultimately receive those assets?
- ✓ Do I want certain assets to go to specific beneficiaries?
- ✓ Do I need to include special provisions for beneficiaries who are young, disabled, incompetent, or not U.S. citizens?
- ✓ Should I provide special provisions to protect particular beneficiaries, such a right to acquire a home, family farm, or business asset?
- ✓ Am I concerned about creditors or the creditors of a beneficiary? What about ex-spouses? Or in-laws?
- ✓ Are there other things considered important?

Determine Your Estate Planning Objectives

Estate planning should begin with a review of your objectives. Sometimes they are obvious. Other times they are not.

Estate planning involves choices. You may wish to treat family equally, but this may not be fair to a child who works in a family business. For this reason, it is important to consider each of your goals. Your goals must be blended to achieve an estate plan balancing each of your goals.

Involve Your Estate Planning Team

Attorneys serve a central role in estate planning. But don't overlook the important role other professionals may plan as well. Your accountant, financial advisor, broker, insurance agent, banker, trust officer, and others should be involved. This is particularly important when you have substantial retirement assets or insurance.

However important it is to seek advice – which is encouraged – keep in mind that the most important aim is achieving your goals. Be certain that your goals are clear to your estate planning professionals. The estate plan must reflect your wishes.

Gather Your Financial Information

To properly plan your estate, you should gather your financial information. A financial advisor, life insurance agent, or accountant may be helpful in organizing this information.

When gathering your financial information, prepare a listing that at least includes this information:

- Description of each asset.
- How the asset is owned.
- Beneficiary designations, if any.
- Value of the asset.
- Debt on the asset.

There are many common ways to own property. It is important to understand how things are held because this may affect your estate plan.

The form of ownership affects how an asset passes on death. Some assets are known as “probate assets.” This means they pass as you provide in your will. Other assets are “non-probate assets.” These assets pass outside of a will. This means that your will has no effect on those assets. Examples of non-probate assets are property held in joint tenancy, a home held as tenants by the entirety, or assets, such as insurance, with a designated beneficiary. These assets pass by operation of law or contract to the joint tenant or designated beneficiary. Assets, which are individually owned, or a person's individual undivided ownership in property, however, are governed by a will.

Common Ways to Own Property:

- ✓ **Individual**: Property may be owned in one’s own name. This property will pass as you provide by will.
- ✓ **Tenants in Common**: Where property is owned as tenants in common, an undivided share is owned that passes just like property individually owned. It does not pass to a co-owner.
- ✓ **Joint Tenants**: If property is held jointly, it will pass to the co-owner automatically on death.
- ✓ **Tenants by the Entirety**: Tenants by the entirety is very much like joint tenancy, but is available only to married couples. Upon death, the property passes to the surviving spouse. What is important is that creditors of only one spouse may not claim the property; the creditors must have a claim against both spouses. Also, neither spouse can deal with the property separately. In Illinois, only a couple’s home may be held as tenants by the entirety; in some other states, including Missouri, most all property may be held in this way.
- ✓ **Beneficiary Forms**: Property may have designated beneficiaries. The beneficiary will then receive the property on death. Payable on death (POD) or transfer on death (TOD) designations, insurance beneficiaries, and IRA, 401k or other retirement beneficiaries, are common examples. Missouri even allows beneficiaries to be designated by deed.

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The distinction between probate and non-probate assets can be very significant. Where an individual desires to fund a trust in a will or make special gifts, it will only be funded with probate assets. Similarly, joint tenancy and beneficiary designations may defeat the directions in a will. Therefore, it is very important to make certain that non-probate forms are used only where clearly intended.

Will May Be a Backup

A will may be a backup to joint tenancies or other forms of ownership. In other words, a will only applies if no other provisions apply to transfer property upon death. This is often the case for married individuals. Although less frequent, even single individuals may utilize these forms of ownership.

For most couples, joint tenancy, beneficiary designations and the like are used so that assets conveniently pass to the other upon death. In general, this is appropriate. However, there may be exceptions.

A few major exceptions are:

- **Non-marital Property:** Some states, including both Illinois and Missouri, classify certain property as non-marital in the event of a divorce. The significance of non-marital property is that a court would be required in these states to assign that asset to the individual owning the non-marital property. Among the non-marital property is property acquired by gift or inheritance, and property acquired prior to marriage, as well as the increase in value and income from the property. Rights to non-marital property are better assured if property is kept separately.

- **Children by Prior Marriage:** Where an individual has children by a prior marriage, that individual often wishes to dispose separately of property to those children. To facilitate this, property is to be separately owned.

- **Special Circumstances:** Special circumstances may also impact the decision on how to hold title to property. For example, a spouse may be unable or unwilling to manage finances.

It is important to recognize that even where property is separately held, a spouse may have certain rights. In Illinois and Missouri, for example, a surviving spouse may renounce a will and receive one-third of the entire estate where there are descendants and one-half of the entire estate where there is no descendant.

Single individuals should be especially cautious in the use of non-probate forms of ownership such as joint tenancy. Joint tenancy and other forms of ownership should be used only after understanding the consequences of their use. It is not uncommon for joint tenancy to be used by mistake and the incorrect assumption made that the asset will pass in accordance with the individual's will. Instead, the asset will pass to the joint tenant.

Be Careful of the Unintended Consequences of Joint Tenancies and Beneficiary Designations

The distinction between probate and non-probate assets may be very significant. Despite the simplicity of non-probate methods of ownership, they may have unintended consequences. Use of these forms of ownership may actually prevent or conflict with an estate plan. Joint tenancies and beneficiary designations require special attention.

Here are some of the problems that might result:

- **Access to Property May be Allowed:** It is usually assumed that the intended beneficiary would not touch property. A joint tenant, however, may have legal access to the property. For accounts, this may well be access to the entire account. In other situations, access may be limited to the joint tenant's relative interest.

- **Creditors May Claim Property:** Where property is held jointly with a child, creditors of the child or a child's spouse might attempt to claim an interest in the property. In some circumstances, they might well be successful.

- **Intended Beneficiaries May be Disinherited:** Most parents want their assets to pass to the descendants of a deceased child. Where an account is held jointly with children, the property will pass to the surviving children. If a child dies before the account is closed, that child's share does not go to the child's children and so the child's children are disinherited. This same problem often arises where beneficiary designations are made. Unless made clear, where a child dies the account or benefit will usually go to the surviving children and not a deceased child's children as would usually be intended.

- **Planned Division May Change:** Where joint tenancies or beneficiary designations are used, the planned division of one's property might be inadvertently changed. The value of property held with joint tenants may differ. And, as already mentioned, if a joint tenant dies the distribution of property may not be as intended.

These are only a few examples of consequences that may result from the use of joint tenancies or beneficiary designations. When a bank teller asked, "Don't you want to put someone else's name of this account?" or an insurance agent urges, "Be certain to name your children as alternate beneficiaries!" consider carefully whether this will carry out your plans.

Joint tenancies or beneficiary designations may well be appropriate in some circumstances. Couples who are not concerned with estate taxes often hold property in joint tenancy or name each other beneficiary. A surviving spouse might do the same where there is a sole child. These estate-planning tools may be useful where a special gift is intended for a specific beneficiary.

Beneficiaries may be appropriately named on insurance and retirement plans as well, provided the impact of a beneficiary's death is contemplated and carefully addressed.

What is important is that you clearly understand all the consequences of joint tenancies and beneficiary designations. Very often, these consequences are not known.

Should We Have Wills or Trusts?

There are many tools that may be used to carry out your estate plan. The most common are wills and trusts.

A will is a legal document by which a person directs how property is to be distributed upon death. Wills are the most frequently used method to dispose of assets on death.

A person who makes a will is called the testator. That's why a person's will is called a "Last Will and Testament." The formalities are few. A person making a will must be at least 18 years old and of sound mind and memory. The will must be in writing and, in most states including Illinois and Missouri, witnessed by two persons.

What Happens If We Don't Have Wills?

A person without a will dies intestate. When this happens, the person's property goes to his or her heirs or next of kin.

A married person's heirs are the surviving spouse and any children. Where there is no surviving spouse, parents and siblings or their descendants are heirs. If there are no persons in these groups, more remote relatives are heirs.

Contrary to popular belief, the state does not take the property of a person who dies without a will. Property can go to quite distant relatives.

After a person's death, the will is submitted to a court for official recognition as the person's will. This process is called probate. A legal representative, usually called the executor, is appointed. The executor collects the person's assets, pays any debts, taxes or other obligations, and ultimately distributes the assets as directed by the will.

Wills are not always presented for probate. Where estate taxes are not a concern and a couple holds all property in joint tenancy or with a spouse as beneficiary, it would not be necessary to probate the will. In this situation, the will is a backup. It is only important on the death of the surviving spouse.

Some advantages of living trusts:

- ✓ A trust is private and doesn't have to be made public.
- ✓ Probate and court involvement may be avoided.
- ✓ Costs of settling things may be reduced.
- ✓ Trusts may provide for asset management where the trust creator is incompetent.
- ✓ Assets are often better organized.
- ✓ After death some creditor protection may result from use of a trust; protection usually is not available during one's life.

Although wills remain the most frequently used method to dispose of property on death, trusts are growing in use. A trust is a legal relationship between a trustee (often also the creator of the trust) and the trust beneficiaries (which, again, may include the creator of the trust). The trustee holds the trust assets for the benefit of the beneficiaries under the terms of the trust.

The most common type of trust is a living or inter-vivos trust. This is a trust a person creates during the person's lifetime. These trusts are usually revocable; they may be changed. Other types of trusts may be used. Some are irrevocable and are not subject to change. Others are created in wills; these are testamentary trusts. Trusts also may be prepared for specific purposes, such as a special needs trust to care for a disabled child or a spendthrift trust which protects assets from one's creditors.

There are advantages and disadvantages to trusts. Perhaps the most cited reason for a trust is to avoid probate. This alone has accounted for the expanding popularity of living trusts. In those states without a streamlined probate process, this is a very significant advantage.

Some disadvantages of living trusts:

- ✓ Setting up a trust is more time-consuming because it requires that property be transferred into the trust and titles changed.
- ✓ Costs are greater to prepare a trust because more documentation is involved.
- ✓ While trusts are private, financial institutions and other often want copies.
- ✓ Trusts may be amended, but because of the greater documentation, may be more cumbersome.
- ✓ Because the authority of the probate court is not involved, there is a greater risk of dishonesty by a successor trustee.
- ✓ Whereas claims are barred during the probate process, they may hang on longer where a trust is used.
- ✓ Some federal, state, or other programs, may not allow participation by trusts. When allowed, greater paperwork may be required to participate.
- ✓ Powers of attorney usually will not have the authority to modify a trust and changes will be difficult if a person becomes incompetent.

There is often a misunderstanding that a living trust will eliminate taxes. In reality, estate and tax planning objectives may be accomplished through the use of either a will or a trust. The decision whether to use a will or a trust is an estate-tax neutral choice. The critical factor is what is contained in the will or the trust. Either can achieve estate tax planning.

Even where a living trust is not used, a trust will still be a part of most estate plans where estates taxes are of concern. Rather than a trust being created during one's lifetime, it is created by will upon death.

There is no doubt that living trusts are becoming more and more popular. Although they are not for everyone, most couples should consider their use.

What About Joint Wills and Trusts?

Estate planning documents may be jointly prepared. Whether joint documents should be used requires careful consideration.

A joint will is almost never appropriate. A joint will is a single will that both couples execute as their respective wills. The reason that joint wills are not used very often is that upon the death a spouse, a contract arises preventing the surviving spouse from altering the will even where it might be appropriate to do so. Most spouses execute reciprocal wills. These are wills that contain essentially the same provisions but are separate and may be changed.

Where there is consideration of a joint estate plan, the underlying reasons should be openly discussed. Some spouses are very fearful about a surviving spouse remarrying and then leaving assets to another spouse, perhaps even disinheriting the couple's children. Others have inherited wealth or separately acquired assets that they want to be certain will go to their children. These sorts of issues may be addressed in various ways. A joint will is not the way to do so.

A joint trust may or may not be appropriate. Unlike a joint will, a joint trust is a single document. However, each spouse retains the right to control whatever assets are held in the trust belonging to that spouse. Usually, the assets are held equally, but this is not always the case. Where a couple has separate assets rather than equal shares in common assets, separate trusts are most often used. For larger estates, separate trusts are more frequently used than joint trusts. The reasons for this is that after the death of a spouse it is usually easier to keep track of what assets are or are not sheltered from further estate taxes. With care, however, a joint trust may be used.

Provisions of a Simple Will

General Considerations

A will is a legal document by which a person directs how assets are to be distributed upon death. The most common estate-planning vehicle is a will. Wills are convenient and easily modified.

Upon the death of an individual, a person's will is submitted to the court for official recognition of the instrument or probate. This process is now routine in most cases. A legal representative, usually called an executor, is appointed. The legal representative collects the individual's assets, pays any debts, taxes or other obligations, and ultimately distributes the assets as directed by the will.

Wills are not always submitted for probate. Where assets are held in a non-probate form, such as joint tenancy, it may not be necessary to probate a will. It is often unnecessary to probate a will of the first spouse to die where smaller estates are involved. A will serves as a backup to be utilized only at the death of the surviving spouse.

Most individuals benefit from having a will. Not only does it make clear a person's wishes but also facilitates administration of one's estate.

Introductory Provisions

Wills usually include some introductory provisions. Although they may vary, they often include a description of one's family and a direction that debts are to be paid.

Another provision sometimes included in a will is a survivorship requirement. By including such a provision, your intention can be better achieved at lesser cost where deaths of beneficiaries occur shortly after the death of the individual.

Special Provisions

Some wills include special provisions. There may be items of personal property you want to pass to someone specifically. Also, special cash or other gifts may be appropriate.

Provisions for Spouse, if Any

Where an individual is married, it is customary to leave one's estate outright to the spouse. Of course, circumstances may warrant deviation from that. An example would be where a special provision for other assets is included or there are children by a prior marriage. The prospect of estate taxes is another.

Remainder of Estate

The will next disposes of the remainder of an estate. A spouse and children are frequent beneficiaries. Others will be beneficiaries in the absence of family.

Executor

The will designates an executor. The executor handles the estate during the period of administration. After administration is completed, the assets would then be turned over to the trustee designated in the will.

Most couples would designate each other as executors. The alternates typically are the same as the trustees. A person 18 years of age or older may be executor. The executor need not be a resident.

Insurance, Annuities, and Retirement Plans

Insurance, annuities and retirement plans may play an important role in an estate plan. Most married couples designate their spouse as the beneficiary of any life insurance, annuities and retirement plans. Except where larger estates are involved or other special circumstances exist, this is generally appropriate. As discussed earlier in this Guide, be careful of the unintended consequences of naming others.

Where beneficiary designations are made, be careful to make certain they are properly prepared. Frequently one's real intentions are not clearly reflected in beneficiary designations. Where children are named, for example, and a child dies, the usual result is that the benefit passes to the surviving children. The deceased child's share will not pass to his or her descendants. A beneficiary designation may provide that the deceased child's share passes to descendants, but this must be made quite clear. Beneficiary designations should be reviewed to make certain that they reflect your trust wishes.

It is also important to make certain that designations are up-to-date. Designations might name parents after being married or having children. They may name children born at the time insurance was obtained and fail to include subsequent born children. Make certain the designations are current.

Exemptions From Creditor Claims

The possibility of creditor claims is often worth consideration. There may be simple methods used to protect assets from claims that are suitable as part of one's estate plan.

An individual's assets are generally subject to the claims of his or her creditors. Unless properly agreed to, one person is usually not responsible for the debts of others. There are some exceptions. For example, spouses are responsible for the health care obligations of the other. Similarly, parents are responsible for the health care expenses of their dependent children.

Where financial problems arise, certain assets may be exempt from creditor claims. These exemptions may be waived. When a mortgage is taken out, for example, the bank or financial institution will require that any exemption with regard to the home be waived.

The exemptions vary from state to state. Illinois provides a number of very important exemptions from creditor claims.

An important exemption is for one's residence where held as tenants by the entirety. Unless there is a claim against both spouses, a judgment may not be enforced against the real estate. In Missouri, any property may be held as tenants by the entirety.

Another exemption for real estate in Illinois is a homestead exemption. For an individual, this amounts to $7,500.00. For a couple, it amounts to $15,000.00. In some states, such as Florida, the exemption for a home is unlimited. Missouri limits the homestead exemption to $8,000.00.

An important exemption in Illinois is insurance. It is worthwhile to realize that the net cash value of life insurance, endowment policies and annuity contracts may be exempt from creditor's claims even in the event of bankruptcy. Some states, such as Illinois, provide that proceeds payable because of the death of the insured and the aggregate cash value of life insurance, endowment policies and annuity contracts are exempt from creditor claims where payable to a spouse of the insured, or to a child, parent, or other person dependent upon the insured. This applies whether the power to change the beneficiary is reserved to the insured or not and whether the insured or the insured's estate is a contingent beneficiary or not. By naming the spouse, the exemption will usually be preserved. Although it is typically advisable to name one's estate as the alternate beneficiary, the possibility of creditor claims should be considered. If creditor claims are possible or likely, the general advice may not be appropriate. Missouri also exempts insurance under certain circumstances, but limits the exemption as to a policy's loan value.

Another important exemption in Illinois relates to retirement plans. Retirement plans are exempt, whether vested or not. Retirement plans include, among others, a pension, profit sharing or similar plan. It even includes individual retirement accounts and simplified employee pension plans (that is, IRAs and SEPs). There are a number of other exemptions. However, they are comparatively modest. It is important to be careful before waiving exemptions to assets. Clearly, it is preferable not to waive an exemption where available. Missouri law also exempts retirement plans under certain circumstances.

Planning for Nursing Home Care

Many individuals find it necessary to enter a nursing home. The possibility of nursing home care is especially important for those of more modest estates. The cost of care may quickly deplete one's assets.

Some may find it advisable to purchase nursing home insurance. For others, Medicaid is a possibility.

The rules regarding qualification for Medicaid are complex. A spouse that does not enter a nursing home usually may retain some separate assets (the exact amount of which varies from year to year) but is less than $100,000.00, a home, and a few other assets. Where there is no spouse, the amount that may be retained is quite limited and only includes a few thousand dollars of assets and a home. Even where assets may be retained, liens can be filed against those assets. To deal with the possibility of going into a home and in order to become eligible for Medicaid, some individuals give away assets. However, this is subject to many restrictions including that gifts made within three years of applying for Medicaid benefits are held against the applicant.

If the need for nursing home care is a concern, it is important to explore this issue further. What is important to keep in mind is that where the need for a home is imminent, it may well be too late to address the issue. Advance planning is necessary.

Estate Taxes

For most people, estate taxes are not a concern. Under the current law, there is no estate tax between couples. If spouses leave their estates outright to each other, no federal estate tax is imposed. A widow of even a Bill Gates will pay no estate estates. The estate tax becomes significant only upon the death of the surviving spouse. The exclusion amount for 2016 is $5.45

Million (federal) and $4 Million (Illinois). Missouri has no estate tax. Should your circumstances change and estate taxes become a concern, this should be discussed as proper estate planning may eliminate estate taxes.

Don't Forget Powers of Attorney and Living Wills

As important as a will or trust might be, don't forget some other important estate planning tools.

One of the more important estate planning tools available is a durable power of attorney. A power of attorney is a written instrument whereby one person appoints another to act as an agent or representative. Depending on how the power of attorney is written, the agent may handle both property matters and health care decisions. The power is durable and may continue to be used even if the person appointing the agent becomes disabled.

Have a Power of Attorney

Don't forget to have a durable power of attorney for property and health care.

This is important.

There are two main types of power of attorney - property and health care. These may be combined or separate. A property power of attorney handles banking, business and similar matters. A health care power of attorney makes health care decisions.

Living wills are another estate planning tool helpful for many. A living will declares one's desire that no extraordinary means be used to delay the moment of death if death is imminent and inevitable. Although the wishes of family will be considered, living wills often give comfort to family members in knowing your wishes.

Reminder: Don't Delay Making Your Plans

Estate planning takes time. But it should be an important priority. Don't delay in making your plans and implementing them.

Please note that this discussion provides general information.
It is not intended to provide specific or personal legal advice.

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