

ESTATE PLANNING; CHOOSING AN ATTORNEY

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Estate Planning means many different things to people. However, the areas that most people think of as being estate planning include the following:

- ! Determining who is to receive assets following death (including directions for distributions of tangible personal property, real property, closely held business interests, investments, etc.);
- ! Determining when distributions of assets and income are to occur;
- ! Providing for distributions from employee benefit plans and retirement accounts;
- ! Determining the type and amount of life insurance that may be needed;
- ! Determining who is to act as Executor of the estate following death;
- ! Creation of a trust to control distributions of income and assets (timing and amounts);
- ! Directing who is to act as Guardian of the person and/or estate of a minor child/children;
- ! Determining opportunities to minimize estate taxes and, in some instances, income taxes;
- ! Determining what gifts should be to family members and consideration of charitable giving;
- ! Determining who will make health care decisions when you are unable to make those decisions for yourself; and
- ! Creation and execution of documents (e.g. Will, Trust, Beneficiary Designation, Advance Health Care Directives, etc.) that give effect to the decisions made relating to the items listed above.

Good estate planning involves all of the above, and other considerations. The execution of a will is only the beginning. For those individuals owning real estate, having assets with a net worth of more than \$100,000.00 (not counting real estate), or that have minor children, the estate planning process should also include consideration

and execution of a living (*inter vivos*) trust. The trust typically becomes the most important document as it provides directions that are operative during the lives of those executing the trust (the Trustors) and thereafter. Coordination of planning concepts and areas (such as those listed above) and the needs and desires of an individual/couple are very important.

One of the very important reasons for using a trust is avoidance of a conservatorship and providing a Trustee the ability to hold, manage, and administer assets during a period of incompetency or disability (as defined in the trust) and the directions regarding how income and assets are to be expended for the benefit of the Trustor(s).

Implementing an estate plan and the valid execution of estate planning documents (such as a will or trust) can occur only while the individual has legal capacity. Absent legal capacity, any documents executed by an individual may be challenged and may not be valid. The lack of capacity is one of the grounds by which a challenge may be asserted as to the effectiveness and enforceability of estate planning documents, along with fraud, coercion or undue influence.

Now that you have decided to do estate planning, how do you select an attorney to assist you? While all attorneys take courses in law school relating to wills and trusts, you should seek and engage an attorney who regularly practices in the field of estate planning (which includes drafting of wills and trusts), and has knowledge of and practices in areas relating to probate and trust administration, and that also has knowledge of estate, gift and income tax matters that are affected by the estate planning documents that their clients sign. The names of attorneys that have experience and work in this area can be obtained from friends, relatives, your accountant, or an attorney that has represented you as to another matter. How do you determine an attorney's experience without meeting with or talking with the attorney? With the advent of internet searching capabilities, that process is much easier. With a simple Google, Yahoo, or other search, information about attorneys is readily available. For example, a brief summary of some of my experience appears at our web site at www.halsmall.com. Some of the items that you will see in that summary that tip you off to my estate planning experience include my heading regional and national offices with organizations that are specifically related to estate planning and where other estate planning professionals elected me to those positions, my holding the designation of Accredited Estate Planner, my teaching of estate planning classes, and my also being a Certified Public Accountant. These are the types of items background/experience that you want to look at relating to any attorney that you are considering being engaged to assist you with your estate planning needs.

Additionally, taking note of bar association memberships and sections of the bar associations or estate planning organizations often indicate a level of dedication to the estate planning field and a commitment to keeping abreast of the law. State bar certification in estate planning is also an indication of experience and expertise, although not all states have certification and not all attorneys that qualify have sought or

maintain certification. Martindale-Hubbell is recognized by attorneys as the only rating service that rates the skill and ethics of an attorney and it does so by surveying other attorneys. The highest rating that can be obtained is “a” for legal ability and “v” for high ethical standards. By looking at their web site of www.martindale.com you can locate and check ratings of attorneys. Upon doing so you will see that I enjoy those two ratings and I have had them for more than 25 years. Hopefully you will find an estate planning attorney in whom you have confidence and with whom you can communicate.

During your meeting with an attorney regarding your estate planning needs and desires, you can get answers to your questions, including how much it will cost. Typically the expense incurred to have an experienced attorney draft your estate planning documents will be a fraction of the fees and costs that will be incurred following a death or incompetency. Good planning can result in your having your desires met, your instructions followed, and a saving of money. Poor planning or the lack of planning can result in conservatorships, expenditures for legal and accounting fees that can otherwise be avoided or limited, and/or fights among family members relating to distributions of assets that may destroy family relationships and cost many thousands of dollars in legal fees and costs.

While there is a lot of information available on the internet, you need to be careful to avoid reliance on that information without the involvement of good legal counsel. Some of the information may be improperly stated, may be inaccurate, or may be dated by changes in the law. Additionally, the laws of each state differ, so it is important that you seek counsel from an attorney that practices in the state in which you reside.

Some have stated that if you do not have minor children, do not care about your property, and have no concerns about your health care treatment, then you do not need an estate plan. However, there usually is a counter-balancing reason for why you need estate planning.

Some of the terms with which you should have familiarity include those indicated below.

A Will, sometimes called a Last Will and Testament, is referred to as a testamentary instrument (it becomes operative at death of the person that signed it). It directs the distribution of assets, designates an Executor (personal representative) to administer the estate and the assets in the estate, and can be used to name guardians of minor children.

An Advance Health Care Directive (sometimes referred to as a Durable Power of Attorney for Health Care or Health Care Proxy) names the person(s) that you want to make health care decisions for you if you are unable to make the decisions yourself or in the event that you are unable to provide informed consent. At times it may be referred to as a Living Will or Directive to Physicians. It can provide directions and guidance for doctors and hospitals so that your desires are followed. Some states, like California, have statutory forms and in some instances the document needs to be

carefully drafted by your attorney.

A Durable Power of Attorney for Property is used to designate a person to act for you and handle financial matters should you be unable or perhaps unavailable to do so. At times they be drafted to be effective immediately and in other instances they can become effective at a later date (e.g. incompetence or lack of ability to give informed consent).

A Trust can be used to hold legal title to assets and provide a mechanism to manage your property. You can select the person or persons you want to act as Trustee and that typically will be you during your lifetime. Following your incompetency or death, the person/institution that you designate to act as Trustee will then commence to act and carry out the instructions you provided in your Trust. Typically one or more successor Trustees are designated to take over if the named Trustee is unable to act. A Trust becomes effective immediately, and may be amended by you and typically becomes irrevocable upon your death (the death of the Trustor). In some instances there are estate planning reasons to create a Trust that is irrevocable at the time of creation. When that is done, the Trust is not subject to amendment or modification.

A Family Limited Partnership can be used to own and manage your property, in a manner similar to a Trust, but allowing additional tax planning techniques to be employed, and/or family involvement in the ownership and operation of a family business or other assets. Typically consideration of the use of a Family Limited Partnership occurs for larger estates or in instances where asset protection is a consideration.

Holographic Wills are wills entirely written by individuals and are signed and dated by that person, and with no other printed text or writing on the document. Frequently holographic wills and instruments prepared by individuals using the guidance of do-it-yourself software or fill-in-the-blank will kits result in the types of challenges and difficulties that are avoided when estate planning documents are drafted by an experienced estate planning attorney.

You can save time and money by preparing thoroughly for your first meeting with your estate planning attorney. We typically provide questionnaires to clients to assist them in gathering and assembling needed information and documents. We also typically provide listings of areas for consideration in advance of our first meeting. These materials assist clients in preparing for that meeting and that saves us time and saves our clients fees for our services.

Every couple of years you should review your estate planning documents to determine if they continue to meet your needs and objectives. Additionally, with the birth of children, an inheritance of assets, a material change in your financial circumstances, changes in your family (e.g. marital dissolution), and/or major changes in the tax law, your estate planning documents should be reviewed and updated. Either consult with your estate planning attorney, or follow the suggestions and guidance

indicated above in selecting new counsel.

The involvement of other professionals in your estate planning can be beneficial. This may include your accountant, your securities broker/financial planner, an insurance agent with knowledge of estate planning, and in situations involving larger estates, an independent fiduciary (banking institution with a specialized trust division or trust institution). Your attorney should be the leader of the team of professionals that you use to make your estate planning decisions and for the implementation of your estate plan that satisfies your needs and objectives.

THE FOREGOING CONCEPTS AND IDEAS ARE GENERAL STATEMENTS AND ARE INTENDED TO PROVIDE CONCEPTS FOR CONSIDERATION IN BUSINESS AND TAX PLANNING. CAREFUL CONSIDERATION NEEDS TO BE GIVEN BY THE READER REGARDING THE USE AND APPLICATION OF THE CONCEPTS. YOUR LEGAL AND TAX COUNSEL SHOULD BE CONSULTED BEFORE THE IMPLEMENTATION OF ANY OF THE IDEAS INDICATED HEREIN. SHOULD YOU HAVE QUESTIONS REGARDING THIS MATTER, HAROLD S. SMALL, ESQ., CAN BE REACHED AT 12526 HIGH BLUFF DRIVE, SUITE 300, SAN DIEGO, CALIFORNIA 92130 OR AT 858.759.4600.

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