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Estate Planning - Common Concerns and How to Address Them

Estate planning, in essence, is the process of addressing a number of important issues which everyone will eventually need to face. We have tried to summarize the basic concerns which people have, and to give you a small idea of how estate planning techniques can be used to address these concerns. **This memorandum is not intended to be comprehensive - we encourage you to ask us any additional questions you may have, and to come in for a free initial consultation regarding your own estate planning concerns.**

1. Who will handle my affairs if I am not able to do so?

The basic way to help ensure that someone is able to step in and take care of your finances if you become temporarily or permanently unable to do so on your own, is to have a **Durable Power of Attorney** in place. A Power of Attorney names an attorney-in-fact who is given certain powers to allow him or her to act on your behalf with regard to your various financial and property-related affairs.

If you have reason to fear that your incapacity will become permanent or otherwise last for a very long period, you can take an additional step to help ensure that someone can take care of your affairs by setting up a **Revocable Living Trust or "RLT"**. An RLT is a trust that you create for your own benefit during your lifetime, and which you can undo later if you change your mind. An RLT is stronger than a Power of Attorney because the Trustee of an RLT generally has broader powers than an attorney-in-fact under a Power of Attorney, and because the Trustee is generally given more respect by third parties. Your assets will be placed in the RLT, where the Trustee will manage and use them for your benefit.

2. Who will make my health care related decisions if I am not able to do so, and how will they know my wishes?

The most basic way to help ensure that your wishes with regard to medical treatment are known and followed is to execute a **Living Will**. The Georgia statute-based Living Will is a document which sets forth your wish to have artificial life support withheld or withdrawn in certain situations. By executing a Living Will, you also indicate whether or not you wish to be given food and water through a feeding tube if you are in one of the situations to which the Living Will applies and other life support measures are not being provided. However, because the Living Will is so limited in its application, you should have more than just a Living Will to help ensure that your wishes are known and that someone can make decisions on your behalf.

In addition to a Living Will, you should also have a **Durable Power of Attorney for Health Care, or “Health Care Power of Attorney.”** A Health Care Power of Attorney names an agent who is authorized to receive health care related information and make health care related decisions for you, including decisions relating to whether to withhold or withdraw life support and emergency resuscitation procedures. The powers given to the Health Care Power of Attorney agent can be quite broad and if you do not have a Health Care Power of Attorney in place it can be extremely difficult for your family to get information about your health, work with your insurance providers, or deal with your health care providers for you.

We also recommend that you take steps to let your family know your general thoughts and desires with regard to medical care, especially with regard to end-of-life situations. Ideally, you will write a letter to your loved ones, and keep a copy of the letter with your Health Care Power of Attorney.

3. Do I need to try to avoid probate?

Generally, if you live primarily in Georgia, you do not need to fear probate, in that the probate process in Georgia is relatively simple, quick, and inexpensive IF you have a properly drafted and executed Will. However, there are at least two situations in which you may want to take steps to reduce the extent to which your assets will pass through probate:

- if you expect that a family member may be unhappy with the terms of your estate plan; and
- if you own real estate located in a state other than Georgia.

The most basic way to reduce the need to have your assets pass through probate is to create a **Revocable Living Trust or “RLT.”** Any assets which you do not want to pass through probate then must be placed in the RLT before your death.

4. What will happen to my assets after my death?

In Georgia, if you do not have a Will, your “probate” assets will pass to your “heirs” at your death. Your “heirs” are your closest then-living family members, as defined by state law. Unfortunately, the distribution which is required by state law may not be what you want. If you are survived by a spouse and two children, for example, your spouse will receive 1/3 of your probate property and each of your children will receive 1/3. Non-probate assets such as retirement savings accounts and life insurance will pass to the designated beneficiaries; however, if your beneficiary is your estate these assets will also be subject to the Georgia distribution rules. You can control who receives your assets and the manner in which your assets are received, but you have to take steps in order to exercise this control. The most basic step is to execute a Will and make sure that your asset ownership and beneficiary designations work with your Will to direct your assets to the right people in the right way.

5. Can't I just use joint ownership and beneficiary designation provisions to make sure my assets pass the way I want them to?

Beneficiary designations and joint ownership are commonly used by people who want to set up an estate plan but are reluctant to talk to an attorney and pay for legal services. Frequently, for example, a widow will name her children as joint owners on her bank and brokerage accounts and sometimes even transfer her home into the joint names of herself and her children, with the goal of allowing her children to help her handle her affairs while she is alive and then having the assets pass equally to the children, outside of probate, at her death. However, there are a number of problems with this approach.

By way of example, here are just a few of the potential problems which can be caused when a person uses joint ownership and beneficiary designations in place of a properly-prepared estate plan: First, joint ownership of assets exposes the assets to the creditors of the other owners, which means that, if you and your child are the joint owners of your bank accounts, your child is involved in a car crash, gets sued, and loses, your accounts can be seized by the person who sued your child. Second, adding an additional owner to an asset you own can result in your making a taxable gift to the new joint owner. Third, adding your children to your assets can interfere with your ability to qualify for Medicaid if you should need to do so in the future. Fourth, if the joint ownership and beneficiary designations are not set up exactly right, it is entirely possible that your assets will end up passing in a way other than you intended. Fifth, if all of your cash and other liquid assets pass directly to your children but other assets, such as your car and other tangible personal property, are owned in your sole name and need to be dealt with after your death, one child often ends up bearing all of the costs of settling your estate out of his or her own pocket, which leads to resentment and tension between the children.

Proper estate planning, which includes, at a minimum, preparing and executing a Power of Attorney, a Durable Power of Attorney for Health Care, and a Will, as well as making sure that you own your assets and make your beneficiary designations in a way which will work with your estate planning documents, is a much better way to accomplish the same goals which people often try to reach using joint ownership and beneficiary designations alone. Money spent during your lifetime for the assistance of a competent estate planning attorney will generally be money well spent.