

Estate Planning Considerations

Please allow this memorandum to serve as a basic introduction to estate planning and the most common questions asked by clients as they begin the process of creating or revising their estate plans.

Generally, there are two types of plans that are prepared for clients: simple or complex. A simple plan includes a Last Will and Testament, advance directives and a durable power of attorney. A complex plan includes a Last Will and Testament, advance directives, durable power of attorney, revocable trust agreement, assignment of tangible and intangible personal property and funding instructions. The difference between the two plans is simply that the complex plan includes a revocable trust and the additional documents associated with creating a trust.

Last Will and Testament and Trust Considerations

A Last Will and Testament is a document that allows you to appoint a Personal Representative, who will take actions to satisfy any and all debts and expenses due and owing at the time of your demise, then distribute your remaining property to the persons or charities designated by you in the Will. Basically, a Will is a document that includes instructions that specify “who gets what.” The Personal Representative is the person that follows the instructions.

A Trust Agreement is a document that may be thought of as a detailed list of instructions that allows you to appoint a Trustee who will take the same types of actions as a Personal Representative and distribute your property to the beneficiaries named in the Trust. The Trust provides “who gets what, and when” and avoids probate. Therefore, many times it is more cost effective to avoid probate if a trust is created and properly funded. Funding a trust refers to the process that it takes to transfer property out of a person’s individual name to the trust by changing the owner from a person to the trust.

A significant part of the estate planning process should focus on the people or entities to whom you wish to leave your property when you depart this life. If you create a Will and the value of the assets that is distributed under your Will is currently valued at \$75,000 or more, it will be necessary to settle your estate through the probate process. This is a court process where a Personal Representative is appointed to gather information about all that you own, determine all that you owe, pay the obligations, then distribute the remaining assets as detailed in your Will.

As matters relate to naming a Personal Representative and/or Trustee, it is common for a husband and wife to name the other spouse, the surviving spouse, as the agent to act on a deceased spouse’s behalf. It is more challenging, in many cases, to determine who might act next after both spouses have met their demise. When naming a Personal Representative or Trustee, you have the option of naming a person or a corporation. It is common for clients to name their bank to serve in this capacity. Most banks do have estate settlement units and trust officers to handle this type of work. Please also know that a Personal Representative will settle an estate, using the Will and a Trustee will administer a trust. You may name the same person or entity to serve in both roles. The roles are completely separate and it is common for people to confuse these roles.

When weighing the options of who you wish to carry out your desires, keep in mind that when a person is named to act, he or she should (1) consult with an attorney, (2) consult with a tax advisor and (3) consult with a financial planner. All of these professionals are entitled to payment for their services, and the person acting, the Personal Representative or Trustee is entitled to charge for his or her services. While it is true that banks charge a fee to serve as Personal Representative

or Trustee, banks also have individuals who are employed and focus on just this type of work. In most instances, the fees assessed by a person and corporation are very similar. My preference is for a bank to serve in this capacity: as a corporate fiduciary. Nevertheless, you do have the option to name persons to serve in this capacity: as a personal fiduciary.

The other questions that you should ask yourself about how your property should be distributed are as follows:

1. Do you have any specific property that you would like to be distributed to a particular person? If this person predeceases you, to whom should this property be distributed?
2. Who would you like to receive your tangible personal property (household goods and items)? If this person predeceases you, to whom should this property be distributed?
3. Who would you like to receive the rest of your property? If this person predeceases you, to whom should the property be distributed?
4. If you would like to distribute any property to more than one person, what percentage should be distributed to which persons?
5. Do you want the property used for only specific purposes (for example, distributions will be made for education until the beneficiaries reach a certain age, then the remaining property will be distributed over time)?
6. If all of the persons named in your Will or Trust predecease you, to whom should the property be distributed? Would you prefer that it be distributed to other persons or charity?

Advance Directive Considerations

With respect to advance directives, these are documents that allow you to designate persons who you wish to communicate with your healthcare providers about how you would like to receive medical treatment if you are unable to communicate for any reason. Florida currently allows one to prepare the following documents: Health Care Surrogate Designation, Living Will Declaration, Anatomical Gift Declaration, HIPAA Release and Funeral Planning Declaration. There are additional documents that may be prepared, but the documents I have listed are the most common that our office prepares.

Most clients name the same persons in their Health Care Surrogate Designation, Living Will Declaration and Anatomical Gift Declaration documents. The Health Care Surrogate Designation allows you to designate persons who will communicate with your physicians about how you wish to receive medical treatment for non-life threatening conditions. A Living Will Declaration allows you to designate persons who will communicate your desire about end of life care and treatment if you are diagnosed with a terminal disease or illness and will likely meet your demise in a short period of time. We will also discuss organ donation and other related concerns.

A HIPAA Release allows you to designate the persons to whom your medical providers are authorized to release information about your health and medical records. The persons named in your Healthcare Surrogate Designation and Living Will Declaration should be named in the HIPAA Release as well as any other persons to whom your medical providers may release information. Please consider the persons that you wish to name in your HIPAA Release and provide their complete legal name and relationship to you.

Some clients also request that we prepare a Funeral Planning Declaration, which is an instrument that allows you to express your wishes relative to how you wish to have your burial effectuated. In other words, would you like to be embalmed and buried, cremated or some other means of final resting? Would you like an obituary printed in a newspaper? Where would you like a headstone or marker? Would you like a memorial service? Things such as these are documented in a Funeral Planning Declaration. This is the least common document that our office prepares for clients, but we have received increased requests for the preparation of this document in the last several years.

Durable Power of Attorney Considerations

A Durable Power of Attorney is an instrument that allows you to designate persons who will handle your financial matters during periods of incapacity. Florida law only currently allows an agent to be designated as a present agent. Some states also allow agents to be designated as a springing agent. A present agent has authority to act as soon as you sign the Durable Power of Attorney and does not need any oversight in acting. A springing agent has authority to act only when a triggering condition occurs. One of the most common triggering conditions is when a physician certifies in writing that a person is incapacitated. Once the physician certification is obtained, then the named agent may act on your behalf.

If you are incapacitated and a guardian must be appointed for you, who would you like to designate as the guardian over your person to make healthcare and wellness determinations? If you are incapacitated and a guardian must be appointed for you, who would you like to designate as the guardian over your estate to make financial decisions for you? There are times when a formal guardianship must be petitioned for and your desires about the persons who would serve in this capacity are included in the Durable Power of Attorney instrument.

These are some of the most common questions posed by clients. Establishing a relationship with an attorney as but one advisor in your team of advisors should allow you to speak candidly about your planning desires and develop a distribution plan that accomplishes your goals and desires.

Advance Directive Agents

If you are unable to communicate with your physicians about your healthcare, who would you like to designate to communicate with your physicians if you require medical care? Who would you name first, second and third? What is each person's relationship to you? Do you want them to act individually, and in the specific order that you have named or do you want any of them to be able to act jointly or severally? In other words, must they agree and act together or may the first one contacted act on your behalf? You may select as many or as few healthcare agents as you desire.

Healthcare Surrogate #1

Name

Relationship (mother, father, sibling, friend, etc.)

Address

Phone number(s)

How to act (successively in the order named or jointly)

Healthcare Surrogate #2

Name

Relationship (mother, father, sibling, friend, etc.)

Address

Phone number(s)

How to act (successively in the order named or jointly)

Healthcare Surrogate #3

Name

Relationship (mother,
father, sibling, friend,
etc.

Address

Phone number(s)

How to act (successively
in the order named or
jointly)

Healthcare Surrogate #4

Name

Relationship (mother,
father, sibling, friend,
etc.

Address

Phone number(s)

How to act (successively
in the order named or
jointly)

If you would like to designate persons who should communicate your desire about end of life care and treatment who are different than those listed above, please provide their information below.

Living Will Agent #1

Name

Relationship (mother, father, sibling, friend, etc.)

Address

Phone number(s)

How to act (successively in the order named or jointly)

Living Will Agent #2

Name

Relationship (mother, father, sibling, friend, etc.)

Address

Phone number(s)

How to act (successively in the order named or jointly)

Living Will Agent #3

Name

Relationship (mother,
father, sibling, friend,
etc.

Address

Phone number(s)

How to act (successively
in the order named or
jointly)

Living Will Agent #4

Name

Relationship (mother,
father, sibling, friend,
etc.

Address

Phone number(s)

How to act (successively
in the order named or
jointly)

Funeral Planning Declaration

What are your wishes with respect to burial or cremation, and who would you like to serve as your agent to handle any arrangements that may not have been made by you?

Funeral Planning Agent #1

Name

Relationship (mother,
father, sibling, friend, etc.)

Funeral Planning Agent #2

Name

Relationship (mother,
father, sibling, friend, etc.)

Funeral Planning Agent #3

Name

Relationship (mother,
father, sibling, friend, etc.)

Funeral Planning Agent #4

Name

Relationship (mother,
father, sibling, friend, etc.)

1. **Disposition of My Body.** I hereby declare and direct that after my death my body shall be:

_____ **Buried** – I direct that my body shall be buried at _____ Cemetery.

_____ I own a cemetery lot at _____ Cemetery, assigned Lot/ Space _____.

_____ I do not currently own a lot / space at _____ Cemetery.

_____ I have no preference as to which Cemetery my body is laid to rest, and I leave this determination to my designee(s).

_____ **Cremated** – I direct that my cremated remains be disposed of as follows:

_____ Scattered at _____.

_____ Buried at _____. [Cemetery or some other location]

_____ Given to and retained by _____. [name of person]

_____ I have no preference as to how my cremains are disposed of, and I leave this determination to my designee(s).

_____ **Entombed** – I direct that my body shall be entombed at _____ Cemetery.

_____ I own a mausoleum crypt in _____ Cemetery.

_____ I do not currently own a mausoleum crypt in _____ Cemetery.

_____ **No Direction** – I intentionally make no decision concerning the disposition of my body, and I leave this determination to my designee(s).

2. **Funeral and Ceremonial Arrangements.** My funeral and ceremonial arrangements shall be made as follows:

_____ **Funeral Home Preference** – It is my desire that services will be obtained from _____.

_____ **Funeral Home Preference** – I have no preference as to which funeral home is selected to provide my funeral and ceremonial arrangements, and I leave this determination to my designee(s).

_____ **Embalmmment** – I direct that embalmmment of my body shall take place

_____ **Embalmmment** – I direct that no embalmmment of my body shall take place.

_____ **Ceremonial Arrangements** – I direct that the following ceremonial arrangements be made:

_____ Funeral services shall take place at _____. [funeral home]

_____ Funeral services shall take place at _____. [Church / Synagogue]

_____ Graveside services shall take place at _____ Cemetery.

_____ I have no preference as to where funeral services occur, and I leave this determination to my designee(s).

_____ I direct that no funeral service shall occur, but a memorial service or celebration of my life, and a gathering for all those who were a part of my life may take place. Any such memorial service or celebration shall be a lively event, celebratory in nature, and shall include food, beverages and merriment.

_____ **Songs and Readings** – I direct that the following song(s) and reading(s) shall be a part of my funeral service, graveside service, memorial service or celebration of life:

_____ List songs

_____ List readings

_____ **Memorial and Merchandise** – I direct my designee(s) to

_____ **Obituary** – I direct that a written obituary, picture or other article advising of my demise be handled as follows:

_____ I direct that a written obituary, picture or other article advising of my demise may be published in _____, _____ and/or _____.

_____ I direct that a written obituary, picture or other article advising of my demise may be published in a newspaper of general circulation or any other written periodical, as determined by my designee(s).

_____ I direct that no publication of my demise (by means of written obituary, picture or other article) shall be published.

In addition to the above directions, I request the following:

Durable Power of Attorney Agents

Who would you like to handle your financial affairs if you are incapacitated?

Attorney-in-fact #1

Name

Relationship (mother,
father, sibling, friend,
etc.

Address

Phone numbers(s)

How to act (successively
in the order named or
jointly)

Attorney-in-fact #2

Name

Relationship (mother,
father, sibling, friend,
etc.

Address

Phone number(s)

How to act (successively
in the order named or
jointly)

Attorney-in-fact #3

Name

Relationship (mother,
father, sibling, friend,
etc.

Address

Phone number(s)

How to act (successively
in the order named or
jointly)