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One of my earlier newsletters, titled "It's Frankly Not That Interesting", was about estate planning generally not being interesting enough to motivate clients to take action on getting their estate planning matters in order.

This brief newsletter includes a checklist one may wish to consider that can sometimes tip the scale in helping garner enough motivation to take action in completing core estate planning (EP) documents.

The EP Documents Become You

Your EP documents (whether your Last Will and Testament, financial power of attorney, revocable trust, etc.) become you in the event of your incapacity or death. Your *alter-ego*.

Every financial, investment, and business matter you handled prior to your death or incapacity is now governed by your documents (or lack thereof).

And, even with no estate planning documents, your situation will still need to be addressed and handled after your incapacity or death. This handling of your situation without EP documents will simply be substantially more expensive and will require a considerable level of otherwise unnecessary court oversight.

Guardians for Your Children

In my years of lawyering I have not (fortunately) faced a situation where both parents died requiring a guardian to take care of the surviving children. But, this is a fear we all as parents must contemplate when considering who will be our children's guardian in this

tragic situation.

A key point is that Georgia law allows the naming of guardians for minor children in a person's Last Will and Testament under Georgia law at O.C.G.A Section 29-2-4 (called a testamentary guardian). No separate court proceeding is required for the appointment of the guardian if this Last Will and Testament approach is used.

By contrast, if the parent dies without naming the guardian in a Last Will and Testament, Georgia law requires the full-blown court petition and procedure for the appointment of a guardian under O.C.G.A. Section 29-2-17. This involves a court hearing, court oversight and approval of the guardian, and input from an independent guardian-ad-litem.

This can be an expensive and time-consuming process. It also may not result in what the parents would have desired if they were otherwise alive to deal with this process on behalf of their children or had included the guardian names in their Last Wills and Testament.

Revocable Trust for Your Older Years

The care, management and oversight of your property while you are alive are just as important as what happens to the property at your death, particularly in the event you become incapacitated. For this reason, and as your core estate planning document, I strongly recommend a revocable trust, often called a Declaration of Trust.

You are the initial sole trustee. If you later

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become incapacitated, this trust gives the successor trustee direct control and access to the trust property on your behalf, without having to struggle with a financial power of attorney or court-managed guardianship. Your spouse (or other trusted person) is named in the trust document as successor trustee.

As to the mechanics of this trust, you create and fund it now with your assets, with you as the initial sole trustee. The trust while you are alive uses your SSN with no requirement for filing a separate trust tax return. All trust items continue on your own personal income tax return Form 1040. You can revise or terminate the trust at any time.

This revocable trust becomes irrevocable at your death and includes the after-death provisions for your beneficiaries, similar to what you otherwise would include if you were using only a Last Will and Testament.

Asset Protection for Your Beneficiaries

The heart of asset protection is purposely to make it very difficult, and in some cases impossible, for a claimant or litigant to get hands on your property or on the property your beneficiaries receive, or will receive, from you. Including strong asset protection features within the design of your EP documents for your beneficiaries is, therefore, itself a wonderful gift for your family.

I am so partial to the notion of asset protection that I generally believe the time, energy and money for core estate planning miss the mark unless the design of the EP documents also includes effective asset protection features.

A substantial level of protection can be achieved by using trusts for holding the property rather than outright distributions to your beneficiaries. And, for the greatest level of asset protection for your beneficiaries, the trust provisions must include fully-discretionary independent trustee powers. Many trusts do not include these fully-discretionary powers, thus weakening the potential asset protection features of the trust.

As an aside for you technical readers, if a family member or beneficiary acts as trustee (certainly fine in many family situations), the trust provisions will include alternative trustee powers, called ascertainable HEMS standards (health, education, maintenance and support). The HEMS standards typically are necessary for tax purposes if a family member or beneficiary is the trustee.

Thus, the trust is designed with both fully-discretionary and HEMS powers, depending on whether an independent trustee is ever at the helm.

An independent trustee with the fully-discretionary powers can step-in down the road (in place of the lesser-protective HEMS standards) if the trust later needs the greater asset protection (due to a divorce or other third-party claim, etc.).

Flexible Trust Powers

I don't like being boxed in, under most any circumstances. Therefore, I recommend that trust documents include two flexible (and powerful) provisions: (i) trustee decanting powers and (ii) powers of appointment. In short, these are powers that enable the trustee or power holder to decant, or hatch another trust, from the original trust. This is sometimes referred to as a distribution-in-further trust.

These powers, therefore, enable a rewriting of the trust provisions in the event of future changes or unanticipated circumstances, within the constraints defined by these powers.

Absent these powers within the trust document, court oversight and approval (if you succeed in obtaining approval), including review and input by a guardian-ad-litem, are required to try and make similar rewrites of the trust. This can be costly.

Your Children's Spouses

The majority of estate planning documents I run across do not include sons-in-law and daughters-in-law as beneficiaries, nor the

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possibility of later including them if desired.

Most estate planning documents also keep the property only within the descendants' line. This means the parents' property for a married child with no children, when that child dies, passes to the other living descendants. This can leave the childless-married child's spouse with nothing. And, this surprisingly may not be desirable in some family situations.

A more flexible alternative is to incorporate the trust powers discussed above in the preceding section of this newsletter (particularly powers of appointment) so that a child's spouse can be added later, if desired, as a beneficiary of part or all of a childless-married child's share of the property.

This potential for including children's spouses, at a minimum, needs to be discussed as part of the design of the EP documents.

Divorce in the Event of Incapacity

The following point, even hypothetically, is a painful topic for clients to contemplate. However, in a financial power of attorney I recommend including an express consent to a divorce in the event of the person's mental incapacity.

Here is an example, If I walk out of my office today, hit my head on the sidewalk, and require 20+ years of nursing home care due to a head injury (and mental incapacity), I do not want my wife and kids to deplete virtually all of our family assets before my nursing home care can qualify for Medicaid assistance. In this situation, and because we are married, both my wife's and my assets together are countable assets in determining my Medicaid eligibility.

This divorce option gives my wife the ability to

eliminate the marriage factor, separate herself from my nursing home care, and, therefore, preserve assets for herself and my kids. This is most assuredly an asset protection provision we hope will never be activated, but it helps give us repose knowing our family has this option.

Estate Tax Planning Features

The non-tax features of your EP documents described above are just as important as the tax features, and possibly more important. The necessary estate and generation-skipping (GST) features can be coordinated with the above features, as necessary for your particular situation.

The federal estate tax is computed on the FMV of your property at the time of death. It is not rocket science to make sure the core estate planning documents enable (i) the deferral of estate tax for a married couple until the second (surviving) spouse's death and (ii) use of each spouse's estate exemption amount (\$5.0 million for each spouse under current law). I have, however, seen too frequently situations where there is a loss and failure to use both spouses' estate exemptions. This leaves money unnecessarily on the table. The IRS's table.

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