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ESTATE PLANNING · BUSINESS LAW

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Introduction to Estate Planning

What Is Estate Planning?

"Estate Planning" is the process of arranging your affairs in anticipation of death and incapacity. Properly done, your estate plan will:

1. Identify who will receive your property after your death and describe when and how the property will be distributed.

2. Minimize exposure to probate administration.

3. Identify the personal representative (executor) of your probate estate and your successor trustee, who will carry out your final instructions.

4. Identify the guardian of your minor children.

5. Accomplish the transfer of your property to your designated recipients with minimal transfer taxes and other costs.

6. Identify your attorney-in-fact and your health care surrogate, who will act on your behalf in the event of your incapacity.

What If I Don't Have an Estate Plan?

Florida law provides a system for determining answers to all of the above questions should you fail to answer them yourself. Under this legal system:

1. The probate court will distribute your property after your death according to statutory "intestate succession" rules. For example, if you leave a spouse and children, and all of your children are also children of your spouse, your spouse will receive the first $60,000 plus half of the remainder; the other half will be divided evenly among your children.

2. The court will appoint a personal representative (executor) for your estate.

3. The court will appoint a guardian for your minor children.

4. The court will appoint a guardian to care for you if you become incapacitated (no longer able to make your own financial or medical decisions).

Of course, all of these court determinations take time and expense. More importantly, you lose the ability to make the determinations yourself.

What Documents Are Required in My Estate Plan?

The basic estate planning documents for a Florida resident consist of the following:

1. Last Will and Testament. This document (i) designates the Personal Representative (executor) of your probate estate and the guardian of your minor children, and (ii) disposes of your probate assets.

2. Durable Power of Attorney. This document appoints your Attorney-in-Fact, who is authorized to deal with your property and financial affairs.

3. Health Care Advance Directive. This document (i) appoints your Health Care Surrogate, who is authorized to make health care decisions on your behalf, and (ii) includes your Living Will, indicating your wishes concerning end-of-life decisions.

4. Revocable Living Trust. This document is primarily used to (i) remove assets from the reach of probate administration, (ii) reduce estate tax exposure, and (iii) achieve particular distribution objectives, such as distributions to children over time rather than in a single lump sum. Whether a trust is beneficial for you depends on your personal situation.

What Is Probate Administration?

Probate administration is the court-supervised process of identifying, managing and ultimately distributing your probate assets following your death. Probate assets generally consist of property interests that you hold in your own name at death (this *excludes* assets held in trust, assets held jointly with others with rights of survivorship, most life insurance and IRA account proceeds and certain other types of assets).

For individuals who are estate tax exempt, the completion of the probate process typically requires around nine months. For individuals who are not estate tax exempt, this process is considerably longer. Costs incurred in connection with probate include Personal Representative (executor) fees (up to 3% of the value of the estate), attorney fees (up to another 3% of the value of the estate) and court, bonding, notice and other incidental fees (around $1,000).

What About Estate Taxes?

Florida no longer imposes any death taxes. The federal estate tax is currently set at a flat 45% of your entire estate, with a $2 million exemption. Accordingly, no estate tax will be owed if your estate is valued at less than $2 million. In addition, there is an unlimited marital deduction, so you can leave $1 billion to your spouse without paying any estate tax. Please note

that the federal tax rates and exemption amounts are scheduled to change dramatically in the coming years and legislative intervention in the near future is likely.

Note also that you generally cannot avoid transfer taxes by simply "giving it all away" before you die, because lifetime gifts trigger the federal gift tax. The federal gift tax rate is currently 45% of the value of most lifetime gifts, although there are exemptions and deductions here as well. For example, you have a $1 million lifetime exemption, the use of which will reduce dollar-for-dollar your $2 million estate tax exemption. In addition, you may make gifts to any person in a single year totaling no more than $12,000 without paying gift tax or using any of your $1 million exemption. These amounts are also subject to change in the future.

If the total value of your estate and your spouse's estate (including life insurance policies, IRAs, real estate, etc.) exceeds $2 million, you should consider adopting techniques to reduce your overall transfer tax liability. These techniques range from the use of a planned gifting strategy or marital and bypass trusts to the use of irrevocable trusts (qualified personal residence trusts, grantor retained annuity trusts, life insurance trusts and others) and other strategies.

I Just Moved to Florida. Do I Need to Redo my Estate Plan?

No and Yes. Florida courts will generally enforce your estate planning documents from your "old" state, so long as they were correctly prepared and executed under the laws of that state. Nonetheless, it is important to have an attorney in Florida look over your out-of-state documents, and make amendments as needed, for (at least) three reasons:

First, your out-of-state documents were likely prepared in light of the legal presumptions and default rules of your "old" state, which may not apply in Florida. For example, Florida law would not permit your friend Bernie from Michigan to serve as your personal representative (executor), even if you named him in your will. Further, the documents may contain specific references to particular statutes from your "old" state. As a result, the interpretation of your documents in Florida may not achieve the result you originally intended.

Second, Florida doctors and hospitals are accustomed to seeing particular language in health care designations and living wills. Similarly, banks and title companies are accustomed to Florida powers of attorney. The use of out-of-state documents may cause delays in the implementation of these documents.

Third, Florida laws may be more favorable in certain respects than the laws of your "old" state. Having Florida documents would permit you to take advantage of such laws. For example, Florida's homestead protections are superior to most other states.

Incidentally, the same reasoning holds true for Florida residents relocating to another state. It's a good idea to have an attorney in your "new" state look over your estate planning documents and make revisions as appropriate.

How Often Do I Need to Update My Estate Plan?

Florida law does not require updates to your estate plan, so your documents are "good" forever from a legal perspective. From the perspective of keeping your plan current, however, you should consider updating your estate plan as financial, family and other changes occur in your life. I generally advise my clients to choose a day each year (birthday, New Year's Day, etc.) that will remind them to think about estate planning. As events occur, you can ask a lawyer to advise you whether your estate planning documents should be revised.

How Do I Prove Florida Domicile?

Unfortunately, there is no single event or action that proves you are a Florida resident from the standpoint of Florida's probate courts. Florida courts weight several factors, such as:

1. Where you own real property.
2. Where you spend most of your time during the year.
3. Where you file your federal income taxes.
4. Whether you have filed a Declaration of Domicile in Florida.
5. Where your cars, boats and motorcycles are registered.
6. Where your estate planning documents indicate your residence.
7. Where you are registered to vote and have your driver's license.
8. Whether you have applied for Florida homestead protection.
9. Where you have bank, brokerage and similar accounts.
10. Whether your Florida address is listed with Social Security, insurance, credit cards, Medicare, pensions, passports and similar areas.
11. Where your church, synagogue and social groups are located.
12. Where your attorney, CPA and other professionals are located.

The foregoing list may be long, but it is not exhaustive. Further, the factors considered by other states (for tax or other purposes) may or may not be similar. The bottom line is that the more factors you can tip towards Florida, the stronger your argument of Florida domicile.

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Please remember that this brochure is intended as a general introduction to basic estate planning issues. Obviously, the application of these general principles (and the more detailed issues not discussed here) to your individual situation will vary. No attorney-client relationship is created by the delivery or receipt of this brochure.

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