

# The Importance of Estate Planning

PRESENTED BY:

GRETCHYN MEINKEN, ESQ., WADE, GRIMES, FRIEDMAN, MEINKEN & LEISCHNER, PLLC;

RACHEL BAER, ESQ., FAMILY FIRST LAW GROUP, PLLC;

AND ELIZABETH CREGO, ESQ., LEGAL SERVICES OF NORTHERN VIRGINIA

# General

- ▶ There are three documents that we generally recommend all clients have in place:
  - ▶ Advance Medical Directive
  - ▶ General Power of Attorney
  - ▶ Last Will and Testament

# Advance Medical Directive

- ▶ An Advance Medical Directive governs who can make medical decisions on your behalf when you “lack the ability to make an informed decision”.
  - ▶ The determination is typically made by two doctors.
  - ▶ Gives your agent the power to handle your medical affairs – your agent stands in your shoes.
  - ▶ Typically sets forth your preference as to organ donation.
  - ▶ Typically addresses your preference on life-support.

# General Power of Attorney

- ▶ A General Power of Attorney is sometimes referred to as a Financial Power of Attorney or Durable Power of Attorney.
  - ▶ This document sets forth who can make financial and business decisions on your behalf.
  - ▶ Your agent owes a fiduciary duty to act in your best interests.
  - ▶ Typically goes into effect on signing on not on determination of incapacity.
  - ▶ Durable means that it is still effective when you lack capacity.

# General Power of Attorney, contd.

- ▶ Power of Attorney with immediate effect:
  - ▶ Your agent can act immediately at any time, whether you are traveling, admitted to a medical facility (even if you are not incapacitated), or simply not available to address your affairs.
  - ▶ Ensuring you have a responsible person serving as your agent.
- ▶ Springing Power of Attorney (not recommended):
  - ▶ Does not take effect immediately: requires that you lack capacity.
  - ▶ May be difficult to obtain a physician's evaluation on capacity.
  - ▶ Higher probability of rejection by financial institutions.

# Last Will and Testament

- ▶ A Last Will and Testament (“Will”) is a written document that is effective upon death and:
  - States who receives property after death
  - Typically states burial preferences
  - Names executor
  - Nominates guardian for minor/disabled children

## Last Will and Testament, contd.

### ▶ How is it created?

- ▶ The Last Will and Testament is drafted, ideally by estate planning attorney
- ▶ Testator (person making the will) and witnesses must all be over 18 years and mentally competent
- ▶ Will is signed by the Testator in front of two (2) disinterested witnesses and Notary Public, who also sign the Will
- ▶ Self-proving affidavit: witnesses attest that the Testator is over 18 years old, Testator signed of own free will, Testator is competent and of sound mind

## Last Will and Testament, contd.

- ▶ A Will governs what happens to your probate assets on your death.
  - ▶ **Probate** assets are those that are in your individual name and for which you do not have beneficiary designations in place.
  - ▶ **Non-probate** assets are those that either have beneficiary designations or are owned by you with another person with a right of survivorship. These assets are not governed by the terms of your Will (your Will has no control over the disposition of those assets).

# Estate Administration

- ▶ Average length of a proceeding is 1.5-2 years.
- ▶ Generally requires the filing of an Inventory and Accounts (generally annually) until all assets have been distributed.
- ▶ Costly process between the court fees, attorneys' fees (typically your executor will hire professional counsel), and sometimes surety bond fees.
- ▶ Difficulties arise with minors inheriting outright under a Will.
- ▶ Your Will and probate assets become public record.

# Avoiding Probate

- ▶ There are several ways to avoid some or all of your assets going through the probate process.
- ▶ Revocable Trust
  - ▶ The Trust is an *inter vivos* trust, which means that it comes into being when you sign the trust document. It uses your SSN, so any income earned by an asset in your Trust is generally reported on your 1040.
  - ▶ Since the document is revocable, you can change it so long as you have capacity.
  - ▶ Your financial advisor and estate planning attorney should be involved with asset retitling and beneficiary designations to help ensure that probate is avoided.
  - ▶ The Will generally states any assets not in the trust or without beneficiary designations be transferred into the Trust, so that the Trust governs the ultimate distribution.
  - ▶ A Trust is generally not required to be provided to the court if probate is necessary, and therefore remains a private means of transferring your assets to the ultimate beneficiaries.

# Avoiding probate, contd.

- ▶ Joint Ownership with Right of Survivorship
  - ▶ The asset (such as a bank account or real estate) becomes the sole property of the other owner when you die without any other action being necessary.
  - ▶ Lacks protection against the joint owner using the money during your life.
  - ▶ Often used by couples.
  - ▶ If sole goal is to give joint owner ability to help you manage finances, then consider giving them authority with a general power of attorney instead.
  - ▶ If sole goal is to allow for a quick transfer after you die, then consider using a beneficiary form instead.
- ▶ Beneficiary forms
  - ▶ Transfers the asset directly to the beneficiary upon your death.
  - ▶ Can transfer assets into a trust.

# Issues with Minors

## Inheriting Directly

- ▶ Minors inherit directly when they are named as beneficiaries on assets, someone dies without a will, or if a will names the minor, rather than a trust for the minor's benefit.
- ▶ The court and/or financial institution requires the appointment of a legal guardian of the minor's estate. The process varies by jurisdiction, but it is generally expensive.
- ▶ In Virginia, the court severely restricts the usage of the funds while under guardianship.
- ▶ There are annual accountings required to the court (with annual fees), as well as an annual surety bond for the guardian.
- ▶ Unless stated otherwise, the minor inherits the funds outright at the age of 18 (generally in senior year of high school), regardless of the person's maturity.

## Inheriting under a Trust

- ▶ If it is a revocable Trust, then the court generally has no involvement.
- ▶ If it is a testamentary trust (a trust contained in your Will, that only goes into effect if the child is under a certain age when you die), then the full probate process is necessary and the trust is subject to court oversight (including accountings) until the trust terminates.
- ▶ You decide how the Trustee uses the money for the minor.
- ▶ You control when the minor inherits funds outright.
- ▶ Assets with beneficiary designations can name the Trust (of which the minor is a beneficiary) to avoiding the minor inheriting directly.

# Adult Guardianship/Conservatorship

- ▶ What is an adult guardianship/conservatorship proceeding?
  - ▶ Occurs when you lack capacity and do not have estate planning documents in place (or are refusing to let your agents do what they need to do).
  - ▶ Someone petitions the court seeking the appointment of a guardianship/conservatorship on your behalf. - It is an expensive and time-consuming process.
- ▶ Who pays for this proceeding?
  - ▶ You do, so long as the matter was brought in good faith. This includes the petitioner's attorneys' fees, the GAL's fees, and the court fees.
- ▶ What happens if a guardian/conservator gets appointed?
  - ▶ You lose a number of rights, depending on your capacity issues (vote, marry, drive, etc.).
  - ▶ Your guardian/conservator will make decisions concerning your medical care and financial affairs going forward. -generally remains in place until death.
  - ▶ The guardian/conservator will generally be required to file annual reports with the court, resulting in annual court fees.

# Adult Guardianship/Conservatorship, contd.

- ▶ How can I avoid this type of proceeding?
  - ▶ The best way to avoid it is to have an Advance Medical Directive and General Power of Attorney in place. The court prefers the least restrictive method, and these documents are generally sufficient to handle your affairs without court involvement. This is also the least expensive means of handling your affairs.
  - ▶ A Trust is another document that can ease the likelihood of these proceedings. Any assets held in the trust can be used by the Trustee for your benefit without court involvement (and all the fees that accompany these kinds of proceedings).
  - ▶ We have seen an uptick in these proceedings in recent years due to the aging population and a lack of proper estate planning.

# Online Software

- ▶ There are a number of online software companies that offer estate planning services.
- ▶ While appearing to be inexpensive, we have seen a number of issues arise from these documents:
  - ▶ The provisions appear to be of the “pick and choose” variety. As most consumers are not familiar with the terms and the interplay amongst the terms, certain language is missing that is needed (which can result in court proceedings) or is inappropriate.
  - ▶ The documents are not drafted based on your particular circumstances, thus certain issues may not be addressed (minors inheriting under a Will; need for a supplemental needs trust; lack of spendthrift provisions; etc.).

# Options for Legal Assistance

- ▶ You can hire an attorney to advise you and draft your documents.
  - ▶ Paying for good drafting is less expensive than paying for problems later.
- ▶ Legal Services of Northern Virginia (LSNV) – free legal representation
  - ▶ Limited services (not trusts or complicated estate plans)
  - ▶ Eligibility: Low-income persons of all ages, persons with disabilities, or persons 60+ years of age
  - ▶ Because of limited resources, LSNV cannot guarantee full service and representation, but advice is available to most who qualify

# ESTATE PLANNING TAKEAWAY

- ▶ Estate Planning is critical for a number of reasons:
  - ▶ It avoids unintended consequences (distant relatives inheriting your assets – happens more often than you can imagine).
  - ▶ It sets out who you trust to manage your affairs (you get to pick rather than the court).
  - ▶ It minimizes the burden on your agents by planning – they know what you want them to do, and you've structured your plan to minimize the time they would otherwise spend sorting out your affairs.
  - ▶ It avoids expensive court proceedings (estate administration, minors inheriting, and guardianship/conservatorship proceedings). It is less expensive to plan than to cleanup!
- ▶ This presentation is meant to be a helpful overview of general information and not legal advice to a particular person. Please talk to an attorney about what is right for you.

## Our Information

Gretchyn Meinken  
Wade, Grimes, Friedman, Meinken & Leischner, PLLC  
616 N. Washington Street  
Alexandria, VA 22314  
tel.: 703.836.9030  
email: [meinken@oldtownlawyers.com](mailto:meinken@oldtownlawyers.com)  
website: [www.oldtownlawyers.com](http://www.oldtownlawyers.com)

## Our Information



Rachel J. Baer, Partner  
Family First Law Group, PLLC  
700 N. Fairfax Street, Suite 220  
Alexandria, VA 22314  
office: 703.229.2440  
direct: 571.255.7570  
email: [Rachel@FamilyFirst.Law](mailto:Rachel@FamilyFirst.Law)  
website: [www.FamilyFirst.Law](http://www.FamilyFirst.Law)

## Our Information

- ▶ Legal Services of Northern Virginia can help draft simple estate planning documents:

Legal Services of Northern Virginia  
100 North Pitt Street, Suite 307  
Alexandria, VA 22314  
tel.: 703.778.6800  
website: [www.lsnv.org](http://www.lsnv.org)

- ▶ Do not assist in drafting/handling trusts.