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"CAN'T I DO IT MYSELF?"

The Need for Professional Estate Planning Advice in the Age of Do-it-Yourself Solutions

Introduction

Just as it is important to seek professional advice when it comes to income tax planning or financial planning for retirement or other goals, it is equally important to seek professional advice when it comes to Estate Planning and Administration.

In this White Paper we will discuss some of the issues that you, as a financial professional or potential client, should be aware of when it comes to estate planning and administration. There are a great many reasons - some of which are not self-evident - to seek professional advice when drafting a Will or other estate planning documents.

Purpose

The purpose of this White Paper is not to make you an expert in this area, but to make you aware of some of the issues, and why professional advice, even in what often appears to be simple situations, may be extremely important. We encourage you to have your clients seek competent legal counsel, be it us or another law firm, when your clients are preparing Wills or dealing with other estate matters.

For those who still wish to "Do It Themselves," this White Paper offers some tips on the problems to avoid.

Who We Are

Fleisher Patterson Law was founded by Stewart W. Fleisher. Mr. Fleisher has over 30 years of experience in drafting Wills, Trusts, other estate planning documents, and in administering Trusts and estates after the client has passed away. A graduate of the University of Denver Law School, he also holds an M.B.A. from the Harvard Business School. Mr. Fleisher retired from the practice of law in 2019.

His partner and current Managing Partner, Benjamin L. Patterson, received his law degree from John Marshall Law School in Chicago, and his undergraduate degree from the University of Wisconsin-Madison.

Just as CPAs and financial planners have different specialties and levels of competence, the same is true for attorneys. For more information about us, our firm, and estate planning articles, visit our website: FleisherPattersonLaw.com

Is It Legal?

The first question many clients will ask regarding their self-prepared documents is, "Is it legal?" For better or for worse, in Colorado most - but not all - efforts to create a Will or Trust are likely to be found legally enforceable.

For instance, Colorado recognizes a "Holographic Will," which is a Will written entirely in the maker's handwriting. So, technically, you don't even need programs like Legal-Zoom (and several hundred dollars) to create a "legal" Will. All you need is paper and a pen. We actually had a signed slip of paper stating "All to wife, daughter, and brother, equally" admitted to probate.

Courts have denied probate of holographic Wills which are not entirely in the decedent's handwriting and of printed Wills which were not properly executed and witnessed.

For instance, the decedent used a "fill in the blanks" Will form, signed it, but did not have it witnessed or notarized. The court determined that it was not a holographic Will because it was not entirely in the decedent's handwriting. Moreover, as it was not witnessed, it could not be admitted to probate (that is, it was not a "legal" Will.) We will discuss more about the proper execution of the Will later in this White Paper.

Knowledge of the Law

Just as clients often don't know tax law or financial planning concepts, similarly clients don't know the probate code and, just as often, don't understand how Colorado laws apply to them.

For example, a client visited us just to see if the Will she just prepared for herself was OK. She was divorced with three young children and had assets, including her life insurance, totalling $400,000. Her Will essentially said, "I leave my estate equally to my three children" and little else. "What was wrong with that?" she asked.

Well, if she had died last night, her children were too young to receive their inheritance. A conservatorship would have to be established by the probate court for each child. But the added expense would not be the worst factor. Who do you think the court would have appointed as the children's conservator? Her ex-husband, of course. "He is the closet blood relative and has priority under Colorado law," we explained. A horrified look came over her face.

Also, did she want each of her three children to receive their inheritance when the child became eighteen years old? "Well, I want it available for college, but not for new cars or drugs!" she exclaimed.

We also explained that if one of her children died shortly after she did, that child's share would pass by intestacy to that child's father (her ex-spouse) under Colorado law. Not surprisingly, she wanted such share to pass to her other children.

A Testamentary Trust would have been most appropriate for this client. A "Testamentary Trust" is a Trust created under a Will, and in this situation, could have named her mother (or father or brother, or anyone other than her ex!) to serve as trustee. The trust funds would be invested, used for college expenses and the like, and distributed to the child once the child attains, for instance, 25 years of age. Furthermore, if a child dies before attaining 25 years of age, his or her remaining share would pass to the client's other children's shares.

Asset Disclosures

Clients sometimes ask, "Why do you need to know about my assets?" Even if estate TAX planning is not needed (the current federal estate tax exemption is $11,180,000, indexed for inflation after 2018), such information is helpful for other purposes as well. The attorney can discuss the importance of joint ownership, beneficiary designations, and the amount the beneficiaries are likely to inherit.

The client mentioned above indicated that she had a 401(k) plan at work. She assumed her Will would control who would receive those assets, but of course, it is the beneficiary designations on file with the plan administration that controls who receives the proceeds on her death.

As she had not changed the beneficiary designation on the 401(k) plan since she started work several years ago, she was certain it was her ex-husband. She was horrified when we told her that if she died last night, that, pursuant to federal law, the plan would be payable to the ex-husband.

She said she would immediately change the beneficiary designation to her three children. We reminded her of the consequences of naming minor children (remember the problems with a conservatorship and getting the funds at age 18, etc.) So when we prepared her new Will, we advised her in writing to name "The Trustee of my Testamentary Trust under my Will" as the beneficiary on the 401(k) beneficiary form.

It is relatively simple issues like those discussed above that "self-help" programs often fail to address, and why an estate planning attorney can be helpful in even the simplest of situations. Estate planning, even with a simple Will, is a lot more than just recording the client's words on paper.

Ambiguities

Of course, even if the document is legal, that doesn't mean it accomplishes the client's estate planning goals. Drafting ambiguities in self-drafted, legally-admissible Wills often result in the client's family paying legal fees many times greater than the cost would have been to have the document professionally prepared.

For example, does "I leave my estate to my surviving children" mean that if a child later dies, that the deceased child's children will not inherit his of her share? The client's response when we asked this question was, "My family knows what I want!" But does the Probate Court which may be asked to interpret his Will?

When pressed further, the client admitted that he would want his daughter's children to inherit, but not his son's children. Discussions like this reveal the client's preferences so the attorney can prepare the client's documents to avoid ambiguities and help accomplish the client's estate planning goals.

Specific Bequests

Another example of the potential problems professional advice can minimize are specific bequests. A father's daughter had taken care of him for many years, and the father had little more than his house and his small bank account.

He prepared his own Will that left his house to his daughter and his bank accounts to his son. That made sense at the time because he wanted to favor the daughter. But prior to his death, he sold his house and put the proceeds in his bank account. The daughter got nothing - his estate passed entirely to the son. An important part of rendering professional advice is asking the "what if?" questions.

Another problem we encounter is that clients are often concentrating on what they might want when they die twenty years from now. Clients are often more comfortable thinking about their death in the distant future rather than tomorrow.

A better approach is to concentrate on what the client would want today if he or she had died last night. We find that clients can deal with that question better than "what would you want if you died tonight?" What a difference a day makes!

Protect the Original

A word of caution: Clients often fail to appreciate the importance of keeping the original signed Will in a safe place where the family can find it when needed. Generally speaking, photocopies are inadmissible. Your attorney can advise you on an appropriate place to store your Will. Signing multiple copies of a Will is also unadvisable, as the law presumes that if all copies cannot be found, the maker is presumes to have destroyed the missing copy with the intent of revoking it. We once have had a photocopy of the Will admitted to probate, but only with the mutual agreement of all of the heirs and at considerable expense to the family.

Avoiding Probate

Avoiding probate is often a primary concern of the client, as well it should be. But avoiding probate also means avoiding the Will, as the Will only controls the probate estate. Joint tenancy, beneficiaries designations and beneficiary deeds may be appropriate in some cases but not in others.

Clients often want to deed their homes to their children to "avoid probate" not realizing the many tax and control issues involves. Although it does not take a genius to prepare a deed, preparing correctly does take some knowledge of the law.

One couple wanted their daughter to inherit their home after they were both gone, so they prepared and filed a deed which deeded the home to the three of them. They felt they didn't need a Will because their home was their major asset and other assets would pass by beneficiary designation to her.

After the couple had died, the daughter tried to sell the home, but because the deed lacked the three magic words necessary to avoid probate, probate was required to be opened on both of her parents. Her mother died first, and her interest passed to the father. On the father's death, the daughter was shocked to learn that his probate estate, which now consisted on two-thirds of the home, was required by Colorado law to be distributed equally to her and her father's son by a prior marriage that the family hadn't seen in over twenty years.

Adding insult to injury, the daughter discovered that she had to pay significant capital gains tax on the one-third that was originally gifted to her. Proper planning could have avoided all of these problems.

Examples of Better Drafting

We strive to be the best in this limited field. Often, we implement documents and drafting techniques long before our colleagues.

For instance, the Colorado statutory form of Living Will (the "disconnect if I am dying" document) only mentioned a "terminal illness" until just a few years ago when "a persistent vegetative state" condition was added. We have had both conditions included in our Living Wills since 1990. Both Nancy Cruzan and Terri Shiavo (two young women whose court cases were widely publicized) were in a persistent vegetative state but were not "terminally ill" as that term is defined in our statutes.

We were one of the first law firms to include a broad "HIPAA Medical Information Release" as one of the documents in almost every estate plan. Some estate planning attorneys still don't include such a document, suggesting that the client sign a HIPAA release at their doctor's office. Of course, usually that release only protects that doctor, and does not authorize the release of protected health information at the hospital or another doctor's office.

We suggest that even though the client may want only one person to make health care decisions, they may want several family members to be able to discuss the situation with their doctor or other health care providers.

Typically, our Power of Attorney for Health Care appoints one person (listed in order of priority) to make health care decisions, whereas the HIPAA release permits doctors and hospitals to discuss matters with all family members.

This White Paper will discuss the four phases of estate planning in which professional legal services can be important:

1. Advice on Structure
2. Actual drafting
3. Updating the estate plan
4. Administration upon death or disability

Let's get started.

ADVICE ON STRUCTURE AND NEEDED DOCUMENTS

The initial attorney consultation with the client usually involves a discussion of both the family situation and the client's assets.

Family Considerations

How is your health? Are there children? What are their ages? Where do they live? Are they in good health? Are they financially responsible? Do the children get along? Has one child been favored financially over the others during your lifetime? Is equalization appropriate? Are your children married and do they have any children? Where do your children live? Are the children's marriages solid? Are the children unduly influenced by their spouses? Are there step-children? If there are no children, similar questions should be asked about the intended estate beneficiaries.

Depending on the answers to these questions, a simple Will with outright distribution may be appropriate or a complex set of trusts to benefit the children - or even the surviving spouse -may be recommended. If the client has children that are not of this marriage, we may recommend Trusts or a "Contract to Will" to protect the children of the first spouse to die from later being disinherited.

The family discussion may be instrumental in selecting the executor (the person to settle the estate) and health care agent (to make health care decisions for the client if the client is unable to make those decisions.)

This discussion should also include a discussion of the various documents that are included in a comprehensive estate plan. For instance, a financial power of attorney gives someone the power to sign your name. More than one client has stated that friends told them never to sign such a document - your children can rob you blind.

But when we explain to the client that the document can be drafted so that it would not be effective immediately, but only upon their disability as certified in writing by their doctor, and the consequences of NOT having a signed document, the client usually agrees that the document is, in fact, needed. Furthermore, a few clients are more comfortable if two children are required to act together.

Probate is a court action to prove the Will, to appoint an executor (referred to as the personal representative in Colorado), to pay the decedent's bills and taxes, to settle any disputes, and then distribute the decedent's probate estate pursuant to the Will. Probate has been described as a lawsuit you have to bring against yourself, which your family gets to pay for, to make it easy for creditors and disgruntled heirs to come in and muddy the waters. It's no wonder that many clients have avoiding probate as one of their primary goals. Probate can be expensive, time-consuming, and very frustrating at a time when emotions run high.

If probate is opened, a disgruntled heir is entitled to notice, to copies of the Will, and to information about the estate. In probate the Will can be easily challenged at little or no expense to the disgruntled heir.

Thus, if a natural heir (child?) is being disinherited, we often recommend a Living Trust-based estate plan to reduce the likelihood of a contest of the estate plan by totally avoiding probate. But if probate is avoided and the estate passes from a Living Trust, the disinherited heir is not entitled to notice, to a copy of the document, or even to an inventory and accounting. If the disgruntled heir wants to challenge the estate plan, that heir must pay for an attorney to prepare and file their own pleadings, pay the filing fees, and the like. The discussion of these various factors with an attorney may influence the recommended estate planning documents and their drafting. Such discussion never takes place in most do-it-yourself programs.

Asset Considerations

A discussion of the assets will help determine if federal estate tax planning is desirable, or if a Living Trust based estate plan or merely a Will-based estate plan may be appropriate. For instance, a Living Trust estate plan may be recommended to clients who own real estate in other states. If owned in the client's name at the time of death, those properties may require the opening of probate in those other states as well as in Colorado. But if owned by a Living Trust, probate can generally be avoided in both Colorado and those other states. There are numerous other unrelated reasons why a Living Trust may be recommended. See our report on our website entitled "When to use a Will; When to use a Trust."

There are other means of avoiding probate and simplifying the settling of an estate in Colorado. For instance, in small simple estates with the right family situation, a beneficiary deed (combined with beneficiary designations on other assets) may be recommended rather than a Living Trust. Such planning may be more cost effective than a Living Trust.

But if the beneficiaries are minors, disabled, or don't get along, a beneficiary deed could be a ticket to disaster. The ideal situation is when the only beneficiary is one healthy adult child. If there are five children that don't get along, the beneficiary deed could be a disaster as it would require that all five owners sign the papers necessary to list and sell the property

Depending on the assets and family situation, we often recommend consolidation of assets, closing of small accounts, and, for married couples, retitling property in joint tenancy.

A review of beneficiary designations and titling is also important. Some clients don't realize that their Will generally does not control their assets on which they have designated a beneficiary or assets held in joint tenancy.

For example, if years ago you named my sister as the beneficiary on your life insurance and added her to the title on your home as a joint tenant. Later you married and named your wife as the beneficiary under your Will. On your death the life insurance company will pay the proceeds to your sister and your sister becomes

the sole owner of your home. Your Will only controls your probate estate - those assets which are titled in your name with no surviving joint tenant and which there is no beneficiary designation.

Even if a Will is perfectly drafted, beneficiary designations can defeat the planning in the Will. For instance, a client's Will (or Living Trust) may create a "Special Needs Trust" for a disabled child.

Such a trust can keep the inheritance from being titled in the child's name and if drafted properly, keep the child eligible for Medicaid and SSI, and the funds can be used for those things that Medicaid and SSI would not pay for.

But if the IRA, 401(k), or life insurance names the child as the beneficiary, those proceeds upon the client's death will be paid outright to the child. That will cause the child to no longer be eligible for public assistance until such funds have been spent down to $2,000 or less. Failure to properly name the trust as the beneficiary of such plans would defeat the purpose of the Will to the extent of such plans.

Only after reviewing the family and financial situation can reasonable recommendations be made. For instance, an existing Will may not need any changes, may need some minor changes (a codicil or amendment), or may need to be completely replaced with a new Will.

Often clients come in with preconceived ideas of how to best handle estate planning. For instance, more than one client has suggested "adding the children to the title," meaning retitling the home in joint tenancy. After the attorney explains the numerous tax and control disadvantages of such action, the client usually abandons the idea. Do-it-yourself programs most likely do not even address such issues.

Sometimes clients have already prepared and filed the deed themselves, thinking that the deed will avoid probate. But often such deeds fail to mention "in joint tenancy." That failure results in tenancy in common, which means that when an owner dies, his or her fractional share of the property must go through probate. So, in addition to making estate planning recommendations based upon the family and financial situation, the attorney often has to address the frequent misunderstandings of clients and sometimes even prepare additional documents (at additional expense) to correct inappropriate actions already taken by the client. Sometimes such actions by the client cannot be reversed.

Documents that clients prepare for themselves often fail to take contingencies into account. A Will may state "I leave my estate to my spouse" which may be sufficient to accomplish the client's estate planning goal if his spouse survives him, but what if the spouse predeceases him? If that happens, the Probate Code controls to whom the decedent's estate will pass. Does the client really want his state legislature to dictate how his assets will pass? For instance, if the decedent has no children and the client has not addressed what happens if his wife predeceases him, his estate would pass to his parents, whereas the client may prefer to have his assets under this situation pass to his siblings and perhaps even his step-children.

Similarly, when naming an executor in the Will or agent in a Power of Attorney, the client should consider naming one or more successors in the event the first person named is unable to serve. Clients, when preparing their own documents, sometimes fail to consider the importance of these contingencies.

The preceding is intended to mention only a few of the factors which may influence the recommendations made by the attorney at the initial consultation, factors which are often ignored when a client attempts to prepare his or her own documents.

ACTUAL DRAFTING

One may think that the actual drafting of documents is pretty standard once the recommendations at the initial meeting are made. But are documents really that standard?

Forms of Wills and Trusts vary greatly. Clients often ask, will all of those extra provisions in a Will or Trust really make a difference? Sometimes, the answer is a definite yes, other times, it's more of a maybe, depending on what happens.

For instance, many Will forms, even some of those used by attorneys, may leave assets "to my children, per stirpes." That means that if a child is deceased, the deceased child's share passes to the deceased child's children. But what if those children are minors? Will the court require a conservatorship be established for each minor child, perhaps at a cost of several thousand dollars? Who will the court appoint as conservator? Perhaps an ex-spouse who is the parent of such beneficiary will be appointed. These problems can frequently be avoided by including a contingency trust for minor (or disabled) beneficiaries.

If a child is to be disinherited, it is important to mention the child and state the client's intention. If the child is not even mentioned in the Will, state law provides that such child is entitled to an intestate share. If a known child is to be omitted, we usually state, for example, "For reasons personal to me, I have intentionally not provided for my son Sam Smith in this Will or otherwise."

We also usually state, for example, "that all references to my children are solely to those three children named above." That could help negate the interest of a child that suddenly appears after the decedent's death, but can prove through DNA testing to be a child of the decedent.

Not all Will forms authorize the use of a "tangible personal property memorandum." Colorado and many other states authorize the use of such memorandum if mentioned in the Will. That allows the client to designate on a separate sheet of paper which items around the house are to pass to which beneficiaries. Our Wills always authorize such memorandums and we provide our clients with a blank form which they can complete later at home.

Moreover, a Revocable Living Trust estate plan should include a similar provision in the Trust and state the execution (signing) requirements. For instance, our Living Trust format states that any amendment must be notarized, with the exception that a tangible personal property memorandum need only be signed. Without such a provision, the legitimacy of the memorandum could be questionable.

Contingent beneficiaries can be important, even for couples with no children. If both spouses die within a short period of time, many couples would agree that their assets should pass 50% to the husband's parents and 50% to the wife's parents. But without that specifically stated in the Will, 100% of the assets would pass to the survivor's parents.

If a client is the custodian under any "Uniform Transfers to Minors Act" for minor children, the Will can name a successor custodian; otherwise a court action may be required to designate a successor.

Is the spouse of a child to inherit if the child predeceases the client? For example, I give my estate to my son David Jones, and if deceased to Donna Jones. Do you see why adding "provided she was married to him and living with him at the time of his death" might be important?

The granting of broad powers to your personal representative under your Will or trustee under your Trust (referred to herein as "executors") could be important. Such powers could include the power to name their successors, the power to make non-pro-rata distributions of assets, the power to withhold distributing the estate until assets can be sold, and even the power to make distributions to minors under the Uniform Transfers to Minors Act" with the executor to serve as custodian. Such powers could save thousands of dollars under certain circumstances.

If IRAs and other qualified plans are payable to a trust, the entire plan may have to be liquidated (and taxes paid largely at the high trust income tax rate - currently 37%) within five years of the decedent's death. However, if the trust contains certain very specific language, the required minimum distributions from the IRA can be withdrawn over a beneficiary life expectancy. Careful drafting in this regard could save the beneficiary thousands of dollars in taxes.

When drafting a Living Trust estate plan, we usually include a separate document entitled "A Declaration of Trust Ownership" which states that any asset titled in just the client's name is actually held by the client as the trustee of the client's Trust. Although not always accepted by banks and brokerage firms, we have sometimes used this document to avoid probate when the client has actually forgotten to change title to his or her Trust. Most online estate planning programs and even many attorneys do not include such a document. Although seldom needed, this document has saved thousands of dollars for numerous clients' families.

When drafting a Joint Revocable Living Trust for married couples, we usually include a separate "Spousal Agreement" which states that, notwithstanding the language in the Trust, in the event of a divorce, any "separate property" which has been transferred to the Trust shall remain as that person's "separate property."

The use of a "contest clause" can be important in both Wills and Living Trusts. Such a clause typically states that anyone who challenges the validity of this document loses his or her share. When we suspect that a child might contest the document, that clause is supplemented with specific reference to such child.

Additionally, our usual wording in such clauses states that the forfeiting beneficiary will be treated as being "predeceased without descendants." Why are those last two words important? Well, a child may decide to contest the Will if the only consequence is that his share passes to his children. We think it is important in most circumstances to negate that consequence.

Survivorship provisions may also be important. Our documents usually provide that "any beneficiary who fails to survive me by 30 days will be treated as having predeceased me." Why could that be important? Without that provision, if you and your son were in a car accident, and you died at the scene, and your son died two weeks later in the hospital, your son's share of your estate would pass to his estate. His estate may be left to his current spouse (who may not be the mother of your grandchildren). With the survivorship provision, his share will pass to his children and not his spouse.

Are you starting to see why those "boiler plate" provisions could not only be very important, but how the specific drafting of these provisions can make a difference? It is often difficult even for an attorney to explain these provisions to a client who "just wants a simple one page document." It is nearly impossible for a computer or other self-help programs to do so.

What about the execution (signing) of the Will? The law requires certain execution formalities for the Will to be accepted for probate. Those who try to do it themselves often take shortcuts which could invalidate the Will. For instance, a Will that contains only the testator signature, and no witnesses and notary, will generally be rejected by the court.

Another example: John takes the Wills that he and his wife just signed next door and asks his neighbors to sign as witnesses. Under that factual situation, many states including Colorado, would invalidate at least the wife's Will and possibly the husband's Will as well.

Even some inexperienced estate planning attorneys fail to appreciate that the witnesses need to be present when the Will is signed or acknowledged. A Will could be rejected by the probate court if, after the Will is signed, the attorney takes the Will across the hall to have two persons sign as witnesses.

Many estate planning attorneys and even some of the self-help programs offer to prepare financial powers of attorney to become effective "only upon my disability." The problem is that without a definition of how disability is to be determined, a bank or brokerage firm or title insurance company may require the holder of the power to have a court declare the client disabled. It's that court action that the client is trying to avoid with this document.

In drafting our documents, when they are to be effective upon disability, we state the test to be used, usually upon the written certification by the attending physician that the client is unable to effectively manage his or her financial affairs. That is a very modest test. We have had doctors so certify in writing based upon the client's (1) "over-ordering" on the home shopping network (2) failing to file tax returns and throwing away 1099's (3) suddenly making unusually large contributions to new charities. Having that disability test being so modest has saved our clients many thousands of dollars. Depending on the client's wishes, we have even drafted such powers appointing the client's son to be the agent only upon the client's daughter so authorizing. That wording offers sufficient protection without getting a doctor involved.

Perhaps the above explains why many clients who try to save a few hundred dollars on the front end of estate planning by "doing it themselves" cause their families to spend many thousands of additional dollars unnecessarily after their death or disability.

UPDATING THE ESTATE PLAN

Once clients have signed their estate planning documents, such documents should be reviewed periodically for changes in the law (both federal taxes and the probate code), changes in the family (deaths, divorces, additional children and grandchildren) and changes in the financial situation. ("Did you sell that house you left to your daughter?")

We mail periodic newsletters, usually at least one per year, to keep our clients informed about changes in the law and to remind them to review their documents in light of any changes in their family or financial situation.

Some of the more significant changes in the law recent years are as follows:

HIPAA

HIPAA is a federal law that prohibits health care providers from disclosing protected heath care information to anyone other than the patient without the patient's written consent. We offered to prepare a broad HIPAA Medical Information Release document that our clients could either sign in our office or that we could mail to them to be signed by them locally in front of a notary public.

A few clients notified us that they had signed a HIPAA form at their doctor's office. We had to explain to them that such form only protected that doctor, and would probably not be honored by other health care providers and hospitals.

Because of our persistence, at least 75% of our clients have signed a broad HIPAA release authorizing, typically, the release of protected information to their spouse and all or most of their children.

Estate Taxes

We prepared estate planning documents for many of our clients back in the 1990's when the federal estate tax exemption was only $600,000. Even for those clients whose documents were prepared in the 2000-2009 era, we typically included trust provisions for married couples that could save a small fortune in estate taxes by utilizing both spouse's estate tax exemption.

Effective on January 1, 2013, Congress and the President approved legislation that would make both the higher estate exemption ($5 million) and portability provisions of the law permanent. Although our government could always change the estate tax law, the trend seems to be a periodic increase in the exemption amount. The estate tax exemption was increased to $11,180,000 for decedents dying in 2016, and is indexed for inflation. The increase is set to sunset (expire) in 2026, and, unless Congress renews it, the exemption will revert back to $5 million, indexed for inflation after 2011.

Portability is a new concept in the tax code which allows a surviving spouse to "pick up" a deceased spouse's unused estate tax exemption, provided an estate tax return is timely filed. Thus, most married couples no longer need those complex and somewhat expensive extra trust provisions. We have notified our clients several times that a minor change may be need to their documents.

Beneficiary Deed

Colorado now authorizes the filing of a beneficiary deed which allows a property owner to designate who will become the owner upon the current owner's death. The filing of such a deed can help families avoid probate, and is certainly a tool that should be considered for many estates. Our newsletters informed our clients of this new estate planning tool, and many have included the beneficiary deed as part of their estate plan.

Family Changes

Here are some of the more common reasons why an estate plan needs to be amended because of family changes:

- A beneficiary is now on public assistance (SSI and Medicaid) and a "Special Needs Trust" is needed to keep the beneficiary eligible for such assistance.
- A child has severed ties with the family and should no longer receive a full share (or any share?) of the estate.
- A child is in a bad marriage (or perhaps a second marriage) and you wish to keep that child's share of any inheritance from you from passing to his or her spouse, and you want to make sure that such share passes to your grandchildren on the child's death, and not to your child's spouse.
- A child has already received (or "taken") considerable assets and as a result, there should be an adjustment to that child's share upon your death.
- A child has a lawsuit against him, or is in prison, and his share needs to be managed, and protected from his creditors, until he is able to handle such matters for himself.
- An executor under a Will or agent under a Power of Attorney has moved far away, or now has great requirements on his time, or is in poor health, or has died, and a new executor or agent needs to be appointed.
- A beneficiary for whom a Trust was created no longer needs such Trust, perhaps because he or she is now more responsible.
- A beneficiary has a drug, alcohol, or gambling problem, and any money left to such person is likely to be gone in a short period of time. Such inheritance may be best left in trust so the beneficiary will receive it over a period of years, or until the beneficiary has tested drug free monthly for several years.

- Although both spouses were healthy when the original documents were signed, it now appears that one spouse is likely to die soon. There may be many planning opportunities at this time to avoid probate, to decrease income taxes after the first death, and to realize other tax benefits.

Almost any financial planner or banker will tell you that financial Powers of Attorney become very difficult to use after, perhaps, ten years. Therefore, we recommend at a minimum that such documents be resigned every seven to ten years. Often, when updating their powers of attorney, clients decide to name someone else to serve as their agent under the power of attorney, or to make the power effective immediately rather than only upon disability as may have been included in the original document. As clients age, they often have more confidence in their children and their goal is to make the document easier to use.

Being available to help for our clients, to keep informed, to assist with any updates, and be an advocate for them, is a very important part of our practice.

ADMINISTRATION UPON DEATH OR DISABILITY

Often, when children and surviving spouses are serving as the executor, they don't know what to do after the client dies. On our web site is a report of "Twelve Steps in Settling a Loved One's Estate." Many of our client's families have found that report helpful.

Beyond that, we strongly suggest a brief meeting to review the documents, decide what needs to be done, and designate who is responsible for each task. For instance, certain tax returns may need to be filed, probate may need to be opened, death certificates filed, and the like. We can assist where our expertise provides cost efficiency; the executor can handle other matters and call us if problems arise.

Many executors find it helpful to have the other beneficiaries present at that initial meeting, as that helps them to understand what to expect. We never "read the Will" as you may see on television, but we may spend time reviewing the most relevant provisions with the heirs. It also helps answer that question that seems to be in most beneficiaries' minds of "when will I get my money?"

We can also provide helpful tips on efficiently settling an estate. One simple example is when there are a number of stock investments at a "full service" investment firm. We had one executor who sold about $60,000 of a listed stock and the brokerage firm charged a commission of over $700. Had that same stock been sold at a discount brokerage firm like Charles Schwab, e-trade, or TD-Ameritrade, the commission would have been under $10. Multiply that by, say, 20 different securities, and you can see how assisting our clients to move the account to a discount brokerage firm BEFORE selling the stock could save over $13,000 in commissions.

Because we charge for administration on an hourly basis, we usually suggest that the executor take care of everything to the extent he or she is able to do so, and to get us involved only when there is a problem. Quite often, surviving spouses and children can settle an estate (or Living Trust) with little or no help from us.

Some attorneys may charge a percentage fee, which is discouraged by the Colorado bar as such fees often result in overcharging. Another practice we see out there is providing no bills until the estate is ready to be closed, then presenting a very large bill. The family is anxious to get their distribution, so they are almost forced to approve the fee as presented, or suffer a delay of several months until the controversy is resolved.

We feel that billing on an hourly basis with monthly statements provides the transparency and timely opportunity to raise questions that some other law firms seem to ignore.

Sometimes probate is opened when it isn't necessary. For instance, we have some family members contact us after a bank officer told them that they "need letters from the court" - which means opening probate and obtaining the court authorization to act on behalf of the decedent.

However, if the "probate estate" - those assets which is titled solely in the decedent's name and without a surviving beneficiary - has a total value of less than $68,000 (2018) and involves no real estate, then the executor can use a Colorado small estate affidavit to take control (collect) the asset and liquidate or sell it if the executor so desires.

The small estate affidavit is often used to sell or transfer the car, to close out small bank accounts, and to liquidate those shares of stock the decedent received when his life insurance company demutualized. It can also be useful in obtaining access to a safe deposit box. We are somewhat unique in how we prepare that affidavit for our clients. We usually include a cover letter on our letterhead and signed by us stating that we have met with the executor and use of the affidavit appears to be appropriate. We even include a copy of the statute which authorizes the usage of this affidavit. Our clients have hardly ever had a problem when using affidavits prepared by our law firm.

If necessary, we lodge Wills with the probate court when someone dies, open probate as needed, prepare inventories, arrange for notice of death publication, prepare estate tax returns when desired by the executor, prepare and mail inventories, accountings and releases as deemed needed by the executor, and anything else we can do to assist the executor in fulfilling his obligations and to protect the executor from liability from disgruntled beneficiaries.

How to handle IRAs and other plans is a frequent topic. Many beneficiaries don't understand that they are not required to liquidate the account immediately, and that they usually have at least five years (and often several decades) over which the plan is required to be liquidated. We usually provide the beneficiaries with specific instructions.

Unless the executor and beneficiaries come into our office immediately, they may make significant irrevocable mistakes with respect to such plans. For instance, the son of one of our clients came in a year after his mother died. His mother had rolled over his father's IRA when he died into her own so as to defer any taxation. So, when his mother died, the son did likewise. He had received a 1099 indicating the full value of his mother's IRA was taxable in the year he rolled it into his own IRA. He was sure there was some mistake, but unfortunately there was no mistake.

Although he could have kept his mother's IRA as an "inherited IRA" and, properly titled, would not have triggered any taxable income, only a surviving spouse can defer taxes by rolling it over into his or her IRA. Since the son by definition was not a surviving spouse, the transfer to his IRA was fully taxable. Furthermore, the IRS was asserting a 6% penalty for each year his mother's IRA was in his IRA because he had made an excess IRA contribution for that year. Had he come in for the review right after his mother's death, he could have avoided these problems.

Each administration poses different issues because of different family members, different assets (and titling and beneficiaries thereof), and different dispositive documents. The manner and timing of how the estate is distributed can affect values, taxes, the executor's liability, and can tear a family apart. The last

thing most clients want is for their children to never speak to each other again. Proper administration can often help avoid such problems.

CONCLUSION

The auto transmission company, AAMCO, had an effective television ad years ago in which a man is standing next to his car in a local garage, and the mechanic says, "I always wanted to work on a transmission." You wouldn't want an eye doctor, regardless of how good he is at his profession, to perform your heart operation.

Do you really want to trust your family's well-being after you are gone to a computer programmer in California who writes code for Legal Zoom, or Suze Orman, or any other self-help organization?

Self-help organizations may help a client recognize a few of the problems and planning opportunities in drafting an estate plan, but they are no substitute for professional advice. Those who specialize in estate planning are generally worth the added expense, if for no other reason than peace of mind.

Moreover, self-help programs offer little or no assistance in keeping your estate plan up-to-date and preparing amendments for you. None of them offer any significant assistance in settling an estate. We find it interesting that most self-help programs urge the client to seek the advice of a local attorney before signing any of their documents. Often, it takes an attorney less time to prepare estate planning documents for a client than to review existing documents drafted by others and then to have to explain to the client any deficiencies.

The use of experienced professionals in preparing an estate plan can make a major difference in its quality and effectiveness. Please call us if you think we can help you with your estate planning needs or those of your clients.