THE MOST IMPORTANT THINGS YOU POSSIBLY ALREADY KNOW ABOUT ESTATE PLANNING - BUT PROBABLY DON'T WANT TO DEAL WITH

subtitled:
STICKING YOUR HEAD IN THE SAND IS NOT AN ESTATE PLAN

A PRIMER
by Kathy N. Rosenthal, Esq.

Dory's Diner
June 12, 2018

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My function today is to educate you, remind you, and motivate you to get your act together to create and implement an estate plan so you can then get on with your life and not have to think about your possible future incapacity and death. I suspect you think this is sort of like going to the dentist, but you don't have to do it every six months. It's sort of like buying insurance, but you don't have to pay for it monthly forever. And it's sort of like going to your spouse's 60^{th} high school reunion but you don't have to listen to people you don't know revisit events you couldn't care less about. But if you ask me, I think estate planning is actually interesting and more rewarding than any of those things (with all due respect to dentists, insurance agents, and party planners).

This Primer is a list of concepts, with comments on each item, which most people need to deal with. You may not need to deal with all of the concepts, but it's good to review them all so you can deliberately eliminate the ones which are not relevant to you.

The problem with this Primer, while detailed and full of information, is that it barely scratches the surface of information needed to manage and coordinate the facts and the laws which are needed for thorough estate planning: gifting during lifetime and at death, charitable gifting, insurance (life and disability), retirement planning, banking, Medicaid planning, domestic relations and last, but never least, taxes (income, gift and estate taxes) all of which must be considered simultaneously.

The information provided in this outline is not intended to be specific legal advice or to be followed without individualized, professional guidance and assistance.

The over-arching message of this program and Primer is that you must deal with planning and distribution issues, must deal with them openly and honestly, and must deal with them with one or more professionals (attorneys, accountants, financial planners, insurance agents) to learn about the full range of options which might be best for you and your family and then implement your choices.

I hope this Primer is helpful. I hope it starts you thinking and planning and talking. And if I can be of any assistance, please do not hesitate to call the office to arrange for a consultation.

#1 - MAKE A PLAN BECAUSE MAKING A PLAN AND SIGNING A WILL DOES NOT MEAN THAT YOU ARE GOING TO DIE SOON.

Ok, we know how silly that sounds, but I know that some of you really think that. If that was true, I'd never have any repeat clients and I'm pleased to tell you that isn't true.

Why do I need to make a plan?

> (1) Without a plan your property may not pass to whom you want and when you want. Your property may pass to minor and/or incapacitated persons and/or adult children with potentially overreaching spouses or partners or creditors.
>
> (2) Without a plan you might not be taking full advantage of estate, gift and income tax protections (federal and/or NYS taxes).
>
> (3) Without a plan and specifically signed documents it will be difficult for someone to pay your bills, manage your assets, make health care decisions for you,.
>
> (4) Without a plan you might be depriving your loved-ones of financial support which is needed. Your plan might need to contemplate gifting while you are alive.
>
> (4) Abdicating on decision making by leaving all of your assets to one child and asking her to divide it among her siblings as she sees best after your death has tax implications, current or potential creditor implications, and can create enormous animosity among your children.

#2 - WHAT IS AN ESTATE PLAN?

Most narrowly, an estate plan is your individualized strategy for providing for the disposition of your assets when you die, but an estate plan is not just about who gets your jewelry, your house, and your IRA. It's not just about writing a Will and/or writing a trust.

A complete estate plan does deal with managing your assets while you are alive and after your death, but it is also about creating a plan to pass the management onto someone else if you become disabled or lack capacity to make decisions.

#3 - WHAT IS INCLUDED IN A THOROUGH ESTATE PLAN? A thorough plan usually includes the following documents, grouped here by function:

HEALTH CARE DOCUMENTS: The function is to arrange for someone to make health care decisions for you if you cannot make them for yourself. Here are the 3 most-used documents.

A health care proxy. This document answers the question: "Who?" Who is entitled to make health care decisions on your behalf.

> You sign a health care proxy to name an "agent" (sometimes called a proxy) who is the person who you authorize to make <u>medical decisions</u> on your behalf. Decisions include starting, continuing and stopping medical treatments, and decisions about artificial nutrition, hydration and respiration. Your agent also has the power to sign a DNR on your behalf. The proxy form can authorize the agent to direct administration of pain medication, even if the pain medication will hasten the time of your death. This form also permits you to make a statement about whether you want, or do not want, to donate your organs after your death.
>
> Because health care, and nursing home care, can be so expensive note that you should coordinate your wishes with both your health care agent (your surrogate health care decision maker) and your power of attorney (who will be paying the bills for the care).
>
> The proxy is effective as soon as you sign it, but the agent does not have the authority to make decisions unless and until you become unable to do so.
>
> If you sign a health care proxy form, it is very important that you speak with your agents and explain the type of care and treatment that you want administered (or withheld), if and when you are unable to express your wishes.

A living will. This document answers the question: "What?" With this document you can tell the agent what kind of care you want and do not want. Unlike a health care proxy, in this document, you get to direct what care and treatment you do/don't want, rather than to state who you want to make those decisions for you. This form is best used as guidance for your agents, so they are more informed to make the decisions which you want them to make. It is also used when a person does not feel comfortable naming someone to make decisions or does not have anyone to name. In addition to secular living wills, an internet search will yield, among others, Halachic Living Wills (for orthodox Jews) and Jehovah's Witness Living Wills.

A HIPAA Release form. The HIPAA Release form permits the people you name on this form to ask for and receive information about your health care now, even if you are competent. This form might be important because the agency under the health care proxy does not begin until you become incompetent, but someone might need this information even if you are competent - so that person can assist with decision-making, paying bills and filing insurance information. This form does not entitle anyone to make decisions - only to receive information. The people named on this form are usually the same people you name as your health care agents.

Organ donation. You can arrange for organ donation by signing on a health care proxy form, on your driver's license or verbally. You can also pre-arrange to donate your body to science or a medical school, and the recipient institution will walk you through its process.

FINANCIAL DOCUMENTS: Arrange for someone to make financial decisions and pay your bills for you if you are (i) incapacitated or (ii) merely unavailable or (iii) too busy to do your own management. There are financial costs of incapacity: No one to pay bills, deal with Medicare or Long Term Care Insurance claims, hire people to help you as and if needed. If you have not made provisions for yourself by signing a power of attorney, you might need a court-appointed guardian of your person and/or your property. Most people only want assistance from the agent in the event of their own incapacity, BUT NOTE that the power of attorney becomes effective immediately after you sign it so it can be used by your agent immediately. However it cannot be used by your agent until you give the agent the form you signed, and your agent signs it in front of a notary. Most, but not all, institutions require the agent to produce a signed, original power in order to be able to use it. So if you don't want your agent to use it until worse comes to worse, don't give it out.

The Power of Attorney Form ("the POA") allows you (you are called the "principal") to name a helper person (called an "agent").

> The agent is authorized to make <u>financial decisions and perform financial acts</u> on your behalf, but the POA does not take away any power from you. A POA is useful so someone can help you with estate tax planning, and Medicaid planning, and also to permit the agent to do your business if you are unavailable or unable to act for yourself.
>
> The power of attorney is comprised of two forms: one form (called a Statutory Short Form Power of Attorney) authorizes the agent to do financial things you can do (referred to in this Primer as the "Short Form"). Depending upon the

modifications you add to the Short Form, the agent could be authorized to do anything and everything you can do - manage, buy, sel, invest and spend your assets on you. The agent is under a statutory duty to act on your behalf - not the agent's. An agent under a POA is never authorized to write a new Will for you. Also, the Short Form does not permit the agent to gift away your assets and/or change your beneficiary designations (such as beneficiary designations on your IRA or life insurance policy or POD accounts). There is a second form called the Statutory Gifts Rider (referred to in this Primer as the "SGR").   The SGR's function is limited. It is to authorize your agent to gift away your assets and change beneficiary designations. In the SGR you can limit to whom gifts can be made and the amounts of the gifts which can be made.

A lifetime trust. You can create and fund a lifetime trust so your appointed trustee can manage your assets and spend your money on your behalf as set forth in the trust agreement. A benefit of the trust agreement is that it also includes instructions on how to dispose of your property after you die (so it provides for management while you are alive and disposes of your property after your death - a two-fer).

Financial planner. Work with a financial planner who will help you - hopefully increase your assets and will hopefully "watch the store" to minimize economic upheaval.

POST DEATH INSTRUCTIONS - FUNERAL AND INTERMENT PLANS:

Consider writing instructions to assist your loved ones after your death, particularly if you have specific plans for donation of organs, disposal of your body (such as cremation), choice of clergy, funeral, burial, obituary information, and/or a celebration of life party. Include the name and contact information for the person you designate to be the decisions-make for any decisions you haven't pre-made. You might even want to write your obituary. If you have something you want to say - say it.

You might want to pre-pay for products and services to make sure you get what you want and relieve your family of making decisions under stress and alleviate the need for some-one to pay for these expenses (although the estate will re-pay for funeral and related expenses). If you don't pre-pay, consider whether the responsible party can afford to advance the funds, or whether you must provide for immediate access to assets sufficient to pay the bills.

Just make sure you give the written instructions (and paid bills if you pre-pay) to the person in charge so s/he knows what to do.

AND YES, A THOROUGH PLAN WILL ALSO DISPOSES OF YOUR ASSETS WHEN YOU DIE - MAYBE BY WILL AND MAYBE ONE OR MORE TRUSTS.

Depending upon your estate tax issues, your financial and family's needs, you might need a Will (with or without trusts), a lifetime trust for management of your assets (revocable or irrevocable), a lifetime trust for management of your beneficiary's assets, a transfer of real property (with or without retaining a life estate), a trust for your spouse, a trust for your beneficiaries, a lifetime life insurance trust.

Here is a partial list of some considerations which will guide you and your planner as to which documents to use.

Consider your assets (the current value, the cost basis of each asset, how each asset is titled); and

Consider your family members/intended beneficiaries (their ages, financial acumen, spendthrift issues, debts, creditors, health, governmental benefits which might be affected by an inheritance;

Consider your charitable intentions; and

Consider the estate, gift and income tax ramifications of your plan.

Consider who you want to be in charge of settling your estate, and the ongoing management of the assets you want to leave to some beneficiaries (those who cannot or will not properly care for themselves).

Consider how you will divide your tangible personal property. Equally? Let your beneficiaries decide? Sell all the "goodies" and divide the money? Leave family heirlooms and sentimental keepsakes to beneficiaries who might be children? Or leave all of your personal property to your second spouse but who might not leave your keepsakes to your own children when the second spouse dies?

#4 - HOW ASSETS PASS WHEN YOU DIE. Not all assets pass by Will or have to pass by Will.

What doesn't pass by Will: Your assets which name a beneficiary, or which are jointly-owned, or which are owned by a trust during your lifetime will pass directly when you die by operation of law. The account which names a beneficiary will pass to the named beneficiary. The asset which is jointly-owned will pass to the surviving joint owner. The assets your transferred into the lifetime trust during your lifetime will pass to the beneficiaries you named in the trust agreement.

But what happens to the property you own in your own name solely (no joint owner, no beneficiary, not owned by a trust)?

If you have a [correctly-executed] Will, then your solely-owned assets will pass under your Will after your Will is admitted to probate after you die.

If you do not make a Will, then your solely-owned assets will pass according to the laws of intestacy of the State of New York. Under the rules of intestacy, you don't get to name your beneficiaries and control distribution after your death. Minors will inherit when they turn 21. Beneficiaries receiving government benefits might have benefits terminated. You don't get to make charitable bequests. You don't get to pick the person who will settle your affairs (meaning the person who will gather your personal information and assets, pay your debts and bills and make distribution according to the laws of intestacy).

Owning all assets jointly with another person and naming a beneficiary on all assets may not be a very suitable plan (in lieu of a Will or trust).

First, not all assets can be owned jointly or name a beneficiary.

Second, owning assets jointly could lead to loss of control and/or creditor problems if your joint owner has creditor issues.

Third, naming a beneficiary of an account removes the possibility of planning to protect the beneficiary and/or her assets from the beneficiary's own bad decision-making and her creditors and her spouse.

Fourth, owning a asset jointly could forfeit an income tax benefit for your joint owner; the asset will only get a step-up in basis as to the decedent/owner's interest.

Fifth, you wouldn't want to own property jointly with your minor children or a disabled person - you want them to inherit, but you don't want to co-manage with children or someone under a disability.

Sixth, when the first owner dies, the second owner must still write a Will or make another plan. True, the survivor can then make a plan, but one cannot predict who will die first or second. Better to have all plans in place. Plans can (almost) always be revised.

#5 - GIFTING AS PART OF AN ESTATE PLAN.

Definitions: The giver of a gift is called a donor. The recipient of a gift is called a donee.

Gifting has important benefits for estate tax planning and Medicaid impoverishment planning, but there are issues which must be considered:

Consider the life style you want to maintain before making gifts.

Gifting assets with a low cost basis can have income tax ramifications for the donee.

Consider your donees before gifting. You might not be taking full advantage of creditor protections for your intended beneficiaries.

Can your donee manage money?
Does your donee have creditors?
Might your donee have marital issues?
Does your donee have special needs/disabilities?
Is, or might, your donee be receiving governmental assistance?

Consider gifting to an irrevocable lifetime trust or naming a UTMA custodian.

Consider cost basis when making gifts.

For donors with taxable estates

Consider annual gifting up to the exclusion amount.

Consider gifting to pay for unreimbursed medical expenses and/or tuition expenses (payments must be made directly to the educational institution or the provider of medical service).

Consider gifting to trusts (for example but not limited to: GRATs, personal residence trusts, ILITs, IIOTS, Supplemental Needs Trusts).

#6 - AFTER YOU'VE GONE TO ALL THE TROUBLE TO CREATE A PLAN, MAKE SURE YOU IMPLEMENT IT.

CHANGING TITLE TO ACCOUNTS:

After you have settled on a plan, change title to your assets and accounts so your accounts and other assets are coordinated with the plan.

If you've created a lifetime trust to avoid probate, then you should fund the trust.

REVIEW YOUR BENEFICIARY DESIGNATION FORMS ON YOUR BANK ACCOUNTS, BROKERAGE ACCOUNTS, and LIFE INSURANCE.

You want to make sure your plan is coordinated. You don't have to name the same people as beneficiaries of your life insurance, your IRA and your Will, but you do need to make sure the designations are coordinated so you're not leaving too much (or too little) to any one person.

You want to make sure you name beneficiaries in a way which passes a beneficiary's share down to his children if a named beneficiary dies before the testator dies. - or make sure a share won't pass if that is not what you want.

In some cases, you want to name people, and alternate people. In some cases, you want to name your estate or lifetime trust to receive the asset.

Honestly and thoughtfully deal with the needs of beneficiaries who are minors or spendthrifts.

DEAL WITH YOUR RETIREMENT ACCOUNTS, INCLUDING THE INHERITED IRA ACCOUNTS.
There could be enormous ramifications to not dealing with your retirement plans or naming some beneficiaries instead of other. Here are some considerations:

> There are income tax consequences to distributing "qualified" accounts:
>
> > There can be income tax benefits to naming one beneficiary over another.

There are different consequences to naming an estate or a trust to receive qualified accounts.

There are consequences to naming a minor to receive any asset passing by operation of law. The consequences must be dealt with on the beneficiary-designation form; your Will only governs assets passing under the Will.

There are consequences to leaving assets (retirement or otherwise) depending upon whether the beneficiary is a spouse or a non-spouse and the age of the beneficiary. There are different consequences if the spouse is a US citizen or not a US citizen.

Consider the ages of your beneficiaries. Consider your beneficiaries ability to handle outright distributions from retirement accounts.

Consider the benefits (and issues) involved with naming a charity as beneficiary of a retirement account to receive annual required minimum distributions and/or the balance at your death.

PROVIDE LIQUIDITY TO MAKE SURE YOUR EXECUTOR AND BENEFICIARIES CAN IMPLEMENT YOUR PLAN. There is a problem in failing to provide sufficient liquidity to settle your estate and make distributions. Again, some considerations:

Your estate might be taxable or have debts or expenses of administration.

Your estate might include a residence which doesn't sell immediately or which needs repairs and the estate needs money to pay real estate taxes, to maintain and/or repair the residence prior to sale.

If most (or the most substantial) assets pass to named beneficiaries outside of your Will, then there will probably not be sufficient liquidity to pay the debts, expenses of administration and/or taxes. This (i) could be a burden on your beneficiaries or (ii) could force an early unprofitable sale or (iii) force a beneficiary to sell a non-liquid asset at a loss, or (iv) pay interest and penalties on income and/or estate taxes pending liquidation.

Leave sufficient assets to pass through your probate estate (under your Will and/or in your revocable lifetime trust) so there will be a kitty to pay your bills, your estate's bills, your estate taxes, and manage the assets which cannot (or should not) be sold quickly.

Purchase life insurance which is payable to your estate to provide liquidity to pay your unpaid bills and the estate's bills including maintaining the property until it can be sold. If owning life insurance increases your estate to taxable limits, there might be other ways to own the life insurance and/or provide liquidity.

#7 - REVIEW YOUR PLAN FROM TIME TO TIME; UPDATE IT AS NECESSARY. A plan and documents should be reviewed upon the happening of a major life event or every five years. The plan and documents might not need to change, but should be re-evaluated upon the happening of any of these events.

Birth of a child or grandchild,

Death of a family member,

Marital difficulties (of the testator or of a beneficiary),

Impending divorce (of the testator or of a beneficiary),

Impending retirement,

Starting a new job or business,

Illness (of the testator or a beneficiary).

#8 - SEEK PROFESSIONAL ADVICE AND ASSISTANCE

Downloading documents from the internet is not professional advice and assistance.

Documents and information on the internet can be outdated (or downright wrong) and you wouldn't know.

Documents might not be appropriate for you in your state. Each state has its own substantive laws about Wills and transfers of assets. Each state has its own laws about how documents are to be signed.

Documents on line can be generic documents not customized for you and your issues.

Estate planning laws are different from state to state. Federal estate tax laws are national, but there are also state estate tax laws which must be considered.

Taking advice from friends, hairdressers, and neighbors. While everyone's business might be interesting, your fact situation is different from everyone else's.

Listening to or reading articles by a nationally-known expert. The expert is speaking generally and not relying on the law in your state or on your fact situation.

Instead of (or in addition to any of the above) talk to professionals: attorneys (who concentrate in estate planning), accountants, financial planners (perhaps fee based or perhaps transactional or perhaps just for a planning consultation), insurance agents (getting information and options on life, health and long term care insurance).

Again, I hope this Primer was helpful. I hope it starts you thinking and talking and planning. If I can be of any assistance, please do not hesitate to call the office to arrange for a consultation.

Kathy

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