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NEWSLETTER
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Estate Planning and Asset Protection Basics for 2007 (and beyond)

Some of you asked us to switch our Newsletter to a monthly format. So we did. It may be a little shorter than the quarterly Newsletters of the past, but we do hope the increased frequency will enable us to cover more topics of interest to you.

This month we outline the basics of estate planning and asset protection. Whether you have estate planning documents in place or have been putting off addressing your estate planning needs, we think this Newsletter will be useful to you.

It goes without saying that we don't like to think about dying and we don't particularly like to plan for it. Perhaps this is the major reason that only about 29% of the adults in the U.S. have done any estate planning. That's a lot of intestacy proceedings waiting to happen.

For better or for worse, the bottom line is that unless you decide to take charge of your affairs, you give up the ability, the right, and the privilege to ensure that you (yes, you), your assets, and your loved ones will be treated the way you desire.

Let's talk about what happens without estate planning. First, without a health care proxy and living will, you leave to the state, doctors (perhaps not ones you know), hospital administrators, and family members to figure out and fight over how you want to be treated if you can no longer make health care related decisions for yourself. Second, without a durable general power of attorney, you leave to the Surrogate the right to decide who will have control over just about all of your property interests. Third, without

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a will, or a revocable living trust and pour over will, you leave to the state the determination of who gets your assets; you also give up tax saving options and set up a possible fight between your family members in an intestacy proceeding.

Now let's talk about some estate planning documents and their functions.

Health Care Proxy and Living Will – This is a document in which you designate a person to be your designated agent to make all your health care and medical decisions, if you should become unable to make those decisions. That's the "proxy" part. In the "living will" part of this document, you set forth your wishes and desires and instructions. You basically put the world on notice of how you wish to be treated if you can no longer communicate your wishes. Why might you need such a document? Well, think of traffic helicopters or how many times you have seen and heard an ambulance go by.

State law governs this type of document, but it can be highly personalized to reflect your wishes. It should be clear and convincing, must contain certain terms or language, and should be executed according to the requirements of any governing state law. It should be drafted by an experienced attorney after consultation with you about your wishes and your intended agent (and back up agent).

Durable General Power of Attorney – With this document you designate a person or persons as your "Attorney-in-Fact" to have control over your property interests should you become unable to manage your affairs. This document can be drafted to go into effect immediately upon execution or upon the occurrence of a future event. It is revocable by you and, unless otherwise revoked or superseded, it stays in effect until you die.

Disposition of Remains Designation – Effective August 2, 2006, New York State revised Section 4201 of the Public Health Law to enable you to designate an agent to have control over the disposition of your remains and to state your wishes regarding that disposition. This means that you no longer need to put that language in your will, which is a public document, subject to probate objections, and not binding until admitted to probate by the court. With this new document, you can avoid or significantly minimize the possibility of any fight between your loved ones. This can be especially important for you if you have been married more than once or if your children and spouse do not necessarily see eye to eye, or if you have religious or other wishes you want to ensure are respected. (For more on the disposition of remains law, see our Summer 2006 Newsletter.)

Will – Your last will and testament sets forth your wishes regarding the following: who you want to have control over gathering, protecting, and distributing your assets; how you desire

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your property to be distributed; how you want your tax liabilities to be apportioned among your property; who you desire to be appointed the guardian of your minor children if their other parent does not survive you or is otherwise unable to parent; the establishment of trusts for your loved ones, including testamentary special needs trusts for a child or spouse that may need governmental assistance as well as the use of your assets; taking maximum advantage of tax savings options, including the estate tax exclusion amount, the marital deduction, and allocation of certain income that may be due to you after your death; and finally, making testamentary charitable gifts or funding a family foundation.

Your will should be drawn by an experienced trusts and estates attorney who has carefully consulted with you about your goals and concerns. You should be given a draft of your will to review so that you can discuss changes or ask your attorney questions about what happens "if." Your properly executed will should be kept in a safe place, preferably your attorney's will vault.

Revocable Living Trust and Pour Over Will – These two documents work together to do what a will does (see above), with some added benefits and, to some, challenges. If you execute a revocable living trust, <u>and transfer your assets into the name of your trust</u>, then just about all of your estate will avoid the probate process. Your pour over will, "pours over" into your trust at your death the property you failed to transfer into it during your life; it can be revoked and redrawn to make changes to smaller, specific or general bequests later in life without redrafting your revocable living trust; and it provides a back up to your trust if you should revoke your trust and not create a new will or a new trust.

Usually you appoint yourself to serve as the trustee of your revocable living trust during your lifetime. In the trust, you appoint a successor trustee or trustees to serve (a) if you should become incapacitated and unable to manage your affairs and (b) at your death (these successor trustees can be the same or different individual(s) or corporate trustee(s)). In addition to distributing your assets as you desire outside of the probate process, your revocable living trust and the property you have transferred into it during your lifetime is not subject to a "will contest." Your pour over will, however, is still subject to probate and can be objected to, which can affect the disposition of the property you do not transfer to your revocable living trust during your life.

If you own real property in more than one state, your family can avoid what is called "ancillary probate" in those other states if you put your vacation or business property into the name of your revocable living trust.

Moreover, because you can set up additional trusts for your family (including trusts for business assets) and for many family-focused charitable

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purposes, including family foundations, your revocable living trust can be used as an asset protection device.

On the other hand, while you do not necessarily lose any tax planning options that you would have with a will, such as the applicable exclusion amount or the marital deduction, a revocable living will is not of itself a tax planning device.

Non Probate Assets – Certain property, such as life insurance (not owned in a life insurance trust), annuities, IRA's, 401(k)'s, Pensions, and certain other deferred compensation, pass by contract and not under your will or your revocable living trust (unless you name your estate or the trust as the beneficiary, which is generally not recommended).

The beneficiaries of these assets are named in designated beneficiary forms that are part of the contract. Do you know where these forms are? Do you know who the named beneficiaries are? Do you or your estate planning advisor have copies? If not, follow these critical steps or ask your estate planning counselor for help: (1) List all these assets; (2) Obtain a copy of the designated beneficiary form for each asset from the administrator, trustee or financial services firm that holds and manages the asset; (3) If the form is complete and correct, check with your estate planning counsel to ensure that the designation fits in with your estate plan (and if you have named your "estate", reconsider); (4) If the form is not complete or correct, complete a new one, naming not only a primary beneficiary or beneficiaries, but a first contingent beneficiary or beneficiaries and a second contingent beneficiary or beneficiaries, and send it to the asset administrator by certified mail and by fax; (5) Keep a copy of the designated beneficiary forms with your other important papers and give a copy of each form to your estate planning attorney and your financial advisor; (6) Consider letting your beneficiaries know of their status as beneficiaries, where to locate the forms, and who to contact in the event of your death; (7) Finally, make the review of these assets and your beneficiary designations part of your periodic estate planning review.

Review and Life Changing Events – In conclusion, even if you have all these documents, we hope that this refresher has been helpful to you. If you don't have these documents in place or have questions about your current documents, please consider setting up a review or consultation with us or your estate planning advisor if you have one.

Remember that if you have been effected by a birth, death, marriage, divorce, significant change in income (up or down), inheritance, catastrophe, change in health or earning power, business deal, change in state of residence or domicile, or change in state or federal laws on income, estate or gift taxes, you should consult your estate planning attorney for a review of your estate planning and asset protection documents. Even if you are unaffected by any such events, we

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recommend that you review your estate plan with your estate planning counsel at least every three years.

For more information please contact us at 212-682-1555 or by email at info@maclean-law.com.

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