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LAW OFFICE
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BASIC ESTATE PLANNING IN AN HOUR OR LESS
FOR CLIENTS OF
STUART ADAMS LAW OFFICE, P.S.C.

Not many of us want to think about our own death or the death of someone close to us. We all realize our time will come, but many of us always seem to be too busy to attend to this inevitability "today." However busy we are, it's not all that hard to get through some basic estate planning in an hour or less. After all, if you don't plan for this, be "comforted" that the government has! Then on the other hand, couldn't you spare an hour of your time TODAY to save those you leave behind the added responsibility and uncertainty which will also be inevitable if you don't do at least some minimal planning?

If you have ever had to attend to the affairs of a deceased relative or friend, you know the task can be overwhelming. Going through personal effects is one thing, getting a motor vehicle or piece of real estate transferred or sold is another. Dealing with creditors, whether they be medical related or just credit cards and utilities, requires some endurance and organization. Imagine how hard it will be for you, if the task is yours, or how difficult it will be for those you leave behind, if you have not done a little planning and organization beforehand.

You can make the aftermath of your own passing much easier in an hour or less. Likewise, you may be able to prevent an incredible loss of you own time, if you can persuade your relatives to do likewise. While some people need substantial tax advice and business planning as part of their estate plan, others can at least improve their situation with just a handful of simple steps. Following is a minimalistic approach to estate planning. This is not an attempt to cover all situations, but is a starting place for most of us.

STEP 1 Understanding the Process

You should realize that a will is a document which has no real legal effect until death. Your will can be changed at any time up until the time of your death, or until you are no longer competent to change it. The issue of competency to make or change a will is outside the scope of this article, but suffice it to say, it can be a complex issue.

You should also realize that a will is a legal document which requires a certain amount of formality, both in drafting and execution, for it to be "legal." The law of wills is typically decided on a state by state basis, with each state having the ability to regulate the

8909 Featherbell Blvd.
Prospect, Kentucky 40059
PHONE (502) 509-4115
E-mail: biz-law@juristechnology.com Web Site: www.juristechnology.com

"magic wording" required for the state to accept it as valid. If not properly drafted and executed, a will may be ruled invalid, meaning it has absolutely no impact on the estate, except that the parties may very well have spent a great deal of money, sometimes the entire estate, litigating the issue of validity of the will or trust.

Most states allow a holographic will to be deemed valid in certain circumstances. A holographic will is one which is written by the person whose estate is at issue, typically being written entirely in their own handwriting. Unfortunately, this is not the only requirement for such a will and there are all too many examples of other essential elements being missing, resulting in invalidity.

State laws typically require wills to be probated by a court of the state in which the person died. Additionally, some wills must also be probated in other states or jurisdictions, if there is property in those states, such as real estate. If you have an interest in real estate located in another state, you should investigate whether or not your estate planning documents will be impacted by this fact. There are often ways to minimize the impact of this situation, such as with trusts.

Finally, on the general planning side, remember that a will only deals with assets of the "estate." A person's estate, for purposes of this article, means that property which will pass to a beneficiary according to a will or trust. There is a difference between your “taxable” estate and your “probate” estate. Transfers during your life may be subject to state and federal gift taxes. Upon your death, the transfer of your interest in assets may be subject to taxes at the state and federal level. This is your taxable estate. Assets which pass through your estate may be substantially less than those included in your taxable estate. Examples of assets which will not pass though your probate estate but which might be included in your taxable estate would be:

- Residence which, according to the deed by which you received it, will pass "in survivorship" to someone else, such as your spouse. Regardless of what your will says, if you own real estate in this fashion, it passes automatically upon your death.
- Bank account which is payable on death to another. In this case, the bank has a duty to transfer the balance of the account to the listed beneficiary regardless of what the will may say.
- Insurance policies payable on death to a beneficiary. These proceeds do not pass according to a will or trust, unless the beneficiary clause of the policy identifies the estate or the deceased individual as the beneficiary. The insurance company, in this case, has a contract requiring it to honor the beneficiary clause, even if it is outdated.

STEP 2 Looking at Your Balance Sheet

The next step is to try to get at least a basic picture of what you own and what you owe. Subtracting what you owe from what you own, you find the balance, which will hopefully be a positive number. Regardless of whether it is or not, you must then decide:

8909 Featherbell Blvd.
Prospect, Kentucky 40059
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E-mail: biz-law@juristechnology.com Web Site: www.juristechnology.com

- Who will receive each asset in which I have an interest?
- Who will receive these assets if the first person is not alive at my death?
- Who will have the duty of gathering my assets together, paying my bills, going to probate court and dealing with creditors? This person is your executor.

A basic Estate Planning Fact Sheet is attached for your convenience in assembling information on your estate. It is critical to spend the time and effort to accurately document:

- what assets may be included in your taxable estate;
- how title is held to these assets;
- whether they are subject to transfer outside of probate (such as a survivorship interest in real estate);
- whether they are subject to any debt, such as a mortgage on a house or loan on a car;
- what you want to happen to the equity in each of these assets upon your death.

STEP 3 The Basic, Simple Will

Once you have a handle on the items above, you are ready to help your legal counsel know how to prepare a basic will. A typical will for husband and wife might, in addition to the "boilerplate" language required by state law, simply provide that you leave everything to your spouse, if he or she survives you. It would also appoint an executor to serve as the person who will take your will to probate court, be sworn in as your legally appointed representative, and to carry out the instructions of the will. Your spouse's will would mirror yours, leaving everything to you and appointing you executor.

A slightly more complicated "simple" will would include provisions identifying who would receive your assets in the event your spouse died before you, creating a "lapsed legacy," or identification of instructions for disposition of property which cannot be carried out. Additionally, it is always good to provide for a successor executor, such as in the case you have appointed your spouse but your spouse has died before you. Remember, in appointing an executor, this individual is probably entitled to a fee, according to state law, for administering your estate. The fee is often, as in Kentucky, tied to the value of your probate estate, as a percent of the estate, and is often entitled to come "off the top" like taxes and funeral expenses. For this reason, you may want to reduce your probate estate, a topic beyond the scope of this article.

The situation described above is very basic. There are a few ideas later in this article which you may want to discuss with your lawyer, if your situation is more complicated. Once you've given instructions to your lawyer on how to prepare your will, you're done with the most basic level of estate planning. Now all you have to do is execute your will, covered briefly later on, and then put your will in a safe place.

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STEP 4 What About Documents Needed Before Death?

Remember that a will only has legal significance in the event of your death. Unfortunately, in the event of a serious illness or injury, there may be a long and difficult period of time between death and the situation leading to this ultimate conclusion. We all realize that we, or a loved one for whom we would have the duty of becoming the care giver, might fall into a state in which our body would function but our mind would not be capable of exercising its normal capacity.

In the event we are so severely injured or ill that it becomes inevitable we will pass on to our final reward, most states have passed laws allowing us to create what is sometimes called a "living will." In Kentucky, this is called a medical designation form and in other states it goes by various names.

The living will is a legal document, which must contain very specific language and be executed with whatever level of formality is required by the laws of the state in which it is to be enforced. The basic object of this document is to allow you, in the event you are in a terminal health situation, and you are incapable of making decisions on your own behalf, to leave legally enforceable instructions for a representative as to certain fundamental levels of treatment and care until your death.

An example of instructions you may leave would include that you do (or do not) want "extraordinary" efforts made to attempt to save or moderate your situation. The legal definition of extraordinary is a matter of case law and legislative intent, on a state by state basis. There is also some federal law on this, as a result of some cases which you may have seen in the news a few years ago. If you are concerned with this, as all of us should be, this may deserve further research on your part, including discussion with your legal and medical counsel. One of Kentucky's provisions, for instance relates to "life prolonging treatment and artificially provided nutrition and hydration," which the "grantor," or person leaving the instructions, has the choice of having continued or discontinued under the circumstances set forth in the living will.

In many states, the law allows you to appoint someone, called a health care surrogate in Kentucky, to act in your place, but pursuant to your "check the box" choices in the living will, to instruct your treating physician what level of care you are to receive under the terminal conditions set forth in your living will. This document would not apply in the situation of even a prolonged illness or injury where there is a reasonable anticipation you will eventually recover.

The living will typically gives the health care surrogate the same power, similar to a power of attorney, to make and enforce decisions to the extent you have specified them. In Kentucky, for instance, if your doctor or hospital will not honor your legally valid living will, your health care surrogate has the authority to discharge you from their care and to retain another doctor or hospital which will honor your instructions.

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Many people feel strongly about the issue of a living will. The law does not require you to have one, just as it does not require you to have a property disposition will. If you don't, however, there are laws which, in the infinite wisdom of the legislatures of various states, are designed to resolve this situation. We suggest you strongly consider picking up this "tool" to allow yourself to make these decisions yourself, while you are competent to do so. Obviously, if you are in an accident and not conscious, it may be too late.

STEP 5 A Document Which Can be Useful Before Death

The final legal document we recommend you consider as part of your basic estate planning documents is a power of attorney (POA). The purpose of a power of attorney is to give to another, your authority to act in certain circumstances. Typically, the basic power of attorney takes effect upon execution and is only legally effective during the life of the grantor of that power. Contrary to widespread belief, the power of attorney ceases to have any ongoing authority upon the death of the grantor. There are several varieties of power of attorney (POA) described below.

General Power of Attorney

The general power of attorney, as the name indicates, gives any authority you have to another. The basic form allows this transfer immediately upon execution. It does not remove the power from you, but it does allow another to exercise the same authority at the same time. Unfortunately, we've seen this result in a race to the bank, so be careful that you give the authority only to someone you would trust under any circumstance. You should also realize, practically, that some banks and financial institutions, as well as some medical related facilities, may require their own "magic language" be inserted in such a document, so this may take some research in some circumstances.

"Durable" General Power of Authority

Just as a POA ceases to give authority upon the death of the grantor, the law of many states provides that it also ceases upon the "disability" of the grantor. What is competency or disability is, once again, a matter of state law. Generally, however, it means you're no longer able to make decisions for yourself, to the extent you could before the onset of some condition, such as serious illness or injury.

Since this may be just when you need someone else to handle your affairs for you, many states allow a POA to be drafted in such a fashion that it will retain legal authority after you lose the mental capacity to continue to make such decisions for yourself. In such a situation, the POA is considered to be "durable" in that it continues to have authority after the "disability" or "incapacity " of the grantor of the power. The exception to this durability, again depending upon state law, is that it may terminate when a court or authorized state agency makes a legal determination of incompetency. In this situation, the state will typically appoint a legal representative for the incompetent individual, such as a trustee, curator, guardian, etc., and the POA authority will be terminated as part of the process.

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“Springing” Power of Attorney

All of the POAs described above, in their typical default form, will take effect immediately. Another variety of the POA is drafted in such a form that it will have no legal effect until the occurrence (“trigger”) of some specified situation, such as disability. In this situation, the POA’ s authority is considered to be “springing” from the specified circumstance. Some people would not want another to have contemporaneous authority with them while they are still able to exercise this power. In this circumstance, the springing POA can be useful.

Limited or Special Power of Attorney

In addition to the general POA, which typically has extremely broad authority, you might find use for a very limited power of attorney. An example might be to attend to one specific matter, such as a real estate closing, handling a specific insurance claim, etc. A limited or special POA can give very limited authority to an individual or institution to take care of a transaction which is limited in time or scope, or both. It can start and end within a specified time frame and usually is limited to one transaction or one type of matter. This can be a very convenient and relatively more secure grant of authority in circumstances where it simply might be more convenient for someone else, such as your spouse, accountant, or attorney, to handle a matter for you, than it would be for you to have to do so yourself. This can be useful with real estate closings, where one spouse cannot easily attend, but the other has the power to conclude all related transactions at the closing.

“Kiddie” Power of Attorney

Years ago, I found it convenient, when children were left with a babysitter or stayed overnight with grandparents or school friends, to give the adult in charge a special variety of power of attorney. This would be considered to be a POA which would be special or limited in its scope and springing from the circumstances of the temporary “custody.” It does not involve a transfer of legal custody, which typically must be done by a family court. What this “kiddie” POA does is to give the “babysitter” the authority to get the child immediate medical treatment in the event of an emergency. That should allow this individual to take your child to the hospital or immediate care center and get treatment, if you are not able to do so within the appropriate time frame. It doesn’t typically include getting your little girl’s ears pierced, plastic surgery, etc., but it would cover a serious burn, car accident, or similar circumstance.

When we prepare this sort of document for our clients (or ourselves) we typically first photocopy our medical insurance card onto a blank sheet of paper. We then run that paper through word processing, inserting the magic POA language, as appropriate, including notary. This can usually be done on one piece of paper, so, when the POA is presented at the hospital, immediate care center or doctor’s office, the intake worker will have both the legal document and the insurance information they need to allow treatment for the child. If either element is missing, the child may have a delay in treatment.

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Step 6 Putting it Where They Can Find It

One of the obvious but sometimes forgotten aspects of estate planning is that one typically desires one's personal representative and heirs to have access to one's estate planning information and documents. Sadly, some folks will go to great lengths to get the documentation done, but put the original, executed version some place where it is hard or impossible to find after death.

It is understandable that some will not necessarily want their intended heirs to know the details of their estate plan before death. In fact, this is probably most often the case for a variety of reasons. The testator may change his mind. Sometimes it may seem desirable to keep plans private to avoid potential attempts at undue influence. It might just be nice to just have the option of some flexibility down the road without discussion, or just to "keep 'em guessin.'"

The "Death" Box

Years ago I ran across an "add on" to basic estate planning which I always try to pass on to my friends and clients interested in estate planning. This is a system assembling critical and useful information in one place for the individual or individuals who will initially be placed in the position of taking care of your affairs upon your death.

The system is a simple one, but it can be a tremendous help, typically to a surviving spouse, sibling or child, who gets the call from the dugout, when that call comes in the middle of the night. The system was affectionately referred to as a death box.

The death box is simply a fireproof box, such as you might find at any home improvement or department store. They usually seem to be some sort of gray, and are designed, as the name indicates, to withstand a fire. They have a lock of some sort, usually keyed, and come in various sizes (and therefore weights). The box is, in essence, a fireproof safe. They typically are small enough that you can "hide" them to prevent them from being stolen by the casual burglar.

They are not a replacement for a safety deposit box at a bank, but are more convenient on a day-to-day basis, and are not subject to the "freeze" rules a bank must follow upon receiving notice of the death of one of its customers. The death box is also accessible to you (and anyone you tell about it) on weekends and holidays.

You and the person you want to get the midnight call should always know where to find the death box and how to get into it (i.e. where the key or lock combination is kept - which will be someplace else). Boxes of this sort are relatively inexpensive, even for larger ones, and you should consider what you will want to put in them, because space is limited.

At a minimum, you will possibly want to leave your POA as well as your living will in the death box, so the person who will have to use the document, possibly in an emergency, will not have to wait until the bank vault opens after the weekend or holiday.

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You may want to leave your property will in the death box, or at least leave instructions as to where it is. If your lawyer has the original of your will (which I do not recommend) or if your will is in your safety deposit box, the laws of most states allow your executor or perhaps your spouse (if different) to access the vault "quickly" and only withdraw that document for probate.

Other assets in the bank vault may have to wait for inventory and assessment by the state revenue folks or some other authority, depending on jurisdiction. What the bank vault leaves out, while providing much greater security than the death box for that heirloom diamond tiara, is convenient access in an emergency, such as death. When someone dies, there is typically a flurry of activity. The person designated to be "in charge" such as a surviving spouse, may also have been injured or killed in an accident, or so grief stricken that they cannot function. In this case, if there is a logical "second in command" such as a sibling or adult "child," that person should be considered for inclusion in the circle of family or friends with knowledge of the death box and access procedure. The death box should possibly contain the following items:

- Information about (or possibly the original or a copy of) estate planning documents, such as living will, POAs and property will.
- Funeral arrangements made or preference if not made. (ex. location of cemetery plot purchased, including deed or access info, headstone location and info, or in the alternative, like the pizza commercial says: "What do you want on your tombstone?")
- Obituary draft. You have the ability to save your survivors the potentially excruciating task of figuring out what to say about you in the newspaper after you are gone. Funeral directors will typically be available to help with this task, but if you are doing this for a parent long after they have retired, you may realize you don't know all the things they did long ago, which perhaps should be included. Organizations, activities, etc. may be long forgotten. This is your chance to help them out and just put some thoughts down on a piece of paper, label it "draft obituary for me" (be kind) and stick it in the box. You can review it later and spice it up if you accomplish something noteworthy. You can also add your favorite picture of yourself for the obituary, to save your heirs the hunt.
- "Christmas" card list or abbreviated mailing list. Those left behind may not know about that college roommate, business associate or old neighbor who would be hurt that they missed your funeral. Put a list in the box with current contact information, so that they can be given notice, if appropriate.
- Funeral instructions. You might want an Irish wake with a certain brand of whiskey served or you, like the ancient Romans, might want to hire professional mourners to trail behind your funeral procession covering themselves with ashes and flogging themselves all the way to the grave site. Whatever it might be, you can leave instructions in the death box. This may be the most time sensitive inclusion in the box, so take advantage of it. If you want Amazing Grace played on bagpipes at the funeral, include a CD in the box.
- Leave your estate planning questionnaire in the box. It should be updated periodically, such as upon change of assets, but includes a handy reference to assets and liabilities.

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- Leave info on where assets are located, such as which branch to go to, in order to inquire about that account or lock box. Pick up a business card from the manager of the branch the next time you're in and clip it to the questionnaire. Likewise, put in a business card or contact info for your accountant, lawyer, insurance agents, financial advisor, doctor, stock broker, etc. Do this for all financial accounts, creditors, etc.
- At least reference applicable insurance policies, as well as the contact info for the agent or agency which has been handling this.
- If you have a deed or title to substantial assets, you may want to put the documents in the death box or reference the bank vault where they are kept. Likewise, if the mortgage is paid off or the loan retired, you may want to keep the cancelled mortgage or promissory note in the death box or reference it being located in the bank vault.

Put anything else in the box, space permitting, which it would be good for someone to be able to find quickly after your death.

PEACE OF MIND LETTER

One tool to handle making the estate fluid and flexible, while not necessarily giving the heirs the keys to the kingdom before death, would be the "Peace of Mind Letter" or "Death Letter." This strategy involves drafting a very detailed financial management plan and inventory of assets, liabilities, opportunities, and threats. This is to some extent like an estate SWOT analysis and workout plan.

The death letter would have all the details of accounts, investments, etc., but would also give the testator's advice on what they would do with the assets post mortem, at least for the short term. In one situation I've come across, the potential grantor writes up this financial inventory, analysis, and recommendations for post mortem management of the estate, and gives it to his designated executor every year at Christmas, but in a sealed envelope. The strategy is for the prospective executor to return the unopened envelope to the testator the next Christmas, in exchange for one that has been recently updated. In the event the testator dies, then the executor can open the envelope and have the benefit of immediate advice on what to do with assets and liabilities. This letter could also be placed in the "death box," as long as the executor knows where the box and key or code can be found when the appropriate time comes.

This death letter exchange program allows the testator to freely manage the financial portfolio in confidence, taking as many or as few risks as desired, without the fear that upon his death his executor will not know how to manage as intended to gain maximum advantage from the investments. By giving his heir the insight on why certain investments were made, and recommendations on the circumstances and timing of dealing with these assets and liabilities, the testator has the opportunity to coach the estate's personal representative into better management. For instance, the testator may recommend holding onto a piece of rental property until valuation comes up to a certain level, while harvesting a steady stream of rental income for short term cash flow, or to

quickly dispose of other more risky investments before the market has an opportunity to turn against them.

Unless incorporated into formally executed estate documents, this financial planning advice need not be taken by the executor once death of the testator occurs. It does, however, provide the opportunity for passing information many an executor would wish they had when the duty of administering their mother or father's estate passed to them unexpectedly. It is a tool that is easy to create with a little planning and ongoing upkeep diligence on the part of the testator, but it can be invaluable to maximize the estate for the heirs. We can help you with a template and work with your financial advisors, insurance agents, and other trusted advisors to get you started creating one that will work best for you and your heirs.

DIGITAL ASSETS INCLUDING SOCIAL MEDIA

Many of us are living more of our lives online, and engaging in networks of "friends" through social networks. Banks and other institutions, as we increase our digital life, have realized that they can or must give clients and customers secure, online access to their financial information. While this can be great for those on the move and those who don't want to have to make a trip to the local bank branch to perform transactions, it can also provide either an opportunity or unnecessary barrier for executors and heirs.

It is hard these days to open a new account or even maintain an old one without being offered online access. Many of us take advantage of this and also manage our financial records, such as checking accounts, and business accounts, in programs like Intuit's® QuickBooks®. Most of these accounts, whether stored on our own devices or on the financial institution's network, require safeguards to prevent unauthorized access, including by identity thieves who seem to lurk everywhere.

Leaving your executor a list of accounts, including physical location of a branch and contact person if relevant, as well as account number, user identification code, password, PIN, answers to security questions, and other data needed to access this information online can save time, and in some cases be invaluable in locating remote accounts that otherwise might not ever be found by an executor doing normal due diligence.

Most of us also seem to have an increasing tendency to post pictures and other information online to "share" with our "friends" in social networks such as Facebook, and engage in business relationships through others, such as LinkedIn®. One reason for writing this section is that I recently had LinkedIn's platform suggest I connect with someone who had "mutual friends." It turned out that the person they suggested was a relative who had died over a year before, but whose social media accounts apparently lived on.

While I am delighted to periodically receive social media updates from friends and relatives, including pictures of grandchildren. On the other hand, when someone dies, it seems to me that their social media accounts should exit with them. Since these accounts

can, of course, be a storehouse of treasure, in terms of the decedent's contacts, pictures, activities, and other useful data, there should be provision for the executor to harvest such data prior to terminating the account. While still active, the decedent's account could provide a mechanism to notify friends, business associates, neighbors, and others, of the passing of the account owner, as well as visitation and funeral arrangements. Pictures stored through the account, and perhaps not available elsewhere, can be acquired to be used at the funeral home, or otherwise distributed to next of kin. If you're doing estate planning, be sure you provide your executor the tools needed to access this social media treasure and to terminate your accounts within a reasonable time after death.

GETTING A LITTLE MORE COMPLEX

Complex estate planning is outside the scope of this article. Clearly, however, the simple will described above, is insufficient for many people. One basic issue, which is an add on to a simple will, is greater detail on assets which should pass other than to a surviving spouse. If each of your children or each of your siblings should be the recipient of a particular heirloom, you can give your lawyer such a list with instructions. Be careful in describing the property. I've been in the unfortunate position of accompanying an executor into a deceased's home, only to find the old will insufficiently described which diamond ring or gold mirror was to go to which heir.

When dealing with minor children, it is often appropriate to create a trust, perhaps in the will itself, authorizing a trustee or guardian, to handle the money for them until they reach a certain age. This is a minor (no pun intended) add on to a simple will, but can be critical to reaching your estate planning goals. Instead of giving that sixteen year old the opportunity to spend their inheritance on that red Ferrari, which is such a good deal, you might want to spread out the payments to them in increments over time (a spendthrift provision) or give the trustee discretion (with or without more specific limitations or instructions) on how and when to pay.

Another issue with multiple children, is whether the principal of the estate should be paid to them at the same time or paid under different circumstances. If the ages of your children are substantially different, for example where you have a son who has graduated from school and now has a good job, but a daughter who is a juvenile with many years to go before reaching emotional and economic independence, you may want to treat them differently in your estate plan. Additionally, if one of two or more siblings became gravely ill, would you want to spend the whole inheritance of all of them to try to save the one in need, or let each "float" on their percentage of the whole? You have the ability in your will or trust to decide how this situation would be handled (presumably, the way you would handle it before death, if you were still in charge).

CLOSELY HELD BUSINESS AND SPECIAL NEEDS ISSUES

Certainly some circumstances eliminate the possibility of effectively handling your estate with the simple and very basic steps above. A living trust may be appropriate, as in the case of passing on that vacation home in another state without including it in your

probate estate, or in the case of a child or spouse with special needs.

If you are the sole or primary owner of a business, you should pay special attention to the dovetailing of your estate documents and your business entity documents so that the business (and whomever will be running it immediately after your death) has authority to make payroll and rent payments, renegotiate a lease or credit terms, etc. Often a business is the most valuable asset an entrepreneur will leave behind. It could be disastrous to have to wait for an executor to have to be appointed, if a corporate or limited liability action is needed immediately and no one has appropriate legal authority, on behalf of the entity, to take the action. This can be easy to remedy, but takes at least a little planning and legal documentation. We will be happy to help with this.

GIFTS MADE DURING YOUR LIFE

I sometimes run across clients who have promised certain pieces of property to their heirs and made those gifts known before death. Unfortunately, however, I've had to take inventory as executor or attorney for the executor, and had a difficult or impossible time finding assets the testator specified. This can be really interesting when "good intentioned" relatives or neighbors get into the residence before the executor.

The "death letter" can include the location of specific assets. It can also include a picture of the asset, so it can be more easily distinguished from other items, such as "my gold mirror" or "my diamond ring," when more than one might exist. Finding a gold ring or mirror may not necessarily mean this is the one the testator intended for a specific beneficiary.

There are other techniques with which we can assist you, including video and digital wills. Since the law in each state may differ substantially with regard to the formality of drafting and execution of wills, powers of attorney, and living wills, it is critical to understand the law where you live, as well as in each jurisdiction where you have property. This is particularly true of real estate, such as a vacation home, which may require ancillary administration in the county where the real estate is located. This ancillary administration is to some extent, a second probating of the will, including qualification of the personal representative and oversight on payment of creditors such as taxing authorities and mortgage holders, as well as probate court authorization for final disposition of the property.

KNOW WHEN TO HOLD 'EM AND WHEN TO FOLD 'EM

How would you feel if your neighbor borrowed your big new riding lawn mower or something else, and then died? Sadness might turn to frustration when you learned just how hard it might be to get your property back, including the necessity of even filing a claim with the estate and having to come up with evidence of ownership.

Although the neighbor's lawn mower may seem like a silly example, making a gift during your life but retaining possession of a particular piece of furniture with family history,

or other sentimental property is something fairly common. One technique we use in drafting estate planning documents for our clients is to include a “disclaimer” section specifying items of property likely to be found at the decedent’s residence, but already gifted prior to death, as well as any other items stored long term in your residence but not owned by you. The section carefully and fully describes the item, the location, and the person to whom it was gifted prior to death or identifies the true owner, so it can be picked up by the “owner” without necessity of extended probate administration, and without being included in the decedent’s estate for tax and other estate administration purposes, such as including it in the estate inventory, making sure it is insured until the estate is closed, etc.

EXECUTING YOUR ESTATE PLANNING DOCUMENTS

All too often, I’ve had to litigate the situation in which good estate planning documents were contemplated or even prepared, but the process fell apart at the execution stage. Remember that the rough draft of the will has essentially no impact on your estate. Each state has laws regarding the formality of execution of estate planning documents, which must be followed. Kentucky and many other states, for instance, have a “self proving” will provision, allowing a properly drafted will to be introduced in probate court without the presence of the witnesses who also would have signed. This simple language can be inserted, where available, reducing the time and cost of getting the will probated. A “proper” will which is not properly executed, may be worse than no will at all.

A WORD ABOUT FORMS AND SOFTWARE PROGRAMS

There are lots of forms, including those generated by software programs like Quicken, or available on the Internet, which can generate an estate planning questionnaire and even a wide variety of estate planning documents, seemingly ready to be executed. The apparent convenience and low cost of these programs ensures their continued availability in the marketplace and their attractiveness as an alternative to an estate plan prepared by a lawyer. Unfortunately, despite the numerous disclaimers which typically accompany such forms and form generating systems, there is always a danger the resulting form or work product will not be in the best interest of the user.

As repeatedly mentioned above, estate planning documents are subject to the ever changing laws of the states, as well as to changes in state and federal tax consequences. No matter how “tailored” these forms and systems profess to be, there is always a danger they are out of date or unsuited to your specific circumstances. Sometimes you don’t know what you don’t know, and a conference with an attorney can help develop these issues and answers for you. Additionally, even a properly drafted estate planning document should be reviewed if your circumstances change, such as upon the emancipation of a child, divorce, moving to another state, acquiring real estate in another jurisdiction, etc.

WHAT IF I WANT TO CHANGE MY WILL?

A will can typically be revoked by tearing it up. That, in itself is a good reason to keep it accessible. Sometimes simple wills can be changed easily with what is called a

8909 Featherbell Blvd.
Prospect, Kentucky 40059
PHONE (502) 509-4115
E-mail: biz-law@juristechnology.com Web Site: www.juristechnology.com

codicil. We typically prefer to simply update a will with the new changes, rather than drafting a codicil to add to and therefore modify the original will, but there are circumstances where we draft codicils. Remember, however, an amendment to a will or a codicil will typically, as a matter of state law, require the same precision of drafting and formality of execution as does an original, primary will. With a codicil, however, there is also the need to make sure the language allows for clear identification of and integration with the provisions of the primary will.

THE TEAM APPROACH

Drafting an estate plan is a serious matter, no matter how simple or complex your estate. Sometimes, as with blended families or families including a member with special needs, there may be complex issues which are beyond the ability of a single person to resolve. In such cases, as well as in the case of any substantial estate, we recommend a team approach. Your estate planning team can be extended beyond yourself and your attorney to include your accountant or tax counsel, your insurance agent, your financial advisor, and in some cases, medical or family consultants.

In some situations, such as with family businesses, which may be the primary source of income for several generations of members of a family, we have worked with family business consultants and professional facilitators to create a succession plan and estate plan that will help ensure a smooth transition of power from the founders of the business to those best able to direct its continued success.

This area can be a particularly difficult one to work in and can seem impossible if looked at only from the “inside.” Parents, for instance, being parents, may have one agenda, while children or grandchildren may have another. What is best for the family may not be best for the business, and vice versa. One thing is certain. If a consensus is not reached before the most senior family members of the management team depart from the day-to-day operation of the business, the heirs will likely have a rougher time remaining in an active and successful family business.

THE ALTERNATIVE TO ESTATE PLANNING

Once again, if the simple steps above don’t fit your timetable, be assured that the “government” has made provisions to take care of most of these things. For instance, a public administrator can be appointed in most states, on behalf of creditors, to squeeze out debts owed to them if you do not have a will. Additionally, take comfort that the laws of every state provide for intestate administration of your estate, giving statutory shares to the “heirs” as found in the statute, and with the preference determined to be appropriate in the infinite wisdom of the various legislative bodies which have drafted such laws.

On the other hand, is this what you want or what is best for your heirs? If not, take a little time right now, before procrastination sets in, to resolve this for those you will leave behind. Likewise, if you are likely to get the midnight call for a relative or close friend, you might want to encourage them to attend to such things also.

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Prospect, Kentucky 40059
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E-mail: biz-law@juristechnology.com Web Site: www.juristechnology.com