HOOK LAW CENTER

SPECIAL REPORT

Estate Planning

This Special Report is brought to you by

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Estate planning is a process by which you plan for the management of your affairs and the disposition of your property, if you become disabled or die. Although many people believe estate planning is for the elderly, accidents and diseases can occur at any time. Asset protection planning is the process that you use to protect your assets and gifts to your beneficiaries from the claims of third parties including creditors or former spouses. Financial planning is the process by which you plan to provide for your own support and that of your dependents during your lifetime and accumulate an inheritance for your dependents. Although these three separate areas have been traditionally handled by different teams of professionals, changes in our society have made them intermingled. Thus, a comprehensive plan that is intended to achieve all of your life goals should incorporate all three of these disciplines.

There is a 58% probability that you will suffer a disability of 90 days or more during your lifetime, during which you will require assistance with the management of your property and personal affairs. There is a 43% probability that you will require nursing home care that will have a devastating impact on your life savings and on your financial plan. During retirement there is a 50% probability that a couple age 65 will incur at least $260,000 of uninsured health and long-term care expenses and a 5% chance of $570,000 of unfunded health and long-term care expenses. You will be virtually assured of inflation during your retirement, which may result in the cost of the goods and services that you purchase rising, while your income remains constant. Many people will spend 25% of their life in retirement, and find that they do not have the funds to enjoy retirement the way they had envisioned. Additionally, America is a litigious society with 50% of marriages ending in a divorce. Death is a certainty. It is not uncommon for a couple to be simultaneously saving for their retirement, while assisting their parents and their children. “Boomerang” children, those who return home after college, are becoming increasingly common. Many people face a challenge in prioritizing retirement planning over college planning. Although it is possible to borrow money for college, it is not possible to borrow money for retirement. You have an obligation to not only provide support to your minor or disabled children but, should they require it, to also provide support to your parents. These added expenses and support obligations can wreak havoc on your finances. These challenges justify the need for most of our clients to adopt and implement a comprehensive estate, asset protection, and financial plan.

A complete estate, asset protection, and financial plan should address your

needs as well as the needs of your spouse, children and grandchildren, parents, life partners and business associates. The planning process requires you to consider a wide range of legal, financial, emotional, and logistical issues. The failure to plan, and to take into account the needs of your family, will cause you or your family to incur unnecessary expense, taxes, effort, delay, and stress, and may cause you to run out of money during your lifetime, spend your children's inheritance, and rely on your children or other family members for financial assistance (i.e. leave your children or family a negative inheritance).

DISABILITY

When planning for disability, you should consider two separate matters:

1. Management of your property and personal affairs during a period of disability.

Guardianship and Conservatorship - If you fail to plan, a court may appoint a guardian and/or conservator for you, after a formal legal proceeding. Most families prefer to avoid guardianship, due to the intense court supervision which accompanies guardianships. A guardian is responsible for making decisions regarding the personal affairs of an incapacitated person, such as support, health care, education, and residence. A conservator is responsible for managing the estate and financial affairs of an incapacitated person. In many cases, the court will appoint the same person as both the guardian and conservator of the incapacitated person.

The appointment process is lengthy, expensive, and often embarrassing. It invites the prospect for disputes over who will be appointed as the guardian and conservator. After their appointment, both the guardian and the conservator of the incapacitated person must file annual reports and accountings.

Joint Bank Account - Many people use a joint bank account as their disability plan. The co-owner of the account will deposit your income into the account and pay your bills. A joint bank account can be very helpful if you become disabled. However, a joint bank account is, at best, an incomplete plan. It also creates challenges sometimes. The co-owner does not have the authority to perform many acts, including filing your income tax returns or selling your real property.

Additionally, the co-owner will own the account at your death, and if the co-owner has marital or creditor problems, the co-owner's former spouse or creditors may seek to seize the assets in the account.

Trust Agreement - A trust is an effective means of managing assets for an incapacitated beneficiary. The trust is a separate legal entity. One person (the "trustee") holds property, usually real estate or investments, for the benefit of another (the "beneficiary"). The person who gives the property for the trust is known as the "donor" or "grantor." The trustee holds legal title to and is responsible for managing, investing, and distributing the trust property for the benefit of the beneficiary. A trust may have more than one trustee or beneficiary.

Depending on your situation, establishing a trust offers several advantages. The most well known advantage is the avoidance of probate. That is, at the death of the donor, any property held in the trust prior to the donor's death passes immediately to or in further trust for the benefit of the beneficiaries by the terms of the trust without requiring

probate. This can save time and money for the beneficiaries. Certain trusts can also result in tax advantages for both the donor and the beneficiary, or they may be used to protect property from creditors or help the grantor qualify for Medicaid. Trusts are private documents, and only those with a direct interest in the trust need to know of trust assets and distribution. If well-drafted and funded with assets, another advantage of a trust is its effectiveness as a means of managing the assets for the benefit of an incapacitated beneficiary. Although many attorneys can draft trusts, it is important to work with an attorney who has seen your specific type of trust in action.

There are many types of trusts. Some of the more common trusts are discussed below:

- A *Revocable Living Trust* (RLT) is sometimes referred to as a “living” or “inter vivos” trust. A RLT is created by a trust agreement between the donor and trustee, and the transfer of asset to the trustee occurs during the life of the donor. The donor is frequently the initial trustee of the RLT. With a RLT, the donor maintains complete control over the trust and may amend, revoke, or terminate the trust at any time. Upon the donor’s disability, a successor trustee will administer the trust assets and make distributions for the donor’s benefit. Upon the donor’s death, the successor trustee will distribute or retain the trust assets as provided in the trust agreement. The donor is thus able to reap the benefits of the trust arrangement and the avoidance of probate administration for the trust assets, while maintaining the ability to change the trust at any time prior to death. A revocable trust has several disadvantages: 1) funding the trust can be expensive and time-consuming, 2) the trust is subject to the grantor’s creditors, 3) the trust assets are countable resources for determining the grantor’s Medicaid eligibility, and 4) the trust assets are included in the grantor’s estate for estate tax purposes.

- An *Irrevocable Trust* is created during the life of the donor, who thereafter may not change or amend the trust. The trustee will administer and distribute any property placed into the trust as provided in the trust instrument itself. However, the donor can be a beneficiary of the trust. For instance, the grantor can provide that he or she will receive income earned on the trust property. Irrevocable trusts are frequently used to 1) own life insurance policies when the insured does not wish the policy included in his or her taxable estate for estate tax purposes and 2) protect the grantor’s home from long-term care expenses. Although irrevocable trusts cannot be changed as easily as revocable trusts, there are a few escape hatches, such as allowing for the implementation of decanting and the use of trust protectors. An irrevocable life insurance trust is an example of a very popular irrevocable trust. This trust allows for the avoidance of the estate tax on the proceeds of a policy owned by the trust. Irrevocable life insurance trusts are also used to create liquidity for those who own land. An irrevocable life insurance trust is an incredibly powerful wealth preservation instrument which can be used to buy and sell land from the estate of a decedent.

- A *Pet Trust* is a trust created by a donor to provide instructions and funds for the care of his or her pets. Frequently, the elderly will have pets who have become their “children.” The client will want to provide for their care during his or her disability, or after his or her death. The Pet trust will contain instructions concerning care of the pets, and the management of funds to pay for their care and burial.

- A *Testamentary Trust* is a trust created by a Will. A testamentary trust is not created until the donor dies and his or her Will is probated. Although a testamentary trust will not avoid the need for probate and will become a public document because it is a part of the will, it can be useful in accomplishing other estate planning

goals. For instance, the testamentary trust can be used to reduce estate taxes on the death of a spouse or to provide for the care of a minor, inexperienced, spendthrift or disabled child or other beneficiary.

- A *Spendthrift Trust* is a trust created by a donor or grantor within his or her will or by trust agreement to protect a gift to a spouse, child, grandchild or other beneficiary. The Trust will name a trustee to administer and invest trust assets and make distribution decisions. The assets in the trust will be exempt from claims by the beneficiary's creditors and from marital claims, if the beneficiary goes through a divorce. The beneficiary can serve as a co-trustee but should not serve as the sole trustee of the trust. The term of the trust can last for the beneficiary's lifetime or for a set period of time (for example, until the beneficiary reaches age 65).

- A *Dynasty Trust* is a trust created by a donor or grantor within his or her will or by trust agreement for the benefit of his or her descendants. The trust has no termination date and continues from one generation to another. A dynasty trust must properly address generation-skipping transfer tax issues from the outset.

- A *Defective Grantor Trust* is an irrevocable trust that is not included in the grantor's estate for estate tax purposes, but the trust's income is taxable to the grantor for income tax purposes. Therefore, the value of the trust will be increased by the amount of the tax paid by the grantor, and the tax payment is not treated as an additional gift to the trust beneficiaries.

- A *Supplemental Needs Trust* can be created by the donor during his or her life or can be created by will. Its purpose is to enable the donor to provide for the continuing care of a disabled spouse, child, relative or friend. The beneficiary of a well-drafted special/supplemental needs trust will have access to the trust assets for purposes other than those provided by public benefits programs. Additionally, the beneficiary will not lose eligibility for needs-based benefits, such as Supplemental Security Income ("SSI"), Medicaid, or low-income housing.

- A *d(4)(A) Special Needs Trust* is a trust created by a parent, guardian or court on behalf of a disabled person, under the age of 65 years, with the disabled person's resources. The trust is not a resource for SSI or Medicaid eligibility. The funding of the trust will not use a period of ineligibility for needs-based public benefits. The trust funds can be used, during the recipient's lifetime, to supplement the recipient's public benefits; however, at the recipient's death, the trust funds must be used to repay the state for any Medicaid benefits provided to the recipient during his or her lifetime.

- A *d(4)(C) Special Needs Trust* is a trust created by 1) a parent, guardian or court on behalf of a disabled person or 2) the disabled person with the disabled person's resources. The trust must be established by a nonprofit corporation. The trust is not a resource for SSI or Medicaid eligibility. The funding of the trust will not cause a period of ineligibility for needs-based public benefits. The trust funds can be used, during the recipient's lifetime, to supplement the recipient's public benefits; however, at the recipient's death, the trust funds must 1) be used to repay the state for any Medicaid benefits provided to the recipient during his or her lifetime, or 2) be retained in trust for the benefit of other disabled persons.

- A *Settlement Preservation Trust* is a trust created for the benefit of a personal injury plaintiff who needs the assistance of a trustee for the management of the recovery and may potentially need Medicaid assistance to pay for medical expenses. The trust is initially a support trust but may be converted by the trustee to a *d(4)(A) Special Needs Trust*.

General Durable Power of Attorney – Virtually every disability plan should include a general durable power of attorney. With this document, you appoint an agent to manage your property and affairs. You should select the agent carefully. The agent will have a great deal of authority to act on your behalf. The durable power of attorney should name a successor agent to serve if the primary agent fails or ceases to serve. The durable power of attorney may be drafted to be effective immediately or to be effective only if you become disabled. The durable power of attorney is not a form, and there is no one power of attorney that is appropriate for all people. The power of attorney should be drafted to meet your specific needs and circumstances. Since powers of attorney are creatures of state law, it is important that you ensure your power of attorney complies with the laws of each state in which you reside and own property. For those who fail to properly implement a durable power of attorney, guardianship is likely.

Whether you use a joint account, power of attorney, a trust, or both a power of attorney and trust, the selection of the joint account owner, agent, or trustee is the most important decision you will make. Even a good disability plan will be frustrated by poor management. You should ensure that the person you select is honest, willing to devote the necessary time, will respect your plan and wishes, and has the necessary skills and expertise to assist you. Hook Law Center can assist you in preparing the necessary documents and in selecting an appropriate person to implement your disability plan.

Where appropriate, Hook Law Center serves as a trustee or an agent for its clients.

2. Health Care Decision-Making

Advance Medical Directive (AMD) - Your health care decision-making is a second concern, if you suffer a disability. In addition to planning for the management of your property, you should provide for your health care decision making in the event that you become disabled. You have the right to make your own health care decisions, including the right to refuse health care. If you are disabled, your health care representative may make health care decisions for you; however, the state has the right to regulate the manner in which they make those decisions, including the evidence your health care representative must produce to make decisions for you.

Virginia has adopted an Advance Health Care Directive Act. This Act authorizes you to: 1) appoint an agent to make health care decisions for you if you are disabled, 2) give instructions concerning your health care if you are dying, and 3) authorize health care providers to keep your family informed. Because AMDs are also creatures of state law, your AMD should comply with the laws of each state in which you reside. If you live in different places throughout the year, you will probably need an advance medical directive in each state.

You should also provide your regular physician and your agent with a copy of your AMD and ensure that it is available if needed. You should discuss your wishes with your family. Additionally, you should carry an AMD card with you in your purse or wallet which provides notice to medical personnel that you have executed an AMD and provides the names and contact information of your designated agents.

Every estate and financial plan should contain an AMD. None of us want to see our family and loved ones involved in expensive and adversarial litigation in order to carry out our wishes. However, the lack of such a directive has resulted in litigation for many families (for example, litigation has resulted in several nationally-known cases involving Terry Schivo and Nancy Cruzan). Hook Law Center assists its clients in: 1) developing a customized AMD that documents your preferences, 2) selecting an appropriate agent to implement those preferences and 3) registering your AMD, so it will be available when and if needed.

DEATH

Estate planning for death centers on planning for the transfer of your assets to your beneficiaries in the most efficient manner and at the lowest possible cost.

Wealth Transfer Taxes - The uncertainty concerning federal estate tax rules continues. The federal government has a unified gift and estate tax. These taxes provide for an unlimited marital and charitable deduction. The gift tax has an annual exclusion of $14,000 (in 2013) per year per donee and an unlimited tuition and medical expense exclusion.

In 2013, , the exemption amount is $5.25 million with a rate of 40% applied above the exemption. Any unused exemption can be used at the death of the surviving spouse. This process is called portability, since the credit is portable from one spouse to the other.

2012	35%	$5 million (indexed for inflation)
2011 & thereafter	55%	$1 million

Your beneficiaries will receive an income tax basis increase to the date-of-death value of your assets. Thus, although the gift tax is exclusive of the calculated tax and the estate tax is inclusive, certain low basis assets should remain in the taxable estate in order to achieve this adjustment in basis. Additionally, the federal government imposes a generation-skipping transfer tax upon gifts to grandchildren or other beneficiaries who are two generations below your age, when the gifts in the aggregate exceed your federal exclusion listed above.

Virginia's probate tax is $1.33 per $1,000 of probate assets. Many of your assets, however, will not be included in your probate estate. For example, life insurance, IRA accounts, or annuities payable to a named beneficiary are not included in your probate estate. Real or personal property owned jointly with the right of survivorship with another person who survives you will not be included in your probate estate. Generally, only assets titled solely in your individual name without a payable-on-death or beneficiary designation are included in your estate.

Virginia does not have a gift, inheritance or estate tax. If you own real property in another state, however, the other state may impose gift, inheritance, probate, or estate taxes on the property in that state.

Death taxes may be reduced or eliminated through appropriate planning. If you have an estate in excess of the exclusion, you can reduce the estate taxes that your estate will pay through estate planning. The available planning methods include:

- Re-titling jointly-owned assets to permit use of both spouse's applicable credit amount,
- Credit shelter trusts,
- Marital trusts,
- Annual exclusion gifts,
- Tuition gifts (including use of 529 plans),
- Payment of medical expenses
- Irrevocable insurance trusts,
- Sales of appreciating assets to grantor trusts,
- Creation of family partnerships or limited liability companies to permit use of discounts in the valuation of your assets,
- Personal residence trusts,
- Charitable gifts including outright gifts, charitable gift annuities, pooled income funds, private foundations, donor advised funds, or charitable trusts.

Hook Law Center can help you 1) determine which of these methods are appropriate for you and 2) implement a sound plan to minimize wealth transfer taxes.

Disposition of Assets - You may dispose of your assets at your death by many means, the most common being by a Will. Depending on the types of assets that you own at your death, your Will may have to go through a court-supervised probate administration in order for your assets to pass to your beneficiaries. Probate can often be a time-consuming and expensive process.

The probate process can be avoided, at least in part, by the use of RLTs (see prior discussion of RLTs in Disability planning section), proper titling of assets or designations of beneficiary. For example, if title to real estate is held jointly with the right of survivorship, title to the real estate will pass automatically to the surviving joint owner at your death. The same holds true for bank accounts and other assets held jointly with the right of survivorship. Similarly, you can make certain financial and investment accounts "transfer on death" or "payable on death" to named beneficiaries. You can and should also designate specific beneficiaries of your life insurance policies, annuity contracts, 401(k) plan accounts, 403(b) accounts and IRA's. At your death, those assets will automatically pass to these designated beneficiaries or co-owners despite any contrary provisions in your Will or RLT.

Notwithstanding the convenience of probate avoidance techniques, everyone should have a Will for a complete estate plan. A Will is an ideal document to designate a personal representative to settle your affairs, pay your bills, file your tax returns at your death, appoint a guardian for minor children, apportion taxes among your beneficiaries and dispose of your assets not disposed of by other means. In selecting your personal representative, you should consider family members, your friends, your business associates, your bank and your attorney. You should not automatically waive surety on the executor's bond. It is insurance for your family's protection.

Once you have completed your Will and, in some cases, RLT, it is crucial that you review them in connection with your form of ownership of assets and beneficiary designations to ensure that your overall estate plan works as you wish.

You should consult us to determine: 1) which method of disposing of your assets is appropriate for you and your family and 2) who is the appropriate person to serve as your executor or trustee to settle your final affairs at death. In some cases, a designation of beneficiary form and a simple Will are all that are needed to dispose of your assets upon your death. However, in other cases, a more detailed plan is needed. For example, a trust is normally considered for minor or disabled beneficiaries. Many estate plans will use several methods of transferring assets. In all cases, the choice of the person who will settle your affairs, whether as an executor or trustee, is the most important decision you will make. Hook Law Center can help guide you through this planning process and, where appropriate, serve as your executor or trustee.

Estate Planning for Same-Sex Couples

Same sex couples present different estate and financial planning issues from traditional married couples. Under federal law same sex couples may not marry. However, there are over 1,000 federal statutes in which marital status affects eligibility for federal benefits. For example, a same-sex couple can not use the Married Filing Joint Returns income tax table, but must file separate returns using the tax table for single individuals. Virginia law forbids marriage by same-sex couples and the creation of contracts or legal status that would convey to same-sex couples the same rights that marriage would grant. Therefore, in Virginia a same-sex couple may not enter into a Domestic Partnership agreement.

Additionally, default legal rules (for example, preferences for guardian, conservator and estate administrator) will frequently be contrary to the couple's wishes. As a result, formal estate planning is critical for same-sex couples. Because of legal, religious and societal issues (including hostile family members), same-sex couples face a real threat to the execution of their wishes. It is generally advised that same-sex couples attempt to avoid the probate system through a will; instead, they can use titling mechanisms, such as JTWROS, which decrease the chances of litigation. Therefore, it is critical for same-sex couples to execute detailed and legally enforceable instructions concerning the management of their financial and health care in the event of disability and the disposition of their assets and remains in the event of death. In addition, same-sex couples must confront the impact of federal and state taxation. For example, the unlimited marital deduction is not available to them. Therefore, the couple faces the potential of significant death taxes on the first of them to die and the need for liquidity to pay those taxes.

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