

# Estate Planning Guidance for Farm Families



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# Choosing an Attorney

## **Referral Sources:**

Friends, family, business associates

Other attorneys or financial professionals (accountants and financial planners)

County and State Bar Association - Trusts and Estates or Elder Law groups

Professional Organizations - look for criteria for admission and whether the organization promotes the profession educationally and in terms of regulation

## **Educational Designations to Denote Specialty Studies:**

LLM - Masters in taxation with accredited program for sophisticated issues in estate planning and taxation generally entailing 20 plus credit hours

Estate Planning Certification - Some American Bar Association accredited programs such as Temple; will have at least 9 credit hours (essentially first half of LLM studies focusing on estate planning)

# Specialty Designations for Practice

Understand any eligibility criteria for membership to professional organizations to gauge whether truly reflecting specialized expertise or merely a marketing tool

Some solely for attorneys - e.g. National Association of Elder Law Attorneys has Certified Elder Law Attorney (“CELA”); National Association of Estate Planners & Councils has Estate and Planning Law Specialist (“EPLS”)

Both of the above organizations have rigorous practical experience requirements (time in practice and substantive area evaluation) in addition to CLE documentation requirements, colleague recommendation requirements and independent testing requirements;

American College of Trusts and Estates Counsel - admission via nomination by College

Some multi-disciplinary - NAEPC also has Accredited Estate Planner (“AEP”) designation that has different eligibility

Other complimenting designations: CPA, CLU, CFC, CFP and CTFA

**Be conscientious as to what may appear to be glamorous but in reality is smoke and mirrors**

# Preparing for Your Attorney Meeting

## Documents to Gather

Any existing estate documents - starting point and as a reference if later under review

Bank accounts - looking at how titled and for identification of persons with powers or payable on death instructions (which render the account proceeds as non-probate passing by operation of law vs. will)

Stocks, CD's, retirement accounts, profit sharing and annuities

Unusual assets - e.g. antique automobiles, clocks or other unusually valuable assets

Deeds - how property titled and any survivorship rights

Life Insurance policies - beneficiary designations

Safety Deposit Boxes

Business documents as appropriate - e.g. partnership or LLC operating agreement

Contractual assets

Any proprietary questionnaire - may look for more general background information, including personal information so as to special needs as well as financial needs

Special needs - e.g. disabled spouse or child, non-citizen spouse, second marriages, different circumstances as between children

# Formulation of Goals

Estate planning encompasses the accumulation, conservation, preservation, and transfer of an estate (assets) through planning and implementation of an estate plan that achieves the client's goals while maintaining financial security throughout each phase of planning.

Financial needs - determine need for tax planning or succession planning as well as assets required for lifetime

Other transfer mechanisms - generally beneficial to transfer outside of estate so as to avoid taxes and meet eligibility criteria under various programs (e.g. Medicaid planning)

Risk Management issues also to be considered - estate planning not in a vacuum

# Meeting with Your Attorney

Can be with other professionals - assembled team from the onset

Can be with individuals or group but must have an identified client and discussion of conflicts

Some attorneys offer preliminary meetings in advance of retention

May have them in attorney's office or at remote location - better to physically meet

# Discussion of Goals and Possible Vehicles to Achieve

Host of different types of trusts - e.g. Credit Shelter Trust, Disclaimer Trust, Marital Trust or Special Needs Trusts, ILIT

Discussion may include lifetime gifting

Discussion should include play out of “worst case scenarios” so that the benefits and limitations of decisions can be fully evaluated - e.g. simultaneous death provisions, irresponsible conduct of children; catastrophic events to others

Note that relationship is confidential and attorney should probe into personal matters

# Identify Functionaries of the Estate

Executor/Executrix - marshals estate assets, identify claims against estate, file appropriate tax returns, distribute assets; time, place and complexity considerations should drive the appointment

Trustee - as “manager” of any created trust to ensure that income is payable to or preserved for the benefit of the trust beneficiaries

Guardian - in case of minors or incapacitated persons will make all legal decisions and be responsible for child; may be different than trustee who may only handle financial components

Can have other fiduciaries such as Trust Protector or co-trustees but may be more problematic

Always have contingent functionaries in the event a person is unavailable or declines



# Discussion of Probate Process

Will filed with Surrogate of county of residence with death certificate - 10 days after death Letters Testamentary issued to Executor or Letters of Administration if the Court appoints an Administrator if executor does not qualify or declines

If assets less than \$10,000, executor can file affidavit and no probate

Notification - within 60 days notice to spouse, heirs and all beneficiaries, entitled to copy of will; proof of service with Surrogate

Marshalling assets - Inventory and accounting

Settling debts and sale of assets

Tax filings - e.g. inheritance tax return within 8 months to avoid interest

Distributions to beneficiaries

# Probate Issues

## Will contests and probate challenges -

Challenge to validity and authenticity of document - must be filed within 4 months of will being admitted to probate; generally, challenge to document not being the true “last will and testament” or product of coercion or undue influence, may be issue of whether it conforms to statutory requirements

Challenges to estate administration - can seek accounting from Executor to have clear understanding of disbursements and expenses; can seek to oust executor for failure to satisfy obligation

Challenges to pre-death transfers - generally where POA or one person previously in control; claims often relating to incompetency or undue influence

Generally, if valid claim asserted, expenses to prosecute/defend borne by estate

# Follow Up

## **Document Storage and Dissemination:**

Advanced Directive to doctor to be part of medical records and to nominated persons; let people know whereabouts

Original will - generally kept by Attorney or in safe deposit box or in fireproof safe

## **Letter of instruction**

If in safe deposit box, executor may remove will, cemetery deed and life insurance policies without representative of Inheritance Tax Bureau present and prior to formal inventory

## **Review and Modification of Plan:**

Update with different milestone events or with changed economic or personal circumstances

Update if change of circumstances to functionaries

Update coinciding with changes in relevant laws and regulations - often will get communications from attorneys as part of continuing obligation to you as a client

# Power of Attorney and Advanced Medical Directive

Critical documents for continuity of life and respect for care decisions in situation where incapacitated

Not just problem with age - *e.g.* Karen Ann Quinlan and Terri Schaivo

Documents should be given to designated individuals/alternates

Execution formalities due to nature of documents

**Avoid need for Court Appointments** - guardianships and conservatorships are timely and costly

# Power of Attorney

Principal appoints person as his agent (“attorney in fact”) conferring authority to perform certain acts

Various types - “general” which provides power to contract, gift, plan, transfer real property or “limited” such as to fund a standby trust

Can have it go into effect upon incapacitation or other triggering event; generally gives power to contract, gift, plan, transfer real property - often referred to as a “springing PAO” - should have objective measures to effect (“e.g. decision of two attending physicians”)

Person must have capacity to grant - practitioners will ensure capacity

If to survive disability must state it is “durable”

IRS requires gifting language to effect gifts without tax consequences

There is a general POA Statute but there are also specific statutes dealing with language for specific types of transactions - e.g. banking

Revocation - Can be done at any time (as long as principal has capacity); must be in writing delivered to the agent and must demand/get back original if provided

# Advance Medical Directives

New Jersey Advance Directives for Health Care Act - 1992 amended in 2006 for added protections to mentally ill

Permits all medical decisions, including DNR by a designated “proxy”

Can specify directions for hydration, food, use of life sustaining equipment, procedures

If spouse designated, revoked by divorce unless specifically noted

Limitation as to physician in that can't be “attending” or employee or administrator of a health care institution in which the declarant is a patient or resident, unless there is some familial relationship

Becomes operative when patient incapacitated to make health care decision - evaluated relative to the health care decision demands - ability to understand and appreciate the nature and consequences of the particular health care decision including benefits and risks of alternatives so as to be able to make an informed decision

Need written opinion of attending physician and second physician if not “clearly” incapacitated