A Never-ending Process

Here's a Helpful Estate-planning Year-end Checklist

By LISA L. HALBERT, Esq.

As the end of the year approaches, this is a good time to take stock and review where you have been and where you want to head. Financial planners encourage annual reviews, employers start to consider year-end evaluations, and life coaches ask clients to reflect on steps taken and plans for professional growth. And estate planners encourage clients to periodically review elder and estate plans in order to confirm (or re-confirm) that all is in place.

Estate planning is not a static project to be finalized and then put on a shelf, never to be reviewed again. In truth, it is a never-ending process, one which requires periodic review in order to remain pertinent. At least every five years and upon major life events, pull out the documents and make sure they continue to be relevant. Further, periodic statutory changes dictate that your intentions will be best attained if documents are reviewed.

Among the action steps or paperwork to consider are the following:

List Your Assets

At the core of any good estate plan is a list of all of your assets, with estimated values. Generally this will include bank accounts, securities, real estate, retirement funds, insurances (life or disability), annuities, business valuations, and tangible personal property, just to name a few. Identify whether each asset is owned in your name alone (and with or without a beneficiary designation) or jointly with another, and whether it carries a beneficiary designation or is held in trust. This information informs an estate-planning attorney as a beginning point. After your estate plan is fully developed, do not be surprised if assets are re-titled or change columns.

Last Will and Testament

A last will and testament controls assets that are held in your name alone and without a designated beneficiary at your time of death. These are the only assets that go through the probate process. Your will provides a road map as to who you would like to receive your probate assets. It can also provide for forgiveness of debt or allow someone temporary use of an asset (such as living in a home until a certain age, or a certain event occurs).

Generally, a will allows you to control and determine who inherits your estate at your death. (Exceptions to this statement are that a surviving spouse and minor children have certain statutory rights that take priority over the terms of the will, even if you intended to disinherit the spouse and/or child.)

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Under the Massachusetts Uniform Probate Code (MUPC), which went into effect March 31, 2012, the probate process has now been expedited and no longer requires as much court intervention or oversight, although court supervision is available where appropriate.

If you pass away without a will (referred to as dying 'intestate'), state law dictates how your assets get distributed. Historically, if you die intestate, survived by a spouse and children, your assets are allocated among them. Under the MUPC, if you die intestate and are survived by your spouse and children of both you and your spouse (whether biological or adopted), then your spouse will receive your entire net estate, without any portion specifically allocated to the children of both you and your spouse.

The MUPC also changes the title of the person appointed to oversee the administration of an estate to a personal representative (PR). Further, the MUPC provides a list of individuals who have priority to serve as your PR. At the top of the list is your spouse, and then a child (over the age of 18), etc. However, if you die intestate and the spouse does not want to serve as the PR, the MUPC allows the spouse to designate someone else to act as the PR, even if an adult child wants to serve. And while the statute is a bit more complex, the point is that you should consider whether it is more thoughtful and prudent to effectuate your intentions by dying with or without a will.

If you want to know that all of those you love will receive certain assets, then have a will or other estate-planning document prepared. Particularly for those who might not have a spouse, but do have good friends or charitable inclinations, a will is likely a solid start to accomplish those same distributions.

A will might also have some significance prior to your death. During your lifetime, if you become incapacitated and another is put in charge of your assets and financial management, there may be occasions where gifts are appropriate and the fiduciary could look to your will in order to figure out who or what entities are most dear to you. The will, therefore, may offer some direction even during your lifetime.

Trust-based Planning

Depending upon your assets, intended beneficiaries, and other information, a trust might be a better option to accomplish your preferred distributions than a will. A trust is a document with three major players: the person who creates it (you, also known as the grantor), the trustee (who could be you and/or others and is the one who actually administers or manages the assets), and the beneficiaries (who could be you and/or others who receive a benefit under the trust). It provides an instruction manual or road map as to how you want your assets (and debt) managed and invested, as well as distributed. It is especially useful if there are minor beneficiaries and you want to know that instructions are followed long-term, or where another needs some long-term financial assistance or management (such as a special or supplementary-needs trust).

Beneficiary Designations

Confirm that beneficiary designations on your various accounts remain current and in line with your overall estate plan. Types of assets that frequently carry opportunities for beneficiary designations include insurance, annuity, retirement accounts, and/or some brokerage accounts (accounts that hold securities and other investments). Beneficiary designations (other than to your estate) completely avoid the asset going through probate, and there may be some income-tax advantages to naming a beneficiary directly, rather than your estate or trust.

Keep in mind that the individuals or entities named on the beneficiary designation are the recipients to whom the assets will be paid. If your estate plan is premised on having assets go through your probate estate, and therefore directed to be distributed through your will, but the beneficiary designation is not changed to be consistent with that approach, your plan will be defeated.

An estate plan, once completed, may use a blend of assets that are directed to specific beneficiaries via designation, as well as assets that go through probate or a trust. Retirement assets may have a better income-tax benefit if directed to specific individuals or charities (especially if you are looking to save an income-tax bite to the estate), while life insurances might be more appropriate to go through probate. Each client situation is different.

If you are divorced and intend for your ex-spouse to receive assets via a beneficiary designation that has not been changed since the divorce, revisit the designation. Under the MUPC, divorce effectively revokes certain beneficiary designations to a prior spouse. You may need to take affirmative steps to insure that the designation will be upheld by renewing it post-divorce.

Same-sex Spouses

On June 26, 2013 the Supreme Court of the United States issued a decision that addressed the legality of the Defense of Marriage Act (DOMA). The court determined that, although each state may regulate marriage for its citizens, once married, all spouses are to be treated equally under federal law. For planning purposes, this impacts not only your federal income taxes, but Social Security benefits, FMLA, and health-insurance coverage.

Retirement benefits from a qualified retirement plan will be required to allow the surviving spouse of a married couple, whether same-sex or heterosexual, to withdraw the funds over the surviving spouse's lifetime. IRAs that allow a spouse to roll over inherited assets into his or her own IRA are now allowed. There are more than 1,000 federal benefits that may be impacted by this ruling. Check beneficiary designations as well as federal tax withholding (IRS Form W-4).

Same-sex married residents no longer need to file separate federal tax returns for each spouse. Married filing jointly or married filing separately is the same for all married couples. In fact, you might want to consider amending your returns for 2011 and 2012. While an amended return is not guaranteed to benefit you, if you do not look into it, you will never know.

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For estate planners, another significant change is that same-sex couples now are able to take advantage of the unlimited marital exemption to transfer assets between spouses during life, as well as at death. For high-wealth couples, portability of the estate-tax exemption at the death of the first spouse to a surviving spouse is now allowed. With an estate-tax exemption currently at $5.25 million per spouse, this allows a same-sex married couple to have a combined $10.5 million estate-tax exemption. While you might not think it impacts you, if the surviving spouse wins a large lottery ticket or comes into money for any other reason, even after the first spouse's death, having elected portability may result in a significant estate-tax savings.

Healthcare Proxy (HCP)

Review your HCP to confirm that it identifies current designations of those whom you want making healthcare decisions for you if and when you can no longer make or communicate them on your own. It can only benefit you to list appointees to serve in consecutive order. Ask your attorney whether additional provisions to your document would be prudent.

For example, do you have a religious belief that needs to be articulated? Would you allow certain drugs to be administered that might otherwise require court approval? Do you want your healthcare agent to choose a nursing home for you if it becomes necessary? Once signed, provide your HCP to your healthcare providers and other physicians and hospitals. Some peoplekeep a copy on the refrigerator, in the car, or with other important papers. And, of course, provide a copy of your HCP to those you have appointed as decision makers.

Even though you may have already signed a HCP at your attorney's office, did you more recently have a medical procedure where you signed a "new" HCP in the physician's office or hospital? Understand that by signing the new form you revoked the prior one. Though it might not have been your intention, reconvene with your attorney to discuss whether to re-sign the old document. It was likely more comprehensive and the product of greater deliberation.

Without an HCP, if healthcare decisions need to be made for you, a court will appoint a guardian to make sure they are made. Your spouse does not automatically have that right. The benefit of an HCP is that you get to choose those individuals who you trust to make decisions for you, as opposed to having a court choose.

Do-not-resuscitate Order

The DNR is not prepared by your attorney. It is available to be signed in your physician's office, and it states that, if your heart stops, you do not want extraordinary measures taken to restart it. A DNR is not interpreted to mean that you want to be taken off of medical machinery (and be allowed to die) if you are being kept alive only by such mechanical devices.

Durable Power of Attorney

The DPA allows you to appoint people to assist with financial management of assets in your name (and not in trust) while you are alive. It terminates at the moment of death. A DPA can be very broad or narrow in the actions which the appointee (the attorney-in-fact) is authorized to take. The benefit of a DPA is that you, not a court, choose who can have access to your financial information. A DPA can allow the attorney-in-fact to have access to your assets even though you are fully capable of thinking and acting for yourself (for example, while away on vacation), or it can be written to allow access only if and when you start to fail mentally.

A DPA does not change the underlying ownership of the asset. It merely allows another to act as your fiduciary, step into your shoes, and make decisions as your agent. If an asset is owned by you and you alone, then at your death, the authority of the attorney-in-fact terminates, and the asset then goes through your will, unless there is a beneficiary designation attached to it.

Provide the DPA to your appointee(s), or advise the appointee of your attorney's name so that the document can be located if needed. Remember, if no one knows about it, or you fall ill and cannot communicate where the document is located, court action might still result.

Passwords

While not directly related to estate planning, a more controversial issue arises regarding passwords. While any IT person will advise against making a comprehensive list of your accounts and associated passwords, those same individuals might not regularly work with a segment of the population that may become ill or lose their memory.

There is no perfect solution in this electronic world. Perhaps you prefer to prepare the list of passwords and save it on paper, publish it to your attorney-in-fact under a DPA, or provide a copy to your legal counsel.

Others recommend putting the passwords into a paper file and filing it at the back of your filing cabinet, backwards. The list should be comprehensive and cover whatever assets you access (such as an ATM card) and electronic accounts, whether for bank, brokerage, credit card, loan, and even health-related information. It also helps to print out the most recent security questions and answers, too.

Important Papers

Organize a filing system for important papers. If an alphabetical system is not your style, consider putting all important papers in one place. Documents to be retained include Social Security card, copy of birth certificate, and legal documents (will, trust, HCP, DPA, marriage license or divorce decree, and funeral-related paperwork). Include on this list your children or next of kin and their addresses. If you should die, and a non-family member is involved, it makes locating family much easier.

Health Insurance and the Affordable Care Act (ACA)

This checklist would be incomplete if you are not reminded about open enrollment for many health-insurance plans in general, and the ACA in particular (open enrollment has been extended through March 2014). Even if you currently have health insurance, there may be financial advantages to reviewing the costs associated with the ACA. This is particularly true for blended families, those where an ex-spouse continues to be covered, or where you are straddling being on Medicare yourself, but have children to cover.

Conclusion

This checklist provides a starting point. For more information, contact an estate-planning professional for a comprehensive review of your plans. ■

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