HOOK
LAW CENTER

Call Today: 757-399-7506

Comprehensive Planning.
Lifelong Solutions.

We help families navigate the legal maze
and implement plans to secure their futures.

SPECIAL REPORT:
Estate Planning Guide

UPDATED MAY 2015

Hook Law Center Offices:
295 Bendix Road, Suite 170, Virginia Beach, Virginia 23452
5806 Harbour View Blvd., Suite 203, Suffolk, Virginia 23434
www.hooklawcenter.com

Tel: 757-399-7506
Fax: 757-397-1267

ESTATE PLANNING

What is Estate Planning?

Estate planning is a process by which an individual plans for the management and transfer of affairs in anticipation of incapacity or death. A common misconception is that estate planning is only for the elderly but truthfully, accidents or diseases can occur at any time. A comprehensive estate plan will also incorporate any necessary asset protection planning as well as financial planning. Asset protection planning is the process used to protect assets and gifts to beneficiaries from potential third party claims, including creditors or former spouses. Financial planning is the process by which an individual plans to provide for his or her own financial support and that of any dependents to last during life, in addition to planning for any potential inheritance for any dependents or future generations.

Changes in society have greatly increased the need for a comprehensive estate plan. There is a 58% probability that during your lifetime, you will suffer a disability lasting 90 days or more, during which you will need assistance with the management of your property and personal affairs. There is a 43% probability that you will require nursing home care, which will have a devastating impact on your life savings and financial plan. During retirement, there is a 50% probability that a couple ages 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. If you can be certain of anything during retirement, you can be certain that you will experience inflation, which will result in the cost of the goods and services rising, while your income remains constant. Many people will spend 25% of their life in retirement, and often find that they do not have the funds to enjoy retirement the way they envisioned. Additionally, America is a litigious society with 50% of marriages ending in a divorce. However, death remains a certainty.

It is also common today for a couple to be simultaneously saving for retirement while assisting both their parents and their children. 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. Moreover, "Boomerang" children (those who return home after college) are becoming increasingly common. 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.

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 develop a plan that takes into account the needs of your family can have dire consequences. It may cause you or your family to incur unnecessary expenses, taxes, effort, delay, and stress; or worse, it may cause you to run out of money during your lifetime, provide no inheritance to your children, and when in dire need may require you to rely on your children or other family members for financial assistance.

DISABILITY

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

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

Guardianship and Conservatorship - If you fail to plan, and you become disabled or incapacitated a court may appoint a guardian and/or conservator for you in a formal legal proceeding. Due to the intense court supervision, most families wisely prefer to avoid guardianship. 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 to serve as both the guardian and conservator.

The court appointment process is lengthy, expensive, and often embarrassing. It often 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 are required to file annual reports and accountings, which can be costly.

Joint Bank Account - People often make the mistake of using a joint bank account as a disability plan. While the co-owner of the account will be able to deposit your income into the account and pay any necessary bills, which can be very helpful in the event you become disabled, this route can also provide unintended consequences. For example, the co-owner does not have the authority to perform other acts that don't involve your bank account, including filing your income tax returns or selling your real property. Additionally, the co-owner will own the account upon your death. This can result in your estate not passing as you had originally planned and in addition, if the co-owner has marital or creditor problems the assets in the account could be subject to those claims.

Trust Agreement - A trust can serve as a comprehensive and effective means of managing assets for both incapacity and death. 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 to 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 for the benefit of the beneficiaries by the terms of the trust without requiring the court supervision involved in probate. This can save time and money for the beneficiaries. Additionally, a trust can provide: i) beneficial tax advantages for both the donor and the beneficiary, ii) protection of property from creditors, or iii) assistance to the grantor to 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 the trust is well-drafted and properly funded, 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 draft trusts, it is important to work with an attorney who specializes in creating and administering trusts and has seen your specific type of trust in action.

There are many types of trusts, which often serve separate and distinct purposes. Some of the more common trusts are:

- A *Revocable Living Trust* (RLT) (also referred to as a "living" or "inter vivos" trust) 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. 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 or incapacity, 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. Thus, the donor is able to simultaneously receive the benefit of a comprehensive disability plan in addition to an estate plan that will avoid court supervision of the administration of his or her assets. Additionally, the donor maintains the ability to change or revoke the trust at any time prior to death. However, it should also be noted that a revocable trust does have disadvantages. For example: i) funding the trust can be expensive and time-consuming, ii) the trust is subject to the donor's creditors, iii) the trust assets are countable resources for determining the grantor's Medicaid eligibility, and iv) the trust assets are included in the grantor's estate for estate tax purposes.

- An *Irrevocable Trust* is also created by the donor during his or her life. However, the donor will not be able to amend or revoke the trust after its creation. The trustee will administer and distribute any property placed into the trust as provided in the trust instrument itself. The donor cannot serve as the trustee of the irrevocable trust but the donor can be a beneficiary of the trust. For instance, the donor can provide that he or she will receive income earned on the trust property. Irrevocable trusts are frequently used to i) own life insurance policies when the insured does not wish the policy included in his or her taxable estate, and ii) protect the grantor's home from long-term care expenses. Although irrevocable trusts cannot be amended 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 (ILIT) is an example of a very popular irrevocable trust. An ILIT can allow for the avoidance of estate tax on the proceeds of a policy owned by the trust, it can create liquidity for those who own land, and it can powerfully assist in wealth preservation with the power 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 court supervision of 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 example, a testamentary trust can reduce estate taxes on the death of a spouse, it can provide for the care of a minor, protect an inheritance for an immature or spendthrift child, or it can provide for the care of a disabled child or 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 and the amount of tax paid by the grantor will increase the value of the trust. The tax payment is not considered an additional gift to the trust beneficiaries.

- A *Supplemental Needs Trust* can be created by the donor during his or her life in a trust agreement or it 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 funded and well-drafted 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, 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 recipient can use the trust funds during his or her 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 i) a parent, guardian or court on behalf of a disabled person or ii) 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 be either i) used to repay the state for any Medicaid benefits provided to the recipient during his or her lifetime, or ii) 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 which you appoint an agent to manage your assets and affairs. You should select the agent carefully because 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 either effective immediately or effective only if you become disabled. The durable power of attorney is not a form and no one power of attorney is appropriate for all people. A power of attorney should be customized to meet your specific needs and circumstances. Since powers of attorney are creatures of state law, it is important that you ensure that it complies with the laws of each state in which you reside and own property. Guardianship is likely for those without a durable power of attorney or for those with a poorly drafted durable power of attorney.

Whether you use a joint account, power of attorney, 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 because even the best disability plan will be frustrated by poor management. You should ensure that the person you select is (among other things) honest, willing to devote the 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) - In addition to planning for the management of your property in anticipation of death or disability, you should also make health care decisions in anticipation of disability. You have the right to make your own health care decisions, including the right to refuse health care. If you fail to plan appropriately and you become disabled to the extent that you are unable to make decisions for yourself, 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.

In Virginia, under the Advance Health Care Directive Act you can: 1) appoint an agent to make health care decisions for you in the event you are unable to make decisions yourself, 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 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 provide your regular physician and your agent with a copy of your AMD and ensure that it is available if needed. Additionally, you should carry an AMD card with you in your purse or wallet to provide notice to medical personnel that you have an AMD and to provide the names and contact information of your designated agents. Every estate and financial plan should contain an AMD because no one should have to go through an expensive, time-consuming court process with a loved one simply to carry out their loved ones medical 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).

For these reasons, the Hook Law Center takes care to advise clients on the necessity of AMDs. Hook Law Center assists its clients in developing a customized AMD that documents your preferences, selecting an appropriate agent to implement those preferences and registering your AMD, so it will be available if needed.

DEATH

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

1. Wealth Transfer Taxes

Both the state and the federal government impose varying tax consequences on your right to transfer property at your death.

Federal Tax

The federal government has a unified gift and estate tax. These taxes provide for an unlimited marital and charitable deduction. In addition, the gift tax has an annual exclusion of $14,000 (in 2015) per year per donor and an unlimited tuition and medical expense exclusion.

In 2015, the exemption amount is $5.43 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.

One beneficial tax consequence of death is that your beneficiaries will receive an income tax basis increase (also known as a “step up in basis”) to the date-of-death value of your assets. Thus, despite the potential for estate tax, this may be reason enough to leave certain low basis assets in your taxable estate. 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.

Because uncertainty concerning federal estate tax rules continue, it is important to review your estate plan each year as the exclusion amounts and certain taxable benefits of estate planning strategies change.

Virginia Tax

Virginia does not impose an estate tax. However, Virginia does impose a probate tax. 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.

While Virginia does not impose a gift, inheritance, or estate tax, if you own real property in another state, that property will be subject to the taxes as determined by that state.

2. Tax Planning Strategies

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. 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 determine which of these methods are appropriate for you and implement a sound plan to minimize wealth transfer taxes.

3. Disposition of Assets

You may dispose of your assets at your death in various ways, the most common being by a Will. Depending on the types of assets that you own at your death, your Will must go through a court-supervised probate administration in order for your assets to pass to your beneficiaries. Probate is often a time-consuming and expensive process.

<u>Non-Probate Transfers</u>

The probate process can be avoided (at least in part), by way of various non-probate transfers. As discussed above, one of the most common ways to avoid probate is through the ruse of a Revocable Living Trust (RLT). However, an RLT is not the only way to avoid probate. Various assets can pass outside of probate with 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. Also, Virginia now permits the use of a "transfer on death deed" which effectively transfers the title of the property to the Grantee specified upon the death of the Grantor. 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 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.

Despite the convenience of probate avoidance techniques, everyone should have a Will for a complete estate plan. A Will is vital 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.

In conjunction with executing your Will and, in some cases, RLT, it is crucial that you review your documents along with your form of ownership of assets and beneficiary designations to ensure that your overall estate plan works as you intend. A common misconception regarding the transfer of assets upon death is that your will controls what happens to *all* of your assets. However, as discussed above various types of assets may pass outside of your will. Thus, the only way to be sure that your estate plan will be carried out as intended, you should always seek the assistance of an attorney to review your estate planning documents in conjunction with the titling of your assets.

The Hook Law Center can assist you in determining which method of disposing of your assets is appropriate for you and your family and help you determine the appropriate person to serve as your executor or trustee. In some cases, a designation of beneficiary form and a simple Will are sufficient to dispose of your assets upon your death. However, in other cases, a more detailed plan is necessary. For example, a trust is typically more beneficial for individuals who wish to provide for minors or disabled beneficiaries. Many estate plans will use a combination of methods for 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. No one estate plan is right for everyone and the 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 that of traditional married couples. In light of the Supreme Court's decision in *United States v. Windsor*, (2013), and the subsequent decisions of many Federal Circuit Courts of Appeals, it is apparent that Federal and State laws on same sex marriage are rapidly evolving. Therefore, same sex couples should review their estate plans regularly to be sure they are receiving all the benefits available to them at the current time.

ABOUT THIS HANDOUT

HOOK
LAW CENTER

Hook Law Center focuses its practice on estate and tax planning, planning for long-term care and aging, retirement and investment advice, trust and estate administration and probate, guardianships for those unable to make sound decisions, and the unique situations associated with special needs.

Learn more about the Hook Law Center at www.HookLawCenter.com.