

PERSONAL CONSIDERATIONS

Isn't it strange that you have a booklet on the process of estate planning and there is a separate section on "Personal considerations"? After all, isn't estate planning all personal considerations? Saying that I realize that most people think of estate planning as a document (a Will or possibly a revocable living trust) used primarily to provide tax planning or to avoid probate. The only non-tax reason I hear with any frequency is the need to name a person or persons a couple desires to be guardian of their children in the event of both of their deaths. The tax law is complex. Estate and other transfer taxes can be onerous, significantly reducing the amount which is ultimately left to your children. The magnitude of the taxes make it easy to slip into the "tax tail wagging the dog". Attorneys can advise you on the most effective ways to reduce the taxes on your death; but only you can provide the information and input so that the personal component is integrated into your estate plan. This aspect can impact your family more than the taxes; therefore, I consider this section of the booklet the most important one. As you consider your personal situation, your "tax planned Will" can be transformed into your personal estate plan.

MINOR CHILDREN

In considering the use and distribution of property for minor children, I realized that estate planning is an expression of your values and not merely a death document. A good way to begin is to consider the amount your children would inherit if you (and your spouse, if you are married) died at this time. Consider having that amount of money in a fund devoted exclusively for the use of your children.

If you did not have a Will, these funds would be held in a legal guardianship. If

In a trust, not a custodianship, you can provide for any terms you want. ...You design the trust.

your children are under the age of 18, they are not legally allowed to receive property. The court would appoint the person to manage the funds. The court

would also decide for what purposes the funds would be distributed. In preparing a Will, you will designate the person to

You know best what structure is productive for your children and what structure is not. Provided that you think about it.

handle the property and the terms on which the property is distributed. The simplest form of "trust" is a custodianship under the Uniform Transfer to Minors Act. This vehicle would hold the funds for each child separately and the custodian may use the funds for the child's benefit until he/she is 21. At age 21 the custodianship terminates and the remaining funds are distributed to your child.

If you want to design the trust and I assume you do, you will include a trust for your children in your Will. In a trust, not a

custodianship, you can provide for any terms you want. You can provide for distributions for any purpose. You can restrict distributions. You can delay the time when your child receives the principal. You design the trust. What are some of the areas you should consider in designing the trust?

- ▶ What type of expenses would you pay for your child if you were alive?
- ▶ Is the guardian able to provide for the child in his/her present home? Do you want to provide for an expansion of the guardian's home? Do you want amounts to

What do you want your children to be like?

- ▶ be distributed to the guardian to assist him/her in his/her general support as well as expenses directly related to your child?
- ▶ Most parents want to provide for their children's education. But paying for education can be a very broad direction. If your child is in college, would you pay all expenses? Would you require that he/she work? Would you purchase a car for him/her? Is it relevant what type of grades your child makes? Would you pay for graduate school? Is there any limit? Would you pay for an extended undergraduate education?
- ▶ Do you want the cost of a child's education to be paid out of his/her

share of the trust or do you want all children to be educated prior to division of the trust into separate shares for your children. What if one child attends a state school for four years and another child attends a private university for seven years?

- ▶ After your child has completed his/her education, do you want your child to receive regular distributions from the trust to support him/her? Do you want distributions to be made to supplement his/her income? Is it relevant in making distributions that your child is able to work and chooses not to? Does it make a difference if your child has small children? Does it make a difference if your child is disabled? Has a drug problem?
- ▶ Let's assume the trust is large enough so that your children will receive a large amount of property after they are educated. When would you want them to receive this money without any strings attached? What would you have done if you had received that amount of money at that age? Would your life be any different? Would you be different? Is the difference positive?

My experience is that you know best what distributions are beneficial and which are not. You know best what structure is productive for your children and what structure is not - provided that you think about it. My objective, my desire is for you to think about it.

In *First Things First*, Stephen Covey suggests that you visualize your funeral and consider the way you would like your life to be described in the areas of work,

Was the money given to them in a manner which resulted in them not being motivated to create a productive, satisfying life for themselves.

family and community. I want you to do the same thing about your children. When your children are grown, say 35 or 40. What do you want them to be like? What do you hope for them? What are your dreams for them? I am not referring to accomplishments - I mean as a person. Are they productive? Are they happy? Are they compassionate people? Generally, we want many things for our children. One of the things we want is to provide them with security and the ability to enjoy some extra things is life. By giving them money, an inheritance, we help provide for this. However, money is not the whole picture.

How did we give them the money. Was the money given to them in a manner which resulted in their not being motivated to create a productive, satisfying life for themselves.

Some of our children seem to be born with motivation. Giving them support and resources seems only to enhance that. Others seem to have little motivation. Struggling to make a living seems to have little impact on increasing their motivation. Some of our children seem to have a "sense of entitlement" about life and you are to give them what they are "entitled to". [Unfortunately this "sense of

entitlement" seems to be increasing in prevalence.] Think about your children and the impact of your inheritance on your children. If we were here at that time, we would probably jump in with advice and counsel. We would make certain restrictions based on our

Some of our children seem to be born with motivation. ... Some of our children seem to have a "sense of entitlement" about life...

children's actions, our feelings, our relationship, even simply to control them. However, in this exercise you cannot say anything, cannot give any advice. The only thing you can do is decide on a structure and write down your thoughts and desires in a written memo to be read after your death.

I do want to mention a couple of generalities that I have seen/learned from my clients. Even these generalities may not apply to your family or to your child.

- ▶ First, automatic distribution of all income from a trust from the time a child becomes an adult frequently is a disincentive to becoming productive and developing the child's skills and self esteem.
- ▶ Second, frequently, it is beneficial to make at least two large distributions of principal (rather than one) so that the child has received funds which he/she controls, uses them, invests them and then has another opportunity to try again.

When a large amount is received, the child may view it as a bottomless amount with no concept that the funds will eventually be dissipated. Perhaps the child perceives himself/herself to be a

If you could give this amount to your children today, would you?

“cunning investor” and believes he/she will multiply the sum. If the child is correct, you have not lost anything by deferring the second distribution. If the child was not correct, hopefully the child learned something in the process and will have a second chance. How much the first time? How long until the second? Think about your estate. Think about yourself at the two ages. That is your best guide. If you are still at a loss, I recommend starting with less than ½ at the first age (say 1/4) and starting with a 10 year space until the second distribution and then modify.

Let me say again, you are the best person to make this decision. The automatic distribution of income prohibition and the two age recommendation may not be best for your family. You know whether they are helpful. Think about yourself as a young adult. Think of the messages you have given your children on work, self sufficiency, values, money. Think about your children. When you consider your particular situation, you will know whether income should be automatically distributed, when the principal is best distributed. Trust yourself. Trust your judgment.

ADULT CHILDREN

Much of the discussion concerning minor children is relevant in considering the distribution of your estate to your adult children as well. The difference is that you know more about your adult children. You are working/living with them now as they establish their lives.

As with your minor children, I would like you to add up the value of your assets including the proceeds of any insurance

Information is a powerful thing.
Withholding information is powerful.
Giving information is powerful.

policies on your and your spouse’s life. Consider taxes. If you have no idea about the taxes, then subtract 50% for everything over \$1.5 million if you are single - \$3 million for a couple. This figure may be a little low or a little high, but this is simply an exercise. Find out the exact amount while working on your estate plan with me, with your financial advisor or your CPA. Since retirement plans will be subject to income taxes on distribution, additional adjustments are necessary to determine the amount available for your children. Also, having a large retirement plan in a taxable estate may reduce the exemption used on the

...add up the value of your assets.

death of the first spouse, but this is simply an exercise to focus your attention on what your children might receive. If you have a retirement plan, reduce the amount in the retirement plan by one-third

for income taxes which will be owed when distributions are made from the plan.

Now, if you could give this amount to your children today, would you? What are your concerns? What would they do with this amount of money? If you believe they would not handle or spend it prudently, do you think they could learn by giving them part of it and letting them “learn on it”.

In giving your children some amount to “learn on”, if they think the well from which this “learning money” came is bottomless, the experience will have a different impact than if they think it is part of a limited amount which they will receive. For this reason, it is very important that they realize what else may come later. Upon your death, they will know what the total sum is.

You may want to provide this learning experience for them while you are alive. If you give them part now, you may want to consider advising them what portion of

... do not count on your spouse leaving any of his/her estate to your children.

their total inheritance this amount is. Perhaps if you are deciding what they can handle on your death, you may want them to know that fact as well. But that discussion is more appropriate to our section on *Giving* than here. Would it be helpful to give your children any guidance in this regard? Can you articulate that guidance in a letter, in a note? Consider it.

I mentioned above that it is important in productively using a “learning amount” for

the child to know what he/she might receive later. Information is a powerful thing. Withholding information is powerful. Giving information is powerful. A child knows the way he has lived. Knows how you have lived. Could your child maintain your lifestyle on his/her share of the inheritance from you? On some level he may expect that. If this expectation is not true, then information is very important to dispel this expectation. What if this expectation is true? Is your child, in some sense, waiting for that life? Could you involve them in your estate planning so that it becomes a part of their life in a productive manner? This involvement can be the greatest legacy, in terms of family cohesiveness, in terms of knowledge actually acquired. But, it is a delicate balance. Are you involving them to control them or are you involving them to begin “letting go”. If control is your real motivation, the process may backfire on you. You know your children. Think of their desires, concerns, strengths, weaknesses. Think of your relationship - the strengths, the weaknesses. With this information, consider whether to involve them and if so, the best method of doing so.

HIS/HERS/OURS

The blended family. A non-traditional family, but no longer an unusual situation. With a divorce rate over 50%, more families are raising their children of two previous marriages together. In addition, we’re living longer and are more likely to have a second spouse at the time of our death. Frequently, widows and widowers remarry late in life, each with their own set of children.

Most significantly, you and your spouse do not have the same set of beneficiaries. You may each like the other's children. You may be very close to them. Your spouse may be close to your children. However, do not count on your spouse leaving any of his/her estate to your children. If you want your children to receive anything, plan for that in your Will.

What do you do if you want to provide for your spouse for his/her lifetime? Do so in your Will. But keep in mind that if you give your spouse all of your property

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outright, your children probably will not receive any of your property upon your spouse's death. To ensure that your children receive any property upon your spouse's death, you should consider leaving your property in trust for your spouse's lifetime.

Another unfortunate fact is that frequently children expect to inherit something upon your death regardless of whether your spouse survives you. You can leave your children a bequest upon your death, but the most effective way to avoid this expectation is to discuss your plans and your Will with your children. Let them know that they will not inherit anything upon your death or will inherit only a certain amount.

The plan then is to leave your property in trust for your spouse and upon your spouse's death, any property which remains in trust is distributed to your children.

Three factors are important.

- ▶ The identity and extent of your property.
- ▶ The portion of your property passing under your Will.
- ▶ How much of your property will be left on your spouse's death.

The first question goes back to the issue of separate and community property. Let's assume you and your spouse have \$2 million. If all of the property is your separate property, then you will dispose of \$2 million of property and can leave all of this property in trust for your spouse with the remainder going to your children. If the property is all community property, then one-half of the property, \$1 million, is your share of the community which you

Protection from whom or what...your children...conflict with your children.

can leave in trust for your spouse with the remainder to your children and the rest is your spouse's share of the community to dispose of as she wishes. See the discussion in the chapter titled "Character of Marital Property" .

The second question is which portion of your property passes under your Will. I have reviewed more than a few estate plans in which the Will provided that the property was given either outright to the

children or in trust for the spouse and in fact little or none of their property actually passed under the terms of their Will. One spouse had life insurance that named the spouse as beneficiary of the life insurance, beneficiary of the retirement plans and/or held all of their non-retirement assets in accounts as joint tenants with rights of survivorship (JTWROS). Ownership of assets is discussed in detail later in the chapter titled "Ownership of Property", but suffice it to say that your overall plan, including ownership of assets and beneficiary designations, must be reviewed in order to provide for the disposition of your assets in the manner desired.

...your spouse from his/her own indiscretions...influence of a significant other...future inability to manage the property ... extravagances

The third question was how much of the trust will remain upon your spouse's death.

The answer to this question depends on a number of factors.

- > the amount held in the trust
- > the needs of your spouse
- > the terms of the trust
- > the investment of the assets in the trust
- > the decisions made by the Trustee in making investments in the trust

- > the decisions made by the Trustee in making distributions to your spouse.

The considerations in protecting the spouse and in protecting your children is discussed in the next two sections.

PROTECTING THE SURVIVING SPOUSE

Protection from whom or what is probably a good place to begin. When I outlined the areas I wanted to cover in this booklet, the type of protection I was considering was protection from your children or more precisely from conflict with your children. The conflict can be with your children which are also his/her children or from conflict with his/her children from a prior marriage. However, there are other types of protection that I want to address. You may want to protect your spouse from his/her own indiscretions. For example, you may want to protect him/her from the influence of a significant other after your death. You may also want to protect your spouse from his/her current or future inability to manage the property or current or future extravagances. Future extravagances may be a dramatic increase in lifestyle (something that sometimes happens short term but is less likely to occur long term) or benevolence in charitable areas (not bad unless it is to his/her detriment). All these fall in the area of protecting the surviving spouse from himself/herself. These possible scenarios all indicate that your spouse should not have complete control over the property. He/she should have a Co-Trustee to assist in managing the

property. The methods of responding to this concern are similar to the methods of protecting your children discussed below.

Protecting the surviving spouse from conflict with your children has a different slant. A Trustee's exercise of discretion on her own behalf and lack of information provided to the other beneficiaries of the trust both are breeding grounds for conflict. Let's assume your spouse is the Trustee of the trust created for his/her benefit and as Trustee has full control over the investments in the trust and in determining the distributions to be made out of principal for his/her health, support and maintenance. Your children have no

Generally their imagination can conceive of things far more extreme than your spouse would ever consider.

information about the investment of the trust or the distributions made from the trust. They only see how she lives. Generally, their imagination can conceive of things far more extreme than your spouse would ever consider. These fantasized indiscretions take on a life of their own. They may be communicated to other siblings and suspicions abound. Your spouse becomes aware on some level of the suspicions and is hurt and angry. Eventually, your spouse may begin to actually do the things he/she is suspected of doing, perhaps even in unconscious retaliation. The objective in protecting the surviving spouse is to provide a framework which will minimize the suspicions. As you will see in any area in which we want to avoid conflict, clarity and information are key factors. First, let's look at clarity. In this regard it

is important to consider what you want, what you intend:

- ▶ What do you want your spouse to have from this trust?
- ▶ Will your spouse need all the income? Do you anticipate that she will also need the principal of the trust?
- ▶ Is it OK with you if all of the trust is used by your spouse? For

Do you need or want any checks on your spouse's use of the funds in the trust.

example, the purpose of the trust may only be to provide for a distribution to your family should you and your spouse die within a relatively short period of time.

- ▶ Do you want some portion of the trust to be preserved for distribution to your children? What portion? Under what circumstances is it permissible to use this portion for your spouse?

Make a clear statement of what you intend. Your intent becomes one of the frequently argued areas after your death. If you do not care whether any property remains for your children, say that. Let's

Make a clear statement of what you intend.

assume that you anticipate that your spouse will need all the income considering a return of 7%, then include a

provision to that effect. For example, state that all of the income shall be distributed to your spouse plus a portion of the principal necessary to bring the total return to 7%. If you are not concerned whether there is any property left in the trust upon your spouse's death, then state in the trust that the principal may be distributed without regard to preservation of the principal for distribution to your children.

Selecting a Trustee is an important decision. Your spouse may want full control and may not want to "report" to anyone. If you feel that your spouse needs no protection from himself/herself and you are not concerned about preserving any property for distribution to

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your children, then name your spouse as Trustee and make your intentions clear to your children.

Now, let's assume that you have confidence that your spouse can manage the property and want her to receive a certain return on the property. You have made these provisions in your Will and have made your intention clear.

The trust can provide that principal distributions may be made with the consent of the Trust Committee.

However, you do not anticipate that the principal will be needed but desire that it be available should it be needed.

Other possibilities are available. You can name co-Trustees or name another

person as Trustee. You can also name your spouse as Trustee and also name a Trust Committee. The trust can provide that principal distributions may be made with the consent of the Trust Committee.

What about the information your children receive or don't receive? You can provide that they are to receive annual reports. The problem with receiving

You can also name your spouse as Trustee and also name a Trust Committee.

annual reports is that the spouse may feel like he or she is "reporting" to your children and your children may view the reports in that manner. An alternative is to provide that the reports are available if requested or that reports are sent to a Trust Committee if your children so request.

You can provide that the Trust Committee only approves certain distributions, receives reports only if requested by your children or you can provide that the Trust Committee meets once a year to discuss the trust administration with your spouse. The benefit of the meeting with the Trust Committee is that any conflict which has arisen can be submitted to the Trust Committee for consideration and resolved at the meeting. This submission and resolution may feel more controlling but it actually protects your spouse. This process can prevent suspicions from becoming extreme, provide a method for resolving disputes and give your spouse a buffer in dealing with your children.

All of these comments are intended to stimulate your thinking. Do you need or

want any checks on your spouse's use of the funds in the trust. Do you want your children to be able to monitor the use of the trust in all events, only if there is conflict between your spouse and your children, only if your spouse remarries or only after your children reach a certain age?

Do you want your children to be able to monitor the use of the trust in all events, only if there is conflict, only if your spouse remarries or only after a certain age.

PROTECTING THE CHILDREN

As I mentioned above, plan on your spouse leaving your children nothing if your children are not her children. Your children's inheritance will depend on what you give them now and what is left when your spouse dies.

The first and most important step is to decide what you want, what you intend.

Protecting the children is the counterpart to protecting the spouse. The first and most important step is to decide what you want, what you intend.

- ▶ Do you want to ensure that upon your spouse's death some portion of the property remains?
- ▶ Are you concerned about the use of the funds if your spouse remarries?

- ▶ Can your spouse manage the funds?
- ▶ How well do your children and your spouse get along now? Even more importantly, how well do they communicate? An open working relationship which is not closed will generally result in less conflict than a closed relationship which may be closer on a personal level.

Clearly communicate your intentions to your children and to your spouse. Before I discuss the types of provisions you might want to include in a trust, let me suggest that you consider giving your children a bequest upon your death. The bequest can be small but some amount.

What about protecting your children from your spouse, or his/her subsequent spouse or his/her children? Let me begin with an observation. Let's assume you and your spouse have estates of about equal size; perhaps because your property is all community property, perhaps because you each brought an equivalent amount of separate property into the marriage. You leave your property to your children and your spouse leaves his/her property to his/her children. All things are equal, right? No. It depends on how the property is invested, how much your spouse needs for his/her support, how much your spouse receives

Be clear on your intent to your children and to your spouse.

for his/her support, the distributions to your spouse and on and on. For example, let's assume that all of your

property is invested conservatively for preservation of the corpus and an income stream. Your Will provides that all of your property is held in trust for your spouse with all income distributed to your spouse and none of the principal distributed to your spouse. If your spouse outlives you by ten years and does not use all of the income for his/her support then his/her estate would have grown and your estate would have remained the same.

I have tried to ensure equality through

Let's assume you and your spouse have estates of about equal size;...leave your property to your children and your spouse leaves his/her property to his/her children. All things are equal, right? No.

the use of forced widow's election Wills (Wills in which all property of both spouses is held in trust), trust provisions, checks and balances and trust committees, to name a few. After numerous efforts, I am here to tell you that equality is impossible. If you want to ensure a certain inheritance for your children, disinherit your spouse or go buy some life insurance. Sound crass? It is a reality. Let me say that sometimes the best way to provide for your children is to give your children certain assets and your spouse others (such as retirement plans) and let it go. Enough said.

We are trying to provide for our spouse, give our children what's left and minimize conflict in the process. What are some of the tools we might use.

First, be clear about your intent. Let's assume that you desire for your spouse to receive a certain income stream from the

property. This income stream when added to the income from their personal resources provides the income sufficient for your spouse's support. You do not want to provide for any distribution of principal. The income from your property depends on how your property is invested. The amount of principal remaining on your spouse's death depends on how the property is invested. The Trustee has control over the investments in the trust. The moral - selection of a Trustee is very important.

This issue can be addressed in your selection of the Trustee or in your Will. I prefer for the issue to be addressed in the selection of the Trustee with some discussion and guidance in the manner in which you would like the property invested in a letter to the Trustee. If guidelines are included in the Will, I prefer

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that the guidelines be suggestions, not restrictions so that your Trustee can adjust the investments for the changes in the economy, the world, your family.

Consider providing a mechanism for your children to obtain information and possibly to have some input. One method of providing this mechanism is to include a Trust Committee as mentioned above. I frequently include a Trust Committee for the sole purpose of replacing a Trustee if there is a vacancy. The Trust Committee also has the power to remove the Trustee. However, in general, the Trust Committee does not have an active role and does not receive

information on the trust. However, the Trust Committee can be included with a mechanism to activate their role in the event of a conflict. For example, if any beneficiary desires to obtain information on the trust, the Trust Committee can be contacted and can obtain the information. The trust can provide that the information is passed on to the beneficiary or can provide for an internal review. If the Trust Committee is a buffer in the event of conflict, mediation may be helpful. I have, on a couple of occasions, included provisions for mediation of a conflict in the Will. This may seem like a cumbersome and negative process; however, my experience has been that avoiding litigation is never negative; in addition, the existence of a process is a tempering influence in and of itself.

PERSONAL EFFECTS - SPOUSE VS. CHILDREN

I have discussed the “big stuff” - money. But what may be the real problem is division of personal effects. Your children will see a lifetime of mementos and family heirlooms kept by a spouse who may have come on the scene in the last few years. On the other hand you don’t want your children backing up a trailer and

I have discussed the “big stuff”, money. But what may be the real problem is division of personal effects.

clearing out the house. Actually, under state law, the spouse has the right to use the personal effects for her lifetime. Be sensitive to the difficulty of this situation.

Consider specifically giving items of personal significance to your children in a specific bequest in your Will. If the item is one that you want your spouse to use while she is living in the house, then state that she has the right to use it for her lifetime or so long as she lives in the house. Consider giving all remaining items, particularly those of little current monetary value, to the spouse outright.

MINIMIZING CONFLICT

You can probably imagine what my first recommendation is. Think about what you want. Be clear about your intent in your own mind. Communicate your intent to your attorney so that he/she can

Be sensitive to the difficulty of this situation.

include any necessary provisions in your estate planning documents. Communicate your intent to your family verbally, in letters, notes and/or memos.

Most of this booklet addresses areas which can arise and cause conflict. This type of conflict is particularly prevalent when your property passes under several different instruments and/or involves the determination of whether property is separate or community. If your Will includes one provision and yet you hold your property in joint accounts with right of survivorship or name another person as beneficiary on a retirement accounts or life insurance policies, conflict is likely to arise as to your intent. Review the section of this booklet on Ownership of Property and Beneficiary Designations

and be clear about your intent in this regard.

The character of property also affects the property which is distributed under your Will. Review the Characterization of Property section. Consider the ambiguities and conflicts that can occur and address them. Some planning can be included in your Will and some clarification can be addressed directly with your spouse.

What else can you do? One aspect of minimizing conflict is to minimize or eliminate the ability to benefit from the complaint itself. For example, if each child receives a certain amount of property upon your death and you provide that if anyone contests your Will, he/she is cut out of your Will (a “no contest” clause), then a child is less likely to complain than if the Will did not contain this provision. The child has something to lose. Without this provision, the child may file a Will contest for “settlement value”. The contest holds up the probate of your Will and the ready access to your funds. Your spouse and the rest of your family may be willing to pay this child something simply to get him/her out of the way.

Be clear about your intent in your own mind.... Communicate your intent to your family verbally, in letters, notes and/or memos.

One method of removing the child’s power to ‘hold up’ the estate is to use a fully funded revocable living trust. If you create a revocable living trust and transfer all of your property to the trust, then your Will is not filed for probate. However,

keep in mind that the benefits can also be the detriments. If the Will is not filed for probate, no one will know the contents of the trust - neither the assets held in the trust nor the terms of the trust, unless the Trustee tells them. The privacy and protection also make abuse of the structure easier.

And a summary of all of the personal considerations:

- ▶ Think about it.
- ▶ Be clear on your intent.
- ▶ Communicate your intent.

All the rest of the discussion is to stimulate your thinking.