The Legal Intelligencer

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Basic Estate Planning Process: A Look at Four Core Documents

When we receive requests like these, we start off by explaining the basic estate planning process, including the documents that should be prepared in order to have a complete basic estate plan.

By **Rebecca Rosenberger Smolen and Amy Neifeld Shkedy** | September 26, 2019

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In our practice, we often meet with individuals who, prior to our meeting, did not

have any estate plan in place. Many times, we receive an email or a phone call from a prospective client, simply stating: "I need a will." We find that the request for a new will often arises with life changes, such as a new marriage or divorce, a new baby or a death in the family. When we receive requests like these, we start off by explaining the basic estate planning process, including the documents that should be prepared in order to have a complete basic estate plan.

For a basic estate plan, we typically prepare these four core estate planning documents: a will; revocable trust (sometimes known as a living trust); living will declaration and health care power of attorney; and general power of attorney. Each of these documents serves an important purpose in every estate plan.

The will is the document that sets forth the distribution of assets at death, designates an executor to administer the estate administration process and names guardians of minor children. While a will may contain all of the dispositive provisions in an estate plan, it has become more commonplace for estate planning practitioners to prepare estate plans that include both a will and a revocable trust. This basic structure includes a very simple "pour-over" will under which the executors of the estate and guardians of any minor children are appointed, and where the entire estate is structured to "pour into" the client's simultaneously executed revocable trust. The revocable trust itself is designed to be a "will substitute." The revocable trust (rather than the will) contains the meat of the estate plan after a decedent's death, whether that includes outright distributions to heirs or distributions in trust for the benefit of heirs.

Revocable trusts are used for multiple reasons, such as probate avoidance, privacy concerns (since a revocable trust is not a public document, unlike a will once probated), ease of beneficiary designations and, in the case of a funded revocable trust, asset management during the lifetime of the settlor (i.e., the settlor is the individual who established the trust). Revocable trusts can be funded or unfunded during an individual's lifetime, although in either case, these documents are completely amendable and revocable during the settlor's lifetime. If the revocable trust is funded during the settlor's lifetime, then the trustee, who is often the same individual as the settlor of the trust, has signing power and distribution authority over the trust assets during the settlor's lifetime. During a settlor's lifetime, any assets in

the revocable trust would be administered solely for the benefit of the settlor, meaning that any distributions would only be made to the settlor.

A general power of attorney is a document by which a "principal" designates an "agent" to act on the principal's behalf for all financial matters. Powers of attorney are effective during the lifetime of the principal and are used in a variety of situations, including when the principal is incapacitated or unable to handle his financial affairs, when the principal is unavailable or for other convenience purposes. A power of attorney can be given to a bank or brokerage institution to enable an agent to have signing authority over various accounts. Powers of attorney can also be utilized in connection with the sale of a house and recorded with the deed. Powers of attorney can be broad or more limited. A limited power of attorney is usually limited to one transaction, such as the sale of a house or the sale of a business interest. General powers of attorney are broader and convey broad authority to an agent, allowing the agent to act on behalf of the principal for nearly any matter, including purchases and sales of assets, check-writing authority and making gifts. In Pennsylvania, some of the powers conferred upon an agent must be specifically stated in the power of attorney, while other powers can be granted by virtue of state law. Powers of attorney are vital to every estate plan. Without a power of attorney, if an individual becomes incapacitated, in order to act on his or her behalf, one would need to go to court in order to become guardian of that individual's estate, which can be costly, burdensome and time consuming. A simple power of attorney helps to ensure against needing to undertake that process.

A living will declaration and health care power of attorney (living will) is a document which provides directives regarding the administration of life-sustaining treatment in the event that an individual would be in an end stage medical condition or permanently unconscious. A living will also enables you to name agents who can make health care decisions on your behalf, such as the consent to surgery or admission to a nursing home.

In our practice, the basic estate planning process is relatively straightforward. First, we send out an estate planning questionnaire so that clients can complete it with their personal and family information and provide a list of assets and approximate values. We find it helpful to have this completed ahead of the first meeting, if

possible, so that we have the full names of the clients and their children (or other intended beneficiaries) and so that we can evaluate whether any estate and gift tax planning is warranted. Then, we meet to discuss the estate plan. For a new estate plan, this meeting usually runs for an hour or so.

At the meeting, we discuss various aspects of the estate plan, including the following:

Disposition of the Assets at Death

We will discuss how the assets should pass at death. For married individuals with children, for example, we will discuss whether or not it is advisable to have the assets pass outright to the spouse or pass in trust for the spouse. There may be tax shelter, creditor protection or other reasons to have the assets pass in trust for the spouse rather than outright, but this varies for each situation. Next, we will discuss whether to have the assets pass outright or in trust for the children at the death of the surviving spouse. If the children are minors, it is important to have trust structures in place, but there are also many reasons that justify keeping the assets in trust for older children (often for the duration of their lifetime).

Fiduciaries

For each document, fiduciaries should be named. It is advisable to name primary fiduciaries as well as back-up or successor fiduciaries in case the primary fiduciaries become unable to serve or are deceased. Often the spouse is named as the primary fiduciary (or as a co-fiduciary), and adult children or siblings are named as successor fiduciaries. In cases where there are no desirable individuals to designate, many clients name a bank or trust company to serve in that role. The various fiduciary roles include:

- Executors of the estate. Executors are named under the will to handle the estate administration, including collecting the assets, paying the debts and expenses out of the estate assets, filing estate/inheritance and income tax returns and distributing the assets in accordance with the provisions of the will.
- Guardians of the persons of minor children. For clients with minor children, guardians should be named under the will, to serve in the unlikely event that

both parents have died before their children have all reached age 18.

- Trustees. Trustees are named under the revocable trust. The trustees named during the estate/trust administration period are often the same as the executors named under the will. In addition, trustees should be named for each separate trust to be established after the settlor's death, such as a trust for the spouse or trusts for children. In many plans, there are trustees named for a period of time until the children reach a certain age, at which point the children commence to serve as trustees (sometimes as sole trustee) for their respective trusts.
- Agents under power of attorney. Agents are named under the power of attorney. Often these agents are the same as the executors named under the will. The agents can be thought of as "lifetime executors," since they are granted the same powers as an executor of an estate, except that these powers are effective during the principal's lifetime.
- Health care agents under living will. Health care agents are named under the living will. These individuals serve a very different role than the executors, trustees and financial agents, since the authority granted to the health care agents is of a more personal nature and not related to financial matters. For this reason, sometimes the individuals named as health care agents (or successor health care agents) vary from the other fiduciaries described above.

After this initial meeting, the documents are drafted and sent to the clients for their review. We also include a summary to assist them in parsing through the documents and the legalese. Once the clients have reviewed the documents and answered any open items, the next step is to execute the documents. The documents need to be executed before two witnesses and a notary, so it often makes sense to come back to the attorney's office for the signing, to make sure that everything is signed properly and so that the attorney can coordinate having the witnesses and notary available. Once the documents are signed, the estate plan is almost complete. The final step is to make sure that beneficiary designations are properly coordinated with the estate plan.

Knowing that estate plans are often the last item to check off on the "to do" list,

leading many to succumb to what seems like endless procrastination, we try to make the process easy and straightforward. In the end, after getting through the process, clients feel much more organized and relieved that they have taken care of things for themselves and for the next generation.

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