ESTATE PLANNING BASICS FOR YOU AND YOUR LAW FIRM

BY GARY P. BAUER

All lawyers likely know how important it is to appoint or designate a surrogate to manage their property and their person during their life, during their incapacity, and after death. But knowing it and doing it are different matters entirely. Those not working in the area of estate and trust planning might not know all the documents that are needed. Further, many lawyers have not adequately planned for what will happen to their law firm after their death or if they become incapacitated. This article offers an overview to help such lawyers (perhaps even you) start the process of estate planning both for themselves and for their law practices.

OVERSIGHT AFTER YOUR DEATH

For most people, passing property after death first comes to mind when engaging in estate planning. It is important and must be done with consideration toward your loved ones and others. If you die without a will or dispositive document, the state you live in has a default distribution plan designed to pass your property to those most closely related to you by blood or marriage. If you have a will, it is *your* recipe that will dictate the distribution of your estate; if you don't have a will, the state will use its own recipe. If you want cookies and the state's recipe gives you cake, then you need to have a will. There are many tools available within a will to allow you to identify who gets what and in what shares. In many states you can designate a guardian of minor children at your death. You may wish to have a trust drawn up transferring property to that trust to manage your property after death and for some time into the future. A trust gives you the tools to pass property and avoid estate taxes, provide extended funding for minor children, transfer property to charitable organizations, and much more. Many states provide for the creation of pet trusts, allowing you to appoint someone to care for your pet and provide financial compensation for doing so.

But what often receives less thought is planning for your incapacity during your lifetime. What passes after your death will have little effect on you as you will be dead. But what about managing your person and property while you are alive?

OVERSIGHT DURING YOUR LIFE

During your lifetime, you may find the need to have someone manage your person or property as a matter of convenience or need. If you are incapacitated and unable to make or communicate informed decisions, no one can take over and pay your bills or assist medical care personnel in making critical care decisions without the intervention of the court. This means that emergency orders must be executed by a judge after sufficient notice and

Aslan Alphan/iStock via Getty Images Plus

opportunity to be heard can be afforded those who are affected. This often means your next of kin. It takes time and often raises questions among those closest to you regarding who should be in charge. A physician cannot operate or engage in procedures (except in certain lifesaving emergency situations) without a court order. Suppose there is a situation in which surgical intervention is considered optimal but not without risks and benefits. Who decides whether the risks outweigh the benefits? It is not the case that your family members take a vote, and then the physician acts on the majority's winning decision. It is my experience that when a loved one is critically ill and loved ones gather around that person, the tensions that were kept below the surface often come to the fore, and disagreements can arise. When that happens and all of the family is not on board with a decision, you can bet the medical care provider will ask that a guardian be appointed by the court to assess the situation and report back to the court. It will ultimately be the judge who decides what happens.

ADVANCE DIRECTIVES

If you want control over your destiny as it pertains to medical care, medical directives or medical powers of attorney are authorized in every state, allowing you to appoint a surrogate to step in and take over consistent with the guidance you provide in that medical directive, including admitting you into or discharging you from a medical care facility. They can also authorize your advocate to sign a "do not resuscitate" order preventing hospital personnel from engaging in artificial resuscitation under certain circumstances. Every state has different criteria and options available for you, and it is best to seek legal counsel in your state regarding your rights and obligations under that state's statutes.

What is often missed is that the agent must be someone whom you can trust to follow through with your directions. This may mean allowing you to die without certain medical interventions. In my practice I have seen spouses decline to act as a surrogate for their spouse as they did not feel they would be able to follow the directions that their spouse gave in his or her directive. A good agent can save a document that may not be well written. By the same token, a poorly chosen agent can destroy a well-drafted document. The agent for each of your documents must be well chosen and can make the difference between harmony in the family and dissent. Think about the last time you were at the bedside of someone who was critically ill and maybe near death. Do you remember how it played out with various personalities manifested in ways that were good, harmonious, or tense? Find an agent who can maintain that critical balance between being a taskmaster and a toastmaster, helping to subdue dissent and bring everyone together without resorting to the courts.

FINANCIAL POWERS OF ATTORNEY

Managing your health care is of the utmost importance. But who would manage your financial affairs in the event you became incapacitated? Even youth won't necessarily save you from the need of dependence on others to take over your finances if you are in an auto accident or become seriously ill. As we age, infirmities of aging and disease become even more prevalent, as does the likelihood that before you die, you might need someone to take over your finances until you regain your capacity to do so yourself.

SPRINGING AND IMMEDIATELY EFFECTIVE POWERS OF ATTORNEY

Two major types of financial powers of attorney are "springing" and "immediately effective." A springing power of attorney is only effective upon a condition precedent, such as an assessment by a physician that you are incompetent as defined within the document. You set the parameters and fix the standard under which the agent you designate will be empowered to act to the extent provided under the document. Some people favor springing powers of attorney with the belief that the power to access their financial matters is limited until the critical time when it becomes necessary.

The other type of power of attorney is immediately effective, meaning that the agent can act on behalf of the grantor anytime after it is signed by the grantor. At that point, the agent acting as a fiduciary (in good faith) may engage in financial dealings on behalf of the grantor consistent with the authority provided within the guidelines in the document.

While I understand why some people would not want someone to be able to engage in financial dealings for the grantor until a condition arose (incompetency), I always ask my clients to consider why they would withhold that authority and require the agent to establish (usually by way

of a physician's documentation) that the grantor is incompetent before the agent can act on their behalf. They don't want to say they don't trust the agent, but I say if you can't trust them now, why would you wait until you couldn't monitor their activities before giving them access to your property? If you don't trust the agent enough to grant him or her authority now, look for a different agent, or don't do a financial power of attorney. Individuals can get authority to manage a disabled person's property by way of a guardianship or conservatorship or special orders through the court if you don't have a power of attorney. But often, someone who has proven to be trustworthy in the past, is financially well set, and has been a good lifelong friend is the best candidate for that job. Picking one of your children may be your best choice; however, birth order is not necessarily a good determinant for the best choice among your children. Who is the natural leader among your children? That son or daughter may be the best choice when selecting an agent who can get along with other siblings when stress levels are high. Think about the qualities and availability of your agent, not necessarily birth order or blood relationship.

ESTATE PLANNING FOR LAWYERS

Estate planning for laypeople is one thing. Planning for legal professionals is another. According to a 2021 article in the *ABA Journal*,

> There is no comprehensive information about how often ethics officials and lawyer assistance programs deal with

ESTATE PLANS INVOLVING EQUAL BUT NOT EQUITABLE ASSETS

By Cason Parker

Malte Mueller/fStop via Getty Images

Equal is when a set of twins wears the same outfit. Equal is when younger and older siblings both receive the same amount of money from the tooth fairy. Equal is not when daughter inherits a Roth IRA and son a traditional IRA. Equal is not when son who worked in mom's widget business inherits the same shares as daughter who did not.

As we seek to be better advocates for our clients, consider how different assets or even differently titled and taxed assets pass to heirs. Have you ever encountered one piece of real estate with multiple heirs? Or a family business with multiple heirs but only one who wants to operate the business? Or a business that requires a license (such as a dental or legal practice), but the business has no successor with said license? How can we intercede for these clients?

Consider two avenues:

Avenue one, tax-deferred retirement plan equalization. Consider the embedded tax of some retirement plans and how they will be distributed under the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which mandates a ten-year distribution for certain beneficiaries. An heir with low taxable income could be an appropriate beneficiary for a non-Roth asset as he or she might not owe as much tax as an heir with higher taxable income. In the case of a high-income/taxed heir, the parents might consider executing a Roth conversion and paying tax now on previously tax-deferred funds; this could be advantageous as it ensures that the ten-year distribution requirement is tax-free and passes tax-free assets to the heir. A mix and match of taxable, tax-free, and tax-deferred assets could be compared to see which heir benefits most and least while looking holistically at distribution options.

Avenue two, life insurance for estate equalization. Consider one piece of real estate and two heirs. One option, sell the property and distribute 50 percent of the proceeds to each heir. Another option, have an amount of life insurance equal to the property value; one heir keeps the property, while the other receives life insurance proceeds. Consider a family business example. One heir is groomed to take over operations, and another only wants income. As above, the business could be sold, or one heir could receive the business outright and another could receive assets or life insurance proceeds with appropriate

(continued on page 10)

> lawyer dementia. . . . But the percentage of lawyers older than age 65—about 14%—is higher than the 7% of workers generally in that age group, suggesting that the problem could be worse in the legal profession. And the numbers are growing. Over the last decade, the number of practicing lawyers older than age 65 has increased more than 50%.

Debra Casssens Weiss, *As the Legal Profession Ages, Dementia Becomes an Increasing Concern*, A.B.A. J. (May 12, 2021), https://tinyurl.com/yckpb2rb.

Look around you—the face of private practice is aging out. True, there are many new graduates entering practice every year, but nearly 50 percent of private practitioners are solo practitioners. I have written and conducted formal presentations on succession planning to groups of solo attorneys. I ask them to identify if they have formalized succession planning. If I said that 5 percent raised their hands, I would be exaggerating.

Many solos don't have backup plans in place if they become disabled. As emphasized in the *ABA Journal* article quoted above, large firms, or even partnerships, provide the peace of mind that someone is there to take over who knows the underpinnings of the firm and can continue the practice and maintain some momentum upon the death or disability of another member of the firm. Even having a paralegal employed provides some institutional memory that can be called on as another attorney steps in to take over. But just having a paralegal is not a plan.

Unless the rules change, a member of the bar must step in to take over. For any business, the problem with emergency operation when the CEO dies suddenly is determining who has authority and from where is it derived. Many of you have planned for your family members with wills, trusts, medical directives, and financial powers of attorney. But have you made parallel arrangements for the continuity of your law firm? Providing your loved ones with the tools necessary to inherit your wealth and care for you during your extended illness with a medical directive may work to a degree. But have you provided someone with the authority to take over your practice within that estate plan?

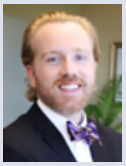
Unless one of your family members is a member of the bar in your state and has been authorized to access your confidential files, financial records, and case status reports, and has the authorization to contact your clients to determine if they wish to continue under that new attorney's supervision, your plan is useless concerning your business. And what is your business worth upon your sudden death without any planning?

Any asset you leave your family by way of your will or trust will need to be administered, and that takes time. The individual seeking authority to continue your practice without any preexisting authority will have a hard time getting access to your records, and it takes time when seeking that authority through the legal system. Granted, you can get emergency orders to begin doing an assessment. But who has the time to run their own practice and clean up another's practice at the same time?

(continued from page 9)

buy-sell agreement planning. In the case of a business where no heir is capable of succession (e.g., a law practice inherited by a nonlawyer), life insurance could be purchased on the owner based on the value of the practice. This allows for full valuation. Insurance can also provide insulation against heirs not being able to sell or a postponement of selling due to probate or other factors. Insurance proceeds pay out at death; the non-licensed heirs receive proceeds and can choose whether to pursue a sale. The heirs have more time flexibility to choose a buyer that would honor the departed's legacy.

Undoubtedly, clients have many options and obstacles based on the law as well as their family and business dynamics. Next time you find yourself counseling those living, breathing embodiments of the American dream on business succession, illiquid assets, and IRA planning, know how significant of an impact you can make for them for generations. From a grateful financial planner, thank you for the work you do! ■



Cason Parker, CFP® (cparker@westshorefinancial.com), has been building a succession exit planning financial practice over the last decade as the son of a family business that wasn't passed on to the next generation. He has personally witnessed how divorce, sickness/injury, and premature death have affected his family and clients.

Several years ago, I learned of an individual who had been a member of a large and very successful firm. Alcohol, drugs, and gambling became his obsessions over time, and he was forced out of that firm. As a solo, he was very smart and managed to continue to practice with a significant client base. But drugs and alcohol took their toll, and he died suddenly and unexpectedly. An attorney who never lost contact with the deceased stepped in to help take over his practice as a friend and to help his family. He described the problems associated with that process. He had to seek emergency authorization to take over the practice and close it out. That meant he had to contact all the deceased attorney's clients, and the decedent did not keep good records. It took hours and hours of sleuthing to find them and do his due diligence. Then, he had to find out the status of each of the cases, and, without written retainers, this became extremely difficult as he tried to work with all the various jurisdictions that were in play. The deceased also had file cabinets full of old and newer files. This meant he had to contact each of them to determine if they wanted their files returned to them. If they did, it was costly to pack them up and send them with appropriate documentation to verify that they got them. As the costs racked up, he sought the assistance of the state bar to help him defray the costs—the bar declined and told him it didn't have a fund for that purpose. In the end, the local bar pitched in to help him defray the costs. What kind of value do you think that attorney left his family from the disposition of his law firm?

More and more state bar associations require attorneys to identify another professional who could take over in case of emergency. I know I must provide that information before renewing my membership, and that is a recent development. Many state bars must appoint receivers to take over firms where there are no volunteers.

Save your family and loved ones a lot of trouble. Make sure that you have coordinated with another member of your bar, ideally one who is familiar with your area of law. Even if this lawyer is not focused on your area of law, reach an agreement that you will reciprocate for one another in the event of catastrophic circumstances. That means you will need to provide this person with a springing power of attorney that is triggered under certain prescribed conditions and authorizes that person to access your files, contact your clients, and manage your financials. Your banker, CPA, family-authorized trustee, and personal representative or executor (as circumstances dictate) must all be apprised of this arrangement, and the state bar also must be made aware of your agreement. Details must be worked out regarding compensation, out-of-pocket costs, and access to passwords where required, and you must coordinate with your malpractice carrier (which will be very pleased to hear that you have made such arrangements).

Identify another attorney who could take over your cases in the event of an emergency.

Finally, make sure that you revisit this agreement at least annually. Things change. New financial institutions, different areas of practice, ongoing litigation, and changes to cloud storage arrangements or paper file storage can occur. If employees are involved, it is imperative that they be involved in your succession plan and in agreement with it. An employee can kill an arrangement that you feel is wonderful. Make sure your family knows of your obligations to your clients and that you are fulfilling those obligations responsibly. If you do all this planning in advance, you will find that you will be leaving your family an asset, not a liability. ■

Gary P. Bauer (bauerg@cooley.edu) is distinguished professor emeritus and visiting professor at Western Michigan University Cooley Law School. He is the author of *Hire and Retire: A Plan for a Continuing Income Stream in Retirement from Any Practice* (ABA, 2019) and was awarded the Solo and Small Firm Trainer Award by the ABA GPSolo Division and the Outstanding Achievement Award by the State Bar of Michigan's Solo and Small Firm Section.