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When is the Right Time to Get Your Estate Planning Affairs in Order?





By: Valerie Powers Smith, Esq.

The answer is, now. Whether it is because you have yet to do your estate plan or that your plan is needing updating due to the passage of time, change in laws, or life events such as marriage, divorce, incapacity, death, or the birth or adoption of a child.

Estate planning is not associated with the size of your estate; but, rather planning for what happens if you become incapacitated (either temporarily or permanently) during your lifetime and, then, upon your death. The basic elements of a well-crafted estate plan include wills, trust(s), durable powers of attorney, and a healthcare directive. The following are important areas to consider as to whether you have all of your affairs in order:

1. Avoiding Probate & Intestacy Succession

The California probate system is complicated, costly, and time-consuming. One can easily avoid having to interact with the court and probate process by having an irrevocable living trust in place at death. Assets in the name of the trust at the time of death avoid probate and pass as per the dispositive provisions contained in the trust document.

If an irrevocable living trust is not your desire, consider this: failure to do any planning or proper planning will subject you to the laws of intestate succession. Two obvious problems are, one, being subjected to the probate process and, two, your estate potentially going to family members to whom you would not have given had you done the proper planning. This is of particular importance if you are unmarried, have a special needs family member, or are part of a blended-family.

2. Planning for Incapacity

Planning for your own incapacity is just as important as planning for death. Durable Powers of Attorney for financial, business, and health care decision making are essential. It is of particular importance if you are a business owner or have business interests to have an experienced estate and trust attorney create durable

powers of attorney that coordinate with your business documents. SBEMP offers its clients that very coordination with the experience of both estate & trust and business attorneys to best meet your needs in an integrated manner.

Particularly in California where the incidence of conservatorship petitions is ever increasing with the aging population, it is important to contemplate who you would want appointed, should there ever be a need during your lifetime, as your conservator to manage your personal, financial, and medical decision-making. Left unplanned, the court will determine who that person will be, which may not be who you would have chosen.

3. Succession Planning

Do you own your own practice and are looking toward retirement or; perhaps, just slowing down? Have you put into place your succession plan? What will happen to the practice and your clients? Who will have authority to take it over and service your clients with minimal disruption? Succession planning is just as important as any of the other components of one's estate plan and can cause unintended consequences if left unaddressed. Again, SBEMP's estate & trust and business attorneys will work in a coordinated manner to ensure our business client's needs are met in this regard.

4. Special Needs Considerations

Do you have a family member with special needs? Do you have a special needs trust as part of your overall estate plan? If not, you could unknowingly be creating an ineligibility problem for the very family member you intend to benefit upon your death. Even worse, those inherited assets could be subjected to recoupment by the state in order to continue MediCal (or other means-tested programs) without interruption. A special needs trust is a freestanding trust that preserves current or future eligibility for individuals with special needs and/or disabilities because assets contained therein are not considered to be countable resources for means-tested programs such as Medicaid (aka, MediCal) and SSI.

What's New: ABLE Accounts. Saving for your children's education? Did you know that saving money in a traditional 529 account can cause ineligibility problems for your child with special needs? While before it was not advisable to do so, now, parents of children with special needs can save for the educational needs of their child with special needs without causing the unintended ineligibility problem that 529s present. In December 2014, the Achieving a Better Life Experience Act of 2014 (ABLE Act) won final congressional approval and was signed into

law by President Obama. The ABLE Act is built on the foundation of the current 529 education savings plans that help families save for college. In the case of ABLE, families now have a tax-deferred savings vehicle to save for the care of people with disabilities. The National Disability Institute estimates there are 58 million individuals with disabilities in the United States. Many of these individuals will qualify for ABLE accounts.

5. Same Sex Couples

Prior to the U.S. Supreme Court's June 26, 2015 decision in Obergefell v. Hodge, 2015 WL 2473451, same-sex marriage was legal in only 37 states (i.e., AL, AK, AZ, CA, CO, CT, DE, FL, HI, ID, IA, IL, IN, KS, ME, MD, MA, MN, MT, NC, NH, NJ, NM, NV, NY, OK, OR, PA, RI, SC, UT, VA, VT, WA, WV, WI, and WY) and Washington, D.C. With legalized marriage for all comes the need to get your estate planning documents in order. The same considerations discussed above in this newsletter apply to same-sex couples. In addition, same-sex couples planning marriage should examine the advantages and disadvantages before doing so, such as healthcare benefits, retiree benefits from the Social Security Administration, and tax treatment, just to name a few.

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