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### **ESTATE PLANNING DOCUMENTS AND PROCEDURES**

Estate planning addresses the preservation of assets, the protection of assets from estate taxes and creditors and assuring that the assets remaining upon our death are passed to our designated beneficiaries. The most common goals regarding asset protection are to minimize the impact of estate or inheritance taxes, to avoid probate and to protect beneficiaries from creditors and poor judgment. It is important to consider 1) the impact of inheritance or estate taxes, 2) capital gains taxes and 3) the title of assets in order to minimize the tax and probate impact and assure that assets are passed to the beneficiaries according to our desires.

The following is a brief summary of some common terms, documents and procedures often used in estate planning.

#### **POWER OF ATTORNEY and DURABLE POWER OF ATTORNEY**

A Power of Attorney, often called a Financial Power of Attorney is a written document that grants (by you as the principal) a broad range of specific powers over your financial affairs to someone you trust (referred to as your “agent” or “attorney-in-fact”). Specific provisions can establish when and how the power of attorney takes effect, the duration and the manner in which it can be terminated and can describe or limit the powers granted to the agent. Generally, a Power of Attorney is only in force while you are healthy while a Durable Power of Attorney remains in force at all times; when the principal is healthy and during periods of disability or incapacity. Under Georgia law, however, all Powers of Attorney remain in force until specifically terminated by the principal or the terms of the power of attorney. The power of attorney will typically authorize your agent to make payments, handle tax or social security matters, manage investments, obtain information regarding your investment accounts and life insurance, and even create trusts for your benefit.

All powers of attorney terminate upon the death of the principal. A Power of Attorney is an extremely important document that can be used to avoid the appointment of a guardian when a person becomes incapacitated. It is also recommended that your power of attorney be reviewed and replaced every 3 – 4 years.

#### **ADVANCE DIRECTIVE FOR HEALTH CARE**

An Advance Directive for Health Care is a written document authorizing someone you name (an “agent” or “attorney-in-fact”) to make health care decisions for you in the event you are unable to make those decisions for yourself. You may authorize your agent to make decisions regarding

autopsy, organ donation and final disposition of your body. You may also provide guidance to your agent for such decisions as burial or cremation, and the continuation or cessation of nutrition, fluids, pain relief medication and cardiopulmonary resuscitation. An Advance Directive for Health Care applies to all medical decisions unless specifically limited. In the event that a medical emergency arises and no Advance Directive for Health Care is in place, the task of making medical decisions will fall to family members. As with the general power of attorney, the Advance Directive for Health Care should be reviewed and replaced every 3 to 4 years.

## **LAST WILL AND TESTAMENT**

The Last Will and Testament is the basic estate planning document that provides for the distribution and disposition of property and personal assets after death. A Will becomes effective upon death, therefore, it can be changed at any time prior to death and should be periodically reviewed to be sure it applies to the current personal and family situation. A Will may contain general or specific provisions regarding the care and distribution of property, distribution of disclaimed property, recommended guardians for minor children, appointment of executors to administer the Will and trustees to manage any assets placed in trusts created by the Will, establishment of trusts for the benefit of others and express desires or guidance regarding the administration of your estate. Divorce, marriage or a child born or adopted after the Will has been executed may revoke the Will unless specific provisions have been made to allow for the occurrence of such events.

A Will should be reviewed periodically, at least every two to three years because it may be affected by changes in domicile, the death or incapacity of beneficiaries, executors, trustees or guardians, divorce or separation, the birth of children, changes in the value or location of significant assets or changes in one's desires to distribute assets.

## **TRUST**

A Trust is an instrument used to manage an asset or a group of assets for the benefit of a specified individual or group of individuals in a restricted manner. It is often used for the management of estate assets in order to minimize federal or state estate taxes, to manage assets for the benefit of a minor, or an adult who may need assistance or is incapacitated. The manager of a trust is known as a "trustee" and may be either a trusted family member or a professional who specializes in trust management. Trusts may be established during life (often known as inter vivos trusts or living trusts) or through provisions included in a Will (testamentary trusts). Trusts established during life may be either revocable (no estate tax benefit) or irrevocable (may be beneficial in avoiding estate tax because the assets transferred to the trust are removed from your control and from your estate).

## **REVOCABLE OR "LIVING" TRUSTS**

Revocable Trusts (commonly referred to as Living Trusts) are established during life, and frequently used as a means to avoid the expense and delay of probate, to establish estate tax avoidance provisions and to specify that the distribution of certain assets be in trust for

beneficiaries. A Revocable Trust may be a valuable planning device but should be evaluated with care and created by an experienced professional so it can be tailored to specific needs. Revocable Trusts are more comprehensive and slightly more expensive to prepare than a Will. Often, a Revocable Trust will include disability planning, appointment of attorneys-in-fact for financial or health care decisions, elder care provisions, and establishment of trusts and distribution of assets. Testamentary trusts may be established for such things as estate tax avoidance, caring for minor or disabled beneficiaries and to assure distribution to specific individuals after the death of a spouse or upon some other event.

Other considerations, beyond simply avoiding probate may motivate an individual to establish a revocable trust. The advantages of Revocable Trusts include 1) avoiding probate in a single state or in multiple states when real property is owned in more than one state, 2) maintaining privacy over one's estate and the distribution of assets, 3) easing the handling of property in other states (including avoidance of probate in each state where real property is owned, 4) expediting the distribution of assets, 5) providing protection in the event of incapacity by naming guardians and trustees and 6) being able to specify the conditions of your own care in the event of incapacity. For a Revocable Trust to be effective, certain assets must be transferred to and titled in the name of the Trust. The re-titling and property transfer steps may be somewhat time-consuming. A decision to use a Revocable Trust should be made by weighing your estate planning objectives with the advantages and disadvantages of establishing and administering the Trust against the advantages and disadvantages of probate.

## **IRREVOCABLE TRUSTS**

An Irrevocable Trust is one that cannot be changed after it is established. Two of the most common irrevocable trusts are 1) those designed to hold life insurance policies outside of an individual's estate (often referred to as an Irrevocable Life Insurance Trust, or ILIT) and 2) those designed to remove property from an individual's estate, to pay back to the individual a specified amount or a percentage for the life of the individual, or for a certain number of years, and distributed to a qualified charity upon the death of the individual or the end of the specified term of years (often referred to as a CRT, CRAT or CRUT).

- 1) Irrevocable Life Insurance Trust (ILIT): Here a donor transfers existing life insurance policies, subject to a 3-year transfer rule, or authorizes the trustee to purchase life insurance and hold it in the name of the trust (or trustee). If designed properly, this type of irrevocable trust may also be used to hold other assets. Donations can be made to the trust beneficiaries, subject to the annual exclusion, and the donations, if rejected by the beneficiaries, can be used to pay the insurance premiums. Upon the death of the insured, the proceeds of the policy can be distributed to the beneficiaries or used to purchase assets from the estate of the insured and thereby providing cash to be used by the estate.
- 2) A Charitable Remainder Trust (CRT) (may be a Charitable Remainder Annuity Trust - CRAT - or a Charitable Remainder Unitrust - CRUT) is used to hold cash and/or property that is transferred to a qualified charitable organization upon the death of the donor or at the end of a term of years. The donor retains an interest in the property,

receives a charitable tax deduction, and receives periodic payments from the CRT for the specific term or for life. Upon the death of the donor, the remainder interest in the property passes to the charity the donor specified. The donor may retain the right to change the charity or to designate additional charities.

An Irrevocable trust may also be created by the terms of a Revocable Trust or Last Will and Testament upon the death of the Maker, often to minimize estate (inheritance) taxes or to assure distribution to specified beneficiaries in a controlled manner.

## **GUARDIANSHIP AND CONSERVATORSHIP**

Guardianships are often made for minors by a provision in a Will, but can also be established for an unemancipated minor or an adult incapacitated to such an extent that they are unable to make responsible decisions regarding their person or their affairs. The judge of the probate court has jurisdiction over appointment of guardians. The responsibility and power of a guardian for a minor is the same as that of a parent. For the guardian of an adult, the powers are similar to those for the guardian of a minor, but the adult's guardian also has the responsibility to respect and maintain the individual rights and dignity of the ward; be reasonably accessible to the ward; participate in legal proceedings in the name of the ward and for the support, education, care or well-being of the ward. The court-approved guardian must annually file with the probate court a personal status report concerning the ward. An adult who has a guardian appointed may retain certain rights, such as the right to vote, make a Will, etc., depending upon the decision of the Probate Court Judge. Guardians for minor children are often named within a Will, but it is important to understand that the guardian named in the Will must be approved by the court.

Conservator is the term used for the court approved manager of the assets of a minor or an incapacitated adult. Similar to a person acting as agent appointed by a Financial Power of Attorney, the Conservator has a fiduciary duty to preserve assets and use them only for the benefit of the ward (and may include those who may be financially dependent upon the assets of the ward).

## **FEDERAL ESTATE TAX PLANNING**

Upon death, a person's estate may be subject to federal estate tax based on the value of all property in which the decedent has an ownership interest. Examples of such property include any interest in retirement plans, the face value of any life insurance policy owned, the net value of any real property, the appraised value of any business interest and the fair market value of all investments, collections, personal belongings, etc. An estate tax credit (called the estate tax exemption) is allowed on the first \$3,500,000\* of assets, but the estate tax rate for amounts above the exemption amount is currently 45% and could be 55% in the future.

Estate taxes may be reduced or avoided in a number of ways. The most common approach is to leave one's entire estate to a surviving spouse. This effectively defers payment of estate tax. Unfortunately, if this is the only planning step, a higher estate tax may be incurred upon the death of the surviving spouse because a simple transfer made to the surviving spouse forfeits the

\$3,500,000\* exemption belonging to the deceased spouse. A more effective means of reducing the impact of estate taxes is to establish one or more irrevocable trusts either during life or at the first death for the purpose of sheltering \$3,500,000\* in assets for one's ultimate beneficiaries. The assets can be held in trust with the surviving spouse receiving all income and having access to the principle, but not included in the surviving spouse's estate. These trusts can be established during life, but more commonly are created by Will or Revocable Trust. The effect of such planning is to take advantage of each spouse's estate tax exemption and thus avoid federal estate taxes on up to \$7,000,000\* for a married couple.

A number of advanced planning techniques should be considered to reduce estate tax impact in larger estates and where one has a substantial interest in a family business. Such techniques may include the use of Family Limited Partnerships, Qualified Personal Residence Trusts, Irrevocable Life Insurance Trusts and Charitable Remainder Trusts to transfer assets out of the estate or to reduce the value of the estate that is subject to estate taxes.

\*The current Estate Tax Exemption is not permanent. As shown in the table below, the exemption has varied in the last few years, as a result of legislation from 2001. The exemption will continue to vary in the next few years, unless the bill is revised. If the bill is not changed, then there will be no estate tax in 2010 and the exemption amount will go back to \$1,000,000 in 2011.

<b>Year</b>	<b>Estate Tax Exemption</b>	<b>Maximum Estate and Gift Tax Rate</b>
2001	\$675,000	55%
2002	\$1,000,000	50%
2003	\$1,000,000	49%
2004	\$1,500,000	48%
2005	\$1,500,000	47%
2006	\$2,000,000	46%
2007	\$2,000,000	45%
2008	\$2,000,000	45%
2009	\$3,500,000	45%
2010	Federal Estate Tax and Gift Tax Repealed	Maximum Individual Income Tax Rate
2011	\$1,000,000	55%
2012, etc.	\$1,000,000	55%

## **PROBATE**

Probate is the process of distributing the assets of a deceased person. If the decedent had a Will, the probate process is that of "proving" a Will. In Georgia, every Will is required to be recorded in the county of the decedent's residence within nine months following the death of the maker (the "testator"). The probate process includes the filing of a probate petition, giving notice to creditors, identifying assets and distributing the assets according to the terms of the Will. A Will may be very simple, leaving one's estate to a spouse or shared between lineal heirs. Or, often in the case of

larger estates or mixed families, a Will may employ trusts and advance estate tax avoidance techniques to preserve assets. It is important, when making distribution of assets in a Will, to be sure that property is titled to match, and not conflict with, the distribution plan.

In Georgia, if a person dies without a Will (said to die intestate), the person's estate will be distributed according to the current statutes governing intestate distribution. The surviving spouse shares equally with children but will take not less than one-third of the estate. Half-blood and adoption are equal to whole blood relations. After the spouse and children, relatives take based upon degrees of inheritance:

- 1st spouse and children (spouse to receive no less than one-third)
- 2nd parents
- 3rd brothers and sisters
- 4th grandparents
- 5th uncles and aunts
- 6th first cousins

The cost of probate varies depending upon the size of the estate, the type of assets owned and the location of the assets. While some states base the cost of probate on the value of the estate, the cost in Georgia is based upon standard filing fees and the cost of obtaining specialized professional assistance from financial planners, CPA's and attorneys whose assistance may be required to help with probate, tax and investment matters. Generally speaking, the cost range is 2%-6%, with the average about 4% of the value of the estate. The items that may increase probate costs are contact and negotiations with creditors, property appraisals and transfer of title, and ownership of property in other states. Probate is required in every state where real property is owned, unless the property is held in trust.

In order to assure that assets are preserved and distributed as you desire, it is most important to name individuals or organizations that you trust to settle your estate after death and to manage testamentary trusts that are established for beneficiaries. It is also imperative to review beneficiary designations and the way property is titled to assure that assets will pass according to our desires and in accordance with state law.