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ATTORNEYS

REVIEWING EXISTING ESTATE PLANNING DOCUMENTS

(Estate Planning Advisory No. 5)

This Advisory discusses the importance of doing periodic reviews of your existing estate planning documents to make sure that they continue to achieve your goals and to identify possible needed changes that need to be made.

This Advisory is neither exhaustive nor tailored to your specific situation. You should discuss your personal situation with us or with your own attorney. Our representation is undertaken through a written engagement letter and not by the mere distribution of this Advisory.

Introduction. When you first created your estate plan, you should have been advised that periodic reviews of your documents were advisable. Many events occur that may require changes in your documents, such as any one or more of the following:

(1) a marriage, death, or divorce;

(2) birth of a child or grandchild;

(3) change in health or capacity;

(4) tax law changes;

(5) change in personal family dynamics;

(6) children are now mature adults and provisions for continued trust management of inheritances is no longer necessary;

(7) disability of your spouse, a parent or child that you provide support or care for;

(8) the person you named to serve as successor trustee is no longer a good choice for the position for some reason;

(9) a teenager or young adult has had problems with alcohol or drug use, illegal activities or incarcerations.

Because the events listed above, as well as other events personal to your own situation, can prompt changes to your documents, it is recommended that you review your documents with your estate planning attorney every three years (or more often if events in your life require it). Tax laws change yearly and you should take advantage of yearly or lifetime gifting to reduce the taxable amount of your estate upon death. Proven estate planning structures allow you to maintain full control of your estate until death with substantial gifting.

There are certain things to look for when doing a review and evaluation of estate planning documents to determine if revisions may be necessary, and these include:

Beneficiary Designations. A review of the existing named beneficiaries on a life insurance policy, a pension plan or an IRA should be done to confirm who is named as the primary and alternate beneficiaries. Surprisingly, most people do not know with certainty who they have named as their beneficiaries! Because of the option of rollover provisions from one spouse to the other after a death, most people name a spouse as the primary beneficiary with children as the secondary. Where there has been a divorce, it is not unusual that the beneficiary named is a former spouse; many times the necessity of making a change has been forgotten. Naming a trust as a beneficiary can have adverse income tax results, so this option should only be established only with full knowledge of the potential impact.

Estate Taxes. Estate taxes are significant -- as much as 40% of your estate that exceeds the amount exempt from taxes. An estate planning review should include a consideration of the amount of your estate that will be taxed, the amount over the exempt amount[1], and the amount of that tax and usual estate planning methods to avoid the tax or pay for it. We pledge to assist you in ensuring that the maximum of your estate transfers to your beneficiaries and the least amount paid to the Internal Revenue Services.

Powers of Attorney.

1. Is it a durable, general or specific power? Review the language in the document to determine if the form is durable or is a general or specific power of attorney. A durable power of attorney may only become effective if the principal (person granting the power) becomes disabled or incapacitated; this is referred to as a "springing power" because under California Probate Code section 4030 it can only be used when the disability occurs and not until.

A durable power of attorney can also designate that the power begins immediately and remains "durable" even after incapacity occurs. A power of attorney is deemed to be general, or non-durable, if it allows the agent to transact business on behalf of the principal under some

[1] The exempt amount of an estate has varied from $1,000,000 to $5,000,000 in recent years, with the exempt amount currently at $5,250,000 as of January 1, 2013.

stated limited situations. The most common use for a nondurable special power of attorney is when the principal anticipates being absent when an important document requires his or her signature. For instance, a person may give a spouse, domestic partner, child, or a trusted friend a nondurable power of attorney to execute the documents to sell a house when he must be out of town and is not available to sign documents at the close of escrow.

A general power of attorney allows an agent to perform all actions and make decisions that a person granting the power could make. It's broad and all exclusive; it expires upon the grantee's incapacity and death. These types of power of attorneys usually have a stated expiration date and generally do not contemplate the possibility of the principal being incapacitated, only that he or she will be unavailable. It is merely a delegation of authority for convenience purposes.

2. Determining Incapacity for a Durable Power of Attorney. The determination of incapacity is easy if a client currently has a terminal illness, is in a coma, or has another condition that makes it clear that the person is too weak or incapable of managing his or her day-to-day financial affairs. If the person has mental impairments, such as dementia or Alzheimer's disease, that have been gradually developing, then determining when incapacity occurs is generally stated in the document to require one or two physicians to examine and certify that the person does not have the ability to understand and manage his own financial affairs. At times when a family is dealing with difficult issues it may be burdensome to require two independent physicians to do a capacity evaluation. Many people prefer to have a requirement of only their own family physician to make a determination of incapacity.

3. Were Document Formalities Followed During Execution? In California, to be an effective power of attorney, the document must be notarized or signed by two witnesses. A valid power of attorney executed in California is generally accepted in other states, but in some instances, a form will not be found valid because it may not meet the standards for that other jurisdiction. If a person regularly deals with property or finances in two or more states, it may be advisable to have two separate power of attorney forms drawn that meets the specific requirements for each state. Otherwise, a delay may occur when a bank or other entity in another state must send a California form to their general counsel to confirm that it meets that state's legal requirements to be deemed valid. Thus, some institutions have their own.

Health Care Directives. The legal authority for designating an agent to make health care decisions on your behalf is set forth in the California Probate Code section 4600-4805 and includes the right to select or discharge a health care provider or institution; approve or disapprove diagnostic tests, surgical procedures, medication and directions to provide, withhold or withdraw life support, artificial nutrition and cardiopulmonary resuscitation.

1. Was the Document Signed before January 1, 1992? Advance Medical Directives or health care power of attorney forms signed prior to 01/01/92 were valid for a period of only seven years. If your health care directive was signed before this date, look for a termination date. After the termination date, the form is no longer valid and a new one needs to be executed.

2. What Type of Health Care Document Is This? There are several types, so review the document or documents to determine what kind of authority is being granted to the agent. An Advance Health Care Directive designates an agent for health care decisions and contains certain instructions regarding choices the principal may want carried out at a time when they are not able to make their own medical decisions, including continuing or terminating life support, burial instructions, or organ donations. Most individuals name their spouse or partner as the primary agent, with children or friends as alternates. The document may also have a Do Not Resuscitate provision, burial instructions and organ donation provisions, or these options may be contained in a separate document. Make sure a thorough review of all documents is done periodically to make sure it continues to reflect your intent.

(a) HIPAA Release. Because of the privacy rules of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) it may be difficult or impossible for an agent to communicate with a health care provider on behalf of a person without a HIPAA release, since the release of private medical information may subject a doctor or hospital to liability if they disclose personal information without a patient's consent. Because of this Act, it is wise to have a signed HIPAA release allowing the same agent designated for health care decisions to be able to receive copies of medical records and communicate with medical providers.

(b) Living Will vs. California Medical Association Form. An attorney can draft a customized document setting forth detailed wishes of how medical decisions should be made by the agent in certain given instances. This document is commonly referred to as a "living will" and can be reassuring to a patient who has strong opinions about choices in receiving medical procedures. For others, it may be preferable to use the pre-printed form available from the California Medical Association (CMA), rather than a custom drafted form. Doctor, hospitals, and nursing homes in California are familiar with the CMA form and will act on it quickly without hesitation since they are familiar with the most commonly used form in California. A custom drafted form may provide greater detailed instructions from the principal, but it may result in delays because a medical provider may need to send a copy of the document to their legal counsel before they will accept and recognize the terms of the document as being legally valid and releasing them from any liability. Evaluating the type of health care document you need is important so that you know what limitations may exist when it is exercised.

3. Is the Named Agent Still the Preferred Choice? People frequently change their mind as to the person they want to designate to have authority over their medical decisions. Some agents named long ago may not be living, or the principal may decide that the responsibility is too much for that person to continue to bear for any number of reasons. If a change in the agent needs to be made, it requires the principal to sign a new form.

4. Were Formalities Observed During Execution? To be valid in California, Health Care Directives may be either notarized or witnessed by two individuals. Other states only require one witness, so if the document does not comply with California law, it will not be accepted as valid by doctors and hospitals here. If the person is living in a skilled nursing facility, it requires an additional signature by the facility's Ombudsman, who will interview the person to confirm that they have not been manipulated or coerced into signing a document that they do not fully understand. If there are any questions about whether the document was properly signed and notarized, or signed with two witnesses *and* an Ombudsman for a resident in a skilled nursing facility, a new form should be signed.

Revocable Trusts.

1. Execution Formalities Observed? While a trust may be deemed valid in California without being notarized, it generally results in court interpretation to validate and can create delays or litigation over whether it is a valid trust. The best option is to review the document and make sure that it was signed before a notary with a proper notary acknowledgment.

2. Successor Trustees Current? By far the most frequent change needed in a Trust is to designate a different successor trustee from the one originally named in the Trust. This is such an important position and naming a family member on a particular date may not be the best choice years later. People die, become incapacitated or burdened with other life events to the point that they are no longer a good choice as a successor trustee. If a change in the named successor trustee is necessary, it merely requires an amendment of the trust to name a new successor trustee.

It is also important to name at lest one alternate successor trustee if your first choice is unable or unwilling to act as trustee. It is helpful to name someone that is at least one generation younger that you are, to ensure that the named trustee is more likely to outlive you. People frequently name a sibling, but many times the sibling is no longer living, so a better choice is a child or a grandchild that is fiscally mature and able to handle the responsibility of managing assets and finances. It may be a wise choice to name a corporate trustee because they have greater experience, are held to a higher fiduciary obligation, can be more objective in

making discretionary decisions during difficult and emotional times, and they are more likely to be available for a longer period of time than an individual.

3. Are Beneficiary Distribution Desires Current? The next most frequent change needed in a Trust is a change in the distribution to beneficiaries. Are the named beneficiaries still living? Is there a provision for what happens to a beneficiary's share if they die before the settlor of the trust? Have beneficiaries for whom trusts were set up with graduated distributions achieved the full age required? If so, it may be time to revise the trust and eliminate continuing trustee oversight and merely distribute everything out to beneficiaries. On the other hand, it may be time to implement a continued trust for someone who cannot manage inherited funds prudently or have threatened creditor collection issues.

4. Specific Bequests and Trust Asset Schedules. Review specific bequests in a trust to make sure that the asset is still a trust asset. Hard feelings and potential lawsuits can be avoided from a beneficiary who feels they are entitled to an asset from the trust if the item they were intended to receive is no longer part of the trust. Likewise, an updated Schedule A to the trust listing the trust assets may be a lifesaver in instances where title to an asset is not in the name of the trust, but appears on the Schedule A, allowing a simple court petition under Probate Code §850 to move the asset into the trust.

As always, you should be sure that additional legislation has not been enacted or that court decisions have been rendered that would change the above advisements. This Advisory is neither exhaustive nor is it tailored to your specific situation. You should discuss your individual situation with us or with your own attorney. We look forward to being of service to you.

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Business and Tax Attorney

This Advisory is one of a series of tax and estate planning advisories prepared by the attorneys at Buynak, Fauver, Archbald & Spray, LLP. Should you have further questions regarding the information provided in this Advisory, please contact the number listed above.

Buynak, Fauver, Archbald & Spray, LLP provides business legal services to individuals, business entities and nonprofit organizations from entity formation and start up, through day-to-day operations and exit strategies, including tax and estate planning.

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