McGUIRE WOOD & BISSETTE LAW FIRM
SMART LEGAL

ESTATE PLANNING & INCAPACITY

FREQUENTLY ASKED QUESTIONS

ESTATE PLANNING

Q. WHAT IS ESTATE PLANNING?

A: The term "estate planning" is merely the process of working with professionals, like attorneys, to develop documents that plan for surrogate decision-making during incapacity and the transfer of assets upon death. This process is applicable to nearly every person and can save a great deal of hassle for your family members and loved ones in the future.

Q. WHAT HAPPENS IF I DIE WITHOUT A WILL?

A. There is a great deal of confusion about what happens with assets if you die without creating a will. Many people believe that if they are married, then all of their assets will automatically pass to their spouse at death. However, this is not necessarily the case. For example, in North Carolina, if a person dies married, with no children, but survived by 1 parent, then the deceased person's surviving spouse and surviving parent would share in the probate estate. Creating your own last will and testament ensures that your wishes are followed.

Q. MY SPOUSE AND I EACH HAVE CHILDREN FROM A PRIOR MARRIAGE. DO WE NEED TO TAKE ANY EXTRA STEPS?

A. Absolutely! Each couple chooses to handle this situation in different ways. Some may choose to combine assets and leave all assets equally to all children. Others may choose to keep the assets separate, to the extent feasible, with the intent that the money may be used for the care of the surviving spouse, but that after both spouses pass away that the children only inherit his or her parent's assets. With little to no planning, some individuals leave all of their assets to their spouse not realizing that the surviving spouse's last will and testament will likely control the ultimate distribution of those assets, which may or may not include the predeceased spouse's children from a prior marriage.

Q. SHOULD I PUT MY CHILD'S NAME ON MY BANK ACCOUNT TO HELP PAY BILLS WHEN I CAN'T?

A. This is a question that elderly clients, in particular, ask regularly. The answer depends on the particular circumstance. However, in most cases the answer is "no." The reason is that instead of just adding their child as a signor on the account or as an agent acting under a financial power of attorney, many clients actually add the child as a co-owner *with right of survivorship*. This means that upon the parent's death, that child will inherit 100% of that account regardless of what the last will and testament says. This result may be okay if there is only one child, but is problematic with multiple children. The joint ownership designation controls distribution at the death of one co-owner. Thus, many folks unintentionally end up disinheriting their other children. <u>Instead, the child should be added as only a signor or as an agent acting under a financial power of attorney.</u>

OUR SERVICES INCLUDE:

- Preparing financial and health care powers of attorney, trusts, and last wills and testaments
- Probate avoidance
- Tax planning
- Estate and trust administration
- Trust modifications

Contact Us

48 Patton Avenue
Asheville, NC 28801
828.254.8800
www.mwblawyers.com

ANDREW ATHERTON
aatherton@mwblawyers.com

PHOEBE BULLS
pbulls@mwblawyers.com

RICHARD KORT
rkort@mwblawyers.com

HARRIS LIVINGSTAIN
hlivingstain@mwblawyers.com

DORIS LOOMIS
dloomis@mwblawyers.com

KATHLEEN RODBERG, CELA
krodberg@mwblawyers.com

SARAH THORNBURG
sthornburg@mwblawyers.com

Q. IS A WILL MADE IN ANOTHER STATE VALID IN NORTH CAROLINA?

A. Generally, any estate planning document that was valid in another state at the time it was signed will remain valid in North Carolina. However, there may be some additional requirements that out-of-state documents must face before being acknowledged in North Carolina. It is a good idea to have a local attorney review out-of-state documents to ensure that you know what those additional requirements are and determine whether new North Carolina documents are needed.

Q. WHAT IS A TRUST?

A. A trust is a legal entity that holds property for the benefit of particular people or organizations. Some examples of frequently used trust arrangements are: (1) revocable trusts for probate avoidance, (2) trusts established to support a surviving spouse (particularly for second marriages where there are children from a prior marriage), and (3) special needs trusts for disabled beneficiaries. Trusts are highly customizable to accommodate your particular wishes and goals.

Q. CAN'T I JUST PREPARE MY DOCUMENTS ONLINE AND SIGN THEM?

A. As technology becomes more advanced, it can be tempting to cut costs by preparing these documents yourself. As you may have guessed, most estate planning attorneys would advise against the "DIY" option. However, it is important to understand why. Visiting an attorney for estate planning matters is not simply about getting documents in place that are signed—it is about getting the correct documents in place, ensuring those documents express your wishes, and spotting potential issues before a problem arises and developing solutions. Taking the DIY approach to save a few hundred dollars may result in tens of thousands being spent by your estate and beneficiaries on legal fees after your passing.

Q. WHO MAKES HEALTHCARE & FINANCIAL DECISIONS FOR INCAPACITATED INDIVIDUALS?

A. If a person becomes incapacitated or unable to communicate health care decisions, then the default decisionmaker depends on how much planning was done in advance. North Carolina General Statute §90-21.13 provides the following order: (1) a health care agent under a valid health care power of attorney *unless* a guardian has been appointed and the court has suspended the health care agent's authority; (2) court-appointed guardian; (3) an agent with the power to make health care decisions; (4) spouse; (5) majority of patient's reasonably available adult parents and children; (6) majority of the patient's reasonably available adult siblings; and, (7) individual with an established relationship with the patient who is acting in good faith and can reasonably convey the patient's wishes.

However, for financial decisions, North Carolina does not provide a default framework. Instead, family members and loved ones would have to go to court in order to seek the appointment of a guardian to make financial decisions. This guardian (known as a general guardian or a guardian of the estate) remains supervised by the court for the duration of the guardianship. Furthermore, most guardianship documents, including financial information, are public record.

Q. WHO SHOULD I NAME AS MY FINANCIAL OR HEALTH CARE AGENT?

A. Although this question may appear simple at first, it can quickly become complicated. Do you name the child who lives closest? The oldest? To aid in this decision, select the person who is most likely to make decisions for you as you would make yourself. This factor should be paramount above other considerations, as the designated individual will have a great deal of responsibilities to you. Discussing the options with your attorney can help you select the child who is most appropriate to serve in each role. You may designate the same agent for both health care and financial decisions, or you can name different people for each. It is also possible to name multiple people together as your agent.

Q. WHAT ARE AN AGENT'S RESPONSIBILITIES?

A. The person you designate to manage your financial affairs under a general durable power of attorney is known as your "agent," though is commonly referred to as your "power of attorney." Your agent is generally responsible for managing your assets, paying bills, filing taxes, representing your financial interests in any court proceedings, etc. This is a great deal of responsibility. Ideally, you should discuss this role with the individual designated before he or she needs to assume these responsibilities. In addition, at least 1 backup agent should be named if your primary agent is unable to serve.