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Your Parents' Estate Plan

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Getting your parents to create or update their estate plan is a sensitive issue. As we watch our parents age, remarry, and/or become infirm, the need to plan becomes more urgent, but it is often put off for another day. Here is what you, your parents, and your clients with living parents may be able to do to start the discussions.

Why Should Your Parents Plan?

Planning in advance will enable your parents to: (1) ensure appropriate people step in to handle their financial and health-care decisions upon their incapacity and death without court intervention, such as guardianship, conservatorship, or probate proceedings, (2) minimize unnecessary administrative burdens and costs after the death of a spouse, (3) minimize taxes, (4) preserve their assets, and ultimately (5) distribute assets to their loved ones in a manner that minimizes disputes and protects the inheritance from creditors, predators, and divorce.

What Planning Should Your Parents Consider?

1. **Get basic documents in place.** Your parents should execute appropriate documents while they still have mental capacity. For most people, these documents include a will, power of attorney for financial matters, power of attorney for health care, living will, and revocable living trust to avoid probate. For people dying with estates exceeding the federal estate tax exemption amount (currently $5 million per person), more advanced techniques are available, but for many people, these basic documents will suffice.

2. **Fund the revocable living trust.** For a revocable living trust to be effective in avoiding probate, it is essential that it is funded. In other words, real property, bank and brokerage accounts, and business interests should be re-titled in the name of the trust.

3. **Build flexibility into the plan for tax purposes.** Your parents' current wills or revocable living trust may force a mandatory split into A-B subtrusts when the first spouse dies, even though the estate tax portability feature introduced at the end of 2010 no longer necessitates a B trust (usually referred to as a "bypass" trust or "credit shelter" trust). Thus, a forced split may cause your surviving parent to incur unnecessary administrative burdens and costs, including having to re-title assets between subtrusts and having to file a separate tax return each year for income generated by assets in the bypass trust. To cope with uncertainty in the tax laws, flexibility can be built into the estate plan instead, enabling the surviving spouse or a fiduciary acting on behalf of the surviving spouse to wait until the death of the first spouse to determine what to do based on the tax laws at that time. If portability is revoked, assets may be disclaimed to a bypass trust. With this approach, unnecessary subtrust funding is eliminated.

4. **Consider a subtrust for control purposes.** Apart from tax considerations, sometimes it is important to have the plan designed to hold a parent's assets in a subtrust called a C trust (often referred to as a "QTIP" trust) after his or her death. This trust can provide for the surviving spouse during his or her life with the remainder going to the deceased spouse's beneficiaries. If a parent is concerned that the surviving spouse may squander assets or lose them to a new spouse or predator, he or she may want to have such a subtrust in place, despite the administrative burdens and costs it will cause (having to re-title the deceased spouse's assets to the QTIP trust and having to file annual tax returns on income generated by the trust). If either of your parents has remarried and is in a blended family situation, a QTIP may be a very important component of the plan.

5. **Select the right fiduciaries.** Your parents need to carefully consider the persons or institutions they name in their documents to handle their financial and health-care decisions. Will naming a particular child

cause friction among other children? If all children serve together, will it be cumbersome to obtain all signatures for all actions taken? If more than one fiduciary is serving, what tiebreaking mechanism will break an impasse? Should there be a corporate trustee or private fiduciary as a backstop? Are there mechanisms to remove a "bad" fiduciary without having to go to court? Selecting appropriate fiduciaries is one of the most important decisions your parents will make.

6. **Decide how to determine incapacity.** Incapacity is a triggering event for fiduciaries to step in and serve. Traditionally, incapacity has been determined by two licensed physicians, but because your parent may be at home or in a nursing home, it may be cumbersome to have more than one physician make the determination. Today, many parents choose to have the attending physician and spouse, or the attending physician alone, make the determination.

7. **Discuss with your parents how they would like to spend their final days.** Most parents want to die at home and do not want life-prolonging measures taken, but this is an important, and in some states, a legally required conversation to have.

8. **Develop a plan for the family business.** If your parents own a family business, business succession planning, which may include a buy-sell agreement or equalizing assets in the estate plan between children who will be taking over the business and those who will not, is critical for the continued health of the business and for family harmony.

9. **Develop a plan for the family vacation home.** If your parents have a family vacation home that might be sold in a forced sale by a disinterested beneficiary, they may want to consider creating a limited liability company now—or a springing one at death—to keep the property in the family for generations.

10. **Consider protections for a beneficiary's inheritance.** There are a number of ways parents can protect a child's inheritance from a child's subsequent divorce, creditors, and predators, most often by leaving the inheritance to the child in a lifetime trust.

11. **Designate recipients of personal effects.** Few gifts are more emotionally charged than gifts of a parent's personal property, such as family heirlooms, jewelry, and artwork. If a parent names one child as the fiduciary in his or her estate planning documents, the child may distribute the property in a way that causes disputes and heartache. If all children are named as fiduciaries, disagreements can ensue. Instead, if possible, parents should discuss the division with the children and specifically allocate more important items of personal property in their estate planning documents.

12. **Where is everything?** The days when the family would gather to unveil the secrets of the safe deposit box have passed. Parents should be encouraged to create a summary of the bank accounts, investment accounts, retirement plans, insurance policies, and real estate the parents own so fiduciaries can initiate the gathering and distribution of the parents' property after the death of the second parent.

13. **Seek professional advice before doing your own planning.** Sometimes parents engage in do-it-yourself estate planning—adding one or more children to bank accounts or to title on real property. Remind your clients of the unintended consequences. For instance, adding a child to title on real property during life is a gift, it exposes the property to the child's creditors, and the child loses the full step up in cost basis he or she would have otherwise received if he or she had inherited the property.

How Can You Encourage Your Parents to Plan?

Starting the discussion is the most difficult step. Parents may not want to discuss end-of-life planning because they consider the subject an invasion of privacy or morbid. Children may be reluctant to bring the subject up because they do not want to be perceived as greedy or anticipating the parents' deaths. Although both parents and children feel the need to communicate, they do not know how to start.

Here are some tips you can recommend your clients use to get started:

- A child with siblings should not initiate the conversation alone, and generally, parents should not have the conversation with only one child. Sibling rivalry persists into adulthood. To avoid the appearance of undue

influence, a child should run the idea by all siblings before starting a discussion with parents, and parents should discuss plans in a family meeting if possible.

- If the parents already have an estate plan, suggest that they have a third party review it. Many financial planners and estate planning attorneys will review existing estate plans and make recommendations at no charge.

- If the parents do not have an estate plan, start by discussing health-care directives. Discussing end-of-life health-care decisions does not require discussing assets. Let the parents know it is important for them to authorize someone to communicate with their medical providers, to make medical decisions for them if they are unable to, and to express their wishes regarding life-sustaining care. Once the dialogue is started, it often leads to more comprehensive planning.

Financial planning professionals can play a critical role in starting these discussions, but there are ethical considerations to keep in mind. Although the child may be the planner's client and may often accompany the parents to estate planning meetings, it is important to remember the client in these discussions is the parent. An adviser or a child could be held accountable for undue influence. Planners should meet with the parents alone for at least a portion of the time to ensure that their interests, and not the child's, are the ones being served.