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The Talk for Estate Planning – A Framework:

Successfully Planning your Loved One's Estate

Addressing incapacity and end of life planning issues with family members is not easy. The purpose of this Guide is to provide you with a framework for having this difficult conversation. While the Guide is written from the perspective of an adult child sitting down with his or her parent(s), many of the considerations may be helpful in a number of different situations.

The conversation with your Parent can be structured around 3 important appointments he or she should make:

1. Attorney in Fact
2. Healthcare Power of Attorney (Health Care Agent)
3. Executor/Trustee

Each of these appointments will be made within a separate document. Who should be appointed will depend on your Loved One's situation and objectives. These documents are discussed in full below.

Your Loved One may have a comprehensive estate plan, or no estate plan at all. Often it is somewhere in between. Either way, you want to be sure that he or she has the proper mechanisms in place at death and in the event he or she becomes mentally and/or physically incapacitated.

When is a Good Time to Have the Talk?

If your family or someone close to you has experienced a life changing event, it may provide the ideal opportunity to open the door to these concerns with your Parent.

If there are signs that your Parent may be in the early stages of dementia, the sooner you can have the talk, the better.

You may be concerned about a Parent who has not put a plan in place and is suffering from Alzheimer's or other forms of dementia. If your Parent's dementia has progressed beyond a certain point, then there is a much greater likelihood that an incompetency/guardianship court proceeding will be required. In that situation, decisions about your Parent's care, health, living environment, finances and other important considerations will be overseen by the Clerk of Court. Whoever is appointed as a guardian will be required to report to the Clerk on a regular basis and will need approval of the court before certain actions can be taken on behalf of your Loved One.

Who Should be a Part? (And Where to Start.)

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Before the first discussion with your Parent, members of the family should decide on a "spokesperson" who will initially approach him or her.

The Spokesperson will want to set a specific time, convenient for your Parent. The Spokesperson may want to let the Parent know ahead of time what is the purpose for the discussion.

Other Family Members: Whether they attend the talk or not, all immediate family members should have the opportunity to be heard and to hear your Parent's concerns. If there are family members who you or the Spokesperson know may create drama, keep the lines of communication open with clearly set boundaries. It is often highly emotional family members who cause the most difficulty during this process.

Parent's Professional Advisors: While it is likely not necessary for these professionals to attend the talk itself, you should take this opportunity to know whom your Parent has as advisors. These may include:

- Physician(s)
- Bank and Banker
- Financial Planner
- Accountant
- Lawyer
- Clergy

You will want to collect contact information for each of these individuals. Ideally, you should ascertain what work each individual has done with your Parent.

The Reluctant Parent

If you are having trouble getting started, it may very well be that your Parent is not ready to have this discussion. It is not unusual for elderly persons to be more secretive about assets and property.

If your Parent is unwilling, the Spokesperson may want to broach the subject by asking for advice for his/her own estate planning. This may open the door to a discussion about your Parent's plan or lack of a plan.

Another option is to ask where the important documents are kept. So that there is no confusion, it would be a good idea to see the paperwork. Hopefully, this will be a way to get the ball rolling.

Sometimes, the reluctance is due to dementia and other physiological ailments. However, many parents of the "Baby Boomers" lived through the depression. As a result, they may be frugal to a fault and distrustful of financial institutions. It may be quite difficult for this person to open up; it

may be next to impossible to have what you would consider a productive meeting with the family. If so, your Parent may feel more comfortable discussing his or her concerns with just one family member.

To encourage the Reluctant Parent, you may want to communicate the following:

1. Your Parent has the opportunity to speak for herself today. If she avoids the conversation, she may not be able to communicate her wishes at a later time. (For example, there may be charities and others that the Parent wishes to include in the estate plan or there may be particular concerns about life prolonging procedures);
2. The conversation may prevent future discord in the family;
3. Proper planning can lessen the emotional trauma and financial burden on your Parent.

Even with encouragement, your Parent may simply refuse to plan. If you are in this situation, give it some time. Wait two months and bring it up again. If your Parent does not create a plan, the future could hold much frustration and pain for all involved. Don't give up.

Meeting Logistics

In some families, it may be possible to have a family conference and resolve many of the concerns. In other situations, there will be interaction among the family members as a meeting is planned. The initial conversation may open the door and the "talk" may continue over several sessions. There may be a formal meeting where the issues and concerns are broached. Thereafter, there may be a series of meetings, either in person, by phone or by email as decisions are made.

There may be many decisions to make regarding how to deal with assets and wealth at the time of death and in the near future. You may need to address your Loved One's continued care and/or impending mental incapacity. If your Loved One does not seem to have sufficient capacity to create a Will, Trust or any advance directives, then obtaining a guardianship may be the next step.

Regardless of the specific situation, it is important to keep an open mind. Be patient with your Loved Ones. It is quite possible that your Parent has never had this kind of discussion. We all tend to push away thoughts about illness and death. However, accepting mortality is a necessary part of living a more fulfilled life. This is something that you can do to help your Loved One live better.

What to Cover

There is no "one-size-fits-all" approach to this question. There are certain points that should be addressed. One way to focus the conversation is to structure the talk around three specific appointments and corresponding documents. These will be influenced by prior estate planning, and your Parent's mental, physical, spiritual, emotional and financial status.

You will want to confirm whether your Parent has completed any type of estate planning. Is there a Will, Power of Attorney or other planning documents already in place? If so, be sure to locate the document(s) and have them available while you are working with your Parent.

Key Documents

Testamentary Will

The distribution of your Parent's personal and real property may be accomplished by a Will. The creator of the Will is called a Testator. The Will becomes effective, it "speaks", at the death of the Testator.

A Will must meet specific legal requirements. The most common Will is type-written and witnessed by 2 people. The Testator and the witnesses must sign the Will before a Notary Public.

You Loved One will identify an Executor in the Will. The Executor will administer the estate as directed by the Will.

Trusts

A Trust is another mechanism to deal with the ultimate distribution of the property of your Loved One. A Will and a Trust both contain instructions for the distribution of your Loved One's property. The Trust can be set up so that there is a full distribution of assets at the time of your Loved One's death or the distribution can be scheduled to occur in portions at certain times and/or upon certain events.

The most common type is called a Revocable Living Trust. Revocable means that it can be changed or revoked. It is "Living" because it is created during your Loved One's lifetime. A Revocable Living Trust allows your Loved One to continue to be in charge of his/her assets until incapacity or death. Thereafter, a Trustee, as identified in the Trust, will administer the Trust. The Trustee will handle the distribution of assets, payment of taxes and other tasks.

A Trust can be structured to address a Special Needs Beneficiary. If the Beneficiary is receiving government benefits, additional income can affect the benefits. In some cases, a large distribution would disqualify the Beneficiary from receiving further government assistance. The

Trust can be set up to direct the Trustee to distribute the assets so as not to interfere with the government benefits.

A Trust can be an effective way to address a family member that is addicted or otherwise impaired or has difficulty with finances. The Trust can contain terms so that certain conditions must be met before a Beneficiary receives a distribution. The amount of each distribution can be limited and can be left to the discretion of the Trustee.

A Will or a Trust?

Your Loved One's concerns and goals will help to decide whether a Will or a Trust is appropriate. Both documents are a way to protect your Loved One's assets. A Living Trust can be set up in such a way that, if your Loved One becomes incapacitated, his/her financial affairs will be taken care of. The use of a Trust allows the decedent to avoid the probate costs/fees that exist when using a Will. A Will must be filed with the Clerk of Court when your Loved One dies, it becomes a public record. Anyone can take a look at it. There is more privacy with a Trust as it does not have to be filed.

A Living Trust can allow your Loved One's estate to be distributed immediately on your death or spread out over a period of years in specific amounts.

A Trust can be more complicated to set-up and will likely cost more than a Will.

Your Parent should weigh the costs and benefits of each before deciding whether a Trust or Will is more appropriate.

Durable Power of Attorney ("DPOA")

This agreement allows an agent (an "Attorney-in-Fact") to act on behalf of your Loved One to perform financial and other transactions. The DPOA remains effective if your Loved One becomes mentally incapacitated. The DPOA must be filed with the Register of Deeds in the county where your Loved One resides.

Healthcare Power of Attorney ("HCPOA")

This agreement grants the "health care agent" broad powers to make health care decisions for the principal when she cannot make the decision for herself or cannot communicate her decision to other people. Except to the extent that the agreement expresses specific limitations or restrictions, the health care agent may make any health care decision that the principal could make.

A HCPOA may provide any lawful guidelines or directions pertaining to your Loved One's health, including instructions to the health care agent to refuse treatment that your Loved One does not want for religious or other reasons.

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Appointments

Your Parent should make 3 appointments: 1) Executor/Trustee; 2) Attorney-in-Fact; and 3) Healthcare Agent.

Executor/Trustee refers to the person who will make the final distribution of your Parent's assets, by either a Will or Trust.

The Attorney-in-Fact ("AIF") refers to the person who will be appointed pursuant to a DPOA. The Healthcare Agent refers to the person who will be appointed pursuant to the HCPOA.

Handling executorship or AIF duties can be cumbersome and emotionally exhausting.
Your Parent may want to consider co-executors/trustees. The documents can be set-up so that the co-executors/trustees must agree before significant actions are taken. In some situations, it may be better to allow the executor/trustee to get some help from other family members and have only one "decision maker".

For each appointment, your Parent will want to name at least one alternate individual. Then, if the first choice dies or is otherwise unable to take on the responsibility, the alternate can serve.

Should the same person be named Health Care Agent, AIF and Executor/Trustee? If so, issues of gifting and commingling may be more likely to arise. It is the appearance of impropriety that often creates a problem. This is especially true where one close-by family member has handled everything and another family member resides far away. The distant sibling may question what is happening simply because the other sibling has been appointed to handle so much responsibility.

Your Parent may want to appoint one person serve to serve as AIF and a different person to serve as Executor/Trustee. The documents can be prepared so that the AIF is required to prepare an accounting on a regular basis and/or at the death of your Parent. When your Parent passes, the Executor, someone other than the AIF, can review the accounting and deal with any concerns.

Other Important Medical Documents

Living Will

This document provides directions as to whether your Parent's life will be prolonged by medical treatment when your Parent:

1. has an incurable/irreversible condition that, in a short time, will result in death;

2. becomes unconscious and the medical providers determine that, to a high degree of medical certainty, he/she will not regain consciousness; and/or
3. suffers from a substantial loss of cognitive ability and the medical providers conclude that the loss is not reversible.

This document will let your Parent determine under what circumstances life-prolonging procedures should be withheld or withdrawn. It can also direct whether your Parent wants artificial nutrition to continue.

There could be some overlap or conflict between the HCpoa and the Living Will. In the event of a potential conflict, the Living Will can specify whether the medical provider should follow the Living Will or the Health Care Agent's decisions.

HIPAA Form
The Health Insurance Portability and Accountability Act ("HIPAA") applies when a person is trying to obtain medical records or information on behalf of another. Sometimes, the medical provider has its own specific form that must be completed. A prepared form may be acceptable in many situations.

Do Not Resuscitate Order ("DNR")
You may also want to consider a DNR order. A DNR will let medical personnel know that your Loved One does not want CPR or artificial resuscitation or to be resuscitated under any circumstances. This document must be completed by a medical doctor and 2 witnesses.

Important Considerations - Non-Estate Property

Non-Estate property concerns assets that pass outside of the probate process. The distribution of the property is not typically determined by the Will.

Your Parent should be aware of how this process works. For example, where the bank account records show an account as payable on death to the daughter, the proceeds will go to the daughter even if the Will directs that the bank account should be distributed to the son.

Also, your Parent can name the estate as the beneficiary of this kind of property and it will then be distributed pursuant to the terms of the Will.

The following is a list of common non-estate property:

1. Joint Bank Account with Right of Survivorship: The account is jointly owned by your Parent and some other person or entity. At the date of death, the joint owner becomes the sole owner.

2. Payable on Death Bank Account: These accounts pass to the named beneficiary at the time of death. As opposed to the Joint Account, the beneficiary is not a joint owner, but becomes the owner at the time of death of your Parent.
3. Stock/Bonds/Securities Jointly Owned with Right of Survivorship or Registered in Beneficiary Form and Automatically Transferred at Death of Decedent: Ownership passes to the joint owner or beneficiary at the time of Decedent's death.
4. Real Estate that is not bequeathed to the estate or directed by the Will to be sold: Ownership passes to the heir at the time of Decedent's death.
5. Real Estate owned as Tenants by the Entirety: Real Property owned by husband and wife passes to the surviving spouse at time of Decedent's death.
6. Life Insurance, Retirement Plans, IRAs, etc.: Unless the estate is the beneficiary, the proceeds pass to the beneficiary outside of the estate.

Under some circumstances, property identified in Numbers 1 – 4 can be brought into the Estate to pay debts if the Estate is otherwise unable to pay. Non-Estate Property identified in Numbers 5 – 6 usually cannot be used to pay debts of the Estate.

Government Benefits

Some Government benefits terminate at death and other benefits should be activated at death. Pensions may end at death. Social Security payments may end and be transferred to another. Your Loved One will want to gather the documentation pertaining to all pensions and death benefits. You and/or your Parent should become aware of what payment options may be available and what is required to secure these benefits. Do not wait until your Loved One has passed to deal with these questions.

Life Insurance

Your Loved One will want to confirm that Beneficiaries have been properly named on life insurance policies and other documents. Remember that the life insurance policy "trumps" the Will.

This really happens. My firm recently handled a matter where the parties divorced a few years before, the ex-spouse died unexpectedly, and the surviving ex-spouse received the death benefit because the policy beneficiary designation was not changed.

Common Pitfalls and Frustrations (and How to Avoid Them)

The Family Home

Because there are often strong emotions associated with the family home and with siblings being treated "equally", this topic should be at the top of your list for the conversation with your Parent.

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If your Parent leaves the family home to all of his/her children, how will the siblings determine who should live in the house? What happens if one of the siblings wants the cash value of his/her portion of the house? Does the Executor of the Will have the power to sell the family home or to decide how sale proceeds will be treated?

If the house is simply bequeathed to all of your Parent's children, then each child has an equal right to the property. It is possible that one sibling will move in and refuse to leave or that one sibling will want to sell and the others will not. In this situation, any of the children can file an action with the Court asking for a partition of the property. Ultimately, the Court may order the sale of the house and the proceeds will be split equally among the siblings. This is called a Judicial Sale.

One way to avoid the Judicial Sale situation is for your Parent to bequeath the house to the Executor with instructions to sell. A sale by the Executor is likely to generate a larger return than a Judicial Sale.

It may be that one sibling wants to live in the house. Your Parent may want to bequeath the house to this sibling with instructions that the sibling can live in the property for a specified amount of time and then the property will be sold.

My firm has dealt with the situation where, pursuant to the Will, each sibling was to receive an equal percentage of the proceeds from the sale of the house. However, the Will did not give the Executor the power to sell the house without the consent of each sibling. The siblings could not agree on the process and the sale of the house was significantly delayed. The expenses associated with the house continued to accrue and the house fell into disrepair. This resulted in a high emotional and financial cost to each sibling. If the Will would have given the Executor the power to sell the house, it could have been put up for sale in a timely fashion. The pain and suffering would have been avoided.

There may be many options available. There is not a single "correct" answer. While your Parent will make the ultimate decision, your family should put all of their concerns on the table. If possible, have an honest, candid discussion. This may help all family members come to terms with whatever your Parent decides.

Location of Documents and Records

If there has been some estate planning, be sure to locate all of the documents. As your Parent prepares additional paperwork, you should put them in a designated space. A safe deposit box is an ideal place to keep the "original" documents. Your Parent's attorney should be identified and the contact information should be kept with the originals. It is a good idea for at least 2 people know where the documents are located.

Family Items and Heirlooms

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Does your Parent want each child to receive the same thing? How will this occur? For financial assets, an equal division may be doable.

What about the value of non-monetary assets? This is often a point of contention for Beneficiaries of the Will. A popular solution is for your Parent to identify who will receive specific items. This is especially true if the items are family heirlooms, one of a kind, and/or have a high monetary or emotional value.

If your Parent cannot decide the recipient, another option may be to allow each Beneficiary an equal number of items as measured by the monetary value. In this case, your Parent may want to identify acceptable appraisers and the method of appraisal. This may help to avoid disagreements between Beneficiaries during the estate administration process.

Loans and Gifts

If one child has received money from your Parent before death, a question may arise as to whether this should be treated as a gift or a loan. If it is treated as a loan, the recipient may be required to pay the balance to the estate. The money could also be treated as an advancement of the child's inheritance. Your Parent should clarify in his/her Will how these items should be treated.

Business Interests

If your Parent is an owner of a business, especially a family business, the Will should address how the death will affect the business. Your Parent will want to consider whether there are buy/sell agreements in place. If a family member will receive the business, other bequeathments may be effected.

Have the Talk

There are many tools that can be used to create an estate plan. Different goals require different tools. The important thing is to start the conversation.

If you help your Parent plan for incapacity, many of the complications and concerns can be significantly lessened. If your Loved One must face the dark days of dementia, you want to be prepared.

If you are the family member who will be appointed Executor, you don't want to start the job the day your Parent passes away. By being proactive now, you can honor the wishes of your Parent and decrease the stress and frustration that can come with settling the estate.

For additional information on estate administration, download my North Carolina Probate Survival Guide at www.claytonkrohnlaw.com/guide.