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LAW FIRM

Choices When You Make Your Estate Plan

Before I prepare your estate plan, you will need to select individuals or organizations to fill several important roles. *If you're married*, you will usually name your spouse to fill these roles, so you're likely choosing alternates to serve if your spouse can't. *If you're a parent*, you need to name a trustee and to select ages at which any trusts for your children will be paid to your children.

Because of my experience, I'm able to provide some insights to help you make these decisions and have included my thoughts in the following discussion.

Who Will be the Personal Representative of Your Estate?

The **personal representative** (sometimes also called the executor or executrix) initially has the following jobs:

- find everything you own;
- sell what needs to be sold;
- deposit cash in an estate account;
- pay any persons to whom you owed money; and
- distribute the rest to the persons named in your will.

These tasks can sometimes be time-consuming, but they are usually straightforward. This role is well-suited for a person who likes to make a list and check off each task in order. The personal representative must also file

any tax returns that are required and pay any taxes that are due. These tax returns can include Federal estate, state inheritance and estate, individual income, and estate income tax returns. (Not all are required in every estate.)

Your personal representative should hire a lawyer to help with the process. I say "a lawyer" because it doesn't have to be me even if I prepared the will. But, one of the rewarding parts of my practice is working with my clients' families to carry out an estate plan I designed. Whoever the lawyer is, if the personal representative depends on the lawyer to make the checklist but does most of the work on their own, the lawyer's fee should be very reasonable.

The personal representative's job takes anywhere from nine months in an uncomplicated estate to several years in a large estate that is aggressively audited by the Internal Revenue Service or the Kentucky Department of Revenue. When the estate is ready to be closed, the personal representative must be able to provide a complete accounting of all the assets received, all the bills paid, and all the distributions made to beneficiaries.

Who Will be Your Minor Childrens' Guardian?

The **guardian** is the person that you name in your will to take care of your children if you and your spouse have both died. Although you *nominate* the guardian, the court *appoints* the guardian. If your child is 14 or over, Kentucky law requires the judge to ask your child about his or her preference. However, the court usually follows your choice.

The guardian does all the things that a parent does, including supporting the child in school, caring for them when they're sick, celebrating successes, and helping a child become a mature adult. Because other provisions of your estate plan will be designed to ensure that enough money is available to care for your children, the guardian doesn't have to be someone with a lot of money. But the guardian will be part of the team teaching your children about managing money, so the guardian's financial skills and habits are important.

At What Ages Should Children Receive Property Free of Trust?

If a child is left without parents, there should be a trust for the child's benefit. The role of the trustee is discussed in the next section, along with suggestions for choosing a trustee. Who you name as trustee needs to be considered based on how long the trust will last.

There are two primary ways to structure a trust, and each has its advantages. Both have the same goal of giving you control over how your children will spend the money you leave them while still providing for their needs. The longer the money remains in trust, the longer you ensure that the money will be used

the way you desire, and the longer it will be protected.

The first option is to leave the money in trust for the child's lifetime so the child must *always* ask the trustee for income and principal. The main advantage of this type of trust is that the money *never* becomes available to a child's creditors and is much less likely to be divided between the child and the child's spouse in a divorce.

The second answer is to give the trustee complete discretion over distributions until a child reaches an age around 25 years old range. This allows the child to complete college or other post-high-school education or training and make their start in life. At that age, the trustee begins mandatory distributions of *income* (such as dividends and interest that the trust investments earn) to the child. The trustee continues to have discretion whether to distribute the *principal* of the trust (the investments themselves that generate the income or the proceeds from their sale) to the child until an age around 40 years old.

To avoid distributing a large amount of money to a young-adult child at one time, I recommend that the trust direct the trustee to distribute the principal at two different ages. Typically, the first distribution would occur around age 30 and the final distribution would be made around age 40. There is no requirement that the two principal distributions be of equal size, so you can front-load or back-load the distributions as you wish.

In sum, you will need to decide whether the trustee will have discretion to make distributions during your child's entire lifetime. Alternatively, you may decide

to require that the trustee distribute income and principal to your child at certain ages, for them to spend as they wish. In that case, you will need to decide the age for the trustee to start mandatory income distributions and the ages for the trustee to make mandatory principal distributions.

Who Will be the Trustee?

The **trustee** wears two quite different hats. One is the analytical role of making wise investments or making wise choices of investment advisors. The second, more subjective, role is making decisions about the appropriate use of the trust's money. For example, your child might want to pursue a culinary degree overseas. The trustee would have to decide if there is enough money for that venture, whether it is a serious goal or a lark, and whether you would have wanted your money to be used for that type of education.

Depending on the ages you set for the trusts to end and the ages of your children, the trustee may have to fill this role for several decades. Although it is important to select a back-up person for all the positions discussed in this memo, it is especially important that you have one or more back-up trustees in case the initial trustee is unable to carry out that role for such a long period of time. A bank or trust company is well-suited to serve as primary or back-up trustee because it doesn't age, it follows internal procedures that are reviewed by state and/or federal agencies, and it will typically use an internal committee to make decisions about discretionary distributions.

Who Will Make Financial Decisions for You if You Can't?

In a Power of Attorney, you name an **agent** (also called the attorney-in-fact) to manage your financial affairs if you are not able to do so for yourself. This can be the result of a short-term, pleasant occurrence such as a vacation abroad, or a long-term, regrettable occurrence such as a devastating illness. You can give your agent limited or broad powers, up to doing almost anything you can do (except agree to your marriage or make a will for you).

Generally, the agent will have access to your bank accounts and will, if you wish, be able to make gifts or set up trusts on your behalf. Your agent's role can be limited in duration (e.g., for signing a real estate deed on your behalf at a particular closing) or as long-term in nature as managing your finances during a lengthy nursing home stay. The Power of Attorney will end upon your death if you don't revoke it prior to that time.

Although you should select persons you trust for all the roles discussed in this memo, I recommend that my clients take the most care in choosing an agent whose honesty and integrity are without question.

Who Will Make Health Care Decisions for You if You Can't?

Your **health care surrogate** makes decisions about your healthcare—including whether to stop life-sustaining treatment in the event of a terminal condition when you are not able to make that decision for yourself.

None of us wants to imagine the terrible situation in which this decision might have to be made, but naming a health care surrogate helps take the weight off the shoulders of your loved ones if they find themselves in this position. Your health care surrogate must use their best judgment and make decisions that they believe you would have made for yourself—taking into consideration the Health Care Directive I will prepare for you and their own knowledge of your wishes.

Ideally, your health care surrogate should be someone with whom you are comfortable discussing the types of care you do and do not want. The health care surrogate's role is often a short-lived but emotionally draining one.

Closing Thoughts

I have found that it is almost always better to name only one person for each role. Of course, that one person can get input from others among your family and close friends. However, the ultimate responsibility and decision making will lie with that individual.

Moreover, many of my clients find themselves inclined toward naming one person to fill many or all the roles. I counsel them not to worry about overloading that person or seeming to show favoritism. If you are concerned

about overburdening one family member, it can often help to simply talk with that person about fulfilling the roles before nominating him or her. Feel free to use this memo in your discussion.

Along the same lines, don't worry that naming one person will hurt another's feelings. If you were to name a family member who is not suited for their role, you would be doing no one any favors. It would be a disservice to that person, to you, and to the others in your family to give someone a responsibility beyond their maturity level or abilities.

Finally, keep in mind that one thing that families do is to take care of each other during difficult times. The family members you don't name can—and usually will—help in other ways.

You are the best judge of who among your family members and friends are most suited for each of these roles. Trust your instincts, your years of experience with them, and choose confidently.

Working Together

I hope this memo helps as you start thinking about these important decisions. It is not meant as legal advice for your specific situation. I hope it helps your thought process. If we end up working together, it will be a starting point for our conversation about your estate plan. I look forward to that.