

STEWART LAW, P.A.

ESTATE PLANNING. PROBATE. CORPORATE.

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Summary Checklist for Review of Estate Planning Documents

The Basics

Does client have all of the standard estate planning documents: Will, Trust, Financial Power of Attorney, Health Care Power of Attorney and Advance Directive for a Natural Death, HIPAA Authorization Form?

Is the Will Valid?

- A Will is valid if it is signed by the testator (who is age 18 or older) and attested by at least 2 competent witnesses.
- Testator must either sign the will in the presence of 2 witnesses or sign and acknowledge his signature to the witnesses.
- Both witnesses must sign the will in the presence of the testator.
- Will should be self-proved at the time of its execution or at any time thereafter through acknowledgement by the testator and affidavits of the attesting witnesses before a Notary Public. Otherwise, before the will can be admitted to probate the witnesses must testify or give affidavit regarding proper execution of the Will.

(There are some other types of valid wills, but these elements are required for most that you will review.)

Has Client Protected Family?

Spouse. Is the spouse's share appropriate in amount? Many estate tax sensitive plans say "maximum amount that can pass free of death taxes" to Family Trust. Is that still appropriate? Should the spouse's share be left to him or her outright? Common cases for a spousal trust: (1) second marriage with children from an earlier marriage and (2) spouse's failing health.

Minor children. Their share should be left in trust (this can be handled in the living trust or, in a simpler plan, in a Will).

Adult children. Is the disposition for adult children still adequate? Has client considered leaving adult child's share to trust in order to protect it from creditors (e.g., in case of divorce or bankruptcy)? The child can be given a great deal of control over his or her own trust and still gain protection from creditors.

Has the Client Protected Himself or Herself in Case of Incapacity?

Financial Power of Attorney. This should be comprehensive allowing the named agent to deal with all types of financial matters. Does it allow annual exclusion gifting? Is at least 1 successor agent named? Is it "durable" (i.e., does not expire upon incapacity of the principal)?

Health Care Power of Attorney. The NC statutory form was updated in 2007 and many clients, particularly if they are updating their estate plan anyway, will want to move to a customized Health Care Power of Attorney that uses this new format as a basis.

Living Will/Advance Directive. When the NC statutory health care power of attorney was updated, the living will was made a part of the health care power of attorney. At the same time, some potential ambiguities were resolved. As with the Health Care Power of Attorney, most will benefit from having this in the current format (i.e., post-2007).

Does Client Need Estate Tax Planning?

Some guidelines for estate tax planning:

Total estate (including all assets, life insurance client owns calculated using full death benefit value, etc.) of both spouses combined:

- Less than 1 times the exemption amount (see below for explanation) - no tax planning required unless significant changes in estate or applicable laws are anticipated.
- More than 1 times the exemption amount, but less than 2 times the exemption amount - estate tax planning could benefit the beneficiaries other than the spouse (e.g., the children). Often this will involve creating a plan with a credit shelter trust (e.g., "Family Trust") upon the first death and attempting to equalize the estate sizes as much as possible.
- More than 2 times the exemption amount - we will recommend credit shelter planning and additional strategies. Common examples include: life insurance trust to remove those proceeds from the taxable estate, lifetime gifting which may utilize a family limited partnership (FLP) to facilitate gifting in a convenient way, Qualified Personal Residence Trust (QPRT) to remove the value of vacation or even principal residences from the estate, and/or Grantor Retained Annuity Trusts (GRATs) or sales to grantor trusts to remove appreciation of rapidly appreciating assets from the estate.

As I write this in July 2010, there is much uncertainty about the estate tax exemption amount going forward, but those general guidelines should remain helpful. Currently, the exemption amount is scheduled to be \$1 Million for deaths occurring on or after January 1, 2011.

Other Technical Items for the Professional Reviewer

Are alternate executor, guardian and trustee named?

Additional provisions to look for (often not found in self-prepared wills or trusts):

- Does Executor have power to sell real estate for purposes other than to pay creditors? Given the way real estate is handled under NC law, this can make it much more convenient and cost efficient to deal with real estate in the estate.
- Is survivorship order spelled out in the case of near simultaneous death between spouses and between testator and descendants? This can have tax and non-tax consequences.
- Is there a specific bequest of tangible personal property (i.e., not included in residuary estate)? This can impact the estate income tax returns.
- Are bonding requirements waived to save expenses (if appropriate in the circumstances)?