

Estate Planning Insights

A Quarterly Publication of

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Vol. 2, No. 4

October 31, 2005

THE POTENTIAL BIRD FLU PANDEMIC— A REMINDER WHY ESTATE PLANNING IS IMPORTANT

At the time of writing this newsletter, the media have been discussing a potential bird flu pandemic. Pandemics, or widespread epidemics, occur periodically. In 1918, an influenza pandemic killed an estimated 50 to 100 million people worldwide. Scientists are afraid that once the bird flu virus mutates, so that it can be spread directly from human to human, we may face the worst pandemic in recent times, with 50% or more of infected people dying. Thus, the threatened bird flu pandemic is not something to be taken lightly. On the other hand, we all know that we are going to die someday, and that is why we do estate planning. Whether we have a bird flu pandemic or not, we encourage you to make sure that your estate plan is up to date.

Estate Planning involves preparing for the possibility of disability and the certainty of death. It is something that people do to prevent problems for their loved ones. It is a thoughtful, responsible gift to others, and it also provides the giver with "peace of mind".

A Basic Estate Planning Package. There are a number of documents that everyone should have, regardless of the size of his or her "estate". Here is a list and a brief explanation of each document:

1. Will or Living Trust. A person's Will or Living Trust serves as his primary estate planning document. Each of these "vehicles" has advantages and disadvantages (for a more detailed explanation of the Living Trust, see our newsletter dated April 30, 2005). Basically, the Will or Living Trust appoints someone to be in charge of carrying out your final wishes and delivering your assets to your chosen beneficiaries after you die. Other provisions are often included in the document as well, such as tax savings devices, creditor protection devices, and trusts, so that assets can be managed for beneficiaries who are incapable of prudent asset management.

2. Financial Durable Power of Attorney. If you become mentally incapacitated while you are living, to the point where you are no longer able to manage your assets and financial affairs, to avoid having the Court take control of your assets in a guardianship, you can appoint a person you trust to handle these matters for you as your "agent". Obviously, it is very important to name someone

who is trustworthy and prudent. The word "durable" means that the power of attorney is still valid after you lose your mental capacity.

3. Medical Durable Power of Attorney. If you become mentally incapacitated or unconscious, so that you cannot make or communicate your own medical decisions, to avoid having the Court become involved in your medical affairs via a guardianship, you can appoint someone as your "agent". Your medical agent should be someone you trust to make medical decisions for you.

4. Directive to Physicians or "Living Will". There is one medical decision that Texas law allows you to make for yourself in advance: whether you would or would not want life sustaining treatment if you were ever to develop a terminal illness or an irreversible condition. Your decision on this issue is reflected in the Living Will. It is all right not to sign a Living Will, as long as you have a Medical Power of Attorney (so that your agent, and not the Court, will make the decision if the circumstances arise).

5. HIPAA Authorization. HIPAA is a relatively new federal privacy law that forbids doctors, nurses, hospitals, pharmacies, insurance companies and others in the health care field from discussing your private medical information with anyone but you. As already noted, if you lose your mental capacity, the doctors and other medical providers can discuss your situation with your Medical Agent. However, what if you become very ill physically, but are not mentally incapacitated or

unconscious, and you want a trusted person to speak with the doctor on your behalf? The Medical Power of Attorney does not apply in that case, so there is a "gap" in your medical/legal situation. That is why we are now including a HIPAA Authorization as one of the standard documents in our estate planning package.

6. Guardian Designation for Children. A parent of a minor or adult disabled child should have a Guardian Designation, naming someone to serve as Guardian of her child (or children) if she dies. This provision can be included in a Will; however, it is one of those appointments that is likely to be changed over time, so it is often better to make a Guardian Designation in a separate document.

7. Coordinating Beneficiary Designations. A basic estate plan is not complete unless the beneficiary designation forms for the client's life insurance policies, annuities, qualified and non-qualified retirement plans, IRAs and IRA rollovers are coordinated with the client's estate plan in the Will or Living Trust. Good attorneys will provide their clients with the appropriate wording to use on the forms and, in many cases, help the clients complete the forms.

8. "Cleaning Up" Account Titles. Another important part of the estate planning process is making sure that the client's other accounts (those not included within item 7 above) are titled correctly. Improper account titling can override the client's estate plan in the Will or Living Trust, rendering it ineffective (see our July 31, 2005 newsletter for a discussion of "Multi-Party Accounts" and the problems they can cause).

Some Things That People Handle Themselves.

1. Handwritten Amendment Disposing of Personal Effects. In a handwritten amendment to a Will (called a "holographic Codicil") or in an amendment to a Living Trust, a person can dispose of various types of "tangible personal property", which is the legal term for household furnishings and personal effects, such as jewelry, china, silver, pictures, furniture, etc. This is an easy way to dispose of these kind of assets. Most attorneys provide instructions to clients regarding how to word gifts of this type that they want to make.

2. Burial and Funeral Instructions. Long ago, people included this sort of information in their Wills. Today, however, it is better to write these instructions separately because by the time the Will is retrieved, it is usually too late. People can address issues such as cremation or burial, and also whether to have a funeral or memorial service. They can even provide details

regarding the type of service they want. People sometimes write a draft of their own obituary, too. These written instructions are given to certain trusted family members, often in an envelope labeled, "To be opened immediately upon my death." Of course, these matters can merely be discussed orally with family members as well. In addition, burial (or cremation) and funerals can be prearranged (and paid for) through a contractual arrangement with a funeral home.

3. Organ/Tissue Donation. Contact LifeGift Organ Donation Center or other appropriate organization(s) to obtain their forms and complete them. Be sure to let your loved ones know that you want to do this.

4. Final "Love Letter". Some people like to write a final "love letter" to their loved ones, to be opened after their death. This idea is similar to the "Ethical Will". For more discussion on this topic, go to our website and see the August 15, 2001, Newsletter entitled, "Leaving a Legacy Beyond Wealth".

Other Relevant Documents That Some People May Need. There are a few other documents that may be appropriate for some people, but often are not included in a standard estate planning package.

1. Pre-Marital Agreement. Anyone who is about to marry and has significant assets and/or children from a prior marriage should strongly consider signing a Pre-Marital Agreement prior to the marriage. The main reason is that, otherwise, assets brought into the marriage may become community property during the marriage. In addition, assets acquired during the marriage through earnings of any type will be community property assets. This could cause problems on the death of one of the spouses. It is also very difficult to do estate planning when it is not clear who owns what.

2. Designation of Guardian for Yourself in the Event of Later Need. Technically, if you have both a Financial Power of Attorney and a Medical Power of Attorney there should be no need for a guardianship in the event of your mental incapacity. Further, if your estate plan is in the form of a Living Trust, there is even less need for a guardianship. You may, however, sign a Guardianship Designation for yourself, indicating who you would want to be your legal guardian if the situation arises. Mostly, however, this document is used defensively—if you have a close relative (such as a child or a spouse) from whom you are estranged or with whom you disagree on money and/or medical matters, you can state in this document that, in the event of your incapacity, you would *not* want that person to be appointed as your Guardian. Again,

most people do not need this document, but it is available, if desired.

3. Appointment of Agent for Disposition of Remains. This is another document that most people do not need. It can be useful, however, if you are worried that certain family members will not respect your wishes regarding cremation or burial, for example. In such a case, you can execute this document and appoint a person you trust to carry out your wishes. Again, in most cases, it is not necessary to obtain this additional document because family members usually respect their loved one's wishes with respect to these matters.

4. Do Not Resuscitate or "DNR" Order. The idea of a DNR Order is similar to the concept of a Living Will, but it's not exactly the same thing. If a person (or her Medical Agent or a Qualified Relative) has signed a valid "Out-of-Hospital-Do-Not-Resuscitate Order", then if her heart stops beating or she stops breathing, she should not be revived or resuscitated. Thus, the DNR Order applies in an urgent, emergency situation. This is the form needed by emergency personnel, such as those arriving on ambulances. These forms can be obtained from various medical providers, such as hospitals and nursing homes.

Other Things Everyone Should Do. There are some additional things that everyone should do to make life easier for their loved ones upon their disability or death.

1. Updated Financial Statement. It is a good idea to make an updated financial statement, at least annually, listing all of your assets and liabilities (debts) with values and amounts as of the statement date. In a typical financial statement, however, only life insurance policies having a cash value are listed, and the face amount or death benefit may not be shown. Because life insurance is part of your estate for estate tax purposes (unless owned by an Irrevocable Trust), it would be wise to make sure that all insurance policies are listed also, with information regarding the death benefit reflected in the statement. You may give the person who is going to be in charge of your affairs upon your death or disability a copy of your financial statement; however, most people are reluctant to do that. Instead, be sure to advise that person where you keep your financial statement, so that they will have a place to start when they must take over. There are many computer software programs that can be used to prepare a financial statement, and most of them are user friendly. CPAs and financial advisors can also prepare financial statements.

2. List of Important Information. It is also a good idea to keep a file containing "important information", such as a list of all important documents, indicating where

both the originals and copies are kept, and the names and contact information for all of your health care providers, professional advisors, family members and other relevant persons. Important documents would include birth certificates, car titles, deeds, stock and bond certificates, income tax returns, gift tax returns, estate planning documents, entity documentation (for example, documents creating your corporation or a partnership), insurance policies of all type (life, auto, homeowners, umbrella, long-term care, disability), mineral leases, Pre-Marital/Post-Marital Agreements, divorce decrees, citizenship papers, etc. The file should also contain information regarding where you keep current account statements and access information (log in name, password) for your computer, along with relevant websites. All of your doctors, dentists and other health care providers should be listed, with any particular specialty indicated. Your estate planning attorney (and any other attorneys that you use), your CPA, your insurance agent(s), your banker(s), your trust officer (if applicable) and your financial advisors and consultants should all be listed.

How Often Should You Update Your Estate Plan?

Generally, people should review their estate planning documents at least once every five years. Three factors affect your estate plan (i) changes in your financial situation (job change, retirement, changes in the value and type of assets), (ii) changes in your personal/family situation (births, marriages, divorces, deaths), and (iii) changes in the tax laws (and other laws affecting estate planning). Unless our clients come back to us periodically for a "check up", we will not be aware of changes in the first two categories listed above, so we will not be in a position to provide advice regarding changes that should be made to their estate plan. Anyone whose estate planning documents are more than 5 years old really should make an appointment to review their estate plan, especially those who have large retirement plans or IRAs (due to significant changes made in 2002). We are always happy to do this; however, please do not call "at the last minute" wanting to update your estate planning documents. Estate planning is something very important that should not be done in a rush. Generally, from the time clients hire us to prepare new documents (usually after a meeting), it takes about 2 weeks before the draft documents are sent out to be reviewed (because other clients are already in line to receive their documents). It takes several more weeks to revise and discuss the documents after that. So, count on the entire process taking at least a month (or more).

Other Thoughts on Serious Matters. Hurricanes Katrina and Rita reminded us how precious life is and also how fragile "things" are. Fortunately, most "things"

can be replaced. It's the safety of our loved ones that counts. In view of the type of damage that hurricanes and other severe weather can cause, however, serious consideration must be given to a safe and secure location for important original documents. In most cases, a safe deposit box will work (although many safe deposit boxes located in the basement of downtown bank buildings flooded during tropical storm Allison). For original legal documents, many attorneys (and corporate trustees who are appointed as a fiduciary in the Will or Trust) offer a secure location for storage of those documents at no charge to the client.

What if one needs to evacuate, what items should be taken with you? Of course, one would want to have food, water, medications, batteries, other necessities and perhaps an extra container of gas. Many people who left the city due to Hurricane Rita advised me that they also took family photo albums and pictures with them. Perhaps a list should be made in advance of the next evacuation situation, so that items can be gathered quickly.

What if we do have a bird flu epidemic and the issue is not what to take with you but what you need to have at home if it is unsafe to go out for a lengthy period of time? Obviously, it would be wise to have appropriate amounts of food and water stockpiled at home. If it looks like an epidemic is starting, you may also want to secure several months' worth of necessary medications. It is likely that government officials will provide instructions and information via the media regarding what to do, but you may want to spend some time thinking of ways to plan ahead for this possibility and come up with your own plan. And, of course, all of your estate planning should be up to date long before the bird flu arrives.

Contact Us:

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone, fax or traditional mail at the address and phone number shown below.

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