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THE DOCUMENTS AND GOALS OF ESTATE PLANNING

To help you to better understand the estate planning process, the following sets forth the documents that we generally prepare as part of your estate plan, and the goals that we believe the estate planning process should achieve:

1. ***The Estate Planning Process***. The estate planning process should develop an overall plan which, first and foremost, accomplishes your objectives for the disposition of your assets and the protection of your family. This process can be as simple as reviewing your existing documents and your assets, including your retirement benefits and your life insurance. On the other hand, it can be quite complicated, involving the creation of multiple trusts and entities to own your real estate and other assets, or the establishment of a comprehensive gift giving program which may last for several years. Your estate plan may include some or all of the following:

   a. Drafting of a **Will**, **Trust Agreement**, or both, to dispose of your assets to your intended beneficiaries at your death, and to appoint an executor and trustee to handle the disposition of your assets. In many situations this is relatively easy, but your unique situation may involve the following considerations:

      i. nominating a guardian for your minor children in the event that both you and your spouse are deceased;

      ii. establishing trusts for the care of your minor children or beneficiaries with special needs;

      iii. planning in the case of a second marriage when there are children from prior marriages; and,

      iv. planning for the special health or financial needs of a surviving spouse or children;

   b. Preparing a **General Durable Power of Attorney** to appoint an agent to make financial decisions for you in the event of your incapacity. Note that the General Durable Power of Attorney is a very powerful document, which grants your named agent the authority to exercise the powers set forth therein as soon as the document is signed, regardless of your incapacity. As a result, some clients ask us to hold their General Durable Power of Attorney under a letter agreement which instructs us to deliver the General Durable Power of Attorney to your agent only after we have received instructions from you to do so, or after your physician advises us that you are incapable of taking care of your affairs;

c. Preparing an **Advance Medical Directive** to set forth your wishes for your medical care if you are unable to make decisions for yourself, and to appoint an agent to make medical decisions for you if you are unable to do so. The "default" provisions of the Advance Medical Directive direct that if your attending physician should determine that you have a terminal condition where the application of life-prolonging procedures would serve only to artificially prolong the dying process, you direct that such procedures be withheld or withdrawn and that you be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide you with comfort care or to alleviate pain. Of course, to the extent these directions do not reflect your intentions, they can be revised accordingly;

d. Re-titling assets and designating beneficiaries of assets in order to avoid the time and expense associated with probate at your death, with particular attention to life insurance, retirement assets, and the designation of accounts as POD ("pay on death") or TOD ("transfer on death");

e. Rearranging asset ownership for tax savings and creditor protection; and,

f. Reducing estate, gift, and generation-skipping transfer taxes by:

    i. utilizing your ability to pass the maximum amount of assets estate and gift tax free;

    ii. passing significant amounts of life insurance estate tax free through irrevocable life insurance trust(s);

    iii. minimizing your taxes through a comprehensive gift giving program;

    iv. skipping estate taxation in the estates of your children for the maximum amount that you may pass free of generation-skipping transfer tax;

    v. planning to obtain the maximum step up in basis for your assets at your death and the death of your spouse; and,

    vi. providing for liquidity to pay estate taxes at your death.

2. ***Living Trusts for "Probate" Avoidance***. A living trust is a trust that you create during your lifetime, and reserve the right to amend or revoke at any time during your lifetime. As part of your estate planning, we may recommend what is called a "pour over" will and trust agreement. The "pour over" will essentially provides that all of your assets "pour over" to your trust agreement at your death, and your trust agreement then provides for the disposition of your estate. The trust agreements drafted in these situations are more often than not living trusts.

a. The primary advantage of a living trust is that with the proper titling of your assets, your estate can avoid probate at your death. Additionally, to the extent assets are re-titled into the name of the trustee of your living trust, these assets will be available for your trustee to use for your benefit during your lifetime in the event of your incapacity.

b. Although the probate process in Virginia is not particularly expense, there are certain circumstances in which a living trust may be particularly advantageous, such as:

i. if assets will be held in a trust arrangement for your beneficiaries after your death either because of the age, capacity, or special needs of the beneficiaries;

ii. if you own assets in other states, especially New York or Florida, where those assets will need to be probated out-of-state at your death, which is often an expensive and burdensome process;

iii. if you anticipate that some of your heirs may raise objections to the disposition of your assets at your death;

iv. if for personal reasons you wish anonymity at your death with respect to your assets which are placed in the trust; or,

v. if you wish to provide for the management of your assets because of your age or because you travel frequently.

c. However, please note that in certain circumstances it may actually be desirable for your estate to be probated at your death. Examples of such circumstances include if you have significant debt, potential tax liabilities to the Internal Revenue Service of state department of taxation, or issues with contingent debts or potential law suits.

3. ***Estate, Gift, and Generation-Skipping Transfer (GST) Taxation***. Under current law, each individual may gift during their lifetime or at death a total of $5,340,000[1] ($10,680,000 combined for married couples with proper planning) free of estate, gift, and GST taxes. Please note that this does not mean that if you have less than this amount in assets that you do not need to plan, as there are a number of other non-tax reasons to properly plan your estate. However, if your assets are at a level where estate, gift, or GST taxes may apply to you, then we may discuss the following opportunities with you, with the goal of transferring your assets to your intended beneficiaries while incurring the minimum transfer tax costs:

   a. Utilizing the ability of each of you and your spouse to pass the maximum amount estate tax free to your descendants by establishing a separate trust or trusts under your trust agreement at the death of the first spouse to die. This can be accomplished in one of the following two ways:

      i. For smaller estates, we often recommend a technique called a "disclaimer trust." Under the provisions of a disclaimer trust, if your spouse survives you, all of your assets generally pass outright to your spouse. Any assets passing outright to your spouse are eligible for the marital deduction. However, if because of the receipt of the assets the surviving spouse's estate would exceed the then current applicable credit amount (currently $5,340,000), he or she may "disclaim" some part or all of the assets which would otherwise pass to him or her. To the extent this is done, the disclaimed assets pass as if the surviving spouse did not survive, and thus the assets will not be taxed in the surviving spouse's estate. With disclaimer trust planning, each of your and your spouse's trust agreements would provide that any assets which are disclaimed by the surviving spouse are retained in trust. The disclaimer trust would provide that the income is paid to the surviving spouse during his or her lifetime and that the principal may be paid to or for the benefit of the surviving spouse and your descendants for their health, maintenance, support and education. At the death of the surviving spouse, the remaining assets would be distributed and administered as provided in your trust agreement.

      ii. For larger estates, we often recommend the creation of a separate Family Trust (also known as a "credit shelter trust") and Marital Trust at the death of the first spouse to die. The Family Trust is

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1 Note that this amount is indexed for inflation and may change every year.

funded first, with assets equal to the deceased spouse's applicable credit amount (currently $5,340,000), and the remaining assets pass to the Marital Trust. Under the Family Trust, the surviving spouse may be the primary beneficiary during his or her life; may receive all of the income from the Family Trust; may be the sole trustee of the Family Trust, provided that his or her right to invade the principal for his or her benefit and the benefit of your descendants is limited by standards of health, maintenance, support, and education; and, may have the right to redirect the assets in the Family Trust to your children, more remote descendants, or third parties at the surviving spouse's death. The primary advantage of this structure is that estate taxes will be due only at the death of the surviving spouse.

b. Transferring life insurance policies to, or the purchase of new life insurance policies by, irrevocable life insurance trusts. By having an irrevocable trust own your life insurance, the policy proceeds will be removed from your gross estate and thus, substantial estate tax savings may be generated. However, please note that if existing policies are transferred to an irrevocable trust, you must survive the transfer by three years for this technique to be successful.

c. In larger estates, the future growth and appreciation of assets, and the resulting estate taxes, may be reduced and even eliminated by adopting a cogent and comprehensive gift giving program. In such situations, in order to reduce or eliminate the estate tax, we may suggest that you:

i. make maximum annual exclusion gifts to donees of your choice of the maximum amount (currently $14,000[2] per year per donee);

ii. pay private school or college tuition for grandchildren directly to the educational institutions;

iii. make gifts to college savings plans;

iv. pay certain medical expenses for your children and grandchildren directly to the health care provider;

v. make gifts to charitable organizations if you are so inclined; and,

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[2] Note that this amount is indexed for inflation.

vi. make gifts larger than annual exclusion gifts (possibly incurring gift tax) in order to remove future appreciation and the gift taxes from your estate.

d. Other tax-savings techniques that we may discuss include grantor retained annuity trusts, qualified personal residence trusts, formation of limited liability companies to own some of your property, the recapitalization of business interests followed by gifts of voting and non-voting interests, the formation of charitable remainder trusts for gifts of highly appreciated assets, and the sales of appreciated property to your children.

e. If you are charitably inclined, we may also recommend charitable gifting techniques such as charitable remainder trusts and charitable lead trusts.

f. Additionally, in very large estates, or if you have one or more children who are financially successful, we may suggest the creation of generation-skipping transfer trusts for your children. These trusts provide for your children and grandchildren during their lives, and each of your children may be the trustee of his or her own trust. Upon your child's death, any assets left in the trust would pass free of estate taxes to his or her children or grandchildren. Please note that if you are married, these generation-skipping transfer trusts would not become effective until the death of the survivor of the two of you.

4. ***Spousal Representation***. Please note that whenever we plan the estates of a married couple, we represent the interests of both spouses. Although spouses' interests are usually compatible, conflicts can arise. If conflicts do arise, we cannot advocate the interests of either spouse. You should be aware that because each of you is our client, matters that you tell us in confidence are not protected by attorney-client privilege from disclosure to the other of you. Accordingly, if you do not share the same objectives or if you wish to speak in confidence to your lawyer, you should consider having separate counsel.

We understand that the foregoing presents a lot of information, and may raise additional questions. We look forward to discussing this information with you in more detail, and invite any questions that you may have.

Freed & Shepherd, P.C.

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Date Updated: May 3, 2014