Estate Planning and Recent Developments
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Disclaimer

This presentation is intended to provide general information about estate planning and should not be construed as providing legal advice. It should not be cited or relied upon as legal authority. State laws vary and any attempt made to discuss laws of states other than Maryland is for general information to help the viewer better understand Maryland law. For advice about how these issues might apply to your individual situation, consult an attorney.
Agricultural Law Education Initiative

Website: umaglaw.org
Good initial source

• When starting to develop these plans, a good initial source for you to review is: Neil Harl’s *Farm Estate and Business Planning*

• Book is in its 17\(^{\text{th}}\) edition and a good initial source for this topic
HOW MANY OF YOU HAVE ESTATE PLANS?

Raise your hands if you do
Overview

- Survey results show the U.S. farm population is in line with the rest of the US population (majority do not have estate plans).

- Failing to plan for death can lead to issues with not having a named successor, the family understanding your goals, and who gets what.
In this world nothing can be said to be certain, except death and taxes.

-- Benjamin Franklin
WHY DID I PUT THAT QUOTE UP THERE?
Overview

• Estate planning is considered the process of arranging for an orderly transfer of your assets upon your death.

• An estate plan is not just one single document, but can include multiple documents that effectively transfers your property at death and achieve other goals.

• An estate plan can include:
  – A will
  – Trusts
  – Life insurance policies
  – Living Will
  – Durable Power of Attorney
  – Health Care Proxy
Overview

• Important to remember:
  – Your estate plan will be different than your friends and neighbors
  – Your estate plan is not the extra value meal at a fast food joint
Why Should You Think About Estate Planning?

• Estate planning allows you to achieve your goals in the transfer of assets to certain family and friends after your death and puts the proper people in charge of your affairs if you become incapacitated

• Want to ensure you get the medical treatment you want if you become incapacitated

• Do not want to rely on state laws in place for when no estate plan exists – May not properly take care of you
Estate Planning Tools

• Will:
  – A written document that provides instructions on how you want your property and resources to be transferred upon your death

• Trust:
  – A legal agreement between you (grantor) and a manager of the trust (trustee) for the benefit of a third party (beneficiary).

• Durable Power of Attorney:
  – A legal document that gives one person (agent) the right to act on behalf of another person (principal). This is done to allow for your business and financial matters to be continued if you are incapacitated
Estate Planning Tools

• Health Care Proxy:
  – Gives a third party (agent) the right to make medical decisions for you if you become incapacitated

• Living will:
  – Similar to a medical power of attorney, a living will spells out the types of lifesaving treatment you desire in a limited number of situations and designates a third party to make those decisions on your behalf.
Dying Without An Estate Plan

• Without at least a valid will, you will be considered to have died intestate and state laws will govern how your property is distributed.
  – Intestate is a person who dies without a valid will

• Interstate succession laws are designed to divide your property up among your family members, regardless of the relationship you had with that family member.
  – The idea is if you wanted your property to go to a specific non-family member then you should have written a will
  – The idea is you are close with your family and want them to have your property
Wills

• As defined earlier, a will is simply the instructions you have on how to distribute your property upon your death.

• Wills can also provide for other besides how to distribute your property”
  – For parents with minor children, those under the age of 18, you can appoint a guardian to raise your minor children
  
  – You also appoint the executor/personal representative, or the person in charge of making sure your property is distributed according to the terms of your will
Will terminology

• Testator – the person making the will

• Executor/Personal Representative – the person appointed in the will by the testator to administer or carry out the terms of the will

• Decedents – are the testator’s relatives, such as spouse, children, grandkids, parents, etc.

• Probate – is when the decedent’s will’s validity is established by a court. This allows the personal representative, or person in charge of carrying out the will, to make distribution of your property and assets.
Who Can Make a Will?

• As one state Supreme Court has pointed out “Let it first be stated that one does not have to be a genius, a college graduate, a high school graduate, or even have attended grade school, to make a will.” *Harwell v. Garrett*, 393 S.W.2d 256, 260 (Ark. 1965).

• Any person of sound mind over the age of 18 can make a will

• A will is one estate planning tool everyone should consider having.
Elements of a Valid Will

1. Legal age
2. Sound mind
3. Intention to transfer property
4. Written
5. Properly signed
6. Properly witnessed
7. Properly executed
1. Legal Age

• A person must be at least 18 years old.

• After a person has reached 18 years old, the law typically provides no age cutoff for making a will.
2. Sound Mind

• You must know that you are making a will, the property that you have, and who are your decedents that you will leave your property to.

• To have a sound mind a testator must:
  – Be able to retain in their memory without prompting the condition and extent of their property
  – Understand who the testator is giving the property to
  – Realize he may be excluding decedents from the will

• Even if the testator is a little odd or peculiar, a court will generally find the odd testator to be of sound mind if they meet the 3 requirements.
3. Intention to Transfer Property

- Your will needs to have clear language that you are intending to give away some or all of your property to the people, businesses, or charities specified in your will.

- Language such as “I bequeath . . .” or “Upon my death I give . . .”
4. **Written**

- The will needs to be written
- An oral will is not provided for under Maryland law
- The reason for requiring the will to be in writing is to show everyone the testator’s intent of how the testator wanted their property transferred at their death and not allow anyone to change this intent because they could not remember exactly what the testator said
Holographic Wills

• One exception to the properly witnessed requirement is a holographic will.

• A holographic will is a will written entirely in the testator’s handwriting and signed at the end by testator.

• Only valid in Maryland if made by a member of the armed services and signed by the testator outside the United States.
  – Void one year after discharge.
Changing the Will

• A will can be changed or amended by drafting a codicil that amends the earlier will or the person can draft a new will.
  – The codicil, or document amending the prior will, will need to meet all the requirements of a valid will to be valid

• If you do write a will, you should keep it up to date depending on major changes that happen in your life. Such as:
  – Marriage or divorce
  – The birth of a child
  – Moving to another state – laws related to estate planning vary among the states and you will want to make sure your will complies with the laws of your new state
  – Acquiring new property
Property Outside the Will

Certain property can not be included in your will, because the property already has a person specified to receive it on your death.

1. Life insurance policies – you have selected the beneficiary of the policy on your death
2. Payable-on-death bank accounts – you have selected
3. Joint bank accounts
   – Such as a joint checking or savings account used by a married couple
   – Remaining account holders would receive the account
4. Real property held as joint tenants with multiple owners
   – Traditionally all property owned by a husband and a wife is owned as joint tenants
   – Property would go to surviving owners
Trusts

• Unlike wills, trusts as an estate planning tool are not for everyone
• People who should consider using a trust
  – Those with estates approaching federal estate tax limits, for 2014 that is estates over $5.34 million
  – Those with children or a disabled family member to provide for their care if the parents were to unexpectedly pass away
  – Family members that can no longer manage their own affairs, such as an elderly parent
Trust terminology

• Grantor, Trustor, or Settlor – various ways to describe the person who creates the trust

• Trustee – is the person that manages the property in the trust

• Beneficiary – is the person that the trust benefits
Types of Trusts:

• Testamentary Trust – trust created in a will upon the death of the grantor
  – Typically used to provide for the benefit of minor children or disabled family members

• Living Trust – Is created during the trustor’s life and continue after the trustor’s death. Used by many people as a way to avoid the probate process upon their death.
  – Can either be revocable or irrevocable
    • Revocable – You retain control of the trust to change the beneficiaries, trustee, terms, and can even choose to dissolve the trust
    • Irrevocable – permanent and retain no power to change the trust
Living Trust

• Reasons to consider a living trust
  – Avoid probate costs
  – Allows for the transfer of property in different states
  – Allows for managing of assets if you become incapacitated
  – Distributes property to the beneficiaries faster than probate process

• Reasons to not consider a living trust
  – Expensive to set up and update, requires a lawyer to draft trust documents and to administer
  – Expenses can outweigh benefits
Durable Power of Attorney

- Appoints an “attorney-in-fact” or agent to handle your business and financial issues that could arise if you become incapacitated and this power lasts until the authority is revoked or at your death
  
  - Ex: A signs a durable power of attorney making X his agent. A eats a bad jelly bean and goes into a coma. X would be able to pay bills, make business decisions, and make other decisions within the scope of X’s authority until A is able to make these decisions again.
  
  - This authority can be limited by the person granting it
Durable Power of Attorney

• Two kinds of durable power of attorneys:
  1. Durable power of attorney – the agent gains the authority to make decisions for you when you become incapacitated, disabled, or incompetent.
Durable Power of Attorney

2. Springing durable power of attorney – here the person granting the authority specifies in exactly what cases their agent grants decision making authority. The person granting the authority can also specify if a doctor’s certification is necessary in order for your agent to gain decision making authority.

   – Ex: Same as previous example, but this time the durable power of attorney specifies that a doctor must certify that A has become incapacitated before X gains decision making authority. If A goes into a coma, then a doctor would have to certify that A is incapacitated before X can make any decisions for A.
Durable Power of Attorney

• The power of attorney can be revoked for any reason by the person granting the power or it terminates at the person granting the power. The agent would also be required to be compensated for their actions, unless the durable power of attorney specifically says that the agent will not be compensated.
RETIREMENT IN AGRICULTURE
Retirement in Agriculture

• Let me ask you a question:

• How many of you plan to retire?
Retirement in Agriculture

- Literature is full of active farmers’ responses to survey questions on retirement plans:
  - Kirkpatrick (2006) found 73% of respondents never plan to retire or only to semi-retire from farming
  - In Iowa, 27% of farm operators have identified a farm successor (73% have not)
  - ERS has found that US farm net worth is over $1 million but 76% of that is tied up in farm assets
Typical “Farm” Family?

- Granddad is 92 (no one really knows what he does in the operation)
- Grandma is 87 and manages the day-to-day operations
- Dad (next in line to inherit) is 65 and never had control of day-to-day operations
- Son is 31 will eventually inherit control from dad at some point.
Typical Farm Family

- You may laugh at my previous slide, but similar issues in agriculture across the U.S.

- Grandparent’s generation may not want to retire and retain some control in operation

- Parent’s generation may have only been farm labor and never helped with management and marketing decisions

- Kid’s generation may want to take over the farm and have necessary background to step in front of parent
Typical Farm Family

• 2\textsuperscript{nd} Generation (Parents) may be missing critical management skills because 1\textsuperscript{st} Generation always did it:
  – Ex: Cindy may not understand corn and soybean marketing plan because her dad, Steve, has always taken care of that. Cindy may not realize that she needs to hedge \% of crop each year.

• 1\textsuperscript{st} Generation may not let 2\textsuperscript{nd} Generation participate in these decisions in order to stay relevant to operation.

• Need to realize you bring a host of knowledge and skills learned over lifetime – 2\textsuperscript{nd} and 3\textsuperscript{rd} generation may not have had those experiences.
What is the answer?

• If the goal is to continue farm on past your generation:
  – Let successor participate in day-to-day decisions
  – Let successor’s understand the skills that will be necessary to continue on farming operation.
  – Realize skills you have were not learned overnight

• Consider use of business organization structure (more on this in a minute)
  – Allows current generation to slowly give more and more control to successors, while retaining some control.
    • 1st generation may retain some veto power over decisions of 2nd generation
  – Business organization may allow for 1st Generation to continue to participate in profits of farm (retirement income)
What is the answer?

• Communication will again be big here:
  – May realize that 2\textsuperscript{nd} generation does not really want to have control of operation.
    • They may not be interested in making decisions
    • They may think they are too old, want to retire, and let 3\textsuperscript{rd} generation take over

  – Communication will also help 2\textsuperscript{nd} and 3\textsuperscript{rd} generation understand how to effectively manage the operation and the decisions they will be expected to make.
BUSINESS ORGANIZATIONS
Business Organizations

• Business Organizations would include:
  – Partnership – an association of two or more individuals to jointly carry on a business. Each shares in the profits and loses of the partnership equally and each individual has the authority to bind other partners.
  – Limited Partnership – similar to a partnership, but allows for a separate class of partner who only provide capital and share in profits or loses but do not participate in management decisions in the business.
  – Corporation – is an entity formed under state law to act as a single person, separate from the individuals owning the business, and right to exist indefinitely.
  – Limited Liability Company (LLC) – is an entity formed under state law containing elements of a partnership and a corporation
Business Org in Estate Planning

- Each of these entities may have some place in achieving goals in estate planning by allowing for efficient continuation of agricultural businesses from generation to generation.

- Multiple entities maybe utilized depending on a person’s goals.
  - Ex: Bill runs a farming operation and owns multiple tracts of land. Bill has two children, Tom who helps Bill in the operation and Stacy who lives and works off the farm. Bill may set up one business entity for the farming operation with the intent of passing ownership of this entity to Tom. Bill may set up another business entity that controls the farmland he owns and enter into long-term leases with the first entity. Bill may pass this second entity onto Stacy to allow her access to capital generated by the family farmland.
Business Org in Estate Planning

• Use of a business entity is one way to gift shares in the entity to family members
  – This allows parents to retain some control over the operation, reduce their future estate tax burden, and take full advantage of the yearly gift tax exemption.
  – Ex: family could also set up a corporation with shares that can facilitate the transfer of ownership. Each parent can transfer at least $14,000 worth of shares every year without reporting on a gift tax return and without incurring any gift tax liability, this number will go up each year based on inflation. In addition, the value of the interest gifted can be reduced by discounting since the recipient does not control the property and cannot easily sell this minority interest in the family farm. A discount of between 20 and 40 percent of the value of the gift property may be justified.
Let's talk about the recent developments in estate planning.

TIME OUT . . .
Digital Accounts

• Many of us keep more than we even realize on digital accounts online.
  – Email, social media accounts, bank accounts, credit card accounts, etc

• The question is, what happens to these accounts after we die?

• As you might guess, in Maryland, anti-hacking laws and privacy rights keep heirs, executors and the like from gaining access to these accounts
  – This can cause serious issues
Digital Accounts

• Many states are now realizing the issue concerning digital accounts after death and grant family members, executors and heirs total control over a person’s digital accounts after his death, the same way it grants those rights over physical documents.
  – Delaware and Virginia are two states that have jumped on board
Digital Accounts

• So what can you do until Maryland, and other states, fix this hole in the law?
  – Have your accounts set up under an business organization
  – Simply keeping a log of passwords and accounts will not solve this problem (laws will still keep the executor from gaining access
Thanks
Any Questions?
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