

Autumn 2008 Newsletter

10 Tips for Planning for Death and Disability

You can make it easier for your family to cope with your death or disability if you plan ahead. The following are ten steps you can take to help them in advance:

1. Have a Last Will and Testament. Your will directs distribution of your “probate” assets, nominates a personal representative (executor) and contains other important provisions regarding your estate. Probate assets are assets that are not held in joint tenancy or with a beneficiary designation (other than your estate named as beneficiary), as further discussed below. Your will should be prepared by an attorney to ensure that it is valid and properly carries out your wishes.
2. Have a General (Financial) Power of Attorney. A General Power of Attorney allows your agent to deal with your property for you. A Power of Attorney is only effective during your lifetime. Having a General Power of Attorney in place can prevent the need for a conservator to be appointed for you by a court if you become incapacitated.¹ Make certain that the Power of Attorney is “durable,” meaning that it will remain effective, even if you become incapacitated.
3. Have a Medical Power of Attorney. A Medical Power of Attorney gives your agent the authority to consent to or refuse medical treatment on your behalf. The Medical Power of Attorney may be combined with the General Power of Attorney into one document. Having a Medical Power of Attorney in place can prevent the need for a guardian to be appointed for you by a court if you become incapacitated.² It should also be durable.
4. Have a Living Will. A Living Will is typically narrow in scope. Generally, it directs when life-sustaining procedures and artificial nourishment will be withdrawn if you are unconscious for a certain amount of time and have a terminal condition. You should have a Living Will if you want to leave your family with directions in this regard.
5. Nominate a Guardian for Your Minor Children. You can nominate a guardian for your minor children in a properly executed will or in another document that meets certain criteria.
6. Safekeeping of Your Documents. It is important to keep your documents in a safe place and let your nominated personal representative and agents know where they are located. Copies of these documents are rarely sufficient, so you should keep track of the originals. A safe-

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deposit box is an excellent place to keep your will (of which there should be just one original). For your Powers of Attorney and Living Will, you may have multiple originals. You should keep at least one original of each document outside of your safe deposit box so that your agent has immediate access to them. You might even give your agent an original of your Powers of Attorney and Living Will immediately. Make sure your agent and nominated personal representative know where your safe-deposit box key is located.

7. Maintain a List of Financial Information. Compile a list of your assets and the names and contact information for your financial advisors (including accountant and attorney), and let your nominated personal representative and agent know where to find this information when necessary.
8. Limit Co-ownership of Property. For several reasons, we generally recommend avoiding co-owning property with anyone other than your spouse (and in some cases, it is even best to limit co-ownership with a spouse). First, it can be complicated to deal with property that is owned by two or more individuals. For example, problems can arise if the owners have differing views as to whether the property should be improved, sold or mortgaged, or if one owner fails to pay his or her share of expenses. Second, if you hold property in joint tenancy with right of survivorship, then the surviving owner becomes the sole owner of the property as a matter of law at your death. This result may be contrary to the directions in your will. Your will does not control the distribution of joint tenancy property. Many of the problems we see with the administration of decedents' estates stem from a person holding property in joint tenancy "for convenience" with one child. In such a situation, that child receives that entire joint tenancy asset in addition to his or her inheritance under the will, with the result that the child receives a larger share of the estate than the other children receive. Due to tax laws and other considerations, it can be complicated to correct this result even if everyone agrees that the estate should be distributed equally. Third, a transfer of an interest in real property without adequate payment is typically treated as a gift to the other joint tenant, requiring reporting on a federal gift tax return. The income tax consequences on death are usually less favorable than if received by way of the probate process. Fourth, with any joint tenancy assets, the joint tenants' marital or creditor problems may affect your asset.
9. Be Careful with Beneficiary Designations. If you name a beneficiary for your assets, such as a payable-on-death (POD) beneficiary, that beneficiary will receive those assets at your death. This result may be contrary to the directions in your will. Your will does not control the distribution of property that has a named beneficiary, unless your estate is named as the beneficiary (which is generally not advisable). However, in the case of some assets, such as life insurance, retirement assets and annuities, there are income tax considerations and/or creditor protections reasons that may make it advisable to name an individual or a trust as the beneficiary. The designation of beneficiaries of such assets should be carefully coordinated with your overall estate plan.
10. Review Your Planning. You should periodically review your estate plan; about every 3-5 years, or earlier, if there are significant changes in your family, your financial situation, or the tax laws. A plan that may be ideal for you at one stage of your life may not be as suitable a few years later as circumstances change. However, it is important that you not make changes to your estate planning documents by writing on them. If you want to make changes to the documents, you should have new ones professionally prepared.

The above list is not an exclusive list of the steps you should take to prepare for death or disability. Proper planning is very individualized. Please let us know if we can assist you with your estate planning.

¹ A "conservator" is someone appointed by a court to manage the assets of a person who is a minor or who is incapacitated.

² A "guardian" is someone appointed by a court to take responsibility for the care of a minor or incapacitated person, including making decisions regarding where such person lives and his or her medical care.

★ ★ ★ ROLL CALL ★ ★ ★

Tom Stover and **Jennifer Spitz** both presented programs at the Colorado Bar Association's Annual Estate Planning Retreat in Santa Fe, New Mexico in June 2008. **Jennifer** discussed planning in light of the uncertain future of the estate tax. Jennifer also published an article in the September 2008 issue of The Colorado Lawyer titled "Planning for Other States' Estate Taxes." Although Colorado does not currently have an estate tax, about half of the states impose such a tax. These state estate taxes can impact Colorado residents who own property in other states.

Tom's presentation at the Estate Planning Retreat was on the topic of advising beneficiaries of generation-skipping transfer (GST) trusts. The program considered various aspects of integrating existing GST plans with new estate plans for clients, as well as identifying and avoiding possible problems with older GST trusts. He will present a program for the Colorado Bar Association in November of this year entitled "Marital Deduction Planning – Beyond the Basics."

Tom and his wife Judy celebrated their 30th wedding anniversary with a trip to Sweden in September.



Status of the Estate Tax

The federal estate tax laws were changed significantly in 2001. The 2001 tax act repealed the estate tax effective for the year 2010. Repeal is only scheduled to last for one year. The estate tax laws are scheduled to return in 2011 in the form they were in prior to 2001, so that the estate tax exclusion amount (currently \$2 million, and scheduled to increase to \$3.5 million in 2009) will drop to \$1 million. These factors have made estate planning more challenging since 2001.

Over the past seven years, Congress has considered several proposals to either repeal the estate tax permanently or eliminate the one year of repeal. Permanent repeal of the estate tax has lost momentum. The most current proposals have included the following key features:

- Eliminate the one year repeal of the estate tax.
- Fix the estate tax exclusion amount at \$2 million or \$3.5 million (although \$5 million has also been proposed). The estate tax exclusion amount might be indexed for inflation.
- Possible reunification of the gift and estate tax. Any gift tax exclusion amount used during life reduces the amount of estate tax exclusion amount available at death. Previously, the two exclusion amounts were the same. However, pursuant to the 2001 tax act, they have been "decoupled" since the year 2004. The gift tax exclusion amount is \$1 million.
- There has been some discussion of making the estate tax exclusion amount "portable" between spouses. With portability, the second spouse to die could use any of the first spouse's estate tax exclusion amount that was unused at the first spouse's death. Portability would be a departure from current law and could be especially useful in cases where one spouse owns more assets than the other spouse.

There has been much speculation over the past seven years as to the future of the estate tax. Many of the predictions have failed to come true. However, the continued discussion in Congress about changes to the estate tax laws gives some hope for more certainty in the future. Sooner would be better, but if the tax laws are changed, it may not happen until 2009.

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AUTUMN 2008 NEWSLETTER



David Brantz and his wife, Carly,
were delighted to welcome
Samantha Lee Brantz
on July 3, 2008!

At birth, she weighed 7 pounds,
9 ounces and was 20½ inches long.

David's practice focuses on
real estate, estate planning, probate,
trust administration and business law.

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