

JOSEPH E. SEAGLE, P.A.

JOSEPH E. SEAGLE **

** Admitted in the District of Columbia,
North Carolina, South Carolina, & Florida

ATTORNEY AT LAW
924 West Colonial Drive
Orlando, Florida 32804

Telephone: (407) 770-0100
Facsimile: (407) 770-0200

MEMORANDUM FOR ESTATE PLANNING CLIENTS

This memorandum is provided as a service to our new and established clients who are interested in establishing a plan as to how their estate will be distributed during their lives and upon their death.

It is designed to answer many of the questions that we have found clients have about these issues.

1. Conflicts of Interest. It has been said that a servant can only have one master, and this applies to attorneys as well. Bar rules prevent us from representing both sides of a legal issue without consent from all parties involved. Many times, however, we are asked by life partners or different generations of families to represent all the parties involved. Sometimes life partners have differing desires as to how they want their property distributed upon their death. This occurs most often when the partners have children from prior relationships or have inherited separate property from their ancestors. As for conflicts of interest among generations, sometimes a legal estate planning technique that may be advantageous to one generation, may not be as advantageous to the next generation. Either of these conflicts can lead to problems later when one life partner or generation wants to change the terms of their estate plan that adversely affects another of our clients. We are then placed in the precarious position of having to divulge confidential information from one client to the other to fulfill our ethical obligations under the rules of the State Bar. If you feel that there may be a conflict of interest in our handling of your estate planning needs, please let us know as soon as possible so that we may address this issue with you. Likewise, please understand that, if we provide counseling for both life partners or various generations of the same family, we may later be required to withdraw from representation if such a conflict of interest arises.

2. Wills. A Last Will and Testament tells the world how you want your estate divided when you die. If you die without a Will, you are said to have died *intestate*, and the state's laws will determine how your estate will be divided among your relatives. The Will does not *speak* until your death. Under most circumstances, it may be changed, revoked, or modified as many times as you desire before you die and have no effect until your death.

Most Wills are simple documents that name a personal representative (the PR) and direct the PR to divide your property among those whom you want to receive a portion. Wills can become more complex with the inclusion of testamentary trusts (see below), and appointments of guardians and trustees. We will discuss your desires and hopes and tailor a Will to those.

Wills for life partners are usually mirror images of each other, with each partner leaving everything to the other. The estate usually goes to the partners' children should the partners die simultaneously. If you and your life partner can not agree that this is how you both want your estate distributed, then we strongly suggest that you each retain separate attorneys to draft your wills.

3. Trusts. There are two types of express trusts often used in estate planning: living and testamentary. Living trusts are established during your lifetime and may be revocable or irrevocable. If a trust is revocable, you may revoke the trust at any time before your death. If irrevocable, you can not. A testamentary trust is created by a directive in your Will. A third type of trust available in Florida is the Land Trust. This type of trust is not limited to use for estate planning purposes, and is beyond the scope of our discussion here. However, if you feel the need to own real property in a vehicle that protects your privacy and provides some estate planning benefits, please ask us for more information about land trusts.

All trusts, living or testamentary, offer the opportunity to permit several people, simultaneously or in succession, to share the benefits of property. They may also provide a method to receive substantial tax savings. They are often used to set aside certain realty, personal property, or currency for the benefit of another person, group of persons or even a charity. Fundamentally, the trust document is simply a set of instructions for a trustee to follow as he or she manages the property for the benefit of another party. Trusts may also provide a method of realizing substantial tax savings in certain individual estates worth in excess of certain amounts.

We are able to draft trusts, living and testamentary, that are tailored to your estate planning needs. Please let us know if you feel you could benefit from a trust.

4. Powers of Attorney. A Power of Attorney gives another person, an "attorney-in-fact," the right to act on your behalf in certain affairs. Such documents may be very specific, such as a limited power of attorney to allow another person

to sign a title of a car or settlement documents for the sale of real property. The powers may be broad and sweeping as well, allowing your attorney-in-fact to act on your behalf to transfer title to real and personal property, buy or sell securities, access bank accounts, and other financial and personal matters. For this reason, you should give very careful thought as to whom you choose to act as your attorney-in-fact.

Legally, a Power of Attorney is effective for all transactions, except transfers of real property, as soon as it is properly signed and executed before a notary public. However, most banks and other financial institutions will not honor the document until it has been recorded in the Public Records. Recordation is also required before the Power of Attorney may be used by the attorney-in-fact to transfer real property on your behalf. Also, any Power of Attorney used to transfer real property must be signed in the presence of two witnesses and a notary public to be valid to transfer the real property in the State of Florida.

Once the Power of Attorney is recorded in the Public Records, it is effective, and the attorney-in-fact may exercise his or her powers freely to access your bank accounts, stocks, real property and personal property. The attorney-in-fact is restrained in his or her actions by the law. The attorney-in-fact is not allowed to convert your property to his or her own use, unless the document gives him or her that right. Also, the attorney-in-fact is not allowed to act recklessly with your property. However, the best way to avoid problems with your Power of Attorney is to give great thought to the person you choose as your agent. You should choose someone who is trustworthy and very dependable.

You should notify the person you have chosen as your attorney-in-fact as well as the successor attorney-in-fact. This will give you the peace of mind of knowing that should something drastic occur, someone will be able to take over the duties of paying your bills and other daily activities. The attorney-in-fact should sign all documents on your behalf as "John Q. Public, Attorney-in-fact for Betsy N. Capacitated," or "Betsy N. Capacitated by John Q. Public, AIF" to avoid personal liability for actions taken on your behalf.

5. Health Care Surrogates. These documents are like special powers of attorney that give an agent the right to make health care decisions on your behalf should you be unable to do so on your own. Your health care surrogate will make judgments regarding your care and treatment when you are unable to do so because of incapacity. Please weigh your choice of health care surrogate very carefully. Although knowledge of medical procedures is helpful, it is not essential. Most importantly, this person should be acquainted with your views on health care and should be someone that you would trust to carry out these wishes. Usually, a life partner or other family member is the obvious choice, and doctors ordinarily prefer that someone other than themselves have this authority.

You may designate one or more physicians to determine when you lack the ability to make your own health care decisions, or you may choose this doctor to be any physician who is attending you at the time the question arises. Finally, only one person at a time may be your health care surrogate, but you may also designate a successor, in the event that your primary choice is unable or unwilling to act. Your health care agent should sign all documents as, "John Q. Public, health care surrogate for Betsy N. Capacitated," or "Betsy N. Capacitated by John Q. Public, Surrogate" to avoid personal liability for actions taken on your behalf. This will help your agent avoid personal liability for medical bills and other expenses.

6. Living Will. This document allows you to determine when life support will be terminated if you are unable to make this wish known. Under the statutory form, you have three choices: the will applies only if you are terminal or incurable, *and/or* if you are also in a persistent vegetative state, *and/or* if you are in an end-stage condition. By executing a Living Will, you absolve a physician from liability for properly carrying out your directions. In so doing, the physician is not *required* to consult your family members, although standard medical practice ordinarily involves such consultation. Some hospitals will keep a copy of your Living Will on file. You may also give a copy to your health care surrogate so that it is easy to find should the need arise unexpectedly. Please remember that a Living Will is not a Do-Not-Resuscitate Order which is only available from your attending physician, and is only valid for a certain period of time.

7. Anatomical Gifts. There is an enormous need for organ and tissue donors in this country. We can provide a standard form that you can execute, specifying what organs you would like donated to hospitals and medical schools. While executing this document is important, giving hospitals and doctors the power to effectuate your wishes, many health care providers will still consult family members before taking action. You should make your family aware of your desires on this issue so that your wishes are carried out. The anatomical gift document should also be given to your health care power of attorney for safe-keeping.

8. The "Time Factor". We attempt to complete your estate planning documents as quickly and efficiently as possible. However, sometimes our other cases require more immediate attention. We use automation as much as possible to make

our work more efficient, while still tailoring the documents to your specific needs. Usually, we can prepare the documents necessary for a simple estate plan within one to two weeks of our initial consultation. We may also prepare the documents sooner if emergency circumstances exist. However, the larger the estate, the more complex the documents and thus the longer time frame to complete the project. Please be patient as we tailor the documents to your specific wishes, and feel free to approach our able assistants with any concerns or questions you may have in our absence. They are unable to answer legal questions, but can answer general questions and pass along your concerns to the lawyer.

9. Fees. Our fees vary according to the complexity of the estate plan. We provide our services with a mixture of flat fees and hourly fees. Flat fees are reserved for simple matters, while more complex matters such as trusts and tax planning may be handled on an hourly basis. Factors such as the nature of the employment, the amount involved, the results obtained, and our experience and ability will affect our fees. Also, fees such as for photocopies, faxes, and filing fees with the court are in addition to, and are *not* included in our fees. We will discuss our fee structure with you during our initial consultation. If you have any questions at any time, please feel free to ask.

Our office offers its clients a unique combination of professional legal services in estate planning and administration, corporate formation and transactions, and real property law. We are proud of our firm's reputation and pleased to serve your legal needs.

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