

*“Let our advance worrying become advance thinking and planning” – Sir Winston Churchill*

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# ELDER LAW TODAY

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I have been musing over as to what to focus on in this newsletter. What I came up with is this: various things that folks need to know when it comes to estate planning.

Estate Planning. There are 5, possibly 6, documents you need to consider.

## **1. A current, well-drafted Will.**

It needs to take into consideration all of your beneficiaries needs and potential, future needs. Assume you have a beneficiary who may now or in the future be eligible for SSI or Medicaid. Make sure your Will provides the right kind of trust for that person's share of your estate when you die. Here is what a client did that created lots of problems. He had 5 children, 2 of whom were disabled on SSI and Medicaid. I prepared a Will that created a "special needs trust" for each of these 2 beneficiaries, with the other 3 children to receive their shares outright. After he signed the Will, he went to the bank where he had a large account (\$1M) and signed a new signature card making the account a "pay on death" account to pass at his death equally among the 5 children. After he died, the executor came to me and I explained we had a major problem – the majority of his assets would not be controlled by his Will -but would pass outright to all 5 beneficiaries causing the 2 beneficiaries who were entitled to SSI/Medicaid to immediately lose their benefits! To "fix" this major problem, I recommended: (1) we file a petition in the county court at law where the Will had been admitted to probate asking the Court to find that the client was mistaken when he changed the account to a "pay on death" account and asked that the bank be ordered to distribute the assets to the executor of the Will so the 2 special needs trusts could be funded and the other 3 beneficiaries would receive their part outright. (2) get an attorney ad litem appointed for one of the 2 beneficiaries who is severely mentally incapacitated (3) try to get the other 3 beneficiaries to "sign off" on the proposed plan and

have them sign waivers and consents (4) schedule a court hearing (5) and assuming the court granted our petition then get the bank to transfer the assets to the executor of the Will. While we have accomplished all of the above which has so far taken over 6 months, we are still waiting on the bank to transfer the assets to the executor so we can proceed with handling this \$1M. It is obvious the decedent never realized what problems he created by trying to "simplify" this major asset of his estate! Why did he do this? Who knows? Perhaps he heard that "probate" was to be avoided at all costs! Perhaps he was told by someone that the "P.O.D." account is all you need –again because it avoids probate (to which I would say, yes; avoid probate, but cause the 2 beneficiaries who need the protection of "special needs trusts" to lose their government benefits!!! )

**2. A well drafted Statutory (financial) Durable Power of Attorney.** One power that I see that is quite often missing is the authority of the agent to make gifts [or what I see quite often is where the agent's authority to "gift" is limited to the annual gift tax exclusion (which is \$16,000.00 per donee)]. The Texas Supreme Court has ruled that if there is no authority to make gifts, the agent does not have that power. In my opinion, it is extremely important if Medicaid for the principal (the one giving the power of attorney) might be necessary in the future that the agent have unlimited gifting powers. Otherwise, if the principal is lacking in capacity, it might not be possible to be able to transfer assets out of the principal's name, thereby making it impossible to implement a Medicaid asset protection plan. However, it is critically important that you have complete trust in the agent because a dishonest or incompetent agent can wreak havoc on your estate plan.

**3. Medical Durable Power of Attorney,** to make health care decisions if you become unable to make same and your doctor certifies to that fact.

**4. HIPAA (Health Improvement Portability Accountability Act) Release,** to authorize family or friends to be able to communicate with your health care provider (doctor, pharmacist, dentist, etc.). Without a HIPAA (release) the health care provider should only release information to the patient.

**5. Directive to Physicians (also known as a “living will”)** directing that if you are terminally ill to instruct physicians not to use artificial means to keep you alive if death is imminent.

**6. Revocable Trust (living trust).** In my opinion, a Revocable Trust (also known as a Living Trust) should be considered in 3 situations: (a) where you own real estate (including minerals) in another state so as to avoid having to probate your Will in that other state (called an ancillary probate). This out of state property would be transferred by deed into the Revocable Trust while you are alive; (b) where you own property which is your separate property, which you want to keep identifiable as separate property as well as income to be derived from that separate property, it would be important to have that property transferred into

your revocable trust and, if you are married, also have a premarital or post marital agreement identifying this separate property to keep it from becoming commingled with community property; (c) you want to provide for professional management of your assets i.e. a bank with a trust department should you become unable to manage, but you may be reluctant to give someone a durable power of attorney over your property.

Finally, you need a complete list of all your financial assets, accounts, account numbers, passwords, and phone numbers of the financial institutions. Obviously, this document needs to be extremely safeguarded to prevent theft like a safe deposit box.

Well, that’s it for now! If we can assist you or anyone you know with estate planning, please call for an appointment.

**Have a great summer!!**



**Elder Law Today** is written by C. Dan Campbell, Attorney at Law, who is Board Certified by the Texas Board of Legal Specialization in Estate Planning and Probate Law and Civil Trial Law. This newsletter is not intended to be construed as the giving of legal advice. Before taking any action referred to in this newsletter you should consult with an attorney who is knowledgeable in this area of law. This newsletter is published as a service of C. Dan Campbell, P.C., 4245 Kemp Blvd., Suite 800, Wichita Falls, Texas 76308. Visit our website at: [www.dancampbell.com](http://www.dancampbell.com)  
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