Here are examples of some situations I have seen:

Often, elderly people create joint bank accounts with a friend or relative. Joint bank accounts are payable to either joint tenant, and upon the death of one, to the survivor. Thus, if Dad creates a joint bank account with Son, when Dad dies Son gets what is left in the account, regardless of what Dad's Will may say about the disposition of his estate.

Sometimes joint bank accounts are opened by an elderly person and someone younger, so the younger person can pay the bills of the elder. These are referred to as "convenience accounts", and may not have been intended to be true joint accounts. However, it is difficult to say whether a joint account was merely for convenience. Often, when the elder person dies the beneficiaries of the estate think that a joint bank account was such a convenience account, and that it should not go to the surviving joint tenant. But, the surviving joint tenant may have other ideas.

> *"The laws of many states provide that a person who is financially interested in the case… may not testify…about conversations…with the decedent."*

If a joint bank account is set up properly according to statutory requirements, there is a presumption that it was intended to be a joint account, so that it passes to the survivor and does not go into the decedent's estate. Anyone challenging that presumption has the burden to present evidence in court that the account was not intended to be a joint account and was merely a convenience account. This is usually a difficult evidentiary burden to carry.

However, if the surviving joint account tenant was acting as an attorney-in-fact of the elder person under a written Power of Attorney, there is an inference that the account was set up as part of the Power of Attorney arrangement, and the burden would then shift to the attorney-in-fact to show by clear and convincing evidence that a true joint account was intended when the elder person created the account.

Sometimes, when the end is near for one joint tenant, the other joint tenant may feel it appropriate to go down to the bank and clean out the joint bank account. For instance, Dad and Son have joint bank account. Dad is in the hospital, and Son is concerned that another child may try to access the account. So, Son goes to the bank and takes out all of the money.

What Son does not realize is that by withdrawing all of the money before Dad dies, Son may have to return part of the money to Dad's estate, whereas if he waited until Dad died, Son would get the entire account.

The reason for this result is that joint tenants on a bank account are each deemed to own half of the money on deposit, regardless of who put the money into the account, and even though either of them could withdraw all of the money at any time. Further, as noted above, upon the death of one, the survivor becomes entitled to the entire account.

However, if while they are both alive, one of the joint tenants withdraws more than his or her half of the account, that act is deemed to terminate the joint account. That termination means that upon the death of the one who did not withdraw, the remaining funds in the joint account belong to his or her estate. Further, the withdrawing joint tenant is liable to the decedent's estate for the amount withdrawn in excess of half.

If the survivor had left everything in the joint account he would have gotten all upon the decedent's death, but if he withdraws more than his half, he may lose the decedent's half.

Of course, each case depends upon its own facts. For instance, if the decedent had instructed the survivor to take everything out of the account, and if this can be proven by admissible evidence, then the survivor would not have to pay half back to the estate.

This brings up another issue regarding deathbed gifts – what evidence is admissible in court regarding the gift. If a gift is contested in court, the recipient of a gift has the burden to prove that he received the property as a gift. For instance, Mom on her deathbed gives her ring to Daughter. After Mom dies, the other family members challenge Daughter about the gift. Daughter has the burden to prove that Mom made a gift. If only she and Mom were present when the gift was made, Daughter may not be able to prove a gift in court.

The laws of many states provide that a person who is financially interested in a case which involves a decedent may not testify about any communications or transactions he or she had with the decedent.

In our example, Daughter would be prohibited from testifying what Mom said when she handed the ring to Daughter. If there was no other evidence, Daughter would have to turn the ring over to the estate.

Gifts made to an attorney-in-fact or to a person who is considered in a "confidential relationship" with the person making the gift, may create problems. After the donor has died, the recipient of the gift may be required to prove by clear and convincing evidence that a gift was intended. However, that evidence cannot be testimony of the recipient of the gift.

If Mom wishes to make a deathbed gift to Daughter, who is acting under a Power of Attorney, or who is taking care of Mom (a confidential relationship), the gift should be documented by a writing prepared by an attorney, or by testimony of third parties who are not recipients of any gifts.

Transfers made near the time of a person's death are a continuing source of litigation. This litigation could be avoided, or won, with some careful planning when the gift is made.

The information contained in this newsletter is for general information only. It is not intended as legal advice, nor should it be considered to provide specific advice or recommendation. You should obtain the advice of legal counsel.

ESTATE PLANNING

Ideas to Help You Plan for Your Future

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LIVING WILLS PROTECTS YOU AND YOUR LOVED ONES

80% of Americans agree that end of life directives – Living Wills-- should be followed, but only 20% of Americans have those directives in writing. The events of the last few months have made it abundantly apparent that we all need to have a Living Will, stating expressly what we want to have happen if we are terminally ill or in a persistent vegetative state.

In addition to Living Wills, all states have documents by which you designate who can make health care decisions for you if you are incapacitated.. Those documents are variously called Health Care Proxies, or Powers of Attorney for Health Care, or Declarations of Health Care Surrogate.

> *"The choice is up to you, and you should take advantage of that choice."*

For shorthand we refer to such documents which state your wishes about life support and which designate someone to make health care decisions if you cannot as Advance Directives.

Your Advance Directive can state that you do not wish to be kept alive if you are terminally ill and likely to die soon, or if you are in a persistent vegetative state.

Or, if you wish, it can say that no effort should be spared to keep you alive.

Or, it can also say that once you have been diagnosed in either condition your designated Agent should not rush into terminating life support until he or she is convinced that there is no hope of recovery.

The choice is up to you, and you should take advantage of that choice. If you do not have an Advance Directive you cannot rely upon what you may or may not have told relatives or friends to carry the day.

Aside from personal feelings about the sanctity of life or termination of needless suffering, some cases involve underlying personal issues such as in the case of in-laws who do not get along, or same sex couples. If your family situation has "issues" you absolutely should have an Advance Directive.

While you can write your own form of Advance Directive, most states have a form of Advance Directive which is endorsed by statute. It is my recommendation that you use the statutory form, so that there is no question that the document which you sign will be recognized as valid by health care providers.

In addition to stating your wishes an Advance Directive can name someone to make health care decisions for you if you are unable to make such decisions – that person is called a Health Care Agent.

Your Health Care Agent can have access to your confidential health information under HIPAA – the federal Health Insurance Portability and Accountability Act.

Your Health Care Agent can not only make decisions about continuing or withdrawing life support, but he or she can also consent to treatment or medication for you.

In many states you cannot name multiple people to act together as Health Care Agents. The reason for this is that if you name two or more, they might disagree on what course to take. However, you can name alternate or successor Agents who can act if the original Agent cannot, or refuses, to act.

If you reside in multiple states, it is my recommendation that you execute the form which applies to each state in which you are resident. While most state statutes authorize reliance upon out-of-state Advance Directives, why risk that a health care provider who does not understand the law will refuse to honor an out-of-state Directive?

I mentioned above the Health Insurance Portability and Accountability Act (HIPAA). That federal statute imposes confidentiality restrictions upon health care

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providers so that the providers cannot give out your health care information without your written authority. However, that means that health care providers cannot give that information to your family members unless you have authorized it in writing, even if you are seriously ill.

HIPAA permits disclosure of such information to a "personal representative" of the patient, but the statute is not crystal clear as to who a personal representative may be. At least one court has held that a Health Care Agent under an Advance Directive is such a personal representative.

However, that may not always be satisfactory. An Advance Directive only becomes effective if the patient can no longer make decisions himself – he is incompetent or unconscious. What if the patient is merely weak? Or, what if someone else is paying the patient's bills and needs to inquire about a bill?

So that there is no question about who has authority, I provide in both Advance Directives and in Powers of Attorney that the Agent named is a personal representative under HIPAA and is entitled to have access to private health information.

While we are on the topic of Powers of Attorney, you should also have one of those so that someone can handle your business affairs if you become incapacitated. If you do not have a Power of Attorney and you become incapacitated, it may be necessary to conduct a very expensive guardianship proceeding to have a court give someone authority to manage your business affairs.

The Power of Attorney that you execute should be "durable", meaning that it will continue to be effective if you become incapacitated. The law is that a Power of Attorney is an agency relationship which is terminated upon incapacity.

> *"The Power of Attorney that you execute should be "durable", meaning that it will continue to be effective if you become incapacitated."*

However, it is just for that circumstance of incapacity that most of us want to have a Power of Attorney. Therefore, most states now have statutes which authorize Powers of Attorney to be "durable"; that is, to continue to be effective in spite of incapacity of the person granting the Power.

A Power of Attorney and an Advance Directive are important documents. I sometimes find that people allow the importance of the documents to paralyze them into inaction. I strongly recommend that you execute a Power of Attorney and an Advance Directive as soon as possible. You can then continue to think about it and make changes later, but at least you will have something in place in case anything happens to you.

WHATS REALLY UP WITH SOCIAL SECURITY?

Some people have asked me what I think about the proposal to change Social Security by offering private accounts. I have been doing a good deal of reading on the issue, and I think that the proposal is too expensive and not needed. Some modifications to Social Security are needed, but those can be accomplished without great expense to the taxpayers.

Of course, there is the basic philosophical question about whether the government should be in the business of providing pensions. However, since all industrialized nations of which I am aware have government funded pension plans of some sort, and since Social Security has been around for 70 years and is extremely popular, we are well past that basic debate.

Although the administration has not offered any detailed legislation, it has suggested that workers under 50 should be permitted to divert a portion of their Social Security taxes into private accounts which can then be invested in stocks and bonds. Ultimately, the Social Security benefits of workers would be reduced, the reduction supposedly to be offset by the private investment account.

Social Security system is partially a "pay as you go" system. That is, benefits being paid out now to retirees are in large part paid for by contributions of those of who are currently employed. Any excess paid into the system is invested in government bonds to pay for benefits to future retirees.

If part of that cash flow from current workers is diverted into private accounts, the federal government will have to borrow money to make up the funds needed to pay current retirees. That borrowing has been estimated at $1 Trillion over the next 10 years. Considering the current annual federal budget deficit of over $400 Billion, that additional $1 Trillion expense is one which we can ill afford.

Further, it appears that the potential problems of Social Security are a bit overstated. The projected short-

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fall in Social Security is based upon an assumption that our real economic growth over the next 75 years will be about 1.9% per year. In fact, our real economic growth over the last 75 years has averaged 3.5% per year – almost double the figures used to project Social Security's shortfall. There is no reason to expect such a drastic fall off of real economic growth in the future.

Further, the proposed plan for privatization is asking workers to give up a guaranteed benefit in exchange for a private account with potential for higher returns. This is a fundamental change from Social Security's founding mission of providing a safeguard against the major misfortunes of life.

There is some concern that due to the Baby Boomers (born between 1946 and 1960) coming into the system in a few years, and the fact that people are living longer than when the system was started, Social Security will not have sufficient assets to pay all of the promised benefits in 2040 and thereafter. However, there are some relatively simple solutions which can address the problem without incurring $1 Trillion of additional debt.

When Social Security started in 1935, the average life expectancy was 60 years; now it is 77 years. Recognizing that people are living longer and are able to work longer, we could gradually increase to 70 the retirement age at which a person can collect full benefits. It has been estimated that change alone would cure half of the long-term funding deficit for Social Security.

Social Security benefits are linked to increases in wages. Wages tend to grow faster than prices. Linking Social Security increases to inflation rather than wages would also reduce the long-term funding problems.

We might also increase the Social Security wage base. Currently, wage earners pay Social Security tax on the first $90,000 of earned income. Increasing that base would increase the funds going into the system, and that tax would be imposed upon higher earners -- those most able to pay it.

The basic notion of privatization, to have more people invest in stocks and bonds, could more easily be accomplished by requiring employers with a workforce above a certain size to have mandatory 401(k) plans for new, full-time employees, with contributions by both the employer and the employee. This would increase investment without government borrowing.

Also, the government could simplify the morass of laws and regulations governing IRAs and 401(k) plans, to make it easier for people voluntarily to put more away for their retirement. The current system, especially with regard to small businesses, requires hiring expensive plan administrators and investment managers, and the filing of detailed reports and tax forms, all of which sucks money out of the plan and reduces eventual retirement funds. Social Security needs some fine tuning to make sure that promised benefits will be there for retired workers in 2040 and thereafter, but it does not need a very expensive major overhaul.

> *"…the government could simplify the morass of laws and regulations governing IRAs and 401(k) plans, to make it easier for people…to put more away for their retirement."*

INTERNET INFORMATION: PRIVATIZING SOCIAL SECURITY

Web sites offering additional information regarding Privatizing Social Security: www.house.gov – put in your zip code and you will go to your congressional representative's page with his or her thoughts on the issue. www.factcheck.org ,maintained by the University of Pennsylvania, has extensive articles the issue.

TIME TO CONSIDER SIMPLIFYING ESTATE PLANS

Every year I have cases involving transfers made shortly before a person dies. Some involve greedy relatives of the decedent, who take advantage of a frail, elderly person to loot his or her bank accounts. Others involve an older person who decides to make gifts to those who have been especially close.

Unfortunately, whether a transfer from an elderly person is a "looting" situation, or, a heartfelt expression of appreciation, may depend upon which side one is on.

If an elderly person wishes to make end of life gifts it is smart to get an experienced trust and estate lawyer involved to give advice and to document the gift, so that the gift stands up after the elderly person has passed away.

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