ESTATE PLANNING
-
AN OVERVIEW

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I What is Estate Planning

Anyone who owns property or has a dollar that he doesn't plan to spend has an **"estate"**. Although the state and federal governments may have something to say about what he can do with it, no other person can tell him what he is to do with that property, whether he is to keep it, sell it, exchange it or give it away. No one can tell him what he is to do with his dollar, whether he is to put it away in a savings account, what the form of the account should be, or whatever. He alone can plan his estate.

Although he may be a layman and know nothing about the technical aspects of estate planning, he is the only person competent to decide what is to be done with his estate, including: what risks to be taken to build it; what security measures to be taken to preserve it; how much he would like to have available for the objects of his bounty, his family, his church, his charitable concerns; and how much is to be available for his own retirement.

There are value judgments to be made. There is a personal investment philosophy, an attitude toward risk, here at work. There are blood and emotional ties to be considered. No outsider can impose his values, his philosophy, his feelings, on the estate-owner.

But society can, and does, impose laws and taxes that affect whatever he might plan. It can, and does, exact a high toll for transferring property of significant or substantial value. There is the federal tax collector, whose toll is geared to the net dollar value of the property transferred by gift or bequest. There is the lien of the state inheritance tax that attaches to each item of property of an estate. And there are the liens and regulations of our health support systems to contend with during our later years.

Administering this estate exacts another toll: fees and commissions alone might exceed 10 percent of the gross estate. However, if there are complications, such as a will contest over testate capacity, or a contested audit, or if the will is not a model of clarity with conflicting interpretation, then there will be added administrative charges. If there are trusts, there will be trustee's fees. If there are minor children, a court-appointed guardian may be required to safe-guard their interests - which means more fees.

These are some of the visible costs of transferring property at death; but there can be hidden costs as well. If assets must be liquidated at an inopportune time, the fair market value may not be realized. Accounts receivable may require significant discount to collect. More

property may be imputed into the gross estate for tax purposes than actually transfer, inflating the overall tax bite. The appraised value of assets by tax agents may be unreasonably high, resulting in litigation.

All in all, at best, transfer of property at death is expensive. Cutting those costs is reason enough for estate planning. But there is much more to estate planning. It is concerned, above all, with providing for the welfare of individuals and the protection of their interests, whether through trusts, or by other means. It is concerned not only with the disposition of an estate, but also with the acquisition and preservation of an estate while the estate-owner is alive. It is concerned with building tax-sheltered retirement benefits, and employee and executive compensation benefits, with ways and means of saving on family income taxes, and coordinating medical support arrangements. In its broadest aspect, it is concerned with what might be better described as **"personal financial planning"**.

The estate-owner is the only one competent to plan his own estate, but he should consider professional help. And that professional needs broad and deep skills. He must be concerned about federal and state death, gift, and income taxes. Corporate and partnership law, securities law, and accounting practices, techniques and procedures all come into play. The estate planner must be familiar with tax-sheltered investments, and know something about economics and medicine. And he should be a bit of a psychiatrist, as well!

Often a team effort involving the attorney, the accountant, the life underwriter, the trust officer, the physician, the cleric, and the investment advisor is needed, particularly if the size or complexity of the estate requires it, or the health needs of the estate-owner demands it. But even in those situations in which a team effort is not required, a review of one's estate with a trusted and competent professional should occur periodically. Such a review is particularly in order when there is a change in the laws affecting estates or of their taxation, or a change in family or health circumstances occurs.

My purpose in this monograph is to provide a broad overview of estate planning, with particular concern for the planning needs of the elderly or infirm.

II Dispositive Considerations - After Death

The right to transfer one's property upon death according to written instruction dates back to the beginnings of the Common Law. During the passage of hundreds of years, that right, and the requirements necessary to exercise that right, have become well-defined. That Common Law

still controls, subject only to modern statutes and court interpretation.

Because it is imperative for the law to maintain the lines of ownership from one generation to the next, the law provides for what shall occur if a person dies with a will, and what shall occur if a person dies without a will. The first situation is known as **testacy**, and the person creating the will is known as the **testator**.

An estate without a will is known as **intestacy** and the law imputes what the intention of the decedent "would have been" had he taken the time to create a will. This imputed intention is defined in the statutes of the Commonwealth and provides, very generally, for descent through a hierarchical structure of groups of beneficiaries. The first group takes it all. If the first group does not exist, then the second group takes it all. The last group is the Commonwealth of Pennsylvania. The first group is the spouse and the last results in **escheat** to the Commonwealth.

In some cases intestacy may be sufficient to carry out the desires of the estate owner. In most cases, however, relying on the statutory whim of the state to meet the concerns of the estate owner is risky, at best.

The law requires that a will be a writing, signed at the logical end, with **donative intent**. Further, it must have two witnesses to the signing of the document. The only exception is a wholly handwritten document by the testator himself, which also must be signed at its logical end. Such an instrument is known as a **holographic will** and does not require the two subscribing witnesses. A will does not require an affidavit with notarial seal, and is not lodged during the life of the testator with the courts. A will can be amended without the necessity of revoking the last executed document. The amendment is known as a **codicil** and to be valid, must be executed as if it were a will.

A statutory innovation is the **self-proving will**. Essentially, if an affidavit of the testator and the subscribing witnesses, in the statutorily prescribed form, is presented at the time of probate, it is not necessary to produce the actual witnesses. This reduces the cost and inconvenience of probate. The affidavit does not affect the validity of the presented will, but only facilitates the process of probate. Should a will contest develop over the execution of the will, witnesses will be required to be produced for probate.

It is important to realize that a will has no force or effect until after the death of its maker. Consequently, it may be changed or destroyed - **revoked** - by the testator at his whim. Further, it still has no force or effect until **Probate** occurs, which is a judicial determination that the instru-

ment is, in fact, the last will of the deceased.

One should be careful where the will is stored. It should be kept with one's other valuable papers. Many people prefer to leave their wills with their attorney or with the trust department of the bank to be appointed fiduciary. Safety and ease of access are the crucial concerns. Equally important, the persons who need to carry out the provisions of the will need to know where to find it. Hence, communication is crucial between the maker and the proposed executor.

In the event that it is stored in a safe-deposit vault, the will can be obtained by the next of kin of the deceased if accompanied by a bank officer for the limited purpose of doing a **"will search"**. Other than this exception the safe deposit vault of a decedent cannot be accessed until a representative of the Department of Revenue does an **inventory**.

Two other thoughts regarding donative intention are appropriate. Because of changes in medical skill concerning transplants, people are quite sensitive to making donations of body parts, and to making decisions concerning the use of heroic efforts to maintain life, even after all hope is gone. Commonly a testator will be concerned with setting forth in his will his intentions regarding such final arrangements, while also outlining his desire for burial plots, cremation, or other final instructions.

In my view, in neither of these situations is the will the proper method to meet this concern of the testator. The simple fact is that the arrangements are concluded, and probably carried out, before the will is even located or read. And until the will is probated, it has no force or effect. At best, it would provide some guidance to the next of kin and may serve as evidence of intention regarding surrogate health care decision-making. However, that guidance can be accomplished far more effectively by a donor's card, or by a living will or advance health care directive, and probably with more legal effect.

III Memo

I always urge my estate planning clients to prepare a written **memorandum** to keep with the original will or in some other easily accessible location, or to distribute to the attorney and those persons who will make decisions regarding final arrangements. Decisions concerning the use of artificial means to preserve life after all hope is gone should be clearly set forth. Donative intention concerning body parts should be expressed. Preferences for final arrangements should be stated. The names, addresses and telephone numbers of important people concerning one's estate should be listed. Special thoughts, concerns and instructions should be clearly set forth.

Lists of assets, obligations, and where evidence of them can be found, should be outlined, as well. Any appropriate comments may be included.

Because final arrangements are generally quickly concluded after death, it is imperative that those individuals responsible for decision-making know the testator's desires. This may then require that they have a copy of the memo in advance, and, hopefully, have had a chance to discuss it with the testator, as well.

IV Dispositive Considerations - While Alive

Lifetime **gifting** as an estate planning technique is quite useful. A person can make a gift of up to $11,000.00 per person per year free of federal estate and gift tax implications, and a spouse can join in, to double the gift. Up to that maximum amount may be given, annually, to any number of beneficiaries. The Internal Revenue Code provides additional gifting opportunities with positive tax aspects. The only limitation for any of these gifts is that each must be of a **present interest**. Thus, subject to the provisions of the Internal Revenue Code, an unlimited amount can be provided to individuals for defined medical or educational purposes.

The use of lifetime gifts is a particularly effective way to thin out an estate (to bring it below the federal estate tax threshold). Gifting is a unique estate planning technique as it permits the donor to benefit the objects of one's bounty, while at the same time being present to enjoy the "fruits" of that generosity.

V Dispositive Considerations - Trusts

A **trust** gives the **creator**, normally called the **maker** or **settlor**, the capability to imbue his trustee with legally enforceable powers and instructions, which can be quite detailed and varied, and which can continue in force for a considerable period of time.

A trust is a legal method for dividing up among various entities the bundle of rights that ownership of an asset carries with it. Simply stated, if I own something, I have the right to a present enjoyment of it, to make decisions regarding it, and to enjoy it into the future. With a trust, the maker can make various decisions concerning his property, the most important of which is to give the legal ownership, or title, to some other person, usually with specific instructions, which are legally binding and enforceable. The person to whom legal title is transferred is called the **trustee**.

The trustee holds the title, and controls the property, for the benefit of another person, the **beneficiary**. The law says that the beneficiary has **equitable** title to the property, and the trustee

has **legal** title. Equitable title carries with it various rights which are enforceable at law. Further, those rights of equitable ownership can be divided even further, as between a present interest and a future interest, a vested interest versus a contingent interest, and an income interest separate from an interest in principal, to name but a few.

Further, in addition to those rights that the settlor has given away, he has the right to make the transfer during his lifetime, known as an **inter vivos** trust, or to make it as a provision of his will, known as a **testamentary** trust. Further, if the trust is created during the life of the settlor, he can make it **revocable**, so that he can subsequently change the terms of the trust, or even cancel it; or he can make it **irrevocable**, thereby giving up the right of amending the trust, an **incident of ownership**.

Another type of trust is known as a **tentative** or **totten** trust. It is often used with regard to bank accounts and other legal instruments. "Scudder Stevens, in trust for Colin Stevens", for example. Title to the asset passes automatically to the beneficiary upon death of the maker. But until death, the owner has full power over, and right to enjoyment of, that asset. Consequently, it remains subject to death taxes. Its principal value is that it transfers title upon death without the necessity of probate.

The trust is one of the most effective methods of estate planning, being versatile, safe and effective. A trust is an important estate-planning technique for the person with sufficient assets to justify the modest expense of creating it and of its subsequent administration, or with heirs who will need long-term support or care.

VI Incapacity - Powers of Attorney

Any person realistically planning to manage his estate must consider the possibility of losing his physical or mental capability to deal with his assets. Once that happens, an expensive and time-consuming public court procedure is required to transfer control to someone else. It is known as an **incapacity hearing** and requires the testimony of family and friends, the expert testimony of doctors and possibly other professionals, and involves considerable time and expense.

The issue to be determined is the **mental capacity**, or soundness of mind, of a person. The law presumes a sound mind unless there is a showing that the person in question does not have a full and intelligent knowledge of his acts, does not have a full and intelligent knowledge of the property that he possesses, does not have an intelligent understanding of the dispositions

he desires to make and the persons and objects he desires to be the recipients of his bounty. This is not one short and clearly definable episode, but concerns an ongoing condition. The law is concerned that a person with such a weakened mental capacity will come under the influence of **"designing persons"**. The procedure has as its goal the appointment of a person who will serve, under court supervision, as **guardian** of either the person or the property of the alleged incapacitated person.

The procedures and presumptions governing guardianships have been completely revised by provisions included in the "**Advance Directive for Health Care Act"**, signed into law in April of 1992. Although the previous action remains and is known as a **plenary proceeding**, the Act now also provides for a **limited guardianship**. This means that the guardian has only such powers, and for such duration as are specifically granted under the court's decree. There is no longer a presumption of total incapacity or of the granting of total power for an indefinite duration to a guardian. Further, the term "incompetent" is no longer used; instead the term **"incapacitated"** is required. An incapacitated person means an adult whose ability to receive and evaluate information effectively, and to communicate decisions in any way, is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.

An important alternative to the capacity hearing is the **durable power of attorney**. It is a writing creating a fiduciary relationship whereby one person acts on behalf of another. The maker of the power is the **principal**, and the holder of the power is an **agent** or **attorney-in-fact**. The attorney-in-fact has the legal duty to act with the highest regard for the benefit of the principal. The power is “durable” when the writing creating the relationship states that the power will survive the mental incapacity of the principal.

Most typically mental incapacity grows out of **senile dementia** or other aging - related circumstances, but can arise under other circumstances, as well. Several years ago I prepared a will for a lady. Thereafter, she slipped in her tub, fell, and lapsed into a coma. She then began her recovery in a full-care nursing home with the expectation to be able to care for herself again within six to nine months. Fortunately she executed a durable power of attorney when she executed her will, and her son and I were able to deposit her income checks and to issue checks to cover her bills, as well as to make the decisions necessary for her financial or medical well-being, all without the necessity of intervention by the court.

It should be noted that not all banks are cooperative in this fashion, although legally they must be. Further, it is imperative to choose the right person to hold the power. Finally, the power must be durable.

Even though there may be complications in its use, I always urge my estate-planning clients to create a durable power of attorney.

VII Fiduciaries

When individuals share a close relationship in which there is a reliance by the one on the other, and a special skill with the one person and a lesser ability with the other, the law imposes the highest duty of care, one to the other. Business partners, joint venturers, executors, trustees, attorneys-in-fact and guardians all share these attributes, and are held to that higher duty.

An **executor** acts in the place of a deceased person, the decedent, in the administration of that decedent's estate. A **trustee** holds legal title to the assets, the **corpus**, of the settlor for the benefit of the **beneficiary** of a trust. A **guardian** controls the assets of someone else who does not have the legal, as opposed to actual, capacity to enter into contracts or to control his property, such as an incapacitated person or a minor. All three of these are **fiduciaries**. Only individuals and certain statutorily defined corporate entities such as trust companies may serve as fiduciaries.

A fiduciary must gather together all the property under his control, and he must invest it carefully. He must determine all outstanding obligations and pay those bills. He must be prudent in his actions to maximize current income, yet provide for security and appreciation of principal for the future. He must have a sensitivity for, and knowledge about, the individuals who are the beneficiaries of the assets. And he must account fully and accurately to the court. Clearly no simple task!

People often choose their investment advisor, attorney, accountant or banker to serve in this roll. A surviving spouse is a logical choice to share this obligation, particularly if he or she has financial experience. If possible, a member of the family should be included so that the fiduciary is sensitive to the needs of the beneficiaries. And of course, it goes without saying that it should be someone scrupulously honest!

VIII Administration Considerations

The administration of an estate involves four basic functions. 1. The bills of the decedent are paid with the accumulated assets, which should be liquidated into cash. 2. The inheritance

and estate taxes must be paid. 3. The balance of the assets are then distributed, in cash or in kind, to the beneficiaries of the estate. 4. And a full and complete accounting should be prepared. These duties are accomplished by the executor if there is a will that is probated; otherwise, by the next of kin, or the administrator of an intestate estate.

Not all of the decedent's property requires involved estate administration, and careful planning can simplify the process. In many small and medium-sized estates it is possible to avoid probate altogether. Generally speaking, this can be done if the estate is very small, or if the decedent's assets are owned jointly or are in a tentative or totten trust. However, if the decedent owned significant assets in his own name, and if title to those assets does not pass by mere delivery, generally it will require probate.

The type of property determines the applicable law controlling probate. Real estate is subject to the laws of the state where it is located. Personal property is controlled by the law of the state in which the decedent considered his permanent residence to be located, his **domicile**. Consequently, it is possible to have probate in several states, each state exercising control over different property. The additional probate action is known as an **ancillary** proceeding.

In the planning process it is vital to consider the cash needs of the estate. The cost of probate and administration may create severe financial stress on an estate, as can the bite of death taxes. If the person planning his estate is concerned about transferring much of his assets in kind, and not converting them to cash, cash flow problems can develop.

Generally no bond will be required of a corporate trustee or of a resident fiduciary. The will often provides that no bond will be required. Although bonding is a protection for the beneficiaries, in many cases that protection isn't necessary and it results in an unnecessary expense to the estate.

Once the administration is concluded the fiduciary has the duty to fully **account** for his services. Properly that accounting should be filed with the court for review and approval. However, time and money can be saved if all the beneficiaries agree to accept the accounting as presented, to release the fiduciary, and to hold him harmless. Often this is accomplished through a **family settlement**, which the courts generally encourage. Nevertheless, anyone concerned about the administration can insist upon a court **audit** to review the full administration.

IX Taxes

The **Pennsylvania Inheritance Tax** is a tax upon the right to transfer assets and properly

is charged against the share the beneficiary receives. However, by will the decedent can direct that the tax be paid from the residuary estate, and that the beneficiary receive the gross, not net, amount of his bequest. The tax is 4% of the net estate for bequests to close family beneficiaries, and 12% to beneficiaries who do not meet the definition of "close"..

The **Federal Estate and Gift Tax** is a tax on the net estate, subject to the applicable credit amount, formerly known as the **unified credit**. The credit is subtracted from the decedent's estate or gift tax liability, and the amount of the credit available at death will be reduced to the extent that any portion was used to offset gift taxes on lifetime transfers. The credit is $345,800.00 for estates of decedents dying in 2002, which sum is equivalent to the tax owed on a net estate less than $1,000,000.00, the "exemption equivalent" amount. Estates equal to, or below, that exemption equivalent amount will be free of federal estate and gift tax liability.

For those estates with a federal estate or gift tax liability, there are various planning mechanisms that may be appropriate, including trusts, marital deduction transfers, and charitable gifting. Professional tax guidance and legal input is crucial.

Just as individuals have the duty to pay taxes upon income, so also do trusts and estates. Care should be exercised to take such steps as are appropriate to minimize the state and federal income tax bite during trust or estate administration.

X Planning for the Elderly or Infirm

Although there are numerous concerns appropriate to consideration by the elderly and infirm, two broad areas come to mind: health care financing and personal care decision-making.

The decision-maker should be concerned about those estate-planning concepts already discussed; however, consideration toward **health care financing** is also in order. We must presume that savings plans, pension and retirement plans, insurance programs and other financial planning efforts over the peak income-earning periods have already begun to bear fruit. However, the decision-maker should consider means for preserving that hard-earned estate from the erosion of medical bills and long term health care. The principal means for doing this is to attempt to preserve one's estate, and yet qualify for government-provided supports for income (**SSI**) and medical care (**PA Medicaid**).

Both SSI and Medicaid are **"means related"**; that is, qualification for these benefits depends upon not exceeding income over the statutory threshold (recently $372.40/month for an individual or $558.70/month for a couple, but subject to regular change!) or of having resources

in excess of legal limits. The resources and income limits deserve sharp examination as certain assets are **excluded**, certain are **deducted**, and certain expenses act as a **set-off**. Further, certain assets and income of the spouse are **"deemed"** a resource or income in the calculation. Close scrutiny is essential since exceeding the limits by even one dollar will have a catastrophic effect on eligibility for these valuable government programs for the month in question.

The planning process requires a balancing act to see if estate assets can be managed in such a way as to not cause disqualification. Thus, a trust fund that poured over income for discretionary luxuries may well not be treated as income to cause disqualification, but that same trust fund, in pouring over unrestricted income, would clearly cause the disqualification. The same cash flow from the trust, but a wholly different result to the beneficiary!

The traditional inter vivos trust for the benefit of the grantor and spouse, although perfectly effective for federal estate tax planning purposes, will be deemed to be a **"MEDICAID-qualifying trust"** and the discretionary income will be presumed to the grantor or spouse for determining SSI and Medicaid qualification, whether so paid or not! But if that trust were artfully changed, it may be effective for both purposes.

The 1985 amendments to the Medicaid law nullified retroactively the impact of traditional trusts for the sheltering of assets for Medicaid eligibility. Currently, any trust established by an individual or spouse under which the individual may be the beneficiary of all or part of the payments from the trust, and where the trustee has any discretion in distributing payments for the beneficiary, is a MEDICAID-qualifying trust. The law deems the maximum amount of payments which the trustee may distribute to the individual or spouse to be available to the individual, and this amount qualifies as a resource or as income on a Medicaid application. It makes no difference whether the trust is irrevocable or whether it is established for purposes other than to qualify for Medicaid; nor does it matter whether the trustee actually exercised that discretion.

Once the plan is created, the method to accomplish it must be established. The transfer or disposition without full and adequate consideration **within 36 months** of application for benefits is **presumed** done for the purpose of Medicaid qualification, and therefore the application for benefits will be rejected until after the passage of those 36 months (subject to certain exceptions). Timing and the mechanism to effectuate the plan are significant; the transferor must provide for adequate financial support during those 36 months of ineligibility for SSI and Medicaid.

When making traditional estate planning judgments, such as asset disposition, transfer of the house, or the creation of trusts, it is important to also review the SSI and Medicaid statutes and regulations to see if they can aid in reducing the dissipation of estate assets for health care needs. Careful scrutiny is necessary because the applicable federal and state statutes, and applicable rules and regulations, are all periodically revised and amended. And those rules and regulations have progressively become more and more stringent and restrictive. If it is to be done, do it NOW and not later!

Another area, new in the law, that has implications for the elderly or disabled, is **long term care insurance**. Close scrutiny of the policy, and a trusted insurance advisor, is required; there is little claims experience currently, and certain carriers have already "folded their tents and left the field"! And such coverage may also throw the beneficiary over the SSI or Medicaid limits for someone who would otherwise qualify. However, under appropriate circumstances, a proper and effective policy will permit living arrangements with dignity and financial security.

The decision-maker may also face the issue of selling the family home to move into some other housing arrangement. What is the effect on the estate plan when considering a nursing home, a statutorily defined "life care facility", or other alternate housing arrangement?

The point here is that traditional estate planning has concerned itself with attempting to provide for one's future through reliance upon one's assets. However, the available programs, both public and private, that are now available considerably broaden the options. It is wise to broaden our view in the planning stage, as well, to encompass these other options before final decisions are reached.

My final comments are directed to **personal care decision making**. We are all aware of living wills, with the donation of body parts, with durable powers of attorney, and with whether or not to use heroic measures to preserve life. But what does Pennsylvania law provide?

I've already commented upon the durable power of attorney. Let me also point out that the law grants the power "to authorize medical or surgical procedures"; it does not grant the power to **stop** the continuation of medical or surgical procedures already in place. Does the holder have the ability to direct the shut-down of life-support mechanisms? Probably not! The law is clear, however, concerning the gifting of body parts. This may be done through a living will, by form provided by the Pennsylvania Department of Transportation, or through a durable power of attorney.

An important area of Pennsylvania law for elder care is that concerned with heroic measures to preserve life, or the right to refuse them. The law is clear that a competent adult, for himself, and at the time that the decision must be acted upon, may choose whatever medical treatment he wants, subject only to the concept of **informed consent**. Briefly - facing the probability of death, a person may choose a course that will likely result in death. But what is the law in Pennsylvania when the person whose life is on the line is incapacitated and unable to express his desires?

Hence, a decision to refuse a blood transfusion, made at the outset of an operation by a competent adult, fully informed, and knowing that death might well be one of the results of the decision, is most likely to be respected by the courts. But if that decision were made several years earlier than when it is to be respected, and may be part of a driver licensing program, and the person, now unconscious, faces emergency surgery, what will the courts do?

In fact, in a significant Pennsylvania case on substantially these facts, the court, over the objection of the parents and fiancé of the patient, authorized the use of blood transfusions on the 22 year old Jehovah's Witness who was lying on the operating table as a result of an auto accident. The court concluded that the use of a form card attached to his drivers license, and no testimony as to his expressed concern against the use of blood transfusions, was insufficient to overcome the presumption to maintain the life of the patient. Several court hearings, and appeals to the Pennsylvania Supreme Court, considerable time and money, public notoriety and great anguish were all expended to finally reach this conclusion.

Pennsylvania common law relies upon the clear written and oral utterances of the person in question to determine the expressed desire for the use of those measures commonly called "heroic". This approach is honored in the majority of the states of the Union, and is supported by the decisions of the United States Supreme Court dealing with the issue of the "right to die". But even without these clear utterances, or an advance health care directive, the Pennsylvania Supreme Court has recently determined that a close relative, acting as a substitute decision maker, and with the consent of two physicians, could cause to be removed the life-sustaining treatment from an adult patient in a permanent vegetative state.

The blood transfusion case illustrates the predicament that we care givers, as surrogates, must face. In planning for personal care decision making, the care giver should be sure to create as complete a record as possible of what the patient's wishes would be, if given the opportunity

to express them. Written documents are very helpful. Discussions with family and doctors, perhaps even video-taped, will also help to create the necessary record. And even more importantly, it will guide the care giver who ultimately has to live with the ramifications of the decision!

There have been several changes in various federal and state laws in the last few years that have dramatically changed the situation for the surrogate in personal care decision making. The one dramatic change is set forth in the **Omnibus Budget Reconciliation Act of 1990** (OBRA). This federal law requires hospitals, nursing facilities, home health and personal care providers, hospices and HMO's that receive Medicaid to provide individuals under their care with information about their rights under state law to accept or refuse medical and surgical treatment. The provider must document in the patient's records whether the individual has executed an **advance health care directive**. The provider is prohibited from discriminating against an individual or from conditioning the provision of care on the basis of the execution of an advance health care directive. Care which conflicts with an advance health care directive need not be provided.

On April 16, 1992 Governor Casey signed Senate Bill No. 3 (Session of 1991) into being and Pennsylvania finally joined the ranks of the other 49 states with "living will" legislation. The act is known as the **"Advance Directive for Health Care Act"**; it does not use the term "living will". Any individual of sound mind who is 18 years of age or older, or who has graduated from high school, or who is married, may execute a declaration governing the initiation, continuation, withholding or withdrawal of life-sustaining treatment. It must be voluntarily executed by the declarant, or other authorized person, and must be witnessed by two individuals, each of whom is 18 years of age or older. The Act provides a sample form and encourages the declarant to spell out those kinds of treatment which are either desired or not desired.

The Act authorizes the use of another person to make treatment decisions if the declarant becomes incapacitated and is determined either to be in a "terminal condition" or to be "permanently unconscious". This could most effectively be used to insure that the declarant's expressed detailed treatment preferences are implemented.

The declaration becomes effective when a copy is provided to the **attending physician**, and that physician thereafter determines whether the declarant is incapacitated and is in either a terminal condition or in a state of permanent unconsciousness. An attending physician is a

physician who has the primary responsibility for the treatment and care of the declarant. Once operative, both the primary physician and any other health care provider must, except for reasons of "conscience", act in accordance with that declaration.

Although this Act provides an opportunity for an individual to contemplate death and dying issues, and to provide a mechanism for carrying out those wishes, and to minimize uncertainty, conflicts and litigation; nevertheless, a full, frank and open discussion of these matters with one's personal care decision maker is still strongly encouraged. This Act, although creating a legislatively sanctioned procedure for advance health care directives, does not set aside the common law. And the most carefully constructed document may still not cover that one contingency that becomes crucial. The evidence of that discussion would go a long way to permitting a court to facilitate the carrying out of the intention of the declarant.

XI CONCLUSIONS

This monograph is designed to provide a concise overview of many of the crucial issues to be encountered in estate planning. These issues involve questions related to living a full and secure life, and legal questions related to the process of dying. It is important to always remember, however, that much of the current law is now defined by statute, and subject to change by legislative fiat. This is particularly so in the area of taxes and Medicaid benefits. Hence, a periodic review of changes in those statutes is crucial to any estate plan. Please contact us should you have any questions or concerns about any of the issues discussed in this booklet.

ABOUT THE AUTHOR

Scudder G. Stevens *is an attorney in the general practice of law. He holds a Bachelor of Arts degree from the Pennsylvania State University (1966), and a Juris Doctor degree from Valparaiso University School of Law (1969). After serving a clerkship at the Chester County law office of* ***Gawthrop & Greenwood*** *in 1969, he became a partner in the Philadelphia general practice and estates firm of* ***Peck, Young & VanSant*** *(1970). After withdrawing from that partnership (1980), he practiced as a sole practitioner in Philadelphia, PA, and, since 1984, in Chester County, PA where he maintains his home. He has been active in the American, Pennsylvania, Philadelphia and Chester County Bar Associations, particularly in the area of continuing legal education. He lectures on behalf of the Chester and Philadelphia Bar Associations and the Pennsylvania Bar Institute, particularly in the area of Estate Planning and Administration, and co-authored PBI Publication No. 93,* ***Administration Of Estates****. In addition to his Bar activities, Mr. Stevens is active in church, alumni, masonic and civic activities.*

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