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NONTRADITIONAL FAMILIES AND THE LAW: ESTATE PLANNING

- I. Special issues for unmarried couples
 - A. Gay marriage?
 - 1. Now legal in most Canadian provinces and in Massachusetts
 - a. Must reside in Massachusetts in order to marry there.
 - b. Massachusetts marriages not recognized by Arizona or federal government.
 - c. Same-sex couples married in Massachusetts cannot get a divorce in Arizona.
 - 2. New York's highest court ruled in 2006 that there is no right to same-sex marriage under the New York state constitution
 - 3. Defense of Marriage Acts (both in Arizona and at the federal level) prevent recognition of legal marriages entered into in other jurisdictions.
 - B. Domestic partnerships
 - 1. Pitfalls in the joint ownership of property
 - a. Joint tenancy with right of survivorship
 - b. Partition actions
 - 2. Domestic partnership agreements
 - a. The parties agree in writing on their respective rights and duties in the event that they terminate their relationship.
 - b. Comparison with prenuptial agreements
 - c. Enforceability
 - 3. Domestic partner registry
 - a. Now available on a state level in California, Washington, and elsewhere
 - (1) Domestic partners can register with the state
 - (2) Registration entitles the couple to certain *limited* state law protections
 - (3) Registration not recognized in other states
 - (4) Registration may require divorce proceedings to terminate
 - (5) Registration may negatively effect immigration status
 - (6) Registration triggers joint responsibility for each other's debts
 - (7) Registration creates a kind of community property status regarding each other's earnings for California law purposes

- (8) Registration does not alter any of the effects of existing federal tax law, including gift tax law
- (9) Division of property upon termination of registered domestic partnership may trigger federal gift tax liability
- (10) Registration may negatively affect eligibility for public benefits such as Medi-Cal (the California equivalent of AHCCCS)
- b. Domestic partner registration now available in one Arizona jurisdiction
 - (1) City of Tucson domestic partner registry became law in December 2003 with respect to city legal protections
 - (2) Domestic partner benefits may become available for State of Arizona employees in the foreseeable future by executive order of Governor Janet Napolitano.
- C. Co-parenting and second-parent adoption
 - 1. Co-parenting agreements
 - a. The parties agree in writing on their respective rights and duties *as between each other* with respect to the child.
 - b. Enforceability is subject to the best interests of the child.
 - 2. Custody and visitation
 - a. Former domestic partner of biological or adoptive parent has no rights other than those conferred by co-parenting agreement or *in loco parentis* statute.
 - b. Arizona's *in loco parentis* statute may benefit the non-biological non-adoptive parent in certain cases.
 - c. As in all cases, the court considers the best interests of the child above all other considerations.
 - 3. Second-parent adoption
 - a. Adoption in Arizona is legal only for a single person or by a husband and wife.
 - b. Arizona does recognize second-parent adoptions completed in other states if the couple later lives in Arizona.
- II. What will your estate planning documents look like?
 - A. Your Last Will and Testament.
 - 1. At a minimum, the will should contain the following recitals.
 - a. Your legal name and your county and state of residence
 - b. A clause stating that any former wills and codicils you made in the past are revoked
 - c. Your family status
 - (1) It is wise to set forth in your will the names of your relatives, *even if* you don't intend to provide for them.
 - (a) Naming your relatives can help to show that you were of sound mind when you signed the will.

- (b) Including specifics in your will can discourage **will contests** by disgruntled relatives or others.
 - (2) You can also state the names of the beneficiaries of your will, *especially* if they are not related to you.
- 2. I recommend a number of clauses and features.
 - a. Your will can incorporate by reference a separate document known as a **devise of personal property**.
 - (1) A devise of personal property is like a "dresser drawer deed." You use it to list your keepsakes, mementoes, and other personal property and the persons to whom you want such items to be distributed after you die.
 - (2) Thus, you can change your mind about these personal items as many times as you like, without having to consult your advisers about changing your will.
 - b. You will want to include **specific bequests** and **general bequests**.
 - c. Every will needs a **residuary clause** which provides to whom all remaining property in your estate will be distributed.
 - d. Include instructions regarding burial, funeral, and memorial services.
 - e. Every will should provide for the appointment of a personal representative and waiver of bond.
 - f. If you have minor children, you should provide for the appointment of a guardian for the minor children and a waiver of bond.
 - g. The **in terrorem clause** is intended to discourage will contests by eliminating any bequest in the will for any person who challenges the will or interferes with the personal representative.
 - (1) Such clauses do not block a will contest if, after notice and hearing, the judge finds probable cause for the will contest.
 - (2) In terrorem clauses are most effective when coupled with modest bequests to persons who might contest the will.
 - h. You must have a signature block for yourself and the witnesses, and a **self-proving affidavit**.
 - (1) It is common for persons who prepare their own wills or use "do-it-yourself" wills to fail to comply with these rules.
 - (2) Of course, you must sign the will.
 - (3) Two **witnesses** must be present when you sign the will.
 - (a) The witnesses themselves are also required to sign.
 - (b) If the witnesses do not sign, the will is invalid.
 - (4) If you and the witnesses do not sign a self-proving affidavit, then upon your death, the witnesses will have to testify in court in order for your will to be admitted to probate, or if they are unavailable, other evidence will have to be introduced to show that you in fact signed the will.
 - h. The signatures should be acknowledged before a notary public.

- (1) Of course, the self-proving affidavit won't qualify as an affidavit unless it is notarized.
 - (2) The notary public needs to be present at the time you and the witnesses sign the will.
 3. Many features in common form wills are unnecessary for most people.
 - a. A tax apportionment clause may not be necessary if your estate is not likely to be subject to **federal estate tax** (basically, net worth in excess of \$2,000,000 for decedents dying in 2008).
 - b. A tax elections clause may also be overkill, although it is relevant to income tax as well as estate tax issues.
 4. As noted above, certain formalities must be observed with respect to the execution of a will.
 - a. Two witnesses and a notary public are required by law.
 - (1) Witnesses should not be related to testator or have an interest under the will, although the use of interested witnesses no longer invalidates the will.
 - (2) If possible, witnesses should be selected with an eye toward whether they could give believable testimony in the event of a will contest.
 - b. You must meet certain requirements for the execution of your will.
 - (1) You must be aware of the natural objects of your bounty, *i.e.*, your relatives, loved ones, and friends.
 - (2) You must be aware of the extent of your property, *i.e.*, you must know what you own.
 - (3) You must not be under any undue influence.
 - (a) Undue influence is a common basis for will contests.
 - (b) Those who want to battle your will in court may claim that your arm was being twisted when you signed it.
 - (4) You must be above eighteen years of age.
- B. Here's what you should know about the Devise of Personal Property.
 1. Arizona law permits you, from time to time or at any time, to make subsequent specific bequests of keepsakes and other personal property without executing a **codicil** (amendment) to your will.
 2. Your advisers may prepare and attach this form to your will for your later use, or you can simply use a blank sheet of paper.
- C. Health Care Powers of Attorney and Living Wills can be important.
 1. These documents were authorized by Arizona law in 1992.
 - a. Your medical directive is grandfathered (*i.e.*, still valid) under the law even if it was executed prior to September 30, 1992.
 - b. New health care powers of attorney and living wills must comply with the current Arizona law.
 2. A well-drafted health care power of attorney contains several recommended clauses and features.

- a. First, you nominate an agent to make medical decisions for you.
 - (1) If and when you are unable to make or communicate those decisions, your agent can make the decisions.
 - (2) You need to include the addresses and telephone numbers where your agent can be reached in an emergency.
 - b. You can also nominate an alternate agent and set forth her addresses and telephone numbers.
 - c. You can define the scope of authority granted to your agent.
 - d. You can include general guidelines on your agent's medical decision-making authority in the event of emergency.
 - e. You can revoke existing medical directives you previously made.
 - f. You can release third parties from liability for recognizing you health care agent's authority.
 - g. You can authorize your agent to sue third parties who refuse to recognize your agent's medical decision-making authority.
3. The living will also can contain various recommended features.
- a. First and foremost is your advance guidance as to specific medical decisions that you would want or would not want.
 - (1) Artificial life support
 - (2) Cardiopulmonary resuscitation
 - (3) Artificial nutrition and hydration
 - (4) Particular medications
 - (5) Autopsy and organ donation instructions
 - (6) Hospitalization and other health care
4. A health care power of attorney and living will can be incorporated into a single document or can be in separate documents.
5. Notarization requirements.
- a. Must be signed by a notary *or* by an adult witness or witnesses.
 - b. The notary and/or witness statement *must* say the following:
 - (1) You appeared to be of sound mind and free from duress.
 - (2) The notary or witness is not responsible for paying for your health care.
 - (3) The notary or witness is not related to you or to any potential beneficiary of your estate after your death.
 - c. Finally, the notary or witness cannot be the same person whom you named as your powerholder for health care.
- D. Another tool in planning for incapacity is the General Durable Power of Attorney.
- 1. Arizona law authorizes powers of attorney that remain in effect even upon the disability of the principal.
 - a. A power of attorney creates an agency relationship between you and your powerholder.
 - b. A power of attorney is crucial when you want a friend or adviser to handle your affairs, rather than allowing family members to do so.

- c. An appointment of an agent can take effect immediately or upon your disability.
 - 2. Determine whether a power of attorney is appropriate for your situation.
 - a. Powers of attorney are usually used to ensure orderly handling of a disabled person's financial matters.
 - b. A power of attorney may facilitate communications with insurance companies, banks, and landlords, for example.
 - 3. There are, of course, recommended provisions for powers of attorney.
 - a. The document should be as specific as possible--Arizona courts and institutions are likely to be suspicious of powers of attorney.
 - b. The power to make health care decisions should *not* be included if you have a health care power of attorney in place.
 - 4. Naming *one* individual agent is usually appropriate, rather than naming co-powerholders to cooperate with each other in making decisions.
 - a. Multiple agents acting jointly are cumbersome.
 - b. A corporate fiduciary (*e.g.*, a bank) can also be named as powerholder if cost is no object.
 - c. Because the power of attorney could become crucial at the time of your incapacity, you may wish to name an agent whom you perceive as capable of making decisions in stressful situations.

- III. Things to do *before* your appointment to discuss your estate plan with your attorney, accountant, financial planner, or other advisers.
 - A. If your private advisers are charging you by the hour, you will *save money* by being as organized as possible about providing information to them.
 - B. Before you decide what to do with your estate upon your death, first determine your situation and your goals.
 - 1. Whom do you wish to remember in your will?
 - 2. Who might disagree with your dispositive plan and want to challenge it?
 - 3. Who is dependent on you for financial support?
 - C. Gather your vital statistics.
 - 1. Compile a list of the names, addresses, and telephone numbers of yourself and of your significant other, your family members, and close friends who will be part of your estate plan.
 - 2. Prepare a summary of information about your parents, significant other, ex-spouses, children, stepchildren, and siblings and the nature of your relationship with each of them.
 - D. Determine your assets and liabilities.
 - 1. Assets can include life insurance, real estate, automobiles, retirement plan interests, brokerage accounts.
 - a. Assets such as your employer-provided retirement plan, your IRA, and your life insurance are important to mention to your advisers.
 - (1) Estate planning and income tax planning for **pension, profit-sharing, and 401(k) plan benefits** is important.

- (2) When considering your life insurance coverage, don't forget employer-provided life insurance.
 - b. Be very candid with your advisers about your assets. Advisers can't plan for you effectively if you don't tell them what you own.
 - 2. Typical liabilities include mortgages, car loans, and personal loans.
- IV. Providing information to your advisers
 - A. Why certain information is necessary in order to prepare proper documents
 - 1. Understanding the purpose of a will
 - a. Empowers personal representative to handle decedent's affairs
 - b. Alters intestate scheme of property distribution
 - c. Names guardian and conservator for minor children
 - d. Sets forth arrangements for memorial observances
 - e. Waives fidelity bond for personal representative
 - 2. Understanding the purpose of a health care power of attorney and living will
 - a. Appoints someone to make medical decisions in the event of client's inability to do so
 - b. Memorializes client's medical decisions in advance in anticipation of future inability to do so
 - 3. Understanding the purpose of a general durable power of attorney
 - a. Nominates someone to handle financial affairs in the event of client's inability to do so
 - b. Can specifically enumerate powers re. particular categories of assets
 - B. Who currently relies on you for financial support?
 - 1. You may want to provide for significant others, members of your household, or special needs children in your estate plan.
 - 2. You may have significant others, spouses, or children who are unable to manage their own assets or who may become incapacitated later in life.