Role of Lawyer as Counselor Is Important

by James P. Cox, III

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While having an lawyer to make sure that your will and other estate planning documents are legally binding and that your affairs are in order is important when planning one's estate, James P. Cox, III of MichieHamlett believes that it is the role of the attorney as a counselor that many people overlook in estate planning.

"The role of an attorney as counsel is important in developing a proper estate plan but it is even more in the forefront during the initial period following a death." Cox explains, "There are no doubt important financial decisions which must be made after one dies but there should be no need for the family to rush to deal with them immediately after death. First there are the personal matters to address----family matters to care for, funeral arrangements to be made and time for the grieving and remembrance. It's the role of a good attorney to help the family in these first days to focus and remember what is important."

The best way to head off problems in the estate administration process is with good estate planning. "A good lawyer should counsel their client when they are drawing up a wills, trusts and other documents, helping to be sure decisions are thought through properly, making sure the client is aware that their well-intentioned desires might lead to unintended consequences," states Cox.

He notes that sometimes a person will assume that certain assets or property will automatically go to the person they intend to have it, but how a person's assets are titled may determine how they are distributed when that person dies. "A lawyer, acting as counselor, can help the client think through all of these issues, helping them decide what they should do now to have their intentions fulfilled later," Cox says.

People decide to write, or rewrite, their wills at different times in their lives, Cox reveals. "They will come in when they have their first child, when they reach an age when they start to think about getting old, if they have a brush with death, even when they plan a trip and know they will

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be flying," he says. "A person will decide to change their wills for many reasons and it is always their right to do so."

Communicating to one's family about many of the aspects of one's estate plan is important Cox states and this is another aspect of when an attorney should serve as a counselor to his client. Many times one of several children will be chosen to serve as executor of the will or as a trustee for another's inheritance. Cox believes that an attorney as counselor can help a client understand how problems within the family can be lessened or avoided by sensible planning but also with communication with family members when it is appropriate.

"In all families, but especially in complex families with a step-parent as a spouse or with children and stepchildren involved there will be different sensitivities that should be addressed," Cox explains. "The client should alert their lawyer when these situations exist. When the lawyer knows the family dynamics, he or she will be able to highlight trouble spots and how some of the client's decisions may affect the family members, making the client aware of the possible consequences of those decisions not only on the finances of the beneficiaries but also the future relationship among family members."

The role of a lawyer as counselor, and not just advocate, is one that Cox is proud of and thinks that more clients should seek such advice from their lawyers. "Acting as a counselor, someone from whom a client seeks guidance when making critical decisions, as in estate planning, is fundamental to being a good lawyer," Cox said while pointing to his Virginia law license on the wall. "It does not just say attorney; it says 'Counselor at Law' as well. We're there to assist the client with their decision making, to make sure that their testamentary desires are achieved but also to help them understand the possible consequences of their decisions, as well as to be there to help their families when the time for an estate administration comes," Cox says.

James P. Cox, III, is President of the Charlottesville Albemarle Bar Association, a member of the American Bar Association and the Virginia State Bar and is presently the Vice Chair and member of the Council and Legislative Committee of the Wills, Trusts and Estates Section of the Virginia Bar Association, among other memberships.

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ESTATE PLANNING CONSIDERATIONS

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Introduction.

A. *Estate Planning.* Many people view the estate planning process as simply the means by which one makes decisions to control the disposition of their assets at death. By taking care to clearly set forth in writing one's desires, a person has the ability to control not only who receives assets at death but also the manner and timing of the distribution of the assets. Making his or her own choices as to the disposition of assets avoids relying on the default provisions provided by the laws of the state where the person lives at the time of death.

The estate planning process is much broader than simply providing for the disposition of assets at death. It also involves many of the following considerations:

1. Planning for the transfer of wealth within a family;

2. Titling assets in a manner to achieve one's desires;

3. Providing for the management of assets during a disability or incapacity;

4. Preserving and protecting assets; and

5. Planning for medical needs and end-of-life decisions.

B. *Reasons for Estate Planning.* Some of the most common motivating factors prompting a client to commence the estate planning process are the following:

1. A new family situation, especially getting married or having children;

2. Recent change in the client's financial circumstances;

3. Recent change in medical condition;

4. A move to a new jurisdiction;

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5. The death of a family member and either a good or bad experience with the administration of the decedent's estate; or

6. Planning to take a family trip.

Testamentary Desires.

Obviously, the fundamental goal in any estate plan is to set out in writing your desires as to how your assets will be distributed and managed at death. The law imposes very few restrictions on the manner in which property may pass at one's death. Among the most important decisions you need to make are as follows:

A. *Distributions to Beneficiaries.*

1. The amount and manner of how assets pass to the surviving spouse:

   - Remember assets passing outright to a surviving spouse free of trust or any restrictions, pass according to the surviving spouse's will at his or her subsequent death.

   - Always consider the implications of so-called "simple" wills—"simple" wills can sometimes lead to complicated estate administration issues.

   - Under Virginia law, a surviving spouse is one beneficiary who in certain circumstances is entitled to claim a share of the estate in the event the spouse is disinherited.

2. The shares and manner of how assets pass to children or other beneficiaries:

   - Under Virginia law, there is no requirement to provide for any child or to provide for equal treatment of children.

   - Still, a client should carefully consider all ramifications before making any unequal distributions among children (or any beneficiaries of the same kindred).

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3. The terms of any trusts for the shares of children or other beneficiaries:

- Any share of an estate designated for a minor beneficiary—whether a child or grandchild should be held in trust until the beneficiary reaches a designated age.
- Determine the age or ages at which assets are distributed to children free of trust.
- Delineate the terms and purposes of the trust.
- The choice of the Trustee becomes extremely important in making sure the terms of the trust will be carried out.

4. How shares of your estate will pass if a beneficiary predeceases you:

- Planning for the unexpected death of a beneficiary can avoid unintended and undesirable distribution of assets.

5. Are there any particular assets to be specifically designated for a particular beneficiary:

- Are there any persons to receive a specific bequest of money.
- Are there any specific assets to be designated for a particular person.
- Estate plans with specific bequest often require more careful monitoring and review to make sure the nature and the amount of the assets specified have not changed.

B. *Choice of Fiduciaries—Who will carry out your wishes:*

1. *Executor*: Who will be executor of the estate -- the person or entity which administers your estate:

- The executor will be the person entrusted to carry out the testator's final testamentary desires as reflected by the terms of the will.

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- The best estate plan can crumble if the choice of the executor in charge of administering the testator's estate at the time of death is not well-chosen and carefully thought out.

- As with any fiduciary, this is a position of great trust and responsibility.

- It is important for the person designated to have the willingness and ability to serve.

- A nonresident individual can serve as Executor but must either serve with a Virginia resident or obtain a surety.

2. *Trustee*: Who will be trustee of any trust -- the person or entity which administers the trust;

- As with the selection of any fiduciary, the choice of the Trustee is a critical decision to insure the faithful and smooth administration of the trust for its intended beneficiaries.

- The testator should consider the following factors in making a choice as Trustee:

  a. Confidence in the trustworthiness of the individual and the judgment of the individual in financial matters.

  b. Ability to exercise appropriate discretion delegated to the trustee under the terms of the trust.

  c. Likelihood of being able to serve out the duration of the trust. Many trust are set up to continue for a number of years. It is important to choose a trustee who is likely to be able to serve as trustee at the commencement of the trust administration process and at the termination of the trust.

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3. *Guardian*: Who you wish to be guardian of any minor children:

- The clients will want to choose a guardian with whom they believe the children will be raised and nurtured in an environment and setting that is consistent with the philosophy, beliefs and outlooks of the natural parents and provide the proper guidance and direction to the minor child who, having lost both parents, will understandably be in very fragile state.

- Family members and close friends are typically considered.

- The parents must also consider the willingness of the designated guardian to undertake the responsibility and duties of being the guardian and how the additional family responsibility will effect the guardian's existing family.

Avoiding Probate.

A. *Introduction.*

1. Over the past two decades, greater amounts and different type of assets have been passing at death by nontestamentary or nonprobate means.

2. This significant disposition of wealth does not lessen the importance of a properly prepared will but requires the estate planning attorney to be fully aware of the nonprobate assets of the client and to make sure the dispositions of those assets are consistent with client's desires.

B. *Non-probate Assets.*

1. Jointly titled with survivorship

2. Payable or Transfer on death provision

3. Assets with Beneficiary Designations

- Life Insurance Policies
- Retirement Accounts

4. Inter vivos Trusts

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C. *Benefit of Non-probate Assets.*

1. Joint ownership of personal property often provides an efficient and effective alternative to formal administration of the estate.

2. Avoids probate costs.

D. *Disadvantages of Non-Probate Disposition of Assets.*

1. Because the typical non-probate account is not executed with the protection or the solemnity associated with the execution of a will, the designation of beneficiaries under such assets are sometimes not carefully planned or properly integrated with other client's will or other estate planning documents.

2. Litigation surrounding the dispositions of non-probate assets is exploding.

3. Keep careful records and always be aware of any assets with beneficiary designation.

E. *Importance of Jointly Titled Assets and Beneficiary Designations.*

1. Careful attention should be given to the manner in which assets are titled and the nonprobate beneficiaries of such assets.

2. The manner in which an asset is titled or a beneficiary designation on an account such as a retirement account or life insurance policy takes precedence over the terms of a will.

3. While nonprobate (dispositions other than by will) can be efficient and economical, any large disposition of assets by a nonprobate means which are contrary to the testamentary disposition under the will can undermine an estate plan.

4. Careful coordination of the terms of a will and nonprobate dispositions of property must be considered in order to achieve the desired testamentary results.

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Revocable Trust.

Although a will is often the very effective manner of disposing of property at death, in many circumstances, the use of a revocable trust has numerous benefits which may be applicable in the administration of an estate:

A. *Avoidance of Probate.*

Any assets placed in the trust during your lifetime or which are designated to go into the trust directly upon your death avoid probate. Although the probate process in Virginia is not extremely complicated or expensive, there can be significant savings by avoiding probate.

B. *Ease of Administration.*

Since a revocable trust, unlike a will, is a private document, the administration process is simplified. There is no reporting or filing with the Clerk's Office or the Commissioner of Accounts for assets which pass by virtue of the revocable trust. In addition, once assets are distributed to the revocable trust, the administration of the assets is also simplified.

C. *Lack of Delay in Administration.*

By using a revocable trust for your estate planning, you can also avoid certain delays in the distribution of your assets.

D. *Privacy.*

Since the trust is a private document, its terms are not a matter of public information.

E. *Ease of Amendment.*

The trust is an easier document to amend than a will. In light of the possibility that your testamentary desires may change in the future, you can simply modify the terms of the trust by an amendment to the trust which is typically signed by you before a notary public. When you modify the trust, any assets already placed in the trust do not need to be retitled.

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Powers of Attorney/Advance Medical Directive.

A. *Financial Power of Attorney.*

1. A general power of attorney allows you to name someone to act on your behalf for financial matters in the event of a period of disability.

2. Without a power of attorney, in the event of a disability, the only alternative might be to file a Petition for an appointment of a conservator in court which can be an expensive, emotional and time-consuming process.

3. Of course, an attorney-in-fact is a significant position of trust and loyalty and powers of attorney have been abused by some people in the past so you should choose your attorney-in-fact carefully.

B. *Provisions of Power of Attorney.*

1. Among the most important matters to consider are:

a. Whether to have one or more Agents.

b. Whether multiple Agents should act alone or jointly.

c. Whether to name a successor Agent.

d. Whether any specific transactions need to be authorized.

e. Whether to allow an Agent to make gifts or to take actions with respect to the Principal's estate plan.

C. *Advance Medical Directive.*

1. The Advance Medical Directive is the document which incorporates the "living will" and a medical authorization and medical power of attorney.

2. In the absence of an Advance Medical Directive, state law sets the priority of persons who can make medical decisions for a person incapable of giving informed consent.

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