UPDATING ESTATE PLANS

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About the author

Engaged in the practice of law since 1995, Judge Calabrese has extensive experience counseling individuals, families, and businesses. His areas of practice include estate planning; wills; trusts; planning for incapacity; probate; asset protection; commercial transactions; general counsel for small and large businesses; contracts; software licensing agreements; and business entity formation and administration.

He has been a Connecticut probate judge since 2003. He is currently judge of the Region 22 Probate District in Southbury and is the Administrative Judge in the Waterbury Regional Children's Court, where he was a founding judge. The Region 22 Probate District serves over 72,000 residents in seven towns and is one of the highest-volume probate courts in Connecticut.

Judge Calabrese has overseen thousands of probate matters, including decedents' estates, trusts, guardianships, conservatorships, and children's matters.

He also was general counsel for Gemini Healthcare, LLC, for ten years beginning in 2005. His responsibilities there included drafting and negotiating contracts and agreements, and managing commercial transactions and intellectual property.

Education

University of Connecticut School of Law, Hartford, Connecticut *Juris Doct*or

University of New Haven, West Haven, Connecticut *Master of Business Administration*

University of Connecticut, Storrs, Connecticut *Bachelor of Science*, Allied Health

Professional Association Memberships

- Connecticut Probate Assembly
    - Member, Executive Committee
    - Member, Education Committee
    - Member, Court Security Committee
- National College of Probate Judges
- Connecticut Bar Association
    - Member, Estates and Probate Section
    - Member, Business Section
- American Bar Association
    - Member, Real Property and Probate Section
    - Member, Business Section
- Waterbury Bar Association

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Introduction

Every day, I see the hardships created when people failed to make or update estate plans. Being both a practicing attorney and a sitting Connecticut Probate Judge, I have a unique perspective on the workings of estate plans, and the wonderful benefits they can provide families during challenging times.

In this article, I provide a very general, but comprehensive overview of estate planning: what it can do, how it works, and what can happen when there is no estate plan or the existing estate plan is outdated.

I hope that readers will use the information in this article as an effective reminder to meet with their estate planning attorney to create an estate plan, or to update an estate plan that is no longer current.

Purposes of Estate Plans

An estate plan is more than just a collection of documents. It should be comprehensive, using wills, trusts, annuities, lifetime transfers, powers of attorney, advance healthcare directives, healthcare representatives, and business entities such as limited liability companies in a way to achieve estate planning objectives.

An estate plan should help you maintain control over your affairs and health if you become incapacitated; avoid court intervention; make your wishes for health care, and management and disposition of your assets clear; minimize tax liability; protect you and your family from creditors; reduce likelihood of family conflict; provide for loved ones; and make provision to continue the operation of businesses.

Why Estate Plans Are Important

A good estate plan provides peace of mind. Most people think of estate plans in the context of what happens to their assets after they pass away, buy that's only one of many objectives of an estate plan.

Maintaining independence and control over your affairs during your lifetime – particularly during incapacity – is another very important reason to have an updated estate plan. Incapacity can strike suddenly and without warning. Without an estate plan, it's likely that conservatorship proceedings will be necessary to manage the incapacitated person's affairs.

Ensuring the continuing operation of a business is yet another important purpose of an estate plan. Especially for residents of Connecticut and other states that impose a state estate tax, an effective estate plan can also minimize estate tax liability, leaving more of your assets to transfer to the people and organizations of your choosing.

Incapacity is Common

The likelihood of incapacity for people age 65 and older can be as high as 50%. Even for working age adults, the possibility of incapacity striking before age 65 is anywhere from 28% to 48% according to one study.

Conservatorships

As a probate judge, I spend more courtroom time on conservatorships than all other matters put together. In a conservatorship, someone's rights to make decisions for themselves are taken away and given to another person – usually, but not always, a family member. If no family member is willing or able to serve as a conservator, then an attorney is usually appointed.

Like any other fiduciary, conservators are legally entitled to a reasonable fee for their services. Payment is made from the conserved person's assets, and the conservator must report to the court and file documents periodically. All of this adds up to expense and potential delay – most of which could be avoided with an effective estate plan.

Involuntary conservatorship proceedings in Connecticut are inherently adversarial, expensive, time-consuming and stressful. The person who is the subject of the proceeding must be represented by an attorney. While Connecticut probate courts are generally informal, that is not the case in conservatorship proceedings. In fact, a conservatorship proceeding in a Connecticut Probate Court looks a lot like a proceeding in Superior Court: close adherence to the Connecticut Code of Evidence is required; audio recording of the hearings are required and form the official record of the proceedings; the rules of procedure must be carefully followed; and the person seeking the conservatorship and the person for whom the conservatorship is sought are treated as adversarial parties, even if they have a good relationship outside the courtroom.

Good News

The good news is that with an effective and updated estate plan, it's possible to avoid a conservatorship. However, such a plan must be created before incapacity

strikes; after incapacity strikes, options are greatly reduced and the necessity for a conservatorship increases. That's because a person must have the legal capacity to create an estate plan, which involves naming trustees, appointing agents under a power of attorney, healthcare representatives and executors. Someone who is incapacitated may lack the required legal ability to do some or all of these things. It's a good example of the old adage, "an ounce of prevention is worth a pound of cure."

Do Estate Plans Expire?

I frequently get questions about the validity of estate planning documents that were executed many years ago. The short answer is that, unless an estate planning document has an expiration date on it – a very rare occurrence – it is generally valid unless and until certain events occur. That should not, however, be understood to mean that an estate plan is static and need not be reviewed and revised regularly.

Termination

In the case of a power of attorney, termination occurs when certain events take place: the death of the person who created it (the "principal"); revocation of the power of attorney by the principal; on a date that is specified in the power of attorney (very few powers of attorney include an expiration date, but it is allowed); if the person who is granted authority under the power of attorney (the "agent") is unwilling or unable to act and no successor agent is named.

While someone is alive, their appointment of health care representative doesn't expire, nor do advance healthcare directives and advance designations of conservator. However, the authority granted terminates automatically upon the death of the person who is the subject of these documents.

Wills and trusts don't have expiration dates, but may be revoked. Wills may be modified through a codicil to the will; trusts may be amended or restated. When someone executes a new will, there is usually language in the new will revoking all prior wills and codicils.

"Stale" Powers of Attorney

At a presentation I recently conducted on powers of attorney, a member of the audience asked me if her power of attorney that was executed forty years ago was still valid. She didn't have the power of attorney with her, and it would be impossible to definitively answer that question without seeing the document itself. If the power of attorney complied with the statutory requirements at the time, and didn't contain an explicit expiration date (something that's possible, but very

unusual), the law places no expiration date on it (of course, expiration is automatic when the agent dies). Despite this, it is unlikely that a third party – such as a financial institution – would honor a 40-year-old power of attorney. Why? Because a third party has no idea if such an old power of attorney is still valid. For that reason, the older the power of attorney, the less likely it is that a third party will honor it. The refusal of a third party to honor a power of attorney is a common reason why conservatorship applications are presented to the court.

The new Connecticut Uniform Power of Attorney Act requires third parties to honor a valid power of attorney, with some notable exceptions (see my article series).[1] My suggestion – based on experience as a probate judge for fifteen years and practicing attorney for 22 years – is that a new power of attorney should be executed every three years or so. This will make it less likely that a third party will refuse to honor the power of attorney due to the age of the document.

When To Review Your Estate Plan

I believe that estate plans should be reviewed with an estate planning attorney at least every three years. There are many reasons for this.

Change in Assets

Life is constantly changing. Assets (real estate, bank accounts, investments, businesses) someone owned 3 or five or 10 years ago may be very different from what they are today, and are likely to be very different from what they will be 5 or ten years in the future. Thoughtful, effective and efficient asset management and transfer are key objectives of any estate plan.

It's not uncommon for a will to name an adult son or daughter to be the beneficiary of real property, such as a particular house. If the will refers to the specific house (or any other specific asset) but the asset is not owned at the time of death, the bequest will fail.

Digital Assets

Most people now have digital assets – email accounts; websites and blogs; social media accounts; online accounts; cryptocurrency; and computers, cell phones, and other digital devices. Twenty years ago, such assets were not nearly as common as they are today. It is inevitable that more and more categories of digital assets will come into existence in the years to come. However, developments in federal case

1. Connecticut Estate Planning Site. New Connecticut Uniform Power of Attorney Act at my blog: https://connecticutestateplanningsite.com
2. C.G.S. section 45a-234 Connecticut Revised Uniform Fiduciary Access to Digital Assets Act

law have given rise to new state and federal law regulating who may access such assets on behalf of another person.[2,3]

Because of the unique nature of digital assets and the laws governing third party access to them, a modern estate plan should encompass access to such assets in the event of death or incapacity of the owner. General authorities not specific to digital assets are often inadequate to allow an agent to access these assets.

Protecting Beneficiaries

If a beneficiary under a will was the recipient of state assistance (Medicaid or other state assistance programs) or was incarcerated, the Department of Administrative Services will seek a portion of that beneficiary's inheritance to offset what the state paid for the assistance they received or the costs of their incarceration. People who are aware of this fact may adjust their estate plan accordingly.

Parents with more than one child may try to divide all their assets evenly among all their children in a will. But what if the parent purchases a significant asset and names only one of their children a beneficiary of that asset on the title to the asset? Such an asset would not pass under a will, but instead would pass to the beneficiary automatically when the owner dies. As a result, the beneficiary of the new asset might receive a much larger share of their parent's total assets than their siblings. This would result in a very uneven distribution of the parent's assets among their children – a result that may not have been desired. Such unintended outcomes can have profound, negative effects on family dynamics after the death of the parent.

If a child is born or adopted and the parent's will doesn't specifically provide for that child, the parent's will becomes invalid and cannot be admitted to the probate court.

For example, what if the beneficiary of your life insurance policy dies before you do and no one is named as a contingent beneficiary? In that case, the death benefit from the life insurance policy will pass under your probate estate – your will if you have one, or the laws of intestacy if there is no will. Naming a new beneficiary of the policy can effectively avoid probate court involvement in the transfer of the insurance death benefit.

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2. C.G.S. section 45a-234 Connecticut Revised Uniform Fiduciary Access to Digital Assets Act
https://www.cga.ct.gov/2016/TOB/h/2016HB-05606-R00-HB.htm

3. 18 USC Ch. 121 Stored Wire and Electronic Communications and Transactional Records Access
http://uscode.house.gov/view.xhtml?path=/prelim@title18/part1/chapter121&edition=prelim

Factors Affecting Estate Plans

Other elements of our lives change as well – marriage, divorce, the death of a spouse; the birth of children and grandchildren; changes in health or finances; the establishment, purchase, sale or termination of a business; and moving to a different state are just a few examples of common changes affecting estate plans.

People often change their estate planning objectives over time. Changes in relationships with family members, for example, may require changing an estate plan. The death or incapacity of persons named to serve as fiduciaries (executors, agents under a power of attorney, trustees, and healthcare representatives) are another reason why periodically reviewing estate plans is necessary.

Keeping Assets in the Family

It's not unusual for people to want to keep assets in their family, and prevent them from falling into the hands of creditors or ex sons-in-law or daughters-in-law. However, outright distributions to family members as lifetime transfers or via bequests in a will or trust may subject those assets at a later date to being taken from the family member who receives them.

Family members with special needs may have their eligibility for public and private assistance jeopardized as the result of an inheritance, or of distributions from a trust. Protecting assets and providing for family members who may be in an unstable marriage, have serious creditor issues, are battling substance abuse, or have special needs may all be effectively addressed in a comprehensive estate plan.

Another concern married couples with children may have is the remarriage of the surviving spouse. Many married couples initially want an estate plan that leaves everything to the surviving spouse outright upon the death of the first spouse. In such a scenario, it's possible that the surviving spouse may remarry and create a new will leaving the children with nothing. Trusts can be created to allow a surviving spouse to have the use of the marital assets, but also prevent the surviving spouse from diverting those assets away from the children to someone else.

Changes in the Law

Other significant developments impacting existing estate plans are changes in the law. The law is in a constant state of change, and the rate of change is increasing. Case law (law that is made when judges decide cases in the courtroom) and statutory law (laws passed by the legislature and signed by the governor, or the president on a federal level) is the basis for how estate plans are structured and how estate planning documents are drafted.

Just this year, the federal and state estate and gift tax laws changed dramatically. The most comprehensive changes to powers of attorney in decades - the Connecticut Uniform Power of Attorney Act - became effective October 1, 2016; another change to that law went into effect on July 1, 2017. The Connecticut Uniform Limited Liability Company Act changed Connecticut law on limited liability companies beginning July 1, 2017; it completely overhauled Connecticut law in this area. [4]

More than 90 changes to Connecticut statutes became law as of July 1, 2018. While many of these new laws have no effect on estate planning, imagine how many changes have occurred since an estate plan that is five, ten or more years old was created!

Priorities

In the probate court, I often see situations where a senior citizen is unable to independently conduct the activities of daily living (dressing, eating, bathing, toileting, and transferring) and a family member came to their aid, providing substantial custodial care over a period of time for little or no compensation. Most of the time, the sick family member intended to change their estate plan to acknowledge the help they received and the person who provided it, but didn't get around to doing so. In these cases, another family member or members - some of whom may have had no or little contact with their elderly relative during the final years of their life - were the recipients of significant portions of the estate, either through an outdated will, or the laws of intestacy if there was no will, and the care provider walked away with little or nothing.

Family Businesses

Challenges to Planning

Successful business owners work long hours - nights, weekends, while on vacation. The demands of the business can seem endless. Dealing with tight deadlines, employees, production quotas and demanding clients is time consuming. They devote a great deal of time to their businesses over a period of years. In the process, they develop expertise in operating the business; understanding the marketplace in which they conduct business, their clients, and the financial intricacies that have a direct impact on the continued success of the business.

4. C.G.S. section 34-243 through 34-299

Unfortunately, because the business owner's role can be so consuming, it's easy for them give little or no thought to business succession planning and asset protection.

Demise of the Business

By not investing a relatively modest amount of time and money in a business succession and asset protection plan, business owners put themselves, their families and their businesses at risk. In those cases, if the business owner becomes incapacitated or dies, or if a judgment is entered against the business or business owner, the entire enterprise may come to a grinding halt, or even be forced to close permanently.

In the case of the owner's death or incapacity, there may be no one to continue the operation of the business. Usually, the business owner's family relies on the income from the business for support. Employees of the business put their faith and invest their careers in the business owner. Business clients come to depend on the products or services of the business.

All of this is in jeopardy when a business has no succession plan. Succession planning should have many components. On a practical level, there should be employees or family members in place who understand and are able to operate the business should the key person die or become incapacitated. This is a process that can be started fairly easily. However, it will take months or even years to get the person or persons to a level of experience where they are able to operate the business in the absence of the owner. Getting started with this process is usually the most common reason why it's never done.

Substantial insurance on the life of the key person or persons for which the business is the beneficiary should also be considered. This measure can help in a number of ways, including providing operating capital, paying estate taxes, and as part of a stock sale or transfer process during a critical time.

Wills, trusts, bylaws (for corporations) or operating agreements (for limited liability companies) should also be put in place to allow the business to continue to operate when the owner is effectively out of the picture. These documents should be coordinated so that they don't conflict with each other. Collectively, they form the succession and asset protection plan.

Asset protection plans can make the difference between continuing the operation of the business, or even closing the doors when a large judgment is entered against the business. Using entities, especially combinations of entities (corporations and limited liability companies), can create an effective financial firewall that will protect the business and business owners from catastrophic civil judgments and aggressive creditors.

Summary

Estate planning can be an intimidating process. Finding a trusted attorney – a necessary starting point – is the most common reason Americans gave in a 2016 survey for not having an estate plan.

However, the cost and consequences of failing to plan are far greater than putting a plan in place. Choosing an estate planning attorney who will take time to understand you, your values and objectives, and educate you about options will get you through the estate planning process in a reasonable period of time. [5]

It's also essential to review your estate plan regularly. In this way, changes to your circumstances as well as changes in the law can be reviewed and the plan revised to make it as accurate and effective as possible.

Finally, estate planning, like most areas of the law, has gotten increasingly complex. In addition, changes to statutory and case law are occurring at a much faster pace. Only attorneys who devote the majority of their practice to this area could possibly keep up with these changes. I've heard of bank tellers, nurses, contractors and even cashiers giving people advice on probate and estate planning. You should ignore advice from possibly well-meaning, but unqualified sources.

Estate and business planning is not something to try to do yourself, or accomplish by using online vendors or forms. I've seen more than my share of disasters because someone thought they could do it themselves, or relied on some distant (perhaps even outside the country) online, unqualified purveyor only interested in making a profit at the expense of the unsuspecting. My advice is always that it's better to not create an estate plan at all if your approach is to do it yourself or use an unqualified online service.

Only an attorney who devotes a significant part of her or his practice to this area is qualified to provide guidance and counsel. Avoid "one size fits all" purveyors of questionable (and usually expensive) estate planning products that prey on fear of the probate process in order to sell their expensive and often ineffective products.

5. Connecticut Estate Planning Site. How to Choose the Right Attorney
https://connecticutestateplanningsite.com/2017/05/03/how-to-choose-the-right-attorney/